

Mentorship Article

Denying Child Welfare Services to Delinquent Teens: A Call to Return to the Roots of Illinois' Juvenile Court[†]

*Jeffrey M. Y. Hammer**

mentored by

*Judge Curtis Heaston** & Diane N. Walsh****

[†] Cite as Jeffrey M. Y. Hammer, mentored by Judge Curtis Heaston & Diane N. Walsh, *Denying Child Welfare Services to Delinquent Teens: A Call to Return to the Roots of Illinois' Juvenile Court*, 36 LOY U. CHI L.J. 927, __ (2005).

* J.D. expected May 2006. As with all of my endeavors, I am grateful for the unswerving love and support of my wife, Miyoung. This Article would not have been possible without the insight from personnel at the following departments who generously lent me their time: the Cook County Juvenile Probation Department, the Juvenile Justice Bureau for the Cook County State's Attorney, the Department of Children and Family Services, and judges of the Juvenile Division. I especially thank Diane N. Walsh and Judge Curtis Heaston for their enthusiasm and encouragement. I would also like to thank Robyn Axberg and the editors of the *Loyola University Chicago Law Journal* for their tireless work and helpful comments. Finally, I thank the faculty at Loyola's Civitas ChildLaw Center for their wisdom and commitment to training capable advocates for children.

** Judge Curtis Heaston is the Presiding Judge of the Juvenile Justice Division of the Circuit Court of Cook County, Illinois since June 25, 1999. For the past six years, he has provided administrative leadership for the division and to fourteen trial court judges. He oversees at least 1000 probation and Court Services Personnel. Judge Heaston has been on the bench since 1986. He has served as a trial judge in Juvenile court and several other divisions within the Circuit Court of Cook County. He has developed a broad base of judicial expertise in juvenile matters. He has received many awards and honors for his groundbreaking work in the Juvenile Justice Division. Throughout his legal career, Judge Heaston has demonstrated a commitment to public service and improving the administration of justice. Through his publications and lectures, he consistently seeks to protect the interests of society and the rights of individuals.

*** Diane N. Walsh is the Legal Officer for the Juvenile Justice Division of the Circuit Court of Cook County since 1996. In this capacity, she is responsible for a myriad of duties that have a direct impact on that division. Previously, Diane was a Supervisor in the Hearing Officer Section of the Child Protection Division. Before her promotion to Supervisor, she was a Hearing Officer and conducted permanency hearings in post dispositional matters. Diane was also a Cook County Assistant State's Attorney for eight years and prosecuted numerous bench and jury trials. Before receiving her law degree, she worked in both Federal and State Defender offices as well as in private law firms. She was a paralegal in the Child Support Division and worked in the Lawyer Referral Program for the Chicago Bar Association.

I. INTRODUCTION

Like many kids who end up in Juvenile Court, Michael grew up too fast.¹ Before reaching his teenage years, Michael smoked marijuana regularly and attended school infrequently, if at all. Juvenile court first intervened after the police arrested him for driving a stolen car when he was eleven. The court placed Michael under the supervision of the Probation Department and sent him back home to his mother, an alcoholic who had little control over his actions. The Probation Department enrolled him in a therapeutic day school, but within six months, Michael was removed from three different schools: the first for bringing marijuana to school, the second after a classmate sexually abused him on the school bus and the third because he was defiant and regularly truant. Michael returned to court because he violated his supervision and underwent a psychological evaluation that concluded that he should receive treatment at a residential home.

After sixteen months at a residential facility, Michael is now ready to go home. He flourished under close supervision and treatment at the residential home, making significant progress in his schooling and eliminating many of the behavioral problems he previously exhibited. His mother, meanwhile, did not progress as well. She failed to cooperate with the family therapy and drug treatment provided by the Probation Department and now refuses to allow Michael back into her home, saying she does not want him.

Should the juvenile judge release Michael and hope for the best? Or, should the judge keep him under the guardianship of the Probation Department until his mother decides to take him back and, if she does not, find him a different home? Juvenile judges routinely make such complicated decisions. In this case, the decision involves more than Michael's isolated delinquent act. The judge must consider the circumstances that preceded his delinquent conduct, the needs of both Michael and society, and the circumstances to which Michael will return if the court releases him.

Before 1995, the judge would also consider whether to call in the Department of Children and Family Services (DCFS), the state agency charged with keeping troubled families intact and promoting the welfare of children.² However, in 1995, the Illinois legislature severely limited

1. This narrative is a composite of actual cases supplied by the Advocacy Unit, a special group within the Cook County Juvenile Probation Department that serves delinquent minors who are at risk and have a serious mental health diagnosis that requires out-of-home placement services. Michael is not the minor's real name.

2. See *infra* Part III (discussing DCFS's role and emphasis on securing safe and permanent

2005] Denying Child Welfare Services to Delinquent Teens 927

access to DCFS services for teenagers who were adjudicated delinquent—for Michael, DCFS is not an option.³ In the vacuum created by DCFS's absence, the judge must draw upon county resources to provide Michael with a safe home, try to keep his family intact, and if necessary, find Michael an alternative, permanent home.⁴

This Article examines the legislative history and policy concerns that led to the current delinquency restrictions, and argues that such a severe limitation on DCFS involvement in the lives of teenage delinquents is inconsistent with the guiding principles of the Juvenile Court Act ("Act").⁵ Part II discusses the origin of the Juvenile Court in Illinois and provides an overview of how juvenile courts function in both child protection and delinquency cases.⁶ Part III describes the role and responsibilities of DCFS and how the agency interacts with juvenile courts.⁷ Part IV traces the historical and legal developments that culminated in the current provisions and examines their immediate and long-term effects.⁸ Part V revisits the founding principles that continue to guide the Juvenile Court today and argues that the delinquency restrictions conflict with these principles.⁹ Part V also critiques the rationale for the restrictions and further argues that the legislation has repercussions that extend well beyond its intended effects.¹⁰ Finally, Part VI recommends that the Illinois legislature revise the current

homes for children).

3. Act of May 26, 1995, Pub. Act 89-21, ch. 5-15, § 5(1), 1995 Ill. Laws 690, 696-97 (1995) (codified as amended at 20 ILL. COMP. STAT. 505/5 (2004)); Juvenile Court Act of 1987, Pub. Act 89-21, ch. 15-15, § 2-10(2), 1995 Ill. Laws 782, 785 (1995) (codified as amended at 705 ILL. COMP. STAT. 405/2-10 (2004)). *See also infra* Part IV.D (describing the effects of the restrictions on delinquency proceedings).

4. *See infra* Part II.B.2.b (examining the post-adjudication options for courts in delinquency cases).

5. Legislators and DCFS have cast the debate over the agency's role in the lives of teenage delinquents in purely financial terms. *See infra* Part IV.A (discussing the financial motivations underlying DCFS's lobbying efforts in favor of the delinquency restrictions); Part IV.C (recounting the legislature's focus on the financial repercussions of the delinquency restrictions when deciding how to amend the initial restrictions). This Article seeks to go beyond the fiscal debate by focusing on the substantive issue of providing minors with appropriate and effective care in a manner consistent with Illinois' historical approach to caring for youth that are in need of state intervention.

6. *See infra* Part II (providing an overview of the origin of the Juvenile Court in Illinois and how it functions).

7. *See infra* Part III (examining the role of DCFS, its theory of child welfare, and access to its services).

8. *See infra* Part IV (discussing the legislation that resulted in the current delinquency restrictions).

9. *See infra* Part V (arguing that the delinquency restrictions fail to abide by the basic principles that underlie Juvenile Court).

10. *See infra* Part V (analyzing the rationale and effects of the current statutory framework).

statutory scheme so that it is consistent with the guiding principles of the Juvenile Court by allowing a court to consider the specific needs and circumstances of every minor when determining whether DCFS should provide care.¹¹

II. OVERVIEW OF THE JUVENILE COURT

The Juvenile Court provides one point of access to DCFS services.¹² This Part first discusses the foundations of Illinois juvenile courts,¹³ then describes how juvenile courts function in the context of both child protection¹⁴ and delinquency proceedings.¹⁵

A. *The Origins and Purpose of the Juvenile Court*

Child advocates worked for decades to remedy the perceived injustices of a legal system that treated children no differently from adults, and their efforts culminated in the creation of the Cook County Juvenile Court in 1899, the first juvenile court in the country.¹⁶ The court was a manifestation of the *parens patriae* doctrine, which provides that the state has a duty to care for those, such as children, who cannot care for themselves.¹⁷ As Judge Julian Mack, a prominent judge

11. See *infra* Part VI (recommending that a more flexible scheme be implemented that allows a court to make a particularized finding concerning a teenage delinquent's access to DCFS services).

12. See DCFS, PROCEDURES 304: ACCESS TO AND ELIGIBILITY FOR CHILD WELFARE SERVICES § 304.5(a) (Jan. 30, 1987) (listing four ways that families come to the attention of DCFS: (1) reports of child abuse or neglect; (2) referrals from other child welfare service providers, other state agencies, or other states; (3) direct parent or caretaker request for services; and (4) court orders adjudicating children "neglected, dependent, [and] delinquent (under age 13)").

13. See *infra* Part II.A (discussing the origins and purpose of Illinois juvenile courts in the Act).

14. See *infra* Part II.B.1 (explaining the steps to remove a child from a harmful situation and place him in a safe and permanent home).

15. See *infra* Part II.B.2 (describing the continuum of interventions that a court utilizes to provide the most appropriate consequences for delinquent conduct).

16. See JULIAN W. MACK, *The Chancery Procedure in the Juvenile Court*, in THE CHILD, THE CLINIC AND THE COURT 310, 310 (1925) ("Up to that time there was but one thought in jurisprudence. If a child broke the law, he was treated as an adult."); GWEN HOERR MCNAMEE, *The Origin of the Cook County Juvenile Court*, in A NOBLE SOCIAL EXPERIMENT? THE FIRST 100 YEARS OF THE COOK COUNTY JUVENILE COURT 1899-1999 14, 18 (Gwen Hoerr McNamee ed., 1999) (detailing the efforts of numerous lawyers, judges, and social workers, as well as the social and political factors, that culminated in the creation of the Cook County Juvenile Court).

17. See Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 527 (1996) (presenting *parens patriae*).

Under its *parens patriae* power, the state may remove an abused or neglected child from his or her parents' home and may, under certain circumstances, permanently terminate all relationships and rights between parent and child. The state's compelling

in the early days of the court,¹⁸ explained, the Juvenile Court was originally created with the belief that the state had a responsibility to deal with delinquent youth in the same way that a wise parent would deal with a disobedient child.¹⁹ Thus, the juvenile judge's role was not to merely determine whether the child was guilty or innocent of the specific crime, but also to examine the child's life as a whole in order to protect the public safety while also guiding the child to an adult life of good citizenship.²⁰

The 1899 Illinois' Juvenile Court Act served as a model for the nation, and by 1925, all but two states adopted similar approaches to treating minors who were in need of a State's care.²¹ Under the current version of the Act, such minors fall into two major categories:²² (1)

interest in preventing harm to children justifies intrusion on the constitutional right to parental custody.

Id. See also CLIFFORD E. SIMONSEN, *JUVENILE JUSTICE IN AMERICA* 14, 228 (3d ed. 1991) (discussing the origin of the *parens patriae* doctrine in British common law and its major influence on the development of the juvenile court in America); Lawrence B. Custer, *The Origins of Parens Patriae*, 27 *EMORY L.J.* 195, 201–08 (1978) (providing a detailed discussion of the origins and historical development of the *parens patriae* doctrine). *Parens patriae* literally translated from Latin means “parent of his or her country.” *BLACK'S LAW DICTIONARY* 511 (2d Pocket ed. 2001). The term generally means:

1. The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves 2. A doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen, esp. on behalf of someone who is under a legal disability to prosecute the suit The state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit.

Id.

18. SIMONSEN, *supra* note 17, at 228.

19. See MACK, *supra* note 16, at 310 (stating that when “a child . . . broke the law [he or she] was to be dealt with by the State, as a wise parent would deal with a wayward child”). Mack went on to write that:

[T]he State is the higher parent; . . . it has an obligation, not merely a right but an obligation, towards its children; and that is a specific obligation to step in when the natural parent, either through viciousness or inability, fails “so” to deal with the child that it no longer goes along the right path that leads to good, sound, adult citizenship.

Id. at 312.

20. *Id.* at 314 (asserting that the juvenile judge has an obligation to not only ask a child, “[a]re you guilty or innocent of the specific crime with which you are charged?” but also, “[w]hat are you? How have you become what you are? Whither are you tending and how can we direct you . . . so that you may go along the straight path that leads to good citizenship?”).

21. SIMONSEN, *supra* note 17, at 228–29. Maine and Wyoming, the two states that did not join the initial wave of states that created a separate juvenile court, did so in 1945. *Id.* at 229.

22. The Act is comprised of seven articles. 705 ILL. COMP. STAT. 405/1-7 (2004). Article II addresses abused, neglected, or dependent minors. 705 ILL. COMP. STAT. 405/2; and Article V addresses delinquent minors. 705 ILL. COMP. STAT. 405/5. Two other categories of minors—minors requiring authoritative intervention and addicted minors—are addressed in Articles III and IV, respectively, but they are not relevant to the issue addressed in this article. 705 ILL. COMP. STAT. 405/3-4. Articles II and V comprise the two major areas addressed by the juvenile court,

abused,²³ neglected,²⁴ or dependent minors,²⁵ (whose cases fall under the heading of “child protection”); and (2) delinquent minors.²⁶ The Act has gone through many changes since 1899, but its core purpose echoes the words of Judge Mack, which is to “secure for each minor subject hereto such care and guidance” that will serve his best interests and the best interests of the community.²⁷ To achieve this broad purpose, the Act allows judges to liberally construe its language²⁸ and empowers them with an array of options to address the needs of the minors, their families, and their communities.²⁹

as evidenced by the administrative restructuring of the Cook County Juvenile Court that took place in 1994 under Donald P. O’Connell, Chief Judge of the Cook County Circuit Court. MARTHA A. MILLS, *The Juvenile Court Today, in A NOBLE SOCIAL EXPERIMENT? THE FIRST 100 YEARS OF THE COOK COUNTY JUVENILE COURT 1899–1999* 93, 93 (Gwen Hoerr McNamee ed., 1999). Judge O’Connell created a separate Child Protection Division to hear abuse, neglect, and dependency petitions, and a separate Juvenile Justice Division to hear delinquency petitions. *Id.*

23. See 705 ILL. COMP. STAT. 405/2-3(2) (2004) (defining the actions that constitute abuse). Generally, a person who is responsible for a minor’s welfare commits abuse if she inflicts, or allows someone else to inflict, any physical or emotional injury or sexual offense upon the minor, or creates a substantial risk of such injury or offense. 705 ILL. COMP. STAT. 405/2-3(2)(i).

24. See 705 ILL. COMP. STAT. 405/2-3(1) (defining the conduct and omissions that constitute neglect). A caretaker neglects a minor if he fails to provide the minor with necessary or proper support, such as education and medical care, or with physical necessities, such as food, shelter, and clothing. 705 ILL. COMP. STAT. 405/2-3(1)(a). A caretaker who subjects a minor to a potentially harmful environment or, for minors under age fourteen, leaves the minor without supervision for an unreasonable period of time is also guilty of neglect. 705 ILL. COMP. STAT. 405/2-3(1)(b), (d). A mother who gives birth to a baby whose bodily fluids contain any amount of a controlled substance is also guilty of neglect. 705 ILL. COMP. STAT. 405/2-3(1)(c).

25. See 705 ILL. COMP. STAT. 405/2-4 (2004) (enumerating the requisite conditions for a finding of dependency). Generally, a minor is dependent on the state if his legal caretaker, through no fault of his own, is unable to care for the minor’s needs or if the minor has no legal caretaker whatsoever. *Id.*

26. See 705 ILL. COMP. STAT. 405/5-105(3) (2004) (defining a “delinquent minor” as “any minor who prior to his or her 17th birthday has violated or attempted to violate, regardless of where the act occurred, any federal or State law, county or municipal ordinance”).

27. 705 ILL. COMP. STAT. 405/1-2(i) (2004).

28. 705 ILL. COMP. STAT. 405/1-2(4).

29. See, e.g., 705 ILL. COMP. STAT. 405/2-23 (2004) (enumerating dispositional options after a court has found the minor was abused, neglected, or is dependent); 705 ILL. COMP. STAT. 405/5-710, 715, 740 (providing the court with a variety of options when sentencing a minor found guilty of criminal conduct, when setting the terms of their probation, and when placing a minor in the legal custody of a guardian, or agency). For example, in the context of delinquency cases, the court may restrict the minor’s behavior by prohibiting the juvenile from entering a designated geographical area as a term of probation, 705 ILL. COMP. STAT. 405/5-715(2)(r), specify the minor’s educational training, 705 ILL. COMP. STAT. 405/5-740(1)(d), require the minor to undergo certain medical or psychiatric treatment, 705 ILL. COMP. STAT. 405/5-715(2)(d), order the minor to make restitution for his delinquent act, 705 ILL. COMP. STAT. 405/5-710(4), or even mandate that the minor have a gang tattoo surgically removed, 705 ILL. COMP. STAT. 405/5-715(2)(s-5).

B. *The Juvenile Court in Practice*

When a minor is before a juvenile court, the judge's ultimate goal is to promote the overall welfare of the child³⁰ and in delinquency cases, to balance the child's welfare with the interests of the community and the victim of the minor's conduct.³¹ This section describes the statutory schemes that aim to accomplish these goals in both child protection and delinquency cases. The first part describes the statutory provisions that guide the judge in child protection cases to secure a safe and permanent home for the child.³² The second part focuses on delinquency cases and briefly summarizes the balanced and restorative justice model ("BARJ") that the Illinois legislature embraced when it enacted the Juvenile Justice Reform Act of 1998 ("JJRA").³³ The section goes on to review the statutory provisions and local initiatives created under the JJRA that provide judges with pre-trial and post-adjudication alternatives to detention in situations that will serve the best interests of both the minor and the community.³⁴

1. Child Protection Cases

A juvenile court may initially intervene at a temporary custody hearing when a child has allegedly suffered abuse, neglect, or is dependent.³⁵ In a temporary custody hearing, the court evaluates

30. 705 ILL. COMP. STAT. 405/1-2(1).

31. 705 ILL. COMP. STAT. 405/5-101(1) (stating that the Illinois General Assembly created the delinquency provisions of the Act with the intention of protecting the community and providing the minor with "competencies to live responsibly and productively").

32. See *infra* Part II.B.1 (providing an overview of the statutory scheme in child protection cases).

33. See *infra* Part II.B.2 (describing the basic tenets of the balanced and restorative justice model).

34. See *infra* Part II.B.2.a-b (discussing the pre- and post-adjudication options available to judges in delinquency cases).

35. When a law enforcement officer has reasonable cause to believe that a minor has been maltreated, the officer has discretion to take custody of the minor without a warrant. 705 ILL. COMP. STAT. 405/2-5(1). See also FRANK J. KOPECKY, ILL. INST. FOR CONTINUING LEGAL EDUC., *Juvenile Law*, in STARTING POINTS: FUNDAMENTALS OF PRACTICE IN ILLINOIS 3-1 § 3.63, at 3-27-28 (2001) (explaining that after an abused or neglected child is taken into custody by a law enforcement officer, a temporary custody hearing must take place "within 48 hours, excluding weekends and court holidays"). State intervention begins with a report of suspected maltreatment to the State Central Registry (SCR) for Child Abuse/Neglect. ILL. ADMIN. CODE tit. 89, § 300.30 (2002). Child Protection Services Workers then investigate the report to determine whether credible evidence of abuse or neglect exists. ILL. ADMIN. CODE tit. 89, § 300.110(i). Even if the report is founded, the court will only remove the child from the home if it is necessary to protect her health and safety. See DCFS, *Chapter Four: Intake and Investigations*, in BEST PRACTICES § 4.16.1 (Oct. 2, 2001) (limiting the option of protective custody to situations where the child faces imminent danger), available at <http://dcfswebresource.prairienet.org/downloads/bp/>. See also *supra* note 25 (explaining that the term "dependent" refers to a child's

whether there is probable cause to believe that the minor is abused, neglected, or dependent, and whether there is an urgent and immediate necessity to remove the child from his home.³⁶ The court must further find that DCFS made reasonable efforts to eliminate the necessity of removal by providing appropriate services.³⁷ If removal is necessary, the court can either place the minor in a “suitable place” designated by the court, usually the home of a relative or some other temporary care placement designated by DCFS.³⁸ The Act recognizes the importance of timeliness when dealing with a child who has been removed from his home.³⁹ Accordingly, a minor cannot remain in temporary custody for longer than ninety days.⁴⁰

In order to keep the child in custody, the court must hold an adjudicatory hearing before the ninety-day window closes⁴¹ to determine if the minor has been abused, neglected, or is dependent.⁴² If the alleged abusive or neglectful behavior is found, then the court may find in a subsequent dispositional hearing⁴³ that it is in the minor’s best interests⁴⁴ to become a ward of the court,⁴⁵ thereby giving the court

dependence on the state due to his parent’s inability to care for him).

36. 705 ILL. COMP. STAT. 405/2-10. If the court does not find that there is probable cause to believe the minor has been maltreated, the court must dismiss the petition. *Id.* The court may also find that, although probable cause exists, it is not necessary to remove the child from his home. *Id.* In this case the minor remains with his custodian until the adjudicatory hearing. *Id.*

37. 705 ILL. COMP. STAT. 405/2-10(2). The court may also find that no reasonable efforts can be made to eliminate the necessity of removal. *Id.* See also *In re Patricia S.*, 584 N.E.2d 270, 275 (Ill. App. 1st Dist. 1991) (holding that a juvenile court must determine whether reasonable efforts were made or were not required as part of the temporary custody hearing).

38. 705 ILL. COMP. STAT. 405/2-10(2). The statutory term for this temporary placement is “shelter care.” *Id.* “Shelter” is defined as “the temporary care of a minor in physically unrestricting facilities pending court disposition or execution of court order for placement.” 705 ILL. COMP. STAT. 405/1-3(14).

39. 705 ILL. COMP. STAT. 405/2-14(a) (“The legislature recognizes that serious delay in the adjudication of abuse, neglect, or dependency cases can cause grave harm to the minor and the family and that it frustrates the health, safety and best interests of the minor and the effort to establish permanent homes for children in need.”).

40. 705 ILL. COMP. STAT. 405/2-14(b). A court may continue the case under certain circumstances, but only if it is in the best interests of the minor, and only up to thirty days. 705 ILL. COMP. STAT. 405/2-14(c).

41. 705 ILL. COMP. STAT. 405/2-14(c) (stating that, if the adjudicatory hearing does not take place within ninety days or the continued period, the petition shall be dismissed without prejudice upon motion by any party).

42. See 705 ILL. COMP. STAT. 405/2-21(2) (prescribing the procedure for an adjudicatory hearing). A finding of abuse, neglect, or dependency must be based on the preponderance of the evidence. 705 ILL. COMP. STAT. 405/2-18(1).

43. See 705 ILL. COMP. STAT. 405/2-22. This dispositional hearing must occur within thirty days of the adjudicatory hearing, though it may be continued for an additional period not to exceed thirty days. *Id.*

44. A “best interest” determination is based on a variety of factors that account for the minor’s

2005] Denying Child Welfare Services to Delinquent Teens 933

power over the minor.⁴⁶ The court may commit the minor to one of four entities: a suitable relative or other person, the probation department, “an agency for care or placement,” or DCFS.⁴⁷ Child protection cases progress against the backdrop of “permanency,” a philosophy of casework that prioritizes the child’s interest in finding a safe and permanent home.⁴⁸ With this end in mind, the court will set a permanency goal for the child when he is initially placed⁴⁹ and ensure that the services being provided to him and his family are focused on achieving that goal.⁵⁰

A minor who becomes a ward of the court remains under continual court supervision.⁵¹ The court must revisit the child’s case every six months to review the permanency goal and the service plan in a “permanency hearing.”⁵² Based on a number of factors that contemplate the totality of the minor’s circumstances, from his mental and physical well-being to the options available for permanence,⁵³ the court will

physical and mental needs, as well as the minor’s sense of belonging in his family and surrounding community. 705 ILL. COMP. STAT. 405/1-3(4.05).

45. 705 ILL. COMP. STAT. 405/2-22. Even if the court found that the minor was abused, neglected, or is dependent, the court may still order that the minor return to his parents or legal guardians (if the child was removed from the home at the temporary custody hearing) or remain with them (if the child was not removed) and order the caretakers to comply with services provided by DCFS. 705 ILL. COMP. STAT. 405/2-23.

46. 705 ILL. COMP. STAT. 405/1-3(16) (defining a “ward of the court” as a minor who is subject to the dispositional power of the court under the Act after a finding of requisite jurisdictional facts).

47. 705 ILL. COMP. STAT. 405/2-23(1)(a)–(b), 2-27(1)(a)–(d). The court may also order that the minor be placed in a subsidized guardianship with a suitable relative or other person, where the caretaker receives payments to help care for the child. 705 ILL. COMP. STAT. 405/2-27(1)(a-5). However, DCFS must approve a subsidized guardianship in accordance with its administrative rules. *Id.*

48. *See infra* Part III.A (describing the legislative efforts that have elevated safety and permanency as the most important concerns of child welfare work).

49. 705 ILL. COMP. STAT. 405/2-22(1), 2-28. Some examples of “permanency goals” are to return the minor home within five months or move the child towards adoption. 705 ILL. COMP. STAT. 405/2-28(2)(A), (D).

50. 705 ILL. COMP. STAT. 405/2-23(3). While the court enters the goal and may require the parties to comply with services aimed at achieving the goal, the court may not manage the casework by ordering the entity that has custody of the minor, such as DCFS, to utilize “specific placements, specific services, or specific service providers” to achieve the goal. *Id.*

51. 705 ILL. COMP. STAT. 405/2-28 (requiring periodic review of the minor’s case by the court to re-evaluate the permanency goal and determine how to proceed with the case).

52. 705 ILL. COMP. STAT. 405/2-28(2). The initial permanency hearing must be held within twelve months of when temporary custody was taken. *Id.* If the parental rights of both parents have been terminated, a permanency hearing must be held within thirty days of that order. *Id.*

53. *Id.* The court’s evaluation must include the following factors:

Age of the child.

Options available for permanence.

Current placement of the child and the intent of the family regarding adoption.

continue or revise the permanency goal to one of eight options.⁵⁴ Wardship will continue until the minor turns nineteen years old or the court determines that permanency has been achieved and the “health, safety, and best interests of the minor and the public” do not require further wardship.⁵⁵

2. Delinquency Cases⁵⁶

In the last decade, legislative and programming initiatives have focused on developing a continuum of intervention in the lives of delinquent youth. Through the JJRA,⁵⁷ the Illinois legislature attempted to strike a balance between the rehabilitative roots of the Juvenile Court and recent trends toward a more punitive system by enacting changes based on the BARJ.⁵⁸ BARJ recognizes that a minor’s criminal action

Emotional, physical, and mental status or condition of the child.

Types of services previously offered and whether or not the services were successful and, if not successful, the reasons the services failed.

Availability of services currently needed and whether the services exist.

Status of siblings of the minor.

Id.

54. 705 ILL. COMP. STAT. 405/2-28(2)(A)–(G). Generally, the permanency goals focus on returning a child to his home in the near future, terminating parental rights and placing the child in an adoptive home, placing the child in a permanent home under the care of a guardian, or placing the child in substitute care due to disabilities or mental illness, or because the child is over age fifteen. *Id.*

55. 705 ILL. COMP. STAT. 405/2-31(1).

56. The Juvenile Court has jurisdiction over any minor under seventeen who violates or attempts to violate federal, state, or local law. 705 ILL. COMP. STAT. 405/5-120. However, an exception exists for minors at least fifteen years old who have been charged with more serious crimes, like first degree murder, aggravated criminal sexual assault, certain instances of aggravated battery with a firearm, armed robbery with a firearm, or aggravated vehicular hijacking with a firearm. 705 ILL. COMP. STAT. 405/5-130(1)(a). These charges and other charges stemming from the same incident are prosecuted under the criminal laws rather than the Act. *Id.*

The Juvenile Justice Reform Act of 1988 changed some of the language that was distinct to the juvenile justice system to be synonymous with criminal court. 705 ILL. COMP. STAT. 405/5-105. Specifically, “dispositional hearing” was replaced with “sentencing hearing,” and “adjudicated” with “guilty.” 705 ILL. COMP. STAT. 405/5-105 (13), (17). This Article uses the former language for ease of communication.

57. Juvenile Justice Reform Act of 1988, Pub. Act 90-590, 1998 Ill. Laws 1035 (codified as amended at scattered sections of 20 ILL. COMP. STAT. and 705 ILL. COMP. STAT.).

58. See Daniel Dighton, *Balanced and Restorative Justice in Illinois*, THE COMPILER (Ill. Criminal Justice Info. Auth., Chi., Ill.), Winter 1999, 4, 4 (reporting that the Juvenile Justice Reform Act was an attempt to strike a balance between the competing theories of rehabilitation and retribution); *Q&A on Juvenile Justice Reform*, THE COMPILER (Ill. Criminal Justice Info. Auth., Chi., Ill.), Winter 1999, at 1, 9 (quoting one of the principal architects of the reforms as saying that “the BARJ Model has great advantage over traditional models of juvenile justice, which focus almost exclusively on either the treatment or punishment [of the minor]”). See also Sacha M. Coupet, Comment, *What to Do With the Sheep in Wolf’s Clothing: The Role of Rhetoric*

2005] Denying Child Welfare Services to Delinquent Teens 935

harms the victim and the community, as well as the offender, and works to restore each party to its original state.⁵⁹ BARJ thus seeks to balance the rights and interests of these three parties, which are sometimes at odds, by creating a range of community-oriented interventions.⁶⁰ In practice, these interventions hold the minor accountable for his conduct,⁶¹ develop competencies⁶² in the minor, and promote reconciliation through dialogue between the offender and the victim.⁶³

In addition to implementing very tangible changes, legislators sought to provide juvenile courts with a guiding principle that would unify both the new and existing provisions with a common focus.⁶⁴ Under the

and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System, 148 U. PA. L. REV. 1303, 1317–27 (2000) (discussing the national legislative trends in the early 1990s towards more punitive juvenile justice systems and arguing that the balanced and restorative justice model provides an appropriate third alternative to a purely rehabilitative or retributive model).

59. See Coupet, *supra* note 58, at 1341–45 (describing the philosophical underpinnings of BARJ); PETER FREIVALDS, BALANCED AND RESTORATIVE JUSTICE PROJECT (BARJ), 1 (Office of Juvenile Justice and Delinquency Prevention, FACT SHEET No. 42, July 1996) (outlining the basic principles of BARJ, which emphasize the importance of the victims, both the individual and community, in the justice process).

60. Dighton, *supra* note 58, at 4. See 705 ILL. COMP. STAT. 405/5-101 (giving the purpose and policy promoted through the 1998 changes to the juvenile justice system and mandating the development of new programs that, for example, are community-based, are in close proximity to the minor's home, involve the minor's family, and provide post-release services). One example of a JJRA-created intervention is community mediation panels, which the State's Attorney may establish to meet with victims, juvenile offenders, and their parents in a process to hold juveniles accountable, to reimburse the victims and community that have been injured, and to offer the juvenile offenders opportunities to develop skills necessary for development as positive members of the community. 705 ILL. COMP. STAT. 405/5-310.

Critics of the JJRA have argued that the law uses the language of restorative justice but provides little funding to implement the initiatives, while at the same time creating a more rigid juvenile justice system by limiting the use of diversionary procedures, such as station adjustments, and leaving automatic transfer laws intact. See Dighton, *supra* note 58, at 5 (quoting Steve Drizin of the Northwestern University Legal Clinic); *Q&A on Juvenile Justice Reform*, *supra* note 58, at 10 (quoting Betsy Clarke, then part of the Juvenile Justice Counsel, Cook County Public Defender's Office, as saying "[c]learly, restorative justice will be successful only if there are sufficient resources to successfully divert youths from the juvenile justice system through competency development. If these services are not in place, then restorative justice will not be balanced."). See also KOPECKY, *supra* note 35, at § 3.17, at 3-9-10 (explaining the shift in philosophy ushered in by the JJRA to one that emphasizes accountability and public safety).

61. 705 ILL. COMP. STAT. 405/5-101(2)(j).

62. 705 ILL. COMP. STAT. 405/5-101(1)(c) ("'[C]ompetency' means the development of educational, vocational, social, emotional and basic life skills which enable a minor to mature into a productive member of society.>").

63. 705 ILL. COMP. STAT. 405/5-310(1)(2004) (establishing community mediation programs with the goal of "mak[ing] the juvenile understand the seriousness of his or her actions and the effect that crime has on the minor, his or her family, his or her victim and his or her community").

64. See *Q&A on Juvenile Justice Reform*, *supra* note 58, at 1, 9 (quoting one of the principal architects of the reform provisions as saying that, because Illinois' delinquency statute did not have a purpose statement, the JJRA intentionally created a conceptual framework that "will

BARJ model and the JJRA, the court does not view a juvenile's conduct in isolation, but rather in the context of his personal history and his specific community. In doing so, the rights of the victim and community are honored, as well as the place of the minor in that community.⁶⁵ Juvenile courts put this underlying philosophy into action before and after minors are adjudicated delinquent.⁶⁶

a. Pre-adjudication: Illinois Juvenile Detention Alternatives Initiative

At a detention hearing, a court may detain a child awaiting adjudication to achieve one of two purposes: (1) to ensure that the juvenile appears in court; or (2) to safeguard the public from further delinquent acts.⁶⁷ Between 1987 and 1996, pre-adjudication detention rates drastically increased across the country, including Cook County, with the majority of detained youth residing in facilities operating above their design capacity.⁶⁸

In 1994, Cook County implemented a grant from the Annie E. Casey Foundation aimed at developing responsible community-based alternatives to pre-adjudication detention that do not compromise public safety.⁶⁹ Through the collaborative efforts of the court, the Probation Department, and other key entities such as the Cook County Board of Commissioners, which operates the Juvenile Temporary Detention Center ("JTDC"), Cook County developed a continuum of programs

provide our juvenile courts with specific guidance needed to effectively deal with the problem of juvenile delinquency in our state").

65. *See id.* at 9 ("Under the BARJ Model the juvenile offender, the victim, and the community in which they live, are all viewed as 'clients' of the juvenile justice system.").

66. There are also immediate intervention procedures that are intended to redirect delinquent youth without coming before the court. 705 ILL. COMP. STAT. 405/5-300-30 (2004). Because this Article focuses on options available to the court, these provisions are not discussed.

67. 705 ILL. COMP. STAT. 405/5-501(2). *See also* A PARTNERSHIP TO REDUCE UNNECESSARY DETENTION OF ILLINOIS YOUTH (Ill. Juvenile Detention Alternatives Initiative, Chi., Ill.), 1 (describing the role of pre-adjudication detention) [hereinafter Ill. Juvenile Detention Alternatives Initiative]; Kopecky, *supra* note 35, §§ 3.40-3.41 (detailing the pre-adjudication detention procedures).

68. *See* Bill Rust, *Juvenile Jailhouse Rocked: Reforming Detention In Chicago, Portland, and Sacramento*, ADVOCASEY (Annie E. Casey Foundation, Balt., Md.), Fall/Winter 1999, at 1 (stating that pretrial detention rates across the country rose by thirty eight percent during that period, with nearly seventy percent of the children housed in facilities operating above their capacity), available at <http://www.aecf.org/initiatives/jdai/> (last visited Jan. 18, 2005). Cook County's Juvenile Temporary Detention Center held an average population of about 800 juveniles in the early 1990s, despite having a capacity of only 490. Ill. Juvenile Det. Alternatives Initiative, *supra* note 67, at 6.

69. Ill. Juvenile Det. Alternatives Initiative, *supra* note 67, at 6. *See also* The Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative*, at <http://www.aecf.org/initiatives/jdai/> (summarizing the program and providing resources describing the implementation of JDAI programs in different jurisdictions).

that engage juveniles in positive and productive activities within their communities.⁷⁰ The array of new programs was collectively labeled the Juvenile Detention Alternatives Initiative (“JDAI”).

Cook County has successfully implemented JDAI, resulting in a forty percent drop in the number of juveniles in detention between 1996 and 2003.⁷¹ Moreover, ninety percent of the youth participating in the alternative programs did not commit a delinquent act while awaiting trial and attended their scheduled court dates on time.⁷² JDAI’s success in Cook County spawned the Illinois Juvenile Detention Alternatives Initiative (“IJDAI”), which thirty-three counties throughout the state have joined.⁷³ These programs have succeeded because they enable juvenile justice professionals to assess the particular risk posed by the individual juvenile before them, thereby eschewing any blanket solution to the problem.⁷⁴

As community-based solutions, the detention alternatives require that the minor actually have a home. Some minors, however, do not have a home to return to, because either their parents or guardians refuse to pick them up from the juvenile detention center or they are simply homeless.⁷⁵ These minors are considered “release upon request” (“RUR”) minors, because they are free to leave the juvenile detention center upon the request of a parent, guardian, or legal custodian.⁷⁶ In such instances, the court will issue a summons directing the parent or

70. See Rust, *supra* note 68, at 4 (discussing the positive benefits of the collaborative programs); JUVENILE PROB. AND COURT SERV. DEP’T, SUMMARY OF JUVENILE PROBATION AND COURT SERVICES, PROGRAMS, AND INITIATIVES 9–11 (2004) (depicting the “Juvenile Detention Alternatives Continuum” graphically). The alternatives provide a range of oversight, depending on the particular characteristics of the minor, from evening reporting centers, where the minor spends from 4:00 to 9:00 p.m. at a recreational center, to electronic monitoring. See *id.* at 8 (summarizing the various juvenile detention alternatives in Cook County).

71. See Timothy C. Evans, Letter to the Editor, *Keeping Youths Out of Detention is Key Priority for Court*, CHI. DAILY LAW BULL., Feb. 3, 2004 (heralding the reduced detention rates in Cook County).

72. Angela Rozas, *More Kids Locked Up, Study Finds*, CHI. TRIB., Jan. 8, 2004, at 1.

73. See Ill. Juvenile Det. Alternatives Initiative, *supra* note 67, at 8 (showing a map of the thirty-three participating counties as of May, 2003).

74. See generally Evans, *supra* note 71 (stating that the success of the program hinges on the ability vested in the judge and other professionals to individually assess each juvenile).

75. Other scenarios may also leave a minor without a home to return to. For example, a court will typically release a minor accused of sexually assaulting another minor in the same household with the condition that he have no contact with the alleged victim (i.e., not reside in the same home) while awaiting adjudication.

76. See STATE OF ILL. DEP’T OF HUMAN SERVICES, Agreement Attachment, Release Upon Request § A (describing a RUR minor as “any youth [who is the subject of] a delinquency petition . . . [who] a.) has been released by the court by an order to release the youth upon the request of a parent, guardian, or custodian but; b.) remains in detention because no parent, guardian, or custodian has appeared within seven (7) days of the RUR order to accept custody”).

guardian to report for a detention rehearing within seven days.⁷⁷ If the minor's caretaker does not appear at the rehearing, the court may order the Department of Human Services ("DHS") to designate a suitable placement for the minor while he awaits adjudication, such as a foster home or group home.⁷⁸ DHS will fund the minor's placement and provide services to the minor for up to thirty days.⁷⁹

b. Post-adjudication

The court has a wide range of sentencing options at its disposal upon adjudicating a minor, from dictating the minor's educational training to ordering the minor to have a gang tattoo surgically removed.⁸⁰ If the minor does not belong in the Department of Corrections, yet the court finds that the minor's parents or custodians are unfit or unable to care for or discipline the minor, the court may order the minor into placements that parallel the placement options available in child protection hearings if it is in his best interests.⁸¹ For example, the court may place the minor with a relative or suitable caregiver, with an outside agency, or under the guardianship of the probation department.⁸² In Cook County, a division of the Probation Department called the Advocacy Unit services teenage delinquents with serious mental health diagnoses that require out-of-home placements.⁸³ Similar to child protection cases, the court periodically reviews placement decisions and decides how to proceed.⁸⁴

Although the Act empowers the court to take very similar steps in delinquency and child protection placement hearings, the goals are not identical in both proceedings. A child protection court seeks to expeditiously yet cautiously place the child in a safe and permanent home, whether it entails returning the child to his previous home or

77. 705 ILL. COMP. STAT. 405/5-501(6) (2004).

78. *Id.*; STATE OF ILL. DEP'T OF HUMAN SERVICES, *supra* note 76, § A.1.a.

79. STATE OF ILL. DEP'T OF HUMAN SERVICES, *supra* note 76, § A.4.a.

80. 705 ILL. COMP. STAT. 405/5-710.

81. *Compare* 705 ILL. COMP. STAT. 405/5-740 (empowering the court to place a juvenile adjudged a ward of the court in the custody of a relative, under the guardianship of the probation department, with an agency for care, with a training school, or in an appropriate institution) *with* 705 ILL. COMP. STAT. 405/2-27 (providing the same alternatives with the exception of the training school and appropriate institution, but with the addition of DCFS and subsidized guardianship placement options). The court makes the initial placement decision at the sentencing stage. 705 ILL. COMP. STAT. 405/5-710. *See also supra* note 47 and accompanying text (discussing the placement options in child protection cases).

82. 705 ILL. COMP. STAT. 405/5-740(1)(a)-(c).

83. JUVENILE PROB. AND COURT SERV. DEP'T, *supra* note 70, at 47.

84. 705 ILL. COMP. STAT. 405/5-745 (2004).

assigning him to a new home.⁸⁵ The statutory scheme focuses on this permanency goal, and in most cases, the court calls on DCFS, as the state child welfare agency, to accomplish the goal.⁸⁶ While the goals in a delinquency case resemble those in a child protection case, they are not identical. For example, there are no explicitly stated goals in the placement hearings in delinquency cases.⁸⁷ Rather, placement hearings take place under the broad themes of balanced and restorative justice, which recognize that the delinquent youth has committed some sort of wrongdoing, and accordingly, the court has an obligation to ensure the public safety and rehabilitate the minor.⁸⁸ The statutes that govern delinquency cases therefore do not share the same orientation towards permanency.⁸⁹ Still, like in child protection cases, placing the minor with a different legal custodian is conditioned upon the malfeasance or inaction of his caretaker.⁹⁰

Although the Act does not prioritize permanency in delinquency cases, the statutory schemes in both child protection and delinquency proceedings nonetheless share a common heritage that can be traced back to the earliest days of the juvenile court. Under both types of proceedings, the judge views the minor holistically, recognizing the interdependence of all aspects of the child's life, not just the isolated incident that brought the minor before the court.

III. DCFS: THE DEPARTMENT OF CHILDREN AND FAMILY SERVICES

Juvenile courts work closely with DCFS, a state agency created in 1964 with the goal of providing extensive social and family

85. *See supra* Part II.B (describing the focus of child protection hearings on safety and permanency).

86. *See* 705 ILL. COMP. STAT. 405/1-2 (2004) (presuming DCFS involvement in cases where a child is removed from his or her home, "so that permanency may occur at the earliest opportunity").

87. 705 ILL. COMP. STAT. 405/5-740.

88. 705 ILL. COMP. STAT. 405/5-101 (focusing on restoring the offending juvenile, the victim, and the community, not "permanency" for the youth).

89. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-27(1.5) (2004) (governing placement hearings in child protection cases and requiring the court to consider the success and appropriateness of family reunification services); 705 ILL. COMP. STAT. 405/2-28 (2004) (requiring periodic permanency hearings at which the court shall determine the future status of the child and set one of eight permanency goals). In contrast, the statute that governs a court's review of a placement in a delinquency case makes no mention of permanency nor does it require the court to make a determination concerning the future status of the child. 705 ILL. COMP. STAT. 405/5-745.

90. *Compare* 705 ILL. COMP. STAT. 405/2-27(1) (requiring a determination that a minor's parents or guardians are unfit or are unable to care for the minor before the court may place him in the legal custody of another person or entity), *with* 705 ILL. COMP. STAT. 405/5-740 (articulating the same standard before a court may place the child in delinquency cases).

preservation services to protect and promote the welfare of children.⁹¹ Prior to the 1995 legislation,⁹² minors could access DCFS services in juvenile court⁹³ either through the child protection proceedings discussed above, or in Cook County delinquency cases, through two service programs that were created in the 1980s as a result of class-action litigation. One program was the Governor's Youth Services Initiative ("GYSI"),⁹⁴ a collaborative group that provided alternative services for youth who were referred to juvenile court on a delinquency petition yet did not require punitive measures. The other program serviced RUR minors: those who did not belong in detention while awaiting adjudication, yet were detained because they had no home to return to.⁹⁵ This Part begins with an overview of DCFS, focusing particularly on the agency's role in finding safe and permanent homes for abused, neglected, and dependent youth.⁹⁶ The second section discusses the creation and role of the GYSI.⁹⁷ The third section looks at DCFS's responsibility to provide short-term care for RUR minors.⁹⁸

91. See generally 20 ILL. COMP. STAT. 505/5 (2004) (detailing DCFS's duties and obligations in providing child welfare services). DCFS is also responsible for licensing and regulating child welfare agencies, foster family homes, group homes, childcare institutions, and day care facilities. DCFS, *Chapter One: An Introduction to Child Welfare in Illinois*, in BEST PRACTICES § 1.1.2 (2002), available at <http://dcfswebresource.prairienet.org/downloads/bp/>. DCFS has a five-point mission statement:

Protect children who are reported to be abused or neglected and to increase their families' capacity to safely care for them.

Provide for the well-being of children in our care.

Provide appropriate, permanent families as quickly as possible for those children who cannot safely return home.

Support early intervention and child abuse prevention activities.

Work in partnerships with communities to fulfill its mission.

Id.

92. See *infra* Part IV (tracing the historical factors that led to the 1995 delinquency restrictions and the 1996 amendment to the restrictions).

93. See DCFS, *supra* note 12, § 304.5 (listing four ways that families come to the attention of DCFS: (1) reports of child abuse or neglect; (2) referrals from other child welfare service providers, other state agencies, or other states; (3) direct parent or caretaker request for services; and (4) court orders adjudicating children "neglected, dependent, [and] delinquent (under age 13) . . .").

94. See *infra* Part III.B (discussing the role of the GYSI).

95. See *supra* Part II.B.2.b (explaining the circumstances that lead to RUR status).

96. See *infra* Part III.A (discussing DCFS's role in finding maltreated children safe and permanent homes).

97. See *infra* Part III.B (tracing the origins and purpose of the GYSI).

98. See *infra* Part III.C (discussing the litigation that led to DCFS's agreement to maintain short-term residential care facilities to care for RUR minors).

A. Agency Overview

DCFS provides child welfare services through two primary methods: (1) the direct work of DCFS staff with children and families; and, or alternatively, (2) through contracts with outside child welfare agencies for foster care services or family preservation services.⁹⁹ “Services,” a common term in child welfare parlance, generically refers to any social program directed toward the goal of a particular case, such as reuniting a child and his family.¹⁰⁰

DCFS prioritizes “permanency” as a cornerstone of effective child welfare programming.¹⁰¹ Permanency means “providing a lifetime commitment to a child in a setting where he or she is safe, can have a sense of belonging and well being, and can live to adulthood”¹⁰² by either re-unifying the child with his family, finding an adoptive home, or placing him in the home of a guardian.¹⁰³ Successful permanency planning not only provides a strong foundation for meeting the child’s needs throughout his childhood, but also develops the life skills that a child will need when he becomes an adult.¹⁰⁴ DCFS stresses the importance of conscientious casework “based on the child’s sense of time and his or her urgent need for a stable, caring and permanent family.”¹⁰⁵ From the family’s first contact with DCFS until the child’s case is closed, DCFS workers concurrently develop alternative plans to ensure that a child does not languish in temporary care.¹⁰⁶ To help achieve this goal, DCFS strives to keep one caseworker assigned to each case to provide continuity to the family and promote streamlined

99. DCFS, *supra* note 12, § 304.5. DCFS provides a wide array of services, such as emergency family shelter, counseling, and drug treatment, to name a few. *See generally* ILL. ADMIN. CODE tit. 89, § 302 (2005) (describing available services).

100. *See* ILL. ADMIN. CODE tit. 89, § 302.20 (2005) (defining “child welfare services” as any “publicly funded social services which are directed toward the accomplishment” of the agency’s goals, such as remedying the potentially harmful circumstances in a child’s home, reuniting a child with his family, or finding a permanent home for a child).

101. DCFS, *Chapter Two: Permanency for All Children*, in BEST PRACTICES § 2.2 (2002), available at <http://dcfswebresource.prairienet.org/downloads/bp/>.

102. *Id.* at § 2.1.2.

103. *See* DCFS, BUDGET BRIEFING: FY 2003 25 (2002) (giving placements through reunification, adoptions, guardianships as the three primary indicators of permanency), available at <http://www.state.il.us/dcf/library/index.shtml>.

104. DCFS, *supra* note 101, § 2.2.

105. *Id.* at § 2.2.

106. *Id.* at § 2.2.1 (adopting “concurrent planning,” as opposed to sequential planning, as the guiding philosophy in child welfare casework, and summarizing the concurrent planning as “actively work[ing] toward one permanency plan while simultaneously preparing for or taking steps toward an alternative permanency plan” in order to prevent multiple foster placement that impair a child’s ability to form normal attachments).

and coordinated services.¹⁰⁷

DCFS's emphasis on permanence became more pronounced in 1997 with the passage of the federal Adoption and Safe Families Act ("ASFA")¹⁰⁸ and a group of Illinois laws referred to as the Permanency Initiative.¹⁰⁹ ASFA amended some requirements in Title IV-E of the Social Security Act, which provides federal funding to help defray the costs of foster care services, in order to reduce the amount of time it takes to achieve permanency.¹¹⁰ The Permanency Initiative, in part, altered some of the mechanics of the Act and Adoption Act to establish a more structured process to ensure that the court monitored each child's move towards permanency¹¹¹ and reduce the amount of time it took for a child to find a permanent home.¹¹² Under the new legislation and changes in agency practices, DCFS has nearly doubled the number of children that it moves from foster care to a permanent home on an annual basis.¹¹³

107. *Id.* at § 2.2.2.

108. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

109. *See* DCFS, *supra* note 91, § 1.1.1, at 3-5 (noting the effects of the Permanency Initiative and the interplay between the Illinois laws and federal law).

110. *See id.* at § 1.1.1, at 3-5 (discussing the three most important federal laws in child welfare, which includes Title IV-E of the Social Security Act). Examples of the requirements contained in ASFA include: (1) a state must hold a judicial permanency hearing no later than twelve months after the date a child entered foster care and at least every twelve months thereafter as long as the child remains in foster care; and (2) a state must make reasonable efforts to find an adoptive home for a child whose parents' rights have been terminated. DCFS, *supra* note 91, § 1.1.1, at 5. For the first requirement, Illinois adopted a more stringent scheme whereby, after the first permanency hearing, all subsequent permanency hearings are held at least every six months. 705 ILL. COMP. STAT. 405/2-28(2) (2004).

111. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-28(2)(A)-(G) (giving eight permanency goals that establish the future status of the child); *id.* § 405/2-28(2) (requiring the first permanency hearings within twelve months from the date of temporary custody, and every subsequent hearing at least every six months).

112. *See, e.g.*, 750 ILL. COMP. STAT. 50/1(D) (listing twenty-four grounds for terminating parental rights and also providing for an expedited process to terminate parental rights under extreme circumstances).

113. *See* DCFS, BUDGET BRIEFING: FY 2004 26 (2003) (charting the permanency rate in 1997, the year the new legislation was enacted, at 16.1%, and from 1999 to 2003 at 32.6%, 33.6%, 29.9%, 30.8%, and 32.3%, respectively), *available at* <http://www.state.il.us/dcfs/library/index.shtml>. With the increased permanency rate came a reduction in the average time a child stays in foster care, from thirty-four months in 1996 to twenty-five months in 2003. *Id.* at 27. This continued a trend that saw the time in foster care reduced from forty-four months in 1993 to thirty-four in 1996. *Id.*

While the changes in law and social work practice are certainly significant factors in reducing time in foster care, the overall caseload in the Illinois' child welfare system was reduced over the same period of time: the number of reported cases of abuse or neglect in the state declined from 136,312 in 1994, to 119,447 in 1997, to 104,264 in 2004. DCFS, CHILD ABUSE AND NEGLECT STATISTICS, ANNUAL REPORT: FISCAL YEAR 2004 3, *available at* <http://www.state.il.us/dcfs/>

B. The GYSI: The Governor's Youth Services Initiative

The controversy over allocating responsibility for the care of delinquent youth existed well before the 1995 legislation.¹¹⁴ In 1979, the Cook County Public Guardian filed suit in federal court on behalf of a class of children with emotional, physical, or mental disabilities who had been adjudicated delinquent or had delinquency petitions pending.¹¹⁵ Because of the minors' disabilities and the typically non-serious nature of the crimes, juvenile court judges sought to place them with various state agencies that could provide treatment and care for them rather than impose punitive measures.¹¹⁶ The plaintiffs alleged that three state agencies—DCFS, DHS (formerly the Department of Mental Health and Development Disabilities (“DMHDD”)), and the Illinois State Board of Education (“SBE”)—violated the Rehabilitation Act of 1973 by refusing to assume responsibility for the children's needs because of their disabilities.¹¹⁷ All of the defendant-agencies maintained that the children were either too disabled or not disabled enough to receive the services they provided,¹¹⁸ resulting in the

library/index.shtml (last visited Nov. 11, 2004). Some researchers believe that there is insufficient data to conclude that the increased adoption rates, and therefore increased permanency rates, are due to the Adoption and Safe Families Act. *See generally* FRED WULCZYN ET AL., ADOPTION DYNAMICS: THE IMPACT OF THE ADOPTION AND SAFE FAMILIES ACT (2003) (finding that it is too soon to determine the impact of the Adoption and Safe Families Act on the adoption rates in Illinois), available at http://www.chapinhall.org/category_editor_new.asp?L2=61 (last visited Nov. 11, 2004).

114. *See infra* Part IV.A (describing DCFS's lobbying efforts to reduce the agency's responsibility to provide services to delinquent youth).

115. *David B. v. Patla*, 950 F. Supp. 841, 843 (N.D. Ill. 1996).

116. *Id.*

117. *Id.* After amending their complaint, the plaintiffs ultimately brought their claim under § 504 of the Rehabilitation Act of 1973, which provides:

No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

Petition for Writ of Cert. at 3, *David B. v. McDonald*, 156 F.3d 780 (7th Cir. 1998) (No. 98-1016) (quoting 29 U.S.C. § 794(a)) (alterations in original). The class alleged that the defendant-agencies denied them services solely because of their disabilities. Second Amended Complaint at B15–B16, *David B. v. deVito*, No. 79 C 1662 (N.D. Ill. Sept. 4, 1980), Petition for Writ of Cert., *David B. v. McDonald*, 156 F.3d 780 (7th Cir. 1998) (No. 98-1016). The plaintiffs also alleged that the defendants violated their constitutional equal protection rights by assuming a special relationship with them and then denying them adequate care. *Id.* at B17.

118. *David B. v. Patla*, 950 F. Supp. at 843. According to the plaintiffs, DHS withheld services because the minors did not require extended hospitalization; DCFS acknowledged that the children were neglected or abused, but maintained that the neglect or abuse did not require placement outside of their homes, or alternatively that the minors were too disruptive to be placed with other DCFS children; and SBE disavowed any responsibility for the youth because, although they had special education needs, their residential placement needs brought them under the

children's needs going unmet.¹¹⁹

The parties resolved the lawsuit in late 1981 by entering a Consent Decree.¹²⁰ The Consent Decree was a binding agreement that created the GYSI, a collaborative group made up of representatives of each defendant-agency that focused on providing child welfare, mental health, and education services to children seventeen or younger¹²¹ who were referred to Cook County Juvenile Court because of delinquent conduct.¹²² The Consent Decree created the GYSI to ensure that the population of children who needed services, yet were historically shuffled between agencies because they failed to meet eligibility requirements, would receive appropriate care and treatment under the least restrictive conditions.¹²³ In practice, juvenile court judges referred minors to the GYSI when they determined, after hearing evidence concerning the delinquency petition that committing the child to the Department of Corrections would be inappropriate.¹²⁴ With the input of the Advocacy Unit,¹²⁵ the GYSI determined the most appropriate services for the minor and apportioned responsibility for providing those services among the three agencies.¹²⁶

purview of the other agencies. *Id.*

119. *Id.* ("As a result, these children 'fell between the cracks,' and were left to fend for themselves at the [Department of Corrections] or on the streets.")

120. *Id.* at 843-44.

121. If the minor was already a ward of the Juvenile Court, the upper age limit was twenty. Consent Decree at D4, David B. v. Pavkovic, No. 79 C 1662 (N.D. Ill. Sept. 4, 1980), Petition for Writ of Cert., David B. v. McDonald, 156 F.3d 780 (7th Cir. 1998) (No. 98-1016) [hereinafter *Consent Decree*].

122. A minor who was "referred" to Juvenile Court was either the subject of an intake screening or was taken into custody and the subject of an investigation. *Id.* at D3.

123. *Id.* at D4-D5.

124. Declaration of Sheila Nicolai at E1, Petition for Writ of Cert., David B. v. McDonald, 156 F.3d 780 (7th Cir. 1998) (No. 98-1016) [hereinafter *Declaration*].

125. *Id.* The Advocacy Unit served as the liaison between the juvenile court and GYSI. *Id.* The unit investigated the background of each minor, facilitated referrals, and participated in GYSI meetings, but had no say in the ultimate decision of how to assist the minor. *Id.* Because the GYSI no longer exists, the Advocacy Unit now directly serves the same population, roughly filling the GYSI's former role, by linking the youth with appropriate services. *See* JUVENILE PROB. AND COURT SERV. DEP'T, *supra* note 70, at 47 (describing one of the Advocacy Unit's duties as recommending appropriate services and identifying the funding sources from either DCFS, the Chicago Board of Education, or DHS).

126. ILL. ADMIN. CODE tit. 89, § 311.3 (2003). The four basic functions of the GYSI were to:

- Assist in conflict resolution over disagreements between state agencies and/or the juvenile court in accessing or planning appropriate services for multi-problem youth;
- Assist in case planning, management, and coordination for multi-problem youth whose problems are not the clear responsibility of any state agency;
- Identify policy, procedural, and programming gaps in the network of state and local community service systems;
- Promote the development of a full continuum of in-state programs to meet the needs of

In 1986, the Illinois General Assembly officially created the GYSI in terms that closely tracked the language of the Consent Decree.¹²⁷ Yet, the legislature's commitment to the program was mixed: while the new statute emphasized the importance of meeting the needs of "multi-problem youth,"¹²⁸ the existence of the program was contingent upon the availability of program funds.¹²⁹ Still, according to the Probation Department, the GYSI operated effectively and without incident for fourteen years, placing virtually every referred child in residential placement.¹³⁰

C. Release Upon Request Minors

RUR minors in Cook County comprised an additional class that gained access to DCFS services in the 1980s through a class-action lawsuit.¹³¹ In January 1985, a class of RUR juveniles in custody at the Cook County JTDC filed suit in federal court against the JTDC superintendent and Cook County, alleging that the defendants violated their rights by indefinitely incarcerating them while awaiting adjudication, despite a finding that detention was unwarranted.¹³² In

multi-problem youth.

Id.

127. See ILL. ADMIN. CODE tit. 89, § 311 (giving the operating rules for the GYSI); see also *infra* note 188 (explaining the rulemaking process). Compare 20 ILL. COMP. STAT. 505/17a-11 (2004) (codifying the existence of the GYSI for the purpose of "offer[ing] assistance to multi-problem youth whose difficulties are not the clear responsibility of any one state agency, and who are referred to the program by the juvenile court" and stating that the decision-making body of the GYSI "shall be composed of State agency liaisons appointed by the Secretary of Human Services, the Directors of the Department of Children and Family Services and the Department of Corrections, and the State Superintendent of Education"), with *Consent Decree*, *supra* note 121, at D4 (guaranteeing appropriate care and treatment for youth who "[a]re in need of specialized services not limited to child welfare, mental health and education" yet "[h]ave been denied appropriate services by one or more of the defendant[-agencies] . . . after having made the necessary applications for such services"). In accordance with the statute, DCFS promulgated rules and regulations governing the operation of GYSI.

128. "'Multi-problem youth' means youth with multiple problems in domains of mental illness or retardation, emotional disturbance, juvenile delinquency, serious criminal offense, child abuse or neglect, behavioral disorders, or educational handicapping conditions." ILL. ADMIN. CODE tit. 89, § 311.2 (2005).

129. See 20 ILL. COMP. STAT. 505/17a-11 (2002) (stating that the provision of services is contingent upon the "availability of program funds and the overall needs of the service area").

130. *Declaration*, *supra* note 124, at E2, E4. Residential placement was defined in the Consent Decree as "[c]ustody or substitute care [that] is away from the home of the child's parents in a facility providing care for children, including but not limited to foster homes, group homes and child care institutions . . ." *Consent Decree*, *supra* note 121, at D3.

131. See *supra* notes 76-78 and accompanying text (describing the circumstances that lead to RUR status).

132. Consent Decree § I, A.T. v. County of Cook, No. 85 C 0325 (N.D. Ill. May 23, 1986).

some cases, minors were held for months or even as long as a year.¹³³

There was a swift response to the lawsuit. In July 1985, the Presiding Judge of Cook County's Juvenile Division ordered that judges subpoena parents and guardians to appear at court within seven days for a detention rehearing, in an attempt to avoid unnecessary detention.¹³⁴ Although DCFS was not a party to the lawsuit, it agreed to enter negotiations in August 1985, and ultimately agreed to oversee the creation of two specialized foster homes for RUR minors.¹³⁵ By 1987, the Illinois General Assembly essentially codified the Presiding Judge's order and DCFS's agreement to provide care for RUR minors.¹³⁶ Thus, RUR minors would default into receiving DCFS care until they were reunited with their families or the court held their adjudicatory hearing.

IV. LEGISLATIVE REFORM—THE DELINQUENCY RESTRICTIONS

The Consent Decree forced DCFS to fund a number of residential placements that otherwise would not have been the agency's responsibility. When DCFS faced rising costs in the early 1990s, it advocated for delinquency restrictions in order to vacate the decree and conserve resources. This Part reconstructs the historical antecedents and effects of the delinquency restrictions. First, this Part discusses the passage of the new legislation and the GYSI's role as a catalyst for the restrictions.¹³⁷ Second, this Part looks at the demise of the GYSI that accompanied the passage of the restrictions and the litigation that ensued because juvenile courts continued placing delinquent minors in DCFS custody in direct opposition of the new provisions.¹³⁸ Third, this Part pieces together the legislative steps and accompanying debate that resulted in an exception to the delinquency provisions.¹³⁹ Finally, this Part describes how the delinquency restrictions have altered child protection and delinquency proceedings and the effects DCFS has felt since the passage of the restrictions.¹⁴⁰

133. *Id.*

134. *Id.*

135. *Id.*

136. *See* Ill. Rev. Stat. ch. 37, ¶ 805-10(7) (1987) (requiring a summons be issued to a parent, guardian or custodian if none of them appear on behalf of a child).

137. *See infra* Part IV.A (describing the role of the GYSI in enacting the delinquency restrictions).

138. *See infra* Part IV.B (discussing the demise of the GYSI and the appeals that resulted from circuit court decisions that contravened the new amendments).

139. *See infra* Part IV.C (tracing the legislative process that created the current form of the delinquency restriction).

140. *See infra* Part IV.D (recounting the long-term effects of the delinquency restriction on DCFS access).

A. *The Delinquency Restrictions*

Between fiscal years 1991 and 1995, DCFS's budgetary needs expanded by 170%, largely because of the tripling of costs associated with placing children in residential care (both GYSI referrals and DCFS wards).¹⁴¹ Because the GYSI typically placed minors in residential care facilities operated by private providers, the Consent Decree merely shifted the financial burden of paying for the care of these troubled youth from Cook County to the state agencies.¹⁴² The children who juvenile court judges referred to the GYSI were never adjudicated abused or neglected, and consequently were never ordered into DCFS custody.¹⁴³ As a result, DCFS's relationship with these children only extended to the financial obligation to pay for the placement.¹⁴⁴ Over time, the criminal conduct of GYSI referrals became more severe, and the costs associated with their care rose significantly.¹⁴⁵

The ballooning residential costs stemmed not only from GYSI placements, but also from judges in other counties indiscriminately placing delinquent juveniles in DCFS care without a genuine case of

141. Audio tape: *Hearing on H.B. 2915 Before the House Comm. on the Judiciary and Criminal Law*, 1996 Sess., 89th Gen. Assembly (Ill. 1996) (March 7, 1996) (statement of Jess McDonald, Director, DCFS) (on file with author) [hereinafter *Testimony of Jess McDonald*].

142. See *David B. v. Patla*, 950 F. Supp. 841, 844 (N.D. Ill. 1996) (describing the operation of the GYSI and stating that, because none of the defendant agencies operated the type of residential facilities that most of the referred youth require, the children are typically placed with private treatment providers who then bill the respective agencies for the cost, with DCFS bearing approximately one-third of the cost); see also *Testimony of Jess McDonald*, *supra* note 141 (noting that placing juveniles in residential care through the GYSI "is a way to pay for an alternative to corrections," and that DCFS does not provide the full range of services to GYSI-referrals that it would to DCFS wards).

143. *Testimony of Jess McDonald*, *supra* note 141 (testifying that the juveniles were "not [referred to GYSI] because of any finding of neglect or abuse"). See *Declaration*, *supra* note 124, at E2 ("The court does not commit the children [referred to the GYSI] to DCFS or place them in custody of DCFS.").

144. See *Testimony of Jess McDonald*, *supra* note 141 (criticizing the current system that allowed courts to require DCFS to pay for out-of-state residential placements for children that DCFS was not otherwise involved with).

145. See *Patla*, 950 F. Supp. at 844 n.4 (noting that, although it was irrelevant to the court's decision, DCFS complained that the treatments proposed by the GYSI were becoming more expensive because of the increasingly dangerous propensities of the children referred to the GYSI). Near the end of the GYSI's operation, there were ninety-six children receiving services, and some of them had been charged with crimes that included first-degree murder, domestic violence, sexual assault, and robbery. *Testimony of Jess McDonald*, *supra* note 141. The Advocacy Unit's supervisor acknowledged that the crimes of GYSI-referrals ranged "from nonviolent acts to domestic violence to violent crimes," including two youths who were charged with first-degree murder, but noted that "[t]he court bases its referral to GYSI on the overall unmet needs of the child rather than the specific charges in the delinquency petition." *Declaration*, *supra* note 124, at E2.

maltreatment.¹⁴⁶ As an agency charged with protecting abused and neglected children, DCFS asserted that the juvenile courts improperly utilized the state's child protection system, which diminished the resources available to children who had a more legitimate need for DCFS services and care.¹⁴⁷ DCFS maintained that it was being forced to care for kids who simply were not its responsibility, and that local counties could provide a more appropriate response to the population's needs.¹⁴⁸

In order to foreclose its obligation to fund the placements of delinquent juveniles under the Consent Decree, DCFS pushed for legislation that would clearly state that delinquent teenagers were ineligible for the agency's care.¹⁴⁹ DCFS succeeded, and in 1995 the Illinois legislature passed new legislation barring any minor thirteen or older charged with a criminal offense or adjudicated delinquent from being placed in the custody of or committed to DCFS.¹⁵⁰

B. Immediate Effects of the Legislation

This section describes the events that ensued in the years immediately following the passage of the delinquency restrictions. This section recounts DCFS's successful effort to eliminate its obligations under the

146. See Audio tape: *Hearing on H.B. 2915 Before the House Comm. on the Judiciary and Criminal Law*, 1996 Sess., 89th Gen. Assembly (Ill. 1996) (Feb. 29, 1996) (statement of Rep. Spangler, Member, House Comm. on the Judiciary and Criminal Law) (on file with author) [hereinafter *Testimony of Rep. Spangler I*] (explaining that the impetus for the 1995 delinquency restrictions was the fact that "[m]any of the [juvenile court] judges were indiscriminately making all of the children wards of the state"); see also *Testimony of Jess McDonald*, *supra* note 141 ("[W]e exercise no control [over the placement of delinquent children with DCFS], in fact many times the decisions are made before we are even called. In many jurisdictions no one has the courtesy to call the DCFS caseworker and say 'We have a problem, will you help us deal with it.' They say 'We've made the decision, we're placing the kids.'"). Because juvenile court judges were not permitted to sentence children to DCFS under the pre-1995 statute without DCFS consent, presumably judges would find the child abused or neglected and then commit him to DCFS custody. 705 ILL. COMP. STAT. 405/5-23(1)(a) (1994) (held unconstitutional by *People v. Cervantes*, 723 N.E.2d 265 (Ill. 1999), amended and re-codified at 705 ILL. COMP. STAT. 405/5-710 (2002)).

147. See *Testimony of Jess McDonald*, *supra* note 141 (describing the decision to use DCFS funds to pay for treatment of delinquent youth as an improper allocation of DCFS resources).

148. See *id.* (arguing that community-based systems developed by the counties serve as a better solution to the problem of servicing delinquent youth than forcing DCFS to pay for residential placement).

149. See *id.* (informing the committee that DCFS advocated for the 1995 legislation in order to vacate the 1981 GYSI Consent Decree).

150. Act of May 26, 1995, Pub. Act 89-21, § 5-15, 1996 Ill. Laws 673, 696 (codified as amended at 20 ILL. COMP. STAT. 505/5(1) (2004)); Act of May 26, 1995, Pub. Act 89-21, § 15-15, at 785 (codified as amended at 705 ILL. COMP. STAT. 405/2-10); *id.* at 789 (codified as amended at 705 ILL. COMP. STAT. 405/2-27); *id.* at 797 (codified as amended at 705 ILL. COMP. STAT. 405/5-710).

GYSI Consent Decree¹⁵¹ and then briefly describes how some juvenile court judges attempted to sidestep the new restrictions and continue to place delinquent teenagers in DCFS custody.¹⁵²

1. Extinguishing the GYSI Consent Decree

In July of 1995, less than a month after the delinquency restrictions became effective, DCFS notified the Cook County Juvenile Court that it would no longer abide by the Consent Decree.¹⁵³ The original claim underlying the decree alleged that DCFS, as well as the other defendant-agencies, violated the Rehabilitation Act by denying the minors services they were “otherwise qualified” for based “solely” on their disabilities.¹⁵⁴ DCFS reasoned that with the changes to its enabling statute¹⁵⁵ and the Act¹⁵⁶ that barred it from taking custody of teenagers charged with a crime or adjudicated delinquent, the basis for the claim disappeared—the minors were no longer “otherwise qualified” for DCFS services nor were they denied the services “solely” because of their disabilities.¹⁵⁷ The agency maintained that it was simply obeying the laws of Illinois, and as a result, there was no longer a substantial federal claim under the Rehabilitation Act that granted the federal court jurisdiction to enforce the Consent Decree.¹⁵⁸

After three years of litigating the vitality of the Consent Decree in light of the new legislation, the Seventh Circuit ultimately decided that it could not enforce the decree because it lacked subject matter jurisdiction.¹⁵⁹ Because the terms of the Consent Decree no longer

151. See *infra* Part IV.B.1 (summarizing the litigation that followed the passage of the delinquency restrictions to determine if the Consent Decree was still binding).

152. See *infra* Part IV.B.2 (discussing the attempts of some juvenile courts to place minors in DCFS care despite the new restrictions).

153. The applicable portions of P.A. 89-21 became effective on June 6, 1995 and July 1, 1995. Act of May 26, 1995, Pub. Act 89-21, 1996 Ill. Laws 673, 701, 789, 791, 799. On July 5, 1995, DCFS officials informed the Presiding Judge of the Juvenile Justice Division of the Circuit Court of Cook County that it would no longer participate in GYSI. *Declaration, supra* note 124, at E4.

154. See *supra* note 117–20 and accompanying text (explaining the basis for the original claim that led to the GYSI Consent Decree).

155. 20 ILL. COMP. STAT. 505/5(l) (“A minor charged with a criminal offense . . . or adjudicated delinquent shall not be placed in the custody of or committed to [DCFS] by any court . . .”).

156. 705 ILL. COMP. STAT. 405/2-10(2) (“A minor charged with a criminal offense . . . or adjudicated delinquent shall not be placed in the custody of or committed to [DCFS] by any court . . .”); 705 ILL. COMP. STAT. 405/5-710(1)(a)(iv) (stating that a minor who is found guilty may be “placed in the guardianship of [DCFS], but only if the delinquent minor is under 13 years of age . . .”).

157. David B. v. Patla, 950 F. Supp. 841, 844 (N.D. Ill. 1996).

158. *Id.*

159. David B. v. McDonald, 156 F.3d 780, 784 (7th Cir. 1998), *cert. denied*, 525 U.S. 1145

applied to the agencies and the statute that codified the decree was never binding to begin with, the GYSI ceased to function.¹⁶⁰

(1999).

160. *Id.* Initially, the District Court denied the defendants' motion to vacate the Consent Decree. *David B. v. Patla*, 950 F. Supp. at 851. Consent decrees may be modified or vacated if "the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application." FED. R. CIV. P. 60(b)(5). The Supreme Court has instructed district courts to modify or vacate a consent decree under FED. R. CIV. P. 60(b)(5) only if there is "a significant change either in factual conditions or in law." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). In addition to the grounds articulated in *Rufo*, DCFS urged the District Court to adopt the reasoning of the plurality opinion in a recent Seventh Circuit decision, which stated that a decree should be vacated if no substantial federal claim is found underlying the plaintiffs' complaint. *David B. v. Patla*, 950 F. Supp. at 845-46 (citing *Evans v. City of Chicago*, 10 F.3d 474 (7th Cir. 1993), *cert. denied*, 511 U.S. 1082 (1994)) [hereinafter referred to as *Evans III*].

The District Court did not embrace the reasoning from *Evans III*, and went on to focus on whether (1) there were any significant and unanticipated factual changes since the parties agreed to enter the Consent Decree; or (2) there were any changes in the law that made lawful the conduct that the Consent Decree prevented. *Id.* at 845-46. DCFS argued that, under the statutory changes made through P.A. 89-21, it no longer was in violation of Section 504 of the Rehabilitation Act, since the plaintiffs were not "otherwise qualified" for DCFS's services, nor were they excluded "solely by reason" of their disability. *Id.* at 847. The District Court disagreed. *Id.* at 847. First, although it was far from conclusive that the minors were discriminated against solely on the basis of their disability, the court found enough uncertainty to conclude that DCFS failed to carry its burden. *Id.* at 848. Second, the new provisions prevented delinquent teens from being placed in DCFS custody, but did not preclude DCFS from providing services to these minors. *Id.* at 850. Because minors referred to the GYSI were not placed in DCFS custody but were only given necessary services, the changes in the law did not affect the fact that the minors were still "otherwise qualified" for those services. *Id.* at 850-51.

The Seventh Circuit reversed the District Court's decision and remanded the case for the District Court to decide, among other things, whether the Consent Decree was in compliance with the Eleventh Amendment of the Constitution, which provides that states may not be sued in federal court unless they unequivocally consent to it or Congress abrogates the immunity. *David B. v. McDonald*, 116 F.3d 1146, 1148, 1150 (7th Cir. 1997); *David B. v. McDonald*, No. 79 C 166, 1997 U.S. Dist. LEXIS 19529, at *9 (N.D. Ill. Dec. 2, 1997). Notwithstanding the Eleventh Amendment, state officials may be sued if they are acting outside of their authority by violating federal law, but the court should terminate litigation at the point when the state brings itself in conformity with national law. *McDonald*, 116 F.3d at 1148. On remand, the District Court held that Illinois complied with federal law in 1986 when it passed a statute, 20 ILL. COMP. STAT. 505/17a-11, that essentially codified the Consent Decree by formally creating the GYSI for providing services to multi-problem youth. *McDonald*, 1997 U.S. Dist. LEXIS 19529, at *19. Because the 1986 statute brought the state into conformity with federal law, the District Court vacated the Consent Decree without reaching the other issues the Seventh Circuit instructed it to deal with. *Id.* at *19-20.

However, soon after the District Court vacated the Consent Decree, DCFS notified the court that it would no longer provide services formerly required by the Consent Decree, removing the basis for the court's decision. *David B. v. McDonald*, 1998 U.S. Dist. LEXIS 2982 *4 (N.D. Ill. March 10, 1998). The District Court granted the plaintiffs' motion for reconsideration and resumed its analysis according to the instructions of the Seventh Circuit. *Id.* The court began by applying the reasoning of the Seventh Circuit's decision in *Evans III*, which it previously chose not to adopt, to determine whether there was a substantial federal claim to support the plaintiffs' suit. *Id.* at *4-5;

2. Enforcing the Delinquency Restrictions

The legal ripples caused by the passage of the restrictive provisions did not dissipate after the litigation over the binding nature of the Consent Decree. In counties throughout the state, juvenile judges hearing child protection cases disregarded the new restrictions and continued to place teenage minors with delinquent pasts in the custody of DCFS.¹⁶¹ Judges justified sidestepping the restrictions by favoring other portions of the Act that either relegated the restrictions to the context of delinquency hearings¹⁶² or subjugated the restrictions to the overarching theme of serving the child's "best interests."¹⁶³ Nonetheless, the language of the new provisions clearly extended to

see McDonald, 116 F.3d at 1149–50 (chastising the lower court for disregarding its plurality opinion in *Evans III*). Deferring to the Seventh Circuit's reasoning, the District Court held that a minor's delinquency provides a separate reason for denying services, and hence the defendant-agencies do not deny the minors services solely on the basis of the minors' disabilities and, therefore, there is no federal claim under the Rehabilitation Act. *McDonald*, 1998 U.S. Dist. LEXIS 2982 at *10. But the District Court did find a substantial federal claim in the plaintiffs' due process claim and held that the class of minors do have a constitutional right to adequate shelter and basic therapeutic treatment while in the state's care. *Id.* at *17–20. Rather than craft a new decree to ensure these due process rights were protected, the District Court resurrected the 1981 Consent Decree and modified it in two ways: (1) DCFS was allowed to abide by state law and deny custody to any delinquent minor over thirteen; and (2) any minor referred to GYSI under the decree needed to be a ward of the state in order to substantiate the due process claim. *Id.* at *20–23. The end result was to keep the GYSI program intact in nearly its original form. *See Id.* at *22 (stating that DCFS's responsibility to provide services under the Decree is not modified).

The life of the reinstated Consent Decree was short. The Seventh Circuit again reversed the District Court, this time dismissing the proceeding for a lack of subject matter jurisdiction. *David B. v. McDonald*, 156 F.3d at 784. Although the plaintiffs included their due process claim in their original complaint, the Seventh Circuit asserted that because the theory of the litigation moved from the Rehabilitation Act to the Due Process Clause at the appeal stage, the identity of the appropriate defendants changed from those named in the original 1980 complaint, who denied services to the youth, to those who actually have custody of the minors and are in a position to violate their due process rights. *Id.* at 783–84. Although the court implies that a due process claim would have been defeated, it did not reach the issue on the merits. *Id.* at 782–83. "[A]lmost 20 years old, this case has reached the end of the line." *Id.* at 781.

161. *See, e.g., In re A.A.*, 690 N.E.2d 980 (Ill. 1998) (reversing a St. Clair County district court's decision which held the legislation unconstitutional); *In re C.M.*, 669 N.E.2d 707 (Ill. App. Ct. 3d Dist. 1996) (illustrating the disregard for the restrictions Kankakee and Will Counties district courts); *In re C.T.*, 666 N.E.2d 888 (Ill. App. Ct. 2d Dist. 1996) (showing how a district court in DuPage County defied the restrictions).

162. *See In re C.T.*, 666 N.E.2d at 890–91 (evaluating the respondent's argument that, although the amendatory language appears in the DCFS enabling statute, in Article II of the Act (which governs abuse, neglect, and dependency hearings) and in Article V (which governs delinquency proceedings), the legislature's purpose was only to restrict the juvenile court's sentencing options in delinquency cases).

163. *See In re C.M.*, 669 N.E.2d at 710 (addressing the argument "that Public Act 89-21 is invalid because it restricts trial courts' authority to name custodians in accordance with the best interests of the affected minors").

both delinquency and child protection hearings, and on appeal, reviewing courts unequivocally stated that the juvenile courts lacked authority to contravene the words of the statute.¹⁶⁴ The delinquency restrictions even prohibited DCFS from consenting to custody of teenage children it deemed appropriate for agency care if a child had any delinquent history.¹⁶⁵ Furthermore, equal protection challenges to the constitutionality of Illinois' decision to deny access to DCFS's services to certain delinquent minors were futile.¹⁶⁶ Thus, the new law proved to be an absolute bar on any DCFS involvement with teenage delinquents.

C. The "Independent Basis" Exception and DCFS Rulemaking

Judging from the swift response by the Illinois General Assembly and the ensuing committee discussions and floor debates, many state legislators either did not take note of the amendatory language nestled in the massive budgetary bill or did not anticipate its impact.¹⁶⁷ One

164. See *id.* ("The Act delineates the authority of the circuit courts, and the 'best interests of the child' standard must operate within these limits."); *In re C.T.*, 666 N.E.2d at 891 (holding that a statutory construction that limits the amendments to delinquency proceedings is implausible given the plain language of the statutes in question).

165. See *In re C.T.*, 666 N.E.2d at 890-91 (dismissing the statutory construction proffered by DCFS that would allow it to take custody of a minor if he suffered abuse, neglect, or dependency that was not related to the minor's delinquency).

166. *In re A.A.*, 690 N.E.2d at 983; *In re C.M.*, 669 N.E.2d at 710-11; *In re C.T.*, 666 N.E.2d at 893. *In re C.T.* provided the seminal constitutional analysis that courts relied upon in considering later cases. *In re A.A.*, 690 N.E.2d at 983 (noting that the *In re C.M.* court followed the sound reasoning of *In re C.T.*, and endorsing the conclusions of those courts). The respondents in *In re C.T.* argued that the legislation should be strictly scrutinized because, although juveniles do not constitute a suspect class, the amendments implicate the fundamental liberty interest of parents in the care and custody of their child. *In re C.T.*, 666 N.E.2d at 892. The court rejected this notion, stating that the statutes do not affect custodial rights, but a minor's right to be placed with DCFS. *Id.* Instead of applying strict scrutiny, the court examined whether a rational basis existed for classifying minors based on their delinquency. *Id.* This test was easily satisfied, as the court looked to any plausible justification for the legislation—such as to preserve scarce funds for the core population of abused or neglected minors with no delinquent histories, or to protect younger and more vulnerable children from the potential dangers posed by teenage delinquents. *Id.* at 893.

167. See Audio tape: *Hearing on H.B. 2915 Before the House Comm. on the Judiciary and Criminal Law*, 1996 Sess., 89th Gen. Assembly (Ill. 1996) (Feb. 29, 1996) (statement of Rep. Hoffman, Member, House Comm. on the Judiciary and Criminal Law) (on file with author) (linking the unforeseen fiscal impacts of P.A. 89-21 to the hasty passage of the bill, and remarking that "[t]hat's what happens when a \$33 billion budget gets put on peoples desks at nine o'clock in the morning and gets voted on at noon"); *id.* (March 7, 1996) (statement of Rep. Turner, Member, House Comm. on the Judiciary and Criminal Law) (on file with author) (doubting that issues created by the restrictions in P.A. 89-21 were ever addressed because, if they were, "it would have sent up a red flag, because there are a lot of problems with the legislation" that we enacted) [hereinafter *Testimony of Rep. Turner I*]; see also *In re A.A.*, No. 96-JA-33 (Ill. Cir. Ct., 20th Cir., July 22, 1996) (ordering A.A. into DCFS custody and declaring

2005] Denying Child Welfare Services to Delinquent Teens 953

legislator characterized the prior bill as a last-minute DCFS initiative that “started us in all this mess” and needed to be promptly remedied.¹⁶⁸ Another legislator, in a more heated speech, decried DCFS’s attempt to “jettison all these kids” as an “absolutely disgraceful” tactic motivated by an interest in shifting the financial burden to the counties.¹⁶⁹ By February 1996, eight months after the new provisions became effective, legislators introduced House Bill (H.B.) 2915 to curtail the sweeping exclusion of delinquent teenagers from DCFS care.¹⁷⁰

According to Representative Spangler, the new bill’s sponsor, the original delinquency restrictions did not implicate other juvenile justice and child welfare issues; he asserted that it was “a money issue and a money issue only.”¹⁷¹ He noted that the immediate effect of the restrictions shifted the cost of caring for certain juvenile delinquents from DCFS to counties unprepared to shoulder the economic burden, leaving them in an unexpected fiscal crisis.¹⁷² The original form of H.B. 2915 aimed to undo the drastic cost-shifting by striking the restriction on delinquents in temporary custody proceedings altogether.¹⁷³

At hearings before the House Judiciary-Criminal Committee, DCFS

the amendments enacted through P.A. 89-21 unconstitutional, while noting the dearth of legislative debate as an indication that there is no rational basis for the restrictions).

168. 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 87–88 (May 9, 1996, Ill.) (statement of Rep. Scott) Rep. Scott went on to add:

[W]e know that [DCFS’s] glaring concern for the kids last year was to dump them into the counties where they knew a lot of kids wouldn’t get serviced at all. We knew that their overriding concern was a financial one. It wasn’t one based on the best interest of the children, it was one based on the best interest of their own particular budget

Id. at 90.

169. *Id.* at 133 (March 27, 1996, Ill.) (statement of Rep. Dart, Member, House Comm. on the Judiciary and Criminal Law) (positing that “DCFS, in an effort to cut down on their numbers and cut down on their expenses, was dumping these kids on the counties”).

170. 3 LEGISLATIVE REFERENCE BUREAU, LEGISLATIVE SYNOPSIS AND DIGEST OF THE 1996 SESSION OF THE 89TH GENERAL ASSEMBLY, STATE OF ILLINOIS 1995 (Ill. Mar. 10, 1997) (on file with author) (stating the H.B. 2915 was filed on Feb. 6, 1996) [hereinafter *Legislative Synopsis*].

171. See Audio tape: *Hearing on H.B. 2915 Before the House Comm. on the Judiciary and Criminal Law*, 1996 Sess., 89th Gen. Assembly (Ill. 1996) (March 7, 1996) (statement of Rep. Spangler, Member, House Comm. on the Judiciary and Criminal Law) (on file with author) (arguing that the other issues that other witnesses were present to testify about would only muddle the issue, and encouraging those present to focus on the basic budgetary issue) [hereinafter *Testimony of Rep. Spangler II*].

172. See *Testimony of Rep. Spangler I*, *supra* note 146 (“A number of different counties have become quite concerned with the cost of this—it was never in fact their charge, but in fact the charge of the [DCFS].”).

173. House Amendment No. 1 to House Bill 2915 (Feb. 29, 1996) (on file with author). See *Testimony of Rep. Spangler II*, *supra* note 171 (stating that “[a]ll this bill does, simply put, is reverse language that became Public Act 89-21 in 1995” in order to relieve counties of sudden financial burdens created by that Act).

Director Jess McDonald urged the lawmakers to leave the original restrictive language intact because the agency's budget simply could not accommodate the placement needs of youth charged with delinquent conduct, such as those that were previously placed with DCFS through the GYSI or whose conduct did not warrant detention but have no home to return to.¹⁷⁴ McDonald painted a grim outlook if the General Assembly reversed the provisions, warning the lawmakers to "consider the possibility that we'll close the [Cook County Juvenile Temporary Detention Center] and refinance 400 kids plus that are there [awaiting adjudication] on an ongoing basis."¹⁷⁵ To McDonald and others testifying before the committee, the appropriate solution was to focus on community-based alternatives rather than rely on DCFS for any aspect of juvenile corrections.¹⁷⁶

However, not all lawmakers thought this was purely a budgetary issue. Under the strict language of the delinquency restrictions, DCFS could disavow responsibility for a RUR minor whose parents essentially abandon him by refusing to pick him up when the minor did not require pretrial detention¹⁷⁷ or, after satisfying his sentence, was no longer a ward of the juvenile court.¹⁷⁸ Some legislators believed that this scenario would constitute "one of the highest degrees of neglect" that would require DCFS involvement.¹⁷⁹ DCFS did not claim that it should

174. See *Testimony of Jess McDonald*, *supra* note 141 (stating that the cost of residential placement for all children has tripled in the previous five years, and, if delinquents are allowed back in DCFS care, "[i]t will be a problem that I will not be able to control fiscally, that I will not be able to control programmatically"). See also *supra* notes 75–77 and accompanying text (discussing those youth who the court determines do not need to be detained pending adjudication, but have no home to return to).

175. *Testimony of Jess McDonald*, *supra* note 141.

176. See *id.* (emphasizing the need for counties to develop "a community-based juvenile correction system" as an alternative to DCFS's costly involvement); *Hearing on H.B. 2915 Before the House Comm. on the Judiciary and Criminal Law*, 1996 Sess., 89th Gen. Assembly (Ill. 1996) (March 7, 1996) (statement of Dallas Ingemunson, Member, Legislative Committee on Juvenile Justice) (urging the lawmakers to maintain the language introduced in P.A. 89-21 because it served as "an incentive to local governments to find ways of solving the problems of kids at risk in Illinois" and, although "there's some pain" that accompanies such changes, "it is not time . . . to retreat").

177. See *supra* Part III.C (discussing DCFS's role in providing services to RUR minors before the delinquency restrictions).

178. See 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 129–30 (March 27, 1996, Ill.) (statement of Rep. Spangler) (acknowledging the dispute over who should care for delinquent youth abandoned by their caretakers and stating that H.B. 2915 would allow DCFS to continue with their current policy of denying services to such minors).

179. *Id.* at 130 (statement of Rep. Spangler) (speaking on behalf of a coalition of lawmakers). See also *Testimony of Rep. Turner I*, *supra* note 167 (asking "[w]hy in the world would DCFS not become involved" in a situation where "[p]arents never come to pick up a minor released to them by the delinquency court"); 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 131–32

2005] Denying Child Welfare Services to Delinquent Teens 955

have no role in that instance, but instead maintained that there were more appropriate community programs, such as Comprehensive Community Based Youth Services (“CCBYS”), to handle these children.¹⁸⁰

CCBYS is a network of agencies that service “lock-out” minors: youth who cannot return home after being away for a period because their parents are unable or refuse to care for them.¹⁸¹ CCBYS provides short-term shelter care for minors and intensive reunification services in an attempt to keep them out of the child welfare system.¹⁸² If the short-term services are unsuccessful, CCBYS refers the minor to DCFS.¹⁸³ McDonald was unclear in his committee testimony as to whether DCFS would accept a minor when CCBYS was unsuccessful in reuniting him to his family,¹⁸⁴ but rather he focused on the importance of using CCBYS at the initial point of lock-out to alleviate the pressure on DCFS.¹⁸⁵

Despite DCFS resistance, H.B. 2915 became law after undergoing three amendments.¹⁸⁶ The final version of the bill still applied only to temporary custody hearings, but instead of completely repealing the delinquency restriction in such hearings, an amendment allowed access

(March 27, 1996, Ill.) (statement of Rep. Turner) (criticizing the bill’s failure to hold DCFS accountable for the care of abandoned delinquents as its “particular flaw”).

180. See *Testimony of Jess McDonald*, *supra* note 141 (responding to a question as to whether DCFS would have no part in abandonment situations by saying, “No. We’re not saying that. We’re saying that there is a Youth Service System in that case that could respond in many of those instances, and do[es] . . .”).

181. See Letter from D.D. Fischer, Chair, Board of Directors, West Central Community Services, to Tom Ryder, Co-Chairman, Joint Committee on Administrative Rules 1 (Jan. 12, 1998) (on file with the Joint Committee on Administrative Rules) (describing, as a provider in the CCBYS system, the population of minors that they serve); see also *infra* note 189 and accompanying text (giving the DCFS definition of a “lock-out”). RUR minors comprise a sub-category of minors CCBYS focuses on. See *supra* Part III.C (discussing the characteristics of RUR minors).

182. See Letter from C. Gary Leofanti, President, Illinois Collaboration on Youth, to Tom Ryder, Co-Chairman, Joint Committee on Administrative Rules 2 (Dec. 26, 1997) (on file with the Joint Committee on Administrative Rules) (stating that a CCBYS provider typically provides five to six days of intensive family reunification services in an effort to place a child back in his home without calling upon DCFS).

183. See *id.* (stating that DCFS will only take responsibility for the minor after the intensive reunification services have failed).

184. See *Testimony of Jess McDonald*, *supra* note 141 (stating on the one hand that “[i]t is not the purpose of the child protection system” to care for locked out youth, but also stating later that the agency is “not saying that” they have no part in a lock-out situation).

185. See *id.* (emphasizing the need for community programs to address lock-out situations).

186. Act of July 31, 1996, Pub. Act 89-582, § 5, 1997 Ill. Laws 2457 (codified as amended at 705 ILL. COMP. STAT. 405/2-10 (2004)). The bill passed unanimously, 113–0–0. *Legislative Synopsis*, *supra* note 170, at 1994.

to DCFS care for delinquent teenagers for whom “an independent basis of abuse, neglect, or dependency exists.”¹⁸⁷ The Illinois General Assembly deferred to DCFS, because of its superior expertise in child welfare, to define what constituted an “independent basis” through the rulemaking process.¹⁸⁸ The final version of the rule stated that DCFS

187. The House Committee on the Judiciary and Criminal Law recommended the passage of H.B. 2915 in its original form, which would have struck the delinquency restriction completely in temporary custody proceedings, by a vote of 11–2–2. *Legislative Synopsis, supra* note 170, at 1995. But the extent of H.B. 2915 was curtailed as it proceeded through the General Assembly, with the following qualifying language added in order to ensure that only truly abused or neglected minors would be placed with DCFS: “If, however, a separate petition alleging the minor is neglected or abused has previously been filed or filed after the arrest or adjudication and the minor was placed in the custody of the Department of Children and Family Services, the above restriction on placement shall not apply.” House Amendment No. 2 to House Bill 2915 (March 27, 1996) (adopted by the General Assembly).

Significantly, no exception existed for separate dependency petition—when a minor is without a legal caretaker or the caretaker is unwilling or unable to care for the minor—which is the type of maltreatment often suffered by lock-out victims. *See supra* note 25 and accompanying text (summarizing the conduct that constitutes dependency); *Testimony of Rep. Turner I, supra* note 167 (saying that a child who is not picked up by his family after being released “strikes me as a dependent child”). *But see* 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 129–30 (March 27, 1996, Ill.) (statement of Rep. Spangler) (lamenting the same situation as “one of the highest degrees of neglect”). Whether a lock-out amounts to neglect or dependency will likely depend upon the culpability of the parent or guardian, the dependency statute applies to parents and guardians who could not care for their children due to “physical or mental disabilit[ies],” or “through no fault, neglect or lack of concern,” or who wishes to relinquish responsibility with “good cause.” 705 ILL. COMP. STAT. 405/2-4 (2004). The neglect statute does not address any factors that would mitigate the fault of the parent or guardian. 705 ILL. COMP. STAT. 405/2-3. Despite concerns that these abandoned minors might be denied DCFS care under the current form of the bill, the House voted in March 1996 to pass the bill and ship it to the Senate by a vote of 106–3–5. *Legislative Synopsis, supra* note 170, at 1995.

The Illinois Senate altered H.B. 2915 to require, rather than a separate abuse or neglect petition, that “an independent basis of abuse, neglect, or dependency exists” in order for a teenager with a delinquent past to be eligible for DCFS care (notably inserting a dependency exception into the bill alongside the abuse and neglect exceptions). Senate Amendment No. 1 to House Bill 2915 (April 25, 1996).

188. 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 89–90 (May 9, 1996, Ill.) (statement of Rep. Spangler). The sponsor of the bill summed up the sentiments of the chief architects of the bill: “It will end up being [DCFS’s] decision, and it was felt that, that was better, them being the experts in that field rather than left up to the courts.” *Id.* Rep. Scott, on the other hand, was extremely distrustful of DCFS because of the effects of P.A. 89-21, and asked his fellow legislators “how [they know] that the departmental rule isn’t going to be just as bad or worse than that Bill [P.A. 89-21] was?” *Id.* at 88 (statement of Rep. Scott). Scott went on: “So, I guess I’m scared, quite frankly, just to say ‘Well that is fine. Let’s let a departmental initiated rule come forward and then it will all be fine again?’” *Id.* at 90. Still, the checks and balances built into the Administrative Rulemaking process were enough to assure the members of the House that the rule would be fair and true to their intent. *Id.* at 90 (statement of Rep. Spangler).

All rules are subject to the rulemaking procedures specified in the Illinois Administrative Procedure Act (“IAPA”). 5 ILL. COMP. STAT. 100/5, *et seq.* (2002). The proposed rules must go through two consecutive notice periods of at least forty-five days each. 5 ILL. COMP. STAT. 100/5-40(b)–(c). During the first notice period, the text of the new rule or amendment must

2005] Denying Child Welfare Services to Delinquent Teens 957

would not accept for custody, care or services minors thirteen or older “for whom allegations of adjudication or abuse, neglect or dependency arise from the same facts, incident or circumstances which give rise to a charge or adjudication of delinquency unless the minor” is already in DCFS care.¹⁸⁹

appear in the Illinois Register, along with the statute that authorizes the rule and, if applicable, the text that is being replaced or amended. 5 ILL. COMP. STAT. 100/5-40(b)(1)–(3). The agency must also provide a brief description of the subjects addressed by the proposal, the anticipated procedural changes required to comply with the rule, and, if the rule was based on any research, instructions on how to obtain the study. 5 ILL. COMP. STAT. 100/5-40(b)(3.5)–(4). The IAPA also requires the agency to provide the public with the opportunity to comment on the rule. 5 ILL. COMP. STAT. 100/5-40(b)(5).

After the initial forty-five day period, agencies must then provide written notice to the Joint Committee on Administrative Rules (“JCAR”). 5 ILL. COMP. STAT. 100/5-40(c). The second notice is not as exhaustive as the first: it must contain the proposed and amended text, a “regulatory flexibility analysis” that takes the comments of small business owners during the first notice period into account, and, if requested by JCAR, an analysis of the economic and budgetary effects of the proposed rulemaking. *Id.* During the second period, JCAR may raise objections to the rule or notify the agency that no objections will be issued. *Id.* After the agency addresses any objections, the rule must be certified with the Secretary of State, 5 ILL. COMP. STAT. 100/5-65(a), and published in the Illinois Register. 5 ILL. COMP. STAT. 100/5-40(c).

189. 22 Ill. Reg. 18843, 18846, (Oct. 16, 1998) (amending ILL. ADMIN. CODE tit. 89, § 304.4). The first version of the rule also excluded “lock-out” minors from DCFS eligibility with the following provision:

The Department shall not accept for care or services a minor 13 years of age or older for whom a finding of abuse, neglect, dependency or delinquency is due solely to what is generally categorized as “lock-out.” “Lock-out” is defined as the failure or refusal of the parent or guardian, for whatever reason, to continue to resume providing for the care and guidance of a minor, including physical custody, following an absence from the home of any duration for any reason. The term “lock-out” applies only if the parent or guardian refuses or fails to make provision for other living arrangements for the minor.

21 Ill. Reg. 13220, 13223, Issue 40 (Oct. 3, 1997) (amending ILL. ADMIN. CODE tit. 89, § 304.4). During the comment period, however, a number of organizations that participate in the CCBYS wrote JCAR to voice their opposition to the “lock-out” provision because it would leave minors over twelve for whom the intensive reunification services did not work, and who were then typically referred to DCFS, without any alternatives. *See* Letter from D.D. Fischer, *supra* note 181 (stating that this amendment will have the unintended effect of increasing the number of children on the streets); Letter from Ron Moorman, Executive Director, Child Care Association of Illinois, to Tom Ryder, Co-Chairman, Joint Committee on Administrative Rules (Jan. 9, 1998) (voicing strong opposition to the lock-out amendment); Letter from Peter D. Cunneen, Executive Director, The Bridge Youth & Family Services, to Tom Ryder, Co-Chairman, Joint Committee on Administrative Rules (Jan. 9, 1998) (urging JCAR Co-Chairman to stop the lock-out amendment because it will leave many children without refuge); Letter from Denise Loveland, Supervisor/Therapist, Youth Attention Center, to Tom Ryder, Co-Chairman, Joint Committee on Administrative Rules (Jan. 5, 1998) (asking JCAR Co-Chairman to oppose the lock-out amendment “for the well-being of the youth involved” and warning that a failure to do so will render a number of children homeless); Letter from C. Gary Leofanti, *supra* note 182 (warning of the drastic effects of the lock-out prohibition for a the minors who could not be reunified with their families).

The concerns raised by the CCBYS organizations effectively convinced DCFS to remove the

Throughout the legislative process, lawmakers were primarily concerned with “put[ting] the responsibility back on the agency of DCFS to accept the juveniles that they should have taken in the first place.”¹⁹⁰ Yet H.B. 2915 created an exception in the temporary custody statute alone, which allows a juvenile court to order DCFS care for a maximum of ninety days.¹⁹¹ The legislative record does not mention why the exception was not extended for the full duration of an abused, neglected, or dependent child’s time as a ward of the court.

D. Long-Term Effects of the Legislation

Since the passage of the 1996 amendment to the original delinquency restrictions, Illinois has not altered its policy towards teenagers with delinquent histories that need DCFS assistance. The policy requires that an independent basis of maltreatment must exist for the minor to obtain agency services, and even then, a judge may not order DCFS involvement beyond the ninety-day temporary custody window. This

lock-out provision when the rule was re-issued on second notice. *See* Notice to Joint Committee On Administrative Rules, DCFS 2–3 (July 27, 1998) (citing the concerns of the organizations that protested the lock-out provision and concluding, therefore, to “delet[e] references to and the definition of ‘lock-out’ from the proposed amendments”). The second, and final, version of the rule removed the lock-out provision, but also stated that the agency would not accept delinquent minors for *care or services* as well as legal custody or guardianship. 22 Ill. Reg. 18843, 18846, Issue 42 (Oct. 16, 1998). The temporary custody statute, which authorizes this rule, only prohibits delinquent youth from being placed in the custody of or committed to DCFS by any court and makes no mention of withholding care or services. 705 ILL. COMP. STAT. 405/2-10(2) (2004).

By including care or services in the delinquency restriction, DCFS was likely attempting to preclude the arrangement imposed by the GYSI Consent Decree, which required DCFS and other agencies to provide services to a minor without a court committing the minor to any agency’s custody. *See supra* note 160 and accompanying text (detailing the appeal process and discussing the relevance of the fact that services were not prohibited in the delinquency restrictions). At the time DCFS submitted this version of the rule to JCAR, the Federal District Court had temporarily revived the Consent Decree and noted that, while Illinois law prohibited DCFS from taking custody of delinquent teens, the agency was “permitted under state law to continue to participate in the provision of services” to delinquent youth. *David B. v. McDonald*, 1998 U.S. Dist. LEXIS 2982, *22 (N.D. Ill. 1998). The case was decided on March 10, 1998. *Id.* at *23. DCFS submitted the rule changes for second notice to JCAR on July 27, 1998. *Notice to Joint Committee On Administrative Rules* at 1. The Seventh Circuit Court of Appeals vacated the Consent Decree on Sept. 28, 1998, *David B. v. McDonald*, 156 F.3d 780, 780 (7th Cir. 1998), *cert. denied*, 525 U.S. 1145, and the final form of the rule became effective on Oct. 1, 1998. 22 Ill. Reg. 18843, 18846, Issue 42 (Oct. 16, 1998). Whatever the reason for including the extra language, JCAR did not object to this change and the rule was certified. *See supra* note 188 and accompanying text (discussing the rulemaking process and noting that, on second notice, JCAR has an opportunity to object to the rule and, after any objections are addressed, the rule is certified with the Secretary of State).

190. 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 127 (March 27, 1996, Ill.) (statement of Rep. Spangler).

191. 705 ILL. COMP. STAT. 405/2-10(2), 2-14(b) (2004).

section discusses how the delinquency restrictions impacted the statutory schemes in both child protection¹⁹² and delinquency cases¹⁹³ and describes some of the agency-wide changes in DCFS since the reform legislation took effect.¹⁹⁴

1. Child Protection Cases

Before 1995, a juvenile judge only considered a child's history of delinquent conduct in child protection proceedings insofar as that history affected decisions about where to place a child and what service plan was appropriate.¹⁹⁵ Such conduct did not affect a judge's ability under the Act to place a minor in DCFS custody or order the agency to provide a minor with services. Under the current statutory scheme, however, a judge may not place a teenager who has been charged with a crime or otherwise adjudicated delinquent in DCFS care or custody, unless the alleged abuse or neglect that the minor has suffered is independent of the child's delinquent conduct.¹⁹⁶ Even then, the court may only place the teenager in temporary custody with DCFS for the statutorily limited period of ninety days.¹⁹⁷

If the court does declare the minor to be a ward after the adjudicatory and dispositional hearings, a strict interpretation of the placement statute does not allow the court to place a teenage minor with DCFS if he has a delinquent past, regardless of whether the maltreatment was independent of the delinquency.¹⁹⁸ Even without the option of DCFS

192. See *infra* Part IV.D.1 (describing the effect of the restrictions in child protection proceedings).

193. See *infra* Part IV.D.2 (describing the effect of the restrictions in delinquency proceedings).

194. See *infra* Part IV.D.3 (reporting that, between 1995 and 2003, DCFS has reduced the statewide residential caseload for children over twelve and stabilized its budget).

195. 705 ILL. COMP. STAT. 405/2-10, 2-27 (1994) (allowing juvenile courts to place minors with DCFS in temporary custody or for long-term care and services without any qualification for a delinquent past).

196. 705 ILL. COMP. STAT. 405/2-10(2), 2-27(d) (2004).

197. 705 ILL. COMP. STAT. 405/2-10(2).

198. 705 ILL. COMP. STAT. 405/2-27 (providing no "independent basis" exception at the dispositional stage that follows temporary custody and adjudication). In practice, juvenile courts might place the delinquent teen in DCFS's care as part of the dispositional hearing, but this would contravene the express language of the statute. As discussed above, removing a minor from his home and placing him in the legal custody of another custodian is a three-step process: 1) there is a temporary custody hearing to determine if there is probable cause to believe the minor was maltreated and there is an urgent and immediate need to remove him from his home; 2) there is an adjudicatory hearing to determine if the child has in fact been abused, neglected, or is dependent; and 3) if the court adjudicates the minor abused, neglected, or dependent, there is a dispositional hearing to determine the best course of action—such as placing the minor in DCFS custody. See *supra* Part II.B.1 (detailing the procedural sequence in child protection cases). If the court chooses to place the minor in a DCFS shelter care facility at the temporary custody stage, the

custody, however, the court may still place the child with a suitable relative or other person, the probation department, or “an agency for care or placement.”¹⁹⁹ Moreover, DCFS states that the agency may elect

court also appoints DCFS as the minor’s temporary custodian (upon the agency’s request). 705 ILL. COMP. STAT. 405/2-10(2). DCFS can then become the minor’s legal custodian at the dispositional hearing if the court determines that the minor should be made a ward of the court and that the proper disposition is to place the minor in DCFS care. 705 ILL. COMP. STAT. 405/2-22(1), 23(1), 27(1)(d). For the minor who was placed in DCFS’s temporary custody and then remains in DCFS care after disposition, the physical transition is seamless. A court might view a minor who has received the agency’s care while in temporary custody as “already in the legal custody or guardianship of [DCFS]” and therefore eligible to remain in its care at the dispositional phase. 705 ILL. COMP. STAT. 405/2-23(1)(a)(1); ILL. ADMIN. CODE tit. 89, § 304.4(d) (2002). But although DCFS’s legal relationship to the minor as temporary custodian carries with it the same responsibilities as if it was legal custodian, the Illinois legislature recognizes the two as distinct legal categories. *See* 20 ILL. COMP. STAT. 505/5(m) (stating that as temporary custodian, DCFS “shall have the authority, responsibilities and duties that a legal custodian of the child would have . . .”). *But see* 705 ILL. COMP. STAT. 405/2-27(1), 2-28(1) (allowing the court to confer legal custody in child protection cases at the dispositional phase or the placement hearings that follow). Regardless of whether DCFS was acting as temporary custodian, the court must abide by the placement statute when deciding whether the agency should become legal custodian or guardian, which clearly prohibits placing a teenage minor with a delinquent past in DCFS custody. 705 ILL. COMP. STAT. 405/2-27(1)(d). While DCFS may have fulfilled the responsibilities of a legal custodian during temporary custody, the placement statute provides the only route in child protection cases for a court to bestow legal custody.

To embrace the view that a minor in temporary custody is already in DCFS legal custody upon reaching the dispositional phase leads to arbitrary results. For example, consider two teenage minors, A and B, who were both adjudicated delinquent when they were younger and later abused. The court determines that it should take temporary custody of each minor. The court places A in the temporary custody of a relative, but places B in DCFS’s temporary custody because B has no relatives who are willing to care for him (because the abuse is independent of B’s prior conduct, 705 ILL. COMP. STAT. 405/2-10(2) allows the court to do so). At the dispositional phase, if the court chooses to keep the children out of their homes, the court must order both A and B into the legal custody of another entity. 705 ILL. COMP. STAT. 405/2-22, 23. Under the reasoning that temporary custody equates with legal custody, B may remain in DCFS care. But because A was placed with a relative—which most courts would find to be in any minor’s best interests, *see* 705 ILL. COMP. STAT. 405/1-3(4.05) (recognizing the significance of a minor’s family ties in many factors that inform a court’s “best interests” determination)—the court would not be able to place the minor with DCFS at disposition, even if A’s relative was no longer able to care for her. Such a scenario not only undermines any substantive argument for allowing a minor in temporary custody with DCFS to avoid the prohibition on DCFS care at the dispositional stage, but also encourages judges to place any minor in A or B’s place in DCFS’s temporary custody if they are concerned about the minor receiving DCFS services at disposition.

In many cases where the maltreatment is independent of a minor’s delinquent history, DCFS will likely choose to accept the minor for services, as its rules dictate. *See* ILL. ADMIN. CODE tit. 89, § 304.4(c) (2002) (stating that the agency may choose to serve children and families not otherwise eligible for its services); ILL. ADMIN. CODE tit. 89, § 304.4(d) (granting eligibility to minors thirteen or older where the maltreatment is independent of past delinquent conduct). But upon placement, the express language of the statute proscribes these departmental rules. *See supra* note 188 (describing rulemaking process and explaining that all rules must comply with existing law); *see also infra* note 200 and accompanying text (questioning the validity of the DCFS rule that gives the agency broad discretion to provide services to any minor it chooses).

199. 705 ILL. COMP. STAT. 405/2-27(1)(a)–(c).

to serve children and families who would not otherwise qualify for its services.²⁰⁰

2. Delinquency Cases

This section discusses the effect of the delinquency restrictions on delinquency cases, both before and after adjudication.

a. Pre-adjudication

Prior to the 1995 restrictions, courts could order DCFS to provide services to juveniles charged with delinquent conduct in Cook County, which accessed DCFS care through two avenues: 1) the GYSI, which placed nearly all minors referred to it in DCFS's care,²⁰¹ or 2) if the child was RUR and remained in detention for seven days, then the court could order DCFS to place the minor in a "suitable place" while awaiting adjudication.²⁰² Outside of these two routes, some courts would allegedly find the juvenile abused or neglected, even though he was before the court on a delinquency petition in order to access DCFS services.²⁰³ The 1995 restrictions closed the operation of the GYSI,²⁰⁴ and although it is unclear what the immediate impact was on RUR minors, the legislature replaced DCFS with DHS as the responsible

200. ILL. ADMIN. CODE tit. 89, § 304.4(c) (2002). It is unlikely that this rule would allow the agency to take legal custody of a teenage minor with a history of delinquency. The placement statute expressly prohibits a court from placing such a minor in DCFS's legal custody, with out exceptions. 705 ILL. COMP. STAT. 405/2-27(d).

During the litigation that followed the initial 1995 delinquency restrictions, DCFS contended in one case that, although the juvenile judges contravened the recent changes to the Act by placing delinquent teens in DCFS custody, the agency is empowered to consent to custody of any minor if it so chooses. *In re C.T.*, 666 N.E.2d 888, 889–90 (Ill. App. Ct. 2d Dist. 1996); *see supra* Part IV.B.2 (discussing the cases that followed the creation of the delinquency restrictions). The court soundly rejected DCFS's reasoning, holding that the Illinois legislature chose to completely prohibit delinquent teens from entering DCFS care. *In re C.T.*, 666 N.E.2d at 889–90. The 1996 amendment only changed the language in the temporary custody statute. *See supra* Part IV.C (discussing the creation of an "independent basis" exception in temporary custody hearings). The amendment states that an "independent basis . . . must be defined by [DCFS] rule," but did not empower DCFS with discretion to care for any minor it chooses. 705 ILL. COMP. STAT. 405/2-10. Without explicit sanction from the Illinois legislature, DCFS is unable to circumvent the prohibition on placing delinquent teens in DCFS care at the dispositional phase, even if it complies with the agency's internal rules. *See supra* note 188 (explaining the rulemaking process).

201. *See supra* Part III.B (discussing the creation and purpose of the GYSI).

202. *See supra* Part III.C (discussing the lawsuit brought by "release upon request" minors and the resulting agreement).

203. *See supra* notes 146–48 and accompanying text (discussing DCFS's assertion that juvenile court judges were liberally allocating the state's child welfare resources to juvenile delinquents).

204. *See supra* Part IV.B.1 (describing the effects of the delinquency restrictions on the GYSI).

agency for this population as part of the JJRA of 1998.²⁰⁵ The restrictions effectively closed all pre-adjudication routes to DCFS services.

b. Post-adjudication

The pre-1995 sentencing provisions enabled courts to place the minor in DCFS custody, although the provisions required DCFS consent for minors thirteen or over.²⁰⁶ With the passage of the 1995 delinquency restrictions and the amendment that followed, however, a teenage minor is completely barred from DCFS care once he has been adjudicated delinquent.²⁰⁷ The new restrictions require that any DCFS involvement come through child protection proceedings.²⁰⁸

3. DCFS

Consistent with DCFS's emphasis on finding permanent safe homes for children, the agency has drastically reduced the number of children placed in residential care facilities since 1995. In the mid-1990s, the agency began using residential care as a last resort for children,²⁰⁹ resulting in fewer youths being placed in residential care with a higher percentage coming from more restrictive settings, such as

205. Juvenile Justice Reform Act of 1998, Pub. Act 90-590, 1998 Ill. Laws 1035, 1177 (codified as amended at 705 ILL. COMP. STAT. 405/5-501(7) (2004)).

206. 705 ILL. COMP. STAT. 405/5-23(a)(1) (1994). The prohibition on DCFS involvement does not apply to minors under thirteen who are already DCFS wards when they are adjudicated delinquent. See ILL. ADMIN. CODE tit. 89, § 304.4(b)(3) (2002) (requiring DCFS to provide services to those adjudged delinquent). If the child adjudicated delinquent is a DCFS ward, or is under thirteen and placed under DCFS guardianship, the court has jurisdiction to order the child into a specific residential placement and require DCFS, as the guardian, to pay for the placement. See, e.g., *In re O.H.*, 768 N.E.2d 799, 803 (Ill. App. Ct. 3d Dist. 2002) (holding that the juvenile court has jurisdiction to direct placement for juveniles). The court does not have jurisdiction to order a specific placement in child protection placement hearings. 705 ILL. COMP. STAT. 405/5-740(1)(a)–(e) (2004).

207. 705 ILL. COMP. STAT. 405/5-710(1)(a)(iv) (allowing only those under thirteen to be placed in DCFS custody).

208. See *In re E.F.*, 754 N.E.2d 837, 839 (Ill. App. Ct. 3d Dist. 2001) (holding that the trial court lacked jurisdiction to place a minor in DCFS custody at the sentencing hearing).

209. STEPHEN BUDDE ET AL., RESIDENTIAL CARE IN ILLINOIS: TRENDS AND ALTERNATIVES, FINAL REPORT 5 (2004), available at http://www.chapinhall.org/category_archive_new.asp?L2=61&L3=130. Prior to being placed in residential care in 2003, 39% of youth age twelve and older came from a more restrictive setting, such as detention, the department of corrections, or hospitalization. STEPHEN BUDDE ET AL., RESIDENTIAL CARE IN ILLINOIS: TRENDS AND ALTERNATIVES; INTERIM REPORT: DESCRIPTIVE FINDINGS FROM ANALYSIS OF DCFS ADMINISTRATIVE DATA 10–11 (2004), available at http://www.chapinhall.org/category_archive_new.asp?L2=61&L3=130 [hereinafter DESCRIPTIVE FINDINGS]. The report does not distinguish between each of the “more restrictive” placements nor does it account for what percentage of the population was already in DCFS custody prior to residential placement.

hospitalization or detention. Between 1995 and 2003, the statewide residential care caseload for children ages twelve and older fell from 2,816 to 1,387—over a fifty percent reduction.²¹⁰ Along with these shifts in the type of care that DCFS provides, has come greater stability in the agency's budget: while the budget grew about 170% between 1991 and 1995,²¹¹ it has remained steady in the past five years.²¹²

The underlying factors that contributed to these trends are not easily discernible. Between 1995 and 2004, the number of children screened into the child welfare system in Illinois dropped almost fifty percent, which certainly affected the care DCFS provided and the agency's overall expenditures.²¹³ As mentioned above, changes in federal and state laws were also likely catalysts for achieving permanency more quickly.²¹⁴ The role of the delinquency restrictions in effectuating these changes is not clear, as there is no comprehensive data that describes the number of youth that courts would have committed to DCFS care but for the restrictions. Regardless of the causal links, DCFS advocated for the delinquency restrictions in order to reduce its residential placement population and stabilize its budget. Those two goals were achieved in the years that followed the enactment of the restrictions.

V. ANALYSIS

DCFS lobbied for the 1995 delinquency restrictions in order to stabilize its budget and redirect the flow of delinquent teenagers from DCFS-funded residential placements to county-funded programs.²¹⁵ In the intervening years, DCFS has successfully satisfied its fiscal needs²¹⁶

210. DESCRIPTIVE FINDINGS, *supra* note 209, at 31. The residential care caseload for all children fell from 4,015 to 1,683. *Id.* at 29. The study defined residential care to include both institutional residential placements (IPAs) and group homes. *Id.* at iii.

211. *See Testimony of Jess McDonald, supra* note 141 (testifying that the budgetary needs of the agency grew 170% from 1991 to 1995).

212. *See* DCFS, BUDGET BRIEFING: FY 2003 4 (listing the total funding for fiscal year 1999 at \$1,392,638,100), *available at* <http://www.state.il.us/dcf/library/index.shtml> (Feb. 2, 2002); DCFS, BUDGET BRIEFING: FY 2005 4 (projecting budgetary needs of \$1,406,207,800 in 2005, an increase from 1999 of less than one percent), *available at* <http://www.state.il.us/dcf/library/index.shtml> (Feb. 18, 2004).

213. DCFS, CHILD ABUSE AND NEGLECT STATISTICS, ANNUAL REPORT: FISCAL YEAR 2004 4 (listing the number of indicated reports in 1995 at 53,246 and in 2004 at 27,489), *available at* <http://www.state.il.us/dcf/library/index.shtml> (last visited Apr. 12, 2005). A report of child abuse or neglect is "indicated" when an investigation determines that credible evidence of the reported abuse or neglect exists. 325 ILL. COMP. STAT. 5/3 (2002).

214. *See supra* Part III.A (noting the role of the Adoption and Safe Families Act of 1997 and Permanency Initiative legislation in the focus on permanency).

215. *See supra* Part IV.A, C (discussing the reasons that DCFS favored the delinquency restrictions).

216. *See supra* Part IV.D.3 (highlighting the reduction in residential placements and stable

and many counties have developed a community-based “continuum of intervention.”²¹⁷ However, due to the drastic nature of the restrictions, its effects go well beyond these intended results.

The current policy to withhold long-term DCFS care from teenagers who have any history of delinquency is over-inclusive and stands in contrast to the principles that otherwise guide the Juvenile Court, specifically, to look at every aspect of the child. The ethos described by Judge Julian Mack in the early days of the Juvenile Court continues to pervade juvenile justice proceedings today.²¹⁸ The purpose and policy of the Article that governs delinquent minors, as implemented through the JJRA, is to restore the offending minor and the community he belongs to according to the particular circumstances of each case.²¹⁹ The mechanics of juvenile justice proceedings, as well as the pre-detention programs implemented through the IJDAI,²²⁰ give flesh to this particularized approach. From initial intake to discharge, the court is empowered with options that recognize the unique strengths, deficiencies, and needs of each child. If the minor requires pre-adjudication monitoring, courts in many counties can choose a program that is best suited to the needs of the minor and community.²²¹ Prior to sentencing, the court may order a social investigation report that details all aspects of a minor’s life;²²² at sentencing, the court may condition probation upon very specialized requirements.²²³ If the minor’s parents or custodians are unfit or unable to care for the minor, the court may place the minor in a number of custodial or guardianship placements.²²⁴ Even the eventual discharge of proceedings is based on the court’s very discretionary finding that it is in the “best interests” of the minor and the public.²²⁵

budget since the passage of the restrictions).

217. *See supra* Part II.B.2 (examining the range of community-based responses under the Juvenile Justice Reform Act and the Illinois Juvenile Detention Alternatives Initiative).

218. *See supra* Part II.A (quoting Judge Mack, one of the prominent judges of the Cook County Juvenile Court in its early years).

219. *See supra* Part II.B.2 (describing the theoretical approach of the JJRA).

220. *See supra* Part II.B.2.a (discussing the creation of the IJDAI). Not all counties participate in the IJDAI. *See* Ill. Juvenile Detention Alternatives Initiative, *supra* note 67, at 8 (showing a map of the thirty participating counties as of May 2003).

221. *See supra* Part II.B.2.a (summarizing the various programs available through the IJDAI).

222. 705 ILL. COMP. STAT. 405/5-701 (2002 & West Supp. 2003).

223. 705 ILL. COMP. STAT. 405/5-715 (empowering the court to require a minor placed on probation to comply with a number of terms, including a catch-all provision to “comply with other conditions as may be ordered by the court”).

224. 705 ILL. COMP. STAT. 405/5-740 (2002).

225. 705 ILL. COMP. STAT. 405/5-755 (2002). A “best interest” determination is based on a variety of factors that account for the minor’s physical and mental needs, as well as the minor’s

2005] Denying Child Welfare Services to Delinquent Teens 965

Against this backdrop, the binary operation of the DCFS delinquency restrictions produces anomalous results. The restrictions do not promote a contextual perspective; rather, they constrain teenagers to one category or the other when it comes to access to DCFS services. Such an approach ironically mirrors the conduct that it was intended to prevent: just as the provisions indiscriminately bar all delinquent teenagers from DCFS care, so did juvenile courts indiscriminately use DCFS resources for minors whose circumstances did not always warrant the agency's involvement.

This Part challenges the legislation's underlying rationale for the delinquency restrictions and then argues that the expansive nature of the provisions has created results unintended by the legislature. The first section argues that exempting DCFS from any responsibility to help pay for the placement of troubled youth results from an oversimplified perspective that reduces a minor to a single delinquent act and thereby excludes any history of abuse or neglect.²²⁶ The second section disputes the claim that the delinquency restrictions merely implicate budget issues and argues that DCFS has unique value to a child in need of a home.²²⁷ The final section highlights the limited nature of the "independent basis" exception and suggests that the broad reach of the restrictions seriously undermines any legitimate policy rationale.²²⁸

A. Flawed Rationale: Delinquent or Victim

The legislature enacted the statutory restrictions on placing delinquent teenagers in DCFS care in response to perceived abuses of DCFS resources by juvenile courts.²²⁹ To DCFS, the GYSI embodied these abuses most distinctly by using DCFS money (along with funding from other agencies) to place delinquent youth in residential homes with only initial court involvement.²³⁰ Outside of Cook County, DCFS perceived that judges indiscriminately used the agency as a funding

place in his family and surrounding community. 705 ILL. COMP. STAT. 405/1-3(4.05) (2002).

226. See *infra* Part V.A (arguing that the delinquency restrictions are based on an oversimplified perspective of delinquent youth).

227. See *infra* Part V.B (maintaining that the delinquency restrictions amount to more than mere cost-shifting from DCFS to the counties because DCFS has unique value for the minor in need of a permanent home).

228. See *infra* Part V.C (arguing that the "independent basis" exception in the temporary custody statute has very limited benefit for minors with a delinquent past).

229. See *supra* note 146 and accompanying text (explaining that the delinquency restrictions were enacted to stem liberal use of DCFS resources by juvenile court judges).

230. See *supra* Part IV.A (discussing DCFS's role in funding GYSI-placements as an impetus for the delinquency restrictions).

source for placing children in residential homes.²³¹ The claim that DCFS's relationship simply entailed paying for the placement and did not involve any other casework highlighted that these were not the type of minors that DCFS was intended to care for.²³² Thus, the dispute was much more about principle than about practicalities; it was not a matter of determining who could provide more appropriate care (indeed, neither the counties nor DCFS directly provided the residential services), but whether the juvenile was more delinquent or victim. The legislature clearly stated that absent a separate and distinct finding of abuse or neglect, a teenage minor would always remain a delinquent in the eyes of the state child welfare system.²³³

For the delinquent minor who has been abused or neglected, these histories are not so easily differentiated. Experts have long debated the strength and nature of the link between child maltreatment and delinquency.²³⁴ Although the resolution of the issue is outside the scope of this Article, a number of recent studies have demonstrated that early child abuse and neglect significantly increased the risk of arrest as a juvenile.²³⁵ Cook County records show that one out of every ten

231. See *supra* note 146 and accompanying text (quoting the testimony of Jess McDonald).

232. See *David B. v. Patla*, 950 F. Supp. 841, 844 (N.D. Ill. 1996) (describing the operation of the GYSI and stating that, because none of the defendant agencies operated the type of residential facilities that most of the referred youth require, the children are typically placed with private treatment providers who then bill the respective agencies for the cost, with DCFS bearing approximately one-third of the cost).

233. See *supra* Part IV (tracing the legislative process that culminated in the current statutory scheme); see also notes 172–74 (explaining the legislative and administrative process that resulted in the current rule).

234. See DAVID N. SANDBERG, *Testimony Submitted to the U.S. Senate Subcommittee on Juvenile Justice on "The Relationship between Child Abuse and Delinquency,"* in THE CHILD ABUSE—DELINQUENCY CONNECTION 137, 138 (reporting that sixty-six percent of the youth at a New Hampshire residential home for juvenile delinquents suffered abuse and advocating for legislation that accounts for a history of maltreatment in delinquency proceedings). But see James Garbarino & Margaret C. Plantz, *Child Abuse and Juvenile Delinquency: What are the links?*, in TROUBLED YOUTH, TROUBLED FAMILIES 27, 27–39 (James Garbarino et al. eds., 1986) (discussing the difficulty of reaching a conclusion about the connection between abuse and delinquency due to methodological problems in earlier studies).

235. See Cathy Spatz Widom, *Understanding Child Maltreatment and Juvenile Delinquency: The Research*, in UNDERSTANDING CHILD MALTREATMENT & JUVENILE DELINQUENCY 1, 2–5 (Janet Wiig et al. eds., 2003) (summarizing the results from four recent studies of the connection between child abuse and neglect). The first study, conducted in a metropolitan county in the Midwest, found that early child abuse and neglect increased the risk of arrest as a juvenile by fifty-five percent, and increased the risk of being arrested for a violent crime by ninety-six percent. *Id.* at 2. A second study conducted in Rochester, N.Y. reaped similar results, with childhood maltreatment increasing the risk of being arrested as an adolescent by fifty percent. *Id.* at 2–3. The fourth study found that a group of abused and neglected youth from the Northwest were nearly five times more likely to be arrested as juveniles and eleven times more likely to be arrested as violent offenders than their non-abused counterparts. *Id.* at 4.

2005] Denying Child Welfare Services to Delinquent Teens 967

juveniles referred to court on a delinquency petition has been the subject of an indicated report of abuse or neglect in the previous five years.²³⁶ This statistic does not include any juveniles who suffered from abuse or neglect that was not reported or indicated.²³⁷

A minor is barred from DCFS care by circumstances that are outside of his control simply because the state did not discover he had been abused or neglected until after he was charged with a delinquent act. If someone had reported the maltreatment to the state prior to the delinquency charges, the minor might have already have been receiving DCFS care and thus would have remained eligible for further child welfare services upon committing a delinquent act.²³⁸ Thus, two teens with identical histories of abuse and delinquency can find themselves on different sides of the door to DCFS services. The different outcomes are not based on the conduct of the respective minors, but on the chronological point of state intervention.

One potential justification for such divergent results for two similarly situated minors is that DCFS, as the parent figure to those minors under its care, has a continuing obligation to provide for its children regardless of the child's conduct, just as an ordinary parent would.²³⁹ Thus, although the state does not view the two minors differently, it is bound to fulfill a pre-existing duty to a child with whom it already has a relationship.

However, in some instances the state bears a more direct responsibility for a delinquent minor, even if there was no legal relationship at the time the delinquent act was committed. Under the current scheme, once the court places a DCFS ward in a permanent

236. CLARK M. PETERS ET AL., CASE PROCESSING AND SERVICES TO CHILDREN IN THE JUVENILE JUSTICE DIVISION OF THE COOK COUNTY JUVENILE COURT 18 (2004), available at http://www.chapinhall.org/category_archive_new.asp?L2=61&L3=132 (last visited Apr. 12, 2005). See also ILL. CRIMINAL JUSTICE INFO. AUTH., A PROFILE OF JUVENILE JUSTICE SYSTEM ACTIVITIES AND JUVENILE DELINQUENCY RISK FACTORS IN COOK COUNTY 26-30 (reporting that, statewide, there is a 0.29 and 0.26 correlation between child abuse and neglect and child sexual abuse, respectively, and probation). The study also warns that, although the figures reveal that prior abuse is a viable risk factor, past research reveals little evidence linking prior abuse to future delinquency. *Id.* at 38.

237. 325 ILL. COMP. STAT. 5/3 (2004) (defining an "indicated report" as one where an investigation determines that credible evidence of the alleged abuse or neglect exists).

238. ILL. ADMIN. CODE tit. 89, § 304.4(b)(4) (2002) ("The Department is mandated to continue serving these children even if they are over age 13 when they are adjudicated delinquent or minors requiring authoritative intervention."). See also *supra* note 35 and accompanying text (explaining the process from initial report of suspected abuse or neglect to the decision to remove a child from his or her home).

239. See ILL. ADMIN. CODE tit. 89, § 306.3 (2003) (providing the circumstances that prompt DCFS to seek to end its legal relationship with children, which does not include a minor's delinquent or otherwise difficult behavior).

home through a guardianship or adoption, that child will not be able to re-access DCFS services if the placement fails and there is any history of delinquency.²⁴⁰ He stands in a no-man's-land, unable to stay with the family that he was placed with, and unable to return to the state's care because the placement effectively severed the child's relationship with DCFS.²⁴¹

The eventual outcome is the same for a teen whose placement failed because of some delinquent conduct and for a teen who was adjudicated delinquent at a young age, and whose placement failed for some unrelated reason. In the former scenario, Illinois law precludes DCFS involvement because the neglect (the fact that his adoptive parents or guardians no longer wish to care for him) arises "from the same facts, incidents, or circumstances which give rise to a charge or adjudication of delinquency. . . ."²⁴² In the latter scenario, Illinois law limits DCFS involvement to the ninety-day temporary custody period because, although the neglect is independent of the minor's distant delinquent conduct, the minor is no longer in DCFS custody and thus cannot re-enter the agency's long-term care under the placement statute.²⁴³

The inability to regain DCFS care after a failed placement is particularly significant because, with the increased emphasis on permanency (and the resulting increase in permanency rates) more placements have failed²⁴⁴ and presumably, a substantial portion of these

240. See ILL. ADMIN. CODE tit. 89, § 304.4(b)(4) (creating an exception only for delinquent teens who were in DCFS custody prior to committing their delinquent conduct). An adoptive parent or guardian may file a supplemental petition to reinstate wardship, but the court is not obligated to reinstate wardship. 705 ILL. COMP. STAT. 405/2-33 (2002). However, even if the court did reinstate wardship, because DCFS did not retain continuous custody, the court could not require DCFS to provide care or services. 705 ILL. COMP. STAT. 405/2-27(1)(d) (2004); ILL. ADMIN. CODE tit. 89, § 304.4(b)(4) (2002).

241. The Advocacy Unit provided the story of one youth that highlights the difficult situation for a delinquent minor in a failed adoption. Chris's mother is addicted to drugs and his father is incarcerated, and eventually Chris entered DCFS custody. When he was thirteen years old, his paternal grandparents adopted him. Chris's paternal uncle sexually abused him in the adoptive home. He ran away, is believed to have prostituted himself, and at age fifteen, committed aggravated battery. His adoptive family is no longer willing to care for him. The Advocacy Unit has determined that Chris needs specialized residential treatment, but DCFS is unwilling to resume care for Chris, and the delinquency restrictions preclude the court from ordering DCFS to do so.

242. ILL. ADMIN. CODE tit. 89, § 304.4(d) (2002) (stating the "independent basis" criteria that would entitle a delinquent teen to DCFS services).

243. 705 ILL. COMP. STAT. 405/2-27(1)(d) (2002). See also *supra* note 198 (discussing how the absence of an "independent basis" exception in the placement statute proves to be an absolute bar on placing a delinquent teen in DCFS's legal custody, even if the minor was already placed in DCFS's temporary custody).

244. See Dave Orrick, *Rushing Into Adoption*, THE DAILY HERALD, Sept. 21, 2004 (citing statistics that show the number of adoptions significantly increasing since 1997, with the rate of

failed placements are due to delinquent conduct by the minor or involve a minor with a delinquent past. Barring access to DCFS services for delinquent teens in failed placements has the potential of tainting the placement process by foreclosing the long-term responsibility the agency has to such youth. The restriction provides an incentive for DCFS to place minors with delinquent histories or proclivities (who are often more costly to care for) as quickly as possible by guaranteeing that DCFS will not have a continuing obligation to the minor if the placement fails after he turns thirteen.

For the more conscientious DCFS caseworker, the delinquency restrictions curtail the effectiveness of the permanency legislation for teenage youths who have a delinquent history or who exhibit delinquent tendencies.²⁴⁵ The worker wants to find the child a permanent home as soon as possible, as Illinois law and DCFS policy urges her to do,²⁴⁶ but she will make the decision with great caution knowing that the child will not be able to return to DCFS if the placement fails. By allowing eligibility regulations for delinquents to influence DCFS's placement process, the Illinois legislature has added a bureaucratic layer to the very human decision of placing a unique child in a safe and loving home.

These scenarios do not compel the conclusion that DCFS has the sole responsibility for all delinquent children who have suffered abuse or neglect at some time in their pasts. Rather, they reveal how factually complex each case is and that the child's needs, and the state's obligation to provide child welfare services, are wrapped up in a protracted history that cannot be so easily reduced to a single delinquent act. The legislature's decision to remove DCFS from the range of available options for delinquent teens ignores the reality that minors can

failed adoption remaining at about 1.2% annually), *available at* <http://www.dailyherald.com/special/fosteringfrustration/daythreeside.asp> (last visited Apr. 12, 2005). The article also notes that the figures are calculated from financial data that suggest the failure rate, but that DCFS does not retain any failure data and these projections are not wholly accurate. *Id.* With the dramatic rise in adoptions since the permanency initiatives of the mid-1990s, critics have charged that DCFS pushes too hard for adoptions without providing adequate supports, resulting in a higher rate of failed placements. *See supra* Part III.A (highlighting the emphasis on permanency and the successful increase in permanent placements in the last seven years); *see also* Orrick, *supra* (quoting critics of DCFS's efforts to push adoptions). DCFS has recently provided increased post-guardianship and adoption services. DCFS, BUDGET BRIEFING: FY 2003 27 (2002), *available at* <http://www.state.il.us/dcf/library/index.shtml> (last visited Apr. 12, 2005). Although there is no formal tracking system, the agency points to the fact that the only studies that have been completed reveal that the failure rate has, at worst, remained constant. Orrick, *supra*.

245. *See supra* notes 108–13 and accompanying text (discussing the federal and state legislation that focuses on promoting permanency in the child welfare system).

246. *Id.*

simultaneously be both delinquent and maltreated.

B. The Unique Value of DCFS

Although lawmakers intended to eliminate DCFS's obligation to pay for the residential placements of delinquent youths, the legislation creates ramifications beyond mere cost-shifting.²⁴⁷ DCFS involvement has value beyond its financial resources. As the statewide agency that is comprehensively involved in every aspect of child protection—from the initial point of contact with the child welfare system to the eventual placement of the child²⁴⁸—DCFS possesses unique expertise and resources that would benefit any child in need of a safe and permanent home. The fundamental philosophy of concurrent planning that informs all case management decisions requires the type of macro-level oversight that only DCFS possesses, and DCFS has developed extensive guidelines and practices for expeditiously moving a child through the child welfare system.²⁴⁹ The purpose and policy statement for the entire Act even assumes DCFS will serve a vital role in placing the child in a permanent home.²⁵⁰

DCFS's expertise may be irrelevant to the delinquent housed in the Department of Corrections or in a residential placement—the service he receives will be the same regardless of who pays for it. The minor who is discharged from one of these sites and cannot return home depends upon the services that DCFS provides. When the court places a minor in a residential placement, it is with the hope and expectation that the minor will eventually return to an awaiting family. However, the

247. See *Testimony of Rep. Spangler II*, *supra* note 171 (“This is a money issue and a money issue only.”).

248. DCFS receives and investigates reports of child maltreatment, decides when to refer cases to local law enforcement and the state's attorney, and determines when to take protective custody of the child. ILL. ADMIN. CODE tit. 89, § 300 *et. seq.* (2002). Once a child is removed from her home and placed with DCFS, the agency creates and oversees a service plan for the child, with a view towards placing the child in a permanent home. See *supra* Part III.A (discussing the type of casework DCFS provides to children placed in its custody). DCFS is also responsible for licensing and regulating agencies and individuals that provide child welfare services or child care. DCFS, *Chapter One: An Introduction to Child Welfare in Illinois*, in BEST PRACTICES § 1.1.2 (2002), available at <http://dcfswebresource.prairienet.org/downloads/bp/> (last visited Apr. 12, 2005).

249. See generally DCFS, *Chapter Two: Permanency for All Children*, in BEST PRACTICES (2002) (detailing the principles and application of permanency planning in agency casework); DCFS, *Chapter Six: Establishing Permanency for Children in Substitute Care*, in BEST PRACTICES (2002) (providing protocol for effective and expeditious permanency planning), available at <http://dcfswebresource.prairienet.org/downloads/bp/> (last visited Apr. 12, 2005).

250. 705 ILL. COMP. STAT. 405/1-2(1) (2002) (“[I]f the child is removed from the custody of his or her parents, the Department of Children and Family Services immediately shall consider concurrent planning . . . so that permanency may occur at the earliest opportunity . . .”).

realities are not always so ideal.

It is not uncommon for a minor to successfully complete the terms of his sentence (either at a residential placement or the Department of Corrections), but to be unable to return home because his family is unwilling or unable to take him back. This is one type of the more broadly defined “lock-out” situation, where a youth, absent from his home for a period, finds that his parent or guardian refuses to or cannot care for him.²⁵¹ A lock-out situation may constitute neglect or dependency, depending on the given circumstances.²⁵² A dependent or neglected minor typically qualifies for DCFS services,²⁵³ but when his family’s refusal or inability to allow him to return home is inextricably linked to his delinquency, the minor is not eligible for the agency’s services.²⁵⁴ In the House Committee hearings in 1996, DCFS maintained that this result was justified because there were more appropriate local programs, such as CCBYS, that were focused on youth in “lock-out” situations.²⁵⁵

The purpose of CCBYS, however, extends only to providing intensive services aimed at reunifying families within a narrow period.²⁵⁶ CCBYS acts as a triage system; it does not serve as a substitute for the long-term planning that DCFS provides, but rather keeps minors from entering the state’s child welfare system.²⁵⁷ If CCBYS does not successfully divert the minor from the child welfare system by reunifying him with his family, and if the lock-out was unrelated to any delinquent conduct, then CCBYS moves the minor to DCFS’s care in order to provide him with long-term services.²⁵⁸ But if the minor was locked out because of his delinquent conduct and CCBYS’s short-term efforts prove unsuccessful, then DCFS is not an

251. See *supra* note 189 and accompanying text (defining what is meant by “lock-out”).

252. See *supra* notes 24–25 and accompanying text (describing the conduct that constitutes neglect and dependency).

253. ILL. ADMIN. CODE tit. 89, § 304.4(b) (2002).

254. ILL. ADMIN. CODE title 28, § 304.4(d). The provision states:

The Department shall not accept for care or services, or legal custody or guardianship, of a minor 13 years of age or older for whom allegations or adjudication of abuse, neglect or dependency arise from the same facts, incident or circumstances which give rise to a charge or adjudication of delinquency unless the minor is already in the legal custody or guardianship of the Department.

Id.

255. See *supra* note 180 and accompanying text (conveying DCFS’s position that community-based programs should be used to relieve the agency of the strain to care for locked-out minors).

256. See *supra* notes 181–83 and accompanying text (describing the CCBYS’s role in providing services to locked out minors).

257. *Id.*

258. *Id.*

option.²⁵⁹ He must remain in the custody of the probation department or another agency.²⁶⁰ Even assuming that each of these placement options (DCFS, probation department, or another agency) has adequate funding to provide the minor with similar services, a non-DCFS placement nonetheless deprives the minor of the unique DCFS resources that would more capably facilitate placing him in a permanent home. Minors who face more than short-term lock-out do not merely need temporary shelter; they need a permanent home.

As some legislators pointed out in the discussions about the delinquency restrictions, minors who are successfully discharged yet have no home to return to suffer genuine neglect that would typically trigger DCFS involvement.²⁶¹ The minor's situation implicates DCFS not only because he falls squarely within DCFS's statutory obligation to help neglected youths, but also because DCFS could provide the most appropriate care under the circumstances. Under the current statutes, however, there is no framework that directs a decision-maker to look at the specific circumstances of the case to determine whether DCFS should be involved.

C. Temporary Custody as a Temporary Solution

Through the 1996 amendment, the Illinois legislature seemingly intended to restore full access to DCFS care to teenage minors who experienced abuse and neglect that was independent of any delinquent conduct.²⁶² Legislators spoke of undoing the unfair effects of the sweeping 1995 exclusion felt by independently mistreated minors.²⁶³ Yet the "independent basis" exception applied only to the temporary custody hearing, thereby creating a maximum ninety-day window of eligibility for DCFS care.²⁶⁴ Once the adjudicatory and permanency

259. ILL. ADMIN. CODE tit. 89, § 304.4(d) (2002).

260. See 705 ILL. COMP. STAT. 405/5-740 (2002) (providing placement options for a delinquency court when the minor's parents are unfit or unable to care for the minor). See also *supra* Part II.B.2.b (discussing the parallels and differences between the placement hearings in delinquency and child protection cases).

261. See *supra* note 179 and accompanying text (reporting the opinion that abandoning a child when he is discharged constitutes one of the highest forms of neglect).

262. See 89TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 127 (March 27, 1996, Ill.) (statement of Rep. Spangler) ("[H.B. 2915] does nothing more than put the responsibility back on the agency of DCFS to accept the juvenile that they should have taken in the first place.").

263. See *supra* Part IV.C (discussing the reasons underlying the legislature's decision to create the "independent basis" exception).

264. 705 ILL. COMP. STAT. 405/2-14(b) (2002) (stating that "an adjudicatory hearing shall be commenced within 90 days of the date of service of process"). If it is in the child's best interest and good cause is shown, the court may extend temporary custody for up to an additional thirty days. 705 ILL. COMP. STAT. 405/2-14(c).

2005] Denying Child Welfare Services to Delinquent Teens 973

hearings have passed, DCFS involvement is precluded with the same force as with the original delinquency restrictions.²⁶⁵

The inflexibility of the provision can lead to absurd results. After the temporary custody period, a youth who committed a small offense when he was very young, such as stealing change from a vending machine,²⁶⁶ and then suffered severe abuse at age thirteen, is treated the same under the delinquency restrictions as a sixteen-year-old with a long history of criminal conduct. The placement statute in child protection cases does not allow the court to account for the individual circumstances of a teenager's delinquent history. Both are ineligible for long-term DCFS care or services because both have been adjudicated delinquent.²⁶⁷ This result would create few practical consequences for the minor if the non-DCFS placement alternatives—a suitable relative or other person, the probation department, or “an agency for care or placement”²⁶⁸—provided the same expertise as DCFS, but DCFS provides a unique range of services and casework.²⁶⁹ By barring the child's access to DCFS beyond ninety days, the legislature is significantly inhibiting the minor's chances of finding a permanent home in a timely manner.

The outcome is even more egregious in the case of a DCFS ward with a delinquent past who is later placed in a permanent home that fails because of reasons unrelated to delinquency. This effectively gives the minor one shot at permanency, because once his status as a DCFS ward is removed, the current regime denies him the ability to re-access long-term DCFS care. This result becomes more significant in light of criticisms that DCFS, because of its emphasis on permanency, too eagerly forces children into guardianships or adoptions that have a poor likelihood of success.²⁷⁰

Although the policy justifications given by legislators and DCFS for

265. 705 ILL. COMP. STAT. 405/2-27(1)(d) (prohibiting any minor over twelve who is charged with a criminal offense or adjudicated delinquent from being placed in DCFS custody, with no mention of an “independent basis” exception). *See also supra* note 198 and accompanying text (discussing the application of the delinquency restriction in placement hearings in child protection cases).

266. 720 ILL. COMP. STAT. 5/16-5 (2004). “Theft from coin-operated machines” is included in the Criminal Code of 1961. *Id.*

267. 705 ILL. COMP. STAT. 405/2-27(1)(d) (2004) (preventing any court from placing any minor over twelve who has been “adjudicated delinquent” in the custody of DCFS).

268. *See supra* note 47 and accompanying text (describing the placement hearings in child protection proceedings, and discussing the court's different placement options).

269. *See supra* Part V.B (arguing that, regardless of the entity that bears the cost of paying for a child's care, a minor who is kept from DCFS care is deprived of the agency's unique services and expertise).

270. *See Orrick, supra* note 244 (reporting on the debate over DCFS's increased adoption rates).

the delinquency restrictions can help explain the statutory enactment, the unrestrained nature of the provisions seriously undermines any coherent policy rationale that purportedly supports their enactment. Under the current framework, the maximum period that a court may order DCFS involvement for any teenager whom a court has ever adjudicated delinquent is ninety days.²⁷¹ In the light of such a sweeping restriction, the contours of any policy argument fade away.

As discussed above, the legislature enacted the original delinquency restrictions in response to the juvenile courts that liberally used DCFS resources to fund residential placements of delinquents.²⁷² A tailored response by the legislature could have constrained judicial indiscretion by providing more rigid guidelines, or, if the lawmakers wanted to take the decision out of the court's hands altogether, by prohibiting the placement of certain types of offenders in DCFS care. Instead, the legislature enacted provisions that do not draw any distinctions between different types of offenses or offenders, but label all teenagers with criminal histories "delinquent."

VI. RECOMMENDATIONS

Regardless of whether the legislature's sweeping response to the perceived abuses of DCFS resources represented good policy, it quelled the abuses in bold terms and likely contributed to the agency's stabilized budget.²⁷³ Moreover, by eliminating DCFS as an option for delinquent youth, the legislature effectively forced local counties to create community-based programming for juvenile delinquents.²⁷⁴ The legislature achieved these results by completely restricting the flow of delinquents into DCFS care, but in doing so, teenage delinquents who are in genuine need of DCFS's involvement are inevitably denied it as well.²⁷⁵ The systemic problems that gave rise to the rigid restrictions have been ameliorated, and it is time to pursue a less stringent approach that is more consistent with the goals and principles that have historically guided Illinois' juvenile courts.

This Part recommends legislative changes to the existing juvenile restrictions that will enable juvenile courts to more effectively address

271. *See supra* Part IV.D.1 (discussing the ninety-day limit on temporary custody).

272. *See supra* Part IV.A (discussing the conditions that resulted in the passage of the delinquency restrictions).

273. *See supra* Part IV.D.3 (examining the long-term changes felt by DCFS in the years following the delinquency restrictions).

274. *See supra* Part II.B.2.a (summarizing the various programs available through the IJDAI).

275. *See supra* Part V (discussing the shortcomings of the current statutory provisions in providing long-term child welfare services for teenage delinquents).

2005] Denying Child Welfare Services to Delinquent Teens 975

the complex child welfare issues that delinquent teenagers face. Specifically, this Part suggests that, at the least, the legislature should create an “independent basis” exception in the placement statute for child protection cases.²⁷⁶ A better response would be for the legislature to strike the delinquency restrictions altogether in child protection proceedings because the initial abuse, neglect or dependency determination acts as a sufficient safeguard on judicial indiscretion.²⁷⁷ In the context of delinquency cases, this Part recommends that the legislature modify both the pre- and post-adjudication statutes to enable courts to utilize DCFS services when individual circumstances call for it, while still safeguarding DCFS resources.²⁷⁸

A. Child Protection Cases

In the child protection context, the legislature should at least allow long-term DCFS involvement for teenage delinquents when there is an independent basis of maltreatment. Currently, the independent basis exception exists only at the temporary custody hearing.²⁷⁹ The legislature may have intended to extend the exception to the placement of the minor,²⁸⁰ and juvenile courts may operate as if this is the case,²⁸¹ but the placement statute specifically precludes placing a teenage delinquent with DCFS after temporary custody.²⁸² The placement statute should be amended to ensure that any minor who is legitimately maltreated would benefit from the state resources set aside to find children safe and permanent homes.

A more drastic but superior solution is to remove the delinquency restrictions altogether in child protection cases.²⁸³ The purpose of child protection proceedings is to identify children in need of state

276. See *infra* Part VI.A (recommending changes in the statutory scheme for child protection cases).

277. See *infra* Part VI.A (arguing that the delinquency restrictions should be removed from child protection proceedings).

278. See *infra* Part VI.B (recommending a framework for decision-making that allows for DCFS involvement in delinquency cases when necessary).

279. 705 ILL. COMP. STAT. 405/2-10(2) (2004). See also *supra* Part IV.C (discussing the creation of the “independent basis” exception at the temporary custody hearing).

280. See *supra* note 190 and accompanying text (stating that, although the exception was created only in the temporary custody statute, legislators were concerned that DCFS accept for care all minors who genuinely needed its services).

281. See *supra* note 198 and accompanying text (demonstrating that, although courts may function as if a minor who was in DCFS’s temporary custody may be placed in the agency’s legal custody after disposition, the placement statute expressly prohibits such an order for a delinquent teenager).

282. 705 ILL. COMP. STAT. 405/2-27(1)(d).

283. 705 ILL. COMP. STAT. 405/2-10, 27(1)(d).

intervention and ensure their well-being through appropriate services. The legislature introduced the delinquency restrictions to constrain juvenile judges that were otherwise indiscriminately utilizing the state's child welfare resources.²⁸⁴ Yet the child protection statutes already contain effective constraints on judicial indiscretion by requiring that a court find the minor abused, neglected, or dependent before the state intervenes.²⁸⁵ The solution should not be to narrow the scope of eligibility, but to assure that the statutory definitions of abuse, neglect, and dependency are faithfully applied. If the minor fits into one of these categories as a threshold matter, the legislature should empower the courts to pursue the ultimate goal of keeping a family intact or placing the child in a safe and permanent home as quickly as possible. Past delinquency does not diminish the state's interest in achieving this goal.

B. Delinquency Cases

This section recommends that the legislature allow for DCFS involvement both before and after adjudication in situations where DCFS would provide the most appropriate care.

1. Pre-adjudication

A court may release a charged minor awaiting adjudication to his home and require him to participate in detention alternative programs²⁸⁶ or if the minor is likely to flee the jurisdiction of the court or is a threat to the community, the court may place the minor in a juvenile detention facility.²⁸⁷ But an RUR minor lies somewhere in between: he does not belong in detention but does not have a home to return to.²⁸⁸ If the minor's caretaker does not assume custody of him, the court may order DHS to temporarily care for the minor until he is reunified with his family.²⁸⁹ But under DHS policy, the agency will only provide

284. *See supra* Part IV.A (discussing the concerns that drove the delinquency restriction legislation).

285. *See supra* notes 23–25 and accompanying text (outlining the statutory criteria for a finding of abuse, neglect, or dependency); 705 ILL. COMP. STAT. 405/2-10(1)–(2) (requiring probable cause to believe a minor fits a statutory category of maltreatment before a court can take temporary custody of the minor); 705 ILL. COMP. STAT. 2-21(2) (requiring that a court enter a finding as to whether the minor has been abused, neglected, or maltreated before deciding whether the minor be made a ward of the court).

286. *See supra* Part II.B.2.a (describing the origins and effect of the Illinois Juvenile Detention Alternatives Initiative).

287. 705 ILL. COMP. STAT. 405/5-501(2) (2004).

288. *See supra* Part III.C (discussing the circumstances faced by RUR minors).

289. 705 ILL. COMP. STAT. 405/5-501(6).

temporary care for a thirty-day period.²⁹⁰ After thirty days, the minor will have no place to go and could end up back in detention to await adjudication.

The legislature should create a special provision in the detention hearing statute²⁹¹ to address the situation where an RUR minor can no longer remain in DHS care. Clearly, where a court has already determined that a minor does not belong in detention, detention should not be an option. The legislature could require that at the end of thirty days in DHS care, the Probation Department, DHS, and DCFS hold a collaborative meeting where they decide which entity is best suited to care for the specific needs of the minor. The group would operate in a similar manner to the GYSI but could have a more structured decision-making process to ensure that one entity does not always end up with temporary custody of the minor;²⁹² in other words, the process would be truly collaborative. Also, the process would likely be more workable because the minor would only remain in temporary care until the family is reunified or the adjudicatory hearing takes place and therefore there would not be the specter of caring for the minor for an extended period.

2. Post-adjudication

Under the current sentencing statute, the legislature has foreclosed DCFS custody as an option for teenagers adjudicated delinquent.²⁹³ As discussed above, the sentencing options do allow a court to place a minor in the legal custody of another person or entity if he is not committed to the Department of Corrections.²⁹⁴ And while the placement statutes in delinquency and child protection proceedings resemble each other, the two differ significantly in that the delinquency statute neither emphasizes the minor's permanency nor does it list DCFS as a placement option.²⁹⁵

The legislature should act to create a similar emphasis on permanency in delinquency placements as exists in child protection cases.²⁹⁶ Although permanency is not the court's primary concern in

290. STATE OF ILL. DEP'T OF HUMAN SERVICES, *supra* note 76, at § A.4.a.

291. 705 ILL. COMP. STAT. 405/5-501.

292. *See supra* Part IV.A (discussing DCFS's criticism of the GYSI program which consistently placed referred minors in residential placement and required DCFS to pay one-third of the placement costs).

293. 705 ILL. COMP. STAT. 405/5-710(1)(a)(iv).

294. *See supra* Part II.B.2.b (discussing placement options in delinquency cases).

295. *See supra* notes 85-90 and accompanying text (examining the differing emphases in the respective placement statutes).

296. *See supra* Part II.B.1 (explaining the priority of permanency in child protection cases).

delinquency cases, once the court determines that custody should be stripped from the minor's parents or guardians because of their inability to care for him, it triggers the same value that informed the state's permanency initiative in the late 1990s²⁹⁷—namely, that all children deserve a safe and permanent home. The legislature could work towards this goal in delinquency cases while still safeguarding DCFS resources by taking two steps: (1) introduce permanency goals that closely parallel those that already exist in child protection cases; and (2) allow courts to place a minor in DCFS custody when the permanency goal is one that DCFS would most capably work towards.

When a court decides to remove a delinquent minor from the legal custody of his parent or guardian, it is not to punish the child, but is because the caregivers “are unfit or are unable” to care for the minor.²⁹⁸ For a minor who is not sentenced to the Department of Corrections, the rehabilitative and punitive aspects of the minor's sentence are addressed through probationary orders.²⁹⁹ A court's decision to remove a minor from his home in both child protection and delinquency cases does not depend on the minor's conduct, but on the parents' ability to care for the child and the minor's best interests. Moreover, just as the minor's best interests are served through focused permanency goals in child protection cases,³⁰⁰ so too will a goal-oriented placement statute benefit a delinquent minor. Emphasizing permanency in delinquency cases where a child has no home will not compromise the punitive or rehabilitative elements of the minor's sentence—he will remain on probation—but rather will recognize how fundamental a safe and permanent home-life is to the well-being and future conduct of the minor. By requiring delinquency courts to adopt a specific permanency goal, it forces the court to plan ahead for the day the minor is no longer a ward of the court, much the same way concurrent planning does in child protection cases.

The legislature should not only create specific goals for these minors, but should give courts the appropriate options and resources to accomplish them. When DCFS is best suited to accomplish the goal

297. *See supra* notes 108–13 and accompanying text (discussing the changes in the child welfare system brought about by federal and state laws that emphasized permanency).

298. 705 ILL. COMP. STAT. 405/5-740(1) (2004).

299. 705 ILL. COMP. STAT. 405/5-710(1)(a)(i), 715. There are some sentencing alternatives to the Department of Corrections that are not considered probation. *See, e.g.*, 705 ILL. COMP. STAT. 405/5-710(1)(a)(iii) (requiring a minor to undergo substance abuse assessment and participate in appropriate counseling); 710(1)(a)(ix) (ordering a minor to have a gang tattoo surgically removed).

300. *See* 705 ILL. COMP. STAT. 405/2-28(2)(A)–(G) (requiring the court to adopt a permanency goal for wards in child protection cases).

2005] Denying Child Welfare Services to Delinquent Teens 979

because of its resources and expertise, it should be a placement option. For example, if a teenage minor's goal is to have guardianship transferred to a private individual,³⁰¹ DCFS would be particularly adept at providing the appropriate services. But if the minor's goal is to remain in a residential home pending independence,³⁰² DCFS's unique expertise in finding a permanent home would not be as relevant.

The legislature could also tailor the statute to allay concerns that courts would select a goal simply because it carries with it the option of DCFS involvement. One possibility is to only allow DCFS involvement after the teenager has been in the custody of another person or entity for a specified period. This would ensure that DCFS is only enlisted when the minor's situation cannot be remedied through alternative, short-term measures. Another possibility is to prohibit any minor with specific probationary conditions from entering DCFS care. This would exclude minors with behavioral problems that DCFS is not equipped to address while still allowing other minors to benefit from the agency's care. The legislature could also forestall what it perceives as judicial indiscretion by narrowing the scope of eligibility according to the minor's offense. Recent transfer laws under the JJRA already exclude minors who commit more egregious offenses, such as first-degree murder or aggravated criminal sexual assault, from the jurisdiction of the juvenile court.³⁰³ Lawmakers could enumerate further offenses that would disqualify minors who remain in juvenile court from DCFS care.

The use of permanency goals recognizes that, for some youth, a delinquent act is just one step in a deteriorating home life, and that part of restoring both the youth and the community is to ensure that the minor is returned to a safe and permanent home. In some instances, DCFS will possess the most appropriate resources to meet the specific goal. The legislature should create a more nuanced permanency statute that enables courts not only to discern when these situations exist, but also to enlist DCFS's aid when they do. The discretion need not be unchecked—the legislature could constrain or expand the court's discretion using specific eligibility criteria. Such an approach would honor the juvenile court's heritage by allowing each judge to individually assess the needs of each minor who appears before the court.

301. 705 ILL. COMP. STAT. 405/2-28(2)(E).

302. 705 ILL. COMP. STAT. 405/2-28(2)(F)–(G).

303. 705 ILL. COMP. STAT. 405/5-130, 805.

VI. CONCLUSION

The unyielding delinquency restrictions that the Illinois General Assembly implemented in 1995 and 1996 hide a whole class of minors behind a blanket label of delinquency and deny them access to DCFS services. This measure drastically departs from the Illinois Juvenile Court's critical guiding principles, which direct a judge to make individualized decisions based on the totality of the minor's life. The Illinois legislature should bring the current restrictions into conformity with those principles by allowing a judge to look at the complexities of each minor's case and make a particularized finding as to whether DCFS involvement would benefit the minor.

TABLE OF CASE CROSS-REFERENCES

Case Name	Regional Reporter	Illinois Reporter
In re <i>Patricia S.</i>	584 N.E.2d 270 (Ill. App. Ct. 1991)	222 Ill. App. 3d 585 (1st Dist. 1991)
In re <i>A.A.</i>	690 N.E.2d 980 (Ill. 1998)	181 Ill. 2d 32 (1998)
In re <i>C.M.</i>	669 N.E.2d 707 (Ill. App. Ct. 1996)	282 Ill. App. 3d 990 (3d Dist. 1996)
In re <i>C.T.</i>	666 N.E.2d 888 (Ill. App. Ct. 1996)	281 Ill. App. 3d 189 (2d Dist. 1996)
In re <i>O.H.</i>	768 N.E.2d 799 (Ill. App. Ct. 2002)	329 Ill. App. 3d 254 (3d Dist. 2002)
In re <i>E.F.</i>	754 N.E.2d 837 (Ill. App. Ct. 2001)	324 Ill. App. 3d 174 (3d Dist. 2001)