

Analysis of Legislative Progress Since a Federal Judge Found Texas Foster Care Unconstitutional

In February 2017, Texans Care for Children released a policy brief, “Highlights of the Texas Foster Care Lawsuit, State Action During the Interim, and Next Steps.” The following new policy brief provides an update on steps taken during the 2017 Texas legislative session that were consistent or conflicted with the most recent federal court order regarding children in long-term foster care in Texas. The most significant actions by the Legislature to address the concerns raised by the court were stabilizing the CPS workforce with additional hiring and pay raises, improving services for youth aging out of foster care, expanding Community-Based Foster Care in a measured manner, and strengthening oversight of foster care facilities. More modest progress was made on legal representation and health care for children in foster care. All areas need additional work, though increasing the number of high-quality foster homes and services for children in foster care is most critical.

Background

In December 2015, a federal court found that the Texas foster care system was so unsafe that it violated the constitutional rights of children in the system. In January 2017, the court issued an initial order outlining the next steps Texas should take to ensure basic protections for children in “permanent” foster care. A final court order is expected later this year or next year. Despite state leaders acknowledging the foster care challenges, the state continues to fight the lawsuit.

The case only applies to one of many areas of Child Protective Services (CPS) responsibility: children in Permanent Managing Conservatorship (PMC). PMC is essentially long-term foster care. It includes children who have been in state custody for over 12 to 18 months and for whom the Department of Family and Protective Services (DFPS) is named the permanent guardian until they are adopted or turn 18. About 40

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percent of children in Texas foster care are in PMC. The court case does not cover children in Temporary Managing Conservatorship in the foster care system. Nor does the scope of the case include CPS investigations of abuse and neglect or CPS services to families to safely keep children with their parents.

Last year, the court case, along with tragedies and significant challenges brought to light by the media and others, spurred state leaders to take action and demand progress from DFPS, the parent agency to CPS. That effort continued during the 2017 legislative session as lawmakers took steps to improve the CPS system, including but not limited to those issues highlighted in the court case. The state made significant progress but has more work to do.

This policy brief examines the legislative changes made during the 2017 legislative session that are consistent or conflict with the court's most recent order and highlights issues that stakeholders and state leaders should monitor and address moving forward. The brief excludes a few aspects of the order that the Legislature did not take significant or direct action to address, including monthly visits, creation of a central databank, creation of a 24-hour hotline, I See You Workers, Residential Child Care Licensing (RCCL) website creation, identifying single child homes, and reporting of sexual abuse.

Analysis

Youth Who "Age Out" of Care

During the 2017 session, Texas leaders laid the groundwork to go above and beyond the federal court's order for youth who age out of care, particularly regarding education and employment opportunities. The court found that youth who "age out" out of foster care are at high risk of low educational attainment, poverty, unemployment, early pregnancy, mental illness, and incarceration. In response, the court directed the state to develop a plan to better prepare older youth in care for adulthood.

Consistent with the court order, the Legislature required DFPS to overhaul Preparation for Adult Living (PAL) classes, including developing a new curriculum and starting PAL at age 14 instead of 16. The Legislature also passed legislation requiring attorneys and guardians ad litem to ensure foster youth 16 and older obtain their birth certificates and other critical identifying documents. These documents will ease the transition to adulthood as youth apply for jobs, colleges, loans, housing, and more.

The Legislature also took steps beyond the scope of the court's order. For example, the Legislature created a summer internship program for current and former foster youth. Additionally, the Legislature directed the Texas Workforce Commission to expand its partnership with CPS to help current and former foster youth reach their educational and employment goals.

Appointment of an Attorney Ad Litem

The federal court highlighted the need for Texas to ensure all children receive legal representation during their entire time in foster care, but legislators did not reach that goal. Currently, all children who enter foster care are assigned an attorney and a guardian ad litem who represent their desires and best interest, respectively. However, once children enter the second phase of foster care, PMC or “permanent” custody, the state no longer guarantees legal representation.

The federal court does not have the legal authority to require the appointment of attorneys to children in PMC because local courts – the only entity with the power to appoint attorneys – are not a party to the lawsuit. Local courts also have to pay for appointed attorneys. To ensure legal representation throughout PMC, the court asked DFPS to evaluate whether the state should request an ad litem appointment for every child in PMC or reimburse the appointing court for ad litem attorneys’ fees. The court’s final order will depend on this evaluation, which has already been completed.

This session the Legislature passed HB 7, which confirms that judges are allowed to appoint counsel to children after they enter PMC, but legal representation is still not required.

Health Care

Improving health care screenings for children in foster care and concerns about missing or incomplete medical records were a key part of the federal court order. The Legislature did not address the court order to DFPS to develop a plan to make missing or nonexistent health care records available in a child’s file within 24 hours of a child entering state custody. DFPS should be able to address the health records issue without legislative direction.

Instead, the Legislature’s work in this area centered on the timeliness of children’s health screenings. According to the American Academy of Pediatrics, all children who enter foster care should be screened within the first 72 hours. Historically, Texas has not required this initial health screening. Instead, physicians have been required to conduct a comprehensive health exam during the child’s first 30 days in care. The state has struggled to comply with the 30-day requirement.

One of the major child welfare bills to pass during the recent session, SB 11, includes provisions addressing screenings. An early version of the bill required all children who enter care to receive a health screening within three business days so that children with pressing health needs would be more likely to receive the comprehensive care they need in a timely fashion. A late amendment to the bill limited these screenings to children who have been sexually or physically abused or are obviously injured. Some other children may receive early health care based on “triage” done by caseworkers. If a caseworker determines that a child has

a chronic or complex physical or behavioral health concern, that child will receive a health care screening during the first three business days they are in state custody. Children with pressing health care needs may go without an early health screening if caseworkers – who are not trained health care professionals – are unable to identify the concern. The 30-day comprehensive health exam is still required for all children in foster care.

As DFPS develops policies to help caseworkers triage health care needs, DFPS should take missing health records into account. A lack of records will make the caseworkers' difficult triage work even harder.

Caseworker Workload and Turnover

The court highlighted that a key step to improving child protection is stabilizing the CPS workforce to reduce caseloads and turnover, a longtime challenge in the state's child welfare system. Currently, in Texas the average daily caseload of 28 cases for each CPS foster care caseworker is double the monthly average of 14 to 17 that national child welfare experts recommend.

State leaders and the Legislature shared this concern and began to address the workforce challenge before the session started. In October 2016, Governor Greg Abbott, Lieutenant Governor Dan Patrick, and Speaker Joe Straus asked the Commissioner of DFPS to develop a plan to improve child protection. Within days of the request, DFPS Commissioner Hank Whitman asked the Legislature for emergency funding to reduce caseworker turnover and caseloads. Following an emergency funding hearing, the Legislature provided \$150 million to add 829 new investigations and foster care caseworker positions and increase caseworker salaries by \$1,000 per month starting on December 1, 2016.

During the legislative session, the Legislature sustained the emergency investment made in December and funded an additional 598 positions for a total of 1,427 new caseworkers at CPS. The Legislative Budget Board estimated that the investment will reduce average daily caseloads to 17. Since the initial investment, the state has already successfully reduced caseworker turnover and caseloads, according to DFPS data, and children are receiving more timely contacts with their caseworkers.

To further assist in reducing caseloads and turnover, the Legislature passed HB 1549, which requires DFPS to create a caseload management system. Other provisions in HB 1549 and SB 11, including secondary trauma support and evaluation of workforce trends, should also help address the problems related to caseloads and workforce retention.

Residential Child Care Licensing (RCCL) and Monitoring Reports of Abuse and Neglect

The federal lawsuit was filed because children in foster care were unsafe in residential child care facilities. Historically, Residential Child Care Licensing (RCCL) licensed foster care facilities, monitored their compliance

with the state's minimum standards, and investigated abuse and neglect in those facilities. The Legislature has taken good steps on child care licensing reform for the last two sessions to address abuse and neglect in foster care facilities, but further monitoring will be necessary to confirm the effectiveness of these changes.

Two years ago during the 2015 legislative session, the Legislature transferred RCCL from DFPS to the Health and Human Services Commission (HHSC) as part of the reforms recommended by the Sunset Commission. The intent was that, as a division of HHSC, RCCL would not face the same pressure to keep dangerous facilities open while simultaneously contending with the severe foster home shortage.

Following passage of SB 11, HB 5, and HB 249 during the 2017 legislative session, primary responsibility for investigating abuse and neglect allegations in child care facilities is shifting from RCCL to CPS. RCCL will continue to license child care facilities and manage minimum standards compliance.

Additionally, prior to the 2017 legislative session, the definition of abuse and neglect was looser for these facilities than for families. The 2017 Legislature improved the definitions of abuse and neglect for child care facilities, requiring providers to meet the same standards that are applied to parents.

Taken together, these changes are consistent with the court's direction to strengthen monitoring and oversight of abuse and neglect in child care facilities. The Legislature has not acted on the court's instruction to conduct an RCCL workload study or create a public website that lists all violations and corrective actions taken in child care facilities, although legislative action may not be necessary.

Placement in Family-like Settings Rather Than Congregate Care

The court found that Texas over-relies on congregate care, which often poses an unreasonable risk of harm to children's health or safety. Congregate care is any licensed facility providing 24-hour-a-day care to seven or more children. Research shows that placing children with families is generally better for their development than placing children in congregate care. Children 12 and under are especially likely to struggle with developing healthy relationships – and likely to learn challenging behaviors – when placed in a congregate care setting.

The court took two main steps regarding congregate care. First, it ordered the closure of one type of congregate care, foster group homes that lack the 24-hour awake supervision necessary to ensure children's safety. Second, it stated that after its final order all children 12 and under in PMC must be placed in family-like settings except for sibling groups of four or more; children who require inpatient hospitalization, treatment, or medical care; and young children who are placed with their minor parent. The court defines family-like settings as non-relative foster care, tribal foster care, kinship care, and therapeutic foster care.

The Legislature's work on kinship care this session will help steer some children from congregate care to family-like settings (and steer some children from foster families to the homes of relatives). Kinship care covers family, or friends who are practically family, who take care of children who would otherwise be in foster homes or other residential facilities. It is generally considered the most family-like placement. The Legislature increased financial support for kinship caregivers through HB 4 and expanded opportunities to find kinship placements for children in state custody through HB 7. These changes mark the biggest move this session to ensure children in the child welfare system live in family-like environments.

The Legislature also took steps that improve congregate care. Following passage of HB 7, foster group homes must now meet the standards of General Residential Operations (GROs), which are more stringent than the licensing standards they previously faced. The licensing restructure noted above may also improve child safety by transferring responsibility for investigating all abuse and neglect to CPS and requiring the facilities to meet the same standards for abuse and neglect that parents must meet.

The Legislature also took a concerning step that contradicts the move towards family-like care rather than congregate care. It passed HB 1542, which applies the "family-like" label to a type of congregate care known as "cottage homes." Cottage homes are a collection of several housing units on a single campus. Each cottage holds approximately 8 to 15 children with rotating "house parents." Cottage homes may be appropriate in some circumstances, but nominally labeling cottage homes as "family-like" could expand the use of congregate care in Texas foster care.

Placement Array

The Legislature took some steps to address the court's concern about the lack of safe, appropriate placements for children in foster care. Many communities lack sufficient capacity to serve children in their region, particularly in the case of "high needs" children, sibling groups, teenagers, children with intellectual or developmental disabilities, or children requiring single child placement. But the capacity challenges go beyond an insufficient number of homes. Children in foster care must also have access to the full array of treatment services that will help them stay safe and thrive.

Key capacity issues before the Legislature this session included reimbursement rates, capacity assessment, expanded Community-Based Foster Care, emergency placements, and faith-based providers. It's clear that Texas still has a long way to go to ensure every foster child is in a safe home and receives the effective treatment and supports she needs in a family-like setting.

Reimbursement Rates

The Legislature increased general reimbursement rates and created new rate categories (“intense plus” and “treatment foster care”) to recruit more providers who can serve high-needs children. This effort should help build capacity and increase placement options for children in care, but it is a key area for the Legislature to monitor.

Capacity Assessment

To ensure DFPS works to build out the right types of homes and services across the state, the court directed DFPS to submit a capacity assessment to the court that included the number, geographical distribution, and placement types available as well as the expected needs for children across the state. The Legislature codified continued foster care capacity needs assessments and planning in furtherance of this goal in SB 11. Although the court’s recent order did not instruct DFPS to continue to assess capacity, the new statutory requirement should ensure that capacity assessment and planning are ongoing.

Community-Based Foster Care

Expanding Foster Care Redesign, now referred to as Community-Based Foster Care, was arguably the largest CPS reform the Legislature passed this session. Community-Based Foster Care is an effort the Legislature started in 2011 that shifts foster care services from the state to the community. Under this model, a private agency acts as a super-contractor and manages a regional network of providers who serve children in foster care. The first attempt to roll out this model in CPS Regions 2 and 9 (Abilene and Midland) failed; however, the second roll out in Region 3b, which is the Fort Worth area, has shown great promise. The goal of Community-Based Foster Care is to prevent abuse and neglect in foster care, keep children close to their home communities and social connections, and reduce the number of times children move between foster homes.

The Legislature passed SB 11, which reflects many lessons learned from both the failures and successes of Community-Based Foster Care attempts. The bill requires private contractors to be community-based, nonprofit organizations with a mission focused on child welfare, such as the contractor in Region 3b, and not private for-profit providers like the contractor in Regions 2 and 9. The Legislature also required DFPS to conduct a “readiness review” to ensure that new super-contractors will in fact be able to deliver the necessary services and truly engage the community. The legislation also ramps up monitoring and oversight of contractors and requires performance-based contracting to incentivize better outcomes for children in foster care.

The legislation also gives new responsibilities to the super-contractors. Initially, Community-Based Foster Care only contracted for placement services – the role of finding homes for children. For decades, private

organizations have primarily provided placement services in Texas, so this was not a huge shift. Under the vision for Community-Based Foster Care passed in SB 11, the super-contractor will now take on the added role of case management services, which has only been a state function to date. The added transfer of case management services has been much more controversial. During the upcoming 2018-2019 biennium, transfer of case management will likely only occur in Region 3b.

Under SB 11, the state will begin planning for Community-Based Foster Care to expand into eight new regions. The Legislature authorized and provided funding for the agency to expand into a maximum of five new regions during the upcoming biennium.

So far, despite the initial failures in Regions 2 and 9 and in part due to the success in Region 3b, the court has allowed Texas to move ahead with Community-Based Foster Care. However, the court has asked for more information about how the model will improve the service array, the capacity of providers across Texas to serve as the super-contractor, and proposed timelines for setting up the model statewide through the end of fiscal year 2021.

Emergency Placements

The insufficient number of homes across the state has led to inappropriate emergency placements for children. The court prohibited overnight placement of PMC children in offices or other unregulated locations unless the placement is with kin or due to medical necessity.

The only step the Legislature took this session to stop these inappropriate placements was to prevent inappropriate detention in inpatient mental health facilities through HB 7. The bill prohibits children from being hospitalized in a mental health facility unless they have a serious emotional disorder and present a risk of harm to themselves or others. The bill also requires regular review of the continued need for inpatient treatment of a minor.

Unfortunately, the Legislature did not make any progress specifically aimed at expanding emergency placement options. Long-term capacity solutions will eventually help address this challenge, but in the meantime the state needs emergency placement options to quickly address the unsafe practice of placing children in CPS offices and other unregulated locations.

Faith-based Providers

Unfortunately, not all legislative reforms aimed at building capacity were positive. Rather than strategically expanding homes and services that would meet the needs of those youth who tend to be more challenging to place, the Legislature primarily focused on recruiting more providers. One strategy to entice more

providers was HB 3859, which addressed the religious liberty of child welfare service providers. The stated intent of this bill was to diversify the existing network of providers serving children in the child welfare system. But many fear the bill will have the opposite effect, limiting the diversity of providers.

HB 3859 allows child-placing agencies (CPAs) – the organizations that license foster homes in Texas – to reject qualified prospective foster parents if the CPA has a religious objection to those parents. This could exclude interfaith couples, single parents, married couples in which one spouse has previously been divorced, and LGBTQ couples. Some regions of the state only have religiously affiliated CPAs, which may raise objections under HB 3859. Rather than expanding capacity, this could seriously limit the number of available foster homes in those regions. In addition, bill opponents argued that entities that contract with the state should not be allowed to discriminate based on religious belief.

Further, HB 3859 prohibits the state from canceling contracts with providers who refuse to provide children with services that may be necessary or appropriate if such services conflict with the provider's religious beliefs. This could prevent children from receiving certain health services, some of which are delineated in the bill, including access to birth control. Even more troubling, if the state identifies religious providers who perform harmful practices, such as requiring foster children to undergo faith healing, the bill would make it harder for the state to move a child out of their care or stop placing children there. In an attempt to protect against these types of concerns, the bill requires the state to ensure that secondary service providers are available in every region where a religious provider refuses a needed service to a child. The bill also acknowledges the best interest of a child should remain paramount. But it remains unclear how the state will determine what types of services need to be made available to truly protect each child's best interest.

Conclusion

All of the challenges facing permanent managing conservatorship (as well as other CPS functions outside the scope of the court case) need additional attention, although the progress in some areas is particularly noteworthy.

The most significant steps taken by the Legislature to address the concerns raised by the court were stabilizing the CPS workforce with additional hiring and pay raises, improving services for youth aging out of care, expanding Community-Based Foster Care in a thoughtful and measured manner, and strengthening oversight of foster care facilities. We applaud state leaders for their hard work this session to address these issues.

In other areas, the progress was more modest. The state recognized the importance of legal representation for children throughout their time in foster care, but because representation of children in PMC is still not

guaranteed, state leaders and stakeholders will need to monitor whether kids are receiving the legal representation they need. The state also made some progress on improving access to screenings and health care in a timely way but did not take important steps to ensure missing or nonexistent health care records are no longer a barrier for children and caregivers.

Of all the challenges highlighted in the court case, the one that needs the most work is building sufficient and targeted foster home and treatment capacity to ensure children in foster care have safe and stable homes and treatment options. Although the state is working to find more safe, appropriate foster homes and expand access to needed services, Texas is focused more on quantity than quality. Rather than looking at gaps that need to be filled to address the specific needs of children, the state is taking a more general approach to recruitment. The exception to this is Community-Based Foster Care in Region 3b, which has excelled at the targeted expansion of homes and services to meet the needs of the children in its care. While Texas appears concerned with simply recruiting enough “warm bodies” to serve as foster parents, the state should focus on creating foster homes that can meet the specific, often complex needs of children in foster care.

The federal court and the state clearly have more work ahead. A narrow court order and a single 140-day legislative session will not resolve years of deep, systemic challenges in Texas foster care. The next court date has not been scheduled, but we expect the court to assess the reforms passed this session and those aspects of the court order that legislators did not address. We are hopeful the court will soon provide more guidance for the state, Texas will move forward with the order and stop fighting the court case, and the Legislature will continue to monitor progress and improve the Texas child welfare system by investing the necessary resources and enacting policies that prioritize the safety and well-being of children in foster care.

Moving forward, stakeholders and state leaders should actively monitor and report on progress and seek answers to key questions, including:

- Is the workforce investment bringing caseloads down to recommended levels? Are additional steps needed to reduce caseloads and CPS staff turnover?
- Is the state seeing better results for youth who aged out of care? Are more aged-foster youth getting a post-secondary education and are fewer ending up homeless, in the criminal justice system, and victims of human trafficking?
- Are more foster children in Permanent Managing Conservatorship receiving legal representation throughout their time in foster care?
- Are more children in foster care gaining timely access (within 30 days) to quality health care?
- Are foster children safer in state-monitored residential facilities?

- Has the state eliminated the need for children in foster care to sleep in CPS or other government offices?
- Does Texas have a broader array of placement options for children in foster care throughout the state, particularly therapeutic foster care options?
- Is Community-Based Foster Care getting better results for children than the state-run CPS system?
- Are children safe during their time in care or are they suffering further trauma?
- Do more children in foster care have stable placements rather than going through frequent moves from home to home?
- Are fewer foster children placed in congregate care and, for those who require the supervision and treatment in congregate care settings, are they safe and receiving the support they need?

Appendix: Summary of Legislative Action on Court Orders

Topic	Court Order	Legislative Action
Children who "Age Out"	<ul style="list-style-type: none"> Help children in PMC age 14 and older transition to adulthood Birth certificate must be available to each child before age 18 	<ul style="list-style-type: none"> SB 1758: Preparation for Adult Living classes start at 14 with new curriculum and all youth 16 and over must receive their birth certificate HB 1608: Internships for foster youth SB 1220: Career development and education program through DFPS and TWC
Appointment of Attorney ad litem	<ul style="list-style-type: none"> All children in PMC are entitled to legal representation 	<ul style="list-style-type: none"> HB 7: Courts are permitted to appoint attorneys ad litem to children in PMC
Health Care	<ul style="list-style-type: none"> Access to medical records within 24 hours of entering foster care 	<ul style="list-style-type: none"> SB 11: Certain children will receive health care screenings within 72 hours
Caseworker Workload and Turnover	<ul style="list-style-type: none"> Reduce PMC caseloads to 14–17 children per caseworker Create caseload monitoring system Reduce turnover 	<ul style="list-style-type: none"> Budget: Funded caseload reduction and salary increases HB 1549: New caseload management system and secondary trauma support SB 11: New evaluation of workforce trends
RCCL and Monitoring Reports of Abuse and Neglect	<ul style="list-style-type: none"> Create a specialized unit to address maltreatment investigations in RCCL facilities Strengthen monitoring and oversight of PMC placements 	<ul style="list-style-type: none"> HB 249: Strengthened investigations of abuse and neglect within foster care facilities by raising standards and transferring investigations responsibility from RCCL to CPS
Placement in Family-like Settings	<ul style="list-style-type: none"> Unrelated children in PMC with different service levels or who are more than 3 years apart in age must be placed in different rooms Children 12 & under in PMC must be placed in family-like settings 	<ul style="list-style-type: none"> HB 4: Increased support for kinship HB 7: Eliminated licensure for foster group homes HB 1542: Increased reliance on congregate care
Placement Arrays	<ul style="list-style-type: none"> Statewide Placement Needs Assessment required No kids may sleep in CPS offices Determine feasibility and usefulness of Foster Care Redesign 	<ul style="list-style-type: none"> Budget: Raised reimbursement rates SB 11: Foster care capacity needs plan required HB 3859: Religious rights protection to recruit providers SB 11: Expand Community-Based Care No action on emergency placement options