IN THE SUPREME COURT OF FLORIDA

AMENDMENT TO THE RULES OF
JUVENILE PROCEDURE
Fla.R.Juv.P. 8.350
_______________________________/

Case No. SC 00-2044

COMMENTS SUBMITTED BY
UNIVERSITY OF MIAMI CHILDREN & YOUTH LAW CLINIC

INTRODUCTION

The University of Miami School of Law Children & Youth Law Clinic submits these comments on the proposed amendments to the Florida Rules of Juvenile Procedure establishing procedures for committing minors in foster care to psychiatric hospitals and residential treatment centers. The Clinic has a unique interest in the proposed rules, as it represented the petitioner in *M.W. v. Davis*, 756 So.2d 90 (Fla. 2000), in which this Court directed the Juvenile Court Rules Committee to submit the proposed rules.

Moreover, since its establishment in 1996, the Clinic has been appointed by the judges of the Juvenile Division of Circuit Court for the Eleventh Judicial Circuit to represent over 100 foster care children, particularly adolescents with mental health problems, many of whom have been placed by the Department of Children & Families in residential treatment facilities. Thus, the Clinic has a special interest in the issue before the Court, beyond its role as M.W.'s counsel. The Clinic believes that its expertise in, and familiarity with, the interests of

foster youth in juvenile dependency and mental health proceedings can assist this Court in rendering a fully-informed consideration of the proposed rule.

Commendably, this Court was able to see M.W.'s perspective and understand how he must have felt when he was committed to a psychiatric institution without the opportunity to be heard by the court. *M.W.*, 756 So.2d at 109. The Clinic's perspective as counsel for foster youth in dependency court gives it the unique ability to see these proceedings from the eyes of the child. Many of our clients have expressed to us feeling "like pieces of furniture" when placed in residential treatment facilities without being seen or heard by the court. They have described feeling "shut up" and "shut out" when deprived of the chance to speak to the judge to contest their placement or to correct inaccurate information in the court record.

As an example, one client, upon reaching the age of majority, examined her court file and discovered reports and evaluations submitted to the court that contained repeated inaccuracies, which resulted in her commitment to a locked psychiatric facility where she was subsequently abused. She described how she was taken to the facility by her DCF worker and a police officer, without being able to talk to a judge. It was not until she saw her court file and looked at the numerous court orders in the file that she realized there had been regular court hearings and reviews of her case from which she had been systematically excluded.

Unfortunately, this client's experience is typical of the experiences of children in foster care who are committed to psychiatric facilities. Numerous foster youth have conveyed to us their experiences and feelings when they have been locked up in psychiatric institutions, subjected to seclusion, four-point restraints, the forced administration of potent psychotropic medications, and

limitations imposed on family contact and visitation, without ever having been heard by the juvenile court.

Thus, as this Court considers the proposed rule, the Clinic urges the Court to view the rule's procedures through the eyes of the child who faces commitment. In No One Ever Asked Us . . . A Postscript to Foster Care, the author reported on an extensive study done on the views of former foster care youth:

> The remarks and suggestions made by foster care graduates contained a recurrent theme---the importance of consultation with the young people themselves. They felt like pawns—subject to the many powers of others. They felt disregarded, that it did not matter what they wanted or had to say, because too often they were never asked. Whether it was a decision about a foster home, about changes in placement, about visiting arrangements with kin, or about their goals in life, they felt they should have been heard. . . Such a practice can be beneficial in the long run since it is almost axiomatic that those who participate in making decisions are more concerned about making things work out.

Trudy Festinger, No One Ever Asked Us . . . A Postscript to Foster Care, at 296 (Columbia University Press 1983).

Before commenting on the substance of the proposed rule, the Clinic notes its appreciation for the work of the Juvenile Court Rules Committee in developing the proposed rule to submit to the Court. Both the Clinic, as M.W.'s counsel, and counsel for the Department of Children & Families, were

given the opportunity to address the Committee and to observe its deliberations. The Committee was clearly faced with a difficult task in that it had to respond to the Court's directive while also responding to a newly enacted amendment to §39.407, Fla. Stat. (2000).

While the Committee believed itself to be unduly constrained by the amended statute, we respectfully submit that this Court's ability to adopt a rule of court that provides meaningful procedural due process to foster youth is not as limited as the Committee believed. For that reason, we have prepared an alternative proposed rule, that seeks to address the points raised by this Court in its mandate to the Committee, as well as the amended statute, and which gives "due regard to both the rights of the child and the child's best interests" as requested by this Court. *M.W.*, 756 So.2d at 109.

The attached proposed rule differs from the Juvenile Court Rules Committee's proposal in that in that it provides for the following safeguards for a child facing commitment to a psychiatric facility *prior to* the commitment:

- Requiring the Department of Children & Families to give notice to the court that it is having the child assessed by a "qualified evaluator" for the purpose of placement.
- Requiring the appointment of a guardian ad litem and permitting the discretionary appointment of an attorney at this stage;

- Requiring that the qualified evaluator's report and the guardian ad litem's report be given to the court and to all parties;
- Requiring the Department to file a motion to amend the child's case plan when it seeks to place a child in a residential treatment facility;
- Requiring the court to appoint an attorney for the child if the Department's motion or the guardian's report indicates that the child is contesting placement in a residential treatment facility;
- Requiring a hearing within five working days of the filing of the motion to amend the case plan;
- Requiring the amendment of the case plan and the placement of the child in a residential treatment facility without any further hearing only if all of the parties, including the child, are in agreement with the child's placement;
- Requiring the appointment of an attorney to represent the child's articulated wishes and legal interests if the child contests placement in a residential treatment facility;
- Requiring an evidentiary hearing within ten working days at which the court hears evidence of the suitability of such treatment, the guardian ad litem's recommendations, the evaluator's findings, the case review

committee's recommendations, and a showing that the placement is the least restrictive available alternative, and gives the child a "meaningful opportunity to be heard," including the right to present evidence and cross-examine witnesses;

- Permitting the Department to place the child in a residential treatment facility before the evidentiary hearing takes place, if the qualified evaluator determines that the child requires immediate placement;
- Requiring the court to make a finding by clear and convincing evidence that the child is suitable for placement in a residential treatment facility.[1]

Subsequent to the placement of the child in a residential treatment setting, the Clinic's proposed rule would contain the following safeguards:

- Requiring continuing placement review court hearings every three months at which the child is represented by counsel if the child contests continued placement;

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[1] Because "suitability" for residential treatment is such a low threshold standard, a higher burden of proof is necessary before committing a child to a long-term residential treatment center. *See Addington v. Texas,* 441 U.S. 418, 426 (1979)(holding that "clear and convincing evidence" is the minimum standard of proof that should be used in civil commitment hearings, as the preponderance standard leads to an increased number of people improperly committed); *see also In Re Beverly,* 342 So.2d 481 (Fla. 1977).

- Requiring the child's right to be heard at all hearings either in person or telephonically.

The Clinic's discussion below focuses on three main points: (1) the requirement of a pre-placement hearing to amend the case plan, except in emergency cases; (2) the requirement of appointed counsel if the child contests placement in a residential treatment facility; and (3) the requirement that the child be heard directly by the court, either in person or telephonically.

1. <u>The Right to a Pre-Placement Court Hearing</u>

Former foster youth have reported that they were particularly concerned with the changes in their placements, which they found "unsettling and confusing," as they had no opportunity to be heard. <u>No One Ever Asked Us . . . A Postscript to Foster Care</u> at 275. Children in foster care feel bounced around like a "ping-pong ball," to use their words. *Id*. at 281. "'There has to be a greater understanding that one is moving people, not furniture' and 'Children are not objects . . . like merchandise' were common refrains." *Id.* at 275. There can be no change in placement more traumatic to a foster child than being removed from a foster home and being committed instead to a psychiatric institution.

In *M.W.*, this Court stated: "we cannot eschew the necessity for a hearing *before* a dependent child is placed in residential treatment against his wishes

simply because other statutorily mandated hearings are already required or because it would otherwise burden our dependency courts." *M.W.*, 756 So. 2d at 109 (emphasis added). However, the Rules Committee was under the belief that it could not mandate a pre-placement hearing for a child facing commitment to a long-term residential treatment facility because the recent amendment to Chapter 39 did not require such a hearing. Contrary to the assumption of the Rules Committee, this Court can require that the rule provide for a pre-placement court hearing.[2]

Beyond its statutory jurisdiction and authority, the circuit court has both the constitutional authority under Article V, Section 5(b), Fla. Const., and the inherent power to protect children, and this cannot be restricted by statute. The doctrine of inherent judicial power is necessary for the court to protect its independence and integrity and to make its lawful actions effective, and a statute cannot restrict the court's inherent power. *See, e.g.*, *Rose v. Palm Beach County*, 361 So. 2d 135 (Fla. 1978). As this Court stated: "The invocation of the doctrine is most compelling when the judicial function at issue is the safe-

[2] In footnote 34 of the *M.W.* decision, the Court noted that legislation was then pending that would "explicitly set forth certain procedures to be used *before* a child who has been adjudicated dependent may be placed in a residential psychiatric facility." *M.W.,* 756 So. 2d at 107 n.34 (emphasis added). However, the enacted legislation is silent as to a pre-placement hearing procedure, which makes the necessity for such a proceeding through the Juvenile Court Rules even more critical.

guarding of fundamental human rights." *Id.* at 137. This Court stressed that "where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements." *Id*. at 136.

The court's protection of children and their fundamental rights is perhaps the court's most important inherent power. This inherent power, which stems from the duty of chancery courts to protect the interests of minors, is well-established. "Chancery is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom." *State Department of H.R.S. v. Hollis,* 439 So.2d 947 (Fla. 1st DCA 1983). Indeed: "Independent of statute or rule a court of chancery has inherent jurisdiction and right to control and protect infants . . .[Courts] must exercise the utmost vigilance to see that the rights of so protected a class as that of infants are not infringed on or destroyed. The court itself is, in legal contemplation, the infant's guardian." *Id.*

Although the court is the infant's guardian, "[c]ourts lack the physical ability to efficiently carry out custodial functions at all stages of the dependency proceeding . . . In recognition of this fact the legislature gave the courts the prerogative to divest themselves of the actual physical care of children alleged or adjudicated to be dependent while still maintaining the exclusive original jurisdiction of the courts. All powers not expressly divested by the court are retained by it." *Division of Family Services v. State of Florida*, 319 So. 2d 72, 76 (Fla. 1st DCA 1975). "Indeed, it is not conceded that under our Constitution, vesting as it does the circuit courts with equity jurisdiction, this power could, under our Constitution as it stands, be taken away by statute." *Cooper v. Cooper*, 194 So. 2d 278 (Fla. 2d DCA 1967).

This Court has stated that: "A statute which attempts to restrict the inherent power will be broadly interpreted as laying down reasonable guidelines within which the power operates rather than as a sole or actual source of the power." *Rose*, 361 So. 2d at 135. Additionally: "Where this Court promulgates rules relating to the practice and procedure of the courts and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict." *Haven Federal Savings & Loan Assoc. v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991)

The Rules Committee also did not respond to the Court's directive to consider existing Rule 8.410(c) that governs court approval of amendments to

the child's case plan, but this is integral to the proposed rule before this Court. The dependency court adopts a case plan for each child in foster care, in which it orders the "type of placement", and "type of home or institution" where the child is to be placed and specifies the placement that is in the "least restrictive and most family-like setting available . . . . in as close proximity as possible to the child's home".[3] This is not just a requirement of state statutory law, Fla. Stat. §39.601, and the existing juvenile rules of court, Rule 8.410, Form 8.967, but is also a requirement of federal law, 42 U.S.C. §675 et seq. Moreover, this is part of the circuit court's constitutional and inherent power to protect children.

Once the court adopts the case plan, it becomes an order of the court. A statute cannot authorize DCF to unilaterally change the conditions of the child's placement, in contravention of the court's existing order. *See Cooper*, 194 So. 2d at 278.

M.W.'s own case provides a stark example, as his court-ordered case plan placed him in a foster home, with the goal of reunification and regular family therapy with his mother. In contravention of the court-ordered case plan, DCF instead placed him in a locked psychiatric institution in another county far away from his mother. This required a court-ordered amendment to the case plan, after notice and an evidentiary hearing.

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[3] Although the court cannot name the specific foster home or facility where the child is to be placed, it is well-established that the court can name the *type* of placement. *See, e.g., In the Interest of F.B.*, 319 So. 2d 77 (Fla. 1st DCA 1975); *In the Interest of L.W.*, 615 So. 2d 834 (Fla. 4th DCA 1994). *See also Henry & Rilla While Foundation Inc. v. Migdal*, 720 So. 2d 568, 574 (Fla. 4th DCA 1998) (indicating that "the department and the court have overlapping and concurrent power over matters relating to dependency and delinquency proceedings").

Under the recent amendments to chapter 394, a residential treatment center for children and adolescents by definition utilizes "a variety of treatment modalities in a more restrictive setting." §394.67 (22), Fla. Stat. (2000). Pursuant to the statute, these treatment modalities include the use of psychotropic drugs, restraints, and seclusion. §394.875, Fla. Stat., (2000). *See also* Fla. Admin. Code Rule 65-10.021 (discussing procedures for use on children of mechanical restraints, canvas jackets, and cuffs and requiring additional justification for other "hazardous procedures or modalities" that "place the child at physical risk or which are potentially painful"). An institution where the child is subject to these kind of restrictive and potentially hazardous modalities is a drastically different type of placement than a foster home.[4]

When the child's court-ordered case plan requires placement in a foster home, DCF may move the child from foster home to foster home without prior court approval. However, a change in the type of placement from foster home to psychiatric institution requires an amendment to the child's case plan. In the child's case plan, the court orders the "type of placement", and "type of home

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[4] *See also Tal-Mason v. State*, 515 So. 2d 738, 740 (Fla. 1987) (equating a psychiatric institution to a jail because of the facilities for enforced confinement); *Godwin v. State of Florida*, 593 So. 2d 211, 216 (Fla. 1992) (J. Kogan concurring in part and dissenting in part) ("[W]e tend to forget exactly what civil commitment means: The person is taken out of society, deprived of liberty . . and involuntarily subjected to examination and treatment. There is very little difference between this procedure and incarceration for crime.").

or institution" where the child is to be placed, and the child cannot be placed in contravention of a valid, existing court order. Additionally, while the amendment to Fla. Stat. §39.407 is silent on the necessity for a pre-placement hearing, Chapter 39 continues to mandate that DCF, as temporary legal custodian, can only provide a child with ordinary psychiatric and psychological treatment, unless the court orders otherwise. §39.01 (70), Fla. Stat. (2000).

The need for a pre-placement hearing is especially compelling in light of the harmful and traumatic impact erroneous placement in a residential treatment facility can have on a child:

> A recent review of psychological research concluded that certain degrees of freedom of movement, association, and communication are critical to the psychological well-being of children and adolescents. Mental hospitalization may entail substantial periods of isolation, particularly in the case of recalcitrant children and adolescents, and may be characterized by involuntary administration of heavy doses of psychotropic medication (that is, medication used to alter psychological functioning), invasions of privacy, and social pressure to conform behavior to certain norms.... Certain aspects of mental hospitalization can be extremely frightening for some children. Children who are not seriously emotionally disturbed may be greatly upset by exposure to children who are. In addition to the possible assault on one's psychological well-being, an involuntary hospitalization may be harmful to one's physical health[.]

Lois A. Weithorn, "Mental Hospitalization of Troublesome Youth: An Analysis of Skyrocketing Admission Rates," 40 *Stanford Law Review* 773, 797

(1988)(footnotes omitted). Moreover, children erroneously committed to mental hospitals often experience behavioral deterioration because "[t]he psychiatric hospital can also be a place to learn some previously unconsidered behaviors, such as suicide attempts." Gerald P. Koocher, M.D., "Different Lenses, Psycho-Legal Perspectives on Children's Rights,"_16 *Nova Law Review* 711, 723 (1992). *See also* Gary B. Melton, et al., No Place to Go: The Civil Commitment of Minors (University of Nebraska Press 1998).

Furthermore, the abusive treatment to which Florida's foster children have often been subjected in residential facilities throughout this state has long been documented,[5] and substantiated by the DCF Inspector General in at least once instance, as a result of abuses brought to light by Broward Judge Ginger Lerner-Wren. *See* Shana Gruskin, "State: Restraints Overused on Youths," *Ft. Lauderdale Sun-Sentinel*, August 17, 1999 at 4B.

Indeed, juvenile court oversight and supervision of the placement of foster care children in these facilities is particularly warranted in view of the

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[5] *See, e.g.,* William Cooper, Jr., "Alternative to 'Basket Hold' Restraint Demanded," *Palm Beach Post,* December 6, 1998 at 1C; William Cooper, Jr. "Mentally Ill Teen's Homicide Haunts Her Father; Workers Who Restrained Her Placed on Leave," *Palm Beach Post,* November 26, 1998 at 1B; Candy Hatcher, "Meet Samantha: Her Only Family is the State," *Palm Beach Post*, June 12, 1994 at 1A; Karen Samples and Donna Pazdera, "Crisis Center to Adjust Plan Keeps Unruly Teens Out of Unit," *Ft. Lauderdale Sun-Sentinel*, February 8, 1993 at 5B; Carol Gentry, "Child's Death Spurs Inquiry," *St. Petersburg Times*, September 4, 1991 at 1B; Mary Brooks, "Drug-Treatment Program is in Trouble With State Again," *Orlando Sentinel*, December 11, 1991.

startling revelations about these facilities in Florida that have come to light within the past twelve months. In November 1999, the *Ft. Lauderdale Sun-Sentinel* published a 16-part investigative series on the state's practice of locking up hundreds of Florida foster children in psychiatric institutions without affording them pre-placement court hearings, because the state has no other place to put them. Once confined in these facilities, some children spend years in them, where as the series graphically documented, they are often subjected to physical and sexual abuse, overmedication, and the improper use of physical restraints, resulting in serious injuries and even the death.[6] *See* Sally Kestin, "Throwaway Kids," *Ft. Lauderdale Sun-Sentinel*, November 6-9, 1999, at 1A.

As this Court has stated: "We have the authority to establish proper procedures for juvenile proceedings to implement constitutional rights." *R.J.A. v. Foster*, 603 So.2d 1167, 1171 (Fla. 1992) (holding that juvenile rule of procedure regarding a time period took precedence over the legislative enactment). Given that a child is at a documented risk of serious mental and physical injury and even death while confined in these institutions, in establishing appropriate judicial procedures for civil commitment to this type of institution, the Court should sua sponte consider the child's right to privacy under the Florida Constitution that was extensively briefed by the petitioner in *M.W.*, both in the briefs filed in this Court[7] and in the motion for rehearing and response filed in the Fourth District.[8] However, even if the Court declines to address the child's interest in a pre-placement hearing as a constitutionally-ground privacy

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[6] The entire series, "Throwaway Kids," is appended to these Comments.

[7] Petitioner's Initial Brief at 33—53.

[8] Petitioner's Motion for Rehearing, Rehearing En Banc, and Certification to the Florida Supreme Court at 5-13.

right, then certainly the court's inherent power to protect children mandates that the rule contain a court hearing prior to the children's placement in a long-term residential treatment center or hospital.

In *M.W.*, this Court stated: "Ironically, our rules provide more procedural protections in this situation for children in the custody of the state because they are delinquent than for those children who are in the custody of the state because they have been adjudicated dependent through no fault of their own." *M.W.*, 756 So.2d at 109 n.36 (referring to Fla.R.Juv.P. 8.095). This observation by the Court was precisely what M.W. experienced. He could not understand why delinquent children committed to the same locked facility had the opportunity for a full evidentiary hearing before their commitment by the court to the facility, while he as a dependent child in the custody of the state did not receive the same due process protection. As his counsel, we could explain to M.W. why children placed in the Lock Towns facility on the grounds of South Florida State Hospital might enjoy fewer rights than adults in mental health commitment proceedings. It was more difficult to explain the rationale behind granting greater procedural due process for a delinquent child committed to Lock Towns than a dependent child in the next bed in the same locked psychiatric ward.

Moreover, as this court noted in *M.W.,* 756 So. 2d at 108, providing pre-placement hearings for children facing long-term commitment to residential

centers should not be eschewed just because it would be burdensome to the dependency courts. In fact, the courts would not be unduly burdened by having to conduct such hearings, as the number of foster care children in residential psychiatric settings represents a relatively small percentage of the total population. For example, in Miami-Dade County the number of foster care children in long-term psychiatric residential treatment facilities in 1999-2000 totaled only 94, representing only 3% of the children in foster care in the county. Foster Care Review, Inc., *Annual Recapitulation Report July 1999 to July 2000.*

Where the child requires short-term hospitalization or treatment in a crisis facility, then certainly there is no need for the court to conduct a pre-placement hearing. However, when the type of long-term placement is changed from a foster home to a psychiatric institution in contravention of the court-ordered case plan, then a pre-placement hearing must be required by the Rule. Moreover, viewed from both the child's perspective and from the child's best interests, the child should not be subjected to the intrusiveness and harmful effects of this type of placement, nor should the child be bounced around like a "ping-pong ball," sent to a residential treatment center in a different county, only to be discharged by the court days or weeks later.

2. **<u>The Right to Counsel</u>**

For the reasons set forth in the Committee's Minority Report, this Court should mandate the appointment of an attorney for every foster child committed to a long-term residential treatment center or hospital. However, at a minimum, when the child objects to placement and wishes to present evidence on his or her behalf and cross-examine witnesses, the Rule must require appointment of an attorney for the child. Although the Court does not address substantive rights through rules of court, it does address procedural rights. As this Court has stated, "how it [a case] is to be tried in an orderly manner is procedural." *R.J.A. v. Foster*, 603 So. 2d 1167 (Fla. 1992). Certainly, a dependent child cannot be expected to represent himself pro se and present evidence in his own behalf and cross-examine witnesses in any meaningful or orderly manner.

Indeed, as this Court has previously stated:

> A minor completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary. Requiring an indigent minor to handle her case all alone is to risk deterring many minors from pursuing their rights because they are unable to understand how to navigate the complicated court system on their own or because they are too intimidated by the seeming complexity to try.

In re T.W., 551 So. 2d 1186, 1195 (Fla. 1989). As mandated by this Court, if DCF wishes to present evidence and call and cross-examine witnesses in any dependency proceeding, it must be represented by counsel. *See The Florida*

Bar Re: Advisory Opinion HRS Nonlawyer Counselor, 547 So. 2d 909 (Fla. 1989). Pursuant to Florida Rule of Juvenile Procedure 8.215, the duties of a lay guardian cannot include the practice of law, and thus a guardian ad litem who wishes to present evidence and call and cross-examine witnesses must be represented by an attorney in the proceeding. As the Committee's Minority Report notes, under the proposed rule the child is the only party who would not have an attorney, and the child therefore would be the only party lacking the ability to present evidence and call and cross-examine witnesses.[9]

Not only is the child a party to his or her dependency case under Chapter 39 and the Juvenile Rules of Procedure, the child is also a "patient" and as such is protected by the safeguards enumerated in Chapter 394. Under Fla. Stat. §394.875, children placed in residential treatment centers are accorded the rights of patients set forth in Fla. Stat. §394.459. Indeed, when placed in residential treatment, "[c]hildren's rights, as specified in §394.459, F.S., for patients, shall be safeguarded. Children shall be informed of their legal and civil rights, including the right to legal counsel and all other requirements of due process. Receipt of such information shall be documented by parent or guardian, and the child's signature." Fla. Admin. Code 65E-10.021.

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[9] *See* ABA Standards of Practice For Lawyers Who Represent Children in Abuse and Neglect Cases (1996), Standard A-1 (noting that the child is a "separate individual with potentially discrete and independent views").

The Clinic strongly supports the Minority's proposal requiring the mandatory appointment of counsel and believes that this procedural protection should be included in the rule for all children who are committed to a long-term residential treatment center or hospital. However, should the Court reject this, then at a minimum, we urge the Court to adopt the compromise provision in the attached rule and mandate the appointment of counsel when the child contests placement. Under this circumstance, appointment of counsel is an absolute procedural necessity for the child to exercise his or her due process rights and to be afforded "a meaningful opportunity to be heard." *M.W.*, 756 So. 2d at 109. Procedural due process cannot be a matter of discretion, and therefore the appointment of counsel for the child under this particular circumstance cannot be discretionary.

3. The Right To Be Heard Directly By The Court

In *M.W.*, this Court recognized the importance of "whether a child believes that he or she is being listened to and that his or her opinion is respected and counts." *M.W.*, 756 So. 2d at 108. Indeed, former foster youth have indicated this to be a very serious concern. "A recurrent theme in their comments was the importance of consulting with children and allowing them to share in, and contribute to, decisions that need to be made No One Ever Asked Us . . . A Postscript to Foster Care, at 281. "Some felt left, and others felt left

out: ‘They always had conferences and you weren’t in on it and they don’t tell you what they discussed about you . . . then they write a report and you don’t know what they’ve said.’ Some felt that general statements such as ‘it’s in your best interest’ makes you feel like a client, not a person.’” *Id*.

As this Court has observed in its recent re-consideration of whether juvenile detention hearings should be conducted through audio-visual devices rather than personal appearances:

> ‘Florida’s oft-repeated pledge that ‘our children come first’ cannot ring hollow—in of all places our halls of justice.’ … Not only allowing, but mandating that children attend detention hearings conducted through audio-visual devices steers us towards a sterile environment of T.V. chamber justice, and away from a system where children are aptly treated as society’s most precious resource. It is time that we understand that these youth are individuals and require sufficient resources if we are to expect a brighter tomorrow. Personalized attention and plans are necessary to properly address the multiple and complex problems facing today’s children.

Amendment to Florida Rule of Juvenile Procedure 8.100, 25 Fla. L. Weekly S516 (Fla. July 6, 2000) (citation omitted). Surely, a foster child facing the prospect of a loss of liberty and privacy through commitment to a long-term psychiatric residential treatment center deserves to be heard directly by the juvenile court as much as does a child facing a similar loss of liberty at a delinquency detention hearing.

Under the Committee's proposed rule, if the court determines that a court appearance is "not in the child's best interest," the child would only be provided the opportunity to "express his or her views to the court by a method deemed appropriate by the court." In contrast, the Clinic's proposed rule would mandate that the court hear directly from the child at all hearings concerning his or her placement in a residential treatment center, in person or by telephone, rather than leave to the discretion of the court whether to allow the child to speak directly to the court. Without being provided the opportunity to speak directly to the court, the child will doubt "that he or she is being listened to and that his or her opinion is respected and counts." *M.W.*, 756 So. 2d at 108. If the purpose of the proposed Rule is to give each child a "meaningful opportunity to be heard," *id.* at 109, it *must* ensure that each child is given the opportunity to speak directly to the court.

"The decisions in foster care often involve many, and sometimes conflicting, interests. The viewpoints of the children are, therefore, not sufficient alone but need to be seen as a necessary part of the considerations that determine the recommendations that are made. Such a practice can be beneficial in the long run since it is almost axiomatic that those who participate in making decisions are more concerned about making things work out. . . Surely a field that stresses the self determination of clients needs to take steps

to avoid drowning out the voices of children." No One Ever Asked Us … A Postscript to Foster Care, at 296-97.

CONCLUSION

As one former foster youth has written: "Foster care begins with the terror of suddenly losing family, friends, toys, clothes, siblings, relatives, neighborhood, and home. A child faces strange surroundings, strange people, the indignity of a medical strip search, and questions that aren't nice." Jessica Watson Crosby, Why Foster Care Can Never Be Reformed, Foster Care Youth United, 32 (May/June 1997). When a foster child is placed in a residential psychiatric facility, the child experiences the same feelings of loss, indignity, and dislocation. It is therefore essential for this Court to adopt a Rule that provides foster children with meaningful due process procedures and protection by the juvenile court prior to, as well as during, their placement in psychiatric facilities.

For the foregoing reasons, the Children & Youth Law Clinic asks this Court to adopt the attached Proposed Rule 8.350, Fla.R.Juv.P., which gives "due regard to both the rights of the child and the child's best interests" while providing the foster child "a meaningful opportunity to be heard." *M.W.*, 756 So.2d at 109.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of these Comments was sent this 1st day of December, 2000 to the Honorable John N. Alexander, Chair, Juvenile Court Rules Committee, St. John's County Courthouse, P.O. Box 300, St. Augustine, FL 32085-0300.

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CAROLYN S. SALISBURY, ESQ.

RULE 8.350. PLACEMENT OF CHILD IN LEGAL CUSTODY OF THE DEPARTMENT INTO RESIDENTIAL TREATMENT CENTER AFTER ADJUDICATION OF DEPENDENCY

(a) **Placement.**

(1) Whenever the Department of Children & Families believes that a child in its legal custody may require placement in a long-term residential treatment center or hospital, the department shall arrange to have the child assessed by a qualified evaluator as provided by law and shall file notice of this with the court and all parties. Upon the filing of this notice by the department, the court shall appoint a guardian ad litem for the child, if one has not already been appointed, and may also appoint an attorney for the child. Both the guardian ad litem and attorney, if appointed, shall meet the child and shall have the opportunity to discuss the child's suitability for residential treatment with the qualified evaluator conducting the assessment.

(2) Upon the completion of the evaluator's written assessment, the department shall provide a copy to the court and to all parties. The guardian ad litem shall also provide a written report to the court and to all parties indicating the guardian ad litem's recommendation as to the child's placement in residential treatment and the child's wishes.

(3) (A) If the department seeks to change the child's placement to residential treatment, the department shall immediately file a motion with the court to amend the child's case plan pursuant to Rule 8.410 (c). The motion shall state whether all parties, including the child, are in agreement.

(B) Upon the filing of the motion by the department, the court shall enter an order setting the matter for hearing within 5 working days. If the department's motion and/or the guardian ad litem's report indicates that the child is not in agreement, then the court shall appoint an attorney to represent the child, if one has not already been appointed. The clerk of the court shall provide timely written notice of the date, time, and place of the hearing to all parties and attorneys. The child's guardian ad litem and/or attorney shall notify the child of the date, time, and place of the hearing, and the department shall arrange for the child's transportation to the hearing.

(4) If all parties are in agreement at the scheduled hearing, then the revised case plan placing the child in residential treatment, as well as any other corresponding amendments regarding services and visitation, may be approved by the court. However, if any party, including the child, is not in agreement, then the court shall set the matter for hearing within 10 working days. If the child has not already been appointed an attorney, then the court shall appoint an attorney to represent the child. If requested by the child's attorney, the court may appoint an expert to evaluate the child and provide a second opinion regarding the child's suitability for residential treatment. The child's attorney may request a continuance to prepare for the hearing, not to exceed an additional 5 working days. If the evaluator's written assessment indicates that the child requires immediate placement in a long-term residential treatment center or hospital and that such placement cannot wait for the hearing, then the department may place the child pending the hearing, unless the court orders otherwise.

(5) (A) At the hearing, the court shall consider, at a minimum, all of the following:

(i) The recommendation of the department's counselor or authorized agent that the residential treatment or hospitalization is in the child's best interest, based on an independent assessment of the child, and a showing by the department that the placement is the least restrictive available alternative.

(ii) The recommendation of the guardian ad litem.

(iii) A case review committee recommendation, if there has been one.

(iv) The findings of the evaluation and suitability assessment prepared by the qualified evaluator.

(v) The views regarding placement in residential treatment that the child expresses to the court.

(B) All parties shall be permitted to present evidence and, through their counsel, call and cross-examine witnesses.

(C) Based on clear and convincing evidence, if the court determines that the child meets the criteria to be suitable for placement in residential treatment as provided by law, then the court shall amend the case plan to place the child in residential treatment and shall impose any other conditions of placement, services, or visitation that are appropriate.

(D) If the court determines that the child is not suitable for residential treatment as provided by law, then the court shall order the department to place the child in the least restrictive setting that is best suited to meet the child's needs.

(b) **Continuing Residential Placement Reviews.**

(1) If the child is placed in residential treatment, the court shall conduct a hearing to review the status of the child's residential treatment plan no later than 3 months after the child's admission. The court shall conduct review hearings at least every 3 months thereafter, until the child is placed in a less restrictive setting.

(2) An independent review of the child's progress towards achieving the goals and objectives of the treatment plan must be completed by a qualified evaluator and submitted to the court and all parties in writing at least 72 hours before each 3-month review hearing. The guardian ad litem shall also provide a written report to the court and to all parties, indicating the guardian ad litem's recommendation as to the child's continuing placement in residential treatment and the child's wishes, at least 24 hours before each 3-month review hearing.

(3) If the child contests continued residential treatment, then the court shall appoint an attorney for the child, if one has not already been appointed. The court shall ensure that the child is continuously represented by a guardian ad litem, and by an attorney if appointed, for as long as the child remains in residential treatment.

(4) If the court determines at any hearing that the child is not suitable for continued residential treatment as provided by law, then the court shall order the department to place the child in the least restrictive setting that is best suited to meet the child's needs and shall amend the child's case plan accordingly.

(c) Presence of Child.

The child has the right to be heard directly by the court. The child shall be present at all hearings, and the department shall arrange for the child's presence. However, if the court finds that the child's mental or physical condition is such that the child's presence in

court is not in the child's best interest, then the child shall be provided the opportunity to directly express his or her views to the court via telephone.