

## ***Preliminary Research Responsive to Questions on Scope/Impact of CHIPS on Current Practice***

### ➤ **Some points about abuse/neglect/dependency case law in Ohio:**

- Most A/N/D adjudications do not get appealed.
- Many permanent custody cases get appealed; these determinations are largely based on the conduct of the parents (in complying or failing to comply with their case plan) and sometimes briefly discuss the A/N/D adjudication that preceded the custody ruling.
- Often the facts in the judicial opinion are brief (especially in permanent custody appeals).

### ➤ **CHIPS does not substantively expand existing law**

The reality under current law is that the distinctions between “abuse,” “neglect,” and “dependency” are, essentially, meaningless because the parties and the court *very* often decide to adjudicate a child dependent (or sometimes neglected) without any consideration of the proper statutory definition. That is, the parties will agree to a dependency adjudication for a child that, technically, should be adjudicated abused or neglected based on the facts of the case and statutory definitions. For example:

#### **In re B.L. (2005 Ohio 1151):**

**Facts:** The child was born prematurely and suffers from cerebral palsy and global developmental delays. He was seen by doctors when he was five and six years old; the doctors were concerned that he was malnourished, failing to thrive, and not gaining enough weight. His mother failed to properly give him nutritional supplements and frequently broke appointments with the child’s nutritionist.

**Adjudication:** Dependent. The complaint alleged abuse and neglect, but those allegations were dropped and the parties stipulated to an adjudication of dependency.

**Proper adjudication under current law:** Neglected. See O.R.C. § 2151.031(D): a neglected child is one “whose parents, guardian, or custodian neglects the child or fails to provide proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for the child’s health, morals, or well-being.”

**Adjudication under CHIPS:** A child in need of protective services. See the definition of “Lacking Necessary Care or Supervision:” “The child’s parent, legal guardian, or legal custodian fails to provide the child with any of the following, and such failure creates a substantial risk that the child would suffer an injury that could result in an adjudication that the child is in need of protective services ... Adequate food, clothing, shelter, or supervision.”

#### **In re S.T. (2005 Ohio 4793)**

**Facts:** Police found two very young children (less than two years old) soaked in urine and sweat: one in a crib and another in a stroller. Their parents had been setting off fireworks and smoke bombs in the basement of the home while the children were upstairs. Both children were treated at the hospital for smoke inhalation and diaper rash.

**Adjudication:** Neglected and dependent, by stipulation of the parties.

**Proper adjudication under current law:** Abused. O.R.C. § 2151.031(D): “Because of the acts of the child’s parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child’s health or welfare.”

**Adjudication under CHIPS:** A child in need of protective services. See the definition of “physically harmed:” “A child has suffered physical injury, or was placed at substantial risk of physical injury... from one or more non-accidental acts or failures to act by the child’s parent, legal guardian, or legal custodian.”

**In re Turner Children (2006 Ohio 4906)**

**Facts:** All three children suffered a plethora of mental health issues as a result of their parents’ substance abuse and mental health issues that resulted in “a chaotic and highly sexualized household environment.” Their diagnoses included Post Traumatic Stress Disorder, Childhood Depressive Disorder, Attention Deficit Hyperactivity Disorder, early onset Childhood Bipolar Disorder, Sensory Integration Disorder, Oppositional Defiant Disorder, Borderline personality traits, anxiety, depression, possible Asperger’s syndrome, and severe behavioral problems that seriously interfered with their ability to succeed academically. One child was receiving in-patient care and another was in a therapeutic foster placement.

**Adjudication:** Dependent. The complaint alleged abuse and neglect, but the court dismissed these allegations and the parties stipulated to the dependency adjudication.

Proper adjudication under current law: Neglected. See O.R.C. § 2151.031(D): a neglected child is one “whose parents, guardian, or custodian neglects the child or fails to provide proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for the child’s health, morals, or well-being.”

Adjudication under CHIPS: Children in need of protective services. See the definition of “emotionally harmed:” “a child has suffered psychological, emotional, or cognitive injury...from one or more nonaccidental acts or one or more nonaccidental failures to act by the child’s parent.

Thus the concern about the effect of CHIPS on other areas of the law, where CHIPS replaces only one or two of the current definitions, is not well-founded. While it might seem on paper that such a substitution is a substantive change, in practice it is not because courts already, to some extent, think of all children adjudicated abused, neglected, or dependent as simply children in need of protective services. It doesn’t matter which adjudication is recorded, only that an adjudication is recorded so that the agency can begin services to help the family.

This practice of stipulated adjudication seems to reflect a desire to bypass the trouble and stigmatization that comes with an adjudication of abuse under the current framework, and a desire to just start helping the family. CHIPS aims to meet these desires by removing the “abuse” stigma, make the relationship between the parents and the agency less antagonistic, and ensuring services for the child and the family start as soon as possible.

➤ **Responses to Areas of Concern Noted on NCALP’s Memo**

- “Being deprived of sustenance:” There is a question mark next to this provision in the definition of “physically harmed.” Based on current case law this section would come into play usually for infants and very young children who are diagnosed with failure-to-thrive or who are underweight. See:
  - *In re B.L.* (2005): Child was born premature, suffered from cerebral palsy and global developmental delays. He was malnourished and underweight, and diagnosed with failure to thrive. Doctor recommended Pediasure as supplemental nutrition and that the child see a nutritionist, parents did not comply. Child removed from adjudicated dependent, thrived in foster care.

- *In re F.S.* (2005): Six-year-old child underweight. Her doctor recommended Pediasure, but parents did not comply. Infant was premature and underweight. Both children adjudicated dependent.
- *In re Goff* (2003): Infant was severely underweight and diagnosed with failure to thrive. Doctor prescribed soy formula, which mom never filled. Plus, doctor recommended infant be seen by a specialist for a curvature in his leg and parents did not comply. The child was removed and adjudicated dependent. She thrived in foster care.
- Off-label drugs: the provision in “physically harmed” that references “being provided with a drug not in accordance with a prescription” does not concern off-label drugs. Taking a drug off-label is still in accordance with a doctor’s prescription, even if the prescription is not in accordance with FDA testing and approval. This provision is concerned with children ingesting illicit drugs or drugs prescribed for their parents. See:
  - *In re S.* (1995): There were two incidents where the minor child overdosed on drugs taken from his father’s pockets.
  - *In re C.W.* (2010): Parent’s took child to E.R. because he was extremely fatigued, was difficult to awaken, and could not stand. Child tested positive for opiates, a component in one of Dad’s prescription medications. Dad testified that the child may have been into the prescription, or may have picked drugs up off the street because they live in a bad neighborhood.
- An example of “Being physically restrained in a cruel manner or for a prolonged period of time:”
  - *In re Mercy Ann G.* (2007): Parents had nine adopted children. Many of them were kept in cages made from 2x4s and chicken wire. The cages were not locked, but were equipped with loud alarms that sounded when opened. Many children would urinate in the cages rather than venture out, sound the alarm, wake the house, and risk punishment from the parents. Only two children had mattresses or bedding. The parents would routinely barricade the 3-year-old twins alone in their room. Some of the wire was broken and protruding into the cages, and one child had been chewing on the wood. A psychologist testified that the children did not have conditions or behavior issues that required restraint, and the cages presented a significant threat to the children's safety and psychological development. All of the children were adjudicated dependent, the eight subject to restraints were also adjudicated abused.
- Regarding case law for physically harmed: the cases cited in the memo are extreme in terms of behavior, but not extreme in terms of the cases that get adjudicated and appealed. There aren’t any cases that reference a small injury only. Nearly all cases have either extensive injuries, or less serious injuries coupled with other issues (substance abuse, domestic violence between mom and dad, etc.). There is, however, inconsistency between counties as to what injuries warrant adjudication and which do not. See:
  - *In re Mercer* (2005): Dad forced boys to sit on their knees, with legs crossed and arms crossed behind head, and struck them with a belt on back, legs, and buttocks.

One child had a bruised eye; both had bruising on their backs, legs, and buttock. The bruising and welts lasted one week. The beating was punishment for breaking a glass case.

- *In re J.L.* (2008): Mom spanked child with a belt for running away from her at Kings Island, leaving bruises and welts on his buttocks and legs. Appellate court found this to be appropriate discipline, reversed adjudication.
- With regard to pats on the rear and tickling: the sexually harmed provision clearly states that touching that occurs as part of appropriate childcare activity is exempted from the definition. Courts have analyzed this type of touching in the past to determine whether it was appropriate, and they will presumably do so in the future. See
  - *In re Moonshower* (2004): Eleven-year-old girl accused her mother's boyfriend of inappropriately touching her chest and pubic area. The boyfriend claimed to have been engaging in "playful wrestling," and while doing so may have grabbed the child's breast. A social worker and the court considered both explanations and decided to credit the child, not the boyfriend.
- Regarding a child viewing sexually explicit materials and acts: people who sexually abuse children often groom them to accept the abuse by showing them pornography (first adult porn, then child porn). It is not in a child's best interest for children's services to delay interventions for these children until after they have been touched or penetrated. See:
  - *In re Moonshower* (2004): Eleven-year-old girl was sexually abused by her mother's boyfriend. It started with him attempting to show her pornography on the Internet and on television, but quickly escalated to digital penetration, oral sex, and penile penetration. He raped her between six and nine times before someone intervened.
  - *In re Jones* (2001): Mom's boyfriend gave two young girls, aged about 12, wine coolers to drink and showed them pornography. Later he sexually abused them; he raped one child, and took nude pictures of both.
- Participation in a consensual sex act: There are no Ohio cases in which a child has been adjudicated abused, neglected, or dependent because he or she participated in a consensual sex act with a nonrelative in their parent's home. This provision aims to exempt consensual adolescent sex, while catching parents that knowingly allow or negligently permit their children to be sexually harmed by other children in the home. See:
  - *In re Foucht* (2004): Two children initially referred to child protective services because of sexual abuse by their brothers. The subsequent investigation revealed physical abuse and domestic violence.
- With regard to parents who choose not to medicate their children for ADD/ADHD: we locate no Ohio cases in which a child is adjudicated A/N/D because their parent failed to administer behavior modification medications. ADD/ADHD are only mentioned as psychological and behavioral consequences of other types of abuse.

Research among stakeholders revealed tension between schools and child protective

agencies on this issue. Schools will often report A/N/D for a child whose parent is not administering medication because the child is difficult to control in the classroom, and the agencies feel that this is not a proper referral and is something that should be handled between the school and the parents (unless there is reason to believe there are other issues, like nutritional neglect, substance abuse, physical abuse, etc. contributing to the ADHD).

➤ **Context for CHIPS definition of “sexually harmed”**

Ohio’s child abuse statute uses the criminal definitions of sexual activity to define child sexual abuse. Those definitions are unnecessarily vague and complex, and often preclude PCSAs from protecting children who need protection, and force them to intervene in situations that may not involve child protection concerns. Ohio’s reliance upon the criminal code (specifically §2907) to define the legal parameters of sexual abuse of children causes significant confusion among PCSA investigators, and another “disconnect” between child welfare agencies and the courts.

The current statutory language simply is not specific to the type of sexual harm that may be most common within the home. Section 2907 defines illegal sexual activity as *touching* or *penetration* in various forms. From the child welfare perspective, other behaviors such as inappropriate sexual talk, voyeurism and “grooming” are also sexually abusive behaviors, from which children need to be protected. However, a strict reading of the criminal definition seems to preclude PCSA intervention in such situations. It is NOT in a child’s best interest when Protective Services must wait to intervene when it knows someone in the child’s home has been showing that child pornography or forcing the child to pose naked but no touching or penetration has occurred (yet). On the other hand, there are situations under §2907 that qualify as illegal sexual activity but which many professionals believe should not be treated as sexual abuse cases warranting PCSA intervention. Some of the anomalies mentioned include:

In cases involving sexual abuse of a child by a stranger or an individual who no longer has access to the child, agencies are currently required to conduct an investigation of the child's family—including an in-depth risk assessment requiring interviews with every family member and a great deal of paperwork—even where there is no question of wrongdoing on the part of the family. Several of the practitioners with whom we spoke consider this an unnecessary and unfair intrusion in the life of a family that has already been victimized by the assault on their child.

The current age differentiations of §2907.04 do not outlaw sexual activity between a 40-year-old and a 16-year-old or between a father and his 17-year-old daughter, but technically categorize sex between a 15-year-old girl and her 20 year-old-boyfriend as sexual abuse.

Currently, when agencies receive referrals involving children perpetrating on other children they can be forced to label a child as a perpetrator of sexual abuse. Many find this problematic in that children who perpetrate quite often do so because they themselves have been victimized, and it seems counterproductive to burden a young child with this label.

This analysis, and the language in the proposed CHIPS statute, come from extensive qualitative and quantitative research conducted throughout Ohio among all stakeholder groups including: juvenile court judges, juvenile prosecutors and public defenders, child protective services agency directors, intake/screening supervisors and case workers, school principals, teachers, school counselors, school nurses, pediatricians, and mental health professionals. Details of the research are available in the Final Report of the Subcommittee on Responding to Abuse, Neglect and Dependency.