

## **MINUTES OF COMMISSION MEETING**

**October 17, 2013**

Present at the New Jersey Law Revision Commission meeting held at 153 Halsey Street, 7<sup>th</sup> Floor, Newark, New Jersey, were Chairman Vito A. Gagliardi, Jr., Commissioner Andrew Bunn, and Grace C. Bertone, of Bertone Piccini LLP, attended on behalf of Commissioner Rayman Solomon.

Ms. Mary M. McManus-Smith, Esq., of Legal Services of New Jersey, and Ms. Paulina M. Grabczak, of the Princeton Public Affairs Group, were also in attendance.

### **Minutes**

The Minutes of the September meeting were approved on motion of Commissioner Bunn, seconded by Commissioner Bertone.

#### **Title 9 – Child Abuse and Neglect**

John Cannel presented a Draft Tentative Report incorporating changes made in response to comments received. Mary McManus-Smith, Esq., of Legal Services of New Jersey, was in attendance to offer preliminary comments on the Report and to ask that the Report be held for one month to allow additional changes to be incorporated before it is released.

Ms. McManus-Smith said generally that the Division of Child Protection and Permanency, (DCPP, formerly the Division of Youth and Family Services, DYFS) is required to make every effort to reunify a family when it is appropriate to do so, to confirm that a child is not in danger, and also to identify a child in need of services.

Ms. McManus-Smith explained that there are sections of the Report that would benefit from clarification and increased specificity regarding what DCPP is required to do. She expressed concern that sections 9:26-1, 9:26-2 and 9:30-2 did not include references to the reasonable efforts that are required to prevent removal. She mentioned the cases of DYFS v. IS and DYFS v. CM, and DYFS v. PW. Mr. Cannel said that he would review the language of the relevant cases in order to incorporate the Court's language regarding reasonable efforts.

Ms. McManus-Smith also raised concerns about the language of 9:27-2 concerning a child in need of services, indicating that the circumstances under which the DCPP can come in to a family and investigate when there is no allegation of abuse or neglect need to be clear. She suggested that there should be provisions requiring that before the DCPP can do so, there should be a report to the Division and an investigation by the Division.

Ms. McManus-Smith said, with regard to 9:27-3, that there are situations in which access to records would be of assistance to parents. Presently, this is not provided as of right, but an Administrative Law Judge can determine if a parent may have access. She suggested that it seems odd, from a due process perspective, to have allegations made against a person (the parent), and to have to defend against those allegations without seeing the information that was received in support of the allegations. Mr. Cannel said that certain distinctions should be made based on the type of information in issue. Commissioner Bunn said that generally, there should be due process – the right to face one’s accuser. Commissioner Gagliardi explained that the issues arise in a case involving teachers, who are required to report but who do not wish to have ongoing involvement in the subsequent proceedings. Mr. Cannel said that if the records contain information that the Division found out during the course of its investigation, or that was provided in expert reports, such information should be available to the person against whom the accusation was made. Ms. McManus-Smith said that the identity of the informant is not something that the parent wants, and that it is the other material that is important to them and may play a role in their preparation of a response to the allegations. She added that there should not be such a difference between matters heard in Court (for which the Court Rules require the turn-over of everything but confidential material) and matters heard administratively, for which much material is not required to be provided to the person against whom the accusation was made. Mr. Cannel said that this was an issue that could be addressed by drafting.

Ms. McManus-Smith also raised concerns regarding the provisions of 9:30-1 and 9:30-2, noting that the prior draft contained reference to an “abandoned child” while the current draft refers to a “child in need of services”. Mr. Cannel asked whether a child who no longer has parents should be a separate category, or is included within the “child in need of services” description. Ms. McManus-Smith said that she had no specific preference regarding how the issue is handled, but that the new language should be clear.

In a final comment, Ms. McManus-Smith pointed out that in the definition of abused or neglected child, there is language referring to “excessive corporal punishment or using excessive physical restraint or punishment not reasonable related to protection of the child or others or property”. She noted that the last item in that listing – punishment - did not make reference to “excessive” or “physical” so arguably, taking away a child’s cell phone could result in a violation of the provision as currently drafted. Mr. Cannel said that he would continue to work on and improve this section and that while he expects that it will be the subject of some crossfire, he attempted to contract the language to reflect what the New Jersey Supreme Court has identified as abuse or neglect.

The Commission requested a revised draft for November incorporating the comments from Legal Services.

## **Pejorative Terms Regarding Persons with Physical and Sensory Disabilities**

Jayne Johnson presented the Draft Final Report concerning Pejorative Terms Regarding Persons with Physical and Sensory Disabilities for release as a Final Report. Ms. Johnson stated that this Report seeks to eliminate from the New Jersey statutes demeaning, disparaging, and archaic terminology used when referring to persons with a physical or sensory disability. The Chairman observed that it is the goal of this Report to revise the law in such a way that it does not offend but at the same time does not change the meaning of the statutory language.

The Chairman noted that this is a high profile project and that the Legislature's interest in the pejorative terms issue is intense. Ms. Tharney said that the Commission has previously released two Final Reports addressing pejorative terminology regarding persons with developmental, intellectual or psychiatric disabilities. The first, in 2008, was in direct response to the amendment to Article II, Section I, Paragraph 6 of the New Jersey Constitution. The second, in 2011, was released after the enactment of P.L. 2010, c. 50 and was itself recently enacted as P.L. 2013, c. 103, eff. August 7, 2013, after receiving bipartisan support and passing both houses of the Legislature unanimously.

Ms. Tharney added that this Report is consistent with the Legislative goal expressed in P.L. 2010, c.50 to "ensure that the statutes and regulations of the State do not contain language that is outdated and disrespectful to persons with a disability." Mr. Cannel described the function of addressing pejorative language as ongoing and pointed out that simple word for word substitution is not possible due to the various meanings and legal effects of a particular word in different areas of the law.

Ms. Johnson addressed references in the Report to terminology involving "substance use disorders", now referred to in the law as alcoholism, drug addiction, and other similar variations. She stated that the Report seeks to replace pejorative terms related to "substance use disorders" and recommends use of that term in keeping with current clinical terminology and usage. Ms. Johnson stated that the Report, however, does not make direct references to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5).

Ms. Johnson discussed recent comments she received regarding terms related to sensory disabilities. She received recent comments from the New Jersey School for the Deaf, Marie Katzenbach Campus, and the New Jersey Division for Deaf and Hard of Hearing, informing her that the term "hearing impairment", although a technically accurate description of someone who is hard of hearing or deaf, is perceived negatively by the deaf and hard of hearing community. Ms. Johnson subsequently reached out to entities representing individuals with other sensory disabilities and is awaiting responses to clarify the connotation of the term "impairment."

The Commission agreed to release the Report providing Ms. Johnson the opportunity to incorporate the response of these commenters to reconcile the terminology recommended in the Report. The release of the Final Report was unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bertone.

### **Title 2C – Sexual Offenses**

Jordan Goldberg introduced this report by noting that the Commission had seen this project several times and that this would be the second time that a revised Report was issued for public comment.

Ms. Goldberg explained that this draft had been substantially revised so that it clearly reflected the two key motivations for changing the law, two court cases governing the interpretations of the word “force” and the meaning of the sexual offenses as pertains to individuals with intellectual and developmental disabilities.

Chairman Gagliardi noted that this was a very difficult area of the law, and that the Commission needs a great deal of input from the impacted community. He noted that the Memorandum prepared by Ms. Goldberg said that she planned to engage in “extensive outreach” with the relevant communities and he confirmed that was what the Commission wanted her to do. Chairman Gagliardi said that he would like to authorize Staff to release the Report, noting as he did so that the Commission was not yet giving the various aspects of the Report Commission approval, but was instead releasing it so that extensive input from the community could be solicited by Staff. The release of the Revised Tentative Report was unanimously approved on motion of Commissioner Bunn, seconded by Commissioner Bertone.

### **Tuition Aid Grants**

Laura Tharney began by reminding the Commission that this project was based on case decided by App. Div. in August 2012, *A.Z. ex rel B.Z. v. Higher Education Student Assistance Authority*, 427 N.J. Super. 389 (2012). In that case, a student who was a citizen of the United States, had lived in New Jersey since 1997, and had graduated from high school here in 2011, was denied a Tuition Aid Grant by the Higher Education Student Assistance Authority (HESAA). HESAA notified the student that she was not eligible because her parents were not legal residents of New Jersey. Pursuant to the relevant Administrative Code provision, the plaintiff had to be domiciled in New Jersey to qualify for aid, residence is synonymous with domicile, and her domicile was conclusively deemed to be that of her mother since she was a dependent student. The Appellate Division found that “conclusively deeming a dependent student’s domicile to be that of her parent alters the plain meaning of the statute and is contrary to the legislative intent”.

Ms. Tharney explained that she had the opportunity to speak with Dean Ronald Chen, of the Rutgers School of Law – Newark, about this project, which was very helpful since he was one of the individuals who briefed and he also argued A.Z. on behalf of the Constitutional Rights Clinic at Rutgers – Newark. Dean Chen provided, for the Commission’s consideration, a Petition for Rulemaking filed with HESAA in July of this year. The Petition provided information about the number of students affected, indicating that more than 700 eligible students were denied TAG monies in 2011-2012 school year as a result of the regulation (citing the Office of Legislative Services for its numbers). The petition proposed new language for the regulations. The new language presumes New Jersey residence on the part of a student who: (1) is a US citizen or permanent resident; and (2) is enrolled in or within a year of making first application for financial aid graduated from a New Jersey high school or the equivalent. The new language also permits other documentation (that may be obtained without cost) to be used in support of a residency claim (a voter registration card would be permitted).

Ms. Tharney explained that Dean Chen agreed that something needs to be done in this area as a result of the ongoing impact on students, and that he indicated that the Commission’s Report accurately reflects the Court’s concern regarding the rebuttable nature of the presumption. Dean Chen expressed concern, however, that the Commission proposal might not be as broadly effective as, for example, the bill Senator Ruiz introduced - S1760 (Higher Education Citizenship Equality Act – the related Assembly bill is A3162). Those bills are broader in scope than the Commission’s Report and have the potential to move in the lame duck session. That that would be preferable to the Commission’s approach, because the bills define domicile for dependent students for purposes of eligibility for grants, loans, scholarships and in-state tuition. Ms. Tharney noted that, the weekend before the meeting, news articles suggested that the Governor may now favor allowing undocumented immigrants to pay in-state tuition at New Jersey’s public colleges. One article quoted him as saying “we need to get to work in the state Legislature on things like making sure that there’s tuition equality for everybody in New Jersey”.

Dean Chen also conveyed to Ms. Tharney that a broader approach than the Commission’s is preferable on this issue since, as a practical matter, students applying for a Tuition Aid Grant are almost universally not in a position to appeal because they lack the financial wherewithal and/or they fear that reprisals may result from bringing attention to undocumented parents.

The Chairman stated that this project originated from the Commission’s monitoring of judicial decisions. The Commission, in keeping with its statutory mandate, highlighted an issue that required Legislative response. The Chairman acknowledged that the Legislature has taken the issue on, so the work of the Commission in this area is complete at this stage because the Commission has fulfilled its statutory mandate. The

Commission agreed that to do anything now other than hold the Report is to guess at the preference of the Legislature, and that the Report should be held pending Legislative action before the conclusion of this Legislative session. A motion to that effect was made by Commissioner Bunn and seconded by Commissioner Bertone.

### **Uniform Electronic Real Property Recording Act**

Mr. Cannel presented his memorandum regarding the Uniform Electronic Real Property Recording Act, recommending that no action be taken by the Commission. Mr. Cannel noted that the first thing to remember is that the Uniform Acts are supposed to be appropriate for 50 states so they tend to be “milk and water.” He added that New Jersey already has gone well beyond what this Uniform Act recommends, and therefore it would be completely unnecessary to adopt it.

Commissioner Bunn asked whether there were any good arguments in favor of uniformity in this area. Mr. Cannel responded that there were none, noting that there is no uniformity in this area across the country.

Mr. Cannel noted that this Uniform Act would have no impact because of existing New Jersey law. Chairman Gagliardi noted that the Commission has a statutory obligation to report to the Legislature regarding uniform laws, and therefore we should definitely issue a report of some kind or include it in our annual report. Commissioner Bunn said that if we have considered a uniform act and decide not to do anything, it should be noted somewhere. Ms. Tharney explained that the Commission’s recent practice has been to release a Final Report recommending that the Act not be adopted. Commissioner Bunn and Chairman Gagliardi agreed that the Commission should issue a report even if it’s in a cursory form. Chairman Gagliardi noted that perhaps the Legislators who are responsible for New Jersey’s law being so advanced might appreciate knowing that we think New Jersey is ahead of the curve. The Commission requested that a Draft Final Report be prepared for the next meeting.

### **Miscellaneous**

Ms. Tharney provided a brief update regarding the law school students who are providing research and drafting assistance to the Commission through law school clinics and pro bono programs. She added that several students had applied for externships with the Commission for the Spring 2014 semester. She also mentioned that Commission Staff will be providing, as a panel, a second continuing legal education program in the spring through the Office of Legislative Services.

The meeting was adjourned after a motion by Commissioner Bunn, seconded by Commissioner Bertone. The next meeting of the Commission is scheduled for November 21, 2013 at 10:00 am.