Differential Response in Child Protective Services: A Legal Analysis

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Introduction

Differential response is a child protective services reform that has been implemented in a number of States throughout the country.[i] The reform has taken various forms and names, including *family assessment*, *alternative response*, and *multi-* or *dual track*. Despite the growing number of jurisdictions that are piloting or considering differential response, there has been little legal literature analyzing it or cases that have challenged the approach.

For purposes of this analysis, differential response is a child protective services approach that:

- offers at least two pathways through which child welfare agencies may respond to child abuse and neglect hotline calls,
- performs assessments in lieu of investigations for select[ii] families that meet the statutory criteria for abuse or neglect[iii],
- offers these select families the option of participating in a non-investigation (assessment) or an investigation pathway,
- does not place the names of non-investigation pathway family members on a central registry of abuse or neglect perpetrators, and
- offers voluntary services to non-investigation pathway families who, barring any information related to safety concerns, may refuse services at any time. In many jurisdictions, differential response also includes the assignment of the least severe cases of neglect to the non-investigation pathway and the more serious abuse and neglect cases to the investigation pathway.[iv]

This analysis is an overview of key legal and constitutional issues associated with differential response which should be contemplated by jurisdictions implementing the approach.[v] The legal issues below were identified in part by conducting legal and judicial focus groups, participating in policy summits on differential response and performing extensive legal research on the topic. This document analyzes in brief whether differential response affects children's and parents' rights. It covers:

- substantive and procedural due process,
- equal protection,
- the Fourth Amendment,
- Federal statutory-based rights,
- State-based rights and claims, and
- common defenses.

It is important to note that just like traditional investigations, differential response can be used in a way that keeps children safe while respecting children's and parents' constitutional rights. In both approaches, child protective agencies can accomplish their goals without violating the law, they must simply be aware of what the constitution and State law require, and use that understanding to inform policy and practice. The legal issues around differential response are not necessarily greater or less than those involved in an investigative response.

Differential response is a growing practice in child welfare. Despite this, there has been very little legal scholarship or case law discussing its legal ramifications for parents and children involved in the system. There have, however, been a handful of relevant constitutional and State cases, discussed below, that provide child welfare agencies some guidance when developing a differential response program. These cases suggest that families must be fully informed of the process, the scope of their response, and the possibility that the process may become more formalized if the child's safety is at issue. They indicate that if agencies encourage family members to separate temporarily as part of a plan made under a non-investigation pathway, this may affect their constitutional rights and in some instances may warrant the provision of some procedural protections for the family.

These cases also show that the extent to which a differential response approach may be challenged depends on how it is codified in statute or agency policy, how prescriptive the statute or policy is and whether either requires the agency to assume some duty of care over the families it serves. Finally, the cases discussed below illustrate the difficulties families have faced in challenging these practices, in part because of the weight of evidence that must be compiled and the defenses the agency can raise. However, even if families often lose these cases, they do offer guidance to jurisdictions on how to develop and implement a legally sound differential response approach that embodies best practices around the delivery of voluntary services.

Before delving into the various legal issues that may involve differential response, it is important to note that if a family challenges the constitutionality of differential response, it may do so within the rubric of the Federal civil rights act.[vi] To state a viable claim under the act, the family must show that 1) they were deprived of a right or privilege secured by the Constitution or laws of the United States and 2) the deprivation was caused by a person acting under the apparent authority of State law.[vii]

Substantive Due Process

The Due Process Clause protects citizens' entitlements to life, liberty, and the pursuit of happiness. A State action constitutes a substantive due process violation when it deprives an individual of these rights.[viii]

A Parent's Right to the Care and Custody of His Child

Courts have held that parents have a substantive due process right to the care, custody, and control of their children.[ix] Courts grant parents deference in most child-rearing decisions, but they also recognize that the State has legitimate authority to interfere with parental rights if the child is in danger.[x] There has been little case law assessing whether a differential response approach interferes with these substantive parental rights. However, two Federal appeals court cases are instructive. In both cases, the courts held that temporary safety plans offered to parents on a voluntary basis do *not* interfere with parents' substantive due process rights. The courts reasoned that such interference is acceptable because if the parents refuse services, the State's only recourse is to pursue the normal, lawful investigative process to which the parent would have otherwise been subject.[xi] In these cases, discussed in more depth in the following pages, courts rejected parents' substantive due process claims with respect to safety plans that included

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the temporary removal of children or parents from the home or restrictions on visits, if they were truly voluntary and set for a limited period of time. Courts, however, have noted that the voluntary nature of the approach may be compromised if States make improper threats to parents in pressuring them to accept services. However, simply offering a voluntary plan as an alternative to a normal investigation is not likely to rise to the level of coercion.[xii]

Under this precedent, a parent may succeed in challenging the imposition of non-investigative services under the substantive due process doctrine if the agency coerces the parents to comply and the plan, which includes the child's or parent's removal from the home, is imposed for an unlimited period. In existing cases, all challenges to voluntary pre-court services and safety plans include the temporary removal of a family member. It is, therefore, less likely that a parent will successfully challenge agency actions under a non-investigation pathway, even if coerced, if the child or parent remains in the home. If the family remains intact during the non-investigation pathway, there is even less interference with the parent-child relationship, thus decreasing the likelihood of a substantive due process violation.

A Child's Right to Family Integrity

Several courts have held that just as parents have the right to the care and custody of their children, "children enjoy the corresponding familial right to be raised and nurtured by their parents."[xiii] Of course, this right must still be weighed against the government's need to investigate and protect children from abuse.[xiv] Allegations that an agency violated a child's right to family integrity during a non-investigation pathway would likely be analyzed similarly to allegations that the agency violated the parents' rights.

A Child's Right to Bodily Integrity

Children have brought substantive due process claims against child welfare agencies when they provide non-investigative services in lieu of investigations, fail to conduct an investigation, or conduct an incomplete investigation, and the children were injured in the home.[xv] In these cases, the child (or his estate) asserts that by failing to provide protective services, the State allowed the child to be subject to further abuse, which resulted in the child being deprived of his basic substantive due process right to bodily integrity. In most of these cases, however, this challenge has failed. The Supreme Court has ruled that States or State actors *do not* have an affirmative duty to prevent *non-governmental* third parties from depriving citizens of their substantive due process rights. In this context, the Supreme Court has held that a parent's or caregiver's act of abusing or neglecting his child constitutes a third party deprivation, which the State has no duty to prevent.[xvi]

The courts, however, have carved out two exceptions to this rule the latter of which could be used by a parent or child challenging practices associated with differential response: 1) if the State developed a "special relationship" with the child; and/or 2) if the State created or significantly added to the dangerous situation that led to the child's injury or death. A court will determine that a special relationship has been formed only when the State assumes control over an individual so that he no longer has "freedom to act on his own behalf, through imprisonment, institutionalization, or other similar restraint of personal liberty."[xvii] Such a relationship may

form if the agency places the child into State custody (e.g., foster care or juvenile detention); however, courts have held that a State does not form a special relationship merely by intervening in the family's life or by offering assistance.[xviii]

Under the State-created danger exception, the State may be held responsible for private violence inflicted on a child if by the State's involvement, it put the child in a worse situation than he would have been in had the State never been involved. A State will be held responsible if it created the dangerous situation or made the child more vulnerable to it. This might occur within the differential response context if the State reduces a child's likelihood of obtaining help that could have protected the child, such as if the State discourages family members or other individuals from reporting instances of abuse.[xix] It could also occur if, through differential response, the agency facilitated the placement of the child with a relative or friend that harms the child.

Generally, courts have dismissed "State-created danger" arguments because they require a showing that the State's conduct was "shocking to the conscience" before the exception applies. However, at least one case illustrates facts that resulted in a finding that a child's rights were violated under this theory; facts that could also arise in a differential response context.[xx] In *Currier v. Doran* (2001), the court accepted "State-created danger" and due process arguments when the agency facilitated the removal of the children from their mother to their father's care but failed to investigate allegations of child abuse by the father and advised the mother to stop making child abuse allegations against him. These acts contributed to a later court decision to award the father legal custody.[xxi]

There are limited circumstances under which a child might successfully challenge differential response under substantive due process grounds. The most likely series of events that could lead to this challenge is if the agency puts a case in the non-investigation pathway instead of conducting an investigation and during the process, the parent or caregiver harms the child. The child may argue that the agency's failure to remove him or conduct an investigation deprived him of his substantive right to bodily integrity. To win this argument, however, the child must show either that a State actor, not a parent or caregiver, deprived him of his rights, or that the "special relationship" or "State-created danger" exceptions apply. Since the Supreme Court has held that States have no duty to protect children from parental harm, the child will only succeed if he can prove his case under one of these two narrow circumstances.

To show a special relationship exists within the differential response context, the child has to show that the State somehow assumed control over the child such that he could not act on his own behalf[xxii] A child may have equal difficulty challenging differential response under the "State-created danger" theory[xxiii].

Procedural Due Process

The procedural due process provisions of the U.S. Constitution and many State constitutions place limits on States' ability to deprive citizens of certain protected interests. A State denies an individual his procedural due process rights when it deprives him of a property or liberty interest without following certain protective procedures.[xxiv] Property or liberty interests

are often created through State law; therefore, procedural due process issues arise when a State statute vests individuals with certain entitlements. To determine whether such an entitlement exists, courts first determine whether the statute(s) creates a substantive obligation on the part of the State. If it does, the court will then analyze the extent to which certain mandatory procedures should be put in place to ensure that this obligation is served.[xxv]

The Supreme Court has not addressed whether State child welfare statutes vest children with certain protected interests, but lower courts have addressed the issue within the context of whether children are entitled to investigations or other protective services.[xxvi] And although parents have an established due process right to the care, control, and custody of their children, the issue of whether voluntary pre-court services, akin to differential response's non-investigation pathway, involve due process rights has only been addressed by a handful of lower courts.

A Child's Right to an Investigation

Federal and State courts have found that State child welfare laws will *only* create a right to an investigation when State law requires the State achieve specific results and follow certain steps to achieve those results through an investigative process.[xxvii] Most child welfare statutes, however, fail to meet these standards because they do not mandate a specific result in child abuse and neglect cases; instead, they allow State officials discretion in determining what the substantive outcome should be for each child.

For example, in *Tony L. ex. rel. Simpson v. Childers* (1995), the Sixth Circuit rejected a claim that Kentucky's child welfare statute entitled children to certain rights. The statute in question required child welfare agencies to "initiate a prompt investigation" in response to abuse and neglect allegations and "take necessary action . . . and offer protective services." The court acknowledged that the language was undoubtedly mandatory but held that the child's claim could not survive because the statute did not mandate a particular result. It allowed the State to take several possible courses of action when dealing with an abuse allegation, including removing the child from the home or providing counseling to the parents. The court held that these provisions only give children "an expectation that a certain procedure will be followed," rather than entitling them to a particular outcome.[xxviii]

In *Forrester v. Bass* (2005), siblings of two deceased children argued that the child welfare agency violated the children's procedural due process rights when it failed to follow a Missouri statute that required an investigation in certain cases. Here, Missouri's law allowed the agency to respond to allegations with either a family assessment or an investigation, unless the report, if true, would constitute a crime. In the latter situation, the statute required a child abuse investigation. The court held that even though the statute required the agency to comply with certain procedures, it contained no "substantive predicates expressly limiting the discretion of the [agency] by mandating an outcome to be reached upon a finding that the relevant criteria have been met."[xxix] The court went on to note:

> The [Missouri] statutes do not mandate the particular substantive outcomes of required investigations, law enforcement notification and intervention, direct observation of

> subject children, and the provision of social services. Nor do the statutes define mandatory social services, or dictate how, when or for how long these social services must be provided. Instead, the statutory language simply mandates particular preliminary actions be undertaken and authorizes the provision of social services, thereby leaving the particular substantive outcome in each case to the sound discretion of trained social workers and law enforcement officers.[xxx]

In at least one Federal court case, the court held that a State child welfare statute vested children with certain entitlements. In *Powell v. Department of Human Resources of the State of Georgia* (1996), the court held that the Georgia statute vested children with certain liberty interests because of its comprehensive and mandatory nature. The court reasoned that lawmakers intended to guarantee children specific protections because the statute delineated specific measures that law enforcement officers, the office of the district attorney, the courts, hospitals, and caregivers must take upon receiving allegations of abuse or neglect. The court held that these stakeholders' failure to follow these detailed protocols deprived the deceased child in question of a protected liberty interest. However, in assessing how much process was due to the child, the court found that Georgia's protocol to respond to abuse and neglect allegations provided sufficient procedure to children pre-deprivation and that Georgia's laws, including its Tort Claims Act, provided children with additional process, post-deprivation, through which they could challenge agency actions. The court reasoned that having a court hearing before every judgment of the agency would not be feasible.[xxxi]

Therefore, if a State law gives child welfare agencies the discretion to respond to abuse and neglect allegations with an investigation or non-investigation pathway, it is unlikely a child will be able to argue that the statute vests him with the right to an investigation. Even if the statute requires investigations in certain cases, such as physical or sexual abuse cases, if the statute is not highly prescriptive in the procedure the agency must follow and the substantive outcomes that must occur as a result of that process, then no due process entitlement has arisen.

A child's procedural due process challenge of a State's failure to investigate may only survive under current case law if the State statute in question 1) clearly requires the agency to conduct investigations; 2) is highly prescriptive in the preliminary actions the agency must take as part of the investigation; 3) requires the State reach particular substantive outcomes from the required investigations or services; and/or 4) dictates that certain services must be offered, and specifies when and for how long the services should be offered.

Even if the statute is comprehensive and mandatory in nature such that it creates certain entitlements, a child's due process challenge may still fail if State law provides some pre-deprivation process to assure children's rights are not infringed upon and some post-deprivation procedure through which children can challenge agency actions. Thus, if differential response provides some checks and balances within the approach to assure agency decisions are sound and offers families an opportunity to challenge decisions during or after service delivery, it might be difficult to mount a successful due process claim.

A Parent's Procedural Right to Challenge "Voluntary" Services

Parents have a constitutionally protected liberty interest in the care, control, and custody of their children. In two recent Federal court cases, parents challenged the imposition of "voluntary" services as a violation of this right on procedural due process grounds. In both instances, parents challenged safety plans used by child welfare agencies during the course of abuse or neglect investigations, in which either the child or parent was temporarily removed from the home or unsupervised visits were restricted. The courts have started to carve out those circumstances where a safety plan may involve parent's procedural due process rights. These cases may have a direct impact on differential response models with service options that encourage certain family members, including children, to leave the home temporarily or that only allow certain family members to have supervised contact with each other. It is unclear, though, without more case precedent, whether they also have repercussions for a non-investigation pathway assignment when the family remains intact without visitation restrictions.

Dupuy v. Samuels (2005) is one of the first Federal cases in which a safety plan, as part of a child welfare investigation, was challenged under due process grounds. A Federal district court in Illinois held that safety plans offered to parents during investigations in lieu of formal removal proceedings may deprive parents of their constitutionally protected interests in their children if they are imposed in an unfairly coercive manner. Here, the court held that the safety plans at issue, as written, were not coercive, but found that caseworker threats to remove children from the home unless they agreed to the plans were coercive and affected parents' due process rights when the threat was to separate parents and children for more than a brief or temporary period. To avoid a procedural due process violation, the court said that the State must create a process by which parents can challenge or review agency actions and decisions when offering voluntary safety plans.[xxxii]

On appeal, the Seventh Circuit Court of Appeals disagreed with the analysis of the lower court, but affirmed that court's holding because the government failed to cross-appeal.[xxxiii] The court noted that because safety plans are voluntary, absent some other unlawful action by the agency, they are not coercive and thus do not involve procedural due process rights. The court pointed to language in the consent forms parents must sign to participate as evidence that there was no coercion. The court found that the forms notified parents of their rights, their options, and the options of the State if they refuse to comply. The plans stated that by signing them, parents:

> Understand that failure to agree to the [safety] plan or to carry out the plan may result in a reassessment of my home and possible protective custody and/or referral to the State's Attorney's Office for a court order to remove my children from my home.

The Seventh Circuit focused its examination on the safety plans, ultimately concluding that, as written, they were voluntary. The court did not fully analyze whether the alleged implicit and explicit threats of removal by caseworkers constituted coercion, therefore triggering parents' due process rights.[xxxiv] The Seventh Circuit sent the case back to the district court for a trial on the merits. The district court then found, contrary to its original holding and relying on the higher court's guidance, that the safety plans were voluntary and that the parents had failed to state a valid procedural due process claim.[xxxv] Since *Dupuy*, other courts have relied on the Seventh

Circuit's analysis of safety plans and similarly rejected procedural due process claims on the basis that they are voluntary.

In *Smith v. Williams-Ash* (2008), a child welfare agency in Ohio persuaded parents to participate in a safety plan during which their biological children and kin would temporarily reside with neighbors. The court, relying on the Seventh Circuit *Dupuy* decision, struck down the parents' due process claim, finding that the parents voluntarily entered into the safety plans and that their participation was voluntary throughout its implementation. Here, the parents signed a consent form agreeing that the plan was "voluntary" and that if they could not follow it, the agency "may have to take other action(s)." The plan, signed by the parents, also stated that it would end when they were "able to protect [their] children without help" from the agency. The court adopted the reasoning from *Dupuy* and rejected the parents' claims, stating, "It is not a forbidden means of 'coercing' a settlement to threaten merely to enforce one's legal rights."[xxxvi]

The safety plans in *Dupuy* and *Williams-Ash* are analogous to differential response models. Both offer services intended to be voluntary and help families avoid deeper involvement in the child welfare court system. Arguably, since *Dupuy* is only binding on courts within the Seventh Circuit, courts in other jurisdictions may find a parent's due process rights have been infringed upon if differential response includes some of the safety plan features at issue in these cases. If, as part of a non-investigation pathway, the agency encourages a parent to temporarily place her child in the home of a relative and threatens to remove the child otherwise, this may breach the parent's due process rights if she were given no opportunity to challenge the removal, as she would if a more formal court proceeding commenced. In fact, at least one Federal court case contradicts the *Dupuy* line of cases on this issue. In *Croft v. Westmorland Court Children and Youth Services* (1997), the Third Circuit held that a child welfare agency caseworker's threat to a father to leave the home immediately while she completed her child abuse investigation impermissibly interfered with his constitutional right to rear his child. In this case, the Third Circuit found that the caseworker lacked any "objectively reasonable grounds" to believe that the child had been abused. This, coupled with evidence that the caseworker threatened the father that if he did not leave, his child would be placed in foster care, deprived him of his constitutionally protected rights.[xxxvii] Although this case did not involve a safety plan or differential response, it shows that using coercion or threats to separate parents from children where there are no reasonably objective grounds to do so may violate parents' rights.

Therefore, States implementing differential response should:

- implement the approach in a non-arbitrary manner,
- ensure consent forms used are not coercive or threatening,
- provide training to caseworkers on how to present non-investigation pathway service options in a non-coercive manner, and
- provide families an opportunity to challenge or review decisions made or services offered as part of the approach.

Equal Protection

The Equal Protection Clause mandates that States treat all similarly situated individuals equally.[xxxviii] Courts use heightened scrutiny when evaluating State classifications that are

suspect. Classifications based on race, national origin, or ethnicity receive the strictest scrutiny, requiring the government's actions to be *narrowly tailored* so that they do not affect any more individuals than necessary to achieve the purpose of the law, and the classification must serve a *compelling* government interest. [xxxix] Classifications based on gender will receive intermediate but still heightened scrutiny, requiring that the classification be *substantially related* to *important* government objectives.[xl] A higher standard of review is also used when the State deprives a class[xli] of a fundamental right. The most relevant fundamental right in the differential response context is parents' right to care, custody, and control of their children.[xlii] Other fundamental rights include the right to vote, privacy, interstate travel, and freedom of association.[xliii]

If no suspect classification or fundamental right is involved, courts have held that in most circumstances, State actors may treat groups differently as long as the classification of people into a particular group has a *rational basis* and is related to a *legitimate* government purpose.[xliv] Age, which may be a factor in some child protection decisions, is not considered a suspect class, so age-related differentiation will be considered using this "rational basis" review.[xlv]

Heightened Scrutiny of Differential Response

Suspect Classes

It is highly unlikely that a State would pass a differential response law that explicitly treats individuals differently based on race, gender, national origin, or ethnicity. It is possible, however, that a State agency or employee could apply a neutral law in a discriminatory way, or that a law could have a disparate impact on different groups. In both scenarios, the intent of those carrying out the laws will be considered.

State actions that are taken pursuant to neutral laws but that have a discriminatory purpose are subject to a strict inquiry.[xlvi] Courts will *not* use the heightened equal protection analysis merely because a State law has a disproportionate effect on a suspect class; rather, the higher standard will *only* be used if the law was enacted or is being applied with the purposeful intent to treat a suspect class differently.[xlvii] When a court is evaluating a neutral policy, however, it may consider the policy's disproportionate effect on a suspect class to be evidence that the State or its actors were in fact racially motivated in implementing the policy. In *People United for Children, Inc. v. City of New York* (2000),[xlviii] a New York lower court refused to dismiss the plaintiff's equal protection claim, stating that New York's child welfare policies discriminated against minorities when studies showed, among other things, that the majority of children in foster care were African American, that African American children stayed in foster care longer than did white children, and that African American children were twice as likely as white children were to be removed from their homes.[xlix]

In the differential response context, if an agency's practices were challenged as discriminating based on race, a court could look at evidence of the way different groups were affected. For example, if most African American families were assigned to the investigation pathway, and most Caucasian families were assigned to the non-investigation pathway, a court could consider that as an indication that there was an equal protection violation. Still, while

disparate impact evidence may be relevant, such evidence does not by itself prove a discriminatory intent.[l]

Fundamental Rights

Parents have a fundamental right to the care, custody, and control of their children.[li] Therefore, under equal protection doctrine, the State may not single out a class of parents, such as unmarried fathers, and deprive them of their rights to raise their children.[lii] However, assigning families to a non-investigation pathway does not necessarily constitute an infringement on parents' rights, as long as services are accepted voluntarily and on a temporary basis.[liii] Further, even if a court does find that non-investigation pathways involve a fundamental parental right, a State may succeed in arguing that their use for certain parents satisfies the requirements of the heightened equal protection standard. The State could assert that non-investigative services further its compelling government interest of protecting at-risk children. The State could also argue that non-investigative services apply only to the limited class of parents who have been judged by the agency to be appropriate candidates for a non-investigation pathway, and so the group is narrowly tailored.

The Supreme Court has held that children who are not in State care do not have a constitutional right to receive investigative child protective services.[liv] Therefore, a State may use a non-investigation pathway for some children and investigations for others without being accused of depriving certain classes of children of their fundamental rights.

Rational Basis Review of Differential Response

If neither a suspect class nor a fundamental right is involved in a State's classifications, a court will evaluate an equal protection challenge of a State action using the rational basis standard.[lv] The courts consider the goal of protecting children to be a legitimate State purpose.[lvi] A State legislature may therefore create laws that make any number of rational distinctions among children and parents in order to further this goal in the manner it deems most effective. For example, the State may allocate funds so that children in foster care receive benefits while those in kinship care do not, it may require an investigation of abuse claims reported by certain professionals but not by other members of the public, and it may impose certain duties regarding children in foster care while declining to do so regarding children out of State custody.[lvii] If the State treats individuals differently without a rational reason, a court may find that there was an equal protection violation only if it was motivated by ill will. In a Mississippi District Court case, *Olivia Y. ex. rel. Johnson v. Barbour,* the court found that there could be no violation of the plaintiffs' equal protection rights because although they claimed that there was no rational basis for the alleged discrimination against them, they did "not allege that defendants' action or inaction toward them is based on an illegitimate animus directed against them individually or as an identifiable class."[lviii]

An agency's assignment of non-suspect groups to a non-investigation pathway may be justified by a number of financial and policy reasons that will survive a "rational basis" review. There are many rational reasons why a State might employ disparate tactics in responding to child abuse allegations. Case law indicates that differential response could be justified by the fact

that States have limited resources to spend on child welfare, and so States may make distinctions to ensure that State funds used for investigations are not diverted from the most serious cases in order to fund less serious cases.[lix] In addition, differential response could be rationalized as a way to further the policy goal of reducing the number of children removed from their homes. Courts are reluctant to interfere with such policy determinations. If the determination to treat families differently is made by an agency official, rather than set out in a State law, that is also acceptable as long as the official's decision is not intentionally discriminatory.[lx] Thus, differential response is unlikely to violate equal protection requirements as long as its application is based on the needs of the family, and not on an unfair practice or policy of targeting certain individuals.

An argument can also be made that equal protection is not at issue in differential response because it generally does not involve treating *similarly situated* families differently. Differential response uses a non-investigation pathway with families who are in a different situation from those in an investigation pathway, because they are alleged to have experienced less serious instances of abuse or neglect. The differences between these groups of children may justify different treatment, and may be enough to avoid implicating the Equal Protection Clause.

State Law

State constitutional equal protection clauses may be more stringent than the Federal clause. A State clause may be interpreted to protect a wider range of "suspect" categories or to have a higher standard for what is considered rational, or it may decline to use the traditional Federal equal protection standards in favor of a more fluid balancing test.[lxi] Even if State laws are more expansive, however, they will still often leave room for the State to make rational distinctions in order to further important government goals.

In sum, using a non-investigation pathway may result in the disparate treatment of children and parents in the child welfare system. Two types of claims could be made regarding the Equal Protection Clause: A parent or child could claim that his rights were violated because he was assigned to a non-investigation pathway while other similarly situated parents or children were assigned to an investigation pathway, or a parent or child could claim that his rights were violated by receiving an investigation while others received non-investigative services. In either case, differential response practices will probably not violate the equal protection clause. An agency's use of non-investigative services will not be subject to heightened scrutiny by a court unless the State is using improper race, nationality, or gender considerations in creating and applying these services or they interfere with a fundamental right of children or parents. If a differential response law or practice is reviewed under the rational basis standard, it would be unlikely to violate the equal protection clause because there are numerous rational reasons, discussed previously, why a State would put some families into a non-investigation pathway and others into an investigative one.

Fourth Amendment

The Fourth Amendment of the United States Constitution balances the individual's right to privacy against the government's need to conduct searches and seizures for law enforcement and civil purposes.[lxii] The Fourth Amendment requires that most governmental searches of the

home be authorized in advance with a warrant.[lxiii] However, courts have carved out exceptions to the warrant requirement for those searches which need immediate action or for which securing warrants would be unnecessarily impractical.[lxiv] Home visits that are conducted as part of a child welfare investigation, like other official intrusions into the home, must theoretically pass Fourth Amendment requirements.[lxv] Nevertheless, in practice, child welfare agency visits and even investigations in the home are conducted routinely without warrants, justified by one of several exceptions to the warrant requirement.[lxvi]

Searches

Searches conducted as part of a child welfare investigation are subject to the Fourth Amendment's warrant requirement because they are intrusions on individuals' reasonable expectations of privacy.[lxvii] The first issue that must be considered is whether any aspects of a non-investigation pathway may constitute a search. The Supreme Court has said, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed,"[lxviii] and numerous lower court cases have applied the Fourth Amendment's warrant requirements to physical entries of homes in connection with traditional child abuse investigations.[lxix]

In a 1971 case, *Wyman v. James*, the Supreme Court found that home visits conducted by caseworkers to families receiving welfare benefits did not constitute searches because individuals were free to refuse the visit with no criminal penalty, the only consequence being loss or denial of welfare benefits.[lxx] The Court also asserted that while the visits were partially for the purpose of investigation, the investigation was different in nature from a search connected with a criminal act.[lxxi] In cases where the individual did not permit the caseworker to enter, including the case the Court was considering, there was no entry and therefore no search subject to the Fourth Amendment's requirements. Subsequent lower court cases have noted, however, that Supreme Court cases after *Wyman* have broadened the definition of what constitutes a search in non-criminal matters,[lxxii] and that the principles set out above do not apply to cases in which children are interviewed about possible abuse.[lxxiii] A later circuit court of appeals case, in which a guardian ad litem entered a home to comfort a child and help her select clothing to bring after a custody change, determined that, even though her actions were motivated by "concern for [the child's] comfort and not as part of any investigation, the search falls within the ambit of the Fourth Amendment."[lxxiv] Another case, *Walsh v. Erie County Department of Job and Family Services* (2003), specifically rejected the application of the *Wyman* case to a child abuse case because of the threat of arrest in the child abuse case and because:

> Here, in contrast [to *Wyman*], the plaintiffs were not seeking anything from or asking anything of the State. They did not want the State to interfere with them or their family or to disturb them or their children. They wanted nothing from the State except to be able to enjoy their fundamental right to be left alone.[lxxv]

Very few cases discuss non-investigation pathways, and none were found analyzing whether home entries as part of differential response models qualify as searches and require a warrant under the Fourth Amendment. A court could find that these entries are similar to those conducted for traditional abuse investigations, particularly since caseworkers have the ability to switch the case to the investigation pathway based on information obtained while in the home.

Caseworkers entering homes as part of differential response should therefore ensure that their entry falls under one of the exceptions to the warrant requirement, such as consent, discussed in the following pages.[lxxvi]

Exceptions to the Warrant Requirement

Several exceptions apply to the Fourth Amendment's warrant requirement. The most common is that parents may consent to a warrantless search of their home or child. However, if caseworkers coerce parents into consenting by using threats of removal, this may negate their consent. Second, child welfare investigations may qualify as "special needs" searches, which remove the warrant requirement and require only that the search be reasonable.[lxxvii] Third, warrantless searches conducted in emergencies may fall under an exigent circumstances exception.[lxxviii] Finally, courts are increasingly evaluating warrantless searches in the child welfare context using a general reasonableness test that balances the need of the government against the invasion caused by the search.[lxxix] These exceptions are frequently applied successfully to searches conducted as part of child welfare investigations and might therefore support warrantless searches conducted as part of a non-investigation pathway.

Consent Exception

Many searches conducted during a non-investigation pathway will likely fall under the consent exception -- that is, the parent voluntarily allows the caseworker to visit and offer services. However, the consent exception applies only when consent is freely given, without explicit or implicit coercion.[lxxx] The Supreme Court has said, "in examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."[lxxxi] Courts will also consider the age, education and experience of the consenting person.[lxxxii] For example, a child protective services worker's threat to have children removed or a parent arrested if the family does not agree to participate in a non-investigation pathway assignment may be considered coercive.[lxxxiii]

In determining if consent was coerced, courts may consider whether the agency representative asserted something she did not know to be true or claimed authority she did not have. For example, if a caseworker tells a family that if they choose not to cooperate, she "will obtain a court order to remove the child from the home," that may be considered coercive because the caseworker cannot be certain that the request will be granted or even that her supervisor will approve requesting an order.[lxxxiv] The subjective state of the parents is also a factor, so the court might consider their level of education, mental abilities, age, and past involvement with the child welfare system. A court could also consider how "intimidating" the people asking for consent were.[lxxxv] For example, two uniformed police officers with visibly holstered weapons would clearly pose a higher threat for a coercion claim than would a single, unarmed caseworker in plain clothes.[lxxxvi] If consent is coerced, the protections of the consent exception will not apply and the search may not survive a Fourth Amendment challenge.

As previously noted, differential response models may allow caseworkers to reassign cases between non-investigation and investigation pathways based on the information gathered

during their interactions with the family. [lxxxvii] If a case is reassigned to the investigation pathway, the exception of consent may not apply unless the family knew at the time they consented to the search that reassignment was possible. Consent may also be invalid if the non-investigation process is not explained correctly at the outset. A court will not uphold consent as voluntary unless the individual knew what he or she was consenting to, so a parent agreeing to let a caseworker enter her home to offer services did not validly consent to having her home "searched" for evidence of abuse or neglect. If the caseworker enters the home and sees conditions that require the case to be switched to the investigation pathway, it is unclear whether the initial consent would apply. For this reason, it is advisable that agencies inform families at the outset that cases may be moved to the investigation pathway if the caseworker uncovers information indicating a greater risk to the child than indicated by the hotline call.

"Special Needs" Exception

A warrantless search conducted in connection with a non-investigation pathway may also be allowable if it falls under the "special needs" or "administrative" search exception, which allows reasonable searches if they address "special needs, beyond the normal need for law enforcement."[lxxxviii] Courts in various jurisdictions have reached different conclusions when considering whether traditional child welfare investigations fall under the "special needs" exception.[lxxxix]

In *Ferguson v. City of Charleston* (2001),[xc] the Supreme Court held that a State hospital's practice of drug-testing urine samples of maternity patients without their consent did not fall under the special needs exception, but rather required a warrant because of the program's "extensive involvement of law enforcement at every stage of the policy." [xci] Because the results of the drug tests were turned over to the district attorney and the patients who tested positive were threatened with prosecution if they did not agree to undergo treatment, the Court judged that the hospital's civil purpose was not sufficiently divorced from the State's general interest in law enforcement.[xcii] In jurisdictions where a non-investigation pathway does not involve law enforcement agencies, searches conducted may not require a warrant if the search itself is reasonable (see below for a discussion of reasonableness of searches in the non-investigation pathway context).

Exigent Circumstances Exception

Another exception to the Fourth Amendment's warrant requirement is an emergency, such as a case where a criminal suspect is destroying evidence or fleeing.[xciii] Whether there are exigent circumstances in a given case will be judged partially on "the nature of the underlying offense"; the investigation of serious crimes such as felonies may qualify where "extremely minor" crimes would not.[xciv] Moreover, the exception must be "narrowly drawn to cover cases of real and not contrived emergencies."[xcv] In the child welfare context, courts may find that law enforcement or child welfare officials may enter a residence without a warrant if a child is in immediate danger.[xcvi] Since the non-investigation pathway is usually not used when there is an allegation or danger of serious physical harm to a child, this exception is unlikely to apply to a search conducted as part of that process.

Reasonableness Test

Finally, a court might find that a search connected with a non-investigation pathway conducted without a warrant or probable cause was reasonable under the Fourth Amendment.[xcvii] The Supreme Court has stressed that unreasonableness is the benchmark for impermissible searches and has said that, "reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances."[xcviii] The Court employs a balancing test assessing, "on the one hand, the degree to which [the "search" in question] intrudes upon an individual's privacy and, on the other, the degree to which it is needed to promote legitimate governmental interests."[xcix] In a case dealing with a body search of children in connection with abuse investigations, a circuit court of appeals said, "courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[c]

Analysis of searches conducted in connection with a non-investigation pathway will vary according to the practices of the jurisdiction and the particular facts of a case. The search of a residence or of a child's body involves high levels of intrusion, according to numerous court decisions. However, calling in advance to explain the non-investigation pathway process and to make an appointment for a time convenient for the family (as is done in some jurisdictions) could certainly lower the level of intrusiveness. If a caseworker knocks on the door unexpectedly as a family is eating dinner, on the other hand, a court could consider that to be a much higher level of intrusion. Similarly, a caseworker who sits in one room with the family and simply discusses their situation may be intruding less than one who looks throughout the whole house to determine what services a family might need.

Regarding the justification for initiating a search, if cases have been assigned to the non-investigation pathway because they are considered to be "low risk" a court may not find that the search was reasonable. The court will judge this based on exactly what type of abuse or neglect led to the agency's involvement, rather than simply on the agency's policy. A "search" of a family alleged to have a filthy home might be considered justified while a family whose child has repeatedly missed school might not justify a search. It should be noted that differential response cases have generally already been "screened in," meaning that, if the allegations are true, the situation constitutes what the State has defined as abuse or neglect of a child. One could argue that all of these cases pose some risk to the child and searches connected to them are therefore justified, but courts will still probably look at the nature of the neglect alleged to determine whether the search was reasonable.

Although the manner of conducting a search under a non-investigation pathway will likely be equally or less intrusive than searches used in traditional investigations, the justification for conducting a search may be less strong. For this reason, it is unclear whether, absent consent or a "special needs" exception, searches performed on families placed in the non-investigation pathway would be considered reasonable under the Fourth Amendment. Agencies working with families through the non-investigation pathway should, therefore, attempt to obtain knowing and voluntary consent of the parents prior to initiating agency involvement and avoid excessive coordination with law enforcement.

Rights Based on Federal Statutes

The Federal civil rights act empowers individuals to sue government actors when the government actor's actions, conducted under the color of State law, deprive individuals of their rights under the U.S. Constitution or Federal laws.[ci] Any Federal statute may provide an individual with the power to sue a State or government actor that violates a right created by the Federal statute, if:[cii]

- Congress intended the provision in question to benefit the individual suing;
- the harmed individual demonstrates that his alleged right is protected by the statute and that the statute is not so "vague and amorphous" that its enforcement would strain judicial competence; and
- the statute unambiguously imposes a binding obligation on the States.

The Supreme Court has found that to meet the first prong of this test, the statute must clearly show Congress' intent to confer individual rights.[ciii] Congress uses funding statutes through the spending clause of the Constitution to dictate State action. The Supreme Court has limited individuals' capacity to sue State actors under these Federal funding statutes because "the typical remedy for State noncompliance . . . is to terminate funds to the State," not create individual rights of enforcement.[civ]

However, children and parents have asserted private rights of action against child welfare agencies under several Federal funding statutes, including the Federal Child Abuse Prevention and Treatment Act (CAPTA) and the Adoption Assistance and Child Welfare Act (AACWA), including provisions of the Adoptions and Safe Families Act (ASFA). These challenges may be relevant to differential response insofar as Federal courts have found that provisions relating to mandatory investigations or optional family services create any enforceable rights.

Individual Rights Under CAPTA

The Supreme Court has outlined how courts should assess whether a Federal statute creates a private right of action. However, before the Supreme Court's ruling on this issue, in 1996, a Federal district court in New York, in *Marisol A. v. Giuliani* (1996), held that CAPTA's requirement that States initiate prompt investigations of abuse and neglect reports created an enforceable right. In other words, this decision held that an individual child or parent could sue a child welfare agency for failing to investigate an allegation of abuse or neglect by arguing that the agency violated CAPTA.[cv]

Although the *Marisol A*. case has not been explicitly overruled, there have been several Federal court cases before and after the Supreme Court's line of enforceable rights rulings that have held that CAPTA's provisions *do not* create an enforceable right to an investigation.[cvi] For example, in 1996, in *Doe v. District of Columbia*, a D.C. Federal court found that CAPTA's mandatory investigation provision did not enumerate factors that must be a part of an investigation, but just included suggestions for what may be included. The court concluded that CAPTA, therefore, did not provide "sufficiently specific, mandatory terms" and it therefore created only "generalized duties," and no enforceable rights.[cvii]

Likewise, since the Supreme Court has established its narrowly tailored test to assess whether a private right of action exists, numerous Federal courts have held that CAPTA's provisions do not create enforceable rights.[cviii] Moreover, since CAPTA's most recent reauthorization, at least one Federal court has argued that the decision in *Marisol A*. has been weakened because it was based on a previous version of CAPTA "that contained mandatory language not contained in the current version."[cix] Comparing the language, the old version required States to "'provide that' there be 'prompt' investigations of all reports of known or suspected child abuse or neglect."[cx] In contrast, CAPTA currently requires States to have in place "procedures for the immediate screening, risk and safety assessment, and prompt investigation of . . . reports."[cxi]

Based on this newer CAPTA language, it is unlikely that a parent or child could challenge an agency's use of a non-investigation pathway in lieu of an investigation by arguing that it violates a right created under CAPTA. Numerous Federal courts have held that even CAPTA's prior, more stringent provisions regarding investigations did not create enforceable rights for individuals. Now that the statute's language is more permissive and only requires States to have "procedures" in place, it is less likely that courts will find that this language is sufficiently specific and mandatory such that it creates a private right of action.

Individual Rights Under AACWA and the Adoption and Safe Families Act as Incorporated Into AACWA

In 1992, the Supreme Court in *Suter v. Artist M*. (1992) held that the "reasonable efforts" provision of AACWA to prevent the removal of children from the home and encourage reunification did not create a private right of action. The court found the phrase "reasonable efforts" to be too ambiguous to create any right enforceable by a court. It also asserted that the Department of Health and Human Services' obligation to promulgate regulations pursuant to this provision did not support the creation of a right because they were not sufficiently specific, and did not indicate that States would be held responsible for anything other than submitting an adequate plan of implementation.[cxii]

After *Suter*, lower courts were unclear whether individuals could argue that State plan requirements under AACWA merely required States to create a plan or whether the statute was sufficiently specific as to vest individuals with the private right to enforce the implementation of specific aspects of the plan.[cxiii] Congress amended AACWA in 1994 to provide some guidance on the issue, but stated that its change did not alter the holding in *Suter* relative to the reasonable efforts provisions of the Act. The amendment stated in part:

> In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan.[cxiv]

A review of cases since this amendment shows that it is unclear how this change affects whether AACWA creates enforceable rights. Some Federal courts have held that the amendment

overrules part of *Suter*.[cxv] Applying the analyses from Supreme Court rulings before *Suter*, these lower courts have held that some provisions of AACWA do not create enforceable rights.[cxvi] Others, however, have held that certain provisions of AACWA are sufficiently specific and mandatory to create a private right of action. In *Brian A. v. Sundquist* (2000), a Federal court held that the case planning provisions create a private right of action.[cxvii] In *Jeanine B. v. Thompson* (1995), a Federal district court held that the Act vested children with enforceable rights to demand "reviews, monitoring and collaboration between State, local, and Federal agencies."[cxviii]

In addition, some Federal courts have held that Congress' amendment to AACWA does not overrule *Suter*; rather, it merely prohibits courts from denying plaintiffs' enforceable rights claims simply because the Federal statute at issue requires States to submit a plan. For example, in *Harris v. James* (1997), one circuit court stated that Congress' amendment:

> does not purport to reject any and all grounds relied upon in *Suter*; it purports only to overrule certain grounds -- i.e., that a provision is unenforceable simply because of its inclusion in a section requiring a State plan or specifying the contents of such a plan.

These courts, however, have determined that the Supreme Court did not reach its decision in *Suter* solely because of the existence of State plan provisions; rather, the Court correctly premised its conclusion on the fact that the provisions were too amorphous and vague to be enforced.[cxix] Many courts, although disagreeing with some of *Suter*'s reasoning, have held that several of AACWA's provisions do not create enforceable rights, either due to the legislation's vagueness, or because the Act does not include language that shows a particular Congressional intent.[cxx]

Therefore, based on *Suter* and its progeny, it is very unlikely that a court will find that the "reasonable efforts" provisions of AACWA (or ASFA, which is incorporated therein) create enforceable rights for parents or children. This has implications for differential response because the "reasonable efforts" requirement may be used to argue that an agency is required to make efforts to prevent the removal of a child, which could include the provision of services to families placed on the non-investigation pathway. But, since Congress has stated that the *Suter* ruling still stands regarding the "reasonable efforts" requirement and the Act does not discuss differential response explicitly, the Act does not create a private right of action in favor of any particular pathway. If a child or parent were to sue a child welfare agency arguing that another AACWA provision creates an enforceable right relative to differential response, he would have to show that the provision was intended for his benefit, not too vague, and binding on the States.

Claims Based on State Law or Statute

Although there have been some constitutional challenges to child welfare agencies' practices around the provision of pre-court services, safety plans, and/or failure to investigate, most of these Federal court challenges, from children or parents, have not been successful. Federal courts have largely held that although parents have a constitutional right to the care, custody, and control of their children, this right is not infringed upon by the provision of assessment services or use of voluntary safety plans that are not coercive and limited in scope

and duration.[cxxi] Federal courts have also held that an agency's failure to investigate (or fully investigate) child abuse or neglect allegations does not violate a child's right to bodily integrity.[cxxii] Despite these rulings, State courts have been more receptive to claims made by children and parents under negligence and State statutory standards. Parents and children have also made claims based on State constitutional rights, mirroring the arguments made in Federal cases previously discussed, but they also have been largely unsuccessful.[cxxiii]

A Child's State-Based Right to Investigations of Alleged Abuse or Neglect

If a child welfare agency receives an allegation of abuse or neglect and fails to assign the family to the investigation pathway, instead assigning the family to the non-investigation pathway, and the child is injured during the process, the child (or his representative) could sue the agency or its employees for negligence. Generally, to successfully argue negligence by a State employee, the child must show that 1) the caseworker had a duty to protect the child from injury; 2) she breached that duty; 3) the child suffered actual injury or loss; and 4) the loss or injury proximately resulted from the caseworker's breach of the duty.[cxxiv] Numerous State courts have held that State child welfare statutes create such a duty and held agency representatives responsible for injuries children sustained when the agency did not fully investigate or respond to abuse or neglect allegations.

For example, in *Gowens v. Tys. S*. (2006), the Supreme Court of Alabama considered whether two children had a viable negligence claim against their assigned caseworker when he failed to conduct a thorough investigation and instead instituted an in-home safety plan and services with which the parents did not comply. On appeal, one of the key issues was whether State statute created a special relationship between the caseworker and children. The court found that the worker owed a special duty to investigate child abuse and neglect allegations under State statute. The court reasoned that Alabama's child welfare law created this duty because its stated purpose was to "protect children whose health and welfare may be adversely affected through abuse and neglect" and charged the agency with the duty to "*seek out*, through investigation, complaints from citizens . . . minor children . . . who are in need of its care and protection and to aid such children." The statute further outlined the specific responsibilities of the investigating caseworker to evaluate abuse reports.[cxxv]

Likewise, in *Horridge v. St. Mary's County Department of Social Services* (2004), a father sued child welfare agency caseworkers and supervisors for failing to investigate allegations of abuse of his son. The court found that the State statute regarding the agency's obligation to promptly investigate "each suspected incident of abuse or neglect" created a special duty owed by the agency to children identified to it as being the victim of abuse or neglect. The court reasoned that the statute and its accompanying regulations outlined specific and focused duties of the agency, which were mandatory in nature and, importantly, were geared to a discrete class of individuals (suspected child victims of abuse or neglect) rather than the public at large. The court also found that the father had an actionable negligence claim if he showed that the injury suffered by his son was proximately cause by the agency -- meaning the injury was a "foreseeable consequence of the failure by the [agency] to perform its statutory obligations."[cxxvi]

Several other State courts have found that State abuse and neglect statutes create a special relationship between children and the agency such that the latter owes suspected abuse or neglect victims a duty to investigate.[cxxvii] A caseworker's failure to conduct a thorough investigation as a result of assigning the family to the non-investigation pathway may lead to a finding of negligence against an individual caseworker or supervisor if the other elements of a negligence claim can be proven.[cxxviii] Some jurisdictions have also established tests to determine whether such a duty exists. The South Carolina Court of Appeals articulated a six-part test to determine whether a special duty exists. Under this test, the State owes such a duty to the child if:[cxxix]

- an essential purpose of the statute is to protect against a particular kind of harm;
- that statute either directly or indirectly imposes on a specific public officer a duty to guard against or not cause that harm;
- the class of persons the statute intends to protect is identifiable before the fact;
- the plaintiff is a person within the protected class;
- the public officer knows or has reason to know of the likelihood of harm to members of the class if he fails to do his duty; and
- the officer is given sufficient authority to act in the circumstances or he undertakes to act in the exercise of his office.

This test was affirmed by the Supreme Court of South Carolina[cxxx] and other States have applied similar tests to determine a State's special duty to an abused child.[cxxxi]

In contrast, several courts have rejected negligence claims for failure to investigate, finding that there is no basis for the claim in State law. In *Holloway v. State* (2006), a Tennessee court held that a deceased child's representative could not claim that the child welfare agency was negligent for failing to investigate if the State tort claim's act created a private right of action only if the State assumed custody or control over the child.[cxxxii] In *Rittscher v. State* (1984), an Iowa court held that a State agency could not be liable for failing to investigate where the State statute did not contemplate this kind of liability and it could not arise from the State's general *parens patriae* duty to protect children.[cxxxiii]

Some State courts have found that an agency's failure to investigate allegations of abuse or neglect gives rise to a negligence claim on the child's behalf where the State's statute requires an investigation in circumstances akin to the child's case.[cxxxiv] If a State or county has implemented differential response by policy, but the State statute requires investigations, a family may have a viable negligence claim if it is subject to a non-investigation pathway and the statute is specific in defining the class of individuals who will be investigated and clearly defines the type of harm the statute aims to protect against. In contrast, if the legislature's intent is clear that a cause of action cannot impliedly arise from the statute or the law provides discretion to agency workers in determining whether and under what circumstances investigations must occur, it is less likely that a negligence claim would succeed. In addition, if the State tort-claims act limits the State's liability to actions involving its custody of a child, this may preclude a parent or child's negligence claim.

A Parent's State-Based Right to the Care and Custody of His Child

A State statute may create a duty of care not just to child victims, but also to parents suspected of abuse or neglect.[cxxxv] In *Tyner v. State Department of Social and Health Services, Child Protective Services* (2000), the Washington Supreme Court heard a case in which a father was accused of sexually abusing his son. During the investigation, the court prohibited the father from seeing his children. The caseworker evaluating the claim concluded that the allegations were untrue; however, his report was not provided to the father, his attorney, or the court. The father eventually brought a claim against the State for negligent investigation. The State argued that while caseworkers owe a duty of care to children, they do not owe a parallel duty to parents. The court disagreed. The court recognized that a statute may create such a cause of action if:

> The plaintiff is within the class for whose 'especial' benefit the statute was created…[if the] legislative intent, explicitly or implicitly supports creating or denying a remedy and … [if] implying a remedy is consistent with the underlying purpose of the legislation.

The court noted that child welfare statutes are meant to benefit not just children but also the family as a whole. Further, the court stated that one of the child welfare statute's main purposes, to preserve the integrity of the family, supported an action by parents who have been subject to negligent State investigations.[cxxxvi]

However, some courts disagree with allowing parents to sue agencies based on the latter's negligent investigation. In *Hayes v. State* (2009), a Maryland court found that allowing parents this remedy did not further the State statute's goal to protect children from abuse or neglect. Here, a father claimed that the State had conducted a negligent investigation following a mother's allegations of abuse. The court stated that creating this remedy for parents would open the door to "frivolous lawsuits that would surely be filed by parents unhappy with [the agency's] decisions." The court reasoned that while the child welfare statute was clearly meant to prevent harm to children, there was no indication that one of its major purposes was to protect parents from "mere accusations of abuse."[cxxxvii] Thus, while the court in *Hayes* reviewed many of the same factors analyzed in *Tyner*, different public policy considerations and interpretations of statutory intent led to different results.

State courts vary on whether parents may sue child welfare agencies for conducting negligent investigations under the premise that it deprives them of their right to raise their children. Whether a similar claim can be made arguing the negligent implementation of differential response models will depend on the test the court uses to determine whether a special duty of the agency arose and whether the agency's actions infringed upon the parent's right to care for his child. If the agency's response under a non-investigation pathway includes the temporary removal of the child or parent from the home, a parent may have a stronger argument than if the family unit remains intact. However, the parent will still have to show that he was in a special class of people for whom the law was created and that the underlying purpose of the statute in question supports the creation of a cause of action for parents.

Claims of Unlawful Imprisonment and Interference Under State Law

A child or parent may bring several other State-based civil claims if, during differential response, the child or parent is prevailed upon to live outside the home temporarily.

False Imprisonment

States define the tort of false imprisonment differently. For example, in Ohio, it is "when a person confines another intentionally, without privilege, and against her consent within a limited area for any appreciable time, however short."[cxxxviii] In Mississippi, to make a successful false imprisonment claim, a person must show that1) he was detained and 2) the detention was unlawful.[cxxxix] When considering these two elements, Mississippi courts will evaluate whether, given the totality of the circumstances, the acts of the defendant "were objectively reasonable in their nature, purpose, extent, or duration."[cxl] In most jurisdictions, however, the defendant will have a valid defense if she can show her actions were legal[cxli] or that she did not completely restrain the liberty of the alleged victim.[cxlii]

It is highly unlikely, therefore, that a parent or child could successfully claim false imprisonment if a child welfare agency convinced either family member to temporarily remove himself from the home. Even if the decision is coerced or without the individual's consent, there is no detention of either in a limited area or restraint on his overall movement.

Unlawful Interference

Unlawful interference with the custody of one's child is another State-based claim a parent may raise if challenging differential response. An individual who "with knowledge that the parent does not consent, abducts or otherwise compels or induces a minor child to leave a parent legally entitled to [the child's] custody" is liable to the parent.[cxliii] To establish a claim, a plaintiff must show that 1) the plaintiff has a legal right to establish or maintain a parental or custodial relationship with the child, 2) the defendant took some action or effort to abduct the child or to compel or induce the child to leave the plaintiff's custody, and 3) the abducting or inducing was willful and done with notice or knowledge that the child had a parent whose rights were thereby violated and who did not consent.[cxliv] Courts have recognized several defenses to this claim including that the defendant took the child to prevent physical harm or that the defendant possessed a reasonable, good faith belief that the interference was proper.[cxlv] If the agency's response under a non-investigation pathway includes the temporary removal of a child from the parent's care, this may meet the statutory definition of interference, especially if there is evidence of coercion. However, it is likely that an agency could successfully defend itself by arguing that it reasonably believed that the interference was necessary to protect the child from harm.

Brief Overview of Common Defenses by Agencies, States, or Caseworkers

Immunity Doctrines

When a child or parent challenges an agency's actions, she may make claims against the agency and/or county or State, as well as against individual caseworkers and supervisors. There are several defenses government entities or individual State agents could make that would prevent the parent or child from winning the case, even if there was a finding that a constitutional or State-based right was at issue. The agency (or other government entity) or its employees may assert that they are entitled to immunity under a variety of doctrines, including sovereign immunity, qualified immunity, immunity under the public duty doctrine, or official/State-agent immunity.[cxlvi]

If a family challenges the actions of individual child welfare agency employees, they may have to overcome a defense of qualified immunity. Simply stated, agency employees "are entitled to qualified immunity unless their alleged conduct violated 'clearly established statutory or constitutional rights of which a reasonable person in their positions would have known.'"[cxlvii]

Under sovereign immunity, government actors are immune from liability unless a statute explicitly confers liability on the State; in this situation, a parent or child could only sue if a statute expressly waived immunity for the State's negligent acts.[cxlviii] In some jurisdictions, sovereign immunity is limited by the public duty doctrine. In these jurisdictions, immunity is waived as long as a statute confers upon the State a duty of care to a specific individual, rather than a generalized duty to the public.[cxlix] Under official/State-actor immunity, a jurisdiction may immunize a State actor from liability if he is performing discretionary acts in his official role as a government employee.[cl] However, this immunity may be waived if the actor fails to fulfill the duties of his job as required by statute.[cli]

Abstention Doctrine

Agencies or caseworkers may only raise an abstention defense if the parent or child brings a case against them in Federal court and the Federal case in some way interferes with an ongoing State case or State court decision. If a family were to challenge some aspect of differential response in Federal court, the claim may not be successful if there is a contrary State decision or ongoing abuse or neglect proceeding in State court. In *Younger v. Harris* (1971), the U.S. Supreme Court held that Federal courts were required to "abstain" from hearing constitutional civil rights tort claims brought by persons who were currently being prosecuted in State court for the same matter.[clii] This defense may be raised in a differential response context if, for example, a parent alleges a due process or Fourth Amendment violation in Federal court when his child's abuse/neglect case switched from the non-investigation pathway to the investigation pathway and there is ongoing litigation on the same issues in the abuse/neglect case.[cliii]

Conclusion

Differential response is a growing practice in child welfare, but there has been limited legal scholarship or case law on the subject. However, there have been a handful of cases, challenging analogous approaches that provide guidance to States implementing differential response. These cases show that differential response should be implemented in a non-arbitrary manner and that agencies should ensure consents forms used are not coercive or threatening. They also expose the need for agencies to provide training to caseworkers on how to present non-investigation pathway service options in a non-coercive manner. Finally, they illustrate the need for State laws, policy or procedures to be in place that afford families an opportunity to challenge or review decisions made or services offered as part of the differential response approach.

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[i] American Humane Association & Child Welfare League of America, "National Study of Differential Response in Child Welfare" (Nov. 2006).

[ii] Families are "selected" to participate in the non-investigation pathway based on considerations specified by State/county policy or law. These can include specific criteria to determine low to moderate risk levels, type of maltreatment, and age of the child.

[iii] Some jurisdictions may have a process that includes some or all of these steps except that it also provides non-investigative services to cases which do not meet the statutory criteria for abuse or neglect (those that would otherwise be "screened out" or "diverted"). The analysis in this brief does not apply to diversion cases that are based on hotline calls that do not meet the statutory criteria for abuse or neglect.

[iv] Although cases assigned to a non-investigation pathway would rarely, if ever, include the most severe cases of abuse, the non-investigation pathway is sometimes used in situations where it may be unsafe for a child to remain in the home without services (e.g., a newborn whose parent has a severe substance abuse issue). In those circumstances the parent may agree to temporarily remove the child or him- or herself from the home to ensure the child's safety.

[v] This analysis is not intended to be a comprehensive review of all challenges that could be brought in court regarding differential response. Instead it discusses key legal issues to be aware of, particularly those that are different from traditional investigations.

[vi] 42 U.S.C. § 1983 (West 2009).

[vii] *Smith v. Williams-Ash*, 520 F.3d 596, 599 (6th Cir. 2008) (citing 42 U.S.C. § 1983).

[viii] *See, e.g., Forrester v. Bass*, 397 F.3d 1047, 1058 (8th Cir. 2005).

[ix] *Meyer v. Nebraska,* 262 U.S. 390, 399, 401 (1923).

[x] *See, e.g., Prince v. Massachusetts*, 321 US 158 (1944).

[xi] *See, e.g., Dupuy v. Samuels,* 465 F.3d 757, 761 (7th Cir. 2006); *Smith v. Williams-Ash*, 520 F.3d 596,600 (6th Cir. 2008).

[xii] *Croft v. Westmoreland County Children and Youth Serv*., 103 F.3d 1123, 1127 (3rd Cir. 1997).

[xiii] *Berman v. Young,* 291 F.3d 976, 983 (7th Cir. 2002). *See also Duchesne v. Sugarman*, 566 F.2d 817, 25 (2nd Cir. 1977), Nicholson v. Williams, 203 F.Supp.2d 153, 235 (E.D.N.Y. 2002).

[xiv] *Berman v. Young,* 291 F.3d 976, 983 (7th Cir. 2002).

[xv] *See, e.g., Forrester v. Bass*, 397 F.3d 1047 (8th Cir. 2005); *DeShaney v. Winnebago County Dept. of Social Serv*., 489 U.S. 189 (1989).

[xvi] *DeShaney v. Winnebago County Dept. of Social Serv*., 489 U.S. 189, 194 (1989).

[xvii] *Id*. at 190.

[xviii] *Id*. at 199-200; see also *Burton v. Richmond*, 370 F.3d 723, 728 (8th Cir. 2004) (Holding that the children did not have a special relationship with the State, despite the fact that the agency placed the children with relatives and supervised the placement); *Wooten v. Campbell*, 49 F.3d 696, 701 (11th Cir. 1995) (The court declined to find a due process violation when a child was killed by his father during unsupervised visitation, holding that no special relationship existed where State was only responsible for monitoring and arranging the child's visits with his father, and where the mother retained physical custody over the child.); *A.S. By and Through Blalock v. Tellus*, 22 F.Supp.2d 1217, 1220-22 (D. Kan. 1998) (Holding that a special relationship does not exist, even if the State has legal custody over a child, if a parent retains physical custody over the child).

[xix] *Currier v. Doran*, 242 F.3d 905, 922 (10th Cir. 2001); *Briggs v. Johnson*, No. 07-6037, 2008 WL 1815721, *4 (10th Cir. Apr. 23, 2008) (The Oklahoma Department of Human Services removed a child from her mother's custody after allegations of abuse surfaced, but allowed the mother unsupervised visits; the court refused to dismiss a due process claim on behalf of the child after she was injured during these unsupervised visits because employees of the department discouraged the child's grandparents from reporting additional incidents of abuse.)
[xx] *See, e.g., Currier*, 242 F.3d at 917-18 (10th Cir. 2001) (citing *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996)). For example, in *Forrester v. Bass* (2005), the Sixth Circuit held that an agency's false representations in a family assessment report and failure to follow State protective procedures were insufficient to show that it took affirmative steps to increase the vulnerability or danger to the children in question. 397 F.3d 1047, 1058 (6th Cir. 2005). In *Powell v. Georgia Department of Human Resources* (1997), the 11th Circuit rejected a "State-created danger" argument when during an investigation, a child welfare agency with evidence of prior abuse allowed a child to be removed from the safety of one relative's home and placed in the home of a relative who gave the parents access to the child, who later killed him. 114 F.3d 1074 (11th Cir. 1997).
[xxi] *Currier v. Doran*, 242 F.3d 905, 922 (10th Cir. 2001).
[xxii] This is difficult, if not impossible, if the child remains in the home when non-investigative services are offered. If the State persuades the parent to remove the child from the home, the child may have a stronger argument that the State assumed some control over the child's custody. Even in this circumstance, if the parent *voluntarily* places the child in another home, the State's exposure is minimal. If, however, there is evidence that the State coerced or forced the child's removal, this may help the child's "special relationship" argument, but may still be insufficient if the court holds strictly to the requirement that the State must assume physical and/or legal custody of the child
[xxiii] Here, the child must show that the agency created a situation during the non-investigation pathway that put the child in immediate risk of serious harm that was so egregious that it shocks the conscience. This argument may be successful if agency staff acted outside the bounds of normal protocol for differential response, or any agency procedures, by discouraging individuals from reporting abuse of the child or improperly moving the child into a dangerous environment in which he would not otherwise have been placed.
[xxiv] *Matthews v. Eldridge*, 424 U.S. 319, 332 (1976).
[xxv] *Blalock v. Tellus*, 22 F.Supp.2d 1217, 1222-1223 (D. Kan. 1998), *Doe v. District of Columbia*, 93 F.3d 861, 868-870 (D.C. 1996).
[xxvi] *Pierce v. Delta County Dep't of Social Serv*., 119 F.Supp.2d 1139, 1153 (D.Colo. 2000) (Holding that State law does not grant children outside of foster care an entitlement to receive protective services following an abuse allegation).
[xxvii] *See e.g., Tony L. ex. rel. Simpson v. Childers*, 71 F.3d 1182, 1185-1186 (6th Cir. 1995).
[xxviii] 71 F.3d 1182, 1186-92 (6th Cir. 1995).
[xxix] 397 F.3d 1047, 1054-58 (8th Cir. 2005).
[xxx] *Id*. at 1056; *see also Doe by Nelson v. Milwaukee County*, 903 F.2d 499, 503 (7th Cir. 1990) (Wisconsin's child abuse reporting and investigation procedures did not amount to benefits that children were entitled to receive within the meaning of the due process clause); *Morgan v. Weizbrod*, No 93-6324, 1994 WL 55607, at *2-3 (10th Cir. Feb. 23, 1994) (Oklahoma State duty to investigate reports of child abuse did not constitute an entitlement to an investigation); *Doe v. District of Columbia*, 93 F.3d 861 (D.C. 1996) (The procedures outlined in the District's Child Abuse and Neglect Act were not enacted "pursuant to a substantive constitutional obligation to protect [the child] from abuse and neglect," and therefore the procedures did not trigger the Due Process Clause); *Blalock v. Tellus*, 22 F.Supp.2d 1217 (D. Kan. 1998) (The reporting and investigation procedures in the Kansas statute did not constitute "substantive outcomes," and so the procedures were not entitlements that warranted constitutional protection); *Pierce v. Delta County Dep't of Social Serv*., 119 F.Supp.2d 1139, 1153 (D. Colo. 2000) (Colorado's Child Protection Act mandated certain reporting and investigation practices when dealing with child abuse allegations, but the procedures did "not dictate a particular substantive outcome or guarantee, such as removal from the alleged abuser's home or other protective measures," and so the children were not vested with a constitutionally protected interest); *Olivia Y. v. Barbour*, 351 F.Supp.2d 543, 550 (S.D. Miss. 2004) (A mandate that the Department of Human Services refer all reports of child abuse or neglect to a youth court intake unit did not amount to a "specific substantive outcome," particularly since the law did not define the scope of the intake unit's preliminary inquiry, nor did it mandate that the youth court take any particular action following this inquiry).
[xxxi] 918 F.Supp. 1575, 1581 (S.D. Ga., 1996).
[xxxii] *Dupuy v. Samuels*, 462 F.Supp.2d 859, 888 (N.D.Ill., 2005).
[xxxiii] *Dupuy v. Samuels*, 465 F.3d 757, 763 (7th Cir. 2006).
[xxxiv] *Id.*

[xxxv] *Dupuy v. McEwen*, 495 F.3d 807, 808 (2007).
[xxxvi] 520 F.3d 596, 600 (6th Cir. 2008).
[xxxvii] 103 F.3d 1123 (3rd Cir. 1997).
[xxxviii] *See, e.g., Plyler v. Doe*, 457 U.S. 202, 216 (1982).
[xxxix] Plyler, 457 U.S. at 217.
[xl] *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 84 (2000) (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)).
[xli] Generally a "class" is made up of more than one person, however, courts may recognize a "class of one" if an individual has "been treated by the government in an entirely different manner than all other similarly situated persons." Ronald D. Rotunda and John E. Nowak, "Treatise on Constitutional Law-Substance & Procedure § 14.7. The Equal Protection Clause" (4th ed., 2009).
[xlii] Stanley v. Illinois, 405 U.S. 645, 650 (1972).
[xliii] Ronald D. Rotunda and John E. Nowak, "Treatise on Constitutional Law-Substance & Procedure § 15.7: Fundamental Rights (4th ed., 2009). Fundamental rights are those that that "are implicit in the concept of ordered liberty" and "deeply rooted in this nation's history and tradition." *Flaskamp v. Dearborn Public Schools*, 385 F.3d 935, 941 (6th Cir. 2004) (citing *Roe v. Wade*, 410 U.S. 113, 152 (1973*); Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977)).
[xliv] *See, e.g*., *Todd v. Luzerne County Children and Youth Services*, No. 3:CV-04-2637, 2008 WL 859253, at *10 (M.D.Pa. March 28, 2008).
[xlv] *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).
[xlvi] *See, e.g., People United for Children, Inc. v. City of New York*, 108 F.Supp.2d 275, 296 (S.D.N.Y. 2000).
[xlvii] *See, e.g. Washington v. Davis*, 426 U.S. 229, 248 (1976).
[xlviii] 108 F.Supp.2d 275, 296 (S.D.N.Y., 2000).
[xlix] *Id.* It should be noted that the court did not find that the Equal Protection Clause *had* been violated, only that it could have been, and that this decision is not controlling in other jurisdictions.
[l] *See e.g*., *United States v. Texas Education Agency*, 546 F.2d 162, 168 (5th Cir. 1977).
[li] *Stanley v. Illinois*, 405 U.S. 645, 658 (1972).
[lii] *Id*. at 657.
[liii] *See Dupuy v. Samuels*, 465 F.3d 757, 760-61 (7th Cir. 2006); *Smith v. Williams-Ash*, 520 F.3d 596, 600 (6th Cir. 2008).
[liv] *DeShaney v. Winnebago County Dep't of Social Serv*., 489 U.S. 189, 194 (1989); *see also Doe by Nelson v. Milwaukee County*, 903 F.2d 499 (7th Cir. 1990), *Bryan v. Erie County Office of Children & Youth*, 2006 WL 2850446 (W.D.Pa. 2006).
[lv] *See Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir. 2005).
[lvi] *Stanley v. Illinois*, 405 U.S. 645, 652 (1972). *See also Prince v. Massachusetts,* 321 U.S. 158, 166 (1944).
[lvii] *See Lipscomb By and Through DeFehr v. Simmons*, 962 F.2d 1374, 1380 (9th Cir. 1992); *Doe by Nelson v. Milwaukee County*, 903 F.2d 499, 505 (7th Cir. 1990); *McComb v. Wambaugh*, 834 F.2d 474, 483 (3rd Cir. 1991).
[lviii] *Olivia Y. ex. rel. Johnson v. Barbour*, 351 F.Supp.2d 543, 551-52 (S.D.Miss. 2004). One of the plaintiffs' claims in this case was that Mississippi's child welfare agencies violated the Equal Protection Clause because they, due to funding shortages, had failed to provide some children with investigations and foster care services despite the fact that other similarly situated children received those services. The court stated that when State actors selectively apply a statute so that some individuals are treated differently from others, an equal protection claim will only be successful if the plaintiff can show that the State acted with animus or discriminatory intent. *Id*. at 551-52.
[lix] *See Lipscomb*, 962 F.2d at 1380; *Doe by Nelson*, 903 F.2d at 505.
[lx] *Olivia Y*, 351 F.Supp.2d at 546.
[lxi] *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993); *Baker v. State*. 170 Vt. 194, 203 (Vt. 1999); *Lewis v. Harris*, 188 N.J. 415, 443 (N.J. 2006).
[lxii] U.S. Const. amend. IV.
[lxiii] *Id.*
[lxiv] Some exceptions to the rule include exigent circumstances, instances in which individuals consent to a search, cases involving searches conducted for administrative purposes, cases involving parolees, cases involving children in school custody, and cases involving workers at the workplace.
[lxv] Doriane Lambelet Coleman, "Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment," 47 Wm. & Mary L. Rev. 413, 466-79 (2005) (Arguing that there is and

should be no general child welfare exception to the stringent requirements of the Fourth Amendment, as these requirements are needed to protect children and families from harm arising from overzealous government intrusion).

[lxvi] Regardless of how investigations are justified, some legal scholars are concerned about potential damage to children and families when child welfare agencies are overzealous in conducting investigations. These scholars advocate for a stricter application of the Fourth Amendment's protections in the child welfare context. Coleman, 47 Wm. & Mary L. Rev. at 466-79.

[lxvii] William E. Ringel, "Searches and Seizures, Arrests and Confessions § 2.2: Types of government conduct amounting to search or seizure," (2009).

[lxviii] *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich*., Southern Division**,** 407 U.S. 297, 313 (1972).

[lxix] *See, e.g., Calabretta v. Floyd*, 189 F 3d 808, (9th Cir. 1999), *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008), *Lopkoff v. Slater*, 898 F. Supp 767 (D. Colorado 1995). These cases involved investigations by police, social workers, or social workers and police together. Numerous jurisdictions have explicitly stated that the Fourth Amendment applies to *social workers* (in addition to police) to conduct warrantless searches of homes. *Walsh v. Erie County Dept. of Job and Family Services*, 240 F.Supp.2d 731, 746 (N.D.Ohio, 2003).

[lxx] *Wyman v. James*, 400 U.S. 309 (1971).

[lxxi] *Id*.

[lxxii] *Sanchez v. County of San Diego*, 464 F.3d 917, 922 n.8 (9th Cir. 2006) ("The Court has since repeatedly held that consensual administrative searches qualify as searches under the Fourth Amendment, even though refusal to consent carried no criminal penalty and the searches were not part of a criminal investigation) *See, e.g., Bd. of Educ. v. Earls,* 536 U.S. 822, 833 (2002) (Holding that consensual random drug testing of students participating in extra-curricular activities were searches under the Fourth Amendment even though they were not part of a criminal investigation and a positive test resulted only in suspension from participation); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646 (1995) (same); *see also United States v. Gonzalez,* 300 F.3d 1048 (9th Cir.2002) (Holding that consensual suspicionless searches of government employees' personal belongings in the workplace were searches even though refusal to consent carried no criminal penalty and the searches were not for law enforcement purposes).

[lxxiii] *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008); *see also Walsh v. Erie County Dept. of Job and Family Services*, 240 F.Supp.2d 731 (N.D.Ohio, 2003).

[lxxiv] *Lenz v. Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995).

[lxxv] *Walsh v. Erie County Dept. of Job and Family Services*, 240 F.Supp.2d 731 (N.D.Ohio 2003).

[lxxvi] Courts have also found that physical examinations of children without their clothes on in connection with abuse investigations may be also be considered searches, whether they are conducted in the home, or in another setting, such as a school. (*Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003), *Darryl H. v. Coler,* 801 F.2d 893 (7th Cir. 1986)) In those rare instances where a non-investigation pathway includes examining children who may have been abused without their clothing, the State must ensure that a warrant is obtained or one of the exceptions discussed applies.

[lxxvii] *Ferguson v. City of Charleston*, 532 U.S. 67 67-68 (2001).

[lxxviii] *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).

[lxxix] *See, e.g., Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986).

[lxxx] The doctrine of consent permits officials to conduct a warrantless search if consent of the relevant party is "freely and voluntarily given." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). To be considered voluntary, consent must not be coerced, explicitly or implicitly. *See Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

[lxxxi] *Id*. at 229.

[lxxxii] *Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973). Though courts must consider the age, education, and experience of the person providing consent, more often than not, courts will find that the consent was voluntary. *U.S. v. Gagnon*, 230 F.Supp.2d 260, 270 n. 10 (N.D. New York 2002). However, a court has found the consent to be involuntary when the defendant was under 18 and had little education. *Mobley v. State of Florida*, 335 So2d 880, 882 (Florida 4th District Ct. of Appeal 1976). Several courts have also considered a lack of English language skills in combination with limited formal education as evidence of coerced consent. *Gagnon*, 230 F.Supp.2d at 272; *U.S. v. Wilson*, 11 F.3d 346, 351 (2nd Cir. 1993); *but see State of Montana v. Copelton*, 140 P.3d 1074, 1078 (Montana 2006). Courts may also find that a person's inexperience with the system makes the presence of coercion more likely. *Gagnon*, 230 F.Supp.2d at 272. However, if a person has experience with the system, this may outweigh other factors, even when a person has limited understanding of the English language and has not been formally educated. *Copelton*, 140 P.3d at 1078.

[lxxxiii] The presence or absence of coercion, express or implied, "is a question of fact to be determined by the totality of the circumstances." *Schneckloth*, 412 U.S. at 227. Some Federal courts have held that consent was absent when a caseworker brought a police officer to the door and insisted on entering even though there were no emergency circumstances, *Calabretta v. Floyd*, 189 F.3d 808, 818 (9th Cir. 1999), and when a caseworker threatened a father who initially denied entry with arrest and removal of his children, *Walsh v. Erie County Department of Job and Family Services,* 240 F. Supp.2d 731, 746 (N.D. Ohio 2003).
[lxxxiv] *See* Mark Hardin, "Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights," 63 Wash. L. Rev. 493, 503 (1988), Wayne R. LaFave, "Search & Seizure § 8.2: Factors bearing upon validity of consent," (4th ed. 2008).
[lxxxv] In some jurisdictions, child abuse investigations are conducted primarily by law enforcement staff. Those jurisdictions may need to be particularly careful with regard to searches conducted in connection with non-investigation or investigation pathways.
[lxxxvi] Mark Hardin, "Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights," 63 Wash. L. Rev. 493, 504 (1988), citing *Darryl H. v. Coler*, 585 F. Supp. 383 (N.D. Ill. 1984), aff'd in part and vacated in part, 801 F.2d 893 (7th Cir. 1986), *United States v. Jones*, 641 F.2d 425, 429 (6th Cir. 1981) *and State v. Swank*, 399 So. 2d 510 (Fla. Dist. Ct. App. 1981).
[lxxxvii] American Humane Association & Child Welfare League of America, "National Study of Differential Response in Child Welfare," p. 10 (Nov. 2006).
[lxxxviii] *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646 (1995).
[lxxxix] Doriane Lambelet Coleman, "Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment," 47 Wm. & Mary L. Rev. 413, 473 (2005).
[xc] 532 U.S. 67 (2001).
[xci] *Id.* at 68.
[xcii] *Id*. at 68.
[xciii] *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984).
[xciv] *Id*. at 751.
[xcv] *Id*. at 752.
[xcvi] *See, e.g*., *Oregon v. Weaver*, 168 P.3d 273, 276 (Or. Ct. App. 2007).
[xcvii] *U.S. v. Knights,* 534 U.S. 112, 112-13 (2001) (Applying a balancing test to determine whether the warrantless search in question was reasonable).
[xcviii] *Id*. at 112.
[xcix] *Id*. at 112-13.
[c] *Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986) (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)).
[ci] 42 U.S.C. § 1983 (2009).
[cii] *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (citing *Write v. City of Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 430-32 (1987); *Wilder v. Virginia Hospital Assn*., 496 U.S. 498, 510-11 (1990)).
[ciii] *Gozaga University v. Doe*, 536 U.S. 273, 280 (2002).
[civ] *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981).
[cv] *Marisol A. v. Giuliani*, 929 F.Supp. 662, 684 (S.D.N.Y. 1996).
[cvi] *See*, *e.g., Doe v. District of Columbia*, 93 F.3d 861, 868 (D.C.Cir. 1996); *Tony L. v. Childers*, 71 F.3d 1182, 1188 (6th Cir. 1995).
[cvii] 93 F.3d 861 (D.C.Cir. 1996).
[cviii] *Hilbert v. County of Tioga*, No. 3:03-CV-193, 2005 WL 1460316 at * 14 (N.D.N.Y. Jun. 21, 2005); *see also Charlie H. v Whitman*, 83 F.Supp.2d 476, 496-97 (D.N.J. 2000); *A.S. v. Tellus*, 22 F.Supp.2d 1217, 1224 (D.Dan. 1998); *Jordan v. City of Philadelphia*, 66 F.Supp.2d 638, 648-49 (E.D.Pa. 1999); *Alger v. County of Albany, New York*, 489 F.Supp.2d 155, 159 (N.D.N.Y. 2006).
[cix] *Hilbert S. v. County of Tioga*, No. 3:03-CV-193, 2005 WL 1460316 at *14 (N.D.N.Y. Jun 21, 2005).
[cx] *Jeanine B v. Thompson*, 967 F.Supp.1104, 1113 (E.D.Wisc. 1997).
[cxi] 42 U.S.C. § 5106a (b)(2)(A)(iv) (2009).
[cxii] 503 U.S. 347, 363 (1992).
[cxiii] *See*, *e.g*., *Carson v. Heineman*, 240 F.R.D.456, 538 (D. Neb. 2007).
[cxiv] 42 U.S.C. § 1320a-2 (2009).
[cxv] *See Jeanine B v. Thompson*, 877 F.Supp. 1268, 1283 (E.D.Wis. 1995) (Holding that Congress overruled *Suter* through the passage of §1320a-2); *Stanberry v. Sherman*, 75 F.3d 581, 584 (10th Cir. 1996) ("Basically, the

Congress disavowed Suter's approach, while not purporting to change the decision. It also reaffirmed the approach taken in Supreme Court decisions prior to *Suter*").

[cxvi] *Whitley v. New Mexico Children, Youth & Families Dept.,* 184 F.Supp.2d 1146, 1165 (D.N.M., 2001); *Daniel H. v. City of New York*, 115 F.Supp.2d 423, 427 (S.D.N.Y. 2000).

[cxvii] 149 F.Supp.2d 941, 949 (M.D.Tenn 2000).

[cxviii] 877 F.Supp. 1268, 1284 (E.D.Wis. 1995).

[cxix] 127 F.3d 993, 1002 (1997); *see also Carson v. Heineman*, 240 F.R.D.456, 538 (D. Neb. 2007).

[cxx] *See e.g., Procopio v. Johnson*, 994 F.2d 325, 331 (7th Cir. 1993) (Holding that AACWA does not give foster children an enforceable right to a dispositional hearing within 18 months of foster care placement because it is not clear that the provision reflected Congress' intent to create a "binding obligation"); *31 Foster Children v. Bush*, 329 F.3d 1255 (11th Cir. 2003) (AACWA does not entitle children to receive a "case review system"); *D.G. ex rel. Stricklin v. Henry*, 594 F.Supp.2d 1273, 1276-81 (N.D.Okla. 2009) (The court rejected the argument that the AACWA vested plaintiffs with rights such as the right to a "case review system," the right to services that will achieve permanent placement, or the right to have a petition to terminate parental rights filed within a certain time frame; *Olivia Y. ex. rel. Johnson v. Barbour*, 351 F.Supp.2d 543, 557-65 (S.D.Miss. 2004) (AACWA does not give children the enforceable rights to be placed in foster facilities that conform to national professional standards or to receive timely written case plans); *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 488 (D.N.J., 2000) (AACWA did not create an enforceable right to "planning and services to secure [children's] permanent placement at the earliest possible time").

[cxxi] *Dupuy v. Samuels*, 465 F.3d 757, 760-61 (7th Cir. 2006); *Smith v. Williams-Ash*, 520 F.3d 596, 600 (6th Cir. 2008).

[cxxii] *DeShaney v. Winnebago County Dept. of Social Serv.*, 489 U.S. 189, 194 (1989).

[cxxiii] *See, e.g*., *Robbins v. Cumberland County Children and Youth Serv.*, 802 A.2d 1239, 1251-52 (Pa.Cmwlth. 2002); *Wells v. State*, 100 Md.App. 693, 707 (Md.App. 1994); *Rollo v. Guerreso*, 2005 WL 2045883, No. 251826, *5 (Mich.App. Aug. 25, 2005).

[cxxiv] *Horridge v. St. Mary's County Department of Social Services*, 854 A.2d 1232 (Md. Ct. of App. 2004); *See also District of Columbia v. Harris*, 770 A.2d 82, 87 (D.C. 1997).

[cxxv] *Gowens v. Tys. S*., 948 So.2d 513 (Ala. 2006).

[cxxvi] 854 A.2d 1232 (Md. Ct. of App. 2004).

[cxxvii] *See, e.g., State Dep't of Health and Rehabilitative Serv. v. Yamuni*, 498 So.2d 441, 444 (Fl.Ct.App. 1988); *Radke v. County of Freeborn*, 694 N.W.2d 788, 798 (Minn. 2005); *Turner v. District of Columbia*, 532 A.2d 662, 674-75 (D.C. 1987).

[cxxviii] *Id*.

[cxxix] *Jensen v. South Carolina Dep't of Social Serv*., 377 S.E.2d 102, 105-6 (S.C.App. 1988).

[cxxx] *Jensen v. South Carolina Dep't of Social Serv*., 403 S.E.2d 615, 619 (S.C. 1991).

[cxxxi] *See, e.g*., *Radke*, 694 N.W.2d at 794.

[cxxxii] *Holloway v. State*, 2006 WL 265101, at *1 (Tenn. Ct. App. Feb. 3, 2006).

[cxxxiii] *Rittscher v. State*, 352 N.W. 2d 247 (Iowa 1984).

[cxxxiv] *See, e.g., Horridge v. St. Mary's County Dep't o Social Serv*., 854 A.2d 1232, 1239 (Md. Ct. of App. 2004); *Gowens v. Tys S.*, 948 So.2d 513, 528 (Ala. 2006).

[cxxxv] *Tyner v, State Dep't of Social and Health Serv., Child Protective Serv*., 141 Wash.2d 68, 82 (Wash. 2000); *Rodriguez v. Perez*, 99 Wash.App 439, 444 (Wash.Ct.App. 2000).

[cxxxvi] *Tyner v, State Dep't of Social and Health Serv., Child Protective Serv*., 141 Wash.2d 68, 78-81 (Wash. 2000).

[cxxxvii] *Hayes v. State*, 183 Md.App.742 (Md.Ct.Spec.App. 2009).

[cxxxviii] *Sharp v. Cleveland Clinic*, 176 Ohio App. 3d 226, 232 (2008) (citing *Bennett v. Ohio Dept. of Rehab. & Correction*, 60 Ohio St. 3d 107, 109 (1991)).

[cxxxix] *Wallace v. Thorton*, 672 So. 2d 724 (Miss. 1996).

[cxl] *Thornhill v. Wilson*, 504 So. 2d 1205, 1208 (Miss. 1987); *see also Lansburgh's Inc. v. Ruffin*, 372 A. 2d 561, 564 (D.C. 1977); *State v. May*, 134 Vt. 556, 559 (1976).

[cxli] *Marks v. Baltimore & O.R. Co*., 284 A.D. 251, 327 (N.Y.A.D. 1 Dept., 1954).

[cxlii] *Smith v. Knight*, 907 So. 2d 831, 835 (La.App. 2nd Cir, 2005) ("Submission to mere verbal threats, unaccompanied by force or threats, does not constitute false imprisonment").

[cxliii] *Wolf v. Wolf*, 690 N.W. 2d 887, 891 (Ia. 2005).

[cxliv] *See, e.g*., *Wolf v. Wolf*, 690 N.W. 2d 887, 892 (Ia. 2005); Wilson v. Bernet, 625 S.E.2d 706, 713-14 (W. Va. 2005).

[cxlv] *Kessel v. Leavitt*, 511 S.E. 2d 720, 766 (W.Va. 1998); *Brown v. Brown*, 800 So. 2d 359, 361-62 (Fl. App. 4 Dist. 2001).
[cxlvi] *See Brodie v. Summit County Children Serv.s Bd*., 554 N.E.2d 1302 (Ohio 1990); *Marshall v. Montgomery Cty. Children Serv. Bd*., 750 N.E.2d 549, 553-54 (Ohio 2001).
[cxlvii] *Forrester v. Bass*, 397 F.3d 1047, 1053 (8th Cir. 2005); *C.R.W. v. State, Dept. of Social Service*, 943 So.2d 471 481 (La.Ct.App. 2006).
[cxlviii] *See Kane v. Lamothe*, 182 Vt. 241, 244 (Vt. 2007).
[cxlix] *See Burney v. Kansas Dep't of Social and Rehabilitation Serv.*, 23 Kan.App.2d 394, 398 (Kan.App.Ct. 1997)
[cl] *Gowens v. Tys .S*., 948 So.2d 513, 522-23 (Ala. 2006); *Jensen v. South Carolina Dep't of Social Serv*., 297 S.C. 323 (S.C. 1988).
[cli] *Gowens*, 948 So.2d at 524.
[clii] *Younger v. Harris*, 401 U.S. 37 (1971).
[cliii] *Rooker v. Fidelity Trust Co*., 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).