Vermont Juvenile Defender Newsletter

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Woodside Orders: Flexible or Inflexible and Why It Matters

You're standing next to your 15-year old client at the preliminary hearing. He is charged with retail theft and operating without owner's consent. He ran from his group home and stopped by a local gas station for some – as the police affidavit put it – "meat snacks and a ham sandwich." Allegedly, he neglected to pay for his lunch. To top it all off, he then "borrowed" an unlocked car that had the keys in the ignition and managed to run it off the road and into a muddy cow pasture. The State's Attorney is asking the court to issue an inflexible Woodside order. What should you do?

Chances are, if you represent kids, you have encountered this kind of situation. This article will explain the difference between flexible and inflexible Woodside orders, discuss the interplay between court-ordered placements at Woodside and your client's administrative remedies, and provide practice pointers. However, please bear in mind that the law governing Woodside placements will be changing on July 1, 2018. After July 1, 2018, all pre-disposition Woodside placements will be court-ordered. Therefore, the information contained within this article will no longer be relevant. A more detailed overview of the coming changes is available in the Summer 2017 edition of the Vermont Juvenile Defender Newsletter. The Summer 2017 edition is available here: http://dgsearch.no-ip.biz/juvenile/Newsletters/Juvenile%20Defender%20Newsletter%20Summer%202017.pdf

33 V.S.A. § 5291 assigns the DCF Commissioner "sole discretion" to place youth at Woodside, unless the court orders otherwise "at or after a temporary care hearing." The statute permits the court to issue two different types of orders, flexible and inflexible. Flexible orders authorize, but do not require, the DCF Commissioner to place a youth at Woodside. Inflexible orders require placement at Woodside. Inflexible orders are valid for 7 days, and the court may renew the order each week until disposition. Inflexible orders are available "[u]pon a finding at the temporary care hearing that no other suitable placement is available and the child presents a risk of injury to him- or herself, to others, or to property."

Youth who are placed at Woodside administratively, or by the court pursuant to a flexible order, are entitled to the full

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panoply of administrative remedies outlined in DCF Family Services Policy No. 172. Policy No. 172 is available here: http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/172.pdf

These remedies include an informal administrative hearing on or before the eighth day of placement, the right to appeal an unfavorable decision to an appellate hearing officer (the process for these appellate hearings is more formal), and the right to appeal and unfavorable administrative decision to the Civil Division of the Superior Court pursuant to V.R.C.P. 75. *See B.C. v. Schatz*, No. 280-3-17 Cncv, at *3-4 (Vt. Super. Ct. Jul. 27, 2017) (establishing that a juvenile may appeal an unfavorable administrative decision to the Civil Division).

At these administrative hearings, the burden is on DCF to prove, by a preponderance of the evidence, that the youth: 1) is in DCF custody as a delinquent; 2) scores 10 or more points on the Woodside Screening Instrument; and 3) demonstrates behavior that cannot be safely managed in an available, less-restrictive environment. The first criterion is a statutory requirement. 33 V.S.A. § 5322 (youth who have never been adjudicated delinquent and youth who do not have a pending delinquency may not be placed at Woodside or any other facility used solely for the delinquent children). The second criterion, the Woodside Screening Instrument, assigns points for pending delinquency charges, uncharged delinquent conduct, adjudicated delinquencies, negative behavior that results in a placement change, running away from placements, prior placements at Woodside, and substance abuse. The Woodside Screening Instrument has not been tested for validity or reliability, but it does require at least some evidence of negative behavior on the part of the youth to justify detention in Woodside's short-term program. The third criterion is similar to the statutory requirement for an inflexible order in that it requires a finding that there are no less-restrictive, available placements capable of meeting the youth's needs.

Although the statutory criteria for inflexible orders is similar to DCF's administrative policy for short-term detention at Woodside, administrative hearings offer more time to consider and discuss less-restrictive placements. In contrast to the typical juvenile preliminary hearing on a charge of delinquent behavior, administrative hearings typically last an hour or more, and administrative appeals can last up to five hours.

Unlike youth who are placed administratively or pursuant to a flexible order, youth who are placed at Woodside pursuant to an inflexible order do not have access to any administrative remedies. This means that the only process they get occurs in the Family Division. While inflexible orders are generally not preferable for youth, there may be times when it makes sense for your client to request an inflexible order or support the State's request for such an order.

Assuming your client wants to stay out of Woodside, and the State is proposing an inflexible order, what should you do? First, you should remind the court that DCF policy prescribes a set of criteria for short-term detention at Woodside and that if the court issues a flexible order, DCF will be required to prove that the youth meets those criteria. Second, you should be prepared to argue that there are less-restrictive placements capable of meeting the youth's needs. This could involve having the youth's parents or another relative testify that they are willing

to assume care of the youth, provide appropriate supervision, and ensure that the youth follows relevant conditions and engages in treatment. It might also involve calling the DCF social worker as a witness and asking whether the social worker has explored foster care, therapeutic foster care, community-based wrap-around services, group homes, and residential programs. A list of available programs is available on the Defender General's website: http://defgen.vermont.gov/research/juvenile-division

In summary, for the next nine months, juvenile defenders should be prepared to advocate for flexible Woodside orders and argue against inflexible orders in a majority of cases. Beginning on July 1, 2017, all pre-disposition Woodside placements will be court-ordered, and juvenile defenders will need to be prepared to argue that their clients can be maintained in a less-restrictive setting and do not pose a risk to self, others, community, or property.

Special Education, IDEA, and *Endrew F. v. Douglas County School District*

The Individuals with Disabilities Education Act (IDEA) is "an 'ambitious' piece of legislation enacted in response to Congress' perception that a majority of handicapped children in the United States were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999, 197 L. Ed. 2d 335 (2017) (internal quotation marks and citations omitted). The Supreme Court's recent decision in *Endrew F. v. Douglas Cty. Sch. Dist.* helps to define what it means to provide a "free and appropriate public education" (FAPE).

According to the high Court's unanimous decision, most children receiving special education services should be integrated into the regular classroom. Additionally, for any child who is fully integrated into a regular classroom setting, an individual education plan (IEP) should be "reasonably calculated to enable the child to achieve passing marks and advance from grade to grade" in order to be compliant with IDEA. The decision clarified that IDEA requires schools to assess the adequacy of an IEP in light of the child's individual circumstances.

The *Endrew F.* Court reversed a decision by the Tenth Circuit, which held that a school district was not required to reimburse the parents of an autistic student for the cost of his tuition at the private school. The appellate court reasoned that the school district satisfied its obligation under IDEA to provide a FAPE because the IEP the child's school had prepared for him was reasonably calculated to confer more than a *de minimis* educational benefit.

The Court rejected the Tenth Circuit's reasoning, instead insisting on IEPs calculated to achieve measurable academic progress, taking into account the individual child's unique circumstances. Attorneys representing children and parents should be aware of this decision and should be prepared to remind schools of their obligations under IDEA on behalf of children and youth receiving special education services.

Marijuana Legalization and Child Protective Services

In Vermont, possession of small amounts of marijuana is no longer a criminal offense. However legal marijuana is not yet a reality, despite concerted efforts by advocates to legalize marijuana during the past two legislative sessions. However, in the near future, legalization efforts in nearby states may push legalization efforts here in Vermont across the finish line. Either way, states that have legalized or decriminalized marijuana continue to grapple with the interplay between non-criminal marijuana use and the child welfare system.

Marijuana use is not without risk. Marijuana use during pregnancy and breastfeeding is thought to harm the developing fetus, although scientific results should be interpreted with caution due to the presence of confounding variables such as concurrent smoking/alcohol abuse/other substance abuse, lack of prenatal care, and low socioeconomic status.[1] Likewise, marijuana use by children and teens is associated with a higher risk of addiction[2] and lower educational attainment.[3] However, marijuana use is widely perceived to be less harmful than use of other drugs, and small children who have access to marijuana paraphernalia or marijuana leaves and flowers do not face the same risks as children who have access to other illegal drugs (or even alcohol).

Despite the risks to certain vulnerable groups, parental marijuana use does not always pose a risk to children. In recognition of this fact, Massachusetts has specifically prohibited intervention by child protective services unless the parent's legal marijuana use poses a clear risk of harm to the child. Massachusetts law states: "[a]bsent clear, convincing and articulable evidence that the person's actions related to marijuana have created an unreasonable danger to the safety of a minor child, neither the presence of cannabinoid components or metabolites in a person's bodily fluids nor conduct permitted under this chapter related to the possession, consumption, transfer, cultivation, manufacture or sale of marijuana, marijuana products or marijuana accessories by a person charged with the well-being of a child shall form the sole or primary basis for substantiation, service plans, removal or termination or for denial of custody, visitation or any other parental right or responsibility." G.L. c. 94G § 7. Yet, in other states with legal marijuana, like Colorado, parents have lost custody of their children solely because of activities related to legal marijuana use. Could Vermont parents face a similar situation, with or without legal pot? An examination of the relevant statutes, DCF policies, and case law is necessary to answer that question.

Vermont law defines "harm" to a child. Substance-related harm usually falls into the category of neglect or risk of harm. "Neglect" is defined as "failure to supply the child with adequate food, clothing, shelter,

[1] David M. Fergusson et al., Maternal Use of Cannabis and Pregnancy Outcome, 109 Brit. J. Obstetrics & Gynecology 21 (2002).

[2] U.S. Dept. of Health & Hum. Services, Nat'l Inst. of Drug Abuse, Pub. No. 06-5882, Monitoring the Future: National Results On Adolescent Drug Use: Overview of Key Findings 2005 (2006).

[3] Wayne Hall et al., Nat'l Drug & Alcohol Res. Center, The Health and Psychological Effects of Cannabis Use 125 (2nd ed. 2001).

or health care," and "risk of harm" is defined as "a significant danger that the child will suffer serious harm other than by accidental means…" 33 V.S.A. § 4912. The definition of "risk of harm" also enumerates examples of substance-related risk of harm such as committing a "single egregious act" that placed the child at "significant risk of serious harm" (such as driving while intoxicated with children in the car), methamphetamine manufacturing in the presence of children, failing to appropriately supervise a child due to the parent's use of illegal substances or misuse of prescription drugs or alcohol, and failing to appropriately supervise a child in a situation where drugs or drug paraphernalia are accessible to a child. Behavior that meets the statutory definition of "harm" to a child and is perpetrated by a "person responsible for the child's welfare" may result in a DCF investigation or assessment.

In addition to opening an investigation or assessment when an allegation meets the criteria outlined in Ch. 49, DCF is also empowered to assess any situation where the Commissioner (or designee) has determined that a child is in need of care and supervision. 33 V.S.A. § 5106. These assessments are often called "JPA Assessments" or "CHINS B Assessments." The loose definition of "in need of care and supervision" permits DCF to intervene in a wide variety of situations involving parental substance use.

DCF policy (Policy 51 – Screening Reports of Child Abuse and Neglect) prescribes the circumstances under which a report can be accepted for an investigation or an assessment pursuant to the statutory definitions of harm contained in Ch. 49. This policy also outlines some of the circumstances under which DCF will accept a report for a JPA assessment. These include an allegation that a pregnant woman has used illegal drugs (including marijuana) or misused prescription drugs during her third trimester. DCF will also open a JPA assessment whenever there is an allegation that a newborn has tested positive for illegal drugs (including marijuana) or non-prescribed medication at birth. Interestingly, the policy permits DCF to investigate an allegation that a newborn has Fetal Alcohol Syndrome or a related disorder, but not to investigate an allegation that a pregnant woman is consuming alcohol during her third trimester. Tobacco use during pregnancy is not mentioned at all. Since most evidence suggests that the risk to the developing fetus from alcohol abuse during pregnancy is considerably greater than the risk of marijuana abuse (tobacco use also has significant known risks), it appears that the policy disfavors intervention for the use of legal substances, absent a showing of harm. Thus, in the event of legalization, DCF might change its policy to permit acceptance of the report only in cases where the use is known to have caused harm. Presumably, under current policy, a pregnant woman using marijuana legally (i.e. under medical supervision) would be exempt from DCF intervention unless she had "misused" the prescription.

Finally, applicable case law indicates that whether the court finds a child to be CHINS is not related to whether the child has suffered actual harm, nor is it based on the statutory definitions of child abuse and neglect contained in Ch. 49. *In re L.M.*, 2014 VT 17, 195 Vt. 637, 93 A.3d 553. The threshold for a CHINS finding is extremely low because the statutory definition of a "child in need of care and supervision" is broad and vaguely defined. *See In re B.G.*, 2016 VT 107, ¶ 11, 155 A.3d 179, 182,

reargument denied (Oct. 7, 2016). As Justice Dooley wrote in his concurring opinion in *B.G.*, "the fact that the Department for Children and Families (DCF) can legally intervene to have the child declared a CHINS does not mean that it should do so in all cases." Under these precedents and absent an exercise of discretion on the part of DCF, Vermont families could be subject to court intervention for possession and use of marijuana, even without a showing of actual harm to the child. That said, DCF may very well be exercising such discretion already, but there is no publicly available data on the number of CHINS petitions that allege only marijuana use or possession. Likewise, it is unclear how often DCF intervenes or requests court involvement in cases where marijuana cultivation or distribution is alleged without a concurrent allegation of specific risk to the child.

To summarize, at the present time, parents who use marijuana may be at risk of losing custody of their children in a CHINS proceeding. While the statutory criteria defining abuse and neglect are reasonably precise and tend to require a showing harm or substantial risk of harm, the threshold for a judicial finding that a child is in need of care and supervision remains nebulous. Applicable case law suggests that is that the threshold for a CHINS finding is lower than the threshold for initiating an investigation or assessment under the Ch. 49 criteria.

Ultimately, if legalization moves forward, the Vermont legislature will need to decide how legal marijuana use and the child protection system will interface. One option would be to carve out an exemption for legal possession, cultivation, and sale of marijuana, absent a clear showing of risk of harm to the child, as Massachusetts did. Another option would be to leave the child welfare statutes alone and allow DCF to alter its policy governing discretionary interventions (i.e. JPA assessments pursuant to 33 V.S.A. § 5106).

Recent Changes to DCF Policy

Within the last year, DCF has added four new policies and revised many others. New policies include:

Policy 75: Normalcy and the Reasonable and Prudent Parent Standard (RPPS). This policy was developed in response to the Preventing Sex Trafficking and Strengthening Families Act of 2014, which requires child welfare agencies to promote "normalcy" for children in foster care by empowering foster parents to make decisions for the children in their care according to the "reasonably prudent parent standard. Policy 75 defines the reasonable and prudent parent standard "a standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child or youth in foster care, while at the same time encouraging the emotional and developmental growth of the child, that a caregiver must use when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities."

The policy authorizes caregivers to provide or withhold permission without consulting the social worker so that foster children can participate in normal childhood activities and events such as sleep-overs, school field trips, and social media use. Foster parents are encouraged consult with DCF when the foster parent's opinions and judgements are

likely to differ from those of the birth parents.

Other new policies include:
Policy 72: Educational Achievement and Stability for Children and Youth in DCF Custody
Policy 76: Supporting and Affirming LGBTQ Children and Youth
Policy 251: HOPE (Helping Our Peers Excel) Team

These policies are available on DCF's public website:
http://dcf.vermont.gov/fsd/policies

Some recent policy revisions include:

Policy 68: Serious Physical Injury – Investigation and Case Planning was revised to encompass all cases where serious physical injury occurs, not just cases where the serious injury was caused by physical abuse. Under this policy, all merits stipulations in serious physical injury cases must be pre-approved by the DCF Policy and Operations Manager (the person who supervises the District Director). The policy is available at:
http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/68.pdf

Policies 82 & 83: Juvenile Court Proceedings (CHINS and Delinquency), were revised to incorporate a policy statement on confidential placements. The policy states that in "rare instances" the location of a placement and identity of the foster parents may be kept confidential from parents. Placements may be kept confidential if disclosure would threaten the safety of the child or the resource family. Confidential placements must be approved by the Director of Operations or the Senior Policy and Operations Manager, and social workers are directed to consult with the AAG to discuss seeking a protective order in all cases where DCF has determined that a placement should remain confidential. Policies 82 and 83 are available at:
http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/82.pdf
http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/83.pdf

Policy 51: Screening Reports of Child Abuse and Neglect was revised to broaden and clarify the criteria for accepting reports of chronic neglect. Under the revised policy, allegations of chronic neglect must be assessed in the context of any prior reports suggesting a pattern of concern or ongoing failure to meet the child's needs. The criteria for accepting a report under Ch. 51 (a JPA or CHINS B assessment) were also revised to provide examples of behaviors that warrant acceptance if repeated, harmful to the child, developmentally inappropriate, and substantially outside the bounds of normal parenting. These behaviors include:

- Ignoring the child, either physically or psychologically, by choosing to not respond to the child (e.g., refusing to look at the child or call the child by their name);
- Rejecting the child by actively refusing to respond to their needs (e.g., refusing to touch a child, denying the needs of a child, ridiculing a child);
- Confining or isolating the child for long periods of time or limiting the child's freedom of movement;
- Verbally assaulting behavior which involves the constant belittling, berating, shaming, ridiculing, or threatening the child; or
- Terrorizing the child through threats and bullying which creates a climate of fear for the child in the home. Terrorizing

can include placing the child or the child's loved one (such as a sibling, pet, or toy) in a dangerous or chaotic situation, or placing rigid, unrealistic, or developmentally inappropriate expectations on the child with threats of harm if they are not met.

Policy 51 is available at: http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/51.pdf

Other recently revised policies include:

Policy 50: Child Abuse and Neglect Definitions
Policy 52: Child Safety Interventions – Investigations and Assessments
Policy 55: Unaccepted Reports on Open Cases
Policy 56: Substantiating Child Abuse and Neglect
Policy 60: Juvenile Proceedings Act – CHINS (C) and (D) Assessments
Policy 67: Fatality and Near Fatality Public Disclosure
Policy 69: Family Support Cases – Case Planning, Reassessment, Case Plan Updates, and Closure
Policy 80: Working with Families in Court – Definitions
Policy 84: Conditional Custody Orders (CCOs)
Policy 98: Reunification of Abused or Neglected Children and Youth
Policy 121: Notification of Changes for Children and Youth in DCF Custody
Policy 125: Permanency Planning for Children and Youth in DCF Custody
Policy 135: Intimate Partner Violence (IPV) Practice Framework
Policy 140: Standby and Call-In
Policy 155: Runaway, Abducted, and Missing Children and Youth
Policy 172: Woodside Short-Term Status/Program – Protecting Due Process Rights
Policy 173: Woodside Long-Term Status/Program
Policy 195: Guardianship Assistance Program
Policy 196: Post-Adoption Contact Agreements
Policy 250: Staff Safety
Policy 268: Foster Parent Reimbursement
Policy 300: Title IV-E Program

All of these polices are available on DCF's public website.

Upcoming Training Opportunities

Human Trafficking Training: Dr. Tanisha Knighton will be conducting a two-day training on the topic of human trafficking in Rutland on November 2nd and 3rd in Rutland, Vermont. The first day of the training, *Overview of Human and Sex Trafficking*, will be held on November 2, 2017 from 9:00 AM to 4:00 PM at the Franklin Howe Center, 1 Scale Avenue, Rutland, Vermont. This training is appropriate for attorneys, judges, and GALs.

The second day of the training, titled, *Interviewing Victims of Human and Sex Trafficking: Working with MDT's to Respond to Trafficking in your Communities*, will be held on November 3, 2017 from 9:00 AM until 4:00 PM at the Franklin Howe Center in Rutland. Day two is designed for child welfare and law enforcement professionals and will focus on critical skills for interviewing and responding to human and sex trafficking. However, Day two of this training is open to attorneys and others who are interested in attending.

Register online at: Register for this training at: http://training.vermontcwtp.org/
Enrollment Key: **Training123!**

Juvenile Law Training: Save the date for the Defender General's Juvenile Law Training for public defenders and conflict counsel (by invitation only)! The training will be held on Tuesday, November 14, 2017. This year's topics will include:

- What is zealous advocacy for children?
- Relationships with GALS
- Ethical issues involved with representing children
- New decisions from the VTSCT