

12-2001

Final Report of the Committee to Review the Child Protective System

Maine State Legislature

Office of Policy and Legal Analysis

Margaret J. Reinsch

Maine State Legislature, Margaret.Reinsch@legislature.maine.gov

Follow this and additional works at: http://statedocs.maine.gov/opla_docs

Recommended Citation

Maine State Legislature; Office of Policy and Legal Analysis; and Reinsch, Margaret J., "Final Report of the Committee to Review the Child Protective System" (2001). *Office of Policy and Legal Analysis*. Paper 63.
http://statedocs.maine.gov/opla_docs/63

This Document is brought to you for free and open access by the Legislature Documents at Maine State Documents. It has been accepted for inclusion in Office of Policy and Legal Analysis by an authorized administrator of Maine State Documents. For more information, please contact GovDocs.MSL@maine.gov.

**STATE OF MAINE
120TH LEGISLATURE
FIRST REGULAR SESSION**

**Final Report
of the
Committee to Review the
Child Protective System**

December 2001

Members:

**Sen. Karl W. Turner, Senate Chair
Sen. Anne M. Rand
Rep. Charles C. LaVerdiere, House Chair
Rep. David R. Madore
Rep. Deborah L. Simpson
Louise Boisvert
Karen Boston
Maureen Dea
Maureen Dillane
Elinor Goldberg
Lisa Kittredge
Hon. Vendean V. Vafiades**

Staff:

**Margaret J. Reinsch, Esq.
Principal Analyst
Office of Policy & Legal Analysis
Maine Legislature
(207) 287-1670
www.state.me.us/legis/opla**

**Committee to Review the Child Protective System
Final Report**

Table of Contents

	Page
Executive Summary	i
I. INTRODUCTION	1
A. Background	1
B. Study process	2
II. THE MAINE CHILD PROTECTIVE SYSTEM	4
A. Purpose: To protect children	4
B. The child protective system process	5
III. ISSUES: DISCUSSION AND RECOMMENDATIONS	8
A. Information and resources for parents	10
B. Availability of information and timing of “discovery”	11
C. Accurate preservation of interviews	12
D. Intervenors and participation in the process	13
E. Openness of records and proceedings	15
F. Standards of proof	17
G. Guardians <i>ad litem</i>	22
H. Liability and accountability	24
I. Mandatory reporting laws	24
J. Other issues	25
1. Legal representation of parties	25
2. Timing of preliminary protection order hearing	26
3. Visitation after preliminary protection order	27
4. Use of hearsay and reports and other information	27
5. Compliance with the Indian Child Welfare Act (ICWA)	28
6. Relatives providing care	29
7. Oversight	30
8. Additional statutory changes	30
9. Availability of Department policies	37
10. Juveniles ordered into Department custody through the juvenile justice system	38

Appendices

- A. Authorizing Joint Order
- B. Membership list, Committee to Review the Child Protective System
- C. Legislation related to the child protective system introduced in the First Regular Session
- D. Invited speakers and presenters
- E. Child protective system flow chart
- F. Discovery Agreement Proposal

EXECUTIVE SUMMARY

The Committee to Review the Child Protective System was created by Joint Order, House Paper 1385 of First Regular Session of the 120th Maine Legislature. The study committee consists of 12 members. The President of the Senate appointed two State Senators, as well as an attorney representing parents, an advocate for children and a court-appointed special advocate (CASA) volunteer. The Speaker of the House of Representatives appointed three State Representatives, a foster parent and an attorney guardian ad litem. In addition, the Commissioner of Human Services appointed a caseworker supervisor, and the Chief Justice of the Maine Supreme Judicial Court appointed a District Court Judge. The first-appointed Senator and Representative served as the study committee's chairs.

The study committee met six times and benefited greatly from the generous provision of information and opinions from many professionals and advocates. The following are the study committee's recommendations to the Joint Standing Committee on Judiciary.

Information for parents. Recommendation: The study committee recommends that the State enter into a contract to provide assistance to parents seeking information about their rights and the child protective system. The information would be available from a private provider, selected through a competitive bidding process. The provider would make available advice and counsel without providing individual representation. The contract would be funded from existing resources within the Department of Human Services or the Judicial Department, or through other non-General Fund sources.

Discovery during a child protective case. Recommendation: Representatives from the Department of the Attorney General, The Maine Equal Justice Project and the Child Protective Subcommittee of the Family Law Section of the Maine State Bar Association jointly drafted a negotiated proposal on the timing and content of information shared by the Department of Human Services with attorneys representing parents in child protective proceedings. The study committee recommends that the Discovery Agreement Proposal be adopted and used. Because the Proposal governs civil practice in a court action, adopting the Proposal is within the jurisdiction of the Maine Civil Rules Committee, whose function it is to propose changes in the Maine Rules of Civil Procedure to the Supreme Judicial Court for final adoption. The study committee also recommends that there be sufficient personnel within the Department of Human Services and the Department of the Attorney General to carry out the Proposal. The intent is not to shift caseworkers from case work in order to comply with the information requirements, but to ensure information relevant to the case is complete and provided to the parents in a timely manner.

Recording of interviews. Recommendation: The study committee recommends:

- That the Department of Human Services be required to adopt major substantive rules that require audio recording of all planned interviews of children in child protective cases, to the extent such recording is possible; and
- That the law be amended immediately to make clear that the person being interviewed, including parents and foster parents, may record interviews.

Participation in proceedings. Recommendation: The study committee recommends that the laws concerning intervenors and the participation of nonparties be amended to provide access to the process to more individuals interested in the child's life by establishing a three-tiered system of interested parties.

- The first tier would consist of persons who demonstrate to the court that they have a substantial relationship with the child or a substantial interest in the child's well-being, based on the type, strength and duration of the relationship or interest. This first tier of individuals would be permitted to attend all court proceedings, but would not have the right to speak. The people who are involved in a child's life are thus given the opportunity to learn and understand what the circumstances of the child's life are, and they can be supportive to the child and the family.
- The second tier is a smaller category of the first tier, made up of certain persons who have a special relationship with the child, including grandparents, other relatives by blood or marriage, foster parents, preadoptive parents, and any person who provides or provided care for the child. The involvement in the process of persons in this category would need to be consistent with the best interests of the child. Those in the second tier would be given the opportunity to speak in court proceedings, although they would not have rights of a party (they would not be able to cross examine witnesses or call their own witnesses, or have access to records, for example). Giving interested parties the right to be heard, regardless of intervenor status, would eliminate the need – or the perceived need – to become an intervenor to achieve that goal.
- The third tier already exists, and at this level are those persons who apply for and are granted intervenor status. Intervenor status would be granted in a child protective case on the same grounds and in the same manner as in any other civil matter, with the addition that granting of intervenor status to the particular applicant must be in the best interests of the child and consistent with the purposes listed in 22 MRSA §4003. The current laws setting forth specific standards for granting intervenor status to grandparents and foster parents would be repealed and the general standards would apply to those persons.

Access to proceedings. Recommendation: The study committee recommends that proceedings should remain closed to the general public unless the court rules otherwise. However, the people who are interested in the child's life should have access to the proceedings, if only to observe the proceedings. (See the above recommendation.) The expanded access to the child protective

proceedings for the interested parties raises the issue of compliance with the confidentiality provisions of the child protective statutes. The study committee supports the clarification of contempt powers and remedies for a finding of contempt by the court if interested parties or participants violate the confidentiality of the proceedings.

Provider access to relevant records. Recommendation: The study committee recommends that the statute be amended to require the sharing of relevant but confidential records with service providers upon written request by the providers.

Standard of proof at jeopardy determination. Recommendation: The study committee was unable to reach consensus on whether to change the standard of proof for a finding of jeopardy. Six members supported leaving the standard to prove jeopardy at a preponderance of evidence; five members voted to increase the burden on the State to clear and convincing evidence.

Standard of proof at determination to cease reunification efforts. Recommendation: The study committee recommends that the statute be amended to require that the standard of proof for the State to prove that reunification efforts should cease should be clear and convincing evidence. The study committee also recommends that the hearing in which an order to cease reunification efforts is considered must be a full evidentiary hearing.

Guardians. Recommendation: The study committee recommends that the District Court and the CASA supervisors continue to enforce the guardian standards. The study committee also recommends that the Judiciary Committee begin looking at the availability of guardians, especially in less populated areas, and initiate a discussion about the appropriate expectations of a guardian's responsibilities.

Liability. Recommendation: The study committee recommends no changes in the laws governing liability of individuals, the Department or the State with regard to actions of caseworkers, their supervisors or the Department.

Mandatory reporting of child abuse and neglect. Recommendation: The study committee recommends no changes in the laws governing mandatory reporting of child abuse and neglect.

Representation of parents. Recommendation: The study committee recommends that the Supreme Judicial Court establish a pilot project, modeled on the criminal defense pilot project, under which the Judicial Department contracts with one or more private attorneys or law firms to provide legal representation of parents in child protective cases. The study committee also recommends that attorneys that do take child protective cases be paid for the work they do. If that means an adjustment or restructure of the caps on legal fees, then that should occur without any diminution in the reimbursement that is currently being paid.

Preliminary protection order hearing. Recommendation: The study committee recommends that the statute be amended to require that the hearing on the preliminary protection order be held no

less than seven days and no more than 14 days after the issuance of the preliminary protection order.

Visitation during preliminary protection order. Recommendation: The study committee recommends that the statute be amended to require that visitation between the child and the parents be scheduled within seven calendar days of the issuance of the preliminary protection order, unless there is a compelling reason not to do so.

Use of hearsay evidence. Recommendation: The study committee recommends that the statute be amended to clearly prohibit the use of hearsay evidence admitted in the preliminary protection hearing in subsequent proceedings. The study committee also recommends that the statute be amended to be consistent with the Law Court's pronouncement that the court is required to make "fresh findings" at the jeopardy stage (*In re Isaiah B.*, 1999 ME 174, 740 A.2d 988).

Child protective cases involving children of the Houlton Band of Maliseet Indians. Recommendation: representative Donna Loring (Penobscot Nation) is introducing a bill in the Second Regular Session that authorizes child protective cases involving children of the Houlton Band of Maliseet Indians to be held in the Penobscot Tribal Court. The study committee recommends that the Judiciary Committee give the bill and the underlying issues proper consideration. The study committee also recommends that the Health and Human Services Committee follow up with regard to licensing Native American foster homes and the criteria for therapeutic foster care as they relate to placement of children covered by the Indian Child Welfare Act.

Kinship care policies. Recommendation: The study committee recommends that the Department be required to ensure that the policy concerning care by and placement with relatives be in writing and uniformly implemented by the Department. The study committee also recommends that the Department report back to the Legislature with recommendations on how care by and placement with relatives will be increase, and how kinship visitation and placement options will be made known to all those interested.

Oversight. Recommendation: The study committee recommends that the Judiciary Committee continue active oversight over the legal and court aspects of the child protective system until the problems are rectified.

Permanency planning review. Recommendation: The study committee recommends that the statute be amended to no longer require further permanency planning hearings when a case needs no further review because specified circumstances exist and a permanent plan has been entered. (Title 22, section 4038)

Reunification when custody with a relative. Recommendation: The study committee recommends that the statute be amended to provide that the Department does not have an

obligation to pursue reunification if the permanency plan calls for custody with a relative and the court has ordered custody of the child to the relative. (Title 22, section 4041)

Representation in concurrent family matters case. Recommendation: The study committee recommends that the statute be amended to clarify that the parents' court-appointed counsel in the child protective case is permitted to assist the family in obtaining a family matters order in a concurrent family matters case, as long as the only major substantive issues in the family matter deal with custody and contact. (Title 22, section 4005)

Contents of petition. Recommendation: The study committee recommends that the statute governing the contents of a child protection petition be amended to include:

- A statement of the reasonable efforts made to prevent the need to remove the child from the home or to resolve jeopardy;
- The names of relatives who may be able to provide care; and
- The names of any relatives who are members of an American Indian tribe.

(Title 22, section 4032)

Preliminary protection orders. Recommendation: The study committee recommends that the statute governing preliminary protection orders be amended to clarify that a request for a preliminary protection order may be added to the petition or filed independently, and that the preliminary protection order expires after either a jeopardy order (under Title 22, section 4035) or a judicial review order (under Title 22, section 4038) is issued. (Title 22, section 4034)

Guardian ad litem's report. Recommendation: The study committee recommends that the statute be amended to clearly state that the report of the guardian *ad litem* may be admitted as evidence. In making findings, the court must state what information has been taken into evidence as used as the basis of findings. Findings may be based on a guardian's report only if the report is admitted into evidence. (Title 22, section 4005)

Finding of jeopardy as to both parents. Recommendation: The study committee recommends that the statute be amended to clarify that both parents must present jeopardy in order to find that the child is in circumstances of jeopardy. Such a finding with regard to the custodial parent alone is insufficient to support an order of custody to the Department. (Title 22, section 4035)

Domestic or family violence counseling privilege. Recommendation: The law governing evidentiary privileges currently provides that confidential communications with a domestic or family violence advocate may be revealed consistent with the child welfare services law (Title 16, section 53-B). The study committee recommends that the statute governing the abrogation of privileges in relation to child protection activities be amended to include an acknowledgement of the abrogation of the domestic violence counseling privilege. (Title 22, section 4015)

Criminal liability. Recommendation: The study committee recommends that the statute be amended to completely prohibit the use of statements made by a parent, against whom criminal

charges are pending, to a mental health professional seen to reunify with the child. (Title 22, section 4015)

Aggravating circumstances. Recommendation. The study committee recommends that the definition of “aggravating factor” be amended to cover any child for whom the parent was responsible and who was subjected to aggravating circumstances. (Title 22, section 4002)

Availability of Department policies. Recommendation. The study committee recommends that the Department ensure that all policies governing the Department’s procedures are in writing and are generally available to the public. Posting policies on the Department’s website would be an acceptable form of providing the information.

Juveniles ordered into Department custody through the juvenile justice system.

Recommendation. The study committee recommends that the Judiciary Committee support the principles contained in LD 1701, An Act to Clarify Parental Rights and Responsibilities When Children are Placed in the Custody of the Department of Human Services as a Result of Court Proceedings Governed by the Maine Juvenile Code. Ld 1701 was introduced in the First Regular Session and referred to the Joint Standing Committee on Criminal Justice. The Criminal Justice Committee voted Ought Not To Pass, based on the reviews of the child protective system to be undertaken by the study committee and the Health and Human Services Committee.

I. INTRODUCTION

A. Background

The Committee to Review the Child Protective System was created by the 120th Maine Legislature at the end of the First Regular Session by Joint Order, House Paper 1385. The Joint Order is included as Appendix A. The Joint Order was virtually identical to a resolve (LD 1793) reported out by the Joint Standing Committee on Judiciary in response to the 14 bills related to child abuse and neglect and the child protective system the Judiciary Committee heard and worked during the session. A summary of those bills is included as Appendix C.

The bills, proposed in late 2000, raised several issues about the legal and court aspects of Maine's child protective system. Before most of the proposed legislation was even officially printed for consideration, a child in the custody of the Department of Human Services died while in a temporary foster home. Although none of the bills were introduced because of this tragic death, support for a review of the State's child protective system was evident as the Judiciary Committee heard and worked the bills. The Judiciary Committee quickly decided that a piecemeal approach was inappropriate, and considered the option of a more comprehensive study during the interim between the First and Second Regular Sessions of the Legislature.

The Judiciary Committee shares jurisdiction over the child protective system with the Joint Standing Committee on Health and Human Services. The latter committee has general oversight of the Department of Human Services and considers issues concerning the performance of the Department, services and providers, personnel and the foster care system overall. The Judiciary Committee's jurisdiction traditionally embraces the legal and court aspects of the child protective system, including: the rights of parents; court proceedings; burdens of proof; evidence; the role of guardians *ad litem*; and some public access/confidentiality issues. The two joint standing committees agreed that reviews were not only appropriate, but also necessary, and recommended

two different ways to cover the issues. The Health and Human Services Committee decided to conduct its own review as a joint standing committee during the interim, focusing on the traditional issues within its jurisdiction. The Judiciary Committee recommended the creation of a study committee, made up of five legislators and several persons with particular expertise and experience appropriate to an in-depth study of the legal and court issues being presented.

The Judiciary Committee voted to reject the bills pending in committee in favor of combining all the issues into one comprehensive study on the legal and court aspects of the child protective system. Pursuant to Joint Order, HP 1303, the Judiciary Committee reported out a resolve, LD 1793, creating a study committee. Joint Order, HP 1385, which established the Committee to Review the Child Protective System with the same membership as proposed by LD 1793, replaced the resolve.

B. Study process

The Committee to Review the Child Protective System, referred to in this report as the “study committee,” consists of 12 members. The President of the Senate appointed two State Senators, as well as an attorney representing parents in child protective cases, an advocate for children and a volunteer from the court-appointed special advocate (CASA) program. The Speaker of the House of Representatives appointed three State Representatives, a foster parent and an attorney representing guardians *ad litem*. In addition, the Commissioner of Human Services appointed a caseworker supervisor, and the Chief Justice of the Maine Supreme Judicial Court appointed a District Court Judge. The first-appointed Senator and Representative served as the study committee’s chairs.

The study committee met six times. The organizational meeting was held August 21, 2001 in the State House in Augusta. The members agreed with the chairs' proposal concerning focusing on the issues, and scheduled the next three meetings accordingly.

The meeting held on September 10th was devoted to a comprehensive overview of the child protective system, and a discussion of the standard of proof required at each proceeding in the child protective system. A national advocate for reform of child protection laws spoke, as did several Maine attorneys. The attorneys discussed the practice of child protective law and made suggestions for improvements. The study committee received the Report of the Survey of Private Practice Attorneys Involved with Maine's Child Protective System, completed by the Maine Equal Justice Project and the Maine Civil Liberties Union. The study committee also discussed the timing of the first hearing after a preliminary protection order has been issued.

The study committee's second substantive meeting was held on October 1, 2001. Speakers compared and contrasted the operation of Maine law with the Indian Child Welfare Act. The study committee heard testimony from attorneys about representing parents in the child protective process, and about the role and practical aspects of being a guardian *ad litem*. Finally, the study committee heard from advocates interested in allowing more people involved in the child's life to participate in the process. This discussion initially centered on expanding the number of person who may be eligible to intervene.

The study committee met on October 22nd and heard presentations focused on access to proceedings and records and privacy rights. Practices in other states were highlighted and the interests of different parties were examined and weighed. In addition, the study committee discussed the availability of information for parents, including legal advice, at early stages of involvement with the Department of Human Services.

The study committee held a public hearing on November 5th, seeking testimony on people's experiences in court in child protective proceedings. The public hearing was well attended, and parents, attorneys, foster parents, tribal members and advocates provided their comments and suggestions for change.

The study committee held its final meeting on December 3, 2001 to complete its recommendations, which are contained in this report.

Appendix D contains a list of all the invited speakers who generously gave their time and shared their expertise with the study committee.

II. THE MAINE CHILD PROTECTIVE SYSTEM

A. Purpose: To protect children

[T]he health and safety of children must be of paramount concern and . . . the right to family integrity is limited by the right of children to be protected from abuse and neglect . . .

So begins the statutory section on the purposes of The Child and Family Services and Child Protection Act (Title 22, MRSA chapter 1071; §4003). Although the central focus of the Act is the safety of children, the law directs a continuing exercise in the art of balancing the State's interest in protecting children with the rights of the parents to family integrity. The chapter covers the responsibilities of the Department of Human Services (the Department) in protecting and assisting children and their families, limiting the removal of children from their parents only where failure to do so would jeopardize their health or welfare, classifying as a high priority the rehabilitation and reunification of families without delaying permanency for children

when reunification is not possible, and establishing permanent plans for children who cannot be returned to their families. It also outlines the procedures that must be followed, who can participate in the process and basic rights of the parents.

In many situations, balancing the facts points in the direction of keeping the child in the home as serving both the child's best interests and honoring the parents' rights. In fact, the Department estimates that only 15% of cases proceed to court; the families in the remaining 85% are able to improve the child's situation or work out arrangements with the Department to keep the case from needing resolution by a judge.

This study is focused on the cases in which it is determined that at some point what is in the child's best interests does not also support the parents' interest in keeping the family together; these are the cases that go to court. Although there are a significant number of such cases that are not contested and the parties are able to agree to a progression of services and contact, the remaining cases are contested and engender anguish, confusion and anger within the family and often distrust of the State as well as publicity in the community.

B. The child protective system process

To understand how the balancing process works, the child protective system must be examined at each point at which a determination is made. The following is a skeletal outline of the process. Appendix E contains a basic flow chart of the process.

A child's and family's first contact with the court system in a child protective case begins when a child protective petition is filed in court. The petition must be filed in District Court, unless there is an emergency situation and the petition includes a request for a preliminary protection order, in which case the petition may be filed in the District Court, Superior Court or

Probate Court. After ruling on a request for a preliminary protection order, the Superior Court and the Probate Court must transfer the matter to the District Court.

The child protection petition may be brought by the Department of Human Services by an authorized agent, by a police officer or sheriff or by a group of three or more persons. The petition must allege that the child is in circumstances of jeopardy to the child's health or welfare. The petition must be served on the parents of the child and, if the Department is not the petitioner, on the Department as well. The court shall schedule a hearing on the petition, for which there must be at least 10 day's notice. This hearing is called a "jeopardy hearing" and is a full evidentiary hearing.

If the petitioner believes that there is an immediate risk of harm to the child, the petition may include a request for a preliminary protection order. Such a petition must include facts that show that such a risk exists. Although the parents are to receive notice of when and where the petitioner plans to request the preliminary protection order, such notice is not required if the petitioner includes a sworn statement of the petitioner's belief that either the child would suffer serious harm during the time needed to notify the parents or custodians, or prior notice to the parents or custodians would increase the risk of serious harm to the child. In many cases, the request for the preliminary protection order is made in an *ex parte* proceeding before an available judge without the parents present. If the court finds by a preponderance of the evidence that there is an immediate risk of serious harm to the child, it may issue a preliminary protection order that may include any statutorily authorized disposition, including removal of the child from the home and granting custody to another person or the Department. Whenever a petition is filed, the court assigns an attorney for each parent and appoints a guardian *ad litem* for the child. The court provides that information, as well as the date, time and location of the summary preliminary hearing, with the copy of the order that is then served on the parents.

The summary preliminary hearing must be held within 10 days of the issuance of the preliminary protection order. The hearing is summary in nature, and the court may limit testimony and may admit hearsay evidence. If the court finds by a preponderance of the evidence that returning the child to the child's custodian would place the child in immediate risk of serious harm, the court may continue or amend the existing order. The next court event in the case is the jeopardy hearing.

The jeopardy hearing is a full evidentiary hearing and hearsay is not admissible. Whether this is the first court hearing in the case, or the case was initiated through a preliminary protection order, the court must determine, by a preponderance of the evidence, whether the child is in circumstances of jeopardy to the child's health or welfare. If the court does find that the child is in circumstances of jeopardy to the child's health or welfare, the court hears evidence and makes a determination about the disposition. The court must issue the jeopardy order within 120 days of the filing of the child protection petition.

The statute requires that a court that has entered a jeopardy order shall review the case at least once every six months, unless the child is emancipated or adopted. At the judicial review hearing, the court hears evidence and considers the original reason for the adjudication and disposition (the jeopardy order), the events that have occurred since the order, the efforts of the parents, and the effect of a change in custody on the child. The court may make any further order, based on the preponderance of the evidence.

Within 12 months of the date the child is considered to have entered foster care, the court shall conduct a permanency planning hearing and shall determine a permanency plan. This must occur every 12 months until the child is returned home, adopted or emancipated.

While the child is in foster care, the Department is responsible for developing a rehabilitation and reunification plan and the parents are responsible for rectifying and resolving

problems which prevent the return of the child to the home, and must take part in a reasonable rehabilitation and reunification plan. The Department is charged with not only working with the parents in good faith, but also petitioning for judicial review and return of custody of the child to the child's parents at the earliest appropriate time.

The Department is required to file a petition to terminate parental rights if a court order includes a finding of an aggravating factor and an order to cease reunification, or if the child has been in foster care for 15 of the most recent 22 months. The Department is not required to seek the termination of parental rights if: (1) the Department is required to undertake reunification efforts and the Department has not provided to the family of the child such services as the Department determines to be necessary for the safe return of the child to the child's home consistent with the time period in the case plan; (2) the Department has chosen to have the child cared for by a relative; or (3) the Department has documented to the court a compelling reason for determining that filing a termination petition would not be in the best interests of the child.

The petition for termination of parental rights and notice of the hearing on the petition must be served on the parents and the guardian *ad litem* at least 10 days prior to the hearing. The court may order termination of parental rights if the parent consents to the termination or the court finds by clear and convincing evidence that termination is in the best interests of the child and that the parent is: (1) unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time which is reasonably calculated to meet the child's needs; (2) the parent has been unwilling or unable to take responsibility for the child within a time which is reasonably calculated to meet the child's needs; (3) the child has been abandoned; or (4) the parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to the rehabilitation and reunification plan. Pursuant to recent case law, in a proceeding to terminate parental rights, the court must first find that the parents are unfit before considering the question of whether the termination is in the best interests of the child. In re Michelle W., 2001 ME 123 (July 25, 2001).

III. ISSUES: DISCUSSION AND RECOMMENDATIONS

The Joint Order that created the Committee to Review the Child Protective System required the study committee to examine the following issues:

- Information about rights and future proceedings that should be given to parents at every stage of the child protective process;
- The availability of information in the possession of the Department of Human Services to parents and their attorneys, and the timing and extent of discovery;
- The accurate preservation of interviews involving employees of the Department of Human Services, communications with employees of the Department of Human Services and communications involving parents, including the reliability of the preservation and appropriate use of the communications;
- The appropriate role of intervenors; who, if anyone, should have automatic intervenor status; who should be permitted to apply for intervenor status; and what criteria the court should use in determining whether to grant intervenor status;
- The determination of the best interest of the child, while balancing the child's safety and privacy interests with the public's interest in openness in governmental actions and records, particularly with regard to termination of parental rights hearings;
- The appropriate standard of proof that the State must bear at each stage of child protection proceedings;

- The role of and requirements that apply to guardians *ad litem* and the extent to which guardians *ad litem* are fulfilling their responsibilities;
- The liability of the State, the Department of Human Services and employees of the Department of Human Services, either as a governmental entity or personally, for removal of children from their homes or other actions when such actions are overturned by the court as erroneous or unnecessary;
- The mandatory reporting laws concerning child and adult abuse and neglect; the consequences of failing to report; and the State's role in educating the public about reporting child abuse and neglect; and
- Any other issues the committee determines appropriate.

A. Information and resources for parents

When parents are first contacted by the Department of Human Services about a child abuse or neglect allegation, they may not understand the implications of the allegation, the responsibility and authority of the Department to investigate, the procedures the Department employs in investigating allegations of abuse and neglect, the potential consequences of cooperating or not cooperating with the investigation, the child protective process, and their rights throughout that process. The Department provides a booklet, recently updated, that explains many of these topics. The booklet is provided to the parents upon the first contact by the Department. Although parents are not prohibited from engaging their own attorney at this phase of the Department's action, there is no authorization for a court-appointed attorney until a child protection petition is filed.

Discussion: The study committee discussed the advantages and disadvantages of making legal advice available to parents prior to the filing of a petition. Such advice may be useful in that parents would understand the serious nature of the allegations, the complexity and grave consequences of the child protective process, and the need to make changes to avoid ending up in court. On the other hand, introduction of counsel in the early stages of an investigation may thwart the Department's ability to identify, evaluate and protect children who truly need protection, if the attorneys advise the parents to not cooperate with the Department.

Recommendation: The study committee recommends that the State enter into a contract to provide assistance to parents seeking information about their rights and the child protective system. The information would be available from a private provider, selected through a competitive bidding process. The provider would make available advice and counsel without providing individual representation. The contract would be funded from existing resources within the Department of Human Services or the Judicial Department, or through other non-General Fund sources.

B. Availability of information and timing of “discovery”

Parents and their attorneys need to understand the elements of the child abuse or neglect allegations and the supporting and exculpatory evidence the State has collected in order to put on a credible defense and allow the court to have accurate information on which to base its determinations. Many complaints have been made about the availability of the information and the timing of when it is provided. The Department's practice is to maintain “open files,” allowing the parents and their attorneys access to the file at the Department's office during regular business hours. The file that is maintained often does not include all the caseworker notes to date. The Department may provide the information the day of the hearing; without the opportunity to

review the file earlier, the parents' ability to argue their case is greatly diminished. Because the court process has been speeded up, the timely sharing of information that is and should be in the file is critical.

Discussion: The “open file” practice is often inconvenient at best, and extremely difficult for attorneys who live and work far from the Department office and are therefore spending more time traveling to and from the Department office than actually reviewing the file's contents. In addition, the file is constantly changing: new information, including important evaluations and caseworker notes, comes into the file throughout the course of the Department's involvement. The Department of the Attorney General, the Maine Civil Liberties Union, the Maine Equal Justice Partners, Inc. and the Child Protective Subcommittee of the Family Law Section of the Maine State Bar Association identified the issue of discovery in child protective cases as extremely serious and spent countless hours trying to find middle ground. A negotiated agreement was reached, contingent on the provision of certain resources and a few other conditions. The draft of that agreement is included as Appendix F. Many attorneys believe that adoption of the Proposal will go a long way toward addressing complaints about the process.

Recommendation: The study committee recommends that the Discovery Agreement Proposal be adopted and used. Because the Proposal governs civil practice in a court action, adopting the Proposal is within the jurisdiction of the Maine Civil Rules Committee, whose function it is to propose changes in the Maine Rules of Civil Procedure to the Supreme Judicial Court for final adoption. The study committee also recommends that there be sufficient personnel within the Department of Human Services and the Department of the Attorney General to carry out the Proposal. The intent is not to shift caseworkers from case work in order to comply with the information requirements, but to ensure information is complete and provided to the parents in a timely manner.

C. Accurate preservation of interviews

Current law does not require the audio or audio-video recording of interviews or other questioning by caseworkers, police officers or other investigators. Written notes or other records entered contemporaneously with the questioning are also not required. Later recollections of discussions and interviews by caseworkers are often challenged by parents on the basis that comments are being taken out of context or are simply inaccurate.

LD 745 proposed to prohibit the use of information collected in an interview with a child if the interview was not audio recorded unless the judge determines that exigent circumstances exist to warrant the use of the information.

Discussion: Parents have no way to challenge statements alleged to have been made by their children, and caseworkers have no objective record to support their assertions about the communications that took place. Some parents have apparently been told that taping interviews is against Department policy, although no such policy exists.

Recommendation: The study committee recommends:

- That the Department of Human Services be required to adopt major substantive rules that require audio recording of all planned interviews of children in child protective cases, to the extent such recording is possible;
- That the law be amended immediately to make clear that the person being interviewed, including parents and foster parents, may record interviews; and
- That evidence should not be excluded solely because it has not been recorded.

D. Intervenors and participation in the process

Foster parents and grandparents are given the right to petition the court for standing and intervenor status in child protection proceedings. The standing and intervenor status is limited to that proceeding unless otherwise ordered by the court. Once granted intervenor status, the foster parent or grandparent has the ability to act as a party for the duration of the court order. An intervenor may call witnesses, introduce evidence, cross-examine other parties' witnesses and make motions. The statute does not, however, entitle an intervenor to court-appointed counsel, although an intervenor is free to engage private counsel.

Bills introduced in the First Regular Session of the 120th Legislature proposed allowing godparents to petition for intervenor status, giving foster parents automatic intervenor status and giving long-term foster parents the right to intervene in any proceeding in which parental rights have been terminated.

Current law requires that foster parents, preadoptive parents and relatives providing care be provided notice of their right to be heard in any review or hearing to be held with respect to the child. The right to be heard includes the right to testify but does not include the right to present other witnesses or evidence, to attend any other portion of the review or hearing or to have access to pleadings or records.

LD 1609 proposed that the court or guardian *ad litem* be authorized to convene a conference of the child's relatives who have a potential interest in determining a placement that is in the best interests of the child.

Testimony was provided that there are often many people involved in a child's life who should be allowed to participate, if only to a limited extent, to allow the court to understand the whole context of the child's life and the availability of support and beneficial influences.

Discussion: Extending the opportunity for more intervenors may introduce more complexity in cases that by their very nature are not simple, and allowing individuals to become parties may raise additional questions as to whose interests the intervenors represent. Not including in the process individuals who play significant beneficial roles in a child's life also poses questions as to how the best interests of the child can be determined.

Recommendation: The study committee recommends that the laws concerning intervenors and the participation of nonparties be amended to provide access to the process to more individuals interested in the child's life by establishing a three-tiered system of interested parties.

- The first tier would consist of persons who demonstrate to the court that they have a substantial relationship with the child or a substantial interest in the child's well-being, based on the type, strength and duration of the relationship or interest. This first tier of individuals would be permitted to attend all court proceedings, but would not have the right to speak. The people who are involved in a child's life are thus given the opportunity to learn and understand what the circumstances of the child's life are, and they can be supportive to the child and the family.
- The second tier is a smaller category of the first tier, made up of certain persons who have a special relationship with the child, including grandparents, other relatives by blood or marriage, foster parents, preadoptive parents, and any person who provided or currently provides care for the child. The involvement in the process of persons in this category would need to be consistent with the best interests of the child. Those in the second tier would be given the opportunity to speak in court proceedings, although they would not have rights of a party (they would not be able to cross examine witnesses or call their own witnesses, or have access to records, for example). Giving interested parties the right to be heard under this tier, regardless of intervenor status, would eliminate the need – or the perceived need – to become an intervenor to achieve that goal.

- The third tier already exists, and at this level are those persons who apply for and are granted intervenor status. Intervenor status would be granted in a child protective case on the same grounds and in the same manner as in any other civil matter, with the addition that granting of intervenor status to the particular applicant must be in the best interests of the child and consistent with the purposes of the child protective laws listed in 22 MRSA §4003. The current laws setting forth specific standards for granting intervenor status to grandparents and foster parents would be repealed and the general standards would apply to those persons.

E. Openness of records and proceedings

Federal law imposes restrictions on the release of child protective records and information contained in those records. Because of those federal confidentiality restrictions, states are not free to open all proceedings and records to the public. Some states have applied for waivers from the federal government to allow open hearings without the threat of sanctions.

Maine proceedings are considered “presumptively closed:” the law specifies that all child protective proceedings must be closed, unless otherwise ordered by the court. In addition, there are stringent restrictions on the sharing or release by the State of most information collected or maintained by the Department.

LD 1074 proposed that all hearings on the termination of parental rights be open. LD 1609 proposed that all records and proceedings be open unless the court, for good reason, orders that they be closed.

Discussion: Cloaking child protective proceedings with secrecy does not serve to educate the public. On the other hand, child protective proceedings often include intimate details that are traumatic to a child when revealed, especially in a public proceeding.

Recommendation: The study committee recommends that proceedings should remain closed to the general public unless the court rules otherwise. However, as recommended under Part D above, the people who are interested in the child's life should have access to the proceedings, if only to observe the proceedings. The expanded access to the child protective proceedings for the interested parties raises the issue of compliance with the confidentiality provisions of the child protective statutes. The study committee supports the clarification of contempt powers and remedies for a finding of contempt by the court if interested parties or participants violate the confidentiality of the proceedings.

Discussion: Some providers of services to the families and the children involved in child protective cases are finding it difficult to access relevant records that would help with diagnosis and treatment. Current law does not require the sharing of those records.

Recommendation: The study committee recommends that the statute be amended to require the sharing of relevant but confidential records with providers upon written request by the providers.

F. Standards of proof

The standard of proof at any point in any case, civil or criminal, should be an accurate reflection of the allocation of the risk of harm from an erroneous result on each party. The more serious and long-lasting the erroneous result is to the parties, the higher the standard of proof. Thus, in criminal cases in which the risk to an innocent defendant of being erroneously found

guilty and deprived of liberty is considered much greater than the State's risk of a guilty defendant being erroneously acquitted, the State has the highest burden of proof of all: to prove the defendant guilty beyond a reasonable doubt.

At each point in the child protective process when the court must make a determination about the best interests of the child, one of the parties has the burden of convincing the judge that their explanation of the facts is accurate. That burden generally falls on the State. And at all steps in the process, except for termination of parental rights, the level of proof that is necessary is the preponderance of the evidence.

1. Request for a preliminary protection order

If the court finds by a preponderance of the evidence that there is an immediate risk of serious harm to the child, the court may order any authorized disposition. The most serious disposition is, of course, removal of the child from the custody of the parents. The evidence the judge may consider is the sworn summary of facts submitted by the petitioner to support the request for the preliminary protection order or evidence that is "otherwise" presented. Most requests for preliminary protection orders are made *ex parte*, so the only evidence the court has before it is that which the petitioner has presented.

Discussion: The risk of harm to the parents from an erroneous result is that their child will be removed for some period of time. The risk of harm to the State (representing the child's best interests) of an erroneous result means the child would continue to stay in a dangerous place.

Recommendation: The study committee recommends no change.

2. Preliminary protection order hearing

A summary hearing is scheduled within 10 days of the issuance of a preliminary protection order. At this hearing, the parents may challenge the removal of their child under the preliminary protection order. The State has the burden of proving by the preponderance of the evidence that returning the child would place the child in immediate risk of serious harm.

Discussion: The risks of harm from an erroneous result are basically the same as for the issuance of the preliminary protection order: The risk of harm to the parents from an erroneous result is that their child will be removed for some period of time. The risk of harm to the State of an erroneous result means the child would continue to stay in a dangerous place.

Recommendation: The study committee recommends no change.

3. Jeopardy order hearing

The jeopardy hearing is a full evidentiary hearing and the rules of civil procedure apply. Current law requires that the State must prove that the child is in circumstances of jeopardy by a preponderance of the evidence.

Discussion: For the jeopardy hearing, the State has more time to collect and verify evidence and develop the case. Requiring that the state prove that the child is in circumstances of jeopardy by clear and convincing evidence means that the State would be required to show that it is highly

probable that the child is in circumstances of jeopardy (In re Charles G., 2001 ME 3, 763 A.2d 1163, 1166 (2001)). Members of the study committee mentioned concern about cases that “fall into the crease” just beyond a preponderance of the evidence, resulting in ripping families apart. A jeopardy order has lasting consequences; it is a significant step in a process that can lead to the termination of parental rights. Some members believe that such a significant loss of rights of parents warrants using a higher standard than would be used in an ordinary civil trial. Other members noted that they have not seen any hard data about families being “ripped apart” erroneously, and believe that the safety of the child is protected better by a preponderance standard. If the State cannot meet the higher standard of proof at the jeopardy stage, then it is possible that the services being provided to the family would cease.

Recommendation: The study committee was unable to reach consensus on whether to change the standard of proof for a finding of jeopardy. Six members supported leaving the standard at a preponderance of evidence; five members voted to increase the burden on the State to prove jeopardy by clear and convincing evidence.

4. Judicial review of permanency plan

Current law requires that if parents want to make changes in the permanency plan prepared by the Department, the parents must prove the appropriateness of that change by a preponderance of the evidence.

Discussion: The statute requires the court to conduct a permanency planning hearing to determine the permanency plan for the child within 12 months of the time the child is considered

to have entered foster care and every 12 months thereafter. The permanency plan must contain certain elements, including whether the child will be returned to the parent, placed for adoption, referred for legal guardianship or placed in another planned permanent living arrangement. The court must consider, but is not bound by, the wishes of the child in making a determination if the child is 12 years of age or older.

Recommendation: The study committee recommends no change.

5. Cease reunification efforts

Current law requires that the court's decision to order the Department to cease reunification efforts be based on the preponderance of the evidence. The court must find that an "aggravating factor" exists, or that continuation of reunification efforts is inconsistent with the permanency plan for the child.

Discussion: An order to cease reunification efforts is tantamount to terminating parental rights. Parents who have lost at the cease reunification stage will have a difficult time proving that parental rights should not be terminated, even though the State has a higher burden at the termination stage.

Recommendation: The study committee recommends that the statute be amended to require that the State prove that reunification efforts should cease by clear and convincing evidence. The study committee also recommends that the hearing in which an order to cease reunification efforts is considered must be a full evidentiary hearing.

6. Termination of parental rights

Termination of a person's parental rights can be the ultimate of consequences; it is often expressed that a person would rather go to jail than have his or her parental rights terminated. Current law allows the court to terminate parental rights involuntarily only after it has found that:

- Termination is in the best interest of the child; and
- The parent is unfit. Parental unfitness is shown when:
 - (1) The parent is unwilling or unable to protect the child from jeopardy and these circumstances are unlikely to change within a time that is reasonably calculated to meet the child's needs;
 - (2) The parent has been unwilling or unable to take responsibility for the child within a time that is reasonably calculated to meet the child's needs;
 - (3) The child has been abandoned; or
 - (4) The parent has failed to make a good faith effort to rehabilitate and reunify with the child pursuant to the rehabilitation and reunification plan.

The applicable standard of proof at the termination of parental rights (TPR) stage is clear and convincing evidence. This is established by statute, and support by Maine Law Court and United States Supreme Court decisions.

Discussion: Because of the severity of the result of a TPR action -- the permanent extinguishment of a parent's legal rights related to a child -- the State's burden of proof is greater than preponderance of the evidence. The Indian Child Welfare Act (ICWA) requires that the termination of parental rights be proved beyond a reasonable doubt; all the states have adopted by statute or through case law the clear and convincing evidence standard in non-ICWA cases.

Elizabeth Stout, Esq., Assistant Attorney General, did an informal survey of State attorneys handling child protective cases to determine their thoughts about the effect of changing the TPR standard of proof from clear and convincing evidence to beyond a reasonable doubt. The

responses estimated that the change would probably not affect the outcome in 50-80% of the cases. The attorneys cautioned, however, that a beyond a reasonable doubt standard does not work well with findings concerning rehabilitation probability and what is in the best interests of the child. Assistant Attorney Stout predicted that, if the standard of proof were raised to beyond a reasonable doubt, there would be significantly more children in long-term foster care than under the current statutory structure.

Recommendation: The study committee recommends no change.

G. Guardians *ad litem*

One of the first things a judge does when a child protection petition is filed is appoint for the child a guardian *ad litem* (GAL) from either the roster of certified GALs or a volunteer guardian from the Court Appointed Special Advocate (CASA) program. This GAL or CASA works for the court to advise the court as to what is in the best interests of the child. The GAL or CASA does not represent the child in the sense that an attorney represents a client and advocates for what the client wants. The GAL or CASA takes into account what the child wants, and may report the child's desires, but the GAL or CASA must give a professional opinion as to what he or she believes is in the best interests of the child.

The Chief Judge of the District Court maintains a roster of attorneys, mental health professionals and others who meet the professional and training requirements to serve as guardians *ad litem*. Statutes and court rules govern the responsibilities of guardians and the District Court has established a complaint process if a person believes a GAL has not complied with those responsibilities. There is no actual supervision of GALs, other than by the presiding judge or through the complaint process. As of October 1, 2001, there were 139 rostered guardians *ad litem*.

The Court Appointed Special Advocates serve the same function as GALs, but are set up differently. The CASA program currently has one director and two part-time regional directors to oversee 122 CASAs. They are rigorously screened and undergo a three-day training program.

Discussion: Complaints have been made that some guardians are not fulfilling their responsibilities with regard to visiting the children and understanding their lives in order to accurately determine what is in each child's best interest. LD 836 and LD 1609 both proposed giving foster parents a greater opportunity to intervene, which is necessary, some assert, to represent the best interests of the child to the court because some guardians are not acting in the children's best interests.

District Court Chief Judge Levy agreed to follow up on the concerns. He has sent letters to all rostered GALs reminding them of their responsibilities, including face-to-face visits with each child. He is also directing judges to inquire at each hearing and case management conference whether guardians are complying with the requirements.

Recommendation: The study committee recommends that the District Court and the CASA supervisors continue to enforce the guardian standards. The study committee also recommends that the Judiciary Committee begin looking at the availability of guardians, especially in less populated areas, and to initiate a discussion about the appropriate expectations of what a guardian should be doing in that role.

H. Liability and accountability

Questions have been raised all across the country as to how to ensure that child protection systems are accountable to the society they are established to serve. Some jurisdictions have

opened proceedings to the public in order to allow public review of not only the court's actions but also the actions, or nonactions, of child protective personnel as brought out in court hearings. LD 955 proposed a different approach: holding a Department employee personally responsible for attorney's fees and costs if a child is removed erroneously from the family.

Discussion: Although some caseworkers appear to be able to handle the pressures and requirements of their jobs better than others, there is no hard evidence that children are removed from their homes because caseworkers are not acting in good faith. Smaller caseloads and better support, issues appropriately before the Health and Human Services Committee, may help to resolve some of the concerns. Threatening caseworkers and other Department employees with personal liability may result in less protection of children: such threats may have a chilling effect on professional judgment in the field, which should be focused on the primary objective of protecting the child. In addition, it can have significant effects on recruitment and retention of qualified caseworkers.

Recommendation: The study committee recommends no changes.

I. Mandatory reporting laws

The issue of who should be required to report suspected abuse and neglect was raised by the beating death of a 21-month old New Hampshire girl who was cared for in the home of her mother's sister in Maine. No mandatory reporting law applied in Maine at the time; it was alleged that the child was brought to Maine for childcare to avoid New Hampshire's mandatory reporting law. Public Law 2001, chapter 345 (LD 1066) expanded this State's requirements, and those who have assumed full, intermittent or occasional responsibility for the care or custody of the child, whether or not they receive compensation, now must report suspected abuse and neglect. In addition, Public Law 2001, chapter 429 (LD 1764, acted upon by the Joint Standing

Committee on Criminal Justice) expanded the crime of endangering the welfare of a child to authorize criminal sanctions against a person responsible for the long-term general care and welfare of a child less than 16 years of age who is aware of abuse and does not take reasonable measures to protect the child.

Discussion: The list of mandatory reporters is long and inclusive.

Recommendation: The study committee recommends no changes.

J. Other issues

1. Legal representation of parties

The representation of parents in child protective proceedings is undertaken by too small a group of attorneys. Some of these attorneys are new to the practice of law, and are willing to take court-appointed cases to learn the practice of law and pay their bills. Although these new attorneys can be enthusiastic and represent their clients to their best ability, they are nonetheless not as experienced and may not provide the best representation. (Some attorneys noted that the confidentiality laws preclude sitting in on child protective proceedings to watch how the veteran attorneys handle cases.) Many attorneys, as their experience grows, have determined that they can agree to take few or no child protective cases, because such cases preclude them from devoting their time to other cases: child protective cases can require enormous time commitments and the commitments can continue for years (sometimes lasting until the child turns 18 years old). The costs involved in handling these cases are rarely adequately covered by the \$50/hour reimbursement currently paid by the courts. There is a small, dedicated corps of attorneys that have devoted their legal practices to almost exclusively representing parents or serving as

guardians *ad litem* in child protective cases. Without these attorneys, the system could not function.

Discussion: While the study committee appreciates the work that all the attorneys do on behalf of parents, the committee recognizes the fact that sufficient representation is not available for parents.

Recommendation: The study committee recommends that the Supreme Judicial Court establish a pilot project, modeled on the criminal defense pilot project, under which the Judicial Department contracts with one or more private attorneys or law firms to provide legal representation of parents in child protective cases. The study committee also recommends that attorneys that do take child protective cases be paid for the work they do. If that means an adjustment or restructuring of the caps on legal fees, then that should occur without any diminution in the reimbursement that is currently being paid.

2. Timing of preliminary protection order hearing

Current law requires that a summary hearing be held within 10 days of the issuance of the preliminary protection order.

Discussion: In some situations, the order may be issued on a Friday, with immediate removal of the child, and the hearing is set for Monday. Although parents may be impatient and wish to be reunited with their children as soon as possible, they also want to be able, with their attorney, to present a good and effective case against removal of the child.

Recommendation: The study committee recommends that the statute be amended to require that the hearing on the preliminary protection order be held no less than 7 days and no more than 14 days after the issuance of the preliminary protection order.

3. Visitation after preliminary protection order

When a preliminary protection order is issued, a child may be taken into Department custody before the parents are aware of such removal. The parents may not see the child for days or weeks. In almost all cases, such separation is traumatic for the child, and may not be in the child's best interests.

Discussion: In order to continue contact between the parents and the child while maintaining the child in a safe place, it is possible to provide for supervised visitation. Some foster parents are more than willing to arrange such visits. There are cases in which maintaining such contact would be inappropriate. Cases involving sexual or severe physical abuse would most likely fall into that category.

Recommendation: The study committee recommends that the statute be amended to require that visitation between the child and the parents be scheduled within seven calendar days of the issuance of the preliminary protection order, unless there is a compelling reason not to do so.

4. Use of hearsay and reports and other information

Current law authorizes the court to admit certain hearsay and other information at summary proceedings. The preliminary protection hearing is a summary proceeding at which hearsay, such as reports and written statements made by a person who is not available to be cross-

examined, may be admitted. The court makes findings based on all the evidence, including hearsay evidence, at such a hearing.

Discussion: Parents, on the advice of their attorneys, sometimes waive the preliminary protection hearing to avoid having the court make findings based on hearsay, because those findings can be used in subsequent proceedings, even though the evidence on which the finding was based would not be admissible in that subsequent proceeding.

Recommendation: The study committee recommends that the statute be amended to clearly prohibit the use of hearsay evidence admitted in the preliminary protection hearing in subsequent proceedings. The study committee also recommends that the statute be amended to be consistent with the Law Court's pronouncement that the court is required to make "fresh findings" at the jeopardy stage (*In re Isaiah B.*, 1999 ME 174, 740 A.2d 988).

5. Compliance with the Indian Child Welfare Act (ICWA)

Although not technically within the purview of the study committee, the issue of compliance with the Indian Child Welfare Act (ICWA) was raised before the study committee on at least two occasions. ICWA outlines a protocol for foster placement and the adoption of Indian children. Preference is to be given in foster care or preadoptive placement, in the absence of good cause to the contrary: first, to a member of the Indian child's extended family; second, to a foster home licensed, approved or specified by the Indian child's tribe; third, to an Indian foster home licensed or approved by an authorized non-Indian licensing agency; and fourth, to an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs. For adoptive placements, ICWA requires that preference be given, in the absence of good cause to the contrary: first, to a member of the child's extended family; second, to other members of the Indian child's tribe; and third, to other

Indian families. The Houlton Band of Maliseet Indians has put together statistics that show that a significant segment of their population of children has been removed from their homes and placed in non-native homes. It is unclear from the information that the study committee received why the number of non-native placements is so high.

Discussion: One avenue of addressing the compliance issue is by requiring that the cases concerning Maliseet children be brought in the Penobscot Tribal Courts, in which there is experience in dealing with the Indian Child Welfare Act and more sensitivity to the considerations that must be taken into account. Representative Donna Loring (Penobscot Nation) has agreed to sponsor legislation proposing such a change. The Legislative Council has granted approval for the bill to be introduced in the Second Regular Session of the 120th Maine Legislature.

Recommendation: The study committee recommends that the Judiciary Committee give the bill extending the jurisdiction of the Penobscot Nation Tribal Court to include child protection cases involving Maliseet Band children, as well as the underlying issues, proper consideration. The study committee also recommends that the Health and Human Services Committee follow up with regard to licensing Native American foster homes and the criteria for therapeutic foster care as they relate to placement of children covered by the Indian Child Welfare Act.

6. Relatives providing care

One of the hardest jobs in the world is to be a parent; even harder is being a parent to someone else's child. In some cases, there are relatives available and willing to care for the child that is involved in a child protective case. The Department is required by federal law to use reasonable efforts to place the child with relatives, also known as kinship care.

Discussion: The approach by caseworkers to determine whether relatives are available to provide care is not uniform throughout the state. If the Department places a child with a relative that is not licensed as a foster parent, there are no federal funds available to pay the usual foster parent stipend. There is a mechanism for the Department to ask for an exception for a relative that is not licensed, and any payments released would be 100% state funds. In addition, some offices of the Department wait until relatives are licensed before placing a child with them, while other areas will place the child with relatives and ask for an exception, sometimes while licensing is pending.

Recommendation: The study committee recommends that the Department be required to ensure that the policy concerning care by and placement with relatives be in writing and uniformly implemented. The study committee also recommends that the Department report back to the Legislature with recommendations on how care by and placement with relatives will be put in place, and how kinship issues will be made known to all those interested.

7. Oversight

Recommendation: The study committee recommends that the Judiciary Committee continue active oversight over the legal and court aspects of the child protective system until the problems are rectified.

8. Additional statutory changes

Assistant Attorney General Elizabeth Stout compiled the following list of areas where Title 22 has some inconsistencies, lacks clarity, or otherwise has some problems functioning in the court process, and recommended changes.

(a) Section 4038: Mandated Review

Each child protection case is required to be reviewed every six months unless certain circumstances exist. Section 4038, subsection 1-A describes the circumstances where no continuing review is required, for example, if the child has been placed in the custody of a relative. Subsection 7-A concerns permanency planning hearings, and requires that such hearings be held every 12 months. This has created confusion when a case needs no further review under subsection 1-A, but theoretically needs a permanency planning hearing every twelve months.

Recommendation: The study committee recommends that section 4038, subsection 7-A be amended to reflect that, if the circumstances in subsection 1-A are present and a permanent plan has been entered, no further permanency planning hearings are required.

(b) Section 4041: Reunification

Section 4041 is unclear regarding the reunification obligation of the Department when the child is not in Department custody, for example, if the child is in the custody of a relative or other third party. Section 4041 refers to the child entering foster care as the trigger for reunification obligations, and defines entering foster care as the date of a judicial finding of abuse and neglect. Often a child is placed in the custody of a relative as a permanent plan for the child, and the statute provides that in that situation no further judicial reviews are required. It is not clear whether the Legislature intended that the Department have a reunification obligation in this situation.

Recommendation: The study committee recommends that the statute be amended to provide that the Department does not have an obligation to pursue reunification if the permanency plan calls for custody with a relative and the court has ordered custody of the child to the relative.

(c) Section 4005: Representation of parties

In some cases, a family matters order giving custody to one parent is required before the child protection matter will be dismissed. Court-appointed counsel are generally not able to assist parents with a family matters proceeding that is concurrent with the child protection proceeding. In practice, some courts do consolidate the family matters case with the child protection case, to allow court-appointed counsel to assist in obtaining the family matters order in a timely manner.

Recommendation: The study committee recommends that the statute be amended to clarify that the parents' court-appointed counsel in the child protective case is permitted to assist the family in obtaining a family matters order in a concurrent family matters case, as long as the only major substantive issues in the family matter deal with custody and contact.

(d) Section 4032, subsection 2: Elements of a petition

Current law lists several elements that must be included in a petition for a child protection order. Federal law requires the State to undertake reasonable efforts to prevent the need to remove the child from the home or to resolve jeopardy, to consider kinship care and comply with the Indian Child Welfare Act if the child is a member of an Indian tribe.

Section 4032 does not currently require a statement of the State's activities in these areas as part of the petition.

Recommendation: The study committee recommends that the statute governing the contents of a child protection petition be amended to include:

- A statement of the reasonable efforts made to prevent the need to remove the child from the home or to resolve jeopardy;
- The names of relatives who may be able to provide care; and
- The names of any relatives who are members of an American Indian tribe.

(e) Section 4034: Preliminary Protection Orders (PPO)

Sometimes a court will issue a preliminary protection order after the jeopardy order has been entered. For example, the jeopardy order may have the child remain in the custody of a parent, but subsequent events may create an immediate risk of serious harm to the child. Section 4034, subsection 2 says that the PPO expires once a jeopardy order is issued. This section does not contemplate that a request for a preliminary protection order may be added to the petition or filed independently, and that the PPO expires after an order issues under either section 4035 or 4038 (a jeopardy or judicial review order).

Recommendation: The study committee recommends that the statute governing preliminary protection orders be amended to clarify that a request for a preliminary protection order may be added to the petition or filed independently, and therefore does not provide that the preliminary protection order expires after either a jeopardy order (under Title 22, section 4035) or a judicial review order (under Title 22, section 4038) is issued.

(f) Section 4005: Guardian *ad litem* reports

Section 4005 requires the guardian *ad litem* to provide a written report to the court and parties. In some cases, a question has been raised as to whether this report may be considered by the court as evidence. Most courts do rely on the reports when orders are issued, although the section does not specify whether the guardian's report may be considered as evidence.

Recommendation: The study committee recommends that the statute be amended to clearly state that the report of the guardian *ad litem* may be admitted as evidence. In making findings, the court should be required to state what information has been taken into evidence and used as the basis of findings. Findings may be based on a guardian's report only if the report is admitted into evidence.

(g) Section 4035, subsection 3: Jeopardy determination

Under section 4035, subsection 3, "if the court determines that the child is in circumstances of jeopardy to his health or welfare, the court shall hear evidence regarding proposed dispositions . . . [and] shall make a written order of disposition . . ." The question has been raised in various courts whether a finding that the custodial parent presents jeopardy is sufficient, or whether the court must find that each parent presents jeopardy to the child before custody to the Department is ordered. The issue comes up when there is a non-custodial parent, particularly one who lives out of state.

Recommendation: The study committee recommends that the statute be amended to clarify that both parents must present jeopardy in order to find that the child is in circumstances of jeopardy. Such a finding with regard to the custodial parent alone should be insufficient to support an order of custody to the Department.

(h) Section 4015: Privileges: Domestic Violence

Section 4015 abrogates mental health counseling evidentiary privileges under the Maine Rules of Evidence and state and federal law, in relation to required reporting of abuse or neglect, cooperating with the Department or a guard *ad litem* in an investigation or other child protective activity, or giving evidence in a child protection proceeding. One area of privilege that is not mentioned in this section is the domestic violence counseling privilege created by Title 16, MRSA §53-B. While that statute contains an exception for Title 22 cases, section 4015 does not have a corresponding acknowledgement of Title 16.

Recommendation: The study committee recommends that the statute governing the abrogation of privileges in relation to child protection activities be amended to include an acknowledgement of the abrogation of the domestic violence counseling privilege. This is consistent with treatment of the privilege under Title 16, section 53-B.

(i) Section 4015: Privileges: Criminal Liability

When a parent in a child protection action faces criminal charges relating to the abuse of the child, the parent is often reluctant to engage in treatment for fear that this will be used

against the parent in the criminal action. Section 4015 limits the use in the criminal court of the patient's statements to a mental health professional.

Recommendation: The study committee recommends that the statute be amended to completely prohibit the use of statements made by a parent, against whom criminal charges are pending, to a mental health professional whose services are used by the parent in order to reunify with the child.

(j) Section 4002, subsection 1-B, paragraph A: Aggravating factor

Section 4002, subsection 1-B defines an "aggravating factor." It is significant because the presence of an aggravating factor can be the basis for a cease reunification order, and gives the court the ability to put the case on a fast track towards termination of parental rights. In subsection 1-B, paragraph A, if a parent has committed rape, gross sexual misconduct, gross sexual assault, or other actions that are "heinous and abhorrent to child who is the subject of the petition, the court may find an aggravating factor exists. However, if the parent has committed the same acts against another child, no aggravating factor finding may be made, even if the victim is another child in the same household.

For example, if a mother has a daughter from a previous relationship, and then has a child with another man, and that man commits gross sexual assault against the older child, he is not subject to an aggravating factor finding in either the case involving his child or his stepdaughter. He is not the stepdaughter's father, so he is not a party to that case. In the case of his own child, he did not sexually abuse the child who is the subject of the petition. The court cannot relieve the Department of its reunification obligation in this case until a permanent plan is entered for these children.

The only way for a court to find that there is an aggravating factor for a parent who abuses a non-biological child is if the parent has killed a child, or committed an aggravated assault. It is unclear whether this was an intentional limitation on the court's ability to relieve the Department of its obligation to provide reunification services to parents who have engaged in heinous and abhorrent behavior against a child. This section conflicts with section 4055, subsection 1-A, in which the court may presume that a parent is unfit if the parent has acted in a heinous or abhorrent manner towards any child; this recognition of the harm of child abuse to a non-biological child does not carry over to section 4002. The limitation in section 4002 has led to some results that are difficult to understand, and difficult to explain to parents, relatives, foster parents and others.

Recommendation: The study committee recommends that the definition of “aggravating factor” be amended to cover any child for whom the parent was responsible and subjected to aggravated circumstances. This change would expand the number of parents with an aggravating factor to include people who have behaved in way that the Legislature has already determined to be so extreme as to indicate a lack of rehabilitative potential.

9. Availability of Department policies

Throughout the discussions of the study committee, questions were raised as to what were “official” Department policies on a number of issues and procedures. When policies are not reduced to writing, consistent and fair implementation is extremely difficult. If there are written policies, but access to those documents is not uniformly available, questions of interpretation and fairness inevitably arise. Being able to read the Department's procedures may help parents understand their role in protecting their children or participating in the child protective process.

Recommendation. The study committee recommends that the Department ensure that all policies governing the Department's procedures are in writing and are generally available to the public. Posting policies on the Department's website would be an acceptable form of providing the information.

10. Juveniles ordered into Department custody through the juvenile justice system

During the First Regular Session, the Department introduced a bill, LD 1701, An Act to Clarify Parental Rights and Responsibilities When Children are Placed in the Custody of the Department of Human Services as a Result of Court Proceedings Governed by the Maine Juvenile Code. The bill would have allowed the court to order parents to participate in rehabilitation and reunification services when the Juvenile Court has ordered that the juvenile be removed from the home. The bill also proposed that the court, before ordering that the juvenile be removed from the home, be required to make findings as to whether continuation in the home would be contrary to the welfare of the juvenile, and whether reasonable efforts, if required, have been made to prevent or eliminate the need for removal from the home. In addition, the bill provided that the reviews and permanency planning hearings requirements of the child protective laws would apply to juveniles placed in foster care by the Juvenile Court.

The bill was referred to the Joint Standing Committee on Criminal Justice, which eventually reported the bill out of committee with an Ought Not to Pass report. That vote was apparently based on the need for reviews of the child protective system, scheduled to be undertaken by this study committee and the Health and Human Services Committee.

Recommendation. The study committee recommends that the Judiciary Committee support the principles contained in LD 1701, An Act to Clarify Parental Rights and Responsibilities When

Children are Placed in the Custody of the Department of Human Services as a Result of Court Proceedings Governed by the Maine Juvenile Code.

APPENDIX A

Authorizing Joint Order

Joint Order (H.P. 1385)

WHEREAS, there is tremendous concern that the existing child protective laws and system are not adequately and consistently protecting the children they were designed to serve; and

WHEREAS, families and other participants in the system believe their rights and interests are not adequately and consistently taken into account; and

WHEREAS, the Legislature would benefit from a study of issues relating to the existing child protective laws and system; now, therefore, be it

ORDERED, the Senate concurring, that the Committee to Review the Child Protective System is established as follows.

1. Committee established. The Committee to Review the Child Protective System, referred to in this joint order as the "committee," is established.

2. Committee membership. The committee consists of the following 11 members:

A. Two members of the Senate, appointed by the President of the Senate;

B. Three members of the House of Representatives, appointed by the Speaker of the House of Representatives;

C. An attorney who has experience representing parents in child protective cases, appointed by the President of the Senate;

D. An attorney who has experience serving as a guardian ad litem in child protective cases, appointed by the Speaker of the House of Representatives;

E. An advocate for children, appointed by the President of the Senate;

F. A current or former foster parent, appointed by the Speaker of the House of Representatives;

G. A court-appointed special advocate volunteer, appointed by the President of the Senate; and

H. A caseworker or supervisor employed by the Department of Human Services. The Commissioner of Human Services is requested to designate the caseworker or supervisor to be a member of the committee.

The Chief Justice of the Supreme Judicial Court is requested to designate a District Court Judge to participate with the committee.

3. Chairs. The first named Senate member is the Senate chair of the committee and the first named House of Representatives member is the House chair of the committee.

4. Appointments; meetings. All appointments must be made no later than 30 days following passage of this joint order. The appointing authorities shall notify the Executive Director of the Legislative Council once the selections have been made. When the appointment of all members has been completed, the chairs of the committee shall call and convene the first meeting of the committee no later than August 15, 2001.

5. Duties. The committee shall study the child protective system and make recommendations for changes in laws, rules and procedures.

A. In conducting the study, the committee shall examine the following issues:

- (1) Information about rights and future proceedings that should be given to parents at every stage of the child protective process;
- (2) The availability of information in the possession of the Department of Human Services to parents and their attorneys, and the timing and extent of discovery;
- (3) The accurate preservation of interviews involving employees of the Department of Human Services, communications with employees of the Department of Human Services and communications involving parents, including the reliability of the preservation and appropriate use of the communications;
- (4) The appropriate role of intervenors; who, if anyone, should have automatic intervenor status; who should be permitted to apply for intervenor status; and what criteria the court should use in determining whether to grant intervenor status;
- (5) The determination of the best interest of the child, while balancing the child's safety and privacy interests with the public's interest in openness in governmental actions and records, particularly with regard to termination of parental rights hearings;
- (6) The appropriate standard of proof that the State must bear at each stage of child protection proceedings;
- (7) The role of and requirements that apply to guardians ad litem and the extent to which guardians ad litem are fulfilling their responsibilities;
- (8) The liability of the State, the Department of Human Services and employees of the Department of Human Services, either as a governmental entity or personally, for removal of children from their homes or other actions when such actions are overturned by the court as erroneous or unnecessary;

(9) The mandatory reporting laws concerning child and adult abuse and neglect; the consequences of failing to report; and the State's role in educating the public about reporting child abuse and neglect; and

(10) Any other issues the committee determines appropriate.

B. In examining these issues, the committee may:

(1) Hold a public hearing;

(2) Hold informational sessions for discussions with knowledgeable persons;

(3) Review laws, procedures and activities in other jurisdictions; and

(4) Carry out other activities relevant to the purposes of the study.

6. Staff assistance. Upon approval of the Legislative Council, the Office of Policy and Legal Analysis shall provide necessary staffing services to the committee.

7. Compensation. The members of the committee who are Legislators are entitled to the legislative per diem, as defined in the Maine Revised Statutes, Title 3, section 2, and reimbursement for necessary expenses incurred for their attendance at authorized meetings of the committee. Other members of the committee who are not otherwise compensated by their employers or other entities that they represent are entitled to receive reimbursement of necessary expenses incurred for their attendance at authorized meetings.

8. Report. The committee shall submit its report, together with any necessary implementing legislation, to the Joint Standing Committee on Judiciary no later than December 5, 2001. The Joint Standing Committee on Judiciary may introduce legislation related to the report to the Second Regular Session of the 120th Legislature. If the committee requires a limited extension of time to conclude its work, it may apply to the Legislative Council, which may grant the extension.

9. Budget. The chairs of the committee, with assistance from the committee staff, shall administer the committee's budget. Within 10 days after its first meeting, the committee shall present a work plan and proposed budget to the Legislative Council for approval. The committee may not incur expenses that would result in the committee's exceeding its approved budget. Upon request from the committee, the Executive Director of the Legislative Council shall promptly provide the committee chairs and staff with a status report on the committee's budget, expenditures incurred and paid and available funds.

APPENDIX B

**Membership list
Committee to Review the Child Protective System**

COMMITTEE TO REVIEW THE CHILD PROTECTIVE SYSTEM
Joint Order, H.P. 1385

Appointments by the President

Sen. Karl W. Turner, **Senate Chair**
16 Town Landing Road
Cumberland Foreside, Maine 04110

Sen. Anne M. Rand
61 Melbourne Street
Portland, ME 04101

Karen Boston, Esq.
Attorney Representing Parents in Child
Protective Cases
Lipman & Katz, P.A.
227 Water Street
Augusta, ME 04332-1051

Maureen Dillane
Court-appointed Special Advocate Volunteer
P.O. Box 138
Winterport, Maine 04496

Elinor Goldberg
Advocate for Children
Maine Children's Alliance
303 State Street
Augusta, ME 04330

Appointments by the Speaker

Rep. Charles C. LaVerdiere, **House Chair**
P.O. Box 670
Wilton, ME 04294

Rep. David R. Madore
197 Northern Avenue
Augusta, ME 04330

Rep. Deborah L. Simpson
84 Summer Street
Auburn, Maine 04210

Ms. Maureen Dea
Attorney Representing Guardians Ad
Litem in Child Protective Cases
120 Moody Road
Brunswick, ME 04011-7106

Mrs. Lisa Kittredge
Foster Parent
20 Murray Drive
Cape Elizabeth, Maine 04107

Appointment by the Chief Justice

Honorable Vendean V. Vafiades
Deputy Chief of the Maine District Court
Maine District Court
145 State Street
Augusta, ME 04333-0111

Appointment by the Commissioner, DHS

Louise Boisvert
DHS Supervisor
Department of Human Services
208 Graham Street
Biddeford, Maine 04005

APPENDIX C

**Legislation related to the child protective system
Introduced in the First Regular Session**

Child Protective Bills
Considered by the Judiciary Committee, 120th Legislature, First Regular Session

LD	TITLE	Quick summary	Comments
683	An Act to Allow Godparents as Intervenors in Child Custody Care with the Department of Human Services	Adds new section to give godparents the opportunity to petition for standing and intervenor status	Study
745	An Act to Require the Audio Recording of Interviews of Children by the Department of Human Services	Requires audio recording of all DHS interviews with children, and limits admissibility if not recorded	Study
836	An Act to Grant Foster Parents Intervenor Status in Child Protective Custody Procedures	Gives foster parents (child placed with that foster home at least 60 days) automatic intervenor status	Study
876	An Act to Require the Department of Human Services to Provide Automatic Discovery to Opposing Attorneys	Amends the confidentiality laws to require disclosure by DHS of relevant information in DHS records to the parent who is the subject of an investigation or proceeding or the parent's attorney	Study
955	An Act to Ensure Accountability in the Department of Human Services	Makes DHS employee who is responsible for the erroneous removal of a child pay the parent's attorney's fees and costs	Study
1009	An Act to Amend the Child and Family Services and Child Protection Act	Department bill – revises definition of foster parent and revises notice wording. Also includes long-term placement in permanency planning	Study
1066	An Act to Protect Children and Elderly or Incapacitated Adults	Expands adult protective laws and child protective laws to make all persons mandatory reporters of: <ul style="list-style-type: none"> • abuse, neglect or exploitation of incapacitated, dependent or elderly adult; and • abuse or neglect of a child 	Study & OTPA PL 2001, c. 345
1074	An Act to Require that any Proceedings Initiated by the Department of Human Services to Terminate Parental Rights Be Open	Requires the hearing held on the termination of parental rights (TPR) to be open unless a parent objects	Study
1079	An Act to Protect Families by Easing the Standard of Proof for Certain Child Protection Hearings	Changes the burden of proof in preliminary and jeopardy hearings to “clear and convincing evidence” (currently State must prove only by the preponderance of the evidence)	Study

LD	TITLE	Quick summary	Comments
1450	An Act to Protect Parents from Undue Influence in Child Protective Actions	Requires DHS to provide written warnings to parents and custodians of children in child protective proceedings	Study
1609	An Act to Provide a Family Bill of Rights	<ul style="list-style-type: none"> • Requires GAL to report at least 3 days before proceeding, and detail the time and services provided. Failure to do so results in court ignoring recommendations • Allows court to dismiss GAL who doesn't follow rules • Allows long-term foster parents to intervene in any proceeding in which parental rights have been terminated • Changes confidentiality, making everything public unless court for good reason determines record and proceedings are closed • Requires DHS to provide treatment or services regardless of whether the child is in DHS custody • Prohibits ordering a child into the custody of DHS solely because the child is in need of services • Authorizes the court or GAL to hold a conference of relatives and allows relatives to determine placement 	Study
1650	An Act to Require Substance Abuse Assessment and Treatment for Parents of Children Referred to Child Protective Services	Requires substance abuse assessments and treatment to be available and ordered when necessary for parents who are referred to child protective services, and provides \$3 million over the biennium to fund.	Referred issue to HHS
1670	An Act Regarding Child Abandonment	<p>Provides for safe surrender of infants</p> <ul style="list-style-type: none"> • Creates an affirmative defense to crime of child abandonment if infant left in safe place • Provides for statutory waiver of parental rights and responsibilities of parent who abandons infant in safe place • A person who abandons infant in safe place has the right to remain anonymous; person accepting may not inquire, pressure or coerce • DHS shall file a termination of parental rights petition if a parent abandons the child in a safe place 	Carried over
1699	An Act to Make Certain Changes in the Child Welfare Laws	<ul style="list-style-type: none"> • Allows the disclosure of information about the abuse or neglect of a child if the child nearly died • Expands mandatory child abuse and neglect reporting to include foster parents and child care providers 	Study

APPENDIX D

Invited speakers and presenters

Invited speakers and presenters:

- Honorable Brenda Commander, Chief, Houlton Board of Maliseet Indians
- Patrick Ende, Esq., Maine Equal Justice Partners, Inc.
- Caroline Gardiner, Esq., Maine Civil Liberties Union
- Jacqueline Gomes, Esq., Lincoln, Maine and Child Protective Attorney for the Penobscot Nation
- Lucky Hollander, Youth Alternatives
- Toby Hollander, Esq., Portland, Maine
- Mary Henderson, Esq., Maine Equal Justice Project
- Donald Hornblower, Esq., Lewiston, Maine
- Margaret E. Johnson, Esq., Presque Isle, Maine
- Barbara Kates, Families and Children Together, Bangor, Maine
- Lillian B. Kennedy, Esq., Lewiston, Maine
- Honorable Jon D. Levy, Chief Justice, Maine District Court
- Steven Parker, Esq., Augusta, Maine
- Elizabeth F. Stout, Esq., Assistant Attorney General, Maine Department of the Attorney General
- George Thurlow, Maine Association of Foster and Adoptive Parents
- Richard Wexler, National Coalition for Child Protection Reform, Alexandria, Virginia

APPENDIX E

Child protective system flow chart

APPENDIX F

Discovery Agreement Proposal

Discovery Agreement Proposal

This agreement¹ is intended to reduce the need for formal discovery in child protective cases. The parties retain all rights to seek discovery under the Maine Rules of Civil Procedure. This agreement applies to all child protective cases once a Petition for Child Protection Order has been filed.

This agreement will be adopted through the following procedure: M.R.Civ.P. 29 will be amended to add the following statement:

Discovery in all child protection proceedings shall be conducted pursuant to the Memorandum of Agreement executed by the Maine Equal Justice Partners, the Maine Civil Liberties Union and the Maine Attorney Generals Office on _____, 2001.

Nothing in this policy restricts the parties from reviewing the file at the regional office and receiving copies of documents as requested, as was the prior practice.

In this document, the "Department" refers to the Maine Department of Human Services, Bureau of Child and Family Services, child protection division.

All of the Department's records relating to child protection matters are confidential, pursuant to 22 M.R.S.A. §4008. However, child protection proceedings are also governed by the Rules of Civil Procedure (which control all civil cases in court) and attorneys representing parties are entitled to disclosure of most of these records. Information that is highly sensitive includes the following:

1. Identity of confidential informants. This information will not be provided without a specific court order.
2. Substance abuse evaluations/treatment records. Federal law prohibits disclosure unless the patient has signed a specific release. This information will not be distributed to parties other than the patient without a release allowing disclosure to all parties.
3. Police reports in ongoing investigations. 16 M.R.S.A. §614 makes records concerning an ongoing investigation confidential.
4. Nonconviction data on SBI reports is confidential. 16 M.R.S.A. §612, 613.
5. AMHI/BMHI records and psychiatric records from hospitals that contract with the Dep't. of Mental Health. These can be shared only with the patient named in the record and his or her attorney, and the Guardian ad litem. This information will not be provided to other parties without a specific court order.
6. HIV test results will not be released to the parties.

¹ Implementation of this Agreement will require additional resources to allow the Department of Human Services to comply.

7. Probate Court adoption forms and records are confidential under 18-A M.R.S.A. §9-310 and will not be distributed.
8. Information concerning discussions between Department personnel and an Assistant Attorney General.

This Agreement applies to cases in active litigation only, i.e., when a Petition for Child Protection Order has been filed with the Court.

The confidential nature of the records continues after they have been provided to the attorneys in the case. All parties to the action should be cautioned that unauthorized re-release of records is a violation of law. 22 M.R.S.A. §4009.

Discovery by Parents, Guardians ad Litem, Intervenors

A. Automatic Discovery:

1. Petition Includes a Request for Preliminary Protection Order

The caseworker will notify the Guardian ad litem of the name, address and telephone number of the foster care provider within 24 hours of placement.

The Attorney for the State shall ensure receipt by all other parties the following documents, within 72² hours of the filing of a request for Preliminary Protection Order or upon appointment of the attorneys for the parties, whichever is later, except for good cause shown:

- a. The DHS Narrative Log that exists on MACWIS concerning the family. For the purpose of the summary preliminary hearing, the complete Narrative Log for the six month period prior to the date on which discovery is provided shall be provided in all cases. If information contained in earlier portions of the Narrative Log is going to be referenced or introduced at the summary preliminary hearing, those portions must also be furnished to all other parties.
- b. A witness list for the summary preliminary hearing, including the means to contact any witnesses who made statements supporting the Request for a Preliminary Protection Order, and any existing, written witness statements. Attorneys for the parents will exercise discretion in providing the contact information to the parents, to ensure the integrity of the judicial process and avoid any potential out of court confrontations between parents and witnesses.
- c. A Family Service Plan if reunification is being offered.
- d. Any documents the Department plans to offer or use at the Summary Preliminary Hearing, and any documents that are or may

² The parties to the Agreement assume that the legislature will enact a provision affecting the scheduling of the summary preliminary hearing.

be relevant to the preparation of the defense case on the issue of immediate risk of serious harm and/or disposition.

- e. A cover letter listing the information provided and noting any information covered by (a) through (d) above that is not provided.

2. For All Petitions

- a. When there is not a request for a Preliminary Protection Order, the Attorney for the State shall mail or otherwise provide the documents listed above within 14 days of the Petition.
- b. Parties' responsibility: The parents of any child that is the subject of a child protection proceeding and any person seeking custody or visitation in a child protection action shall sign any releases necessary for the Department to obtain relevant information about the person's medical, psychological, psychiatric, or substance abuse treatment and/or history, and to provide this information to other parties to the case. If the Department does not have the necessary releases, reports will not be forwarded to all parties.
- c. The Attorney for the State shall mail or otherwise provide to the parties psychological, psychiatric and substance abuse evaluations, drug test results, police reports and other documents received by the Department after the Petition is filed within 7 days of receipt by the Department.
- d. The Attorney for the State shall mail or otherwise provide to all parties all other documents regarding the parents and children in this case within the possession of DHS no later than 30 days from the filing of the Petition, including the full Narrative Log not previously provided, with the following exceptions:
 - 1. Documents that are protected by privilege or statute.
 - 2. Information regarding confidential referents.
 - 3. Documents that are particularly voluminous and/or go back more than 3 years. In such cases the Department shall ask the other parties if they need the entire file, before providing it. The documents provided will include a cover letter indicating the information provided, and noting any information not provided.
- e. Continuing Duty to Disclose: The Attorney for the State shall have a continuing duty to disclose the matters specified above on an ongoing basis. All discovery sent shall include a cover letter specifying the information enclosed and specifying any information withheld.

- f. The Department caseworker will mail or otherwise provide to the parties the additions to the Narrative Log made since the last hearing to the parties 14 days prior to any scheduled hearing or case management conference, or earlier upon request. Caseworkers will ensure that legal summaries and full case plans will be received by the parties no later than 7 days before case management conferences and/or hearings in all cases, or as directed by the Court in contested cases.

B. Discovery Upon Request:

Upon a party's request, the Attorney for the State shall allow access at any reasonable time to any other material discoverable under M.R.Civ.P. 26 within the state's possession or control. In affording this access, the Attorney for the State shall allow the party at any reasonable time and in any reasonable manner to inspect, photograph, and copy.

C. Discovery Pursuant to Court Order:

1. Dispute about Discovery

M.R.Civ.P. 26 governs disputes about discovery. In addition, upon motion of a Party, the Court may review "in camera" any documents the State fails to provide in discovery and shall hear arguments as to the validity of the basis for withholding that information. If the Court finds the matter is discoverable, it shall so order and may impose sanctions on the Department.

2. Order for Preparation of Report by Expert Witness

If an expert witness whom the state intends to call in any proceeding has not prepared a report of examination or tests, the court, upon motion, may order that the expert prepare and serve a report stating the subject matter on which the expert is expected to testify, the substance of the facts to which the expert is expected to testify and a summary of the expert's opinions and the grounds for each opinion.

Sanctions for Noncompliance:

If the Department fails to comply with this policy, the court on motion of a party or on its own motion, may take appropriate action which may include, but is not limited to, one or more of the following: requiring the Attorney for the State to comply; granting a continuance; finding a compelling reason to extend the time period for permanency planning; prohibiting the Attorney for the State from introducing specified evidence; or any other sanction contemplated by M.R.Civ.P. 37.