



Hearing Delays, “Practically Nominal” Burden of Proof Violate Due Process of Child-Care Professionals Accused of Abuse

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Almost daily, a news story reports an accusation of child abuse against a parent, teacher, or religious leader, with accusations ranging from a failure to monitor diets, to locking children in cages, to pedophilia in churches.¹ Not surprisingly, the public has become convinced that child abuse is rampant, and state bureaucracies and politicians have eagerly capitalized on this fear by passing laws that relax evidentiary rules in child abuse prosecutions,² extend statute of limitation periods,³ and increase criminal penalties for offenses committed against children.⁴ At the same time, states have adopted very low burdens of proof to declare a parent or child-care professional a child abuser, and have afforded the accused perpetrators a limited ability to clear their names from state child abuse registries.

In June 1997, the first statewide class action suit of its kind, *Dupuy v. McDonald*,⁵ was filed in U.S. District Court in Chicago on behalf of persons who are subjects of an “indicated” (i.e., substantiated) report of child abuse or neglect and regis-

tered in the State Central Register, a data base that operates as a blacklist against employment or licensure.⁶ In Illinois, more than 145,000 people are named in this registry, but fewer than 5 percent have been criminally convicted or civilly charged with abuse or neglect.⁷ Child abuse or neglect reports can be indicated if a state investigator determines that “credible evidence” of abuse or neglect exists,⁸ and this low burden of proof (below that of probable cause⁹) enables child protection investigators to treat accused offenders as guilty when they are actually guilty of nothing more than having bad luck.¹⁰

Dupuy Case Invalidates State Policies on Child-Care Worker Abuse Allegations

The *Dupuy* plaintiffs sought class-wide injunctive relief for child-care employees; this includes teachers, social workers, day-care homeowners and workers, nannies, foster parents, and individuals who are pursuing a career in child care, such as child-care license applicants and students in child-care programs.¹¹ This was part of a broader effort to reform the front end of the child pro-

tection system, by raising its standards for intervention into both employment and family life. After a 1999 trial, Judge Rebecca Pallmeyer declared, in a March 2001 opinion, that the core policies used by the Illinois Department of Children and Family Services (DCFS) to register indicated reports of child abuse and neglect against child care-employees violate the Due Process Clause of the Fourteenth Amendment.¹² The ruling was three-fold:

1. The DCFS credible evidence standard for indicating child abuse or neglect reports was “practically nominal;”¹³
2. The hearings to contest indicated findings were unconscionably delayed;¹⁴
3. DCFS used inadequate notices to inform indicated persons of the findings against them and the means to challenge the findings.¹⁵

Based on a massive record, the court found Illinois’ indicated report system ruined innocent child-care workers’ careers, branding them as abusers without giving them a fair opportunity to challenge the state’s findings against them.¹⁶

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1 *E.g.*, Lou Carlozo and Eric Ferkenhoff, *R. Kelly Arrested on 21 Porn Charges*, Chi. Trib., June 6, 2002, at N1; Rick Jervis, *3 Priests Named in Abuse Lawsuit; 2 Brothers Accuse Joliet Diocese*, Chi. Trib., Oct. 16, 2003, at C10.

2 See *e.g.*, Ala. Stat. § 12.45.045 (2003) (allowing evidence of prior acts of child abuse against other children to be admitted in a prosecution for physical or sexual assault or abuse of a minor).

3 See William Lobdell, *The State Statute of Limitations Eased in Abuse Cases*, L.A. Times, July 12, 2002, at B8.

4 Massachusetts passed a law in 2002 making it a crime to “recklessly endanger children.” Mass. Gen. Laws. Ann. ch. 265 § 13L (West 2004).

5 141 F. Supp. 2d 1090 (N.D. Ill. 2001).

6 *Id.* at 1092.

7 Class statistics provided in *Dupuy* discovery (on file with plaintiffs’ counsel).

8 Ill. Admin. Code tit. 89, § 300.110(i) (2002).

9 Credible evidence is defined as evidence that would cause a reasonable person to believe that abuse or neglect had occurred. 325 Ill. Comp. Stat. 3/5 (2003). DCFS has argued that this standard is analogous

to the “reasonable suspicion” standard created in *Terry v. Ohio*, 392 U.S. 1, 30 (1968), a standard that the U.S. Supreme Court said is lower than probable cause.

10 *Dupuy*, 141 F. Supp. 2d at 1135 (finding that several of the plaintiffs were indicated despite solid exculpatory evidence).

11 See *id.* at 1107-29.

12 *Id.* at 1136.

13 *Id.*

14 *Id.* at 1139.

15 *Id.* at 1138.

16 *Id.* at 1130.

The decision determined that many cases were being indicated when the investigator found “any” evidence suggesting abuse or neglect had occurred.¹⁷ Indeed, investigators were not required to gather or weigh exculpatory evidence.¹⁸ However, by the time the appeal hearing was held, it was often too late to save the accused person’s career, for the court also found that the state “inexcusabl[y]” delayed these appeals for more than a year.¹⁹ Unrebutted evidence also showed that 69 percent of the employees whose employers were notified of indicated findings against them had their employment terminated upon this disclosure.²⁰

Case Study Shows Injustice in System

A sample case study of one the *Dupuy* class members sheds light on what can happen to a family when it finds itself on the wrong end of a child abuse allegation.

In early 1999, Paul De La Rosa²¹ and his wife, Sarah, had been married for more than 10 years and had three children – the oldest one in seventh grade. Neither Paul nor Sarah had completed college, but they had both remained employed throughout their marriage and were able to provide for their family in a modest but stable way. Paul had worked a number of jobs before he decided to join his wife at the day care center around the corner from their house, teaching children ages 3 to 5 years old. He organized drama, sports, and art activities for the children, and he loved what he was doing. Several parents talked about how happy they were to have a strong male role model around their children, and the

woman who owned the center was pleased with her new hire.

In January 2001, two years after Paul started working at the day care center, a 4-year-old girl in one of his classes woke up in the middle of the night and told her mother that “Paul digs in my booty at nap time.” On Jan. 5, 2001, the girl’s mother notified the owner of the day care center, who was required by law to report the allegation to DCFS. The investigator assigned to the case told the owner that Paul would have to leave the facility immediately and not return until the investigation was complete. She also told Sarah that unless Paul left the home immediately, DCFS would take their children and place them in state custody.²² Paul moved out and, since his sister was out of town for a week and he had nowhere else to stay, found himself homeless in the middle of January until she returned.

Flimsy Evidence Does Serious Damage

Meanwhile, DCFS used the low credible evidence burden of proof to indicate the allegations against Paul. This meant his name would be recorded in the State Central Register as a perpetrator of child sexual abuse for 20 years, preventing him from working with children during that time and damaging his reputation in an unthinkable way. This, even though DCFS had no evidence corroborating the young child’s testimony, and had never even talked to Paul’s co-teacher, who would have explained that there were adults coming in and out of the classroom during nap time. Even the mother of the child who made the allegations had expressed doubts that the child

was telling the truth, and wasn’t sure if the touching her daughter reported was simply a backrub to help soothe the child to sleep.

Finally, 11 months later, DCFS reversed its position, after a DCFS Administrative Law Judge ruled in an appeal by Paul that the investigation was so shallow as to be unreliable. With the finding expunged, Paul’s family was finally reunited, but not before the family had accumulated a huge debt that forced them into bankruptcy. Paul’s children suffered great emotional distress; 9-year-old Paul began fighting at school, and was placed in a special education class. Paul and Sarah’s marriage suffered as well; Paul had become distant and they were both depressed.

The *Dupuy* Injunction Order

In Illinois, relief for blacklisted child-care workers like Paul De La Rosa has been steadily increasing since Judge Pallmeyer’s ruling. DCFS has adopted extensive new policies. Those policies include requiring investigators to seek specific types of medical evidence and instructing them how to evaluate such evidence;²³ and new rules prohibiting hearing delays²⁴ and amended notices – all prior to the court’s entry of a preliminary injunction order.²⁵

That order, which was issued on July 5, 2003, requires DCFS to provide both a hearing to contest an indicated finding and a final decision by the Director within 90 days of a timely request by the accused. It also requires DCFS to further improve notices of indicated reports.²⁶ Unfortunately, the order did not provide relief against the rampant errors investigators were making in the findings they registered, errors that

¹⁷ *Id.* at 1135.

¹⁸ *Id.* at 1130. In an individual case similar to *Dupuy*, an identical reversal rate was cited by the Court of Appeals for the Second Circuit as to the New York child welfare system. See *Valmonte v. Bane*, 18 F.3d 992, 1003 (2d Cir. 1994). The 75% statistic for Illinois is actually 90% if the appellants who withdraw their appeals before ruling are excluded from the count.

¹⁹ *Id.* at 1138.

²⁰ *Id.* at 1105.

²¹ The names in this case history have been changed to protect privacy. This family has, however, filed an individual civil rights case against the DCFS investigator and supervisor which is pending in the Northern District of Illinois.

²² The *Dupuy* plaintiffs have asked for a second class preliminary injunction against this practice of implementing “safety plans” — including those that force parents or children out of their homes under threats that, if they do not “agree,” the children will be seized by state investigators and placed into substitute care. In 2002, a second preliminary injunction trial on behalf of the plaintiff class and an amended class of persons under investigation

began, but post-trial briefing has been delayed. DCFS has defended safety plans as uniformly voluntary—in effect claiming they are “voluntary as a matter of law, even though the test to determine whether they are voluntary requires a case-by-case factual analysis. See *Schnecko v. Bustamonte*, 412 U.S. 218, 227 (1973) (“[T]he question whether a consent... is in fact ‘voluntary’ or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of the circumstances”). For the proposition that the ouster of a parent from his or her home is equivalent to seizing a child (or taking the child into state custody), see *Croft v. Westmoreland*

County Children & Youth Serv’s., 103 F.3d 1123, 1125 (3d Cir. 1997).

²³ Ill. Admin. Code tit. 89, § 300 Appendix B (2001).

²⁴ See Dep’t of Children & Family Serv’s., Child Protection, <http://www.state.il.us/dcfsc/child/index.shtml>.

²⁵ See Dep’t of Children & Family Serv’s., Notice of Intent to Indicate Child-Care Worker for Report of Child Abuse and/or Neglect (2001), <http://www.state.il.us/dcfsc/docs/NoticIntentBro.pdf>.

²⁶ *Dupuy v. McDonald*, No. 97-C4199, 2003 U.S. Dist. Lexis 12019, at *6 (N.D. Ill. July 10, 2003).

have caused thousands of innocent child-care workers to be blacklisted. Instead, the credible evidence standard was allowed to remain in place, with the court only requiring that DCFS investigators consider exculpatory as well as inculpatory evidence.²⁷ This was the decision even though the court earlier had found that the burden of proof was “practically nominal,”²⁸ and that a “staggering” 75 percent of appealed findings resulted in reversals.²⁹ The *Dupuy* plaintiffs filed an appeal of this part of the ruling Aug. 5, 2003, believing that as long as the current evidence standard remains, innocent parents and childcare workers will be listed in the State Central Register.³⁰ Briefs for the appeal are nearly complete and a decision from the United States Court of Appeals for the Seventh Circuit is expected sometime next session.

Raising the Burden of Proof

It should be noted that, as Judge Pallmeyer found, not all persons who are investigated for child abuse are innocent,³¹ and, of course, actual perpetrators should be prevented from working in child-care facilities. However, children lose out when their caregivers are wrongly accused, and sometimes, as Judge Pallmeyer noted, “[W]hile the appeal of an indicated individual languishes in the administrative process, actual perpetrators . . . remain at large.”³² Furthermore, as Paul’s story demon-

strates, the consequences that flow from an indicated finding against an innocent caregiver and parent can be irreparable and severe. For parents, such a label often means an extended, state-imposed separation that does irreparable damage to the parent-child relationship.³³ If the person is a child-care employee, the loss of employment creates a great financial burden, and causes a significant restriction on the person’s constitutionally protected liberty to pursue the profession of his or her choice.³⁴ Indeed, because of the seriousness of child abuse allegations, and the devastating impact they may have on parent and child, it is important that legislators and judges develop procedural protections that are carefully crafted to safeguard all the parties involved.

Currently, many states ignore the interests of the wrongly accused parent and child-care professional, and use a burden of proof that implies “erring on the side of the child” somehow benefits children.³⁵ While use of this standard may reduce the risk that a case of actual abuse will go undiscovered, it substantially increases the risk that people like Paul De La Rosa, who are completely innocent of any wrongdoing, will be incorrectly indicated, and seriously harmed in their professional and personal lives.

This practice has been justified in Illinois by treating it as an interim finding, akin to (but lower than) a

finding of probable cause in a criminal case. However, there are important differences. When a person is arrested and held in jail based on probable cause, the finding is one that does not establish guilt in any way. In a criminal case, the accused is entitled to representation by counsel during the preliminary hearing and at all subsequent proceedings leading to trial, where a neutral judge considers evidence only so far as it complies with state evidentiary rules.

State System Stacked Against Accused Child-Care Workers

In contrast, when a DCFS investigator indicates an allegation of child abuse, the entry in the State Central Register is permanent, unless the accused eventually prevails in a hearing to contest it.³⁶ While the accused is allowed representation by counsel during a DCFS investigation, none is appointed if the accused is indigent.³⁷ In such situations, frightened parents or child-care workers are forced to defend themselves against charges brought by a DCFS representative who may have extensive investigatory resources and years of experience in the field.³⁸ Further, while an accused is entitled to confront the witnesses against him or her in a criminal case,³⁹ the same is not true in a DCFS investigation. Here, the investigator acts as both police officer and judge – interviewing witnesses, sorting through evidence, and making findings.⁴⁰

27 *Id.* at *10-15.

28 *Dupuy*, 141 F. Supp. 2d at 1140.

29 *Id.* at 1136.

30 The plaintiffs have also challenged other issues on appeal: inadequate pre-deprivation process in the absence of exigent circumstances, and a failure to extend pre-deprivation process to licensed foster parents and child-care career entrants. The defendants have appealed the thirty-five day post deprivation “expedited hearing requirement.”

31 *Id.* at 1130.

32 *Id.* at 1130.

33 See Paul Chill, *Child Protection In The 21st Century: Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 Fam. Ct. Rev. 457, 457-58 (2003) (noting a number of serious psychological harms associated with removing a child from his or her home).

34 See *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

35 See, e.g., Ala. Code § 26-14-8 (2003) (credible evidence); Ariz. Rev. Stat. § 8-804.01 (2003) (probable cause); Cal. Penal Code § 11165.12 (West 2004) (some credible evidence); D.C. Code Ann. § 4-1301.02 (2004) (credible evidence); Ga. Code Ann. § 49-5-184 (2003) (credible evidence); 325 Ill. Comp. Stat. 5/3 (2003) (credible evi-

dence); Ind. Code § 31-9-2-123 (2003) (credible evidence); Md. Code Ann., Family Law § 5-701 (2003) (credible evidence); Mo. Ann. Stat. § 210.152 (West 2004) (probable cause); New York Social Services Law § 412 (2003) (some credible evidence); 10 Okla. Stat. Ann. tit. 10 § 7102 (2004) (some credible evidence); Wyo. Stat. Ann. § 14-3-202 (2003) (credible evidence).

36 See *Dupuy*, 141 F. Supp. 2d at 1100 (finding that appeals made after the sixty day deadline are dismissed).

37 Ill. Admin. Code tit. 89, § 336.70 (2002).

38 See Richard Wexler, *Wounded Innocents* 123 (1995) (describing the unfairness of a child custody proceeding because of the superior position of the state).

Once the hearing begins, CPS is usually represented by a lawyer employed by the county or the state who specializes in this sort of law. On the other side are one or two tired, scared parents, often poor and inarticulate. If they have a lawyer at all . . . they probably just met him or her outside the courtroom.

Id. When it comes to indicated reports, however, there is no lawyer appointed at all. See Ill. Admin. Code tit. 89, § 336.70.

39 See U.S. CONST. amend VI (“In all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him”).

40 Ill. Admin. Code tit. 89, § 300.110(i).

Finally, if the accused requests an appeal of the entry in the State Central Register (again, often after the accused has been fired from his or her job and is unable to work in the field), the rules of evidence are relaxed so that children cannot be subpoenaed, though their out-of-court statements are admissible as an exception to the hearsay rule.⁴¹ The resulting harm is precisely the one that the hearsay rule is designed to avoid – the state can call its investigators to testify about what a child said, while the appellant has no way to test the veracity of the statements.⁴² This practice continues, even though substantial numbers of studies have shown that young children often provide inaccurate statements after being subjected to even mildly suggestive questioning.⁴³

Indicated findings and the corresponding entries into state registries bear serious consequences for the accused person and his or her family. They often result in a state-imposed separation of parent and child, levy incredible financial burdens on the family, and greatly restrict constitutionally protected liberties in pursuing the profession of one's choice. Even basic notions of fairness dictate that such penalties should not be imposed unless heightened due process protections are used to prevent incorrect findings. Burdens of proof such as "some credible evidence," "probable cause," and "reasonable belief," place an unfair share of the risk of an erroneous decision on the accused, and fail to recognize that incorrect findings themselves impose a serious abuse on children.

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⁴¹ *Id.* § 336.120(b) (noting that the strict rules of evidence do not apply). *But see* Manley v. Dep't. of Children & Family Serv's., et. al., 01 CH 15589 (Cir. Ct. Cook County, May 22, 2003) (on file with author) (holding that the exclusion of an accusing child's testimony in the appeal of an indicated finding is violative of due process).

DCFS has not amended its practices in light of *Manley*. *See also*, Crawford v. Washington, 124 S. Ct. 1354, 1370 (2004) (holding that the confrontation clause is not a substantive guarantee that evidence used against a defendant be reliable, but that rather a procedural guarantee that allows a defendant to test the reliability of any statement through cross-examination).

⁴² *See* Roger C. Park Et. Al., Evidence Law 241 (1998) (stating that the purpose of the hearsay rule is to prevent the trier of fact from placing too much emphasis on a statement that has not been subject to cross-examination).

⁴³ *See, e.g.*, Stephen J. Ceci & Maggie Bruck, Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony 87-125 (1995) (discussing the effects of interviewer bias and repeated questioning); Hollida Wakefield & Ralph Underwager, Accusations of Child Sexual Abuse 103-04 (1988) (discussing recent studies that show young children are more suggestible than adults).