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The Right of Circuit Judges to use their Federal Powers to Order Placements

(revised 3/3/2015)

Under the 14th Amendment Due Process Clause of the Constitution, the DCF has an absolute duty not to violate the Constitutional rights of children under its care and Dependency Court Judges have the same powers as Federal Judges to protect such rights.

1. 14th Amendment - Substantive Due Process Rights: Defines scope of due process rights of dependency children under state care and specifically in foster care.

i. Taylor ex rel Walker v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 489 U.S. 1065 (1989).

Leading 11th Circuit case holding that a child involuntarily placed in a foster home has a liberty interest protected by the substantive due process clause of the 14th Amendment. *Id. at 797*.

"In this case, the child's physical safety was a primary objective in placing the child in the foster home. The state's action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the state to ensure the continuing safety of that environment. The state's failure to meet that obligation, as evidenced by the child's injuries in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment. *Id. at 795*.

"With contemporary society's outrage at exposure of defenseless children to gross mistreatment and abuse, it is time that the law give to these defenseless children at least the same protection afforded adults who are imprisoned as a result of their own misdeeds.... We hold that a child involuntarily placed in a foster home is in a situation so analogous to a prisoner in a penal institution and a child confined in a mental health facility that the foster child may bring a section 1983 action for violation of fourteenth amendment rights.... This holding does not mean that every child in foster care may prevail in a section 1983 action against state officials based upon incidental injuries or infrequent acts of abuse; only where it is alleged and the proof shows that the state officials were deliberately indifferent to the welfare of the child will liability be imposed." *Id. at 797*.

ii. "[W]hen the State by the affirmative exercise of its power so restraint's an individual's liberty that it render's him unable to care for himself, and at the same time fails to provide for his basic human needs--e. g. food, clothing, shelter, medical care, and reasonable safety--it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *Deshaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 200 (1989).

iii. *Ledbetter* relies upon the Supreme Court opinion in *Youngberg v. Romeo*, 457 U.S. 307 (1982) where it was held that involuntarily committed residents of state mental retardation institutions have a constitutional right to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and the habilitation reasonably required by their protected liberty interests

iv. Placement status has been a critical factor in determining state obligations to abused and neglected children. In *DeShaney v. Winnebago County Department of Social Services,* the Supreme Court adopted a bright line test to determine liability based upon custodial distinctions and the corresponding state obligations to children in state custody. The Court held that the Winnebago County Department of Social Services did not have a constitutional obligation under the Due Process Clause to protect Joshua DeShaney, from the abuse of his father where the state did not create the danger but was otherwise aware of it. The Court opined "[i]t is the state's affirmative act of restraining the individual's freedom to act on his own behalf... which is the 'deprivation of liberty' triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means." The dissenting opinion relies on *Youngberg v. Romeo*, 457 U.S. 307 (1982) and *Estelle v. Gamble*, 429 U.S. 97 (1976), to stand for the proposition of state created danger, when, for example, the state cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction.

v. Under limited circumstances, the state may have an affirmative obligation to protect an individual from harm. When a "special relationship" exists between the state agency and the individual, the state has an affirmative duty to protect that individual. A "special relationship" is frequently limited to situations where the state has taken physical custody of the person by the affirmative exercise of state power to so restrain an individual's liberty that it renders him unable to care for himself. "The affirmative duty to protect arises not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." Along the same lines, when a child is placed in foster care, (*DeShaney*, 489 U.S. at 199) a special relationship between the state and the child arises as state power has removed the child from the child's normal source of

protection thereby creating the affirmative duty of care. "A child generally depends on his parents to guard against the dangers of his surroundings .... By removing the child from his home, even when the child's best interest lie in such action, the state thereby obligates itself to shoulder the burden of protecting the child from foreseeable trauma." (*Doe v. Taylor*, 975 F.2d 137, 146 (5th Cir. 1992)) When a child is placed in foster care, the child becomes dependent upon the state, through the foster family, to meet the child's basic needs. (See generally *D.R. v. Middle Bucks Area Voc. Tech. Sch*., 972 F.2d 1364, 1369 (3d Cir. 1992)). Placement in foster care does in fact implicate state custody for the purpose of due process rights and protections. States may have a bare minimum obligation to protect a child from at least physical harm while placed in foster care. (*DeShaney*, 489 U.S. at 199)

vi. Although the Second Circuit in *Doe v. N.Y. City Department of Social Services* 709 F.2d 782 did award damages based on the right to safety claim, the court did not identify the source of the constitutional right nor did it address the application of such a right in a foster care context. The court did differentiate the nature of the foster care claim from those of prison inmates.

2. Dependency Court Judges have the same inherent powers as Federal Judges to protect the Constitutional rights of foster children.

i. A Circuit Court judge has the inherent jurisdiction and right to protect minor children and their property. *Phillips v. Nationwide Mutual Insurance Company*, 347 So. 2d 465, 466 (Fla. 2d D.C.A. 1977). In *Brown v. Ripley*, 119 So. 2d 712, 717 (Fla. 1st. D.C.A. 1960), the court said: "Independent of statute or rule a court of chancery has inherent jurisdiction and right to control and protect infants and their property, and enjoys a broad discretion in making orders protecting their welfare. Though the courts should be careful not to disturb rights, which have once been properly settled, they must exert the utmost vigilance to see that the rights of so unprotected a class as that of infants are not infringed on or destroyed. The court itself is, in legal contemplation, the infant's guardian," See also, *Peppard v. Peppard*, 198 So. 2d 68 (Fla. 3d D.C.A.1967).

ii. "[The] courts have authority to do things that are absolutely essential to the performance of their judicial functions." *Rose v. Palm Beach Cnty*., 361 So.2d 135, 137(Fla.1978). Article V, § 1, Fla. Const. defines inherent power as "[A]ll powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense that they exist because the court exits..." "The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a

way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make effective their jurisdiction.

iii. *State, Department of Health and Rehabilitative Services v. Hollis*, 439 So. 2d 947, (Fla. 1st Dist. Ct. App.1983) The court's inherent power extends to reviewing all pleadings filed on behalf of infants for the purpose of ensuring that all proper objections and exceptions are raised and of requiring that "the representative of such minor ... take such exceptions or *file such pleadings* as may be necessary to fully secure and protect such rights and interests as the minors appear by the record to have." *Walker v. Redding,* 40 Fla. 124, 23 So. 565 (1898) (e.s.). *Accord Parken v. Safford,* 48 Fla. 290, 37 So.2d 567 (1904); *Parrish v. Haas,* 69 Fla. 283, 67 So. 868 (1915). In view of the power conferred upon courts of equity to safeguard the rights of minors, the lower court clearly had the authority to order HRS to file a petition for permanent commitment.

iv. *31 Foster Children v Bush* 329 F. 3d 1255 (11th Cir. 2003) *cert. denied*

i. Plaintiffs filed this suit on behalf of twenty-two children against Florida's Department of Children and Families (DCF). The suit alleged that DCF failed to protect foster children in its custody from harm and to provide them with appropriate placements. Specific provisions of the complaint concerned the lack of foster homes and other placement options; overcrowded and inadequately supervised homes and facilities; and placement in homes that were dangerous, abusive, or neglectful.

ii. The Eleventh Circuit Court of Appeals upheld the federal judge's dismissal of the statewide class action based upon *Younger* abstention because "[t]he [Federal] district court found that the juvenile court can act to protect children within its jurisdiction."

iii. Judge Carnes referred to *Pennzoil Co. v. Texaco, Inc*., 481 U.S. 1, 15, 107 S.Ct. 1519, 1528, 95 L.Ed.2d 1 (1987) where the district court found that "the juvenile court can act to protect children within its jurisdiction," citing *Dep't of Children & Family Servs. v. I.C.*, 742 So.2d 401, 404 (Fla. 4th DCA 1999), and declined to hold that the remedies available are inadequate. Judge Carnes stated "We agree with its conclusion."

iv. A Florida state court can remedy in a dependency proceeding the harms that a child in the defendants' custody and in that court's jurisdiction might suffer. Although the Department has discretion regarding the identification of a specific placement for a child, *State v. Brooke*, 573 So.2d 363, 368 (Fla.

1st DCA 1991), the court can order that siblings be placed together in foster care. See *Div. of Family Servs. v. S.R.*, 328 So.2d 270, 271 (Fla. 1st DCA 1976); *F.B. v. State*, 319 So.2d 77, 79 (Fla. 1st DCA 1975). The court can order that a child be placed in a therapeutic setting, *In the Interest of L.W.*, 615 So.2d 834, 839 (Fla. 4th DCA 1993), and that a child be treated by a licensed health care professional or receive mental health treatment. Fla. Stat. § 39.407(4). While the state court cannot compel the Department to place children where space is not available, *Dep't of Children & Family Servs. v. M.H.*, 830 So.2d 849, 850 (Fla. 2d DCA 2002), it can hold the Department in contempt for failing to comply with a child's case plan and can order the Department to submit proposals for compliance. Fla. Stat. § 39.701(8)(c); L.W., 615 So.2d at 837-38. Even though the court cannot prevent the Department from using unsafe or inappropriate facilities for all children, as to those children within its division, the court can take protective measures. It can determine whether a facility in which a child is located is safe, either by appointing a child's representative to make an inquiry or itself investigating conditions at the facility. Fla. Stat. § 39.701(8)(g); I.C., 742 So.2d at 405. If the investigation reveals that a child within the jurisdiction of the court (meaning within its division) is in a dangerous facility, the court can take action, including finding the Department in contempt for failing to comply with the child's case plan. See generally, Fla. Stat. §§ 39.601(3)(e); 39.701(8)(c); I.C., 742 So.2d at 404-06. Case plans always call for an appropriate placement, and an unsafe facility is not an appropriate one. Fla. Stat. § 39.601(3)(e) ("placement is intended to be safe, the least restrictive and most family-like setting available consistent with the best interest and special needs of the child, and in as close proximity as possible to the child's home").

v. Circuit courts retain "inherent and continuing jurisdiction to entertain matters pertaining to child custody and to enter any order appropriate to a child's welfare." *B.Y. v. Dep't of Children & Families,* 887 So.2d 1253, 1256 (Fla. 2004).

3. Foster care placement decisions should be given the highest degree of care-since the state is substituting its decision for that of the parent. *T.M. v. Carson*, 93 F. Supp. 2d 1179, 1187 (D.C. Wyo. 2000). The professional judgment standard was appropriate to determine liability for placement decision of child welfare workers who placed children with sexually abusive foster parent. Id. at 1195.

i. In *Youngberg v. Romeo*, 457 U.S. 307 (1982), the Court held that a mentally retarded person involuntarily committed to state confinement had a constitutional right (rooted in the Fourteenth Amendment) to be

free from harm inflicted by himself or from others. Liability for a civil rights violation by the state could follow when decisions for the inmates care are "a substantial departure from accepted professional judgment, practice, or standards" as to demonstrate that the person responsible did not actually base the decision on such a judgment. Id. at 323.

ii. *LaShawn*, 762 F. Supp. 959, 996-97 (D.D.C. 1991). In a class action brought by children in foster care, the court held: The facts in this case established that defendants failed to protect the plaintiffs from harm-whether physical, psychological, or emotional-by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things... [Klnowledge of these problems and refusal to take action confirm that the problems are not isolated, but amount to "a persistent pervasive practice... decisions made by officials within the DHS have not been the result of the exercise of professional judgment .... These failures are not the result of choosing among several professionally acceptable alternatives. The failures are the result of making no choices at all."

iii. In *Yvonne L. v. New Mexico Dept. of Human Services*, 959 F.2d (10th Cir. 1992) the court elected to apply the professional judgment standard, recognizing that like the mental health patients in Youngberg, foster children are entitled to more considerate treatment than prison inmates. If a caseworker has exercised no professional judgment in placing the child, whether he knew the child was being maltreated or not, the caseworker might be found liable for the resulting harm.

iv. In *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (noting shocks-the-conscience test first applied in *Rochin v. California*, 342 U.S. 165 (1952)), the Court explained that the Fourteenth Amendment's substantive due process provision protects against "arbitrary action," and that to be sufficiently arbitrary, the challenged conduct must shock the conscience in violation of the "decencies of civilized conduct." Negligently inflicted harm may never be sufficiently shocking to be considered a constitutional violation. (see *County of Sacramento* at 849) Conversely, intentionally injurious conduct is highly likely to shock the conscience. Where the government actor's state of mind falls in between those two, liability depends on "an exact analysis of the circumstances" involved. The Supreme Court has yet to rule on the state of mind required to establish liability in § 1983 actions brought by foster children, creating a split among federal and state courts as to which liability standard to apply. Many courts require that the plaintiff prove that the government was deliberately indifferent, others apply the professional judgment standard, while still others apply the "shock-the-conscience" analysis.

v. *T.M. ex rel. R.T. v. Carson*, 93 F.Supp.2d 1179, 1188 (D.Wyo. 2000) (citing *Wendy H. v. City of Philadelphia*, 849 F.Supp. 367, 371-72 (E.D.Pa. 1994)), the District Court of Wyoming concluded that the Supreme Court intended for the professional judgment standard to require only that the government actor exercised professional judgment, and that liability may not be avoided by showing a lack of knowledge of harm.

vi. In *H.A.L. ex rel. Lewis v. Foltz,* 551 F.3d 1227 C.A.11 (Fla.2008) the Court of Appeals held that defendants who allegedly placed children in foster home where they had previously placed child known to be sexually aggressive toward other children, with knowledge that foster parents both worked during the day and that this sexually aggressive child would have unsupervised contact with other children until foster parents returned from work, without first conducting background check into other children already living in home, and without implementing plan to prevent child-on-child sexual abuse which thereafter occurred, were not entitled to qualified immunity from liability under § 1983 for their alleged deliberate indifference to foster children's clearly established substantive due process right to be reasonably safe from sexual abuse. "…the issue here… is whether Defendants-who could have (among other things) removed Plaintiffs from the Shick home-actually knew, and were deliberately indifferent to, a substantial risk of Plaintiffs being sexually abused in the Shick home. *See Taylor,* 818 F.2d at 797."

4. Whenever treatment should be based on professional judgment, Juvenile Judges have the inherent power to order placements to enforce the constitutional rights of children. Professional judgment is required whenever an agency is empowered to use its discretion.

i. The decision in *In the Interest of K.A.B.,* 483 So.2d 898 (Fla. 5th DCA 1986) points out, "it is crystal clear that it is within the discretion of the agency [Department of Health and Rehabilitative Services] to decide where to keep a child who is in its custody," and the trial court has not been granted the authority to direct "precisely" where the child is cared for, but only to place the child in the Department's custody. 483 So.2d at 899.

ii. In *State of Florida, Department of Health and Rehabilitative Services, et al. v. The Honorable Alban Brooke*, et al., 573 So.2d 363 (Fla. 1st Dist. Ct. App. 1991) the court stated "It is clear that Judge Brooke only directed that the Department place the child "in *available* placement as recommended" by the CRC. No order for placement in a specific institution was made as was done in *K.A.B.* and the language arguably is consistent with the discretionary authority granted to the Department pursuant to section 394.4781, insofar as the order may be interpreted

so that the Department need not place the children as recommended by the CRC if there are neither funds nor facilities available. Thus, this particular portion of the identical orders under review by Judge Brooke does not necessarily contravene the statutory scheme. Reading the orders as narrowly as possible, they do not facially interfere with the Department's executive discretion concerning the placement of dependent children in derogation of the doctrine of separation of powers by ordering the children to be placed in specific institutions."

5. The court's inherent authority as it relates to the practice of compelling certain actions by the executive and legislative branches of government

i. *Olive v. Maas,* 811 So.2d 644(Fla.2002) (*Olive I*) where the court cited the doctrine of inherent judicial authority in considering the statutory scheme in sections 27.710 and 27.711 of the Florida Statutes (2007), which governs the statewide registry of attorneys who are qualified to represent defendants in capital collateral proceedings.

ii. *In re Order On Prosecution Of Criminal Appeals By the Tenth Judicial Circuit Public Defender* 561 So.2d 1130, 1132, 1138 (Fla.1990),. "as the district court also recognized, that inherent power is limited by the state and federal constitutions. Because we find that some aspects of the district court's order ignore the existing statutory mechanism, we approve in part and modify the order." "We conclude from our analysis that the Second District Court properly invoked the inherent power of the judiciary in issuing its order of May 12, 1989. However, we modify the procedure adopted by the district court to make it more consistent with existing legislative directions."

iii. *In Simms v. State of Florida Department of Health and Rehabilitative Services*, 641 So. 2d 957, 960 (Fla. 3d D.C.A. 1994) the threshold issue is the court dealt with is "whether the power to protect the welfare of children and terminate a parent's rights under Chapter 39, Florida Statutes (1991), is an exclusive power of one branch of government and is therefore subject to the separation of powers clause. If it is, any exercise of that exclusive power by another branch is unconstitutional. *See, e.g., State v. Bloom,*497 So.2d 2, 3 (Fla.1986). If a power is not exclusive to one branch, the exercise of that non-exclusive power is not unconstitutional. *See, e.g., Department of Health & Rehabilitative Servs. v. Hollis,* 439 So.2d 947, 948 (Fla. 1st DCA 1983)."

"The exclusive powers of the three branches of government are generally not delineated in the Constitution or in statutes. *Florida Motor Lines, Inc. v. Railroad Comm'rs,* 100 Fla. 538, 544, 129 So. 876, 881 (1930). These powers are determined by considering the language and intent of the Constitution as well as the history, nature, powers, limitations and purposes of our form of government. *Id.; see Atlantic Coast Line R.R.,* 56 Fla. at 632, 47 So. at 974. Historically, the courts have possessed inherent and statutory authority to protect

children. The circuit court inherited the common law jurisdiction of the courts of chancery in which minors were wards of the court and the court had inherent power to protect them. *Cone v. Cone,*62 So.2d 907, 908 (Fla.1953); *Pollack v. Pollack,* 159 Fla. 224, 226, 31 So.2d 253, 254 (1947); *In re J.S.,* 444 So.2d 1148, 1149–50 (Fla. 5th DCA 1984). Section 39.40(2), Florida Statutes (1991), codifies the court's inherent power to exercise continuing jurisdiction over dependent children."

"The inherent authority of the courts to protect children extends to the appointment of guardians ad litem for unrepresented children. *James v. James,* 64 So.2d 534, 536 (Fla.1953). The legislature codified this inherent power in 1975, requiring the court to appoint a guardian ad litem in cases involving child abuse or neglect. § 415.508, Fla.Stat. (1991)."

"The fact that one branch has inherent authority does not necessarily mean that all others are excluded. *Petition of Florida State Bar Ass'n,* 145 Fla. 223, 227, 199 So. 57, 59 (1940). The legislature created HRS to be the executive department charged with the protection of dependent children. *In re J.S.,* 444 So.2d at 1150. The authority of HRS to protect children stems either from its enabling act, in chapter 409, Florida Statutes (1991), *see* § 409.145, or a court order divesting the court's exclusively original jurisdiction. *Division of Family Servs. v. State,* 319 So.2d 72, 76 (Fla. 1st DCA 1975)."

"Indeed, a number of Florida statutes delegate overlapping and concurrent power over matters relating to child custody and commitment proceedings to both HRS and to the circuit courts. *Hollis,* 439 So.2d at 948; *see, e.g.,* §§ 39.001,39.40, 39.404, 39.41, 409.145, Fla.Stat. (1991); *see generally In re J.S.,* 444 So.2d at 1150."

"To determine whether the particular activity is an exclusive power of one branch of government, we can also consider the essential nature and effect of the governmental activity to be performed. *Florida Motor Lines, Inc.,* 100 Fla. at 544–45, 129 So. at 881. Thus, a petition for termination of parental rights is not a criminal prosecution which must be brought and prosecuted by the state. *See Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982). It is a civil action initiated to protect the rights of abused, neglected or abandoned children. §§ 39.46–.474, Fla.Stat. (1991)."

"Neither the language and intent of the Constitution nor consideration of the history and purpose of our government indicate that the authority to protect children and to terminate parental rights is an exclusive and pure power which the Constitution requires to be confined to a single branch of government. *See generally In re C.B.,* 561 So.2d 663, 666 (Fla. 5th DCA 1990); *In re J.S.,* 444 So.2d at 1150; *In re J.R.T.,* 427 So.2d 251, 252–53 (Fla. 5th DCA

1983); *Hollis,* 439 So.2d at 948–49. Where a power conferred by statute is not an exclusively held power exercisable only by a single branch of government, a grant of concurrent power does not violate the Constitution."

"A sister court has determined that the separation of powers clause is not violated when the court orders HRS to take action on behalf of the child. *Department of Health & Rehabilitative Servs. v. Brooke,* 573 So.2d 363, 369 (Fla. 1st DCA 1991);*Hollis,* 439 So.2d at 948–49. Another court has determined that a guardian ad litem has authority to initiate proceedings for termination of parental rights. *Lupinek v. Firth,* 619 So.2d 379 (Fla. 5th DCA 1993). Here, we conclude that the separation of powers clause is not violated when a guardian ad litem exercises concurrent power with HRS to initiate and litigate proceedings to terminate parental rights under section 39.464."

iv. This doctrine of inherent judicial power "exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights." *Maas v. Olive*, 992 So.2d 196, 204 (Fla.2008) (*Olive II*) (quoting *Rose*, 361 So.2d at 137).

v. *Maas v. Olive*, 992 So.2d 196, 204 (Fla.2008) (*Olive II*) [W]e have consistently held that statutory limits for compensation of counsel may not constitutionally be applied in a manner that would curtail the trial court's inherent authority to ensure adequate representation." *Id.* at 202.

vi. In *Public Defender, 11th Judicial circuit of Fla. v State* 115 So. 3d 261 (Fla. 2013) the parties raised several issues relating to § 27.5303(1)(d), Fla. Stat. (2007), including whether the statutory prohibition usurps the courts' inherent authority to protect the constitutional rights of indigent defendants to effective counsel.

The relevant subsection reads: "[i]n no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel."

"…in the instant case. If section 27.5303(1)(d) is interpreted as prohibiting *any* motions to withdraw based on excessive caseloads or underfunding, then it would violate the courts' inherent authority to ensure adequate representation of indigent defendants." (emphasis added)

"Thus, we find the statute to be facially constitutional and answer the certified question in the negative. However, the statute should not be applied to preclude a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude a trial court from granting a motion to withdraw under those circumstances."

vii. However the recent case of *Florida Department of Children and Families v In re: SB et al.* 3d 14-1365 (Fla. 2015) makes it clear that dependency court judges can't do just *anything* in the best interest of a child. It was a case in which Florida Department of Children and Families appealed a Final Order of the trial court which required the Department to make payments to certain "Relative Caregivers" of children subject to the jurisdiction of the Department and the trial court. The payment to "Relative Caregivers" helps support children in their families, instead of placing them out with strangers. Section 39.5085(2) (a), Florida Statutes (2014), states that: "The Department of Children and Families shall establish and operate the Relative Caregiver Program pursuant to eligibility guidelines established in this section as further implemented by rule of the department." The trial court held the provisions of rule 65C-28.008(1) (d) (created pursuant to Section 39.5085(2) (a)) to be invalid and ordered payments that the rule in question prohibited.

The Third DCA held: "We conclude that the trial court exceeded its authority in determining the validity of the rule without the issue first going through an administrative challenge under Section 120.56, Florida Statutes (2014)." It went on to state: "A finding of the absence of colorable authority would be required for a determination of invalidity of the rule by the trial court in place of the determination first being made in an administrative proceeding. *State of Florida Dep't of Revenue v. Brock*, 576 So. 2d 848 (Fla. 1st DCA 1991); *Dep't of Envtl. Regulation v. Falls Chase Special Taxing Dist.,* 424 So. 2d 787, 796 (Fla. 1st DCA 1982). As stated in *Brock*, "[a]lthough statutory construction is ultimately the province of the judiciary, it should not be undertaken without first giving the agency an opportunity to explain its interpretation and to create a record in an administrative forum." 576 So. 2d at 850. See also, *Florida Dep't of Agric. & Consumer Servs. v. City of Pompano Beach*, 792 So. 2d 539, 545 (Fla. 4th DCA 2001).

6. Medicaid Placements and Early and Periodic Screening, Diagnosis and Treatment (EPSDT) can be ordered by Courts

i. Section 1983 imposes liability on anyone who, acting under state law, deprives a person of "any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. §1983. The Supreme Court has held that section 1983 can be used to vindicate violations of federal statutory rights. *Maine v. Thiboutot,* 448 U.S. 1, 4-8, 100 S. Ct. 2502, 2504-06, 65 L.Ed.2d 555 (1980); *see also Golden State Transit Corp. v. City of Los Angeles,* 493 U.S. 103, 105, 110 S. Ct. 444, 448, 107 L.Ed.2d 420 (1989) ("As the language of the statute plainly indicates, the remedy encompasses violations of federal statutory as well as constitutional rights.").

ii. In determining whether there is an Early and Periodic Screening, Diagnosis and Treatment (EPSDT) right enforceable under §1983 based on 42 U.S.C. § 1396a (a) (43) Judge Moreno in *Bonnie L. Ex Rel. Hadsock v. Bush*, 180 F. Supp. 2d 1321 (S.D. Fla. 2001) applied the three part test from *Blessing v. Freestone*, 520 U.S. 329, 340-41, 117 S.Ct. 1353, 1359-60, 137 L.Ed.2d 569 (1997):

i. "The federal right conferred on eligible children under the age of twenty-one emanating from these subsections of § 1396a(a) (43) meets the first *Blessing* factor as it is sufficiently intended to benefit eligible individuals."

Section 1369a(a) (43) of the Medicaid Act provides for:
(A) informing all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance ... of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases,
(B) providing or arranging for the provision of such screening services in all cases where they are requested,
(C) arranging for (directly or through referral to appropriate agencies, organizations, or individuals) corrective treatment the need for which is disclosed by such child health screening services....

ii. In deciding whether the right "assertedly protected by the statute is not so `vague and amorphous' that its enforcement would strain judicial competence" Judge Moreno said "Guaranteeing the rights under § 1396a(a) (43) of a foster child for the provision of the specific medical services listed in 42 U.S.C. § 1396d(r) is not outside the judicial competence. *See DaJour B.,* 2001 WL 830674; *Frew v. Gilbert* 109 F.Supp.2d 579, 600-13, *Salazar v. District of Columbia,* 954 F.Supp. 278, 303-07 (D.D.C.1996)."

iii. In determining whether § 1396a(a) (43) unambiguously imposes a binding obligation on the states the Judge opined that "once a state accepts the funding, as Florida has, § 1396a is mandatory, rather than precatory. *See Doe,*136 F.3d at 718."

Accordingly the Judge found that the provisions of § 1396a are sufficiently individualized, particularized, and mandatory under the *Blessing* test to support a § 1983 claim.

iii. *Florida Pediatric Society, et al. v. Dudek, et al.,* (S.D. Fla. 2014) was a class action in which plaintiffs contended that the Florida Medicaid program failed to provide Florida children with access to medical and dental care in accordance with the EPSDT, Reasonable Promptness,

Equal Access, or Outreach requirements under the Medicaid Act, 42 U.S.C. j 1396 et seq.

i. There Judge Jordan stated that "AHCA, as the agency that administers Florida Medicaid, is legally responsible to ensure that children who obtain their care through a Medicaid HMO (or through a Provider Service Network) receive the care to which they are entitled under federal law", and accordingly that "AHCA 'S HMO system fails to meet the federal requirements for providing EPSDT care, in violation of (a)(10); do not provide care with reasonable promptness, as required by (a)(8); do not provide care with equal access under Section 30(A); and have not complied with the obligation to provide care as established by sections 43(b) and 43(c) of the Medicaid Act."

ii. Judge Jordan went on to say that "There is also extensive record evidence that leads me to conclude that children on Medicaid HMOs do not receive equal access to specialist care, and that capitation rates paid to Medicaid HMOs are not set with consideration of the level needed to provide equal access, consistent with the other requirements of Section (30)(a) as required under the Medicaid Act.

iii. "DCF, as well as AHCA and DOH, have outreach responsibilities; they are required to 'ensure that each Medicaid recipient receives clear and easily understandable information' about Medipass or managed care options. This requirement arises from the Medicaid Act's outreach provision." Defendants have failed to provide for a combination of written and oral methods designed to inform effectively all EPSDT eligible individuals (or their families) about the EPSDT program," and to conduct outreach in 'clear and nontechnical language" that provides information about the benefits of preventative care, the services available under the EPSDT program, how those services may be obtained, that the services are available at no cost to children, and that transportation services are available."

Further Acknowledgments
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