

**CHILDREN IN NEED OF SERVICES: TOWARD A MORE COHERENT APPROACH TO PROTECTING NEW JERSEY'S CHILDREN AND FAMILIES**

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“There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they grow up in peace.”

Kofi A. Annan

Secretary-General of the United Nations<sup>1</sup>

## I. INTRODUCTION

Every year, millions of children in the United States are brought to the attention of state and local entities as a result of claims of abuse or neglect. Billions of dollars are spent at the federal, state, and local level in an effort to address this pervasive problem. In state fiscal year 2012, the most recent year for which figures are readily available, the United States spent nearly \$30 billion on child welfare initiatives, and the State of New Jersey spent more than \$962 million.<sup>2</sup> That same year, state and local child protective services agencies across the United States received an estimated 3.4 million referrals regarding children being abused or neglected.<sup>3</sup>

“Child maltreatment,” a term which is deemed to include physical abuse, sexual abuse, psychological abuse, and neglect, has been described by the Centers for Disease Control and Prevention as “a serious and prevalent public health problem in the United States.”<sup>4</sup> Based on a unique count of victims for 2012, rather than using numbers in which a single victim may be counted for multiple forms of maltreatment, nationwide there were almost 700,000 children who were victims of maltreatment, or 9.2 children per every 1,000 children.<sup>5</sup>

Child maltreatment remains a persistent issue in New Jersey as

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<sup>1</sup> The State of the World’s Children 2000; UNICEF, <http://www.unicef.org/sowc00/foreword.htm> (last visited September 16, 2015).

<sup>2</sup> Kerry DeVooght, Megan Fletcher, & Hope Cooper, *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2012: CHILD TRENDS* (2014), <http://www.childtrends.org/wp-content/uploads/2014/09/2014-47ChildWelfareSpending2012.pdf> (last visited September 16, 2015); *Id.* at 52.

<sup>3</sup> *Child Maltreatment: Facts at a Glance*, CTR.’S FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR INJURY PREVENTION & CONTROL: DIV. OF VIOLENCE PREVENTION (2014), <http://cdc.gov/violenceprevention/pdf/childmaltreatment-facts-at-a-glance.pdf> (last visited Sept. 16, 2015).

<sup>4</sup> *Cost of Child Abuse and Neglect Rival Other Major Public Health Problems*, CTR.’S FOR DISEASE CONTROL AND PREVENTION, NAT’L CTR. FOR INJURY PREVENTION & CONTROL: DIV. OF VIOLENCE PREVENTION (Jan. 14, 2014), <http://www.cdc.gov/violenceprevention/childmaltreatment/economiccost.html> (last visited September 16, 2015).

<sup>5</sup> *Id.*

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well. According to the New Jersey Task Force on Child Abuse and Neglect, in 2012, 9,250 children were substantiated as victims of child maltreatment in New Jersey, 74% of those resulting from neglect.<sup>6</sup> During that same time period, 16 child fatalities occurred in New Jersey resulting from child maltreatment; a rate of 0.79 per 100,000 children.<sup>7</sup> In comparison, the national rate is 2.20 per 100,000 children.<sup>8</sup> Although rates for child maltreatment in New Jersey are approximately half of the national rate, they began to increase in 2011.<sup>9</sup>

Nationwide, the various legislative initiatives in any given year indicate that legislators are aware of the many issues surrounding child maltreatment, and also suggest a perception that the statutory provisions of most states could be improved. According to the National Conference of State Legislatures, in 2015 alone, 39 states introduced more than 120 pieces of legislation regarding child maltreatment.<sup>10</sup> New Jersey is among the states in which bills concerning child maltreatment were introduced during recent legislative sessions.<sup>11</sup>

The New Jersey Law Revision Commission (“NJLRC” or “Commission”) has periodically focused on the challenges posed by this area of the law as a result of its monitoring of New Jersey case law. The NJLRC, an independent Legislative commission, serves the citizens of New Jersey and all branches of the State government by identifying areas of New Jersey law that can be improved by changes to New Jersey’s statutes.<sup>12</sup> The Commission is required by statute to “promote and encourage the clarification and simplification of the

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<sup>6</sup> NEW JERSEY TASK FORCE ON CHILD ABUSE AND NEGLECT, SUPPORTING STRONG FAMILIES AND COMMUNITIES IN NEW JERSEY, 2014 – 2017 4 (2014). <http://www.state.nj.us/dcf/news/reportsnewsletters/taskforce/SupportingStrongFamiliesandCommunitiesinNew%20Jersey.pdf>.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 4.

<sup>9</sup> *Id.*

<sup>10</sup> *Injury Prevention Legislation Database*, NAT’L CONFERENCE OF STATE LEGISLATURES (Mar. 10, 2015), <http://www.ncsl.org/research/health/injury-prevention-legislation-database.aspx> (last visited on Sept. 17, 2015) (searched all States for “Child Mistreatment”).

<sup>11</sup> *See, e.g.*, A278, 216th Leg., 2014 Sess. (N.J. 2014) (proposing to authorize the Division of Children and Families to disclose child abuse and neglect information to religious institutions); New Jersey Legislature, Bill Search by Keyword, Searched “child abuse”, <http://www.njleg.state.nj.us/bills/BillsByKeyword.asp> (last visited September 21, 2015).

<sup>12</sup> N.J. LAW REVISION COMM’N ANN. REP. (2014), <http://lawrev.state.nj.us/web%20for%20site/who%20we%20are%20and%20what%20we%20do%200514.pdf> (last visited September 17, 2015).

law . . . and its better adaptation to present social needs, secure the better administration of justice and carry on scholarly legal research and work."<sup>13</sup>

When the NJRLC began working in this area of the law, its opinion was that the current body of law regarding child abuse and neglect, children in need of services, and the termination of parental rights, was adopted piecemeal over a long period of time.<sup>14</sup> The relevant law is divided between two titles of the statutes, and is not – even within those titles – arranged in a coherent order.<sup>15</sup> As a result, it can be cumbersome and difficult to take the action needed to protect children.<sup>16</sup>

The basic law regarding child abuse and neglect is contained in Title 9 and may be found, essentially, at N.J.S.A. § 9:6-8.10 through N.J.S.A. § 9:6-8.70. Child abuse and neglect cases, however, may also involve the authority to protect “children in need of services” and, as more fully discussed below, the courts have determined that such authority is found in Title 30.<sup>17</sup> Child abuse and neglect cases arising under Title 9, and involving the placement of children outside of their homes, require consideration of whether the court and the Department of Children and Families complied with the law pertaining to the permanent placement of the children, which is found in Title 30.<sup>18</sup> These cases may result in the termination of parental rights, the provisions for which are also found in Title 30.<sup>19</sup>

There are also problems of organization within the Title 9 provisions focusing on child abuse and neglect. The bulk of the material regarding child abuse reports is found in N.J.S.A. § 9:6-8.10 through N.J.S.A. § 9:6-8.12, but the language concerning records of those reports, the reports to the prosecutor, and the expungement of unfounded reports, are found in other sections of the statute.<sup>20</sup> Similarly, the statutory authority for emergency action by medical

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<sup>13</sup> N.J. STAT. ANN. § 1:12A-8 (West 2015).

<sup>14</sup> N.J. LAW REVISION COMM’N, FINAL REPORT RELATING TO TITLE 9 – CHILD ABUSE AND NEGLECT, at 2 (July 17 2014), <http://www.lawrev.state.nj.us/child/t9childabuseandneglectFR071714.doc> [hereinafter “N.J. Law Revision Comm’n”].

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> N.J. Dep’t of Children & Families, Div. of Youth & Family Servs. v. I.S., 214 N.J. 8, 13-14 (2013), *cert. denied sub nom.* I.S. v. N.J. Dep’t of Children & Families, Div. of Youth & Family Servs., 134 U.S. 529 (2013); *see also*, N.J. STAT. ANN. § 30:4C-12 (West 2015).

<sup>18</sup> N.J. STAT. ANN. §§ 30:4C-11.1-11.4 (West 2015).

<sup>19</sup> N.J. STAT. ANN. §§ 30:4C-15-15.4 (West 2015).

<sup>20</sup> N.J. STAT. ANN. §§ 9:6-8.40, 9:6-8.36a, and 9:6-8.40a (West 2015).

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personnel is not located near the authority for emergency action by law enforcement, or the authority for emergency action by the Division.<sup>21</sup>

Structurally, the language that pertains to the origination of a child abuse or neglect proceeding is found at N.J.S.A. § 9:6-8.33 and N.J.S.A. § 9:8-6.34, but the law pertaining to counsel is found at N.J.S.A. § 9:6-8.23, and visitation requirements are located in N.J.S.A. § 9:6-19.<sup>22</sup> The requirement to search for the relatives of a child taken into custody at the commencement of a child abuse and neglect action is not even contained in Title 9, but is instead found in Title 30.<sup>23</sup> In addition, certain provisions remain in the current law even though they no longer reflect current practice, and many statutory provisions overlap.<sup>24</sup>

As a further complication, the existing statutory language, as a result of both its structure and its content, has caused the courts to struggle to interpret the definition of child abuse and neglect in a way that protects the interests of parents and refrains from inappropriately stigmatizing those whose actions do not warrant listing in the child abuse registry, for example, while assuring that children are provided with the services they need.<sup>25</sup>

In July 2014, the NJLRC released a Final Report Relating to Title 9 – Child Abuse and Neglect, concluding the work that it began in 2012 and recommending changes to the law.<sup>26</sup> The proposed revisions endeavor to provide a single coherent structure that organizes all of the law relating to child abuse and neglect, children in need of services, and the termination of parental rights.<sup>27</sup>

The revisions simplify the statutory provisions, avoiding repetition, overlap, and conflict among sections.<sup>28</sup> Child abuse and neglect are defined clearly and concisely, and in a way that reflects settled court decisions.<sup>29</sup> In addition, the proposed revisions permit a single court action joining all claims and including all remedies to

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<sup>21</sup> N.J. STAT. ANN. §§ 9:6-8.16, 9:6-8.17, 9:6-8.20, 9:6-8.27, 9:6-8.29, 9:6-8.33, and 9:6-8.30 (West 2015).

<sup>22</sup> N.J. STAT. ANN. §§ 9:6-8.16, 9:6-8.17, 9:6-8.20, 9:6-8.27, 9:6-8.29, 9:6-8.33, and 9:6-8.30 (West 2015).

<sup>23</sup> N.J. STAT. ANN. § 30:4C-12.1 (West 2015).

<sup>24</sup> N.J. LAW REVISION COMM'N, *supra* note 14.

<sup>25</sup> N.J. LAW REVISION COMM'N, *supra* note 14.

<sup>26</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2.

<sup>27</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2.

<sup>28</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2.

<sup>29</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2, 5.

protect a child.<sup>30</sup> By joining claims based on child abuse and neglect with claims that a child is in need of services, the revised law prevents difficult issues as to culpability from delaying or preventing the provision of needed services to a child.<sup>31</sup>

The Commission's proposal also endeavored to reorganize the statutes relating to actions to protect children in a temporal order, based on the types of circumstances in which these cases arise, and the natural progression of a case. Following the general provisions and definitions, the Final Report begins with the statutory language pertaining to reports of child abuse and neglect and the manner in which those reports are handled (proposed sections 9:27-3 through 9:27-9). The next provisions address emergency actions taken before a case is filed (proposed sections 9:27-10 through 9:27-12). Subsequent provisions deal with legal proceedings, beginning with the filing of the case and moving through its disposition (proposed sections 9:27-14 through 9:27-44). Separate chapters thereafter cover the issues of permanency planning and the termination of parental rights.

The consolidation of the statutory material into an organized and logically arranged whole is more than a matter of convenience; it creates a process that will serve the needs of children by allowing the Department of Children and Families to most efficiently provide necessary aid without unnecessary procedural complications.

The revisions proposed by the NJLRC benefited from the help of many interested parties. Representatives from the Department of Children and Families, the Office of the Public Defender, Parental Representation Program, the Office of the Law Guardian, Legal Services of New Jersey, Court Appointed Special Advocates for Children, and members of the public provided comments and suggestions through oral and written submissions and at meetings, including public meetings of the Commission.<sup>32</sup> The Commission incorporated, in whole or in part, the vast majority of the suggestions received during the course of its work in this area. The generosity of commenters willing to share their knowledge, experience, and expertise greatly improved both the process and the drafting. The Final Report embodies much of that input and, although the Report has not been formally approved by any agency or organization, the Commission hopes that it responds to many of

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<sup>30</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 15.

<sup>31</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 15-16.

<sup>32</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2.

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the issues raised by various stakeholders throughout the process.<sup>33</sup>

The comments and suggestions referred to in the following pages represent only a small portion of the valuable input received by the Commission during the course of its work on this project, and are included to serve as examples of the types of issues raised for Commission consideration.

This article is intended both to provide a window into the Commission's process, and to highlight some of the key modifications proposed by the Commission in its Final Report in the area of child abuse and neglect. The following pages discuss the NJLRC consideration of the modification of those statutes to: (1) revise the definition of child abuse and neglect; (2) allow the provision of services in cases in which neither abuse nor neglect is demonstrated by the record; (3) provide for the unification of services; and (4) make other changes to the statutory language including the provisions dealing with access to records of child abuse and neglect proceedings, renaming the Law Guardian to improve the clarity of the statutes and avoid confusion, and bringing to the attention of the Legislature the unworkable deadline for dispositional hearings.

Where the Commission did propose changes to the current statutes, the proposed language appears below in the format in which it appears in the Commission's Final Report – as draft statutory text followed by an explanatory comment. Those unfamiliar with the work of the Commission should note that it is not self-executing. The Commission's recommendations will not alter the law of New Jersey unless and until enacted by the Legislature.

## II. PROPOSED REVISIONS

### *A. Revised Definition of Child Abuse and Neglect*

The Commission considered, on a number of occasions, the components of the critical definition of child abuse and neglect. The Commission acknowledged the need to update the statutory definition of child abuse as a result of a concern – shared by both the Commission and commenters – that the current definition does not give the courts sufficient guidance. The Commission delayed the release of early draft versions of its Report because of its focus on the need to obtain feedback from various stakeholders, which

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<sup>33</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2.

stands as evidence of the care taken by the Commission in reworking the language.

As an initial matter, the Commission decided that the key definition of child abuse or neglect should be in a separate section from the other definitions and that, although it largely incorporated the components of the existing statute, it should be revised and restructured.<sup>34</sup> Clearly, one of the challenges faced by the Commission in this area was the need to craft a definition of child abuse and neglect that reflected the guidance provided in the case law, without unduly limiting the parents' or guardians' role in guiding and disciplining their child. The definition was revisited and modified numerous times throughout the process as a part of the effort to narrow its scope to more closely reflect the types of actions and omissions identified by the New Jersey Supreme Court as constituting abuse or neglect.

Early in the process of the Commission's work, real tension existed between interested stakeholders regarding the definition of child abuse and neglect. On one side were parties who sought a broad definition so that the Division would be clearly empowered to help children in need in the wide variety of circumstances that occur in this area. On the other side were those who unquestionably shared the same underlying concern for children, but who also expressed reservations about an expansive definition that would improperly stigmatize as child abusers individuals who should not be so identified.

If the "Division can prove abuse or neglect, that finding has 'significant consequences.'"<sup>35</sup> These consequences may include the entry of a dispositional order placing the child in the custody of "a relative or another suitable person for a substantial period of time" and the commencement of an action to terminate parental rights.<sup>36</sup> In addition, when an allegation of child abuse or neglect is substantiated, the name of the person found to have committed the abuse, as well as other identifying information, is entered into a Central Registry.<sup>37</sup> "Although those records are kept confidential, they may be disclosed, on written request, to doctors, courts, child welfare agencies, employers who are required by law 'to consider

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<sup>34</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2, 5.

<sup>35</sup> New Jersey Dep't of Children & Families, Div. of Youth & Family Servs. v. A.L., 59 A.3d 576, 590 (2013) (quoting N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 619 (App. Div. 2010)).

<sup>36</sup> *Id.* at 590.

<sup>37</sup> *Id.*

child abuse or neglect information when conducting a background check or employment-related screening,' and others."<sup>38</sup>

As discussed in more detail below, the creation of a statutory section authorizing the provision of services for children in need, even in the absence of a finding of abuse or neglect, enabled the Commission to cut the Gordian knot, crafting a consensus position generally acceptable to stakeholders on all sides of the issue. The assistance of the various commenters was invaluable in crafting the language that ultimately appeared in the Commission's Final Report, which is shown below.

Although not specific to abuse and neglect, it is noted that one of the initial changes made to the definitions generally, in response to the suggestion of the Office of Law Guardian, was the expansion of the definition of "child" to include individuals over the age of 18 who were still receiving services from the Division.<sup>39</sup> This was done because there are children who remain under the oversight of the Division at and beyond the age of 18, and the current statutes deal only with children until they reach that age. Without such a change, there would be no law governing issues such as the placement or disposition of matters pertaining to these individuals.

9:27-1. "Child abuse or neglect" defined

a. "Child abuse or neglect" means an action or failure to act by a parent or other custodian that creates a risk to the child in that:

- (1) the parent or other custodian knows it will cause injury to the child;
- (2) the parent or other custodian knows it creates a substantial and unjustifiable risk of injury to the child; or
- (3) the parent or other custodian acts with grossly negligent disregard of a substantial and unjustifiable risk of injury to the child.

b. "Child abuse or neglect" includes:

- (1) committing or allowing one or more sexual offenses or acts of sexual abuse against the child including (A) the enticement or coercion of any child to engage in, or assist in sexually explicit conduct or simulation of such conduct for the purpose of sexual stimulation of either that person or another person; or (B) sexual conduct including molestation, prostitution, other forms of sexual exploitation of children;
- (2) infliction of excessive physical punishment or restraint; and
- (3) failing to supply the child with adequate food, clothing, shelter, education, or medical care though able to do so.

c. "Child abuse or neglect" does not include:

- (1) good faith treatment by spiritual means alone through prayer in accordance with the tenets and practices of a recognized church or religious denomination by a duly accredited practitioner thereof; or
- (2) inability to provide adequate food, clothing, shelter, education, or

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<sup>38</sup> See N.J. STAT. ANN. § 9:6–8.10a(a) (West 2015); *Id.*

<sup>39</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 2.

medical care due to a lack of financial means.

d. For purposes of this section: "Injury" means significant or protracted impairment of physical, mental, or emotional health.

Source: 9:6-8.21; 9:6-8.9

#### COMMENT

The definition of child abuse is derived from 9:6-8.21 and 9:6-8.9 which are substantively identical to each other.

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The definition has been updated to reflect the Supreme Court's opinion in *DYFS v. T.B.*, 207 N.J. 294 (2011) which clarifies the meaning of "child abuse and neglect" and requires more than ordinary negligence as the basis of a finding of neglect. Subsection b.(2) uses the phrase "physical punishment" which is more inclusive and covers everything included in the old phrase "corporal punishment."

The phrase, "parent or other custodian" is defined in section 9:26-1 to include every kind of custodian of a child.<sup>40</sup>

During the course of drafting a proposal for revised language, the Commission was guided by the position taken by the New Jersey Supreme Court in *Dep't of Children & Families, Div. of Youth & Family Servs. v. T.B.*<sup>41</sup> In that case, the Court quoted its earlier opinion in *G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs.*,<sup>42</sup> wherein it said, with regard to the current definition of child abuse and neglect, that "if the Legislature intended to codify a negligence standard, it would have used the phrase 'failure to exercise reasonable care.' . . . We think the phrase 'failure to exercise a minimum degree of care' was chosen to capture a middle standard."<sup>43</sup>

The phrase "minimum degree of care" denotes a lesser burden on the actor than a duty of ordinary care. If a lesser measure of care is required of an actor, then something more than ordinary negligence is required to hold the actor liable. *The most logical higher measure of neglect is found in conduct that is grossly negligent because it is willful or wanton. Therefore, we believe the phrase "minimum degree of care" refers to conduct that is grossly or wantonly negligent, but not necessarily intentional.*<sup>44</sup>

The Court in *T.B.* went on to explain that previous cases had recognized that the difference "between merely negligent conduct and wanton and willful misconduct cannot be described with

<sup>40</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 3.

<sup>41</sup> *Dept. of Children & Families, Div. of Youth & Family Servs. v. T.B.*, 207 N.J. 294 (2011).

<sup>42</sup> *G.S. v. Dep't of Human Servs., Div. of Youth & Family Servs.*, 157 N.J. 161 (1999) (quoting *G.S. v. Dep't of Children & Families, Div. of Youth & Family Servs.*, 157 N.J. 161, 177 (1999)).

<sup>43</sup> *T.B.*, 207 N.J. at 305.

<sup>44</sup> *Id.* (emphasis in original).

mathematical precision.”<sup>45</sup> Instead, like “many legal characterizations, willful misconduct is not immutably defined but takes its meaning from the context and purpose of its use.’ . . . The label turns on an evaluation of the seriousness of the actor’s misconduct. Although it is clear that the phrase implies more than simple negligence, it can apply to situations ranging from ‘slight inadvertence to malicious purpose to inflict injury.’”<sup>46</sup>

Essentially, the concept of willful and wanton misconduct implies that a person has acted with reckless disregard for the safety of others . . . Where an ordinary reasonable person would understand that a situation poses dangerous risks and acts without regard for the potentially serious consequences, the law holds him responsible for the injuries he causes . . . Thus, under a wanton and willful negligence standard, a person is liable for the foreseeable consequences of her actions, regardless of whether she actually intended to cause injury.<sup>47</sup>

The *T.B.* Court noted that “[o]ver a decade has passed since our decision in *G.S.* In that time, the Legislature has taken no action to alter or amend the language of section (c)(4)(b). We take it from that acquiescence that our interpretation of the statute is consonant with the legislative scheme.”<sup>48</sup>

In addition to proposing modifications to the statutory language to reflect the legal standard articulated by the New Jersey Supreme Court, the Commission drafted a number of other modifications in response to both case law and commenter recommendations, some of which are identified below.

With regard to subsection a. of the definition of child abuse and neglect, the Commission and those who commented on this project considered whether the word “risk” in “risk of injury” should include a qualifier in the form of “substantial risk,” and ultimately decided that such a qualifier was appropriate.<sup>49</sup> At the request of the State of New Jersey Office of the Public Defender, Office of Parental Representation (OPR), the Commission also considered whether the definition in that subsection should include the concept of “imminence.” The OPR referred to appellate case law emphasizing a temporal element, and suggested that both risk and injury should be imminent at the time of the finding.<sup>50</sup> Legal Services of New

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<sup>45</sup> *Id.* at 305-06.

<sup>46</sup> *Id.* at 306.

<sup>47</sup> *Id.*

<sup>48</sup> *T.B.*, 207 N.J. at 307.

<sup>49</sup> Minutes of the Meeting of the New Jersey Law Revision Comm’n, (May 22, 2014), <http://www.lawrev.state.nj.us/minutes/minutes%202014/MIN052214.pdf>; N.J. LAW REVISION COMM’N, *supra* note 14.

<sup>50</sup> Minutes of the Meeting of the New Jersey Law Revision Comm’n, at 2 (May 22, 2014), <http://www.lawrev.state.nj.us/minutes/minutes%202014/MIN052214.pdf>.

Jersey (“LSNJ”) joined in the suggestion that the concept of imminence might be appropriate for inclusion in the definition since it described timing in the context of assessing injury.<sup>51</sup> In support of its position, LSNJ noted that past issues, concerns or behaviors do not necessarily indicate a future risk of harm and that, without a temporal element, anyone with a record of past questionable conduct could be characterized as meeting the criteria for abuse and neglect. Past drug use was given as one example.<sup>52</sup> Ultimately, it was determined that there is little justification for court involvement if there is no risk to a child, and the Commission’s hesitance to propose amendments that could result in a less protective statute resulted in the omission of the temporal element, using a term like “imminent” or “ongoing,” from the definition.<sup>53</sup>

The Commission, with the assistance of commenters, determined that the reference to a “continuing risk of injury” was not necessary and removed it from the draft. As with the issue of “imminent” harm, the newly created category of “child in need of services” provides that a child can receive services without a finding of neglect or abuse, and obviates the need for inclusion of “continuing risk of injury.”<sup>54</sup>

A number of other recommendations from the Department of Children and Families and the Office of the Law Guardian were considered and, as a result of these recommendations, subsection a.(3) was modified to substitute “grossly negligent” for “reckless.”<sup>55</sup> In addition, to address situations in which parents are not, for example, providing needed medical care, the Commission added language – ultimately not to this section but as subsection e. in 9:27-31 – stating that “[t]he court shall not order disposition for a child in need of services over the objection of the child’s parents unless that disposition is necessary to prevent harm to the child.”<sup>56</sup> The Commission indicated that while it was not clear what kinds of services might be provided against the will of the parents, any action taken would be based on the needs of the child. The Commission hoped that having such protective language in place would increase

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<sup>51</sup> *Supra* note 50, at 2.

<sup>52</sup> Minutes of the Meeting of the New Jersey Law Revision Comm’n, at 2 (June 19, 2014), <http://www.lawrev.state.nj.us/minutes/minutes%202014/MIN061914.pdf>.

<sup>53</sup> *Id.* at 2.

<sup>54</sup> *Id.*

<sup>55</sup> N.J. LAW REVISION COMM’N, *supra* note 14, at 5-6.

<sup>56</sup> N.J. LAW REVISION COMM’N, *supra* note 14, at 24.

legislative comfort with the proposals contained in the Final Report.

The issue of corporal or physical punishment, found in subsection b., also presented drafting challenges. During the initial phase of the Commission's work on this issue, a concern was raised because the draft then in circulation contained language referring to "excessive corporal punishment or using excessive physical restraint or punishment not reasonably related to protection of the child or others or property" as child abuse or neglect. Since the last item in the list – punishment – did not make reference to "excessive" or "physical," it was suggested that arguably, taking away a child's cell phone could result in a violation of the provision as then drafted.<sup>57</sup>

In an effort to streamline the language, the Commission also considered whether a statutory reference to corporal punishment would include physical punishment and whether those two were fundamentally referring to the same thing. Commenters identified the working definition of "excessive corporal punishment" established by the New Jersey Supreme Court in *Div. of Youth & Fam. Servs. v. K.A.*<sup>58</sup> In response, the Commission determined that use of the term "excessive physical punishment" is intended to include "excessive corporal punishment" as adopted in case law, and that the Commission adopted the court's determination in that case and expanded it to include excessive physical punishment.<sup>59</sup>

With regard to the language found in subsection (b)(3) above, indicating that child abuse or neglect could consist of "[f]ailing to supply the child with adequate food, clothing, shelter, education, or medical care," the Commission carefully considered the manner in which the language should be drafted. Mindful of the case law clarifying that a mere lack of financial means on the part of a parent or guardian, without more, does not constitute child abuse, the Commission was also aware that the fact that a parent or guardian could supply certain things did not guarantee that they would.<sup>60</sup> The Commission was concerned that any language crafted to address this issue should not insulate parents who were failing to provide for necessities as a result of a lack of effort, rather than a lack of means.<sup>61</sup>

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<sup>57</sup> Minutes of the Meeting of the N.J. Law Revision Comm'n, at 2 (Oct. 17, 2013), <http://www.lawrev.state.nj.us/minutes/minutes%202013/MIN101713.pdf>.

<sup>58</sup> Minutes of the Meeting of the N.J. Law Revision Comm'n, at 5 (Nov. 21, 2013), <http://www.lawrev.state.nj.us/minutes/minutes%202013/MIN112113.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> *Supra* note 58; *see also supra* note 50.

<sup>61</sup> *Supra* note 58.

The Appellate Division addressed these issues in *New Jersey Div. of Child Prot. & Permanency v. L.W.*<sup>62</sup> It explained that the Family Part Judge “did not find that L.W. was financially [able] to provide shelter for her children but elected not to do so.”<sup>63</sup> Instead, “he found that she had ‘engaged in poor planning’ which led her family into homelessness.”<sup>64</sup> The court in *L.W.* contrasted that case with the earlier case of *N.J. Div. of Youth and Family Servs. v. K.M.*,<sup>65</sup> in which the court found neglect where the parents were “financially and physically capable of providing adequate food, clothing and shelter for their children, but failed to do so despite Division assistance.”<sup>66</sup> The Commission ultimately determined that the interplay between this section and the new section pertaining to a child in need of services would adequately address the issue, rendering it moot.<sup>67</sup>

Commenters also recommended the inclusion of a separate subsection c., to identify acts and omissions that do not constitute “child abuse or neglect.”<sup>68</sup> Although the courts have characterized it as “well-settled” in the law “that poverty alone is not a basis for a finding of abuse or neglect,” commenters emphasized that language to this effect should be included in the Commission’s draft since this issue has been litigated many times in the past, and will likely continue to be re-litigated.<sup>69</sup> As the drafting process neared its end, the Commission modified the language of this section so that the references to “adequate food, clothing, shelter, education, or medical care” in subsection b.(3) and c.(2) mirrored each other for the sake of consistency.<sup>70</sup>

Attempting to provide adequate guidance to the courts, and to accurately reflect the developed body of case law, the Commission also endeavored to avoid crafting overly ornate language that could hinder interpretation and application of the new provisions. Supported by case studies and data, a concerned citizen suggested

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<sup>62</sup> *N.J. Div. of Child Prot. & Permanency v. L.W.*, 87 A.3d 279 (N.J. Super. Ct. App. Div. 2014).

<sup>63</sup> *Id.* at 283.

<sup>64</sup> *Id.*

<sup>65</sup> *N.J. Div. of Youth and Family Servs. v. K.M.*, 136 N.J. 546 (1994).

<sup>66</sup> *Id.*

<sup>67</sup> *Supra* note 50.

<sup>68</sup> *Supra* note 58; N.J. LAW REVISION COMM’N, *supra* note 14, at 5-6.

<sup>69</sup> *N.J. Div. of Child Prot. & Permanency v. L.W.*, 87 A.3d 279, 283 (N.J. Super. Ct. App. Div. 2014) (App. Div. 2014) (citing *Doe v. G.D.*, 370 A.2d 27 (N.J. Super. Ct. App. Div. 1976), *aff’d sub. nom.*, 74 N.J. 196 (1977)); *supra* note 58.

<sup>70</sup> N.J. LAW REVISION COMM’N, *supra* note 14, at 5-6.

that “the definition of child abuse should include shaking, striking or spanking children under the age of two” because at that stage of cognitive development, children are unable to make a connection between their actions and the resulting adult response.<sup>71</sup> The negative effects of those actions, as well as an example of the instructional information provided by New Jersey hospitals to parents were submitted in support of the argument that parents in New Jersey “are not ignorant or uninformed about the effects of shaking, striking, or spanking young children,” making it fair to deem those actions child abuse or neglect.<sup>72</sup> In light of concerns about adding language that might inadvertently serve to limit the statute unnecessarily, the definition of child abuse was not modified to include this specific reference.

*B. Provision of Services in Cases in Which the Record Does Not Reveal Either Abuse or Neglect*

The proposal for new language pertaining to a child in need of services was drafted in response to the decision of the New Jersey Supreme Court in *N.J. Dep’t of Children & Families v. I.S.*<sup>73</sup> In that case, the Court held it permissible to provide services to a child without a finding of neglect or abuse, explaining that it addressed “the actions that courts may authorize under Title 9 and Title 30, and the services that the Division of Youth and Family Services . . . may offer to families in need under *N.J.S.A. 30:4C-12*.”<sup>74</sup>

The *I.S.* Court used that case to “address the proper application of the integrated and comprehensive means provided by the Legislature to the Division and the courts when confronting such challenging circumstances.”<sup>75</sup> Specifically, the Court discussed the manner in which it determined that the “Legislature intended to authorize the Division to secure services for children in need when services are clearly needed, and a parent is unable to provide for the children’s health and safety but does not consent to turning over care, custody, or supervision to the Division,” particularly in cases in which the Family Part is unable to make a finding on the record that the children were abused or neglected as defined under Title

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<sup>71</sup> Minutes of the Meeting of the N. J. Law Revision Comm’n, (March 21, 2013), <http://www.lawrev.state.nj.us/minutes/minutes%202013/MIN032113.pdf>.

<sup>72</sup> *Id.*

<sup>73</sup> *N.J. Dep’t of Children & Families, Div. of Youth & Family Servs. v. I.S.*, 214 N.J. 8 (2013), *cert. denied sub nom. I.S. v. N.J. Dep’t of Children & Families, Div. of Youth & Family Servs.*, 134 U.S. 529 (2013).

<sup>74</sup> *Id.* at 13-14.

<sup>75</sup> *Id.* at 14.

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“Title 9 allows the Division to become involved against the wishes of a parent when a child is abused or neglected” because the “State’s child-protection policy interest lies in authorizing immediate care, custody, and supervision of the child harmed or at risk of imminent harm.”<sup>77</sup> Where there is no finding of abuse or neglect, however, the New Jersey statutes do not permit the “continued, indefinite exercise of jurisdiction by the family court” and the Title 9 action must be dismissed.<sup>78</sup>

“[W]hen the Division brings its complaint also under the authority granted to it under Title 30, the court’s jurisdiction may continue.”<sup>79</sup> “Legislative authorization to the Division under Title 30 enables the provision of services to children in need. There are two means provided: *N.J.S.A. 30:4C-11* and *-12*. *N.J.S.A. 30:4C-11* (Section 11) applies when the parent or parents voluntarily consent to the Division’s assistance . . . *N.J.S.A. 30:4C-12* (Section 12) applies when there is no voluntary parental consent to Division care and supervision.”<sup>80</sup>

The *I.S.* Court explained that the purpose of *N.J.S.A. § 30:4C-12* is to protect children, and that the statute is “an acknowledged ‘additional tool afforded [to] the Division to discern the most appropriate course of action for a child and his or her family in need of the Division’s assistance,’” and quoted *N.J. Division of Youth & Family Services v. T.S.*, describing its purpose as the “protection of children from harm when the parents have failed or it is reasonably feared that they will.”<sup>81</sup>

Regardless of whether a finding of abuse or neglect is established under Title 9, the Legislature intended to permit the Division to obtain custody, care, or supervision of a child under Section 12:

A dismissal of a Title 9 action . . . does not foreclose further intervention by the Division pursuant to *N.J.S.A. 30:4C-12* to protect a child who, although not abused or neglected, is in need of services to ensure [his or her] health and safety. The Legislature reformed the child welfare system to “protect children from abuse and neglect” by providing “services to at-risk children and families in order to prevent harm to their children.” . . .

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *I.S.*, 214 N.J. at 14.

<sup>80</sup> *Id.*

<sup>81</sup> *N.J. Div. of Youth & Family Servs. v. T.S.*, 42 A.3d 942, 949 (N.J. Super Ct. App. Div. 2012) (quoting *N.J. Div. of Youth & Family Servs. v. J.C.*, 423 N.J. Super. 259, 267-68 (N.J. Super Ct. App. Div. 2011)); *I.S.*, 214 N.J. at 14 (citing *T.S.*, 42 A.3d at 949).

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In doing that, the Legislature recognized that “the safety of children must always be paramount.”<sup>82</sup>

The Commission’s proposal to modify the statute in accordance with the Court’s determination in *I.S.* allows for a somewhat narrower view of neglect and abuse, while also authorizing the provision of services to the broad range of children who need them.

9:27-2. “Child in need of services” defined

For purposes of this act, “child in need of services” means a child whose health or safety is in danger and that danger can be prevented or ameliorated by services that the Division can supply.

Source: New.

## COMMENT

This definition in this section is derived from the Supreme Court opinion in *DYFS v. I.S.*, 214 N.J. 8 (2013). That case identified a basis for a court to order the provision of Division service without a finding of child abuse or neglect.<sup>83</sup>

In response to concerns raised by commenters, the Commission worked to tailor the language pertaining to a child in need of services in an effort to be clear about the circumstances under which the Division of Child Protection and Permanency (DCCP, formerly DYFS) can engage with a family absent an allegation of abuse or neglect.<sup>84</sup>

The Commission’s Final Report also eliminates the Title 30 references (now found in N.J.S.A. §§ 9:30-1 and 9:30-2) to an “abandoned child.” The Commission determined, with the assistance of commenters, that a special category was no longer needed for a child who does not have parents, and that such a child would be included within the purview of the “child in need of services” provisions.<sup>85</sup>

*C. Unification of Services in Child Abuse and Neglect Cases*

In addition to the changes described above, the language of the proposed statutory section shown below brings an action for a child “in need of services” into the same proceeding as that for child abuse and neglect. Presently, an action for a child “in need of services” is

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<sup>82</sup> *I.S.*, 214 N.J. at 33 (quoting *T.S.*, 42 A.3d at 955).

<sup>83</sup> N.J. LAW REVISION COMM’N, *supra* note 14, at 6.

<sup>84</sup> *Supra* note 57, at 2.

<sup>85</sup> *Supra* note 57, at 2.

found in Title 30 and it is not clear that the existing Title 9 and Title 30 actions can be joined effectively. As a practical matter, however, they need to be joined. The focus of both must be on providing for the needs of the child. In some instances, that will mean identifying actions of a parent that created a problem requiring intervention, while in others that will not be the case. Pursuant to the Commission's proposed section, however, a single proceeding can provide for, and address the needs of the child, regardless of how the facts indicate the problem arose or what sort of assistance is required.

The Commission's proposal for a unified action is not without precedent. New Jersey's courts have periodically called for the Legislature to combine the provisions of Title 9 and Title 30. By way of example, the Appellate Division in the *I.S.* case noted the "parallel but not necessarily 'congruent tracks of Title 9 and Title 30 proceedings[,]'" which prompted the Supreme Court's suggestion that the Legislature "combine both avenues of child advocacy under a single title [.]"<sup>86</sup> The Commission's proposal to combine these provisions received considerable support during the course of its drafting process and is as follows:

9:27-14. Originating child abuse or neglect or child in need of services proceeding

- a. A proceeding to determine whether a child is abused or neglected or in need of services may be commenced by the Division or by any person with knowledge of facts substantiating the abuse or neglect or need of services.
- b. If the proceeding is commenced by a person other than the Division, the person shall:
  - (1) show that the abuse, neglect or need of services was reported to the Division, and
  - (2) make the Division a party to the proceeding.
- c. If the proceeding is commenced by a person other than the Division, on motion by the Division, the court may substitute the Division as plaintiff in the action.
- d. A proceeding to determine whether a child is abused or neglected or is in need of services shall be originated by the filing of an order to show cause and complaint alleging facts sufficient to establish that a child is abused or neglected or is in need of services.
- e. Where more than one child is the responsibility of the parent or other custodian, one complaint may allege that one or more children are

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<sup>86</sup> N.J. Div. of Youth & Family Servs. v. *I.S.*, 422 N.J. Super. 52, 72-73 (N.J. Super. Ct. App. Div. 2011), *opinion clarified on denial of reconsideration*, 423 N.J. Super. 124 (N.J. Super. Ct. App. Div. 2011), *aff'd in part, rev'd in part sub nom.*, N.J. Dep't of Children & Families, Div. of Youth & Family Servs. v. *I.S.*, 214 N.J. 8 (2013) (citing *In re Guardianship of G.S.*, III, 137 N.J. 168, 179 (1994)).

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abused or neglected or in need of services.

Source: 9:6-8.33, 9:8-6.34.

## COMMENT

Subsection a. is similar to 9:8-6.34 but subsection b. requires that if the proceeding is commenced by a private party, that person shall show that the matter has been reported to the Division and the Division shall be made a party to the proceeding. Other parties are required to report child neglect and abuse to the Division, and current practice is for the Division to investigate and determine whether there is a basis for a court action. Subsection c. is new; it provides that the court may substitute the Division as plaintiff in the action if the Division so requests. Subsections d. and e. are substantively identical to subsections a. and b. of 9:6-34. Subsection c. of 9:6-8.33 has been moved to the section allowing temporary removal of a child.

The section has been expanded by inclusion of actions to find that a child is in need of services. These actions, now under 30:4C-12, are often filed concurrently with actions alleging child abuse or neglect. This section simplifies that approach, providing a single set of procedures for both actions. An explicit provision allowing actions to determine whether a child is in need of services is new, as are the requirements as to private party actions in those cases.<sup>87</sup>

It is hoped that unifying the process for child protection actions in this way clarifies that all of the preliminary actions applicable in child abuse and neglect cases apply as well in “in need of services” cases. This will mean that all of the procedural provisions that now govern child abuse and neglect proceedings will apply also in “in need of services” cases (see, for example, proposed sections 9:27-26, 9:27-30, and 9:27-31). Further, some temporary protective actions will be available equally in both kinds of cases (see, for example, proposed sections 9:27-11 and 9:27-12).

In addition to reflecting the periodic suggestion of New Jersey courts, in some respects the Commission proposal for unification reinforces the intent of the Legislature as demonstrated by existing statutory language. The provisions concerning permanency, for example, now found in N.J.S.A. § 30:4C-11.1 through N.J.S.A. § 30:4C-11.4 and continued as proposed sections 9:28-1 through 9:28-3, are intended to apply equally to proceedings for child abuse and neglect or child in need of services as well as proceedings to terminate parental rights. As a result, it is important and logical that all are grouped together in the statute. Now, the child abuse and neglect provisions are found in Title 9, and the permanency provisions are contained in Title 30 along with the provisions on the termination of parental rights.

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<sup>87</sup> N.J. LAW REVISION COMM’N, *supra* note 14, at 15.

After the proposed language unifying the process, the Commission proposal places provisions concerning the termination of parental rights in a separate chapter following the chapters pertaining to child protection actions and permanency planning.<sup>88</sup> That placement accords with the fact that, in practice, termination proceedings occur at the conclusion of the child protection process. A petition for termination of parental rights still requires a separate action, but these last resort petitions often follow actions concerning child abuse or neglect or child in need of services. As a result, although there are important distinctions between child abuse and neglect proceedings and proceedings to terminate parental rights, there are connections between the two and overlapping factual considerations which make it most appropriate for the statutory language concerning the two distinct actions to be placed together, rather than in two separate titles.

9:30-1. Petition to terminate parental rights, conditions

a. A petition to terminate the parental rights of the parent or parents of a child under the age of 18, setting forth the facts in the case, shall be filed by the Division with the Family Part of the Chancery Division of the Superior Court in the county where the child is at the time of filing, when:

(1) the child has been placed in the care and custody of the Division by an order of disposition based on a finding of child abuse or neglect or that the child is in need of services and the Division determines that termination of parental rights is in the best interests of a child as defined in section 9:30-2; or

(2) the parent of a child has been convicted of endangering welfare of the child, of murder, aggravated manslaughter or manslaughter of another child of the parent; or to have committed, or attempted to commit, an assault that resulted, or could have resulted, in the significant bodily injury to the child or another child of the parent; or the parent has committed a similarly serious act which resulted, or could have resulted, in the death or significant bodily injury to the child or another child of the parent;

b. A petition shall be filed as soon as any one of the circumstances in subsections (a) of this section is established, but no later than when the child has been in placement for 15 of the most recent 22 months, unless the Division establishes an exception to the requirement to seek termination of parental rights in accordance with the requirement for permanency planning.

c. When a petition is filed, the Division shall initiate or continue efforts to identify, recruit, process and approve a qualified family to adopt the child.

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<sup>88</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 34-38.

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## COMMENT

This section is substantively similar to 30:4C-15, but subsection c. is derived from 30:4C-15.1. The final paragraph of 30:4C-15 which allowed private parties to file termination actions has been deleted.<sup>89</sup>

*D. Other Proposed Changes*

While the proposed statutory changes identified above represent areas in which the Commission spent considerable time during the course of its work on this subject, the Commission also proposed modifications both large and small in a number of other areas of the law in its Final Report.<sup>90</sup>

*i. Access to Records*

Early in the Commission's drafting process, commenters explained that there are situations in which access to the records concerning reports of child abuse would be of assistance to parents.<sup>91</sup> Presently, such access is not provided as of right, but an Administrative Law Judge can determine if a parent may have access.<sup>92</sup> It was suggested that it seems odd, from a due process perspective, for a person defending him or herself against child abuse allegations to be unable see the information received in support of the allegations.<sup>93</sup> The absence of a statutory provision permitting such access was particularly notable in light of the rather lengthy list of individuals and entities to which the statute did authorize release of the records.

9:27-4 Records of child abuse reports; confidentiality; disclosure

a. All records of child abuse reports made as required by this chapter, all information obtained by the Division in investigating such reports, and all reports of findings forwarded to the child abuse registry shall be kept confidential, and the Division shall disclose information only as expressly authorized in this section that is relevant to the purpose for which the information is required, and nothing may be disclosed which would likely endanger the life, safety, or physical or emotional well-being of a child or the life or safety of any other person or which may compromise the integrity of a Division investigation or a civil or criminal investigation or judicial proceeding. If the Division denies access to specific information on this basis, the requesting entity may seek

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<sup>89</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 34.

<sup>90</sup> N.J. LAW REVISION COMM'N, *supra* note 14.

<sup>91</sup> *Supra* note 57.

<sup>92</sup> *Supra* note 57.

<sup>93</sup> *Supra* note 57.

disclosure through the Chancery Division of the Superior Court.

Nothing in this act shall be construed to permit the disclosure of any information deemed confidential by Federal or State law.

b. The Division may, and upon written request shall, release the records and reports referred to in subsection a. including medical, mental health, school, drug or alcohol treatment and other records and information concerning a client, or parts thereof, to:

(1) A public or private child protective agency authorized to investigate a report of child abuse or neglect;

(2) A police or other law enforcement agency investigating a report of child abuse or neglect;

(3) A physician who is examining or treating a child reasonably suspected of having been abused or neglected, or an authorized member of the staff of a designated regional child abuse diagnostic and treatment center which is involved with a particular child who is the subject of the request;

(4) A physician, a hospital director or designate, a police officer or other person authorized to place a child in protective custody who is aiding a child reasonably suspected of having been abused or neglected and requires the information in order to determine whether to place the child in protective custody;

(5) An agency, whether public or private, including the Division, authorized to care for, treat, assess, evaluate or supervise a child who is the subject of a child abuse report, or a parent, other custodian, resource family parent, or other person who is responsible for the child's welfare, or both, when the information is needed in connection with the provision of care, treatment, assessment, evaluation or supervision to such child or such parent, other custodian, resource family parent or other person and the provision of information is in the best interests of the child as determined by the Division;

(6) A court or the Office of Administrative Law, upon its finding that access to such records may be necessary for determination of an issue before it, and these records may be disclosed by the court or the Office of Administrative Law in whole or in part to the counsel for the child, attorney or other appropriate person upon a finding that such further disclosure is necessary for determination of an issue before the court or the Office of Administrative Law;

(7) A grand jury upon its determination that access to such records is necessary in the conduct of its official business;

(8) Any appropriate State legislative committee acting in the course of its official functions, provided, however, that no names or other information identifying persons named in the report shall be made available to the legislative committee unless it is absolutely essential to the legislative purpose;

(9) A family day care sponsoring organization for the purpose of providing information on child abuse or neglect allegations involving prospective or current providers or household members pursuant to P.L.1993, c.350 (C.30:5B-25.1 et seq.) and as necessary, for use in administrative appeals related to information obtained through a child abuse registry search;

(10) The Victims of Crime Compensation Board, for the purpose of providing services available pursuant to the "Criminal Injuries Compensation Act of 1971," P.L.1971, c.317 (C.52:4B-1 et seq.) to a child victim who is the subject of such report;

(11) Any person appealing a Division service or status action or a

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substantiated finding of child abuse or neglect and his attorney or authorized lay representative upon a determination by the Division or the presiding Administrative Law Judge that disclosure is necessary for a determination of the issue on appeal;

(12) Any party to an administrative appeal or litigation in the Superior Court of New Jersey regarding a finding by the Division of child abuse or neglect and his attorney or authorized lay representative;

(13) Any person accused of and investigated for child abuse or neglect who concurrently or subsequently is a party to litigation in the Superior Court of New Jersey (or a similar court in another jurisdiction) to the extent that the allegation or investigation finding is a material issue in the case, upon providing pleadings evidencing the issue to the Division;

(14) Any person or entity mandated by statute to consider child abuse or neglect information when conducting a background check or employment-related screening of an individual employed by or seeking employment with an agency or organization providing services to children;

(15) Any person or entity conducting a disciplinary, administrative or judicial proceeding to determine terms of employment or continued employment of an officer, employee, or volunteer with an agency or organization providing services for children. The information may be disclosed in whole or in part to the appellant or other appropriate person only upon a determination by the person or entity conducting the proceeding that the disclosure is necessary to make a determination;

(16) The members of a county multi-disciplinary team, established in accordance with State guidelines, for the purpose of coordinating the activities of agencies handling alleged cases of child abuse and neglect;

(17) A person being evaluated by the Division or the court as a potential care-giver to determine whether that person is willing and able to provide the care and support required by the child;

(18) The legal counsel of a child, parent or other custodian, whether court-appointed or retained, when information is needed to discuss the case with the Division in order to make decisions relating to or concerning the child;

(19) A person who has filed a report of suspected child abuse or neglect for the purpose of providing that person with only the disposition of the investigation;

(20) A parent, resource family parent, or other custodian when the information is needed in a Division matter in which that parent, resource family parent or other custodian is directly involved. The information may be released only to the extent necessary for the requesting parent, resource family parent or other custodian to discuss services or the basis for the Division's involvement or to develop, discuss or implement a case plan for the child;

(21) A federal, State or local government entity, to the extent necessary for such entity to carry out its responsibilities under law to protect children from abuse and neglect;

(22) Citizen review panels designated by the State in compliance with the federal "Child Abuse Prevention and Treatment Act Amendments of 1996," P.L.104-235;

(23) The Child Fatality and Near Fatality Review Board established pursuant to P.L.1997, c.175 (C.9:6-8.83 et al.);

(24) Members of a family team or other case planning group formed by the Division and established in accordance with regulations adopted by the Commissioner of Children and Families for the purpose of

addressing the child's safety, permanency or well-being, when the provision of such information is in the best interests of the child as determined by the Division; and

(25) A child who is the subject of a child abuse or neglect report, as appropriate to the child's age or condition, to enable the child to understand the basis for the Division's involvement and to participate in the development, discussion or implementation of a case plan for the child.

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Source: 9:6-8.10a.

#### COMMENT

Although reorganized slightly and somewhat simplified in wording, this section is substantively similar to 9:6-8.10a. Subsections b.(12) and (13) are new but motivated by the same considerations of fairness as the other exceptions to confidentiality as the others. It should be noted that nothing in this section (or in 9:6-8.10a which it replaces) allows the disclosure of the identity of complainants.<sup>94</sup>

The Commission was in agreement with the due process concerns raised in support of providing record access to parents, but questioned whether distinctions should be made based on the type of information in issue. Concern was expressed that issues may arise in a case involving teachers, for example, who are required to report but who may not wish to have ongoing involvement in the subsequent proceedings.<sup>95</sup> Records containing information compiled by the Division during the course of its investigation, or information that was provided in expert reports, should arguably be available to an accused individual, but the consensus was that the identity of the reporting party should be treated differently.<sup>96</sup> It was suggested that, generally speaking, the identity of the reporting party is not the focus of the parent's inquiry, but rather it is the other material that is important to them and may play a role in their preparation of a response to the allegations.<sup>97</sup>

The Commission determined that there should not be a difference between matters heard in court, for which the Court Rules require the disclosure of everything but confidential material, and matters heard administratively, which presently do not require the same level of disclosure to an accused individual. Instead, it was determined that the right of discovery should be parallel, regardless of whether the parent is involved in a court or administrative

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<sup>94</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 7-10.

<sup>95</sup> *Supra* note 57.

<sup>96</sup> *Supra* note 57.

<sup>97</sup> *Supra* note 57.

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proceeding.<sup>98</sup>

ii. Renaming of the Law Guardian

During the course of the Commission's work in this area, commenters suggested that the presently used term "law guardian" can be confusing, given the different contexts in which it is used.<sup>99</sup> It is certainly preferable that those unfamiliar with the role of the law guardian not confuse its unique role in the process with the role of various individuals who may fairly be described as a guardian of a child including foster parents and other custodians of children such as a teacher at a boarding school. Although the relationship of parents often involves kinship, a guardian's relationship does not.<sup>100</sup> The Law Guardian program itself indicated that it was in favor of a statutory name change.<sup>101</sup>

"Attorney for the child" was proposed as a substitute term for "law guardian." It was suggested that such a title would not change the attorney's role, and that it would more accurately reflect the role of the Law Guardian, which is essentially to act as an attorney for the child during Title 9 proceedings.<sup>102</sup> In light of the different connotations of "guardian" and "attorney," there was discussion about whether such a change would add to existing confusion regarding the agency's role. The Commission also considered whether the change in title would be problematic in cases involving the representation of twins, multiple siblings, or other parties in a single case whose interests may conflict or in cases where there is more than one attorney.<sup>103</sup>

In order to make it clear that the attorney in question is appointed by the State, rather than being privately retained, "Office of Children's Counsel" was proposed as a potential new title and ultimately included in the Commission's Report.<sup>104</sup>

iii. Deadline for Dispositional Hearing

Finally, the Commission considered the current thirty-day statutory time limit mandated by N.J.S.A. § 9:6-8.51 (and contained in proposed section 9:27-31) for a dispositional hearing. The

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<sup>98</sup> *Supra* note 57.

<sup>99</sup> *Supra* note 50.

<sup>100</sup> *Supra* note 50.

<sup>101</sup> *Supra* note 52.

<sup>102</sup> *Supra* note 52.

<sup>103</sup> *Supra* note 52.

<sup>104</sup> *Supra* note 52; N.J. LAW REVISION COMM'N, *supra* note 14, at 14, 22, 23.

Commission noted that while the Legislature clearly did not intend to leave a child in an indefinitely unresolved proceeding, commenters have described the existing thirty-day time limit as unrealistic.<sup>105</sup>

The question posed to the Commission was whether a time limit should be included in the statute and, if so, what it should be. Commenters explained that the legal requirement of thirty days is impractical but indicated that approximately seventy-five percent of cases are resolved in 180 days.<sup>106</sup> Given the action's significance and the implication of constitutional rights, an unrealistically short time frame can severely impact the parties' ability to prepare and provide necessary reports that will ultimately determine parental rights.<sup>107</sup> The Commission concluded that the statutory time limit was uniquely within the scope of the Legislature's authority as a policy determination and it would be arbitrary to choose a new date, so the Commission did not propose a modification.

9:27-31. Dispositional hearing

- a. If the child has been found to have been abused or neglected or in need of services, the court shall conduct a dispositional hearing within 30 days to receive evidence concerning the appropriate disposition of the matter.
- b. On motion of the Division, of a parent or other custodian or of the child, if the interests of a child require it, a court shall conduct subsequent dispositional hearings to reconsider the order of disposition.
- c. At the conclusion of a dispositional hearing, the court shall enter an order of disposition, addressing the custody and placement of the child and the provision of services necessary to remediate the dangers or risks to the child that led to the child's placement and the court's intervention, including:
  - (1) releasing the child to the custody of the child's parents or other custodian;
  - (2) placing the child in accord with section 9:26-33;
  - (3) making an order of protection in accord with section 9:26-34; and
  - (4) requiring that an individual found to have abused or neglected a child accept therapeutic services, and this order may be carried out in conjunction with any other order of disposition.
- d. The court shall state the grounds for any disposition made under this section.
- e. The court shall not order any disposition for a child in need of services over the objection of the child's parents unless that disposition is necessary to prevent harm to the child.

Source: 9:6-8.51.

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<sup>105</sup> *Supra* note 50.

<sup>106</sup> *Supra* note 50.

<sup>107</sup> *Supra* note 50.

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## CHILDREN IN NEED OF SERVICES

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## COMMENT

Subsections b. and c. are substantively identical to 9:6-8.51, but a reference to the child in subsection b. recognizes the right of the child to request subsequent hearings. Subsection a. is new. It states the purpose of a dispositional hearing and thereby emphasizes the distinction between the fact-finding hearing and the dispositional hearing. The provision in 9:6-8.47 subsection a. specifically allowing an immediate dispositional hearing has been deleted as other provisions will normally make that procedure impossible. See, e.g. 9:6-8.47 subsec. b. and 9:6-8.48 subsec. b. Subsection e. protects the constitutional rights of the parents to control the child when exercise of those rights does not risk harm to the child.<sup>108</sup>

## III. CONCLUSION

The recommendations included above, as well as others contained in the Commission's Final Report Regarding Title 9 - Child Abuse and Neglect, were prepared in response to the Commission's statutory mandate and to bring to the attention of the Legislature recommendations for changes to the law that could better serve all who participate in the process of determining how best to protect, serve, and support New Jersey's children and families.<sup>109</sup>

As is the Commission's practice, the release of the Final Report is followed by ongoing outreach efforts to identify members of the Legislature who may be interested in sponsoring legislation in this area.

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<sup>108</sup> N.J. LAW REVISION COMM'N, *supra* note 14, at 24.

<sup>109</sup> N.J. STAT. ANN. § 1:12A-8 (West 2015).