

The Impact of Child Welfare Systemic Lawsuits

Building Better Outcomes Policy Masterclass
CSG South in Partnership with Casey Family Programs
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Child Welfare Systemic Litigation Nationwide

- Most States have been subject to these lawsuits in federal court
 - At least 28 States are subject to active litigation or under court oversight (or both)
 - At least 11 States have exited court oversight in the last decade
 - Several States have successfully defended these lawsuits (*e.g.*, Alaska, Indiana, Massachusetts)
 - Several States have been sued multiple times
- Most lawsuits are filed by one of two advocacy organizations based in New York City

Common Features of Child Welfare Systemic Lawsuits

- Types of cases
 - 1) Broad attacks on the entire operation of the foster care system, based on claims that the foster care system is “failing” because of (for example) alleged: high caseworker caseloads; placement instability; abuse and neglect of children in custody; shortages of community-based placements; excessive reliance on residential treatment for children with significant behavioral health needs; and/or lack of access to community-based behavioral health services
 - 2) More targeted lawsuits, for example: lawsuits alleging that the State is unnecessarily placing foster children with serious behavioral health needs in residential treatment, or lawsuits alleging that the State is failing to adequately oversee the administration of psychotropic medications to foster children
- Plaintiffs allege violations of Title IV-E of the Social Security Act, Title XIX of the Social Security Act (Medicaid), the Americans with Disabilities Act, the Rehabilitation Act, and/or Substantive Due Process
- Demands for broad, injunctive relief that require federal court oversight of the foster care system

Common Features of “Consent Decrees” and Settlement

- Over the last several decades, dozens of States have settled these cases and entered “consent decrees”, but there is no evidence that these settlements have improved outcomes for children
- Compliance with dozens of “performance metrics”
 - Metrics are often unachievable (e.g., children must timely receive certain services, despite shortage of providers)
 - Metrics beyond the control of the state agency (e.g., % of children placed in family homes)
- Displacing the role of the legislature
 - Requirements that the State build-out new program(s) or service(s), regardless of whether the legislature has appropriated the necessary funds for new program(s) or service(s)
 - Imposition of a court “monitor” to oversee the State’s child welfare system
- Millions of dollars in attorney’s fees for Plaintiffs’ counsel
- States are rarely able to exit court oversight in less than 10 years, and several States have remained subject to these decrees for 25+ years

Litigation v. Settlement: the Costs and Burdens of Litigating

- 3-10 years of litigation, with several attorneys (either AAGs or outside counsel, or both) assigned to spending a significant portion of their time defending the case, which will cost millions of dollars
- Enormously burdensome discovery demands that require hundreds or thousands of attorney hours and divert agency staff from day-to-day operations serving children (Defendants usually must produce millions of pages of documents and agency staff is usually subject to 10-30 depositions)
- Hundreds of thousands of dollars for an e-discovery vendor
- Hundreds of thousands of dollars for expert witnesses
- Negative press throughout the litigation

Litigation v. Settlement: the Costs and Burdens of Settling

- 5-30+ years of court supervision and litigating disputes arising from the consent decree
- Several attorneys assigned to spending a significant portion of their time helping the State understand the decree, comply with the decree, and resolve or litigate the many disputes that invariably arise from the decree
- Millions or tens of millions of dollars to implement program changes required by the consent decree
- Millions or tens of millions of dollars on data improvements to track compliance
- Millions of dollars on a “monitor”
- Data/information demands from monitor/court diverting agency and staff from day-to-day operations serving children
- Negative press any time the plaintiffs allege noncompliance with the decree

Moving to Vacate or Modify Existing Consent Decrees

- Federal Rule of Civil Procedure 60: a court may grant relief from an order if “the judgment has been satisfied, released, or discharged,” “applying it prospectively is no longer equitable,” or “any other reason that justifies relief”
- *Horne v. Flores*, 557 U.S. 433 (2009): Vacatur of an order may be warranted if there is no “ongoing violation of federal law” and a “durable remedy has been implemented,” even if the underlying injunction has not been satisfied
- Even before *Horne*, modification of a consent decree could be justified by a significant change in factual circumstances, a significant change in the law, the consent decree having become unworkable because of unforeseen obstacles, or if enforcement would be detrimental to the public interest