

# **Position Statement 47: Custody Relinquishment Position Statement**

## **Policy**

As of 2002-2004, when this issue last received critical federal attention from the General Accounting Office and the Congress, more than 12,700 children were placed into state child welfare or juvenile justice systems each year in order to gain access to mental health care.<sup>1</sup> Although some states<sup>2</sup> now outlaw this practice for child welfare,<sup>3</sup> and some states and school districts have provided funding to deal with the fundamental problem of lack of resources, substantial anecdotal information demonstrates that the practice continues.<sup>4</sup> The 2009-2010 state fiscal crisis has effectively precluded<sup>5</sup> state implementation of the 2006 Family Opportunity Act<sup>6</sup> that was enacted to deal with this problem and threatens all Medicaid funding, so the resource problem remains acute. Mental Health America (MHA) remains resolved that requiring families of children with mental health and substance use conditions to relinquish parental rights in order to get mental health treatment for their children is both inhumane and counter-productive.

## **Background**

According to the final report issued by the President's New Freedom Commission on Mental Health<sup>1</sup>, the public mental health system "is in shambles."<sup>7</sup> In no place is this more apparent than in the area of children's services, where barriers to accessing needed treatment through the mental health system still sometimes require parental custody relinquishment to the child welfare or juvenile justice systems.

Custody relinquishment can be required even if families have access to private insurance or public health programs. Implementation of federal and state parity laws will help families with access to private health insurance, but not enough. Because benefit plans do not cover a variety of service options, significant financial burdens remain. Families must sacrifice savings and retirement accounts and sell personal property as a means to finance the services their child needs to deal with a serious mental health or substance use condition.

Families that qualify for public insurance must rely on an under-funded public mental health system, which does not provide appropriate access to services or adequate treatment choices. Families that are living in poverty, but do not qualify for Medicaid or CHIP (Children's Health Insurance, as reauthorized and expanded in 2009<sup>8</sup>) are even more desperate. For these reasons, and as a last resort when all else has failed, families are faced with trying to access mental health care through the child welfare or juvenile justice systems. In order to receive this publicly-funded care, families often must relinquish parental custody to the state. This breaking of the parent-child relationship is devastating for the child, family, and community.

Litigation under the Social Security Act (Medicaid and EPSDT – Early Periodic Screening, Diagnosis and Treatment), IDEA (The Individuals with Disabilities Education Act<sup>9</sup>), and constitutional claims based on the family privacy interests implicated by custody relinquishment have succeeded in developing some resources, especially school-based resources, and CHIP has provided federal funding for health insurance for children, which together have led to a decrease in custody relinquishment cases in the last 10 years.<sup>10</sup> The Family Opportunity Act (passed as part of the 2005 Deficit Reduction Act and cited in footnote 5) provides for a buy-in program to expand Medicaid coverage to children who meet SSI disability criteria and whose family incomes are too high to be eligible under current regulations but fall below 300% of the Federal Poverty Level.<sup>11</sup> However, states have failed to fund the program adequately during the current fiscal emergency, so this promise remains unfulfilled.

Health insurance reform at the federal level could make the Family Opportunity Act promise a reality. But the failure of the Congress to address the issue of custody relinquishment directly following the 2003 GAO study was a great disappointment,<sup>12</sup> and the implementation of federal health care financing reform is a work in progress. Thus, state law reform and active litigation are still needed to fight loss of custody and increase treatment options.

In the “Great Recession” that began in 2009, the problem has actually gotten worse for some children and youth, now focused on juvenile justice placements: As cash-starved states slash mental health programs in communities and schools, they are increasingly relying on the juvenile corrections system to handle a generation of young offenders with psychiatric disorders. About two-thirds of the nation's juvenile inmates - who numbered 92,854 in 2006, down from 107,000 in 1999 - have at least one mental illness, according to surveys of youth prisons, and are more in need of therapy than punishment.

We're seeing more and more mentally ill kids who couldn't find community programs that were intensive enough to treat them," said Joseph Penn, a child psychiatrist at the Texas Youth Commission<sup>13</sup>. “Jails and juvenile justice facilities are the new asylums.”

At least 32 states cut their community mental health programs by an average of 5 percent this year and plan to double those budget reductions by 2010, according to a recent survey of state mental health offices.

Juvenile prisons have been the caretaker of last resort for troubled children since the 1980s, but mental health experts say the system is in crisis, facing a soaring number of inmates reliant on multiple - and powerful - psychotropic drugs and a shortage of therapists.<sup>14</sup>

## **Call to Action**

Children and families should receive the services required to sustain their mental health without sacrificing their family integrity. Thus, MHA encourages affiliates, families and other concerned individuals and organizations to advocate for more state laws banning custody relinquishment requirements and for increased availability, accessibility, and appropriateness of mental health and substance abuse treatment.

Parents should be provided with information about the mental health and substance use treatment services that are available to address the needs of their child. Community-based services designed to eliminate the need for custody relinquishment should be created, implemented and sustained. This is the only way to further positive outcomes and family preservation.

Implementation of the Family Opportunity Act, Medicaid waivers and other mechanisms need to be developed to fill the need that has led to this inappropriate use of the child welfare and juvenile justice systems. Insurance parity must be enforced to provide equal mental health coverage and the increased service options that children with mental health and substance use conditions need to ensure their health and wellness. The provisions of the Social Security Act (Medicaid and EPSDT), IDEA, and constitutional claims based on the family privacy interests implicated by custody relinquishment need to be actively litigated to fight loss of custody and increase treatment options.<sup>15</sup> And the recent federal health care reform legislation (the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010<sup>16</sup>) needs to be funded and fully implemented to consign custody relinquishment to the dustbin of history.

### **Effective Period**

The Mental Health America Board of Directors approved this policy on June 13, 2010. It is reviewed as required by the Public Policy Committee.

### **Expiration:** December 31, 2015

1. CHILD WELFARE AND JUVENILE JUSTICE: Federal Agencies Could Play a Stronger Role in Helping States Reduce the Number of Children Placed Solely to Obtain Mental Health Services (GAO-13-397, April 21, 2003). <http://www.gao.gov/new.items/d03397.pdf>. Estimate based on national survey conducted in 2001. See, generally, “Staying Together: Preventing Custody Relinquishment for Children’s Access to Mental Health Services,” Bazelon Center for Mental Health Law and Federation of Families for Children’s Mental Health (1999) and “Relinquishing Custody: The Tragic Result of Failure to Meet Children’s Mental Health Needs,” Bazelon Center for Mental Health Law (2000), both available from Bazelon. PDF version of 1999 publication available at <http://www.bazelon.org/issues/children/publications/stayingtogether/staying2.pdf>.
2. As of 2003, eleven states permitted access to child welfare services without loss of custody, and six states plus the District of Columbia forbade voluntary provision of child welfare services altogether. The remaining states had no clear policy on custody relinquishment. *Id.* And see “Staying Together: Preventing Custody Relinquishment for Children’s Access to Mental Health Services,” Bazelon Center for Mental Health Law (1999), available at <http://www.bazelon.org/publications/children/index.html>. This list has not been updated by the GAO or Bazelon nor is more recent information available from the National Conference of State Legislatures.
3. Sometimes using a “voluntary placement agreement” to get around the custody issue, see references in footnote 1.
4. Information from the Federation of Families for Children’s Mental Health, NAMI and MHA affiliates, gathered in March-April, 2010. Texas, the only state for which coded data was obtained, documented that in 2008, in three of 788 cases of child welfare funding based on “refusal to assume parental responsibility,” the underlying reason was “lack of mental health services.”
5. With only two known exceptions
6. P.L. 109-171 (February 8, 2006)
7. <http://mentalhealthcommission.gov>
8. The Children’s Health Insurance Program Reauthorization Act of 2009 (CHIPRA or Public Law 111-3) reauthorized the Children’s Health Insurance Program (CHIP). CHIPRA finances CHIP through FY 2013.
9. P.L. 108-446 (December 3, 2004), 20 USC§1400.

10. This information is purely anecdotal. The last known survey was the GAO survey, conducted in 2001.
11. <http://www.cms.gov/NewFreedomInitiative/downloads/LTC%20Roadmap%20to%20Reform.pdf>
12. The Keeping Families Together Act would have promoted comprehensive interagency systems of care for children with mental or emotional disorders by providing for six-year "Family Support Grants" to states to help build new state-level infrastructure. The bill would also have established a new federal interagency task force to examine mental health issues in the child welfare and juvenile justice systems. In addition, it would have required states to report annually on the success of the programs and activities and the Department of Health and Human Services to provide a report to Congress evaluating states' success in addressing the custody-relinquishment problem. The bills remain pending (since 2004), but no action is expected prior to 2011.
13. Acting Director of the Texas Youth Commission which provides mental health services to the state's juvenile correctional system.
14. New York Times, "Mentally Ill Offenders Strain Juvenile [Justice] System," by Solomon Moore, August 10, 2009.
15. Bazelon: Litigation Strategies: <http://www.bazelon.org/issues/children/custody/litigation.htm>
16. -- P.L. -- (March --, 2010) and -- P.L. -- (March --, 2010), <http://democrats.senate.gov/reform/patient-protection-affordable-care-act.pdf> and <http://thomas.loc.gov/cgi-bin/query/F?c111:5:./temp/~c111N4zYWi:e658>., summary at <http://www.whitehouse.gov/health-care-meeting/proposal>.