

COURT PERFORMANCE
IN CHILD ABUSE AND NEGLECT CASES:
RE-ASSESSMENT REPORT
AND RECOMMENDATIONS

West Virginia Court Improvement Oversight Board

June 29, 2005

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APPENDIX A: Focal Circuits

I. INTRODUCTION

The fundamental purpose of child protection laws characteristic of the states, including West Virginia, is intervention when necessary to assure the immediate safety and continued well-being of children at risk of abuse and neglect, preserving family unity where reasonably possible. Both the child protection agencies and the courts responsible for handling child abuse and neglect cases increasingly have become overwhelmed by the enormity of their respective tasks in protecting children at risk. The number of cases involving child abuse and neglect has steadily increased in recent years, placing heavy demands on the resources of state agencies and courts alike. At the time, the Court Improvement Program began in West Virginia in 1994, new abuse and neglect cases were at the annual rate of 647 filings. (Circuit Court Grand Summary, 1994.) A decade later, new filings in abuse and neglect cases were, in 2004, up to 1,744 for that year. (West Virginia Court System, 2004 Annual Report.)

Beyond caseload numbers, changes in federal and state law have substantially increased the responsibilities of child agencies regarding family preservation measures, case planning, and most importantly -- child safety, welfare, and permanency. These legislative reforms have also brought about significant transformation in the role of the courts in child protection cases. A key component of the comprehensive changes in the law is the expectation that the court in each case will perform an active and primary oversight function covering all aspects of the proceedings. Most notable of these oversight duties are: a) determining the adequacy of agency efforts directed toward family preservation; b) case

management to ensure timely progress; and c) systematic review and approval of all planning and placement decisions in these proceedings from start to finish. Court functions are not limited to adjudication of the child maltreatment and parental-rights termination questions. Rather, the legislative developments specifically require that once the state child welfare agency initiates protective proceedings, even on a temporary emergency level, the judicial system must be ultimately responsible for seeing to the prompt development and implementation of an appropriate (and permanent) dispositional plan.

The reforms in federal and state law have underscored the essential objectives of agency case management to achieve safety, appropriate services, and permanency for every at-risk child. In similar purpose, these legal reforms have expanded the judicial role beyond adjudicatory duties -- calling upon the courts to oversee meaningful planning and actively conduct regular review of progress until a safe and permanent home is achieved. In sum, the compounding demands placed upon the child welfare system in abuse and neglect proceedings by the growing caseloads and the increased complexity of the substantive issues and review process have challenged the ability of the judiciary to effectively resolve these cases. The information gathered across West Virginia in the re-assessment stage of this Court Improvement Program indicates that the courts, in collaboration with state child welfare agency personnel, prosecuting attorneys, parent and child attorneys, and CASA volunteers, are meeting this challenge in many respects.

However, it is also clear that not all barriers to timely and permanent outcomes in these cases, such as those problems identified during West Virginia's initial CIP assessment in 1994-95, have been fully resolved. The recently completed re-assessment study reflects that much progress has been made, but also that further improvements must be accomplished in the court system in order to assure a beneficial outcome in every case involving a child at risk. The State judiciary is committed to the fundamental principle that: "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention." In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991). The opportunity for the greatest progress in achieving safety, well-being, and permanency for affected children still rests with the judges carrying the ultimate responsibility to exercise oversight authority, and take prompt action in any circumstance where it becomes evident that the particular needs of a child or family are not being met.

II. SURVEY OF LAW APPLICABLE TO CHILD ABUSE AND NEGLECT PROCEEDINGS

A. Introduction

The guiding purpose of child abuse and neglect laws is to provide a safe, stable, and permanent home for abused and neglected children. W. Va. Code § 49-1-1. In furtherance of this purpose, the Rules of Procedure for Child Abuse and Neglect Proceedings (hereinafter "the Rules" or "Rule ____.") are intended to provide: (1) a fair and timely disposition of child abuse and neglect cases; (2) judicial oversight of case planning; (3) a coordinated decision-making process; (4) a reduced number of unnecessary delays in case management; and (5) encouragement of involvement of all parties in the litigation as well as the involvement of all community agencies and resource personnel providing services to any party.

Child abuse and neglect proceedings are divided into five main stages:

1. **Petition**
The child abuse and neglect proceeding commences with the filing of a petition alleging abuse and neglect.
2. **Preliminary hearing:** The preliminary hearing is the first hearing held in a child abuse and neglect proceeding. The court will consider whether it should commit the child to the temporary custody of the Department of Health and Human Resources (“the Department”) or some responsible person and/or whether there should be an improvement period for the parent(s) or custodian(s).
3. **Adjudicatory hearing:** At the adjudicatory hearing the court determines whether the child was abused or neglected at the time the petition was filed. Again, the court may commit the child to the temporary custody to the Department or a responsible person and/or order an improvement period for the parent(s) or custodian(s).
4. **Disposition hearing:** At the disposition hearing, the court determines the proper disposition of a child who has been adjudged abused and neglected. The court may find that any previous improvement period has been successful and dismiss the petition, the court may order temporary custody and an additional improvement period or the court may terminate parental rights.
5. **Permanent Placement Review:** In appropriate circumstances the court will continue to monitor the child's progress until the child is permanently placed.

Child abuse and neglect cases have priority over all civil proceedings, except for domestic violence proceedings and trials already in progress. W. Va. Code § 49-6-2(d). Upon the filing of a petition before the circuit court, a hearing must be docketed immediately. W. Va. Code §§ 49-6-1 and 2. Under no circumstances shall a civil protection proceeding be delayed pending the initiation, investigation, prosecution, or resolution of any other proceeding, including, but not limited to, criminal proceedings. Rule 5.

B. Emergency Custody

If a child in the presence of a child protective services worker is in imminent danger of physical harm (as defined in W. Va. Code § 49-1-3(e)), and if the worker has probable cause to believe the child will suffer additional abuse or neglect or will be removed from the county before petition can be filed, the worker may take the child into his or her custody prior to filing a petition. If this extreme action is taken, the worker must “forthwith” appear before a circuit judge or a juvenile referee (a magistrate appointed by the circuit court) and apply for an order ratifying the emergency custody.

The application should be made to the judge or referee in the county where custody was taken. If neither a judge nor a referee may be located, the worker may apply to a judge or referee in an adjoining county. The application must set forth facts sufficient to support a probable cause finding. In the event the emergency taking is confirmed by a juvenile referee, the referee must obtain oral confirmation from the circuit court or an adjoining circuit court, which must then enter an order of confirmation on the next judicial day.

If the court or referee ratifies custody the child may remain with the Department no longer than two judicial days unless a petition is filed and the court awards temporary custody as discussed below. W. Va. Code § 49-6-3(c).

C. Filing A Petition

1. Contents of the Petition

A child abuse and neglect petition is commenced with the filing of a petition. Either a reputable person or the Department may file the petition if there is a belief that the child is neglected or abused. W. Va. Code § 49-6-1(a). The petition is preferably filed in the circuit court of the county where the child normally resides. However, the petition may also be filed in the circuit court of any county where the alleged abuse or neglect occurred, or where the custodial respondent or other named party resides. Rule 4a.

The petition must be verified under oath and contain the following:

- a. **Specific allegations of misconduct:** The petition should allege how the misconduct comes within the statutory definition of abuse and/or neglect. Rule 18(a), (c); W. Va. Code § 49-6-1(a); see also W. Va. Code § 49-1-3 (definitions relating to child abuse and neglect). In addition to the statutory references, the petition should allege specific conduct including the time and place of the misconduct and whether the person responsible for the care of the child is incapacitated. Rule 18

(c); W. Va. Code § 49-6-1. The petition should also contain the supportive services provided by the State to remedy the circumstances. W. Va. Code § 49-6-1.

- b. **Description of children:** The petition should also contain a description of all the children in the home or temporary care of the offending parents, including children who are not alleged to be abused or neglected. W. Va. Code § 49-6-3a. Rule 18(b). This information should include, the name, age, sex, and the current location of the child(ren). The petition need not include the location of the child if disclosing the location would endanger the child(ren) or seriously risk disruption of the current placement.
- c. **The relief sought:** The petition should state the relief sought, such as temporary custody (W. Va. Code § 46-6-3) and any disposition permitted by W. Va. Code § 49-6-5. Rule 18(d).
- d. **Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA).** The petition or attached affidavit should contain the information required by the UCCJEA. W. Va. Code § 48-10-1, *et seq.* Rule 18(e).

The court must ensure that the facts in the petition are sufficiently specific, and the sufficiency of each petition should be judged individually. State v. Scritchfield, 280 S.E.2d 315 (W. Va. 1981) (holding that a petition is insufficient when it only alleges one fact: that the mother had been a mental patient from time to time). Mere conclusions alone are insufficient. One reason for the specificity requirement is to provide notice to the offending parent or custodian, thus, allowing him/her an opportunity to defend himself. See Moore v. Munchmeyer, 197 S.E.2d 648 (W. Va. 1973).

The court may allow the petition to be amended at any time until the final adjudicatory hearing begins, provided that an adverse party is granted sufficient time to respond to the amendment. After the final adjudicatory hearing begins, a petition may be amended only if the amendment does not prejudice an adverse party. If the petition is amended after the conclusion of a preliminary hearing in which custody has been temporarily transferred to the Department or a responsible person, another preliminary hearing is not required. Rule 19.

2. Initial Order

The initial order entered upon the filing of a petition must address:

a. First Hearing Date

The court must set an initial hearing date when the petition is filed. W. Va. Code § 49-6-1; Rule 20. If the court orders a temporary placement at the time of the filing of the petition, a preliminary hearing must be held within 10 days. W. Va. Code § 49-6-3(a); Rule 22. Even if a transfer of custody is not made at the time the petition is filed, the court may set a preliminary hearing if facts alleged in the petition indicate existing imminent danger. W. Va. Code § 49-6-3(b). In any event, the court must give the respondents at least five days actual notice of the preliminary hearing. Rule 20. If a preliminary hearing is not held, the adjudicatory hearing should be set to commence within 30 days of the filing of the petition. Rule 25. The court may grant a continuance for a reasonable period of time upon a showing of good cause, provided that the reasons for finding good cause are stated in the order. Rule 7.

b. Appointment of Counsel

The order must also include appointment of counsel for the child. W. Va. Code § 49-6-1(a). The parents or custodians also have a right to be represented by counsel in any child abuse and neglect proceeding. W. Va. Code § 49-6-2(a). If any parent or custodian cannot afford counsel, the court must appoint a lawyer to represent them. In no circumstance shall a lawyer represent both the child and any of the parents or custodians. A lawyer may represent multiple parents or custodians only if all parties consent to the multiple representation after full disclosure and consultation by the lawyer regarding possible conflicts. One lawyer may represent multiple children in the same matter. However, in any case, a lawyer shall not represent multiple parties unless first assuring the court that his or her professional judgment will not be impaired by the multiple representation.

Counsel appointed for parties must have at least three hours of annual CLE training on the representation of children in abuse and neglect proceedings. W. Va. Code § 49-6-2(a). However, if no lawyer meeting this requirement is available, the court may appoint other competent counsel. Counsel must be appointed at least 10 days prior to the initial hearing.

c. Appointment of CASA

In the areas of the State where a Court-Appointed Special Advocate (CASA) Program is functioning, the court may appoint a CASA representative to advocate for the child, and shall by such appointment have access to information and court filings, receive notice of hearings and copies of orders, and be afforded opportunity to be heard.

d. Temporary Custody

The court may also order the temporary transfer of custody to the Department or a responsible person based solely on the facts alleged in the petition. W. Va. Code § 49-6-3(a). The transfer of custody may only be ordered if the Court makes the following specific findings:

- a. **Imminent danger:** The court must find that there exists imminent danger to the physical well-being of the child; *and*
- b. **No reasonable alternatives:** The court must also find that no reasonable alternatives to removal exist. Some reasonable alternatives that the court may consider are medical, psychological, psychiatric, family preservation or homemaking services in the child's present custody.

When the court makes a determination granting temporary custody based on the petition, it must not allow placement of the child in the household of the alleged abusing person, unless there is a judicial order precluding the offending person from residing in or visiting the home.

A preliminary hearing must be initiated within 10 days of the continuation (see Preliminary Hearing Section below) or transfer of custody. Rule 22. Even if the allegations of abuse or neglect do not pertain to some of the children in the home, the court should also remove those children if the court finds they are in imminent danger and there are no reasonable alternatives to removal. W. Va. Code § 49-6-3(a).

When the court orders the temporary change of custody of a child based on the facts alleged in the petition, the order must appoint counsel, schedule a preliminary hearing, and state:

- a. Continuation in the home is contrary to the best interest of the child, and why; and
- b. Whether or not the Department made a reasonable effort to prevent the placement, or that an emergency situation exists making such

efforts unreasonable or impossible, or that reasonable efforts were not required. (See W. Va. Code §§ 49-2D-3; 49-6-3(b).)

The order may also contain a direction to the Department or any other person to become involved in the process in order to facilitate the reunification of the family. W. Va. Code § 49-6-3(a).

e. Visitation

If the court transfer custody of the children in the initial order, it may grant or deny visitation in a manner consistent with the child's best interest and well being. The person requesting visitation shall inform the court of her or his relationship with the child and the amount of previous contact previously existing with the child. If the court orders supervised visitation, the court should consider the child's age, condition, and whether the surroundings are a safe, dignified and otherwise suitable place for visitation. Visitation between the child and siblings should be ordered whenever possible and appropriate. Rule 15.

D. Preliminary Hearing

1. Notice

Notice of the preliminary hearing date, time, and place must be served upon on the following parties: both parents, any other custodian, the Department, and any CASA representative who has been appointed. W. Va. Code § 49-6-1(b); Rule 20. If the court determines at the time the petition is filed that the child is in imminent danger, 5 days notice is required. In all other cases, the parties are to be given 10 days notice of the first hearing.

The respondent(s) should be served in person if such service is readily obtained. If personal service is not reasonably obtainable, then the respondent may be served by certified mail directed to the last known address. In either case, service should include the notice of hearing and a copy of the petition. If the party cannot be served by personal service or certified mail, the party may be served by publication (class II legal advertisement). W. Va. Code § 49-6-1(b).

A preliminary hearing may proceed in some circumstances even though all the parents have not been personally served. Rule 21. For instance, if the child is located in the state, and neither parent has been personally served, the court may accomplish service through publication and continue with the preliminary hearing. However, the court may not hold an adjudicatory hearing until the expiration of the answer time specified in the publication notice.

2. Temporary Custody

The court should consider at the preliminary hearing whether to order (or continue) a temporary transfer of custody. If the court finds that the child is in imminent danger at the preliminary hearing, it may order temporary custody of the child to the Department or to another responsible person. W. Va. Code § 49-6-3(b). If the court orders a transfer of custody at the conclusion of the preliminary hearing, the order must state:

- a. Continuation in the home is contrary to the welfare of the child, and the reasons for this determination;
- b. Whether the Department made reasonable efforts to prevent the removal of the child; or
- c. Because an emergency situation existed, such efforts would be unreasonable or impossible; or
- d. That reasonable efforts were not required due to the emergency situation. W. Va. Code §§ 49-2D-3; 49-6-3(b)(2), (3).
- e. What efforts should be made by the Department to facilitate the child's return to the home.

(See also Section XV. below.)

The court may transfer the temporary custody of the child for up to 60 days (or longer when improvement period granted).

3. Other Matters

The court may order an improvement period consistent with West Virginia Code § 49-6-12 (pre-adjudicatory improvement period). The court may also require a party to pay child support. (See Section XVI. Child Support.) Unless waived by the parties, the court shall make a transcript of the proceeding. The rules of evidence apply to all hearings in child abuse and neglect cases, including preliminary hearings.

E. Multidisciplinary Treatment Teams

The court must convene a multidisciplinary treatment team (MDT) within 30 days after the petition is filed. Rule 51. The MDT shall include the following individuals:

1. The child's custodial parents, guardians, or other immediate family members;
2. The attorneys representing the parents;
3. The child, if over 12 years old and participation is otherwise appropriate; or if the child is under 12 years old, when the team determines that the child's participation is appropriate;
4. The guardian ad litem;
5. The prosecuting attorney, or her or his designee; and
6. Any other agency, person or professional who may be helpful to the MDT's efforts, including any CASA representative.

The purpose of the MDT is to assess, plan and implement a comprehensive, individualized service plan for children in abuse and neglect proceedings. W. Va. Code § 49-5D-3. The MDT will be involved throughout the circuit court proceedings. MDT recommendations and reports are most often reviewed by the court at status conferences held during improvement periods, at disposition, and permanent placement review conferences.

If the MDT provides the court with a recommended service plan prior to disposition (W. Va. Code § 49-5D-3(a)(3)), the court must review the service plan to determine if its implementation is in the child's best interests. If the court decides not to adopt the plan, it must hold a hearing within ten days of such determination to hear from the MDT regarding its rationale for the proposed plan. If the court does not accept the plan, it must make specific written findings as to why the MDT's recommended service plan was not adopted. W. Va. Code § 49-5D-3a. An MDT recommendation (and any resulting hearing under the circumstances just discussed) is not required for any temporary out-of-home placement in an emergency circumstance or for assessment purposes. W. Va. Code § 49-5D-8.

F. Improvement Periods

A court may order an improvement period at any time during the proceeding. W. Va. Code § 49-6-12. The purpose of the improvement period is to give the respondent the opportunity to rectify the circumstances that gave rise to the child abuse or neglect proceeding.

When any improvement period is granted, the burden of initiation and completion of all its terms rests with the respondent. The court may, however, direct the Department to pay expenses associated with the services provided if the respondent is unable to bear the costs. W. Va. Code § 49-6-12(d). The respondent must also be required to execute a release of all medical information, presumably to permit access to such records by the Department. W. Va. Code § 49-6-12(e). Finally, the Department must be required to maintain the progress of the respondent during the improvement period, and report to the court any failures to comply. If such failure is substantiated, the court must forthwith terminate the improvement period. W. Va. Code § 49-6-12(f).

1. Pre-adjudicatory

At any time between the filing of the petition and an adjudication, the court may grant a respondent an improvement period. The improvement period may only be granted after the respondent files a written motion requesting the improvement period and upon the demonstration by the respondent, by clear and convincing evidence, that he or she is likely to fully participate in the improvement period. Further, the court must set forth on the record the terms of the improvement period. The improvement period may be no longer than three months.

Any order granting an improvement period must provide, in addition to those items mentioned above:

- a. That a status conference be held within 60 days; or
- b. That the Department submit a written progress report within 60 days, in which case a status conference must be held within 90 days;
- c. That the Department submit a family case plan within 30 days. W. Va. Code § 49-6-12(a); Rule 23.

The MDT must attend the status conference and report as to progress and developments in the case. The court may also require or accept reports or statements from other persons. The court may revoke the improvement period upon the motion of any party if the respondent has

failed to comply with its terms or if the parties show an inability to remediate the circumstances that gave rise to the abuse and/or neglect. Rule 23; W. Va. Code § 49-6-12(b).

2. Post-adjudicatory

The court may order an improvement period after a final adjudicatory hearing provided that the findings required for a pre-adjudicatory improvement period are made, and that the order contains the same provisions as those required for a pre-adjudicatory improvement period. Additionally, the court must find that the respondent has not previously been granted an improvement period, or that since the initial improvement period there has been a substantial change in circumstances that would render it likely that the respondent will participate in a further improvement period. W. Va. Code § 49-6-12(b); Rule 37.

The improvement period may be for up to six months, unless the court finds that an extension of up to three months is appropriate based upon findings that: the respondent has substantially complied with the improvement period; that continuation will not substantially impair the ability of the Department to permanently place the child; and that an extension is in the best interest of the child. W. Va. Code § 49-6-12(b) and (g).

During a post-adjudicatory improvement period, the Department may proceed with reasonable efforts to place the child for adoption or with a legal guardian or to find other permanent placement. Rule 37.

3. Disposition Improvement Periods

The court may grant an improvement period as a disposition. The required findings, order provisions, and time frames are identical to a post-adjudicatory improvement period. W. Va. Code § 49-6-12(c). Within 60 days after the end of the improvement period, the court must conduct a hearing to determine the final disposition of the case. Rule 38.

4. Timing

The hearings ordered pursuant to an improvement period may only be continued for good cause. The party seeking the continuance must file a written motion and serve the motion on all parties. If the court grants such a continuance, the order must state the future date when the hearing will be held. The hearing held at the end of the improvement period should be held as close to the end of the period as possible. In no circumstances should the hearing at the end of the improvement period be held more than 60 days after the termination of the improvement period. W. Va. Code § 49-6-12(j), (k).

G. Family Case Plan

Family case plans must be submitted by the Department after an improvement period is granted. The purpose of the family case plan is to set forth a clear, well-organized, realistic method of identifying family problems and the logical steps toward reducing or resolving those problems. W. Va. Code § 49-6D-3(a). The family case plan must be prepared by the Department, with the assistance of parties, counsel, and the MDT. The child, if over the age of 12, may participate if appropriate. The plan must closely track the improvement period so that the two constitute a program designed to remedy the circumstances which led to the abuse and/or neglect. See Rule 23; W. Va. Code §§ 49-6-12 and 49-6D-3.

The Department must provide the court with a copy of the family case plan within 30 days. W. Va. Code § 49-6D-3(b). The plan must contain the following:

1. A list of specific, measurable, and realistic goals arranged in an order of priority;
2. A list of problems addressed by each goal;
3. A specific description of how the parties involved will achieve the goals;
4. Time targets for the achievement of goals;
5. Tasks assigned to the abusing or neglecting parent, as well as to other participants in the process and a designation of when and how often tasks will be performed; and
6. The safety of the placement of the child and plans for returning the child safely home.

The court should see that the case plan can be easily understood by the participants accountable under the plan. In addition, the court shall inform the participants of the consequences likely to follow from their failure to meet any of the goals listed in the case plan. It may be modified as appropriate. W. Va. Code § 49-6D-3(a), (b).

H. Adjudicatory Hearing

The purpose of the adjudicatory hearing is to allow the parties to present evidence to support or refute the allegations of abuse and/or neglect.

All parties must be provided a meaningful opportunity to be heard. This includes the right to present and cross-examine witnesses. Unless waived, a transcript shall be made available to all the parties. The rules of evidence apply to final adjudicatory hearings. The court must determine whether the child is abused or neglected. The court's findings must be based on clear and convincing proof that the conditions supporting the determination existed at the time the petition was filed. W. Va. Code § 49-6-2(c).

At the conclusion of the hearing, the court must make findings on the record or in writing as to whether the child is abused or neglected. W. Va. Code § 49-6-2(c); Rule 25.

1. Hearing Time Frames

If the child was previously placed in the temporary custody of the Department or a responsible person without an improvement period having been awarded to a respondent, the hearing must be held within 30 days of the temporary custody order. If an improvement period was granted, the hearing must be held within 60 days after the end of the improvement period. W. Va. Code § 49-6-2(d); Rule 25. If no temporary custody was ordered, the hearing must be held within 30 days after filing of the petition. Rule 25.

2. Order

Upon conclusion of the adjudicatory hearing, the court must enter an order of adjudication containing findings of fact and conclusions of law. The order must be entered within ten days of the conclusion of the hearing. Rule 27. The order must require the Department to compile the child case plan, which includes a permanency plan. W. Va. Code § 49-6-5(a). The order should also include any provisions for an improvement period, if applicable.

3. Stipulated Adjudication and Uncontested Petitions

On those occasions where the respondent does not contest to the petition or the parties agree upon a stipulated adjudication, the court may enter an adjudication order without taking evidence. Any stipulated or uncontested adjudication order must include:

- a. Agreed-upon facts that support the court's involvement, including the respondent's conduct, condition or problems; and

- b. A statement of the respondent's problems to be addressed at the final disposition hearing. Rule 26(a).

The court must ensure that the parties fully understand the consequences and the content of the stipulated adjudication, and must find that the parties have voluntarily consented to the stipulation and that the stipulation or uncontested adjudication is in the best interest of the child. Rule 26(b).

I. Child Case Plan

When a child has been adjudged abused or neglected, the court shall order the Department to complete a child case plan. The plan will include a permanency plan and the same requirements included in the family case plan. W. Va. Code § 49-6-5. See also W. Va. Code § 49-6D-3. The child case plan can be a useful resource for the court at the dispositional hearing. The child case plan represents the Department's recommendations with respect to the child. It may contain recommendations such as:

1. Timetables for the parties to correct problems;
2. Efforts made by the Department to prevent the need for placement of the child;
3. An explanation why placement is in the best interest of the child;
4. A list of friends or relative that would provide a suitable and safe permanent place for the child;
5. A suggested visitation plan; and
6. The ability of parents to contribute financially to placement.

Rule 28.

The case plan should also contain a permanency plan. The permanency plan is designed to achieve a permanent home for the child in the least restrictive setting available. It must document efforts to ensure the child is returned home within the time frames set out in the plan. If reunification of the family is not in the permanency plan, the Department must explain why reunification is not appropriate. The child case plan must be compiled within 30 days after the final adjudicatory order is entered by the court. The plan must also be served on all parties involved at least 5 days before the dispositional hearing. W. Va. Code § 49-6-5(a); Rule 29.

A party may object to the child's case plan at the disposition hearing, in which case the court must enter an order:

- (a) Approving the plan;
- (b) Ordering compliance with all or part of the plan;
- (c) Modifying the plan in accordance with the evidence presented at the hearing; or
- (d) Rejecting the plan and ordering the Department to submit a revised plan with 30 days. If the court rejects the child's case plan, the court shall schedule another disposition hearing within 45 days.

Rule 34.

J. Disposition Hearing

1. Timing

The court shall begin the disposition hearing within 45 days of the entry of the adjudicatory order if no post-adjudicatory improvement period has been granted, or within 60 days after the post-adjudicatory improvement period ends. See Rule 32; see also W. Va. Code § 49-6-12(k).

The parties may choose to have an accelerated disposition hearing. In order to proceed with an accelerated disposition hearing the following requirements must be met: (1) the parties must agree to the accelerated hearing; (2) the child case plan must have been completed and provided to the court and the parties, unless the parties have waived the right to the child case plan; (3) notice of the hearing was either effectuated or was waived by the parties.

2. Disposition

At the disposition hearing, the court must give the parties an opportunity to be heard. The rules of evidence apply in the hearing, and the respondent(s) shall be given the opportunity to present and cross-examine witnesses. W. Va. Code § 49-6-2(c). At the conclusion of the hearing, the court must make findings of fact and conclusions of law on the record or in writing. The following dispositions may be made:

- a. Dismiss the petition;

- b. Dismiss the petition *and* refer the child and/or abusing parent to a community agency for assistance;
 - c. Return the child to the home under the supervision of the department;
 - d. Order terms of supervision;
 - e. Commit the child to the temporary custody of the department, or a suitable person who may be appointed guardian by the court; or
 - f. Terminate parental rights.
- W. Va. Code § 49-6-5(a).

Alternatively, under appropriate circumstances, the court may grant a disposition improvement period prior to making a final disposition in accordance with the above-listed options. W. Va. Code § 49-6-12(c). (See Section VII. C. above.)

3. Order

The court must enter an order within 10 days of the conclusion of the hearing. The order must set forth findings of fact and conclusions of law. Rule 36(a). The court should include the following, if applicable, in the dispositional order:

- a. The date and time for the first placement review conference;
 - b. The terms of visitation;
 - c. Services provided to the child and the family;
 - d. Restraining orders controlling the conduct of any party that may frustrate the disposition order;
 - e. Corrective actions that any parties must take to alleviate problems;
 - f. Conditions regarding the placement of the child, including any special needs the child may have;
 - g. Steps to unite the child with siblings; and
 - h. The terms and conditions of the child's case plan or family case plan.
- Rule 36(b),(c).

4. Improvement Period

The court may order an improvement period in lieu of making a disposition at the final dispositional hearing. An improvement period ordered at the dispositional hearing may not exceed 6 months, with a 3-month extension being permissible if there is a showing of substantial change of circumstances making full participation likely. If the court orders the improvement period, it should hold a final disposition hearing within 60 days after the improvement period ends. W. Va. Code § 49-6-5(c). If the court finds that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected, the court may not order an improvement period. In re Darla B., 331 S.E.2d 868 (W. Va. 1985).

5. Temporary Custody

The court may order as a disposition that the child be committed to the temporary custody of the Department, a private child welfare agency, or a responsible person. W. Va. Code § 49-6-5(a)(5). If the court so orders, it must include the following in its order:

- a. Continuation in the home is contrary to the welfare of the child;
- b. Whether the department made reasonable efforts to prevent the placement, and what those reasonable efforts were, or that an emergency situation existed making efforts unreasonable or impossible, or that such reasonable efforts were not required;

(See also Overview Section XV. Contrary-to-Welfare and Reasonable Efforts Findings.)

- c. The circumstances under which the temporary custody shall continue, and in examining these circumstances, the court should consider whether the child should:
 - i. Be continued in foster care for a specified period;
 - ii. Be considered for adoption;
 - iii. Be considered for legal guardianship;
 - iv. Be considered for permanent placement with a fit and willing relative; or

- v. Be placed in another permanent living arrangement if there are competing reasons not to follow one or the above options.
- d. An order for financial support, if appropriate, from the parents if the child is transferred to the custody of the Department.
- e. An order requiring services for the child.
- 6. Termination of Parental Rights

The court may determine at the dispositional hearing that parental or custodial rights should be terminated. To support such a determination, the court must find that there is “no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future” or that the welfare of the child necessitates termination of the parental or custodial rights. W. Va. Code § 49-6-5(a)(6). The statute provides that there is “no reasonable likelihood that the conditions of neglect and abuse can be substantially corrected” when the abusing adult has demonstrated an inability to solve the problems leading to the abuse or neglect on their own or with help. W. Va. Code § 49-6-5(b). This code section provides examples of circumstances that support this determination:

- a. The abusing adult has an addiction to alcohol or controlled substances that seriously impairs her or his parenting skills and the abusing adult has not responded to the recommended treatment;
- b. The abusing adult has willfully refused to participate in a reasonable family case plan;
- c. The abusing adult has not responded to rehabilitative efforts such that the conditions that threatened the welfare of the child have not diminished in a substantial way;
- d. The abusing parent has abandoned the child;
- e. The abusing adult has repeatedly seriously injured the child physically or emotionally, or has engaged in sexual abuse such that the degree of family stress and potential for further abuse are so great that the use of resources to resolve or mitigate the family problems has been precluded; or

- f. The abusing parent suffers from emotional illness that has lasted for such a duration and is of such a nature that he or she been rendered incapable of exercising proper parenting skills.

Of course, this list is not exhaustive, and there are other circumstances that the court finds make the termination of parental rights necessary. Furthermore, the court should generally consider the following factors when deciding whether parental rights should be terminated:

- a. The child's need for continuity of caretakers;
- b. The amount of time needed to integrate the child into a stable, permanent home; and
- c. Other factors the court considers necessary and proper.

If the child is age 14 or older, or is of an age of discretion as determined by the court, the child's wishes shall be considered. W. Va. Code § 49-6-5(a)(6). If the court terminates parental rights, the court should commit the child to the sole custody of the non-abusing parent, or to the permanent custody of the department. W. Va. Code § 49-6-5(a),(b).

If the termination involves the first removal of the child from the home (or follows an extended improvement period in the home) the contrary-to-welfare and reasonable efforts to prevent placement findings must be made. If removal occurred earlier, reasonable efforts findings regarding finalizing the permanency plan are likely due. (See Section XV. below.)

K. Permanent Placement

1. Permanency Hearing

A permanency hearing must be held if the court found, pursuant to W. Va. Code § 49-6-5(a)(7), that the Department was not required to make reasonable efforts to preserve the family, and as a disposition, either terminated parental rights pursuant to W. Va. Code § 49-6-5(a)(6), or placed the child in the temporary custody of the Department or a responsible person pursuant to W. Va. Code § 49-6-5(a)(5). In any event, a permanency hearing must always be held when a child has been in foster care for one year from the earlier of the date of the first finding of abuse or neglect, or 60 days after removal from the home.

The purpose of the hearing is to determine the permanency plan for the child. Rule 36a. If the Department was not required to make reasonable efforts as mentioned above, then the hearing must be held within 30 days of the disposition hearing. Otherwise, the hearing must be held within one year from the earlier of the date of the first finding of abuse or neglect or

60 days after the removal from the home. All parties, counsel, and persons entitled to notice must be provided five judicial days' notice of the hearing. Rule 36a.

2. Permanent Placement Review

The court, with the assistance of the MDT, must continue to monitor implementation of the permanency plan. A permanent placement review must be held at least once every three months until permanency is achieved. Counsel for the parties and interested persons should be given at least 15 days' notice of the review. The review must actually be held and may not be conducted merely with the entry of an agreed order. Rule 39.

At least ten days before each review, the MDT and the Department must provide the court and parties with a progress report describing efforts to implement permanent placement. Additionally, the court may accept progress reports or statements from other persons, including the parties and CASA. Rule 40.

During the review the court should consider:

- a. The extent to which problems that have given rise to the child abuse or neglect proceedings have been remedied;
- b. Services or assistance provided to the family since the last hearing, and services and review conferences needed in the future;
- c. Compliance by the abusing adult and the Department with the case plan and previous court orders and recommendations;
- d. Any recommended changes in court orders;
- e. The extent to which the abusing adult contributes financially to the placement of the child, and his or her ability to contribute;
- f. The appropriateness of the current placement of the child and whether it is it is the most family-like setting;
- g. A summary of visitation and any recommended changes;
- h. Whether the child's special needs were or were not met while in placement;
- i. The location of siblings and the steps being taken to unite them;

- j. Any recommendation or discussion of the child's return home, placement for adoption, other permanent placement, and concurrent alternative permanency plans; and
 - k. Determination of reasonable efforts for reunification or permanent placement.
- Rule 41(a).

During the permanent placement review conferences, the MDT should make recommendations regarding future placement issues for the child. Some of the information that should accompany various recommendations proposed at the review conference is:

- a. **If a return to the home is recommended:** (a) steps necessary to make return possible and to minimize the disruptive effects of a return; (b) the dangers that may face the child after a return; and (c) reunification services necessary to minimize danger to the child.
- b. **If return to the home is not recommended:** (a) the steps needed to effectuate the termination of parental rights; (b) the time needed to achieve such measures.
- c. **If neither return nor placement for adoption is recommended:** (a) a discussion of guardianship or permanent custody with a responsible individual including, (i) rights and responsibilities of the biological parents and the custodial parents or guardians, and (ii) a time table for the awarding of permanent custody; (b) a discussion of permanently placing the child in foster care, including, (i) a proposed time table, (ii) terms of the foster care agreement, and (iii) and the continuing rights of the biological parents.
- d. **If continued foster care is recommended:** an explanation of why foster care continues to be appropriate for the child.
- e. **If placement in a group home or institution is recommended:** (a) why treatment outside a family setting is necessary, including expert diagnoses and recommendations; (b) why less restrictive, family settings are not practical; (c) why placement with specially trained foster parents is not practical;

- f. **If emancipation is recommended for children over 16 years old:** (a) why foster care is no longer appropriate; (b) the skills needed by the child to prepare for adulthood; and (c) a description of the ongoing support and services to be provided by the department.

Rule 41(a).

3. Order

The court shall enter an order within ten days of the conference, stating whether permanent placement has been achieved. Rule 42(a). The court shall include findings of fact and conclusions of law supporting its determination. If the court finds that permanent placement has not been achieved, the court shall include in the order the issues discussed at the review conference, including the following:

Changes in the child's case plan the court deems necessary to achieve permanent placement, with accompanying findings of fact;

Changes in visitation and other parental involvement;

Changes to be provided to the parties and the child;

Restraining orders controlling any conduct of parties likely to frustrate the order;

Additional action to be taken by parties involved in order to achieve permanent placement; and

Findings as to whether the Department has made reasonable efforts to finalize the permanency plan in effect. (See Contrary-to-Welfare and Reasonable Efforts Findings Section below.)

A date and time for the next permanent placement review conference.

If the court issues an order that permanent placement has been achieved, the case may be dismissed from the docket. Rule 42(b),(c).

L. Appeal

1. Procedure

After any adverse judgment at the adjudicatory hearing, the court shall inquire whether the parents or custodians wish to appeal the decision. W. Va. Code § 49-6-2(e). The court should transcribe the response by the parents; however, a negative response will not constitute a waiver of the right to appeal if the parents later change their mind. The court shall transcribe the evidence and make the transcript available to the parties as soon as practicable. The appeal may pertain to the court's determination of child abuse or neglect, or to the termination of parental rights in an accelerated appeal. The party may appeal under accelerated procedures within 60 days of the judgment. Rule 49. The Supreme Court of Appeals will give priority to all child abuse and neglect appeals.

2. Transcripts

West Virginia Code § 49-6-2(e) provides for a transcript to be furnished to indigent persons without cost. (See also W. Va. Code § 51-7-8). Section IX. 5. of the Manual for Official Court Reporters of the West Virginia Judiciary (Administrative Office of the Supreme Court of Appeals), promulgated October 30, 1984, amended December 13, 2000 ("Official Court Reporter Manual"), provides: "Transcripts of child abuse and neglect proceedings will be paid only if requested under the guidelines of an indigent criminal appeal." Accordingly, the Supreme Court Administrative Director's Office will pay transcription fees for preparation of an original and one copy of a transcript requested by an indigent party in an abuse and neglect case for purposes of appeal to the Supreme Court when the requirements are met. Generally, this means that the requesting party has submitted proof of indigency by affidavit filed with the circuit clerk, and completed the Appellate Transcript Request form and provided it to the appropriate court reporter. Court Reporter Manual, Section IX. 1. and 5.

M. Roles and Responsibilities

1. Abuse and Neglect Definitions

- a. **Principal Definitions.** West Virginia Code § 49-1-3 sets forth comprehensive definitions that pertain to all child abuse and neglect proceedings under Chapter 49 of the Code.

2. Responsible Agencies, Officers and Persons

- a. **Identification.** West Virginia Code § 49-1-4 generally identifies the agencies, officers and persons involved in child

abuse and neglect proceedings. Additionally, the "Multidisciplinary Team" is identified by the definition set forth in West Virginia Code § 49-1-3(g).

- b. **Department of Health and Human Resources Responsibilities for Protection and Care of Children.** West Virginia Code § 49-2-1 et seq. sets forth the responsibilities of the Department for the care of abused and neglected children who are committed to its care for custody or guardianship. Care may be provided through: 1) foster homes; 2) licensed child welfare agencies; 3) state institutions. West Virginia Code § 49-2-16 specifies the Department's responsibilities for child custody and care upon voluntary parental or guardian placement, from courts exercising juvenile jurisdiction and from law-enforcement officers in emergency situations.
- c. **Duties of Department Regarding Licensing for Child Welfare Agencies.** West Virginia Code § 49-2B-1 et seq. specifies the responsibilities of the Department for the licensing, approving and registering of child care facilities and child welfare agencies in the State. Applicable State regulations include Title 78, Series 2-- "Child Placing Agencies Licensure," and Title 78, Series 3-- "Minimum Licensing Requirements for Group Residential Facilities in West Virginia."
- d. **Duties of Prosecuting Attorneys.** West Virginia Code § 49-6-10 specifies the duties of every prosecuting attorney with respect to child abuse and neglect, including: i) fully and promptly cooperate with persons seeking relief in suspected instances; ii) promptly prepare requested applications and petitions for relief; iii) investigate reported cases for possible criminal activity and report to the grand jury at least annually in this regard. Any disputes arising between a prosecuting attorney and the Department regarding proposed action believed by either the prosecutor or the Department to place a child at imminent risk are subject to the mediation provisions set forth in W. Va. Code § 49-6-10a. The prosecuting attorney shall provide legal services as the Department may require. West Virginia Code § 49-7-26. Additionally, under West Virginia Code § 49-5D-2(a), it is the duty of every prosecuting attorney to establish a multidisciplinary investigative team for their county, which shall

be responsible for coordinating and cooperating in the investigation of all civil and criminal allegations of child abuse and neglect. In this regard, also see West Virginia Code § 7-4-5, mandating that each county prosecutor establish a multidisciplinary investigative team by no later than January 1, 1995.

- e. **Duties of Multidisciplinary Treatment Teams.** Under West Virginia Code § 49-5D-3, the Department must establish a Multidisciplinary Team Process in every county (or contiguous counties), which shall be responsible for assessing, planning and implementing comprehensive, individualized service plans for children who are victims of abuse and neglect. Each treatment team shall be directed by the child's or family's case manager, and include the child's custodial parent(s)/guardian(s), other immediate family members, the attorney(s) of the parent(s) if assigned by the court, the child if over 12 years of age or if the team members find the child's participation appropriate, the guardian ad litem, the prosecuting attorney (or designee), and any other agency or person who may contribute to the team's efforts. Pursuant to West Virginia Code § 49-5D-4, each team director must keep records of attendance and case discussions for each meeting.

- f. **Duties of Child Protective Services.** Under West Virginia Code § 49-6A-9, the Department shall maintain a Child Protective Services Office for every county or locale. The local office shall be responsible for: i) investigating all reports of child abuse or neglect pursuant to the time standards and investigatory procedures specified in this statute; ii) providing, directing or coordinating appropriate and timely delivery of services to any child suspected or known to be abused or neglected (and services to the child's family); and, iii) initiating appropriate legal proceedings. (See also West Virginia Code § 49-6-3(c) relating to emergency custody by child protective service workers.) In 1994, the Legislature passed West Virginia Code § 49-6-1a, directed toward the goal of increasing the number of child protective service case workers.

- g. **Persons under Mandatory Duty to Report Suspected Abuse or Neglect.** West Virginia Code § 49-6A-2 requires medical and mental health professionals, school personnel, social workers, child care workers, clergy, law-enforcement officers and judicial officers to report any suspected child abuse or neglect.

3. Education and Training Obligations

Various statutory provisions mandate specific education or training for those persons most involved with prevention and intervention in situations of child abuse and neglect. West Virginia Code § 18-5-15c (County boards of education to provide pupils, parents and school personnel with training programs in prevention of child abuse and neglect); West Virginia Code § 48-27-1104 (Mandatory education on family violence for circuit court judges, family court judges, and magistrates); West Virginia Code § 48-2A-9(i) (Mandatory training for law-enforcement officers relating to response to calls involving family violence); West Virginia Code § 49-6-2(a) (Mandatory continuing legal education training for lawyers involved with representation in child abuse and neglect proceedings); West Virginia Code § 61-8-9a (Curriculum on parenting skills to avoid child abuse required for secondary-level grades in all State schools).

4. Medical and Mental Examinations

West Virginia Code § 49-6-4 specifies the procedure and conditions for court-ordered mental and medical examinations of a child or other parties in abuse and neglect proceedings.

- a. At any time during the proceedings, the court, attorney for child or attorney for other parties may move for an examination by a physician, psychologist or psychiatrist, and require testimony from such expert.
- b. The court cannot terminate parental/custodial rights solely for refusal to submit to an examination, nor may the court hold such person in contempt for such failure or refusal.
- c. The court's order of examination shall provide for payment of the expert and the State will be responsible for payment if the child or parent is indigent. (With regard to payment of expert fees, also see the discussion of W. Va. Code § 49-7-33 below.)

- d. No evidence acquired as the result of such examination of any parent/custodian may be used against such person in subsequent criminal proceedings.
- e. Subsection (b) of this statute allows any person with authority to file an abuse or neglect petition to apply to the circuit judge or juvenile referee for a medical examination in advance of institution of an abuse or neglect proceeding if there is probable cause to believe evidence of abuse or neglect may be found by such examination.
- f. The court may order parties to undergo examinations by experts who are not physicians, psychologists, or psychiatrists and may enter a protective order with regard to W. Va. Code § 57-2-3. In re Daniel D., 211 W. Va. 79, 562 S.E.2d 147 (2002).

Another statute, West Virginia Code § 49-7-33, authorizes the court, *sua sponte* or upon any party's motion, to order the Department to pay for professional services rendered by a psychologist, psychiatrist, physician, therapist or other health care professional to a child or other party in an abuse and neglect proceeding. This statute authorizes the Department to pay for such services in accordance with the Medicaid rate, if any, or a scheduled customary rate. The issue of whether the circuit court retains the ultimate authority to determine the expert witness rates in these circumstances is discussed, but not fully resolved, in Hewitt v. DHHR, 212 W. Va. 698, 575 S.E.2d 308 (2002).

5. Criminal Offenses Involving Abuse and Neglect of Children

Beyond the protections afforded generally to all persons under the criminal statutes, various provisions are specifically designed to deter and punish offenses against children, and provide special protection to child-victims of crimes.

- a. West Virginia Code § 61-8D-1 et seq. defines the various conduct generally constituting criminal offenses of child abuse and neglect. Additional specific criminal offenses involving abuse or neglect of children are principally found in West Virginia Code § 61-8C-1 et seq. (Filming of Sexually Explicit Conduct of Minors) and West Virginia Code § 49-7-7 (Contributing to Delinquency or Neglect of a Child).

- b. A number of statutes provide specific protections for child-victims relating to the investigation, trial, sentencing and release of persons charged and convicted of criminal offenses against children. West Virginia Code § 61-8-13; 61-8B-14; and 61-8C-5 (Limits on interviews of children 11 years old or less); West Virginia Code § 62-6B-1 et seq. (Closed-circuit testimony of child victims testifying in criminal matters involving charges of sexual assault/abuse); West Virginia Code § 61-11A-3(d) (Victim impact statement in a presentence report involving an offense against a child may include a statement from a therapist providing treatment to the child-victim as to recommendations regarding the effect that possible disposition may have on child); West Virginia Code § 61-11A-8 (Notification to child-victim's parent upon release of convicted person from correctional facility); West Virginia Code § 62-1C-17a (Bail in situations of child abuse); West Virginia Code § 62-1C-17c (Bail in cases of crimes between family or household members); West Virginia Code § 62-11A-1(8) (Protections afforded children from those convicted of child offenses who are granted work-release privileges); West Virginia Code § 62-12-7 & 7a (Pre-sentence investigations and reports involving offenses against children); West Virginia Code § 62-12-9(a)(4) (Protections afforded children from those convicted of child offenses who are released on probation); West Virginia Code § 62-12-17(4) (Protections afforded children from those convicted of child offenses who are released on parole); and West Virginia Code § 15-2C-2 (Relating to Central Abuse Registry identifying persons convicted of crimes involving abuse and neglect).
- c. Various statutory provisions also mandate that upon a conviction of person for a crime against a child, when the person has any custodial, visitation or other parental rights to the child, the court shall make a finding that the convicted person is an "abusing parent" within the meaning of the abuse and neglect provisions of Chapter 49 of the Code. West Virginia Code § 61-8-12(e) (Incest); West Virginia Code § 61-8B-11a (Sexual Offenses); West Virginia Code § 61-8D-9 (Child Abuse); see also West Virginia Code § 49-6-11.

N. Cases of Controlling General Principles

1. **In re Renae Ebony W.**, 452 S.E. 2d 737 (W. Va. 1994). Central issue involves pre-adjudicatory improvement periods in abuse and neglect cases, and when such improvement periods should include physical custody of the child in-home or, alternatively, out-of-home placement during the improvement period. Reversing a circuit court decision that ratified emergency removal of a child from the custody of her parents, but returned the child to those parents for a 3-month improvement period, the Court held that where a child is initially removed from the custody of his or her parents pursuant to West Virginia Code § 49-6-3, and where such emergency removal is ratified upon a finding of imminent danger, a child shall remain in the temporary legal and physical custody of the State or some responsible relative and out of the allegedly abusive home during the improvement period until the circumstances which constitute an imminent danger cease to exist or until the alleged abuser has been precluded from residing in or visiting the home.
2. **Alonzo v. Jacqueline F.**, 191 W. Va. 248, 445 S.E.2d 189 (1994). Rejecting an attempt by a mother to place her child for adoption against the wishes of the State Department during the course of abuse and neglect proceedings, the Court held that where an abuse and neglect petition has been filed against a parent, such parent may not confer rights upon a third party by executing a consent-to-adopt during the pendency of the proceedings.
3. **SER S.C. v. Lewis-Chafin**, 191 W. Va. 184, 444 S.E.2d 62 (1994). In a proceeding upon a petition for Writ of Mandamus and Writ of Habeas Corpus, the State Department was ordered to comply with various statutory provisions regarding the protection of children, the Court held: (1) whether or not a court orders immediate transfer of custody pursuant to West Virginia Code § 49-6-3(a), if the court finds there is imminent danger to a child, it may schedule a preliminary hearing; (2) the court may order that a child be placed in the temporary custody of the State Department or some other person for a period of 60 days if the court finds, following the preliminary hearing, that no alternative less drastic will adequately protect the child; (3) if, in addition to finding no less drastic alternative, the court finds, upon the preliminary hearing, that the child has been abused or neglected, then the court and State Department, no later than 60 days after the temporary custody

placement, must proceed with disposition in compliance with West Virginia Code § 49-6-5; (4) pursuant to West Virginia Code § 49-6-5(a), the State Department must, in conjunction with parental rights termination proceedings, file with the court a copy of the child's case plan, including the permanency plan; (5) the court must proceed to disposition, pursuant to West Virginia Code § 49-6-5(a), including possible temporary placement with the State Department if the parents are unwilling or unable to adequately care for the child; (6) if the child has not been placed in permanent foster care, in an adoptive home, or with the natural parent, within one year of receipt of physical custody by the State Department, pursuant to West Virginia Code § 49-6-8(a), the State Department shall file with the court a petition for review, a report detailing efforts to find a permanent placement, and a copy of the child's case plan, all upon which the court shall conduct a hearing to determine whether and what circumstances custody shall continue with the State Department, to determine what efforts are necessary to provide the child with a permanent home, and enter an appropriate order in accordance with the best interest of the child; (7) the court shall retain jurisdiction as long as the child remains in temporary foster care; and (8) the State Department must file a report with the court, pursuant to West Virginia Code § 49-6-8(d), where any child in its temporary or permanent receives more than three placements in one calendar year, which report must be filed no later than 30 days after the third placement.

4. **In re Jeffrey R.L.**, 190 W. Va. 24, 435 S.E.2d 162 (1993). The guardian ad litem appointed to represent the infant for purposes of appeal sought review of an order of the circuit court which ordered physical custody of the infant to his mother following extended proceedings over allegations of abuse where it was shown that the infant had clearly been abused, but neither parent admitted the abuse, accused the other parent, or accused any person with access to the infant. The Court, on appeal, terminated parental rights holding that: (1) parental rights may be terminated where there is clear and convincing evidence of serious physical abuse while in the custody of the parents if there is no reasonable likelihood that the conditions which resulted in abuse can be substantially corrected because the abuser has not been identified and that the parents, even in the face of knowledge of abuse, have taken no action to identify the abuser; (2) every child in an abuse and neglect case has a right to effective assistance of counsel, which includes the presence of counsel at every stage of the proceeding

and an independent investigation of the facts; and (3) an attorney who is appointed as guardian ad litem for a child in an abuse and neglect proceeding should follow the guidelines detailed and adopted as an appendix to this decision.

5. **State v. James R.**, 188 W. Va. 44, 422 S.E.2d 521 (1992). Applying West Virginia Code § 49-6-4(a), the Court held that evidence acquired from a parent or custodian as the result of medical or mental examinations performed in the course of abuse and neglect proceedings may not be used in any subsequent criminal proceedings against such parent or other custodian.

6. **In re Carlita B.**, 185 W. Va. 613, 408 S.E.2d 365 (1991). In an appeal from an order of the circuit court terminating a mother's parental rights to her daughter, the appellant-mother contended that the circuit court erred in terminating her parental rights because the State Department and assigned case worker failed to make reasonable efforts to reunify the family and failed to develop a realistic case plan, and further contended that the circuit court erred in finding the appellant incapable of exercising proper parenting skills and in finding that the appellant abused her children other than the child that was the subject of this proceeding, because such other conduct was not relevant to this proceeding. Affirming the termination of parental rights, the Court held: (1) the status and progress of all child neglect and abuse cases should be closely monitored by appropriate administrative systems developed within the judiciary; (2) the formulation of improvement periods and development of family case plans must be a consolidated, multidisciplinary effort among the court system, the parents, the attorneys, the social service agencies, and any other persons involved in assisting the family; (3) child abuse and neglect cases should receive high priority in the judicial system as directed under West Virginia Code § 49-6-2(d); and, (4) in parental rights termination cases introduction of evidence of prior acts of neglect or abuse toward children in general to show a neglectful or abusive disposition toward children does not violate West Virginia Rules of Evidence, Rule 404(b).

7. **James M. v. Maynard**, 185 W. Va. 648, 408 S.E.2d 400 (1991). Granting a Writ of Prohibition overturning the award of an improvement period to the father of four sons, the Court held: (1) abandonment of a child by a parent(s) constitutes compelling

circumstances sufficient to justify the denial of an improvement period; (2) whenever possible, a change in custody of children should be accomplished gradually in order to foster emotional adjustment to the change and maintain as much stability as possible in the children's lives; (3) in cases of termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if so, the court should enter an appropriate order to preserve the rights of siblings to continued contact; and (4) the duties of a guardian ad litem in abuse and neglect proceedings do not end until the child is placed in a permanent home.

8. **In re Scottie D.**, 185 W. Va. 191, 406 S.E.2d 214 (1991). In an appeal by the guardian ad litem for the involved children, upon the circuit court's refusal to terminate the parental rights of the father after the children were abused by their mother, the Court held that: (1) where one parent knowingly refrained from intervening to prevent the abuse of a child by the other parent or where one parent supports the other parent's version of how a child's injuries occurred despite the clear and convincing medical evidence to the contrary, termination of the non-participating parent's rights is proper; and (2) a guardian ad litem appointed to protect the interests of a child in a parental rights termination case has a duty to appeal any decision which, in the guardian's reasonable judgment, is contrary to the best interests of the child.
9. **In re Jonathan P.**, 182 W. Va. 302, 387 S.E.2d 537 (1989). In an appeal by a mother whose parental rights were terminated upon evidence that she inappropriately fed her 6-month old child and slept with him in a car in sub-freezing weather, all despite offers of assistance from the State Department, the Court held: (1) West Virginia Code § 49-6-3 permits the immediate temporary custody of a child by the State Department where there exists an imminent danger to the physical well-being of the child and there are no reasonably available alternatives to the removal of the child; (2) a request for a pre-adjudicatory improvement period under West Virginia Code § 49-6-2(b) must be made prior to final hearing; and (3) termination of parental rights may be employed without the use of intervening less restrictive alternatives when there is no reasonable likelihood that conditions of neglect or abuse can be substantially corrected.

10. **In re Betty J. W.**, 179 W. Va. 605, 371 S.E.2d 326 (1988). In an appeal by a mother from an order terminating her parental rights to her five children, following physical abuse of the children by her husband, where the mother also contended she was a victim of physical abuse by her husband, the Court reversed the circuit court's denial of an improvement period and termination of parental rights, holding that: (1) West Virginia Code § 49-6-2(b) allows a non-custodial improvement period while the child is temporarily physically removed from the alleged abusive situation; and (2) West Virginia Code § 49-1-3(a) defines an abused child to include one whose parent knowingly allows another person to commit the abuse, and under this standard, a termination of parental rights may be upheld only where the non-abusing parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent. The Court remanded the case with directions for the granting of an improvement period with an appropriate family case plan.
11. **Nancy Viola R. v. Randolph W.**, 177 W. Va. 710, 356 S.E.2d 464 (1987). Following the murder of a child's mother by the child's father, the child's maternal aunt appealed the circuit court's grant of custody to the guardian appointed by the child's father. The Court held that: (1) a conviction of first degree murder of a child's mother by his father, the father's prolonged incarceration for that conviction, and a history of numerous acts of violence by the father toward the mother prior to her death, are all significant factors to be considered in ascertaining the father's fitness and in determining whether his parental rights should be terminated; and (2) where parental rights of a father have been terminated because of his conviction of murder of the child's mother, permanent guardianship may be given to the State Department pursuant to West Virginia Code § 49-6-5(a)(6).
12. **Rozas v. Rozas**, 176 W. Va. 235, 342 S.E.2d 201 (1986). In this modification of custody dispute in which the father sought a transfer of custody based upon allegations of the mother's physical neglect and abuse of the child, the circuit court ordered an examination of the mother pursuant to West Virginia Code § 49-6-4(a), and subsequently excluded the report based upon a conclusion that it was not competent, relevant or probative. The Court on appeal held that it was within the trial court's discretion to exclude the report, but pursuant to Rule of Evidence 706 the court below did not have the authority to abrogate each parties' right to inspect the expert's findings in the report.

13. **In re Darla B.**, 175 W. Va. 137, 331 S.E.2d 868 (1985). In an appeal by both parents following the termination of their parental rights to their daughter, the Court held that: (1) a decision of a circuit court terminating parental rights will not be reversed for failure to grant an improvement period where the evidence supports a finding that the child suffered life-threatening injuries which could not have occurred in the manner testified to by the parents, and the circuit court found compelling circumstances for termination of parental rights; and (2) the granting of an improvement period, pre-adjudicatory or upon disposition, is not an alternative where a finding is made that there is no reasonable likelihood that the conditions of neglect or abuse can be substantially corrected in the near future, and compelling circumstances justify denial of such improvement period.
14. **State v. T.C.**, 172 W. Va. 47, 303 S.E.2d 685 (1983). In this appeal two procedural issues were addressed by the Court, wherein it was held that: (1) in child abuse and neglect hearings a court cannot make any disposition until a hearing is held pursuant to West Virginia Code § 49-6-2 and a determination made whether the child is abused or neglected; and (2) although the child abuse and neglect provisions do not foreclose the ability of the parties, properly counseled, to make some voluntary dispositional plan with respect to the child or children, such arrangements must be approved by the court and cannot be done in manner to circumvent the threshold question of abuse or neglect.
15. **In re Edward B.**, 210 W. Va. 621, 558 S.E.2d 620 (2001). Where it appears from the record that the process established by the Rules of Procedure for Child Abuse and Neglect Proceedings and related statutes for the disposition of cases involving children adjudicated to be abused or neglected has been substantially disregarded or frustrated, the resulting order of disposition will be vacated and the case remanded for compliance with that process and entry of an appropriate dispositional order. The Court further noted that: "Pursuant to Rule 51 of the Rules of Procedure for Child Abuse and Neglect Proceedings, a multidisciplinary treatment team, as defined in West Virginia Code §§ 49-5D-1 to -7, is to be convened for each abuse and neglect case within thirty days of its filing, consisting of the parties and representatives of agencies who may be able to help in the particular situation." 210 W. Va. at 631, 558 S.E.2d at 632. In Edward B., the Court noted that the multidisciplinary team was not convened and relied, in part, on this failure to reverse the circuit court.

16. **In re James G.**, 211 W. Va. 339, 566 S.E.2d 226 (2002). When the parental rights of a parent to a child have been involuntarily terminated, W. Va. Code § 49-6-5b(a)(3) requires the Department of Health and Human Resources to file a petition, to join in a petition, or to otherwise seek a ruling in any pending proceeding, to terminate parental rights as to any sibling of that child. While the Department of Health and Human Resources has a duty to file, join or participate in proceedings to terminate parental rights in the circumstances listed in W. Va. Code § 49-6-5b(a)(3), the Department must still comply with the evidentiary standards established by the Legislature in W. Va. Code § 49-6-2 before a court may terminate parental rights to a child, and must comply with the evidentiary standards established in W. Va. Code § 49-6-3 before a court may grant the Department the authority to take emergency, temporary custody of a child.
17. **In re Billy Joe M.**, 206 W. Va. 1, 521 S.E.2d 173 (1999). Concurrent planning, wherein a permanent placement plan for the child(ren) in the event reunification with the family is unsuccessful is developed contemporaneously with reunification efforts, is in the best interests of children in abuse and neglect proceedings.
18. **State ex rel. Amy M. v. Kaufman**, 196 W. Va. 251, 470 S.E.2d 205 (1996). Statutory limits on improvement periods are mandatory and there comes a time for decision despite genuine emotional bonds. Children deserve resolution and permanency in their lives. Statutorily unauthorized extensions of improvement periods and procedural delays can be so protracted as to violate clear statutory constitutional and common law mandates.
19. **In re Katie S.**, 198 W. Va. 79, 479 S.E.2d 589 (1996). The respondent's argument concerning the stoppage of services by the Department after the children were removed, was based on the assumption that the Department, and not the mother, had the responsibility for initiating contact after the children were removed. The Court found, however, that "[a]lthough the Department is required 'to make reasonable efforts to reunify a family' (W. Va. Code § 49-6-12(i), the parents or custodians have the responsibility 'for the initiation and completion of all terms of the improvement period.' W. Va. Code § 49-6-12(d)." As a general rule the least restrictive alternative regarding parental rights to custody of a child under W. Va. Code § 49-6-5 will be employed; however, courts are not required to exhaust every

speculative possibility of parental improvement before terminating parental rights where it appears that welfare of the child will be seriously threatened, and this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent close interaction with fully committed adults, and are likely to have their emotional and physical development retarded by numerous placements. Therefore, the Court affirmed termination of parental rights.

O. Contrary-to-Welfare and Reasonable Efforts Findings

1. Background

The requirement that any removal of a child be based upon a judicial finding that continuation of the child in the home is contrary of the welfare of the child was the first of the existing protections afforded to children and their families by the federal foster care program. The contrary-to-welfare requirement has been in effect since the inception of the federal program in 1961. The additional requirement that states make reasonable efforts to prevent placement and reunify families was introduced into child welfare proceedings in 1980 under the Federal Adoption Assistance and Child Welfare Act. Both the contrary-to-welfare and reasonable efforts requirements have continued as core concepts in American child welfare practices. More recently, the Federal Adoption and Safe Families Act of 1997 (and implementing regulations) refined and expanded these concepts. In addition to the reasonable efforts required to prevent removal and to reunify families, federal law also now requires states to demonstrate reasonable efforts to finalize the permanency plan once the child is temporarily placed in foster care.

The contrary-to-welfare and reasonable efforts requirements must be reflected in judicial findings, which must be both timely and specific. Once a child is removed from the home (temporarily or permanently), the State is eligible for 3-to-1 federal matching funds under Title IV-E of the Social Security Act for the duration of the child's stay in foster care. If a child's removal from home is not based on a judicial determination that it was contrary to the child's welfare to remain in the home, the State is ineligible for Title IV-E funding for the entire foster care episode subsequent to that removal.¹ When findings of reasonable efforts to prevent removal are negative, insufficient, late or missing, the loss of eligibility for federal foster care matching funds will also be for the duration of the child's stay in foster care. If

¹ In circumstances involving a child placed in foster care as the result of a voluntary placement agreement, within the first 180 days of the placement there must be a judicial determination to the effect that the continued placement is in the best interests of the child. Without this finding, the child's placement will no longer be eligible for federal funding once the 6-month deadline has past.

emergency circumstances support the conclusion that it was reasonable to make no efforts to prevent removal under the particular facts, this determination must be adequately and timely stated in the court's order. Later in the case, when findings of reasonable efforts to finalize a child's permanency plan are negative, insufficient, late or missing, the State will be ineligible for federal matching funds for the child until there are positive and sufficient findings addressing this area of critical concern.

2. Required Judicial Findings

a. Contrary to Welfare

Under 42 U.S.C. § 672(a)(1), a child's removal from the home must have been the result of a judicial determination (unless the child was removed pursuant to a voluntary placement agreement) to the effect that continuation in the home would be contrary to the welfare, or that placement would be in the best interest, of the child. 45 C.F.R. § 1356.21(c). The judicial determination need not necessarily use the exact terminology of the statute or regulation, so long as the language conveys that the court has determined that it would be contrary to the welfare of the child to remain at home or that placement would be in the child's best interest.

b. Reasonable Efforts to Prevent Removal

Under 42 U.S.C. § 671(a)(15)(B), when a child is removed from the home, the court must make findings as to whether the State made reasonable efforts to maintain the family and prevent the unnecessary removal of a child, and to make it possible for the child to safely return home (after a temporary placement necessary to ensure immediate safety). 45 C.F.R. § 1356.21(b). As stated above regarding contrary to welfare findings, exact terminology is not necessary, but the language of the order must convey that the court has determined that reasonable efforts have been made or were not required.

c. Reasonable Efforts to Finalize Permanency Plan

Consistent with 42 U.S.C. § 671(a)(15)(C), the State must obtain a judicial determination that it has made reasonable efforts to finalize the permanency plan that is in effect (whether the plan is reunification, adoption, legal guardianship, placement with a relative, or placement in another planned permanent living arrangement). Federal law recognizes concurrent planning as part of reasonable efforts to finalize the permanency plan. 42 U.S.C. § 671(a)(15)(F); 45 C.F.R. § 1356.21(b)(4).

d. New Findings

If a trial home visit (e.g. improvement period) exceeds 6 months without court authorization, or exceeds the time period the court has deemed appropriate, and the child is subsequently returned to foster care, that must be considered a new placement and Title IV-E eligibility re-established. Accordingly, the judicial determinations regarding contrary to welfare and reasonable efforts would again be required. 45 C.F.R. § 1356.21(e).

3. Determinations That Reasonable Efforts Not Required

The State is not required to make efforts to prevent placement or reunify the family where such efforts will endanger a child's health or safety. Federal law states that "in determining reasonable efforts to be made with respect to a child . . . and in making such efforts, the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A). In addition, reasonable efforts to preserve the family are not required if a court finds that the parent has subjected the child to aggravated circumstances (as defined in State law – such as abandonment, torture, chronic abuse, and sexual abuse); committed certain serious criminal acts against the child or against another child of the parent; or the parental rights of a sibling have been terminated involuntarily. 42 U.S.C. § 671(a)(15)(D); 45 C.F.R. § 1356.21(b)(3). Finally, even if none of the specific circumstances applies, courts may exercise discretion, in individual cases, to protect the health and safety of children. 42 U.S.C. § 678. As discussed in the federal commentary accompanying the promulgation of the final regulations:

[T]he statute should not be construed to support unwarranted attempts to preserve families. Rather, when reasonable efforts are required, the State agency and the courts must determine the level of effort that is reasonable, based on safety considerations and the circumstances of the family. Sometimes, based on its assessment of a family, the State agency determines that it is reasonable to make no effort to maintain the child in the home or to reunify the child and family. In such circumstances, if the court determines that the agency's assessment of the family is accurate and its actions were appropriate, the court should find that the agency's efforts in such cases were reasonable, not that reasonable efforts were not required. 65 Fed. Reg. 4053 (Jan. 25, 2000).

4. Timing of Required Findings

The timing of each of the required findings is specific to the particular events occurring in a case. The "removal" date and the different procedural stages in the case are generally the key factors in identifying the deadlines applicable to a case. There are three different deadlines for judicial findings that strictly govern eligibility for federal foster care matching funds.

a. Contrary to Welfare

The Title IV-E regulations provide that findings to the effect that continuation of the child in the home would be contrary to the child's welfare must be made in the first court order sanctioning or authorizing the child's removal (even temporarily) from the home. If this determination is not made in the first order pertaining to removal, the child is not eligible for Title IV-E foster care funds for the duration of that stay in foster care. 45 C.F.R. § 1356.21(c). Although removal could occur at any stage of the proceedings, orders which most often involve the first removal include: (i) Order Ratifying Emergency Custody; (ii) Initial Order Following Petition (10-day temporary custody); (iii) Order Following Preliminary Hearing; or (iv) Disposition Order.

b. Reasonable Efforts to Prevent Removal

The judicial findings regarding reasonable efforts to prevent placement (or that such efforts were not required under the particular circumstances) must be made within 60 days following the removal of the child from home. If this determination is not made within this time period, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care. 45 C.F.R. § 1356.21(b)(1). In most cases, the best practice is to make this finding at the time of the initial removal (along with the contrary to welfare finding). Otherwise, this finding may be inadvertently omitted during the 60-day time frame.

c. Reasonable Efforts to Finalize Permanent Placement

Findings of reasonable efforts to finalize the child's permanent placement must be made on or before the "due date" of each permanency hearing. Permanency hearings are required within 12 months of the date the child is considered to have entered foster care, and at least once every 12 months thereafter. If the determination is not made, the child becomes ineligible for Title VI-E payments following the due date of the permanency hearing (or 12 months after the most recent judicial determination of reasonable efforts to finalize a permanency plan was made), and remains ineligible until such a judicial determination is made. 45 C.F.R. § 1356.21(b)(2). A child is "considered to have entered foster care" on the date the court found that the child was abused or neglected, or 60 days following the child's actual removal from home, which ever comes first. 45 C.F.R. § 1355.20.

5. Documentation of Judicial Findings

The judicial determinations regarding contrary to welfare, reasonable efforts to prevent removal, and reasonable efforts to finalize the permanency plan, (and any determinations that reasonable efforts are not required), must be "explicitly documented" and "made on a case-by-case basis" in the pertinent court orders. 45 C.F.R. § 1356.21(d). Regulation commentary acknowledges the administrative burdens imposed by explicit and case-by-case findings, and suggests a number of ways to provide detailed findings, including: (i) descriptions in the court order findings; (ii) language in the court order that specifically cross-references detailed statements in an agency or other report submitted to the court; (iii) language of the court order that cross-references to facts in a sustained petition; or (iv) checking off items from a detailed checklist. 65 Fed. Reg. 4056.

If the contrary to welfare or reasonable efforts determinations are not included in the required court orders, a transcript of the court hearing in which the findings were made is the only acceptable substitute. 45 C.F.R. § 1356.21(d)(1). Neither affidavits from hearing participants nor *nunc pro tunc* orders are accepted. 45 C.F.R. § 1356.21(d)(2).

6. West Virginia Statutes

Although receipt of Title IV-E funding in cases involving out-of-home placement is dependent upon compliance with the federal requirements, several State statutes assist with compliance by inclusion of the contrary to welfare and reasonable efforts requirements.

First, the initial order granting temporary (10-day) custody calls for both contrary to welfare and reasonable efforts to prevent removal findings. W. Va. Code §§ 49-2D-3; 49-6-3(a). Secondly, if temporary custody is granted during a preliminary hearing, the contrary to welfare and reasonable efforts to prevent removal findings are similarly required. W. Va. Code §§ 49-2D-3; 49-6-3(b). Upon consideration of temporary custody pursuant to either W. Va. Code § 49-6-3(a) or (b), the circumstances when the court may find that the State was not required to make efforts to prevent removal are specified. W. Va. Code § 49-6-3(d), See also W. Va. Code § 49-2D-3.

Third, if an order at the disposition stage involves temporary custody, the contrary to welfare and reasonable efforts to prevent removal findings are required. W. Va. Code §§ 49-2D-3; 49-6-5(a)(5). Fourth, both types of findings are likewise required in any disposition involving termination of parental rights. W. Va. Code § 49-6-5(a)(6). Finally, the circumstances are set out as to when reasonable efforts to preserve the family are not required before out-of-home placement at the disposition stage. W. Va. Code § 49-6-5(a)(7).

To date, the West Virginia statutes have not incorporated the most recent federal requirement regarding the findings relating to reasonable efforts to finalize a child's permanency plan. Federal funding is nevertheless dependent upon these findings in pertinent circumstances. The Rules of Procedure for Abuse and Neglect Proceedings have incorporated the reasonable efforts to finalize placement determination in the court review process. See, e.g., Rule 41(a).

P. Child Support

1. Establishment of Support

In Article 7 of Chapter 49, the article setting forth general provisions relating to child welfare, West Virginia Code § 49-7-5 provides: “If it appears upon the hearing of a petition under this chapter that a person legally liable for the support of the child is able to contribute to the support of such child, the court or judge shall order the person to pay the state department, institution, organization, or private person to whom the child was committed, a reasonable sum from time to time for the support, maintenance, and education of the child.” The Court may also order the withholding of support from the wages, salary, or commission of the person liable for support pursuant to West Virginia Code § 49-7-6. Further, in Article 6 (Child Abuse and Neglect) of Chapter 49, the Code specifically requires, if a child is temporarily committed to the Department as a disposition, that “an appropriate order of financial support by the parents or guardians shall be entered in accordance with section five, article seven of this chapter.” West Virginia Code § 49-6-5(5).

2. Calculation of Support

West Virginia Code § 48-13-701 provides, in part, that the child support guidelines (the Income Shares Formula) “apply as a rebuttable presumption to all child support orders established or modified in West Virginia. The guidelines must be applied to all actions in which child support is being determined including temporary orders, interstate (URES and UIFSA), domestic violence, foster care, divorce, nondissolution, public assistance, nonpublic assistance and support decrees arising despite nonmarriage of the parties.” The guidelines, set forth in West Virginia Code § 48-13-201 through § 48-13-403, may be disregarded only if the Court makes specific findings that the use thereof is inappropriate pursuant to West Virginia Code § 48-13-702. West Virginia Code § 48-1-205 provides that, under some circumstances, the Court may attribute income to a responsible party who is unemployed or underemployed.

3. Other Support Matters

The court may also consider addressing medical support for the child pursuant to West Virginia Code § 48-12-102, and the inclusion of the language required by West Virginia Code § 48-11-102 in the order establishing child support.

III. COURT IMPROVEMENT PROGRAM

A. Background

The West Virginia Supreme Court of Appeals initiated the Court Improvement Program in this state in January, 1995, upon formation of the Court Improvement Program Oversight Board. In accordance with its original goal, the West Virginia Court Improvement Program Oversight Board continues its efforts directed toward improving the judicial system's review, management and decision-making functions that impact the safety of children and reasonable efforts relating to removal and reunification, temporary placements of children, decisions regarding continuance in foster care, termination of parental rights, and adoption or other permanent placement.

B. Oversight Board Role

The Oversight Board, as currently constituted to be representative of agencies and persons who work with child protection cases in the court system, consists of the following members:

Chairman: Hon. Gary L. Johnson, Circuit Judge, 28th Judicial Circuit
Members: Fran Allen – Mediator
Tom Truman, Assistant Prosecutor, Raleigh County
Donald L. Kopp, II, Harrison County Circuit Clerk
Laurie McKeown, TEAM for W. Va. Children
Jane Moran, Attorney

Catherine Munster, Attorney
Robert T. Noone, Attorney
Sue Julian, WV Coalition Against Domestic Violence
Joyce Cook, WV Coalition Against Domestic Violence
Monica Donohoe, State Director, WV CASA Network
Margaret Waybright, Commissioner, DHHR Bureau for
Children & Families
Julie C. Palas, Special Projects Attorney, West Virginia
Supreme Court of Appeals, Administrative Office
Sue Hage, WVDHHR Bureau for Children & Families
Terrance Hamm, WVDHHR Bureau for Children
& Families
Mary Ellen Griffith, Attorney, Child Law Services

In addition, the following persons have assisted the Supreme Court and Oversight Board in conducting the re-assessment and developing the improvement plan:

West Virginia University Survey Research Center
Ronald Althouse, Ph.D., Director
Charles Walter, Research Associate
Amy White, Research Associate
Korok Biswas, Research Associate

Court Improvement Program Staff
John M. Hedges, Attorney
Peter J. Conley, Attorney

This Re-assessment Report examines the current strengths and challenges of the West Virginia court system relative to abuse and neglect proceedings, and builds on the result of the initial assessment conducted in 1995. The primary purpose is to evaluate the actual performance (and perceptions of performance) of the court system in implementing the requirements of West Virginia law.

The report summarizes and analyses the data collected from an extensive study of abuse and neglect cases filed and procedures followed. The data collection involved

statewide surveys of court participants from all thirty-one judicial circuits; with more intense gathering of information in three judicial circuits that were also studied as part of the initial assessment in 1995.

IV. DESIGN AND METHODOLOGY OF RE-ASSESSMENT

A. Identification of State Laws, Rules, and Procedures

The Court Improvement Program Oversight Board began the statewide re-assessment of all aspects of court performance relating to child protection and placement issues in the Summer of 2004. In accordance with the grant program requirements, the first task completed was the identification of the existing State laws, rules and standards applicable to child protection proceedings which were designed to accomplish safe and appropriate permanent placements (i.e. family reunification or adoption) in a timely manner.

The pertinent statutes, rules and case-law decisions are compiled in the preceding section of this report. This summary was utilized in the drafting of the information-gathering documents to be used for the statewide re-assessment survey of court performance. The provisions of law determined by the Oversight Board to be particularly significant to this re-assessment study and improvement plan are detailed in various sections of this Report. Additionally, certain recent developments in child protection legislation, rules and cases which are relevant to this improvement plan are included and discussed at appropriate points of this Report.

B. Statewide Survey of Court Performance

Next, the information-gathering process for the re-assessment phase was designed and carried out. This re-assessment has involved intensive information gathering in three "focal" judicial circuits, as well as information sampling on a statewide basis. In the original assessment conducted ten years ago, five focal circuits were used for intensive study. In view of the size and demographics of the State, experience from the earlier assessment process indicated that studying three of the original five focal circuits could be conducted without affecting the overall quality of the data collected. Also, data collection was improved by using experienced lawyers to obtain data in the focal circuits, rather than using law students when collecting data for the original assessment. Pertinent information has been obtained, by interviews in the focal circuits and by questionnaires mailed statewide, from circuit judges, prosecutors, attorneys, DHHR caseworkers and CASA representatives. Additionally, information was obtained by detailed review of child abuse and neglect case files, and courtroom observations of hearings, in the three focal circuits.

Instruments were drafted, consistent with existing State laws and procedures in child protection proceedings, for the collection of data from the various sources. Adapted from forms provided by the American Bar Association Center on Children and the Law, these 12 instruments were tailored for each of the target groups and sources of information. Five questionnaires were used for the statewide mail survey of the persons routinely involved in these proceedings: namely circuit judges, DHHR caseworkers, CASA volunteers, prosecuting attorneys, and attorneys representing children and parents. Five instruments in

an interview format containing similar questions were used for the same target groups surveyed face-to-face in the three focal circuits. Finally, two separate survey instruments were designed and used for the case file reviews and courtroom observations in the focal circuits.

The statewide information was collected by mailing the questionnaires to all circuit court judges and a representative sampling of individuals in each of the other target groups.

The mailed questionnaire response rates for the re-assessment process were as follows:

Judges	75.4%	(49 of 65 judges handling abuse-neglect cases)
Prosecutors	57.9%	(55 of 95 prosecutors and assistant prosecutors handling abuse-neglect cases)
DHHR Caseworkers	49.4%	(194 of 393 DHHR employees [includes intake, foster care, ongoing care & supervisors] who handle abuse-neglect and have court experience)
CASA Volunteers	26.8%	(51 of 190 CASAs who were mailed questionnaires)
Attorneys	40.6%	(164 of 404 attorneys experienced in abuse-neglect cases)

While the statewide survey was critical to collecting a broad base of data, in order to obtain a more comprehensive view of the issues being examined, three judicial circuits in the State were selected for in-depth study. The three focal circuits utilized for this part of the study were selected simply as a representative mix of a) varied geographic regions of the State; b) different urban/rural population patterns; and c) single-county and multi-county circuits. These three judicial circuits were:

7th Circuit (Logan County) (2-judge circuit)
11th Circuit (Greenbrier and Pocahontas Counties) (2-judge, multi-county circuit)
17th Circuit (Monongalia County) (2-judge circuit)

(Demographic information and abuse-neglect case filing statistics concerning these judicial circuits may be found in Appendix A.)

The purpose of the in-depth data collection in the focal circuits was not to compare performance of these courts with those in other circuits. Rather, the purpose was to gain an added perspective in the overall survey on how particular aspects of the court system are functioning statewide. Limited time and resources would not permit this kind of detailed examination in every circuit. There is no suggestion in the data that the focal circuits differ on a statewide basis in overall performance of their functions in abuse and neglect cases.

Four lawyers experienced with child abuse and neglect cases conducted all of the personal interviews of the individuals in the target groups in the focal circuits, including six circuit judges, five prosecutors or assistant prosecutors, eight child/parent attorneys, eight DHHR caseworkers, and three CASA volunteers. Additionally, the lawyers collected pertinent data from the observation of six courtroom hearings covering various stages of abuse and neglect cases in these circuits. Finally, an integral part of their work was the comprehensive audit of 52 court files from abuse and neglect cases. For this segment of the data collection, the lawyers reviewed case files in the four circuit clerk offices of these three circuits which the clerk staff designated as "closed" during 2003 and 2004.

Adoption of the instruments and design of the assessment methodology for all data collection, and all field work, were done in close collaboration with the West Virginia

University Survey Research Center. The raw data was then compiled by the Survey Research Center for preliminary review by the Oversight Board staff. Thereafter, the Survey Research Center re-assembled the data into several categories to facilitate further review and analysis in conjunction with areas of concern identified as significant to the re-assessment process in the Court Improvement Program.

V. RE-ASSESSMENT DISCUSSION AND FINDINGS

A. Extent to Which Particular Practices or Procedures Have Been Successful in Facilitating Compliance, or Contributing to Non-compliance, With Those Requirements

1. JANIS Software

The Oversight Board has developed computer software, JANIS (Juvenile Abuse and Neglect Information System), that generates court orders and motions for child abuse and neglect cases. In 2003, the West Virginia Supreme Court of Appeals entered an administrative order requiring the circuit courts of West Virginia to use the JANIS software to prepare any orders in which children are ordered to be removed from their homes. This software has helped to remedy a deficiency which was noted in the Board's 1995 assessment relating to missing court orders. It was noted in 1995 that over one-half of the cases reviewed contained no order indicating either a dismissal or adjudicatory hearing, and that in over 50% of the cases in which an improvement period was granted, there was nothing in the file to indicate that anything ever occurred following the grant of the improvement period.

By contrast, the case reviews conducted as part of the re-assessment noted that the problem with missing orders was virtually non-existent. The re-assessment case reviews indicated that JANIS was used to prepare 21.2% of the court orders. It is significant to note two factors which affect this percentage:

1. The case review included reviews of cases that were closed prior to the use of JANIS being mandated; and
2. The use of JANIS is not uniform throughout the state.

It is also significant to note that when JANIS was used to prepare court orders, these orders were 100% Title IV-E compliant, in that appropriate “reasonable efforts” and “contrary to welfare” findings were made. The case file reviews also indicated that in those court cases where JANIS was used to prepare orders, the orders were entered on a more timely basis than in cases where JANIS was not used.

In an effort to improve the percentage of Title IV-E compliance, the Oversight Board, in collaboration with the West Virginia Department of Health and Human Resources, funded JANIS training for prosecutors, judges, judges’ clerks, and attorneys throughout the State in an effort to increase the use of JANIS. The results of the federal review of West Virginia’s Title IV-E compliance conducted in the Fall of 2003 was a principal reason for encouraging wider use of JANIS. In this earlier federal review, a statistical sample comprised of 80 cases that received Title IV-E funding between October 2002 and March 2003 was reviewed for compliance with the various federal financial eligibility requirements for foster care funding. Twenty-five of the 80 cases (31.25%) were found to be non-compliant. Since the number of

error cases exceeded the allowable 5% error rate, the West Virginia DHHR suffered a disallowance (forfeiture) of over \$450,000 in Title IV-E funds. As stated in the federal report, 20 of the 25 cases found to be in error did not have timely judicial determinations regarding reasonable efforts to finalize the child's permanency plan. The lack of this finding in court orders was essentially the sole reason for the DHHR failing the Title IV-E compliance review. (DHHS-ACF, West Virginia Title IV-E Foster Care Eligibility Review, October 16, 2003.)

This federal review looked at orders entered by West Virginia courts prior to the Supreme Court's administrative order directing the use of JANIS orders to increase the Title IV-E compliance regarding required judicial findings. A secondary (follow-up) compliance review took place June 6-10, 2005 in West Virginia. Once the results of that federal review are reported, if there are still substantial non-compliance issues relating to judicial findings, the Oversight Board will explore further collaborative measures by the courts and the DHHR to address this problem.

2. Court Rules Relating to Case Plans and Court Monitoring

In December, 1996, the West Virginia Supreme Court of Appeals adopted the "Rules of Procedure for Child Abuse and Neglect Proceedings" that were prepared by the Oversight Board. The Rules are intended to provide: a fair and timely disposition of child abuse and neglect cases; judicial oversight of case planning; a coordinated decision-making process; a reduced number of unnecessary delays in case management; and encouragement of

involvement of all parties in the litigation, as well as the involvement of all community agencies and resource personnel providing services to any party.

a. *Case Plans*

Rule 28 requires the Department of Health and Human Resources to submit a child's case plan in accordance with W. Va. Code § 49-6-5. In an effort to improve the consistency and usefulness of the child's case plan, Rule 28 also sets forth a list of criteria to be followed by the Department in preparing the report. The re-assessment case reviews revealed that in several cases, a child's case plan was not even filed. In some of the cases in which a plan was filed, the plan was untimely filed, incomplete, lacking in detail, and generally not in compliance with Rule 28. It is therefore evident that the enactment of Rule 28 has not had its intended effect, and that the Department and the courts must be more diligent in ensuring that a child's case plan is prepared and submitted in accordance with West Virginia law. See *In Re: Desarae M.*, 214 W. Va. 657, 591 S.E.2d 215 (2003) (absence of case plan reversible error).

In the CFSR assessment process, it was determined that the quality of case plan documentation was adequate or better in only 31.25% of the reviewed cases. This assessment also indicated that many judges do not perceive the case plans as easy documents to read. Consequently, there have been many requests from the courts to use different forms or to modify case plan formats. Development and documentation of case plans was determined to be an area needing improvement. (Final Report: Child and Family Services Review, October 2002, at pp. 62-63.)

Undoubtedly, contributing to this lack of attention to the case plans is the increased caseloads with which CPS workers have been burdened. As shown by the CIP assessment and re-assessment data in Table A below, in 1995, 27.1% of CPS workers had a caseload of more than 50 children. By 2005, that figure has grown to 41.2%. (See Table A.)

TABLE A

Please estimate your (DHHR worker) current total caseload: Number of children

Response	DHHR Child Caseload	
	1995	2005
0-25	33.2% (40)	26% (46)
26-50	38.5% (46)	32.8% (58)
51-75	13.1% (16)	20.9% (37)
76-100	1.6% (2)	9.6% (17)
>100	12.4% (15)	10.7% (19)
Total	100% (119)	100% (177)
Missing	16	

b. *Court Monitoring*

Another purpose of enacting the Rules was to ensure that court monitoring of the child’s permanency plan continue until permanent placement is achieved. Rule 39 requires the court to conduct a review conference, involving the multi-disciplinary treatment team, every three months until permanency is achieved. The re-assessment survey questionnaires

revealed that the courts are generally faithful in conducting these reviews. (See Table B.)

The case file reviews in the focal circuits support this conclusion as well.

TABLE B

1995 Study: How often are post-disposition periodic court review hearings actually conducted for children in foster care?

2005 Study: How often are post-disposition permanency review hearings actually conducted by the court for children in foster care?

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Never	0.0% (0)	0.0% (0)	2.7% (1)	0.0% (0)	5.4% (7)	3.7% (5)	4.4% (4)	3.1% (4)	0.0% (0)	0.0% (0)
> 1 every 3 mos.	3.1% (1)	0.0% (0)	8.1% (3)	0.0% (0)	6.2% (8)	2.2% (3)	5.6% (5)	3.1% (4)	6.7% (1)	6.9% (2)
1 every 3-6 mos.	62.5% (20)	90.9% (40)	29.7% (11)	92.3% (48)	66.7% (86)	84.6% (115)	48.9% (44)	77.7% (101)	60.0% (9)	75.9% (2)
1 every 7-9 mos.	12.5% (4)		5.4% (2)		5.4% (7)		1.1% (1)		13.3% (2)	
1 every 10-12 mos.	9.4% (3)	9.1% (4)	32.4% (12)	7.7% (4)	12.4% (16)	8.1% (11)	16.7% (15)	16.2% (21)	13.3% (2)	17.2% (5)
<1 every 12 mos.	12.5% (4)	0.0% (0)	21.6% (8)	0.0% (0)	3.9% (5)	1.5% (2)	23.3% (21)	0.0% (0)	6.7% (1)	0.0% (0)
Total	100% (32)	100% (44)	100% (37)	100% (52)	100% (129)	100% (136)	100% (90)	100% (130)	100% (15)	100% (29)
Missing	1		0		2		5		1	

The comparative data from 1995 and 2005 indicates that the percentage of judges who conduct post-disposition judicial reviews (at least every 6 months) rose from 65.6% to 90.9%. Although this reflects a substantial improvement, Rule 39 requires such reviews every 3 months in all post-disposition cases until permanent placement is achieved. Prior to disposition, Rule 51 requires the court to hold judicial reviews with the MDT -- also at least

every 3 months. In the CFSR process, the program review data indicated that the judicial review hearings required every 3 months were being held on a timely basis only 30.1% of the time. (Final Report: Child and Family Services Review, October 2002, at p. 64.)

Overall, the enactment of the State Rules has had a positive effect on circuit court compliance with judicial review requirements under federal and state law. However, even though the courts are in substantial compliance with the federal standard of 6-month judicial reviews, better case-management and tracking procedures need to be implemented in order to comply with the State requirement of 3-month reviews.

B. Frequency and Extent of Judicial Delays

Child welfare agencies, caseworkers and other service providers, as well as county prosecutors, attorneys for parents and children, and CASA representatives, all play crucial roles in child abuse and neglect cases. In order for the court system to perform its function in securing a safe and permanent home for the children involved in these cases, it is essential that all involved participants carry out their individual responsibilities in a timely and effective manner.

Both federal and State law dictate that from the time of initial State intervention through compulsory judicial process to safeguard a child's well-being, every significant decision affecting that child until permanent placement is determined by judicial decision and resulting court order. For example, over the course of a single case the judge may order: a) emergency state agency custody of the child; b) temporary foster care for the child; c) an improvement period for the parents with appropriate services; d) medical and psychological

evaluation of the child or parents; e) changes in foster care and/or needed services for the child; f) termination of parental rights; and g) adoption or other permanent placement of the child. Ultimately, then, the judge carries the authority and obligation to hold the entire system and all of its participants accountable to ensure the case keeps on pace at every stage of the process.

1. Time Standards

The law, for good reason, recognizes time to be a critical factor in child custody and placement cases. As the West Virginia Supreme Court observed in In re Carlita B., 185 W. Va. 613, 408 S.E.2d 365 (1991):

[P]rotracted procedural histories are for too common a phenomenon in child abuse and neglect cases, as well as other child custody matters.

...

Certainly many delays are occasioned by the fact that troubled human relationships and aggravated parenting problems are not remedied overnight. The law properly recognizes that rights of natural parents enjoy a great deal of protection and that one of the primary goals of the social services network and the courts is to give aid to parents and children in an effort to reunite them.

The bulk of the most aggravated procedural delays, however, are occasioned less by the complexities of mending broken people and relationships than by the tendency of these types of cases to fall through the cracks in the system. The long procedural delays in this and most other abuse and neglect cases considered by this Court in the last decade indicate that neither the lawyers nor the courts are doing an adequate job of assuring that children -- the most voiceless segment of our society -- aren't left to languish in a limbo-like state during a time most crucial to their human development. 408 S.E.2d at 374-75.

Since January 1, 1994, shortly before the initial CIP assessment was conducted, the Rules on Time Standards for Circuit Courts promulgated by the Supreme Court have been applicable to all types of civil and criminal cases (now incorporated into the Trial Court Rules under Rule 16). Minimum compliance rates (Rule 16.02) and particular time standards (Rules 16.04-16.12) vary with the type of proceeding involved. Abuse and neglect proceedings are specifically covered under Rule 16.08. This rule sets maximum intervals between hearings typically occurring in abuse and neglect cases, and provides that the reporting standard from filing of the petition to disposition is 12 months. The minimum overall compliance rate set for this average time interval in these cases is 75 percent.

The reported statistics for 1995 indicate that the statewide overall compliance rate for meeting the time standard in these cases was only 44.8%. (Court Administrative Office, Pending Case Age/County Summary Report, 1995.) Ten years later, the compliance rate for this time standard had improved to 54.9%. (Court Administrative Office, State Pending Case Summary, Calendar Year 2004.)

While an increase of over 10% in the compliance rate is a step forward, the 2004 rate still falls far short of the goal of 75%. In order to try to understand whether compliance rates may be affected by perceptions, the re-assessment again collected data on whether judges, prosecutors and lawyers believed the standards were *workable* or *beneficial*. As Tables C and D below indicate, acceptance of the time standards has increased substantially. It is fairly significant that more than three-fourths of the responding judges now find the time standards to be beneficial. (Table D.) Although the numbers of prosecutors and attorneys

perceiving the time standards to be beneficial increased only marginally, these two groups of case participants have significantly raised their level of finding the time standards to be workable. (Table C.) Some cases will take longer than 12 months to reach disposition, many times for legitimate reasons or for reasons beyond court control. But, based upon the re-assessment data, is it anticipated that the average compliance rate for the standard of 12 months from petition to disposition will continue to improve.

TABLE C

Do you find the time frames required by statute and by the Time Standards Rules to be workable?

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
Yes	58.3% (21)	57.4% (27)	48.8% (21)	66.7% (34)	54.9% (79)	64.5% (98)
No	41.7% (15)	42.6% (20)	51.2% (22)	33.3% (17)	45.1% (65)	35.5% (54)
Total	100% (36)	100% (47)	100% (43)	100% (51)	100% (14)	100% (152)
Missing	0		3		14	

TABLE D

Do you find the time frames required by statute and by the Time Standards Rules to be beneficial?

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
Yes	57.1% (20)	76.6% (36)	55% (22)	59.6% (31)	68.3% (95)	72.4% (110)
No	42.9% (15)	23.4% (11)	45% (18)	40.4% (21)	31.7% (44)	27.6% (42)
Total	100% (35)	100% (47)	100% (40)	100% (52)	100% (139)	100% (152)
Missing	1		6		19	

2. Continuances

In order to maintain the orderly development and progress of child protection cases within the timeframes provided under federal and state law, the case participants should expect hearings to be held on the dates scheduled by the court. To accomplish this end, the judge must exercise case-management leadership. One way to clearly demonstrate a commitment to giving these cases high priority is by having a firm policy regarding continuances. Continuances of abuse and neglect hearings should not be granted simply upon agreement of the parties. Additionally, judges must limit continuances to those instances where compelling circumstances are shown, such as illness of a party or counsel, or the unexpected absence of an essential witness.

Indications of a lack of firm policies in the court system limiting continuances was found in the earlier statewide questionnaire data. In the 1995 assessment, judges, attorneys, DHHR caseworkers, and CASA representatives were asked to estimate how often, on the scheduled day of contested abuse and neglect adjudicatory hearings, it was necessary to reschedule the hearing for another day. Eleven percent of the responding judges said that such rescheduling occurred often or usually. Of the others responding, 7% of prosecutors; 23% of attorneys; 26% of DHHR caseworkers; and 28% of CASA representatives indicated that rescheduling on the day of the adjudicatory hearing occurred often or usually.

In the current re-assessment, the same inquiry yielded somewhat mixed, although more encouraging, data. Approximately 15% of judges (up slightly from 11% in 1995) estimated that on the day of adjudicatory hearings it was necessary to reschedule the hearing often or usually. But others in the 2005 study indicated a decreasing trend over the last decade. Fewer than 6% of prosecutors said it was often or usually necessary to reschedule adjudicatory hearings. Sixteen percent of attorneys, 18% of DHHR workers, and 24% of CASA volunteers indicated such continuances occurred often or usually. (See Table E.)

TABLE E

Please estimate how often, on the scheduled day of contested abuse and neglect adjudication, it is necessary (for any reason) to reschedule the hearing to begin another day?

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	42.9% (15)	38.3% (18)	34.8% (16)	50.9% (27)	34.6% (54)	36.6% (56)	30% (39)	38.2% (63)	38.9% (7)	38.1% (16)
Occasionally	45.7% (16)	46.8% (22)	58.7% (27)	43.4% (23)	42.3% (66)	47.1% (72)	43.8% (57)	43.6% (72)	33.3% (6)	38.1% (16)
Often	11.4% (4)	14.9% (7)	4.3% (2)	5.7% (3)	19.2% (30)	15.0% (23)	18.5% (24)	13.9% (23)	27.8% (5)	21.4% (9)
Usually	0.0% (0)	0.0% (0)	2.2% (1)	0.0% (0)	3.8% (6)	1.3% (2)	7.7% (10)	4.2% (7)	0.0% (0)	2.4% (1)
Total	100% (35)	100% (47)	100% (46)	100% (53)	100% (156)	100% (153)	100% (130)	100% (165)	100% (18)	100% (42)
Missing	1		0		2		5		1	

The data from the case file reviews in the focal circuits provide a more comprehensive picture of changes in continuance practices in all types of hearings in these cases. The case file review data from 1995 indicated that, from the beginning to end of each case, in 64% of the cases there was one or more continuances. The 2005 data reflect a decrease of almost one-half, with only 38% of the cases experiencing one or more continuances at some stage of the proceedings. (See Table F.)

TABLE F

Number of continuances from beginning to end of case?

Response	CFR 1995	CFR 2005
0 continuances	36.5% (31)	61.7% (29)
1 continuances	32.9% (28)	19.1% (9)
2 continuances	18.8% (16)	10.6% (5)
3 continuances	7.1% (6)	4.3% (2)
4 continuances	2.4% (2)	4.3% (2)
5 continuances	0.0% (0)	0.0% (0)
6 continuances	2.4% (2)	0.0% (0)
Total	100.0% (85)	100.0% (47)
Missing Cases	22	5

In the 1995 Assessment Report, the problem of frequent delays resulting from too many continuances was recognized. Interview responses in 1995 indicated that most judges did not permit continuances merely upon agreement of counsel. But the CIP Board recognized the need for an established policy to set a judicial standard also requiring a showing of legitimate cause before a continuance is granted. Among the recommendations in the 1995 Assessment Report, it was proposed that a statewide set of rules be promulgated for all aspects of child abuse and neglect cases, including timeframe and continuance rules. A comprehensive set of rules was thereafter drafted by the CIP Board and submitted to the Supreme Court for consideration. The Court subsequently adopted the *Rules of Procedure for Child Abuse and Neglect Proceedings*. These rules included, among other things, specific timeframes for all stages of these cases and a rule generally governing extensions of time and continuances. Rule 7 provides that a continuance may only be granted for good cause, regardless of whether the parties are in agreement. The rule further requires that if a

continuance is granted, the court must set forth in a written order its reasons for finding good cause.

The issue of court continuances and its impact upon achieving permanency was also identified as a barrier to timely, adoption, measured by the national standard of by achieved within 24 months of entry into foster care. In the West Virginia Child and Family Services Review (CFSR) conducted by the U.S. Department of Health and Human Services, the reviewers determined that timely adoptions was an area in need of improvement in this State because of poor case management practices by DHHR caseworker. But the reviewers also determined that many of the delays were attributed to court delays and continuances, particularly delays in the case prior to termination of parental rights. (Final Report: West Virginia Child and Family Services Review, October 2002, at pp. 36-37.)

Based upon the overall responses in the 2005 statewide questionnaires and focal circuit interviews, and a review of the case file data, the timeframes set out in the rules and rule limiting continuances appear to have contributed to a significant reduction in the frequency and length of court delays in these cases. With further efforts discussed in the Recommendations section of this report, it is anticipated that even greater reductions in unwarranted delays can be achieved.

C . Whether There are Limitations in Available Court Time Inhibiting the Presentation of Evidence and the Making of Arguments

Interview questions were posed to judges, prosecutors, attorneys, CPS workers, and CASA to determine whether the courts were readily open and available to parties involved in

abuse and neglect proceedings. Interview responses generally indicate that the courts are available, on short notice if necessary, to hear matters in abuse and neglect cases. Additionally, the mailed surveys asked similar questions of judges, prosecutors and attorneys throughout the state. These surveys reveal that the judges believe their availability for hearings within one to five weeks on urgent matters has increased from 41.1% in 1995 to 60% in 2005. However, prosecutors and attorneys responded differently, indicating generally that the court's availability in the one- to five-week timeframe had actually decreased between 1995 and the 2005 reassessment (See Table G.) With regard to routine (non-urgent) matters, the responses were fairly uniform in showing the court's availability within a one- to ten-week period had increased (see Table H).

TABLE G

If a party wants to bring a matter quickly before the court, how long does it typically take, from the time of the request until the court hearing?

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
0 weeks	0.0% (0)	0.0% (0)	2.3% (1)	0.0% (0)	.7% (1)	0.0% (0)
1-5 weeks	41.1% (15)	60.0% (27)	34.1% (15)	31.5% (17)	24.6% (37)	22.1% (34)
6-10 weeks	44.1% (15)	33.3% (15)	38.6% (17)	46.3% (25)	30.0% (45)	37.0% (57)
11-30 weeks	14.5% (5)	6.7% (3)	22.6% (10)	22.2% (12)	38.2% (57)	39.0% (60)
>30 weeks	0.0% (0)	0.0% (0)	2.3% (1)	0.0% (0)	6.7% (10)	1.9% (3)
Total	100% (34)	100% (45)	100% (44)	100% (54)	100% (150)	100% (154)
Missing	2					

TABLE H

If a party wants to bring a routine matter before the court, how long does it typically take from the time of the request until the court hearing?

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
0 weeks	0.0% (0)	0.0% (0)	2.3% (1)	0.0% (0)	0.0% (0)	0.0% (0)
1-5 weeks	5.9% (2)	12.8% (6)	2.3% (1)	3.7% (2)	1.3% (2)	1.4% (2)
6-10 weeks	11.7% (4)	36.2% (17)	13.7% (6)	25.9% (14)	14.0% (21)	13.6% (20)
11-30 weeks	70.3% (24)	51.1% (24)	77.3% (34)	63.0% (34)	63.5% (96)	70.1% (103)
>30 weeks	11.7% (4)	0.0% (0)	6.9% (3)	7.4% (4)	21.2% (32)	15.0% (22)
Total	100% (34)	100% (47)	100% (44)	100% (54)	100% (151)	100% (147)
Missing	2		2		7	

None of the data suggests that there are any limitations in available court time that would inhibit the presentation of evidence or making of arguments. Indeed, pursuant to W. Va. Code § 49-6-2(d), child abuse and neglect cases have priority over all civil proceedings, except for domestic violence proceedings and trials that are already in progress. All the relevant available data suggests that the circuit courts have taken this directive to heart.

D. Advocacy in Hearings

1. Responsibilities to Clients and Court

Prosecutors, parent attorney, and child attorneys all perform essential roles throughout the entire course of abuse and neglect cases. Each of these advocacy roles carries with it the commonly shared responsibilities to serve their respective client interests by: a) being

adequately trained in the law and knowledgeable in their roles; b) devoting sufficient time and effort in case investigation, preparation and resolution; and c) actively taking part in every hearing and case review directly or indirectly involving their client. At the same time, each of these advocacy roles contributes a different perspective to the court in conjunction with protecting their client's interests. The ability of the judge to carry out the court's neutral role, as an *informed* decision-maker, is to a large degree a function of how well these advocates collectively and individually perform their obligations, most particularly during hearings.

2. Extent to Which Attorneys Present Evidence and Argument to the Court

Depending upon the stage and circumstances of a case, written information may be periodically provided to the court (and served on counsel), such as DHHR status reports, multidisciplinary team reports, and CASA reports. The principal sources of information permitting the judge to make appropriate decisions through the course of each case, however, is the evidence and legal argument presented during the various hearings. Undoubtedly, adequate investigation, research, and preparation is important, but it is the presentation of relevant evidence and pertinent argument during hearings that has actual bearing on the court's decisions on the child's safety, well-being, and permanent placement.

A series of questions posed to the child abuse and neglect case participants as part of both the initial CIP assessment and the recent re-assessment studies was directed toward the levels of information, whether evidence or legal argument, actually presented to the court in contested review hearings. These advocacy efforts are equally as important at earlier hearing

stages, such as during adjudicatory or disposition hearings. The presentation of evidence and argument is generally commonplace and expected when issues are contested at those stages. Nevertheless, whether the court is conducting a review hearing incident to an improvement period, or a later permanency review hearing, contested issues vital to the outcome of those often less formal review hearings deserve similar attention to the advocacy components typical of other types of hearings. The comparative data discussed below suggest that more efforts should be focused upon emphasizing the importance of the advocacy components of these hearings.

First, the survey questionnaires asked -- when review hearings are contested, how often are opening statements made by: a) prosecutors; b) counsel for the child; and c) counsel for parents? The data compilations are set out in the following Tables I, J, and K. Looking in particular at the combined percentages for "Often" and "Usually," there is a clear downward trend comparing the 1995 assessment responses to the 2005 re-assessment responses. For example, 45% of judge-respondents in 1995 said prosecutors often or usually gave opening statements; but in 2005, only 28% of judges-respondents said prosecutors gave opening statements in these hearings. Only approximately 32% of prosecutors themselves indicated in 1995 that they often or usually gave opening statements; and this was down to about 27% in the 2005 response data. (See Table I.)

Similar downward trends are reflected for counsel for children and parents, even by respondent-attorneys' own estimates. In 1995, attorneys responding to the questionnaire said 35% of children's attorneys and 37% of parents' attorneys often or usually gave opening

statements in these hearings. In 2005, comparative responses by attorneys indicated that only about 30% of child and parent attorneys often or usually gave opening statements in contested review hearings. (See Tables J and K.)

TABLE I

*When the review hearing is contested, how often do the following things happen?
Opening statements by prosecutor*

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	27.3% (9)	50.0% (23)	46.3% (19)	49.0% (25)	38.2% (52)	47.7% (72)	16.2% (16)	12.5% (20)	6.7% (1)	13.2% (5)
Occasionally	27.3% (9)	21.7% (10)	22.0% (9)	23.5% (12)	27.2% (37)	18.5% (28)	12.1% (12)	23.1% (37)	13.3% (2)	5.3% (2)
Often	12.1% (4)	15.2% (7)	14.6% (6)	7.8% (4)	13.2% (18)	14.6% (22)	14.1% (14)	18.1% (29)	13.3% (2)	18.4% (7)
Usually	33.3% (11)	13.0% (6)	17.1% (7)	19.6% (10)	21.3% (29)	19.2% (29)	57.6% (57)	46.3% (74)	66.7% (10)	63.2% (24)

TABLE J

*When the review hearing is contested, how often do the following things happen?
Opening statements by counsel for child*

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	27.3% (9)	47.8% (22)	46.3% (19)	51.0% (26)	32.4% (44)	49.3% (74)	23.2% (23)	15.6% (25)	26.7% (4)	26.3% (10)
Occasionally	27.3% (9)	21.7% (10)	22.0% (9)	23.5% (12)	33.1% (45)	20.0% (30)	17.2% (17)	30.0% (48)	13.3% (2)	13.2% (5)
Often	12.1% (4)	15.2% (7)	14.6% (6)	9.8% (5)	14.7% (20)	13.3% (20)	19.2% (19)	19.4% (31)	13.3% (2)	21.1% (8)
Usually	33.3% (11)	15.2% (7)	17.1% (7)	15.7% (8)	19.9% (27)	17.3% (26)	40.4% (40)	35.0% (56)	46.7% (7)	39.5% (15)
Total	100% (33)	100% (46)	100% (41)	100% (51)	100% (136)	100% (150)	100% (99)	100% (160)	100% (15)	100% (38)
Missing	3		5		22		36		4	

TABLE K

*When the review hearing is contested, how often do the following things happen?
Opening statements by counsel for parents*

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	27.3% (9)	47.8% (22)	46.3% (19)	51.0% (26)	35.3% (48)	49.0% (74)	16.3% (16)	17.5% (28)	20.0% (3)	23.7% (9)
Occasionally	33.3% (11)	19.6% (9)	22.0% (9)	23.5% (12)	27.9% (38)	20.5% (31)	20.4% (20)	30.6% (49)	20.0% (3)	10.5% (4)
Often	15.2% (5)	10.9% (5)	14.6% (6)	9.8% (5)	15.4% (21)	13.2% (20)	18.4% (18)	17.5% (28)	6.7% (1)	21.1% (8)
Usually	24.2% (8)	21.7% (10)	17.1% (7)	15.7% (8)	21.3% (29)	17.2% (26)	44.9% (44)	34.4% (55)	53.3% (8)	44.7% (17)
Total	100% (33)	100% (46)	100% (41)	100% (51)	100% (136)	100% (151)	100% (98)	100% (160)	100% (15)	100% (38)
Missing	3		5		22		37		4	

Next, the questionnaires asked how often testimony was presented and cross-examination conducted in contested review hearings. When there are contested issues in an improvement period or permanency review hearing, it is presumed that witness testimony and cross-examination would be more important, in advocacy terms, than opening statements. Yet, responding judges, prosecutors, and attorneys indicated that such activities occurred less often in 2005 than in 1995. (See Tables L and M.)

TABLE L

*When the review hearing is contested, how often do the following things happen?
Testimony*

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	3.0% (1)	15.2% (7)	4.9% (2)	9.8% (5)	4.4% (6)	9.2% (14)	12.0% (12)	7.6% (12)	33.3% (5)	10.5% (4)
Occasionally	24.2% (8)	19.6% (9)	9.8% (4)	9.8% (5)	12.6% (17)	11.2% (17)	18.0% (18)	18.4% (29)	20.0% (3)	18.4% (7)
Often	15.2% (5)	8.7% (4)	26.8% (11)	15.7% (8)	23.7% (32)	16.4% (25)	30.0% (30)	23.4% (37)	20.0% (3)	23.7% (9)
Usually	57.6% (19)	56.5% (26)	58.5% (24)	64.7% (33)	59.3% (80)	63.2% (96)	40.0% (40)	50.6% (80)	26.7% (4)	47.4% (18)
Total	100% (33)	100% (46)	100% (41)	100% (51)	100% (135)	100% (152)	100% (100)	100% (158)	100% (15)	100% (38)
Missing	3		5		23		35		4	

TABLE M

*When the review hearing is contested, how often do the following things happen?
Cross-examination*

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	6.1% (2)	15.2% (7)	4.9% (2)	9.8% (5)	4.4% (6)	9.2% (14)	11.0% (11)	7.0% (11)	26.7% (4)	13.2% (5)
Occasionally	15.2% (5)	13.0% (6)	7.3% (3)	7.8% (4)	11.9% (16)	7.2% (11)	15.0% (15)	17.2% (27)	26.7% (4)	18.4% (7)
Often	12.1% (4)	10.9% (5)	22.0% (9)	19.6% (10)	20.7% (28)	15.1% (23)	31.0% (31)	21.7% (34)	13.3% (2)	26.3% (10)
Usually	66.7% (22)	60.9% (28)	65.9% (27)	62.7% (32)	63.0% (85)	68.4% (104)	43.0% (43)	54.1% (85)	33.3% (5)	42.1% (16)
Total	100% (33)	100% (46)	100% (41)	100% (51)	100% (135)	100% (152)	100% (100)	100% (157)	100% (15)	100% (38)
Missing	3		5		23		35		4	

Finally, the 1995 and 2005 survey respondents were asked how often arguments were presented by counsel in review hearings involving contested issues. The comparative data involving this advocacy component showed no downward trend, and remained roughly at the same “Often” and “Usually” frequencies in the 1995 and 2005 responses. (See Table N.)

TABLE N

*When the review hearing is contested, how often do the following things happen?
Argument*

Response	Judges		Prosecutors		Attorneys		DHHR		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	12.1% (4)	6.5% (3)	12.2% (5)	9.8% (5)	8.1% (11)	6.6% (10)	15.2% (15)	8.9% (14)	20.0% (3)	10.5% (4)
Occasionally	18.2% (6)	19.6% (9)	14.6% (6)	9.8% (5)	11.8% (16)	13.2% (20)	22.2% (22)	21.7% (34)	53.3% (8)	31.6% (12)
Often	21.2% (7)	13.0% (6)	17.1% (7)	25.5% (13)	24.3% (33)	21.7% (33)	25.3% (25)	24.2% (38)	6.7% (1)	21.1% (8)
Usually	48.5% (16)	60.9% (28)	56.1% (23)	54.9% (28)	55.9% (76)	58.6% (89)	37.4% (37)	45.2% (71)	20.0% (3)	36.8% (14)
Total	100% (33)	100% (46)	100% (41)	100% (51)	100% (136)	100% (152)	100% (99)	100% (157)	100% (15)	100% (38)
Missing	3		5		22		36		4	

It is not clear whether the decrease, or absence of improvement, in these advocacy activities in contested review hearings is reflective of similar patterns in other types of contested hearings in child abuse and neglect cases. It is the general perception, based upon the data from the detailed focal circuit interviews and case file reviews in the 2005 re-assessment that the overall quality of advocacy by prosecutors and attorneys in these cases has significantly improved over the last decade. There have been many trainings every year during this period, offered by the CIP Board and others, on topics relating to child abuse and neglect cases. These trainings around the State have good attendance and are well received. Additionally, by virtue of these trainings, as well as due to the opening of more public defender offices in counties around the State, there appear to be more attorneys (with smaller

caseloads) handling these cases. Accordingly, a closer look at the above-discussed data, and other related information that can be obtained, needs to be undertaken. If there is indeed a downward trend in advocacy components in contested abuse and neglect hearings, measures need to be taken to turn this trend around.

E. The Functioning and Quality of Case Tracking Systems

At the time of the initial assessment in 1995, West Virginia had no case tracking system in place. Shortly thereafter, the Oversight Board created an abuse and neglect case status reporting form to be completed and submitted by each circuit court. The Supreme Court subsequently required that the case status report must be completed every three months for every child involved in abuse and neglect proceedings. (See Rule 53, Case Status Reporting).

The case status reporting form, which has been made available to the courts in both paper and digital formats, enables the tracking of much relevant data relating to the progress of the abuse and neglect case. Specifically, the form tracks key dates, such as the filing of the petition and the dates of preliminary, adjudicatory, dispositional, and improvement period hearings. It also tracks dates and lengths of improvement periods, the ultimate disposition of the case, out of home placements of the child, and the dates of judicial permanent placement reviews.

These forms are used to compile reports to enable the Supreme Court to more fully track the timely progress of abuse and neglect cases. The Statistical Analysis Center of the West Virginia Division of Criminal Justice Services is contracted by the Supreme Court to

assemble the data and produce periodic reports. Each circuit court, as well as the Supreme Court, will be informed of any cases in which the proper timeframes have not been met.

At this time, one report has been prepared and provided to the Oversight Board for review. In the Fall of 2005, the Board expects to receive a more comprehensive report of more recent data that will provide a great deal of useful information for case tracking. The Board is also pursuing the development of a method for the circuit courts to electronically submit the quarterly data to the Statistical Analysis Center. This electronic submission form will be easier for the courts to prepare, and will streamline the reporting process, providing virtually current or “real-time” data.

F. Extent to Which Court Caseload and Resource Limitations Affect Judicial Performance

1. Court Caseload Size

As earlier stated, in 1994, when the West Virginia Court Improvement Program was undertaking its start-up assessment, there were 647 child abuse and neglect cases filed in the circuit courts that year. In 2004, the number of new abuse and neglect filings had increased substantially to 1,774 cases. Abuse and neglect cases are handled by circuit court judges, a court of general jurisdiction handling many other type of cases as well. Therefore, this significant increase in abuse and neglect cases should be viewed in context of the overall numbers of other types of cases filed during the same years. In 1994, the total number of circuit court cases of all types filed was 63,471. (Circuit Court Grand Totals, January-December, 1994.) Due largely to the creation in 2002 of a Family Court to handle divorce

and other domestic relations cases, the circuit courts have experienced a net decrease in their caseload. In 2004, the total number of circuit court filings for all types of cases was 46,890. (Circuit Court State Caseload Summary, January-December 2004.)

Based upon caseload factors and other reasons, it is evident from the data that circuit judges are properly giving higher priority to their increased number of abuse and neglect cases. Positive indicators of that fact are reflected in the following three tables comparing 1995 and 2005 questionnaire data. Table O shows the estimates of work time devoted to child abuse and neglect cases. In 1995, 34% of responding judges stated they spent less than 5% of their time on these cases. But in 2005 only 8% of responding judges said they spent less than 5% of their work time on these cases. The same table shows, at the other end of the spectrum, that in 1995 no responding judges were devoting 26% or more of their work time to abuse and neglect cases. Now, the 2005 responses show that one-fourth of these judges are spending 26% or more of their working hours on these cases.

TABLE O

Please estimate the percentage of your time at work that is devoted to child abuse/neglect cases.

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
<5%	34.3% (12)	8.2% (4)	13% (6)	5.5% (3)	49% (77)	14.4% (23)
5%-10%	45.7% (16)	20.4% (10)	23.9% (11)	18.2% (10)	28.7% (45)	20.6% (33)
11%-25%	20% (7)	44.9% (22)	41.3% (19)	32.7% (18)	17.2% (27)	27.5% (44)
26%-50%	0% (0)	24.5% (12)	15.2% (7)	20% (11)	2.5% (4)	27.5% (44)
>50%	0% (0)	0% (0)	6.5% (3)	23.6% (13)	2.5% (4)	10% (16)
Total	100% (35)	100% (48)	100% (46)	100% (55)	100% (157)	100% (160)
Missing	1	1	0	0	1	0

Equally positive indicators of the increased attention judges are giving to these important cases are Tables P and Q. On a further positive note, it is clearly evident that prosecutors and attorneys are following the lead of the judiciary, devoting more and more time to their child abuse and neglect cases. (See Tables O, P, and Q.)

TABLE P

Please estimate the percentage of your time at work, per month, that is spent hearing child abuse/neglect cases in court.

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
<5%	51.4% (18)	16.7% (8)	26.1% (12)	13% (7)	61.4% (97)	20.8% (33)
5%-10%	40% (14)	31.3% (15)	28.3% (13)	27.8% (15)	24.7% (39)	28.3% (45)
11%-20%	8.6% (3)	33.3% (16)	28.3% (13)	14.8% (8)	8.2% (13)	23.9% (38)
21%-25%	0% (0)	16.7% (8)	8.7% (4)	14.8% (8)	1.9% (3)	13.2% (21)
>25%	0% (0)	2.1% (1)	8.7% (4)	29.6% (16)	3.8% (6)	13.8% (22)
Total	100% (35)	100% (48)	100% (46)	100% (54)	100% (158)	100% (159)
Missing	1	0	0	0	0	0

TABLE Q

Please estimate the percentage of your time at work, per month, that is spent preparing for scheduled hearings in child abuse/neglect cases (e.g., reading files and reports or doing research).

Response	Judges		Prosecutors		Attorneys	
	1995	2005	1995	2005	1995	2005
<5%	77.1% (27)	29.2% (14)	35.6% (16)	10.9% (6)	59.9% (94)	18.1% (29)
5%-10%	22.9% (8)	50% (24)	40% (18)	34.5% (19)	24.2% (38)	35.6% (57)
11%-20%	0% (0)	20.8% (10)	15.6% (7)	25.5% (14)	10.8% (17)	25% (40)
>20%	0% (0)	0% (0)	8.9% (4)	29.1% (16)	5.1% (8)	20.6% (33)
Total	100% (35)	100% (48)	100% (45)	100% (55)	100% (157)	100% (159)
Missing	1	0	1	0	1	1

A related point of concern is raised by the higher caseload carried by DHHR Child Protective Services staff. In 1995, 27% of CPS workers carried caseloads of more than 50 children. In 2005, the data shows the number of workers with more than 50 children had risen to 41% of DHHR survey respondents. (See Table R.) The State Legislature in 2004 authorized DHHR to hire an additional 200 CPS workers. But finding and retaining qualified staff for these positions is a continuing challenge for DHHR administrators.

TABLE R

Please estimate your (DHHR worker) current total caseload: Number of children

Response	DHHR	
	1995	2005
0-25	33.2% (40)	26% (46)
26-50	38.5% (46)	32.8% (58)
51-75	13.1% (16)	20.9% (37)
76-100	1.6% (2)	9.6% (17)
>100	12.4% (15)	10.7% (19)
Total	100% (119)	100% (177)
Missing	16	

2. Resource Limitations

Even with increased attention and priority given to abuse and neglect cases by judges and other case participants, unless there are adequate service providers, the problems giving rise to these cases become more and more entrenched. The predominantly rural nature of this

State exacerbates the problem. Many service providers, such as drug and alcohol treatment centers, family service agencies, and psychologists do not serve the less populated areas. Transportation for adults or children from rural areas was also a common problem identified by those interviewed in rural counties during the re-assessment field work. Finally, when service providers are available, they are often too busy to timely meet the demands needing addressed in a child or family case plan. Possibilities for resolution of these service-provider problems need continued attention. The timely permanent placement of children, whether it be return home or otherwise, is being significantly hindered by the increasing delays due to the unavailability of services for parents and children. (See Table S.)

TABLE S

Are you compelled to delay the proceedings or the permanent placement of children when services for the parents or children are unavailable or delayed?

Response	Judges		Prosecutors		Attorneys		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	17.1% (6)	19.1% (9)	47.8% (22)	48.1% (25)	26.9% (39)	21.3% (33)	25.0% (4)	17.5% (7)
Occasionally	65.7% (23)	59.6% (28)	47.8% (22)	38.5% (20)	48.3% (70)	39.4% (61)	43.8% (7)	40.0% (16)
Often	17.1% (6)	19.1% (9)	4.3% (2)	7.7% (4)	24.8% (36)	25.8% (40)	31.3% (5)	30.0% (12)
Usually		2.1% (1)		5.8% (3)		13.5% (21)		12.5% (5)
Total	100% (35)	100% (47)	100% (46)	100% (52)	100% (145)	100% (155)	100% (16)	100% (40)
Missing	1		0		13		3	

G. How Often Parents and Children have Legal Representation and the Adequacy of Such Representation.

The 2005 re-assessment interviews and case file reviews, without exception, establish that all respondents and children involved in abuse and neglect proceedings are represented by counsel. This is the case even for absent respondents who have not been located and served.

The data collected by questionnaire and interview regarding attorneys representing parents or children in abuse and neglect cases generally indicate the overall perception that these individuals are performing their court advocacy and litigation functions adequately. The 1995 assessment suggested a need for training in the law and specialized requirements for abuse and neglect case preparation. This finding contributed to the Oversight Board's determination to conduct training for attorneys and judges throughout the state. The training has been offered in a "basic" format focusing on an overview of West Virginia abuse and neglect law, as well as in an "advanced track" format which addresses the special educational needs of those involved in abuse and neglect proceedings, as well as the need for collaboration among various support providers. The training provided is free of charge to all participants and participants receive continuing legal education credits. Training manuals are also offered to all participants.

The 2005 re-assessment questionnaire submitted to judges, attorneys, prosecutors, and CASA volunteers confirms that virtually all professionals involved in the abuse and neglect proceedings believe that they receive adequate training. Furthermore, there is a noted

increase in the percentage of respondents who replied “Yes” when asked “Do you feel that you have received adequate training on how to handle cases involving abused and neglected children?”. For example, in 1995, 83.3% of the judges responded favorably, while in 2005, the percentage increased to 95.8%. Likewise, prosecuting attorneys responded 64.4% favorably in 1995, and 78.2% favorably in 2005, while attorneys responded 64.3% favorably in 1995, and 87.4% favorably in 2005. (See Table T.)

TABLE T

Do you feel that you have received adequate training on how to handle cases involving abused and neglected children?

Response	Judges		Prosecutors		Attorneys		CASA		DHHR	
	1995	2005	1995	2005	1995	2005	1995	2005	1995	2005
Yes	83.3% (30)	95.8% (46)	64.4% (29)	78.2% (43)	64.3% (99)	87.4% (139)	100% (17)	97.7% (42)	NA	
No	16.7% (6)	4.2% (2)	35.6% (16)	21.8% (12)	35.7% (55)	12.6% (20)	0	2.3% (1)		
Total	100% (36)	100% (48)	100% (45)	100% (55)	100% (154)	100% (159)	100% (17)	100% (43)		
Missing	0	0	1	0	4	0	2			

The 2005 re-assessment questionnaire also indicated a marked increase in positive responses from judges, prosecutors, attorneys, and CASA volunteers regarding attorneys’ knowledge about services available to families in the community. In 1995, 27.8% of judges responded that attorneys are usually knowledgeable about services in the community. In 2005, this percentage rose to 40.4%. Likewise, there was a noticeable increase in percentages of attorneys who stated they were “often” or “usually” knowledgeable about services available to families in the community. (See Table U.)

TABLE U

How often are attorneys knowledgeable about services available to families in the community?

Response	Judges		Prosecutors		Attorneys		CASA	
	1995	2005	1995	2005	1995	2005	1995	2005
Rarely	16.7% (6)	4.3% (2)	13.3% (6)		32.2% (49)	21.3% (33)	23.5% (33)	7.7% (3)
Occasionally	16.7% (6)	27.7% (13)	42.2% (19)		41.4% (63)	41.3% (64)	29.4% (5)	48.7% (19)
Often	38.9% (14)	27.7% (13)	24.4% (11)		15.8% (24)	21.9% (34)	29.4% (5)	23.1% (9)
Usually	27.8% (10)	40.4% (19)	20.0% (9)		10.5% (16)	15.5% (24)	17.6% (3)	20.5% (8)
Total	100% (36)	100% (47)	100% (45)	100% (0)	100% (152)	100% (155)	100% (17)	100% (39)
Missing	0		1		6		2	

Another factor to consider in assessing the adequacy of the representation of parents and children is the workload of the attorneys. The data from 2005, compared with the 1995 data, indicate that attorneys involved in abuse and neglect proceedings are spending a greater percentage of their time on abuse and neglect cases now than they were in 1995. This increase does not necessarily demonstrate that these attorneys are “overworked” or are otherwise inadequately handling the cases. In fact, when this data is considered in light of the interview responses, it appears that the attorneys are more specialized and experienced in the abuse and neglect field now than they were in 1995. (See Table P above.)

H. Quality of Treatment of Participants in the System

The quality of treatment of participants in abuse and neglect proceedings in the West Virginia judicial system is generally good. These cases, for the sake of the children and their families, are accorded a high priority among the many kinds of cases coming before the courts. Child abuse and neglect cases have, by law, priority over all civil proceedings, except for domestic violence proceedings and trials already in progress. W. Va. Code § 49-6-2(d); Syl. Pt. 1, *In re Carlita B.*, 185 W. Va. 613, 408 S.E.2d 365 (1991).

In furtherance of this guiding principle to handle these cases expeditiously, the active involvement of the parties and other court participants is expected throughout the case. One of the purposes of the *Rules of Procedure for Child Abuse and Neglect Proceedings* adopted by the State Supreme Court at the request of the CIP Oversight Board was to promote involvement by everyone needed to bring the case to a successful and speedy conclusion. Rule 2 provides, in part, that the abuse and neglect rules are designed: “To encourage the involvement of all parties, including children, in the litigation as well as the involvement of all community agencies and resource personnel providing services to any party.”

To this end, the CIP Oversight Board has found over the last decade that, as a whole, that judges and other court participants make every effort to obtain the input of the children, parents, and service providers. Indeed, the MDT process is designed by law to virtually ensure that the court will consider the input of involved court participants.

The one category of participants that could use some attention to improve their quality of treatment is foster parents. In a number of cases, the foster parents do not actively

participate in court proceedings, particularly when not seeking adoption or other permanent placement of the child. Nevertheless, it would appear from some of the re-assessment data, whether or not the foster parents are interested in providing a permanent home for the child, that their involvement in the case should be better facilitated and encouraged.

This concern regarding lack of foster parent involvement was also recognized in the CFSR process. The CFSR did not assess whether foster parents are actually asked to provide input during court hearings or reviews. But the data from the State program review did indicate that foster parents do not routinely participate in hearings or reviews, even though the court is required to notify them of any judicial hearings and give them an opportunity to be heard. With the variation amount the circuits as to whether notice is provided and the level of participation in court hearings and reviews by foster parents, it was determined that this was an area needing improvement in this State. These findings regarding foster parents applied to preadoptive and relative caretakers as well. (Final Report, West Virginia Child and Family Services Review, October 2002, at pp. 66-67.)

The information obtained from the interviews in the focal circuits indicates that foster parents are not routinely given notice of upcoming hearings. Additionally, when foster parents are present at hearings, their treatment as court participants with potentially valuable input is variable in the different circuits and courtrooms. The interviewers posed the question to judges and other court participants: "In hearings when foster parents are present in court, are foster parents asked to speak?" The judge - responses set out below illustrate the mixed treatment and involvement of these court participants:

- *“Always given the opportunity to speak.”*
- *“If they ask to speak, they’re allowed to. Typically, if foster parents appear, they appear with counsel.”*
- *“No, unless they are called as witnesses.”*
- *“Always given the opportunity to speak and raise any issues.”*
- *“Often the foster parents are not asked to speak; however, when the Court does inquire of them they often have very important information to share.”*

If foster parents are interested in adopting a child, they certainly should be expected to participate in MDT’s and attend post-termination review hearings. But in all cases, it would be sound practice to assure they receive notice of all hearing, and are offered to the opportunity to speak when they do attend.

VI. RECOMMENDATIONS

1) Judicial Leadership - Judicial leadership is critical to achieving safety and permanency in child abuse and neglect cases. The re-assessment statewide survey indicates that neither the CPS workers, prosecutors, CASA workers, child’s counsel, adult’s counsel, or even the judges themselves view the judges as being the person who takes the leading role in the child abuse and neglect cases. Similarly, these same people do not perceive judges as being the person who should take the leading role in abuse and neglect cases.

Who takes the leading role in abuse/neglect cases?

Person who is viewed as taking the leading role

	CPS worker	Prosecutors	CASA worker	Child's counsel	Adult's counsel	Judges	Other
Respondent	48%	32%	1%	9%	1%	10%	2%
DHHR	(89)	(60)	(1)	(17)	(2)	(18)	(4)
Judge	13%	55%	0%	26%	4%	34%	4%
	(6)	(26)	(0)	(12)	(2)	(16)	(2)
Prosecutor	43%	63%	0%	7%	0%	11%	2%
	(23)	(34)	(0)	(4)	(0)	(6)	(1)
Attorney	41%	41%	0%	24%	4%	8%	1%
	(65)	(64)	(0)	(38)	(7)	(13)	(1)
CASA	43%	46%	13%	15%	0%	11%	4%
	(200)	(21)	(6)	(7)	(0)	(5)	(2)
Total	41%	42%	1%	16%	2%	12%	2%
	(203)	(205)	(7)	(78)	(11)	(58)	(10)

Who should take leading role

	CPS worker	Prosecutors	CASA worker	Child's counsel	Adult's counsel	Judges	Other
Respondent	49%	34%	1%	8%	0%	11%	5%
DHHR	(92)	(64)	(2)	(15)	(0)	(20)	(9)
Judge	11%	55%	0%	15%	2%	30%	4%
	(25)	(26)	(0)	(7)	(1)	(14)	(2)
Prosecutor	46%	52%	0%	7%	0%	9%	2%
	(25)	(28)	(0)	(4)	(0)	(5)	(1)
Attorney	22%	49%	1%	23%	3%	20%	3%
	(34)	(77)	(1)	(36)	(4)	(32)	(4)
CASA	48%	26%	20%	35%	2%	11%	4%
	(22)	(12)	(9)	(16)	(1)	(5)	(2)
Total	36%	42%	2%	16%	1%	15%	4%
	(178)	(207)	912)	(78)	(6)	(76%)	(18)

It is clear that the judges must take a more assertive role in the handling of child abuse and neglect cases. Where it is essential that timeframes are met, that case plans be filed, and that all persons involved in these proceedings be kept on task, judges need to be leading and directing the progress of the cases. It is accordingly recommended that additional judicial

training be designed and presented demonstrating the effectiveness of judges taking the leadership role in abuse and neglect cases.

2) Case Plans - In order to address timeliness and content issues in the case plans developed for abuse and neglect cases, it is recommended that a uniform case plan format be developed in collaboration with the Department and the judiciary. A mutually acceptable plan format should then be provided to the courts and to CPS workers.

3) Case Tracking - A computerized case-tracking system should be implemented building upon the quarterly reporting protocol already in place for abuse and neglect cases. The reports generated would be accessible by West Virginia Supreme Court of Appeals and to each individual circuit judge. For any judge exhibiting a pattern of non-compliance, the West Virginia Supreme Court of Appeals could then bring to the attention of such judge cases on his or her docket which are not compliant with the appropriate timeframes so that prompt corrective action could be taken.

4) Foster Parent Involvement - Establish a clear and accountable procedure for written notice to foster parents (as well as pre-adoptive parents and relative caretakers) of all court hearings, MDT meetings, and judicial reviews. In addition, the Rules of Procedure for Child Abuse and Neglect Proceedings should be amended to incorporate more specific provisions establishing the right and opportunity of foster parents to participate in judicial hearings and reviews in order to provide pertinent information to the court and parties.

5) Court Orders - Through collaborative efforts of the judiciary and the DHHR, a process and protocol should be developed to assure that all required judicial findings are

made and incorporated into appropriate court orders. Also, focused training efforts and software improvements should be continued to gain wider acceptability and use of the JANIS software.

6) Availability of Services - Needed services are often un-available to children and families, particularly in the many rural areas of the State. Resource directories of services currently available in the State should be developed and distributed to all judges, prosecutors, attorneys, caseworkers, CASA volunteers, and other interested participants. In rural areas, means of providing transportation to those parents are children who cannot otherwise travel to locations where services are available should be identified or established in order to assure that a lack of services does not result in delays in achieving permanent and stable outcomes.

7) Attorney Training - Training programs presented by the Supreme Court CIP Oversight Board during the last decade have been successful in expanding the pool of attorneys available for handling abuse and neglect cases, and improving the knowledge and skills of attorneys attending these seminars. Based upon the re-assessment data, more training should be developed and provided in the area of effective advocacy strategies for parent and child attorneys handling these cases.

8) Quarterly Judicial Reviews - A workable case tracking system should provide the methods to monitor case progress. The 3-month judicial reviews are of particular concern in keeping cases moving toward permanent placement. A process for automatically setting those quarterly reviews in each case should be established in every circuit.

APPENDIX A

FOCAL CIRCUITS DEMOGRAPHICS AND CASE FILING STATISTICS

	7th Circuit Logan County	11th Circuit Greenbrier County	Pocahontas County	17th Circuit Monongalia County
Total Population (2000)	37,710	34,453	9,131	81,866
Population Percent Change (1990-2000)	-12.4%	-0.7%	1.4%	8.4%
Percent Population Under 5 yrs old	5.7%	5.5%	5.0%	4.9%
Percent Population Under 18 yrs old	22.1%	21.6%	20.9%	18.2%
Persons per square mile	83.0	33.7	9.7	226.7
Median Household Income	\$24,603	\$26,927	\$26,401	\$28,625
Persons per Household	2.50	2.32	2.30	2.28
Average Unemployment Rate (2004)	5.8%	5.7%	6.1%	3.4%
Persons Below Poverty, Percent (1999)	24.1%	18.2%	17.1%	22.8%
Total Circuit Court Filings (2004)	1,415	948	257	1,672
Abuse and Neglect Filings (2004)	34	48	15	44