

THE TEXAS FOSTER CARE SYSTEM: 7 YEARS
AFTER *M.D. v. ABBOTT*

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ABSTRACT

The foster care system is designed to remove children from unsafe situations. However, children are often removed from an unsafe situation at home into unsafe situations under the custody of the state once they enter the system. In 2015, the foster care system in Texas was held to be unconstitutional for failing to protect the State’s foster care children from an unreasonable risk of harm. As a result of the State’s failure to provide sufficient oversight and monitoring practices, children in Texas’s foster care system enter into placements where they face abuse or neglect with no means of

redressing the situation. Since this ruling, Texas has made several attempts to reform its foster care program. The most significant reform was the implementation of the Community-Based Care program, which aims to privatize Texas's foster care system by delegating case management responsibilities to private entities. While this reform was aimed at ensuring that children in the foster care system are safe, it is unclear whether the program will eliminate the deficiencies in the system and accomplish that goal. This Comment will evaluate whether Texas's reform efforts have and will be successful in improving the State's oversight practices and eliminating abuse and neglect in Texas's foster care system. Furthermore, this Comment will provide policy suggestions aimed at improving the state's oversight and monitoring practices and thereby reducing abuse and neglect in the foster care system.

INTRODUCTION

The foster care system in Texas is plagued with abuse, neglect, and even the death of children in the state's custody.¹ The primary purpose of the foster care system is to protect children from situations where they are being harmed.² Despite this, many children who have been removed from such situations are placed in the foster care system to face additional abuse, neglect, or exploitation. Texas has attempted to reform its child welfare system several times over the last two decades in hopes of correcting this disturbing truth, but these efforts have been largely unsuccessful.³

In the span of less than one year from 2019 to 2020, 11 children in the state's custody died.⁴ One of these children who tragically passed was a fourteen-year-old girl living in a residential treatment center at the time of her death.⁵ After her complaints of leg pain were ignored for weeks, she had a pulmonary embolism and died.⁶ There are many stories about the children in Texas's foster care system that do not end in death but are nonetheless tragic. For instance, an eight-year-old boy, D.I., was placed in a home with a sixteen-year-old boy who had sexually abused another young boy a few years earlier.⁷ As the

¹ M.D. v. Abbott, 152 F. Supp. 3d 684, 828 (S.D. Tex. 2015); *See also* Roxanna Asgarian, *Texas Failing to Keep Youth in Foster Care Safe*, THE IMPRINT (June 16, 2020, 12:00 PM), <https://imprintnews.org/news-2/texas-failing-to-keep-youth-in-foster-care-safe/44534>.

² *Foster Care*, TEX. DEP'T OF FAM. OF FAM. & PROTECTIVE SERVS., https://www.dfps.state.tx.us/Child_Protection/Foster_Care/default.asp#:~:text=The%20purpose%20is%20to%20improve,with%20their%20communities%20and%20siblings (last visited Feb. 4, 2022).

³ *See* STEPHEN M. RYAN, TEX. APPLESEED, TEXAS FOSTER CARE: CURRENT ISSUES, REFORM EFFORTS AND REMAINING PROBLEMS 2-6 (2007), <https://www.texasappleseed.org/sites/default/files/35-TexasFosterCareCurrentIssues.pdf>; M.D. v. Abbott, 152 F. Supp. 3d 684, 815 (S.D. Tex. 2015) (arguing that Texas's Foster Care Redesign Program was a failure).

⁴ DEBORAH FOWLER & KEVIN RYAN, FIRST COURT MONITORS' REPORT 40 (2020), <https://static.texastribune.org/media/files/cd71f14e349d1133df3072ebc25c9350/Texas%20child%20welfare%20monitors%20report%20June%202020.pdf>.

⁵ *Id.* at 13.

⁶ *Id.* at 13-14.

⁷ M.D. v. Abbott, 907 F.3d 237, 246 n.10 (5th Cir. 2018).

Department of Family and Protective Service's (the Department) did not track child-on-child abuse at the time of D.I.'s placement, the agency that placed D.I. in this home was not aware of the sixteen-year-old boy's history.⁸ D.I. was ultimately sexually abused by that same sixteen-year-old and his reports of the abuse were ignored.⁹ Unfortunately, these stories are not anomalies, but they illustrate a widespread problem in Texas's foster care system.

While these tragedies have permeated the foster care system for decades and are no secret to the Department or Texas's legislature, a recent lawsuit re-emphasized the urgent need to reform Texas's foster care system. In 2015, Judge Janis Graham Jack of the U.S. District Court for the Corpus Christi Division of the Southern District of Texas held that the State's management of its foster care system is unconstitutional.¹⁰ Judge Jack specifically held that the management of the system violates the substantive due process rights of the children who are in the permanent custody of the State.¹¹ The Fifth Circuit upheld this general finding.¹² Specifically, the Fifth Circuit held that the Department's monitoring and oversight policies, coupled with overburdened caseworkers, cause the children in the foster care system to be exposed to unreasonable harm.¹³

To correct these constitutional violations, Judge Jack appointed two Special Masters with expertise in the child welfare field to direct the Department on how to reform the system and to oversee that reform.¹⁴ While the Department has attempted to comply with some

⁸ *Id.*

⁹ *Id.*

¹⁰ *M.D. v. Abbott*, 152 F. Supp. 3d 684, 822 (S.D. Tex. 2015).

¹¹ *Id.*

¹² The Fifth Circuit agreed that DFPS's policies and practices gave rise to several constitutional violations, but the Fifth Circuit did not think many of the injunction provisions were narrowly tailored to correct the constitutional violations. Thus, the Fifth Circuit struck certain provisions of the injunction, like the caseload cap, because they went beyond what is "minimally required" to remedy the substantive due process violation. *M.D. v. Abbott*, 907 F.3d 237, 272 (5th Cir. 2018).

¹³ *Id.* at 264-68.

¹⁴ Appointment Order, 152 F. Supp. 3d 684 (2015).

orders, they have not made progress on others.¹⁵ Additionally, since the ruling, the Texas Legislature has passed a sweeping foster care reform bill.¹⁶ The most drastic change to the State's foster care system that is set forth by the bill is the privatization of case management in the foster care system, called Community-Based Care (CBC).¹⁷ The Texas Legislature has previously set forth privatization efforts in the foster care system, such as shifting the responsibility of placement to private agencies, with little success.¹⁸

As the Department's insufficient oversight and monitoring practices were cited by both Judge Jack and the Fifth Circuit as a primary cause of the unsafe and abusive conditions that children in the foster care system experience, it is questionable whether outsourcing case management to private agencies will correct these issues or if they will further exacerbate the constitutional violations in Texas's child welfare system.

This Comment will examine the effectiveness of the CBC program and other legislative reform efforts following the ruling in *M.D. v. Abbott*. Specifically, this Comment will evaluate the impact of the reform effort on monitoring and oversight in Texas's foster care system and how that affects the safety of children in the system. This Comment will proceed as follows:

Part I will provide relevant background on the placement and case management processes in Texas's foster care system. This section will also provide a brief discussion on the significance of a child entering the permanent custody of the state.

Part II will discuss the holding of *M.D. v. Abbott* and the problems that were highlighted in the case that breed abuse and neglect of the

¹⁵ FOWLER & RYAN, *supra* note 4, at 12.

¹⁶ Marissa Evans, *Texas House Passes Child Welfare Reforms*, THE TEX. TRIBUNE (May 19, 2017), <https://www.texastribune.org/2017/05/18/Texas-House-passes-child-welfare-reforms/>.

¹⁷ Katy Vine, *As Texas Privatizes Child Protective Services, Will the Horror Stories Go Unheard?*, TEX. MONTHLY (Mar. 6, 2019), <https://www.texasmonthly.com/news/texas-privatizes-child-protective-services-will-horror-stories-go-unheard/>.

¹⁸ Beth Cortez-Neavel, *State Stumbles Forward with Foster Care Privatization*, TEX. OBSERVER (Sept. 9, 2014, 3:28 PM), <https://www.texasobserver.org/experiment-partially-privatizing-foster-care-failure/>.

children in the system. This section will also discuss the recommendations from the Special Masters that were appointed by Judge Jack. This section will primarily focus on the problems related to oversight and monitoring issues in the system and the suggestions that were aimed at fixing those issues.

Part III will discuss Texas's legislative response to *M.D. v. Abbott*. This section will focus on the goals of the CBC program, how the CBC program is intended to work, and what parts have been implemented thus far. As the CBC program is part of a broader reform effort, this section will also discuss legislative changes to the foster care system outside of the CBC program.

Part IV will evaluate whether the CBC program and other legislative efforts have and will be effective in mending oversight issues in the foster care system and the implications that has on the health and safety of the children in the system. As CBC is a new program that has not been fully implemented, I will rely on the findings and suggestions made by the Special Masters to see how closely the CBC program aligns with those suggestions. Further, this section will review reports released by the Special Masters and the Texas Legislature. Additionally, this section will also briefly discuss the significance of correcting the issues in Texas's foster care system. It will provide an overview of the long-term health consequences of abuse and neglect and describe the costs associated with those consequences.

Part V will discuss solutions to the safety issues in the system. This will include some combination of suggested legislation from child welfare advocates, policies from other states, and novel suggestions that would fit into Texas's child welfare landscape.

While there are a vast number of problems in Texas's child welfare system, this Comment will focus on the problems that stem from poor monitoring and oversight practices in Texas's foster care system. Further, this Comment will propose solutions to those monitoring problems that are specific to protecting children from abuse and neglect and ensuring that their medical needs (both physical and psychological) are met after the child enters the permanent custody of the state.

I. THE LANDSCAPE OF FOSTER CARE IN TEXAS

To better understand how the CBC program will alter the landscape of Texas's child welfare system, it is necessary to examine how the placement and case management processes within the system work in general, as well as the structure of the agencies who administer those services. The Texas Department of Family Services (the Department) is the agency that has primary responsibility for administering foster care services in the state.¹⁹ Under the Department are the Child Protective Services division and the Child Care Licensing division.²⁰ Child Protective Services handles the removal process and employs conservatorship caseworkers, while Child Care Licensing oversees the licensed facilities that home Texas's children in foster care.²¹

The process by which a child comes under the custody of the state typically begins when the Department files suit requesting the removal of a child from his or her home.²² However, emergency removal is only permitted under exigent circumstances.²³ Once the child is removed, the child then enters into the Temporary Managing Conservatorship

¹⁹ M.D. v. Abbott, 152 F. Supp. 3d 684, 690 (S.D. Tex. 2015). Prior to 2017, the Texas Health and Human Services Commission (Health and Human Services Commission) oversaw the DFPS. The DFPS has since become a stand-alone agency that reports directly to the governor. TEX. DEP'T OF FAM. & PROTECTIVE SERVS., DFPS TO BECOME A STAND-ALONE AGENCY (2017), https://www.dfps.state.tx.us/About_DFPS/News/2017/2017-05-31-Abbott_Signs_Bills.asp (last visited Jan. 13, 2021)

²⁰ *Id.* at 690.

²¹ *Id.*

²² Removal can be initiated with a court order if a suit is filed requesting removal of the child, supported by the affidavit of someone with personal knowledge of the child's circumstances, and the court finds that the child faces an immediate danger to their health and safety, it would be contrary to the welfare of the child to stay in the home, there is no time given the health and safety of the child to conduct a full hearing, and reasonable efforts were made to prevent the need for removal. Tex. Fam. Code §§ 262.101-262.102. Emergency removal can also be initiated without a court order but only if a DFPS representative, law enforcement officer, or juvenile probation officer reasonably believed that there is an immediate danger to the health and safety of the child and that belief is based on personal knowledge or information provided by someone else that has been corroborated by personal knowledge. Tex. Fam. Code § 262.104.

²³ Tex. Fam. Code § 262.102.

the State,²⁴ and the Department is given several rights and duties over the child.²⁵ As one of these rights is the right to designate a primary residence for the child, it is at this time that the child will be placed in some form of substitute care, which includes foster care.²⁶ In determining the proper placement for the child, the Department will use assessment tools designed by a child-care or child-placing agency to select a placement that is in the child's best interest.²⁷ A placement is deemed to be in the best interests of the child if it is the closest placement to the child's family home that is also the least restrictive setting for the child and meets both the identified and the express needs of the child.²⁸ At this time, a Temporary Managing Conservatorship child is also appointed an attorney ad litem who advocates for the child's needs in court.²⁹

If the child was removed via an emergency removal, a full adversary hearing is required within 14 days of the child's removal to determine whether the child should remain outside of the home.³⁰ If the court determines that removal was necessary and that the child should remain outside of the home, the Department will continue to

²⁴ WILSON ET AL., THE TEX. ASS'N FOR THE PROT. OF CHILD., UNDERSTANDING TEXAS'S CHILD PROTECTION SYSTEM 14 (2014), https://www.texprotects.org/media/uploads/10_7_14_combined_cps_systems_flowchart_final.pdf.

²⁵ Tex. Fam. Code § 153.371.

²⁶ *Id.*; Tex. Fam. Code § 263.001(4).

²⁷ Tex. Fam. Code § 264.1075.

²⁸ Tex. Fam. Code § 264.107.

²⁹ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 5241, [https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5200.asp#CPS_5200](https://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_5200.asp#CPS_5200;); Tex. Fam. Code § 107.003.

³⁰ Adversary hearings are required in the case of suits filed under Tex. Fam. Code § 262.101 and Tex. Fam. Code § 262.105, which pertains to emergency removal. During an adversary hearing, the court must determine whether the child should be returned to the supervision of their parent or caregiver. The child should be returned unless the court finds: 1) there was a danger to the physical safety or health of the child; 2) the urgent need for the child's protection required removal and reasonable efforts were made to prevent removal; and 3) there is a "substantial risk of continuing danger" to the child if returned home, despite reasonable efforts to prevent removal. Tex. Fam. Code § 262.201.

have custody of the child.³¹ It is at this time that the Department will typically begin finding a more permanent placement for the child.³² Then, within 45 days of the Department being appointed Temporary Managing Conservatorship of the child, it must file a service plan for the child.³³ The service plan is significant because it includes the steps that are necessary to return the child to the home or to otherwise find a safe permanent placement for the child if the child cannot be returned to the home.³⁴ Next, within 60 days from the date that the Department is appointed Temporary Managing Conservatorship, a court must hold a hearing to review the child's status and the service plan that was developed for the child.³⁵

Next, an initial permanency hearing is required within 180 days from the Department being appointed Temporary Managing Conservatorship.³⁶ No later than ten days before this hearing, the Department must file a permanency plan that is served on all parties.³⁷ A subsequent permanency hearing is required within four months of the final permanency hearing for Temporary Managing Conservatorship children.³⁸ The purpose of the permanency hearing is to ensure that the service plan is being complied with, to allow parents the opportunity to comment on the service plan, and to allow parents to show that they can provide a safe environment for the child and that it would be in the child's best interest to return to the custody of their parents.³⁹ Thus, these hearings provide opportunities for family reunification before the child is placed into permanent custody of the state.

³¹ WILSON ET AL., *supra* note 24, at 15.

³² *Id.*

³³ Tex. Fam. Code § 263.101.

³⁴ Tex. Fam. Code § 263.102.

³⁵ Tex. Fam. Code § 263.201.

³⁶ Tex. Fam. Code § 263.304.

³⁷ The permanency plan contains the permanency goals for the child. Tex. Fam. Code §§ 263.3025--263.303.

³⁸ Tex. Fam. Code § 263.305.

³⁹ Tex. Fam. Code § 263.306.

Finally, a trial on the merits shall be held within one year of the Department being appointed Temporary Managing Conservatorship.⁴⁰ This trial will result in a final order that either: 1) the child is returned to their parent; 2) a relative or some other person becomes the managing conservator of the child; or 3) the Department is appointed as the permanent managing conservator of the child.⁴¹ Once the child has entered the Permanent Managing Conservatorship of the state, permanency hearings are only required every six months, as opposed to every four months for Temporary Managing Conservatorship children.⁴²

Permanency hearings are vitally important to ensuring the safety of Permanent Managing Conservatorship children because the purpose of these hearings is for a judge to determine whether the child's service plan is being complied with and if the child's placement is still appropriate.⁴³ It is in these hearings that a judge can determine that the child is in an unsafe placement or order that additional steps be taken to comply with a child's service plan.⁴⁴ As the child has these crucial hearings less frequently once they enter the permanent custody of the Department, there is less judicial oversight of state's Permanent Managing Conservatorship children.⁴⁵ In other words, once a child enters Permanent Managing Conservatorship, there are less opportunities for a judge to ensure that a child's physical and psychological needs are being met and order that their situation be altered to meet those needs.

⁴⁰ TEX. DEPT. OF FAM. AND PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK, https://www.dfps.State.tx.us/handbooks/cps/files/CPS_pg_5500.asp (last visited Jan. 10, 2021).

⁴¹ Tex. Fam. Code §§ 263.401-263.404.

⁴² Tex. Fam. Code § 263.501.

⁴³ Tex. Fam. Code. § 263.5031; *See also* CHILD.'S COMM'N, TEXAS CHILD PROTECTION LAW BENCH BOOK 124 (2020), <http://texaschildrenscommission.gov/media/84655/2020-bb-master-final.pdf>.

⁴⁴ *Id.*

⁴⁵ As children in the Permanent Managing Conservatorship of the state are required to have permanency hearings less frequently than children in the temporary managing conservatorship of the state, there are fewer opportunities for a judge to review the child's current placement and determine whether their service plan is being complied with.

Further, once a child enters Permanent Managing Conservatorship, their primary contact point is often their caseworker who provides the child and their family with case management services.⁴⁶ Case management duties include creating and ensuring compliance with service and permanency plans, assuming court-related duties, face-to-face visits with the child and caregivers, ensuring visitation with parents or caregivers, and providing reunification support services.⁴⁷ The caseworker is often Permanent Managing Conservatorship child's primary contact point because it is typical for a court to dismiss the attorney ad litem once the child enters Permanent Managing Conservatorship.⁴⁸ Also, it is typical for children in permanent custody of the state to be placed in multiple facilities during their time in foster care.⁴⁹ Thus, the child's most stable relationship is often their caseworker.⁵⁰

Accordingly, if a caseworker is not aware of an unsafe situation or does not take it seriously, the last line of defense in protecting the health and safety of the child is often a judge that the child only sees twice a year.⁵¹ Because of this, if a child's caseworker is not fully privy to or does not properly respond to issues with a child's foster care placement, those issues may persist, unnoticed, for half a year until the child is seen by a judge. This decreased oversight is not just problematic in serious cases of abuse or neglect. If a child's seemingly minor health issue, such as a persistent headache or leg pain, is

⁴⁶ M.D. v. Abbott 152 F. Supp. 3d 684, 782-83 (S.D. Tex. 2015).

⁴⁷ TEX. COURT APPOINTED SPECIAL ADVOCATES, A GUIDE TO COMMUNITY-BASED CARE IN TEXAS 25 (2019), <https://texascasa.org/wp-content/uploads/2020/11/texas-casa-cbc-guide-final-forweb.pdf>.

⁴⁸ M.D. v. Abbott 152 F. Supp. 3d 684, 782-83 (S.D. Tex. 2015).; *See also* TEX. APPLESEED, IMPROVING THE LIVES OF CHILDREN IN LONG-TERM FOSTER CARE: THE ROLE OF TEXAS' COURTS & LEGAL SYSTEM 9 (2010), <https://www.texasappleseed.org/sites/default/files/09-FosterCareImprovingLivesofLongterm.pdf>.

⁴⁹ M.D. v. Abbott 152 F. Supp. 3d 684, 782, 809 (S.D. Tex. 2015).

⁵⁰ M.D. v. Abbott, 152 F. Supp. 3d 684, 782 (S.D. Tex. 2015).

⁵¹ TEX. APPLESEED, IMPROVING THE LIVES OF CHILDREN IN LONG-TERM FOSTER CARE: THE ROLE OF TEXAS' COURTS & LEGAL SYSTEM 9 (2010), <https://www.texasappleseed.org/sites/default/files/09-FosterCareImprovingLivesofLongterm.pdf>.

neglected to be addressed, it can turn into a much more profound issue while no one is watching.

II. M.D. v. ABBOTT

In 2015, a class action was brought against officials of the State of Texas alleging that the State was violating the substantive due process rights of the children under the Department's permanent custody.⁵² The plaintiffs in the suit were a class of minor children who were in the Permanent Managing Conservatorship of the State.⁵³ Judge Janis Graham Jack of the United States District Court for the Southern District of Texas Corpus Christi Division held that the foster care system in Texas violated the substantive due process rights of the children under the State's custody to be free from "an unreasonable risk of harm."⁵⁴

The court reasoned that because the children in the foster care system are in the custody of the State, there is a special relationship between the State and the children in its custody.⁵⁵ Arising out of this special relationship is the State's duty to provide "constitutionally adequate care" to the children in its custody.⁵⁶ In this context, under the Fourteenth Amendment, the State must ensure that children in its custody are free from an unreasonable risk of harm that is caused by the State to achieve constitutionally adequate care.⁵⁷ More specifically, this right includes "personal security and reasonably safe living conditions"⁵⁸ and protection from both psychological and physical abuse.⁵⁹

⁵² See *id.* at 688.

⁵³ *Id.* at 689.

⁵⁴ *Id.* at 822.

⁵⁵ *Id.* at 695-96; see also *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990).

⁵⁶ *M.D. v. Abbott*, 152 F. Supp. 3d at 696.

⁵⁷ *Id.*

⁵⁸ *Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004).

⁵⁹ *R.G. v. Koller*, 415 F. Supp. 2d 1129, 1156 (D. Haw. 2006).

To meet the requisite level of culpability to constitute a constitutional violation, the state's actions must shock "the conscience."⁶⁰ The court applied both the deliberate indifference standard and the professional judgment standard to show that the State's actions, or lack thereof, shocked the conscience.⁶¹ Under both standards, the court found that the State's failure to keep the children safe from an unreasonable risk of harm shocked the conscience and therefore constituted a violation of the children's substantive due process rights.⁶² Specifically, insufficient oversight and monitoring by the Department and overburdened caseworkers put Texas's children in foster care at an unreasonable risk of harm.⁶³

The holding was based on reports from child welfare organizations, reports from consulting firms, national standards from child welfare organizations, former caseworkers and children in foster care, and psychology and child welfare experts.⁶⁴ While the issues related to the inadequate number of caseworkers who have excessive caseloads are significant, this section will focus on the system's inadequacies that are related to oversight and how those inadequacies place the children in the State's custody at an unreasonable risk of harm. However, as the oversight issues in the system are exacerbated by an overburdened caseworkers, a brief discussion about the issue is warranted.⁶⁵

⁶⁰ *M.D. v. Abbott*, 152 F. Supp. 3d 684, 697 (S.D. Tex. 2015).

⁶¹ While it is established that Texas has a duty to the children in its custody to keep them free from an unreasonable risk of harm, there is disagreement about which test should be applied to determine whether the state action rises to the requisite level of culpability. *M.D.*, 152 F. Supp. 3d at 698. The deliberate indifference standard is met if the State "consciously disregards a known and excessive risk to the victim's health and safety." *Id.* The professional judgment standard is met if a state actor's decision departs so substantially from professional judgment, practice, or standards that it demonstrates that the state actor did not rely on professional judgment. *Id.*

⁶² *Id.* at 700.

⁶³ *Id.* at 791-820.

⁶⁴ *Id.* at 700-17.

⁶⁵ See generally *id.*

A. The Failures of the System

Much of the State's failure to adequately monitor the children in its custody stems from inefficient data collection and inaccessible data. For example, the data that is relevant to Texas's children in foster care are not kept in one place, but instead, this data is kept in multiple systems that are overseen by different divisions of the Department.⁶⁶ One of these data systems is the Information Management for the Protection of Adults and Children in Texas (IMPACT). This is where caseworkers input information related to case management activities, so it is primarily utilized by Child Protective Services.⁶⁷ Another system is the CLASS system, which primarily contains data related to investigations of abuse in licensed child-care facilities and is headed by the Residential Child Care Licensing division.⁶⁸

While caseworkers have access to both data systems, the systems are not merged.⁶⁹ This means that if a caseworker is not exceedingly diligent, they may deem the child-care facility to be sufficient without knowledge of the child's specific history of abuse. However, that placement may not actually be appropriate given the child's individual history of abuse because another child in the home may have a history of perpetrating abuse or because the facility simply does not have the tools to respond to the child's individual needs. Thus, to have sufficient information on a child, a caseworker would have to access both systems.

The story of one of the class representatives in *M.D. v. Abbott*, S.A., exemplifies the harm that can occur as a result from keeping data in

⁶⁶ *Id.* at 780-81.

⁶⁷ As IMPACT is the system utilized by caseworkers, the Child Protective Services division of DFPS is the primary entity that utilizes this data system. *Id.* at 732 n.25, 765 n.43.

⁶⁸ *Id.* at 7656 n.43. Prior to *M.D. v. Abbott*, Residential Child Care Licensing was a division of the Department, but the Residential Child Care Licensing division has since been transferred to the Health and Human Services Commission. However, the primary responsibility for investigating abuse and neglect allegations remains with the Department and is carried out through its Residential Child Care Investigations division that was created in 2017. FOWLER & RYAN, *supra* note 4, at 57 n.65. Ninety percent of foster care placements are in licensed facilities and thus regulated by RCCL. *M.D.*, 152 F. Supp. 3d at 798.

⁶⁹ *M.D.*, 152 F. Supp. 3d at 781.

separate places.⁷⁰ Shortly after entering the foster care system at age five, S.A. made a report of sexual abuse by an older child in her facility.⁷¹ While Residential Child Care Licensing did order an investigation of the incident, they did not conduct an independent investigation but instead ordered the child-placing agency⁷² who put S.A. in the facility to investigate.⁷³ As Residential Child Care Licensing permits child-placing agency's to keep their own separate paper files, the results of the investigation did not make it into the CLASS system, let alone the IMPACT system.⁷⁴ Consequently, none of S.A.'s subsequent caseworkers had access to this information.⁷⁵ Following this, S.A. had at least thirty-three different placements, none of which were suitable to her needs.⁷⁶ While S.A. entered the system with minor psychiatric problems and average intellectual functioning, she could not read past a fourth-grade level and had received a plethora of psychiatric diagnoses by the time she aged out of the foster care system.⁷⁷ Some of the reasons for S.A.'s deterioration cited by psychiatrists who evaluated her over the years were "numerous placements," "failed placements," and "sexual molestation."⁷⁸

While reviewing data from both systems is not an impossible task, the need for exceptional attentiveness by caseworkers provides an additional opportunity for a child's needs to fall through the cracks at

⁷⁰ See *id.* 731-365.

⁷¹ *Id.* at 731.

⁷² For nearly two decades Texas has utilized private child-placing agencies. See ASHLEY R. HARRIS, TEXANS CARE FOR CHILDREN, SAFEGUARDING CHILDREN IN TEXAS FOSTER CARE 4 (2014), <https://www.inthepublicinterest.org/wp-content/uploads/safeguarding-children-in-texas.pdf>. Around ninety percent of child placements are managed by these private agencies. M.D., 152 F. Supp. 3d at 692.

⁷³ M.D., 152 F. Supp. 3d at 731.

⁷⁴ *Id.* at 732.

⁷⁵ *Id.*

⁷⁶ She was never placed in a single-child home, which is the recommendation for children who have suffered sexual abuse. *Id.*

⁷⁷ *Id.* at 732-36.

⁷⁸ *Id.* at 735-36.

the risk of their health and safety.⁷⁹ Expecting this type of diligence from overburdened caseworkers is unwise, especially since there have been instances of caseworkers lacking knowledge of considerably significant information that is contained in the system that they have readily available to them, the IMPACT system. In S.A.'s case, she went without contact with a caseworker for months simply because no one checked her file in the IMPACT system to discover that her primary caseworker had changed.⁸⁰ Further, some documents, like certain medical records and birth certificates, cannot be electronically stored and are thus kept in separate, paper files.⁸¹

Not only is this process inefficient, but these databases often do not provide adequate information. For example, even when Residential Child Care Licensing does not outsource its investigation responsibilities to a child-placing agency as they did in S.A.'s case,⁸² it is almost impossible for a caseworker to know if a child is being placed with another child who has a history of perpetrating abuse. This is because the only place to find this type of information is in the perpetrating child's case file.⁸³ Thus, not only is this type of information difficult to find, but it is also almost always inaccessible to the caseworker. Further, data on child-on-child abuse is neither tracked by the Department nor is it aggregated,⁸⁴ so it is impossible to

⁷⁹ *Id.* at 786-87. The disorganization of the systems is further compounded by the high turnover rate for caseworkers at around 26.7% per year. *M.D.*, 152 F. Supp. 3d at 785. Given such a high turnover rate, it is likely that a child in the State's foster care system will have multiple caseworkers during their time in the system. *Id.* at 786. Further, 70% caseworkers who leave cite "workload" as the reason for their departure. *Id.* at 785. As many caseworkers leave the system because they are not able to handle the workload, it is likely that many of the caseworkers who leave, and even some who stay, may not be able to digest the information that is contained in both the IMPACT and CLASS database.

⁸⁰ *Id.* at 735.

⁸¹ *Id.* at 780-81.

⁸² Tex. Fam. Code § 263.305

⁸³ *M.D.*, 152 F. Supp. 3d at 801.

⁸⁴ *Id.* Instead of tracking and aggregating child-on-child abuse, this type of allegation is instead investigated by RCCL as negligent supervision. Because of this, a child's case file will not indicate whether they have a history of perpetrating sexual abuse. As such, it is nearly impossible for a caseworker to know if a child is being placed with another child with a history of sexual abuse. *Id.* at 763-64.

know how often this type of situation occurs. Additionally, it is commonplace for a child's case file to be incomplete because of missing data.⁸⁵

Even if a caseworker has access to all the necessary information, sorting through this information in an intelligible way is infeasible. Firstly, caseworkers tend to have exorbitant caseloads.⁸⁶ On top of that, the case files of each child are extremely lengthy.⁸⁷ The court in *M.D. v. Abbott* reviewed the case files of twenty children in the permanent custody of the state.⁸⁸ These twenty case files totaled 358,102 pages and it took the court 462 hours to simply read these files.⁸⁹ To compound the problem, these case files were not complete.⁹⁰ A caseworker in Texas typically has well over twenty cases at one time,⁹¹ so the material reviewed by the court is less material than a caseworker typically handles at one time. If a caseworker is not privy to all relevant information about a Permanent Managing Conservatorship child and their placement situation, it is possible that no one is privy to this information because of the decreased oversight of Permanent Managing Conservatorship children.

The price of this messy recordkeeping is not merely inefficiencies, but it is the health and safety of the children in the foster care system. The story of K.E., one of the general class representatives in *M.D. v. Abbott*, illustrates the harm that can result from inadequate data

⁸⁵ To make matters worse, if there are blank cells in a child's files in either the IMPACT system or the CLASS system it is impossible to tell if that information is actually missing or is simply not applicable to the child because neither system distinguishes between the two. *Id.* at 780. Thus, if there is missing information regarding an abuse investigation, a case worker who was not involved in the investigation would have no way of knowing whether the information was missing or if the investigation never occurred.

⁸⁶ In 2014, over half of all caseworkers had caseloads of more than twenty-one children, 22% had caseloads of at least 26 children, and 10% of caseworkers had caseloads of thirty-one children or more. *Id.* at 778.

⁸⁷ *Id.* at 781.

⁸⁸ *Id.* at 779.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 778.

management and recordkeeping.⁹² When K.E. entered the system, she had already been sexually abused and had specialized needs as a result of this history, but her case files did not indicate what, if any, investigation was undertaken as a result of these allegations.⁹³ These allegations occurred in 2003 and 2004, but the absence of investigative data in the record was not noticed by a caseworker until 2011.⁹⁴ This may have occurred because none of K.E.'s numerous caseworkers over the years noticed the missing information. It is also possible that the caseworker was not sure whether this information would even be inapplicable to K.E. or if there was critical missing information because of recordkeeping inadequacies.

As a result of lacking or inconsistent data, K.E. was placed in many facilities that did not comport with her supervision needs and she was exposed to further sexual abuse.⁹⁵ Eventually, K.E. began exhibiting sexually aggressive behaviors and was meant to be placed in a single-child placement.⁹⁶ However, because the Department did not track child-and-child abuse, her reports did not adequately reflect this and she was never put in a single-child placement.⁹⁷ Further, her case files do not indicate whether she received treatment for her behavior.⁹⁸ She was removed from her placement in 2009 for "sexually acting out" and then again in 2011 for sexually assaulting another resident.⁹⁹ Thus, as a result of poor data collection, K.E. was put in multiple placements that did not reflect her needs.¹⁰⁰ This not only resulted in K.E. being sexually abused, but also in the sexual abuse of other children.¹⁰¹

⁹² *Id.* at 760-65.

⁹³ *M.D.*, 152 F. Supp. 3d at 761.

⁹⁴ *Id.* at 762.

⁹⁵ *M.D.*, 152 F. Supp. 3d at 761-63.

⁹⁶ *Id.* at 764.

⁹⁷ *Id.* at 761-64.

⁹⁸ *Id.* at 764.

⁹⁹ *Id.*

¹⁰⁰ *M.D.*, 152 F. Supp. 3d at 761-62, 765.

¹⁰¹ *M.D.*, 152 F. Supp. 3d at 764.

In addition to messy and inadequate data collection, there are deficiencies in the State's foster care system specifically related to how the Department conducts abuse and neglect investigations. Prior to *M.D. v. Abbott*, the Residential Child Care Licensing division of the Department¹⁰² was the primary entity that investigated allegations of abuse and neglect in residential foster care facilities.¹⁰³ The Performance Management Unit, the unit that ensured the Residential Child Care Licensing division was following the Department policy, conducted a study on reports made to Residential Child Care Licensing from August 2012 to July 2013 and found that 75 percent of Residential Child Care Licensing's abuse and neglect investigations resulted in incorrect dispositions.¹⁰⁴ This exceedingly high error rate reflects abuse and neglect that is ignored and likely persists because it went undiscovered.

One such instance was reported by an attorney ad litem in *M.D. v. Abbott*, Anna J. Ricker.¹⁰⁵ Ricker testified about an incident where she reported potential abuse and neglect of a child, J.R., to Residential Child Care Licensing.¹⁰⁶ When Ricker visited J.R., she found him to be non-verbal, with a large and unexplained bruise on his forehead, a torn shirt, and buttonless pants.¹⁰⁷ She relayed that the facility smelled of urine and that feces were smeared on the walls of the facility.¹⁰⁸ Despite this gruesome picture, Residential Child Care Licensing dismissed the report after conducting an investigation that excluded

¹⁰² The responsibility for oversight of licensed residential child-care facilities previously resided in the RCCL division of DFPS, but this responsibility has since been transferred to the Health and Human Services Commission. However, the primary responsibility for investigating abuse and neglect allegations remains with the DFPS and is carried out through its Residential Child Care Investigations division that was created in 2017. 2020 report page 57 n.65; SB 200, 2015-16 84th Leg; SB 11, 85th Leg. Ninety percent of foster care placements are in licensed facilities and thus regulated by RCCL. *M.D. v. Abbott*, 152 F. Supp. 3d 684 at 798.

¹⁰³ *M.D.*, 152 F. Supp. 3d at 798.

¹⁰⁴ *Id.* at 799.

¹⁰⁵ *Id.* at 800.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

any follow up with Ricker or any other adult who was familiar with the circumstances at the facility.¹⁰⁹ J.R. remained in this facility.¹¹⁰

Beyond faulty investigative policies when abuse is reported, children in foster care often do not know how to report abuse and neglect. Former foster child, Kristopher Sharp, relayed that he was not aware of a number he could call after experiencing sexual abuse by a caregiver at his facility.¹¹¹ Sharp was also not able to safely report the incident to his caseworker because the same caregiver who abused him was usually present when Sharp had conversations with his caseworker.¹¹² If a child does know how to report abuse, they are often at risk of facing retaliation.¹¹³ For example, after *M.D.*, a class representative in *M.D. v. Abbott*, made a report that she had been raped by a staff member at the facility she was placed in, other staff members at the facility began verbally harassing her and demanding that she “stop spreading rumors.”¹¹⁴ There were also reports of physical abuse by staff members at the facility after M.D. reported the incident.¹¹⁵ This type of retaliation discourages Permanent Managing Conservatorship children from reporting abuse and neglect, which in turn increases the likelihood that abuse and neglect go undiscovered.

M.D.’s story also highlights the issues in the relationships, or lack thereof, between children in foster care and their caseworkers. After being mistreated by staff at her facility, M.D. attempted to run away.¹¹⁶ While she was returned to the facility after this runaway attempt, she ran away from a subsequent facility two years later.¹¹⁷ Almost a year later, a national missing child organization reported M.D.’s

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 788, 801.

¹¹² *Id.* at 787.

¹¹³ *Id.* at 801.

¹¹⁴ *Id.* at 721-22.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 724-25.

¹¹⁷ *Id.*

whereabouts to the Department.¹¹⁸ Despite this, the Department did not immediately try to locate her because they were not sure that it was her, even after being shown a photograph.¹¹⁹ This was because M.D.'s caseworker at the time had never even met her and the Department had no mechanism to identify her.¹²⁰

B. The Recommendations and their Corresponding Goals

Because of the complexities of the issues surrounding Texas's foster care system, Judge Jack appointed Special Masters with expertise in the field to issue recommendations and oversee the implementation of these reforms.¹²¹ There were several recommendations that were aimed directly at correcting monitoring and oversight issues: (1) integrate IMPACT, CLASS, and other filing systems so all data relevant to a child is in one centralized location; (2) require that caseworkers meet privately with their assigned children; (3) include a photograph of each child in their case file; (4) establish a twenty-four-hour hotline for reports of abuse and neglect; (5) track instances of child-on-child-abuse and appropriately categorize any such incidents; (6) respond to reports of abuse and neglect be immediately; (7) require that all Permanent Managing Conservatorship children have an attorney ad litem and a CASA volunteer; and (8) to expand enforcement tools for correcting a placement facilities failure to report instances of child abuse.¹²²

The purpose for requiring that caseworkers meet privately with their assigned children is to create a space where children in foster care can report unsafe situations to their caseworker without the presence

¹¹⁸ *Id.* at 725.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *M.D.*, 152 F. Supp. 3d at 823; *See also* ROBERT SANBORN ET AL., CHILDREN'S RIGHTS, THE STATE OF FOSTER CARE IN TEXAS AFTER *M.D. V. ABBOTT* AND THE 85TH LEGISLATIVE SESSION 20-21 (2018), <https://childrenatrisk.org/wp-content/uploads/2018/04/The-State-of-Foster-Care.pdf>.

¹²² KEVIN RYAN & FRANCIS MCGOVERN, SPECIAL MASTER RECOMMENDATIONS TO THE COURT (2016), <https://www.childrensrights.org/wp-content/uploads/2016/12/2016.11.04-471-Special-Masters-Recommendations.pdf>.

of their potential abuser.¹²³ While this recommendation was overruled by the Fifth Circuit,¹²⁴ the corresponding goal is still necessary to achieve since Permanent Managing Conservatorship children have reported that they are often not afforded these private meetings with caseworkers and thus cannot safely report abuse or neglect at their facility.¹²⁵

The creation of the integrated data system was the most robust of the recommendations by the Special Masters. The recommended data system was to include all relevant information about a child, such as the child's permanency goal, the child's placement and all safety information relevant to the placement, investigations, former caseworkers, and all educational and health history in one place.¹²⁶ The primary purpose of an integrated data system was to make sorting through the IMPACT, CLASS, and other files more efficient.¹²⁷ This would reduce the time caseworkers spend on sorting through data, so they are able to spend more time with the foster child and carry out their case management duties.¹²⁸ It was also intended to reduce the number of incomplete case files.¹²⁹

As caseworkers only able to spend around 26% of their time with their children in foster care because of administrative burdens, a more efficient system would free up caseworker's time.¹³⁰ With the extra time, a caseworker could spend more time with their assigned children in foster care. Not only would this extra time allow caseworkers to spend more time ensuring a child's needs are met, but it would also foster trust between children and their caseworker. This trust, which is largely lacking in the system, would make children in foster care

¹²³ *Id.* at 1.

¹²⁴ *M.D. v. Abbott*, 929 F.3d 272, 275 (5th Cir. 2019).

¹²⁵ *M.D.*, 152 F. Supp. 3d at 787.

¹²⁶ RYAN & MCGOVERN, *supra* note 122, at 1.

¹²⁷ *M.D.*, 152 F. Supp. 3d at 825.

¹²⁸ *Id.*

¹²⁹ RYAN & MCGOVERN, *supra* note 122, at 1.

¹³⁰ *M.D.*, 152 F. Supp. 3d at 780.

more comfortable in reporting abuse or neglect.¹³¹ However, this recommendation was ultimately struck down by the Fifth Circuit because it went beyond what is minimally required to correct the Department's oversight issues.¹³²

The Fifth Circuit also invalidated the recommendation to include a child's photograph in their case file and to establish a twenty-four-hour hotline for reporting abuse as overly broad.¹³³ The goal of requiring a photograph in the case file of each child was to prevent stories like M.D.'s, where a caseworker cannot adequately respond to a situation because they do not know what the foster child looks like and therefore does not know if the situation involves their assigned child.¹³⁴ The creation of the twenty-four-hour hotline was to provide a uniform mechanism for children in foster care to privately report abuse and neglect.¹³⁵ The court did, however, uphold a portion of the twenty-four-hour hotline recommendation that reports abuse and neglect are reported to the child's caseworker within 48 hours even if not referred for investigation.¹³⁶

Further, the Fifth Circuit invalidated the requirement that Permanent Managing Conservatorship children who do not have an attorney ad litem have one appointed.¹³⁷ Despite the invalidation of this recommendation, the goal of providing more than one adult who can advocate for Permanent Managing Conservatorship children is necessary for the state to achieve. M.D.'s story demonstrates this necessity. While M.D.'s caseworker was not able to identify M.D. after she ran away, M.D. was lucky enough to have an attorney ad litem who knew what she looked like.¹³⁸ As the state's caseworkers are severely overburdened, it is necessary that children in foster care have

¹³¹ See *id.* at 783.

¹³² *M.D. v. Abbott*, 929 F.3d 272, 279 (5th Cir. 2019).

¹³³ *M.D. v. Abbott*, 907 F.3d 237, 279, 283 (5th Cir. 2018).

¹³⁴ RYAN & MCGOVERN, *supra* note 122, at 1-2.

¹³⁵ *Id.* at 2.

¹³⁶ *M.D.*, 907 F.3d at 279.

¹³⁷ *Id.* at 283-84.

¹³⁸ *M.D.*, 152 F. Supp. 3d at 725.

access to another trusted adult to reduce the risk of unsafe situations being overlooked.

The Fifth Circuit did however uphold the recommendations to report and track instances of child-on-child-abuse, to expand enforcement mechanisms for child-placement facilities that fail to report abuse, and to immediately respond to abuse allegations.¹³⁹ The recommendation to track instances of child-on-child abuse was aimed at making this type of information available, so caseworkers are aware of their assigned children's history and the history of the children placed with their child.¹⁴⁰ Without this type of data, children like K.E. have been placed in facilities that do not meet their individualized needs.¹⁴¹ These inappropriate placements can exacerbate existing mental and physical health problems and lead to further instances of sexual abuse, as in K.E.'s case.¹⁴²

It is important to note that the stricken recommendations were overruled because they were overly broad, not because they were deemed to be immaterial to correcting the constitutional violations of Texas's foster care system.¹⁴³ As such, the following sections will examine whether Texas has attempted to accomplish the purported goals of the recommendations initially set forth by the Special Masters, including recommendations that were ultimately overruled by the Fifth Circuit. For example, the Special Masters' recommended that the Department create an integrated data system so caseworkers could have all relevant information about a child readily available to them and the caseworker could make informed case management decisions.¹⁴⁴ This recommendation of the integrated data system was initially upheld by the Fifth Circuit because the court recognized that the goal of having a child's information readily accessible to their caseworker is a significant part of correcting the constitutional

¹³⁹ *M.D.*, 907 F.3d at 276.

¹⁴⁰ RYAN & MCGOVERN, *supra* note 122, at 8.

¹⁴¹ *M.D.*, 152 F. Supp. 3d at 761-63.

¹⁴² *Id.*

¹⁴³ RYAN & MCGOVERN, *supra* note 122, at 1.

¹⁴⁴ *Id.*

violations of Texas's foster care system.¹⁴⁵ Thus, the following sections will evaluate whether this goal has been achieved, even if the goal is not achieved through the creation of an integrated data system.

III. LEGISLATIVE RESPONSE TO *M.D. v. ABBOTT*

In response to the holding in *M.D. v. Abbott*, the Texas legislature attempted to fix some of the issues highlighted by the court and to comply with the Special Masters' recommendations. During the 85th and 86th legislative sessions, the Texas legislature made dozens of revisions to the Texas Family Code, Human Resources Code, Government Code, and Health and Safety Code regarding the management of the state's foster care system.¹⁴⁶ Some of these changes were a direct response to the ruling in *M.D. v. Abbott*.

For instance, the passage of H.B. 7 during Texas's 85th legislature amended the Texas Family Code so a court order appointing an attorney ad litem to a child in the state's custody provides for the continuation of the appointment as long as the child is in the state's custody.¹⁴⁷ This is a direct response to the Special Masters' recommendation that all Permanent Managing Conservatorship children have access to an attorney ad litem or CASA volunteer.¹⁴⁸ This should mitigate oversight issues that stem from a Permanent Managing Conservatorship child only having one adult, their overburdened caseworker, to advocate for them since attorney ad

¹⁴⁵ *M.D.*, 907 F.3d at 282-83. This recommendation was eventually struck down because it went beyond what was minimally required to correct the constitutional violation. However, the Fifth Circuit noted that the data system would be a "best practice" in addressing this goal. *M.D. v. Abbott*, 929 F.3d 272, 279 (5th Cir. 2019).

¹⁴⁶ See ROBERT SANBORN ET AL., CHILDREN'S RIGHTS, THE STATE OF FOSTER CARE IN TEXAS AFTER *M.D. v. ABBOTT* AND THE 85TH LEGISLATIVE SESSION (2018), <https://childrenatrisk.org/wp-content/uploads/2018/04/The-State-of-Foster-Care.pdf>; CHILDREN'S COMM'N, 2019 CHILD PROTECTION UPDATE: 86TH LEGISLATIVE SESSION (2019), <http://texaschildrenscommission.gov/media/84111/86th-session-legislative-update-final-online.pdf>.

¹⁴⁷ Tex. Fam. Code § 107.004(d-3); SANBORN ET AL., *supra* note 146, at 32.

¹⁴⁸ RYAN & MCGOVERN, *supra* note 122, at 3.

litems are often dismissed once the child enters the permanent custody of the state.

Further, there were several revisions that indirectly addressed the Special Masters' recommendations. For example, in response to the recommendation that enforcement mechanisms for noncompliant foster care facilities, the state legislature passed S.B. 781.¹⁴⁹ Now, the Department must respond more strictly to facilities that are repeatedly noncompliant with department standards that do not endanger the health or safety of the child.¹⁵⁰ Previously, a facility could be repeatedly noncompliant with such standards with no consequences because the Department had the option to "evaluate" these facilities without suspending or revoking the facilities license.¹⁵¹ Now, the option to evaluate has been removed and the Department must suspend or revoke the facilities license.¹⁵² While this bill is aimed specifically at noncompliance with standards that do not endanger the health or safety of children on its face, it should in practice prevent noncompliance with standards that do in fact endanger children. This is because Residential Child Care Licensing has a history of inappropriately downgrading or dismissing reports of facilities that do arguably put the health and safety of Permanent Managing Conservatorship children, as was the case for J.R.¹⁵³

There were also legislative changes that were not related to the court's recommendations, but nonetheless drastically alter the structure of the Department. For example, the 85th legislature passed H.B. 5 which designated the Department as a standalone agency.¹⁵⁴ Further, a provision was added to the Human Resources Code that creates a division within the Department that specializes in investigations of abuse and neglect.¹⁵⁵ Previously, abuse and neglect

¹⁴⁹ S.B. 781, 86th Leg. (Tex. 2019) (enacted).

¹⁵⁰ *Id.*; Tex. Hum. Res. Code § 42.071.

¹⁵¹ S.B. 781, 86th Leg. (Tex. 2019) (enacted).

¹⁵² Tex. Hum. Res. Code § 42.071.

¹⁵³ *See infra* Part II, Section A.

¹⁵⁴ H.B. 5, 85th Leg. (Tex. 2017) (enacted).

¹⁵⁵ Tex. Hum. Res. Code § 40.042.

investigations were conducted by Residential Child Care Licensing.¹⁵⁶ Now, Residential Child Care Licensing has been transferred out from under the Department and is now under the umbrella of the state's Health and Human Services Commission.¹⁵⁷ While Residential Child Care Licensing still investigates standards violations of residential foster care facilities, the child-focused abuse investigations are now the responsibility of Residential Child Care Investigations unit, which is a division of the Department.¹⁵⁸

Unfortunately, there were several recommendations that were not addressed by legislation such as tracking child-on-child abuse, providing for a twenty-four-hour hotline to report abuse that children in foster care have knowledge of and private access to, requiring private meetings with caseworkers, and centralizing the data of Permanent Managing Conservatorship children.¹⁵⁹ The legislature has attempted to partially address some of the goals of these recommendations, but has done so unsuccessfully. For example, S.B. 1101 modified the structure of the foster care ombudsmen office to supposedly provide a private channel to report abuse and neglect.¹⁶⁰

Further, while there have not been any legislative changes in regard to a hotline to report abuse and neglect, the Department changed their internal policy to promote Permanent Managing Conservatorship children's awareness of how they can report abuse and neglect.¹⁶¹ Now, caseworkers must provide a copy of Child Protective Services' Rights of Children and Youth in Foster Care (Foster Care Bill of Rights) and review it with the child within seventy-two hours of the child's entrance into foster care.¹⁶² The last page of the Foster Care Bill of Rights provides information on how to contact a hotline to report abuse and neglect, the Texas Abuse Hotline, as well

¹⁵⁶ See *supra* note 68 and accompanying text.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ SANBORN ET AL., *supra* note 146, at 34.

¹⁶⁰ S.B. 1101, 86th Leg. (Tex. 2019) (enacted).

¹⁶¹ FOWLER & RYAN, *supra* note 4, at 122.

¹⁶² *Id.*

as the Foster Care Ombudsmen.¹⁶³ Additionally, the Department has updated its internal policies to require tracking of child-on-child abuse.¹⁶⁴ Now, caseworkers track both sexual aggression and sexual victimization in IMPACT.¹⁶⁵ Once child abuse is input in IMPACT, it is also automatically filled in the child's Common Application for Placement.¹⁶⁶ In regions where Community-Based Care (CBC) has been implemented, Single-Source Continuum Contractors are responsible for notifying a caregiver if a child has a history of sexually aggressive behavior.¹⁶⁷ Still, the other goals have not been addressed at all.¹⁶⁸

Nevertheless, the passage of S.B. 11 by the 85th Texas Legislature in 2016, an omnibus foster care reform bill that contains the CBC program model for the foster care system, is the most profound change to the foster care system in Texas since *M.D. v. Abbott*.¹⁶⁹ The CBC program is an extension of the Foster Care Redesign program,¹⁷⁰ which was initially implemented in 2007 and places responsibility for administering services in the foster care system into the hands of private entities, called Single-Source Continuum Contractors

¹⁶³ *Id.*

¹⁶⁴ *Id.*; TEX. DEP'T OF FAM. & PROTECTIVE SERVS., STATEWIDE INTAKE POLICY & PROCEDURES §4540, https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4200.

¹⁶⁵ FOWLER & RYAN, *supra* note 4, at 22.

¹⁶⁶ *Id.* at 205.

¹⁶⁷ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 6241.1, http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_6200.asp#CPS_6241_1.

¹⁶⁸ See generally FOWLER & RYAN, *supra* note 4.

¹⁶⁹ Evans, *supra* note 16.

¹⁷⁰ In Texas's Foster Care Redesign Program, discussed *infra*, the state placed the management of the agencies that are responsible for the placement of children in foster care into the hands of private entities. The first of private entities was Providence Services Corporation, which voluntarily terminated its contract a mere eighteen months into its contract with the state following abysmal performance. Jo Deprang, *Foster Case Contractor Pulls Out, Leaving 'Redesign' in Doubt*, TEX. OBSERVER (Aug. 1, 2014, 2:54 PM), <https://www.texasobserver.org/foster-care-contractor-pulls-leaving-redesign-doubt/>; See also *M.D. v. Abbott*, 152 F. Supp 3d. at 815.

(Contractors).¹⁷¹ In the Redesign program, the State was divided into catchment areas and the Contractors were in charge of a particular catchment area.¹⁷² CBC operates similarly.¹⁷³

With that said, the privatization of Texas's foster care system is not a new concept. The CBC program simply takes the privatization a step further and places the responsibility of case management into the hands of the Contractors.¹⁷⁴ However, the transfer of case management services from the Department to the Contractors is an incredibly significant change. Firstly, case management covers a breadth of vital responsibilities like ensuring a child's service plan is being followed and preparing court materials.¹⁷⁵

The program is to be implemented over time, region-by-region, and divided into two stages.¹⁷⁶ The Texas legislature recognized that privatization programs in other states have failed because the privatization program was rolled out too rapidly.¹⁷⁷ The staged implementation of CBC is intended to roll the program out gradually, so this type of failure does not occur.¹⁷⁸ The first stage puts the

¹⁷¹ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., FOSTER CARE REDESIGN IMPLEMENTATION PLAN 2 (2015) http://www.dfps.State.tx.us/Child_Protection/Foster_Care/Community-Based_Care/documents/foster_care_redesign_implementation_plan.pdf.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See generally U.S. DEP'T OF HEALTH AND HUMAN SERVS., CASE PLANNING FOR FAMILIES INVOLVED WITH CHILD WELFARE AGENCIES (2018), <https://www.childwelfare.gov/pubPDFs/caseplanning.pdf>.

¹⁷⁶ *Community-Based Care*, TEX. DEP'T OF FAM. & PROTECTIVE SERVS., http://www.dfps.State.tx.us/Child_Protection/Foster_Care/Community-Based_Care/default.asp (last visited Jan. 10, 2021).

¹⁷⁷ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., IMPLEMENTATION PLAN FOR THE TEXAS COMMUNITY-BASED CARE SYSTEM 12 (2019), https://www.dfps.state.tx.us/Child_Protection/Foster_Care/Community-Based_Care/documents/2019-08-26_Community-Based_Care_Implementation_Plan.pdf; See also Vine, *supra* note 17.

¹⁷⁸ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., IMPLEMENTATION PLAN FOR THE TEXAS COMMUNITY-BASED CARE SYSTEM 12 (2019), https://www.dfps.state.tx.us/Child_Protection/Foster_Care/Community-Based_Care/documents/2019-08-26_Community-Based_Care_Implementation_Plan.pdf.

responsibility of foster care placement services into the hands of the Contractors and the second stage transfers case management responsibilities to them.¹⁷⁹

The process begins when the Department selects the catchment area where CBC is to be implemented.¹⁸⁰ This selection is based on funding availability, geographical proximity to existing catchment areas, and the level of involvement of relevant stakeholders in the catchment area, among other factors.¹⁸¹ Once the catchment area is selected, Health and Human Services Commission issues a Request for Applications and a bidding process begins in which the Contractor will be selected.¹⁸² For an entity to contract with the Department to serve a region as a Contractor, the entity must be a nonprofit organization with a mission related to child welfare.¹⁸³ In selecting the Contractor, the Department is to consider the entity's past success in providing child welfare services to families in the region.¹⁸⁴ Before a Contractor begins serving a particular region or the region moves from Stage I to Stage II, they must complete a readiness review process designed by the Department, and the Department must determine that they can adequately provide services to the region.¹⁸⁵ Further, the state has recruited several independent entities to conduct evaluations of the implementation of CBC throughout the entire process.¹⁸⁶

While CBC transfers many responsibilities from the Department into the hands of Single-Source Continuum Contractors, the Department will retain several of its responsibilities including intake, abuse and neglect investigations, and Contractor contract

¹⁷⁹ *Id.* at 12-13.

¹⁸⁰ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., IMPLEMENTATION PLAN FOR THE TEXAS COMMUNITY-BASED CARE SYSTEM 7-12 (2019), https://www.dfps.state.tx.us/Child_Protection/Foster_Care/Community-Based_Care/documents/2019-08-26_Community-Based_Care_Implementation_Plan.pdf.

¹⁸¹ *Id.*

¹⁸² TEX. COURT APPOINTED SPECIAL ADVOCATES, *supra* note 47, at 22.

¹⁸³ Tex. Fam. Code § 264.154(a).

¹⁸⁴ Tex. Fam. Code § 264.154(b).

¹⁸⁵ Tex. Fam. Code § 264.156.

¹⁸⁶ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., *supra* note 180, at 13-14.

management.¹⁸⁷ So far, the CBC program is being implemented in five catchment areas. The first stage is being implemented in regions 1 and 8b.¹⁸⁸ The second stage is being implemented in regions 3b and 2.¹⁸⁹ Region 8a has moved to Stage II.¹⁹⁰ The Contractor in charge of Region 1 is Saint Francis Community Services in Texas, Inc.¹⁹¹ Region 2 is headed by 2INgage, a division of Texas Family Initiative, while region 3b is headed by Our Community Our Kids, a division of ACH Child and Family Services and 8a by Family Tapestry, a division of The Children's Shelter.¹⁹² The Contractor for region 8b has not yet been selected.¹⁹³ All of these Contractors, with the exception of Saint Francis Ministries, are Texas-based organizations.¹⁹⁴

Beyond the transfer of case management services to the Contractors, S.B. 11 made several other changes that affect foster care in Texas. Firstly, the Data Access and Standards Governance Council was created to facilitate the transfer of data between the Contractors and the Department through IMPACT.¹⁹⁵ The Contractors also have limited access to CLASS.¹⁹⁶ Despite the creation of this council, there have not been any other measures aimed at correcting the data inefficiencies discussed in Part II and the data in CLASS and IMPACT

¹⁸⁷ *Id.* at 21.

¹⁸⁸ Region 1 encompasses a region around Lubbock, TX and Amarillo, TX. Region 8b encompasses the south-central region of Texas, excluding Bexar County. TEX. DEP'T OF FAM. AND PROTECTIVE SERVS., *supra* note 180.

¹⁸⁹ Region 3b encompasses Tarrant, Erath, Hood, Johnson, Palo Pinto, Parker, and Somerville counties. Region 2 encompasses Abilene, TX and Wichita Falls, TX. These regions have already implemented the first stage of implementation. *Id.*

¹⁹⁰ Region 8a encompasses Bexar County. *Id.*

¹⁹¹ *Community-Based Care Contracts*, TEX. DEP'T OF FAM. & PROTECTIVE SERVS., https://www.dfps.state.tx.us/Doing_Business/Purchased_Client_Services/Community-Based_Care_Contracts/default.asp (last visited Jan. 13, 2021).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ TEX. COURT APPOINTED SPECIAL ADVOCATES, *supra* note 47, at 27. Saint Francis Ministries is based in Kansas. *Id.*

¹⁹⁵ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., *supra* note 180, at 29.

¹⁹⁶ *Id.*

are still disaggregated.¹⁹⁷ S.B. 11 did however modify the Family Code to require the Department to collect data about repeated reports of abuse and neglect that involve the same child or are allegedly perpetrated by the same individual.¹⁹⁸ It also requires that the Department group together reports that involve children that are residing in the same facility.¹⁹⁹ Further, S.B. 11 requires that Contractors, child-placing agencies, and other relevant parties receive a complete health history of the child.²⁰⁰ Finally, S.B. 11 modified the definition of neglect to include situations of child-on-child abuse.²⁰¹ Under the new definition, the list of persons responsible for the child safety was expanded to include employees of child-care facilities.²⁰²

IV. EVALUATION OF COMMUNITY-BASED CARE AND THE STATE'S RESPONSE TO *M.D. v. ABBOTT*

The first listed goal of the Community-Based Care (CBC) program is to keep the children in the foster care system safe from abuse and neglect.²⁰³ As Judge Jack explained in *M.D. v. Abbott* and as explained above, the State's monitoring and oversight inadequacies contribute to the pervasiveness of abuse and neglect in Texas's foster care system.²⁰⁴ Thus, to evaluate whether CBC will be successful in reaching its primary goal of keeping children safe, this section will analyze whether the legislation passed since *M.D. v. Abbott* has or will accomplish the goals set forth by Judge Jack to correct the system's monitoring and oversight deficiencies. Additionally, this section will investigate whether the program will contribute to existing issues or create additional monitoring issues that were not highlighted in *M.D.*

¹⁹⁷ FOWLER & RYAN, *supra* note 4, at 18-19.

¹⁹⁸ S.B. 11, 85th Leg. (Tex. 2017) (enacted); Tex. Fam. Code § 261.004.

¹⁹⁹ S.B. 11, 85th Leg. (Tex. 2017) (enacted); Tex. Fam. Code § 261.004.

²⁰⁰ S.B. 11, 85th Leg. (Tex. 2017) (enacted); Tex. Fam. Code. § 162.005(c).

²⁰¹ Tex. Fam. Code. § 261.001(4)(A)(iv).

²⁰² Tex. Fam. Code. § 261.001(5)(F).

²⁰³ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., *supra* note 180, at 6.

²⁰⁴ See generally *M.D. v. Abbott*, 152 F. Supp. 3d 684 (S.D. Tex. 2015).

v. Abbott but may nonetheless exacerbate abuse and neglect issues in Texas's foster care system.

Texas has directly responded to some of the recommendations by the Special Masters in promising ways, such as requiring the appointment of an attorney ad litem for all Permanent Managing Conservatorship children.²⁰⁵ However, some of the other legislative changes in response to *M.D. v. Abbott* have not solved the monitoring issues that they were meant to target. For example, the expansion of enforcement mechanisms for child-care facilities has not had much success. While the passage of H.B. 781 during the 86th legislative session called for an uncompromising approach to standards violations, of the 30,000 reported violations, Residential Child Care Licensing has only suspended one license and has not revoked a single license.²⁰⁶ Residential Child Care Licensing has, however, issued six toothless "intent to revoke" letters to violating facilities.²⁰⁷ Thus, the tightening of enforcement measures has done little to correct potentially unsafe situations in foster care facilities.

Further, the State does have a hotline that is available twenty-four hours a day, seven days a week, the Texas Abuse Hotline.²⁰⁸ However, the Texas legislature has not addressed the privacy and access issues to the hotline that were highlighted in *M.D. v. Abbott*.²⁰⁹ The creation of the hotline was intended to serve as a safe and accessible way for the State's children in foster care to report abuse without fear of retaliation.²¹⁰ However, the hotline has not achieved these goals in practice. While the Department has changed internal policy so caseworkers must inform children about the hotline shortly after they enter foster care, 40 percent of the children in foster care that the Special Monitors interviewed in its evaluation were not aware of this

²⁰⁵ See *infra* Part III.

²⁰⁶ FOWLER & RYAN, *supra* note 4, at 20.

²⁰⁷ *Id.*

²⁰⁸ Report Abuse, Neglect, or Exploitation, TEX. DEP'T OF FAMILY & PROT. SERVS. (last visited Sep. 21, 2021), https://www.dfps.state.tx.us/contact_us/report_abuse.asp.

²⁰⁹ RYAN & MCGOVERN, *supra* note 122, at 1.

²¹⁰ *Id.* at 2.

hotline.²¹¹ Additionally, some of the children who were aware of the hotline's existence could not use it because of limited access to a phone.²¹² While there is another avenue to report abuse and neglect, the Foster Care Ombudsmen, 71 percent of the children interviewed were not aware of its existence.²¹³

Moreover, when abuse and neglect is reported to the hotline, some investigations into these reports of abuse or neglect do not always follow.²¹⁴ This is because the same unit within the Department who is responsible for conducting such investigations, the Residential Child Care Investigations unit, is the unit that has the final decision as to whether an investigation is warranted for abuse allegations in licensed foster care placements.²¹⁵ Allegations of abuse and neglect are initially referred to the Statewide Intake division via the Texas Abuse Hotline who evaluates the allegation and refers the case to the appropriate agency.²¹⁶ Allegations involving a child who is placed in a licensed foster care facility are referred to Residential Child Care Investigations, while Child Protective Services, through its investigations division, handles abuse investigations involving children in unlicensed facilities.²¹⁷ Before Statewide Intake refers the allegation to Residential Child Care Investigations, they make a determination about the priority level of the allegation, which governs the required response time to the allegation.²¹⁸ However, once the case is referred to Residential Child Care Investigations, the unit may unilaterally downgrade or screen out the case if the report "indicates that there is

²¹¹ FOWLER & RYAN, *supra* note 4, at 23-24.

²¹² *Id.* at 24.

²¹³ *Id.* at 23-24.

²¹⁴ *See id.* at 72-73.

²¹⁵ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 6211.1, (last visited Sep. 21, 2021), https://www.dfps.state.tx.us/handbooks/CCI/Files/LPPH_pg_6000.asp#LPPH_6200.

²¹⁶ FOWLER & RYAN, *supra* note 4, at 56-57.

²¹⁷ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., STATEWIDE INTAKE POLICY & PROCEDURES § 4730, (last visited Sep. 21, 2021), https://www.dfps.state.tx.us/handbooks/SWI_Procedures/Files/SWP_pg_4000.asp#SWP_4200.

²¹⁸ FOWLER & RYAN, *supra* note 4, at 56-57.

some risk to children, but the information is too vague to determine whether the child was abused or neglected.”²¹⁹ Contrastingly, if there is a report of abuse or neglect involving a child that is not in the State’s custody that is too vague an abuse or neglect determination, Child Protective Services is required to investigate the allegation.²²⁰ Thus, the State’s children in foster care must meet a higher standard than children not in the State’s custody to warrant an investigation into reports of abuse or neglect.

To make matters worse, the Texas Abuse Hotline is riddled with flaws. Firstly, for children who are aware of the hotline’s existence and try to contact Statewide Intake to make a report of abuse or neglect, nearly one in five calls made to the hotline are abandoned.²²¹ If the report does make it through, then it must be evaluated not only by Statewide Intake, but also Residential Child Care Investigations who may downgrade the priority of the investigation or even screen it out entirely.²²² The Special Masters conducted an analysis of the hotline’s efficacy and found that 18 percent of calls to the hotline were abandoned and 33 percent of reports were inappropriately downgraded.²²³

While there is not a clear explanation for inappropriate downgrades, the excessive number of abandoned calls has been attributed to a combination of a rise in reports to the hotline because more children are aware of its existence and not enough Statewide Intake workers.²²⁴ However, given the Special Masters finding that

²¹⁹ *Id.* at 59.

²²⁰ *Id.*; Tex. Admin. Code. 40 § 700.507(e)(1)(A)-(C).

²²¹ FOWLER & RYAN, *supra* note 4, at 16.

²²² *Id.* at 17.

²²³ *Id.* at 16. The reports were downgraded inappropriately because there was evidence that warranted an investigation into potential abuse and neglect, but the reports were designated as “Priority None” and no investigation occurred.

²²⁴ See Robert T. Garrett, *Texas Hotline for Reporting Child, Elder Abuse Wins Praise but Could Use More Help*, THE DALLAS MORNING NEWS (Dec. 21, 2017), <https://www.dallasnews.com/news/politics/2017/12/21/texas-hotline-for-reporting-child-elder-abuse-wins-praise-but-could-use-more-help/>; Julie Chang, *As Wait Times Grow, Calls to the Texas Abuse Hotline Go Unanswered*, AUSTIN AM.-STATESMAN (Mar. 30, 2018), <https://www.statesman.com/news/20180330/as-wait-times-grow-calls-to-the-texas-abuse-hotline-go-unanswered>.

nearly half of the children in foster care they interviewed do not know about the hotline, an inadequate amount of Statewide Intake workers is likely the primary contributor to this issue.

Some of the recent reform efforts have been successful, such as the updated policy for tracking child-on-child abuse.²²⁵ As in the case of D.I., Permanent Managing Conservatorship children have been put in placements with other children who have a history of exhibiting sexually aggressive behaviors, unbeknownst to the caseworker and child-placing agency, and are abused by that child.²²⁶ The risk of this occurring should decrease because placement decisions will not account for a history of sexual aggression as this information is automatically filled in a child's Common Application.

However, it is not perfect. Firstly, because the history of sexual aggression is tracked in the perpetrating child's file and Common Application,²²⁷ it is possible that this information will only be considered when making placement decisions about the perpetrating child. Further, the Common Application is only made available to prospective caregivers when the child needs a new placement.²²⁸ Thus, this information will likely not be viewed by the child's current caregiver unless it is brought to their attention. Unfortunately, over half of the caregivers interviewed by the Special Monitors in their evaluation were not informed that a child in their care had a history of sexual aggression.²²⁹ As these caregivers were not aware of the children's history, they likely did not take extra measures to ensure further abuse did not occur like recommend the child be placed in a single-child home.

While the Department has made some strides in improving its data collection practices, these practices have done little to prevent child abuse and neglect in practice. The increased data collection is admirable, but it needs improvement. When parties, such as a child's

²²⁵ See *infra* part III.

²²⁶ *M.D. v. Abbott*, 907 F.3d 237, 246 n.10 (5th Cir. 2018).

²²⁷ FOWLER & RYAN, *supra* note 4, at 36.

²²⁸ *Id.*

²²⁹ *Id.* at 22-23.

current caregiver, do not have access to the relevant information or are not notified about such information then they cannot make informed decisions about the needs of the child or the children around them.

Regrettably, it does not seem as if CBC will fill in the gaps called by these inefficiencies. While the Data Access and Standards Governance Council was created to facilitate information between the Department and the Contractors for children within catchment areas, it suffers from all the same flaws that are found for Permanent Managing Conservatorship children outside of catchment areas.²³⁰ As the data from the Contractors is transferred to the Department via the IMPACT system, the Contractors must deal with the long-existing inadequacies with the data system.²³¹

Further, while the legislature has been mindful about the need to transition to the CBC program slowly and designed an intensive bidding process to choose the most qualified Contractors, these measures do not get to the heart of the oversight and monitoring issues in the system. If anything, these issues will be exacerbated. These considerations may act as preventative measures for the failures of other states' privatization programs. However, there has been little change to the investigatory practices of the Department and the Health and Human Services Commission because they are still the entities responsible for abuse and neglect investigations.²³² As such, many of the investigatory inadequacies that existed when *M.D. v. Abbott* was decided are still present today.

This is not to say that the CBC program does not have many positive attributes. The program's goal to draw on community resources so children are placed in closer proximity to their family home is admirable.²³³ Further, there is some evidence that the program

²³⁰ TEX. DEP'T OF FAM. & PROTECTIVE SERVS., *supra* note 180, at 28-29.

²³¹ TEX. DEP'T OF FAMILY & PROTECTIVE SERVS., DFPS RIDER 15 REPORT FOR COMMUNITY-BASED CARE 3-6 (Sept. 2020), http://www.dfps.state.tx.us/About_DFPS/Reports_and_Presentations/Rider_Reports/documents/2020/2020-09-30_Rider_15_Community-Based_Care_Report.pdf.

²³² TEX. DEP'T OF FAM. & PROTECTIVE SERVS., *supra* note 180, at 21.

²³³ TEX. DEP'T FAMILY & PROTECTIVE SERVS., DFPS RIDER 15 REPORT FOR COMMUNITY-BASED CARE 1, 5-6 (Apr. 2020).

has been successful on this front.²³⁴ While this is promising, children in foster care's proximity to their family home and the use of community resources are not the issues that are threatening the health and safety of Texas's children in foster care.

However, the Texas Legislature has released a report on the progress of the program that includes some data on the health and safety data on the children in catchment areas where CBC has been rolled out.²³⁵ In Region 3b, the only region in Stage II of CBC, a reported 99.2 percent of children in foster care were safe from abuse and neglect.²³⁶ The regions that have fully implemented Stage II, Regions 2, 8a, and 1, have reported safety rates of 99.5, 99.8, and 100 percent respectively.²³⁷ While these numbers seem promising on their face, these statistics should be taken with a grain of salt since there is an ongoing history of underreported abuse and neglect in the state's foster care system. Further, the region with the lowest reported safety rates is the region that is furthest along in its implementation of CBC.²³⁸ Additionally, even with a statistic that says 99.8 percent of children are safe within a given region, the flipside of that statistic should be examined. In 2019, Family Tapestry, the Contractor in charge of region 8a, served nearly 2000 children in foster care.²³⁹ Thus, around 40 children (.2 percent of 2000) were deemed to be unsafe.

Moreover, looking at statistics from the past two decades, there has not been a marked improvement. According to a report by the U.S. Department of Health and Human Services (HHS) based on data from the National Child Abuse and Neglect Data System (NCANDS), approximately 0.32 percent of the children in Texas's foster care system had reports of abuse or neglect investigated and substantiated

²³⁴ *Id.*

²³⁵ *Id.* at 3.

²³⁶ *Id.* at 9.

²³⁷ *Id.* at 12-14.

²³⁸ *See id.*

²³⁹ Peggy O'Hare & Jacob Beltran, 'Worst of all Situations' – Children's Shelter, Family Tapestry Defensive After Report, SAN ANTONIO EXPRESS-NEWS (Apr. 28, 7:31 PM), <https://www.expressnews.com/news/local/article/Children-Shelter-san-antonio-foster-lawsuit-16135909.php>.

in 2004.²⁴⁰ In 2016 alone, that percentage was 0.31 percent according to NCANDS.²⁴¹ Thus, there is only evidence in two of the four regions where CBC is being implemented that the safety of children in foster care is any better than it was in 2004.

It is important to note that CBC is in its infancy, so these numbers may improve over time. However, CBC is not the first program of its kind.²⁴² Texas has been dabbling with privatization efforts for decades, but the number of abused and neglected children in the state's foster care system do not reflect this effort. While the continued effort by the state to improve the system is noteworthy, perhaps it is time that the state change course away from privatization and outsourcing our responsibilities towards the children in its custody and instead work on reforming and pouring resources into the already existing system. The costs for not correcting abuse and neglect in the state's foster care system are too high to continue down the same road.

While the stories discussed in Part II provide anecdotal evidence of the devastating long-term effects of abuse, there is also a plethora of empirical evidence that suggests that abuse and neglect have ruinous long-term effects on both mental and physical health.²⁴³ For instance, individuals who experience abuse or neglect during childhood have been shown to have higher instances psychological problems such as posttraumatic stress disorder, disordered emotional regulation, and personality disorders, including antisocial personality disorder.²⁴⁴ In addition to being at an increased risk for psychological disorders,

²⁴⁰ U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 64 (2006), <https://www.acf.hhs.gov/sites/default/files/cb/cm06.pdf> [https://web.archive.org/web/20201112000446/https://www.acf.hhs.gov/sites/default/files/cb/cm06.pdf].

²⁴¹ U.S. DEP'T OF HEALTH AND HUMAN SERVS., CHILD WELFARE OUTCOMES 23 (2016) <https://www.acf.hhs.gov/sites/default/files/cb/cwo2016.pdf#page=15> [https://web.archive.org/web/20191113170733/https://www.acf.hhs.gov/sites/default/files/cb/cwo2016.pdf].

²⁴² See TEX. DEP'T OF FAM. & PROTECTIVE SERVS., FOSTER CARE REDESIGN IMPLEMENTATION PLAN 2 (2015) http://www.dfps.State.tx.us/Child_Protection/Foster_Care/Community-Based_Care/documents/foster_care_redesign_implementation_plan.pdf.

²⁴³ INST. MED. & NAT'L RSCH. COUNCIL, NEW DIRECTIONS IN CHILD ABUSE AND NEGLECT RESEARCH 17-18 (Anne C. Peterson et al. eds. 2014).

²⁴⁴ *Id.* at 17.

childhood abuse and neglect is associated with higher rates of certain physical health outcomes such as stunted growth, gastrointestinal issues, and obesity.²⁴⁵ Like some of the class representatives in *M.D. v. Abbott*,²⁴⁶ children in Texas's foster care system are not simply at risk of facing one instance of abuse or neglect, but they are exposed to the risk of persistent and unchecked abuse or neglect either.

V. POLICY RECOMMENDATIONS

There are aspects of the Community-Based Care (CBC) program that should be retained. For instance, the goal to draw on local resources to meet the individual needs of children within a particular region should remain in place.²⁴⁷ As Texas is the second largest state in the nation and is teeming with cultural diversity, the foster care system should draw on resources that are uniquely appropriate for the populations it serves.²⁴⁸ Drawing on regional resources is an innovative and efficient way to do just that. However, hiring a private entity to do so is not necessary. That is not to say that private entities should be left out of the equation. Instead, the state could form partnerships with these private entities and draw on their expertise. However, rather than a private entity taking over case management duties, they could instead act in a consulting capacity.

Further, the Department could implement incentives for caseworkers to work in their home regions and with children who have similar backgrounds to their own. For example, the Department could create a division or committee within it that is focused on drawing on the community and cultural strengths across the state. The division could be staffed with individuals who already have experience working as a caseworker for children in the state and

²⁴⁵ *Id.* at 141-44.

²⁴⁶ *M.D.*, 152 F. Supp. 3d at 51, 61, 65, 72, 77, 82, 98, 106, 113, 114, 115.

²⁴⁷ *Community-Based Care*, TEX. DEP'T OF FAM. & PROTECTIVE SERVS., https://www.dfps.state.tx.us/Child_Protection/Foster_Care/Community-Based_Care/default.asp (last visited Feb. 4, 2022).

²⁴⁸ *Most Diverse States 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/state-rankings/most-diverse-states> (last visited Sep. 7, 2021).

receive an increase in pay. Individuals who have a history of directly working with children in a particular region likely have connections with the community and its resources just as Single-Source Continuum Contractors do. The turnover rate for caseworkers is already excessive,²⁴⁹ and the CBC program has done little to reduce stressors. Instead, the program has led already overburdened caseworkers to fear that they will lose their job to a private entity.²⁵⁰

To mitigate stress associated with the constantly-changing foster care landscape and general stressors associated with the job, caseworker pay in general needs to increase. The pay of caseworkers should reflect the difficulty of their job. Currently, caseworkers carry caseloads that are far above what is recommended by child welfare agencies.²⁵¹ Further, caseworkers are required to take up extra responsibilities to make up for gaps in the system, such as allowing children in foster care to sleep in their offices because of an inadequate number of placements.²⁵² This would be costly, but caseworker turnover already costs the state \$72 million annually.²⁵³ In 2017, Texas did pour \$500 million into the Department to increase caseworker pay.²⁵⁴ However, the starting salary for caseworkers is still around \$47,277.²⁵⁵ This number is well-below what is considered a living wage in Texas for adults that have at least one child.²⁵⁶

²⁴⁹ See *M.D.*, 152 F. Supp. 3d.

²⁵⁰ Marissa Evans, *Child Welfare Workers Fear Legislative Push to Outsource Their Jobs*, TEX. TRIBUNE (Mar. 16, 2017), <https://www.texastribune.org/2017/03/16/caseworkers-fear-community-based-care-push-legislature/>.

²⁵¹ *M.D. v. Abbott*, 907 F.3d 237, 244-45 (5th Cir. 2018).

²⁵² Robert T. Garrett, *Abused, Neglected Children Again Sleeping in CPS Offices in Repeat of Texas Foster Care Crisis*, DALLAS MORNING NEWS (Dec. 18 2020), <https://www.dallasnews.com/news/politics/2020/12/18/abused-neglected-children-again-sleeping-in-cps-offices-in-repeat-of-texas-foster-care-crisis/>.

²⁵³ *M.D.*, 907 F.3d at 291 n.15.

²⁵⁴ Emma Platoff, *Years After a Judge Ordered Fixes, Texas' Child Welfare System Continues to Expose Children to Harm, Federal Monitors Say*, TEX. TRIBUNE, (June 16, 2020), <https://www.texastribune.org/2020/06/16/texas-child-welfare-harm-federal-monitors/>.

²⁵⁵ *Foster Care Social Worker Salary in Texas*, SALARY, <https://www.salary.com/research/salary/posting/foster-care-social-worker-salary/tx> (last visited Feb. 4, 2022).

²⁵⁶ *Living Wage Calculation for Texas*, MASS. INST. TECH., <https://livingwage.mit.edu/states/48>

If caseworkers were properly incentivized, then perhaps the caseworker turnover rate would decrease, and more skilled individuals would want to become caseworkers in the first place. This would in turn reduce the number of children assigned to each caseworker, permitting each caseworker to devote more time and energy to each child. If this happens, then caseworkers could develop a relationship of trust with their assigned children and children in foster care would feel more comfortable reporting abuse and neglect to their caseworker. Additionally, it could provide caseworkers with more time and energy to recognize and report signs of abuse and neglect when their assigned children do not report unsafe situations. In fact, Texas has had some success in reducing the turnover rate since it increased pay in 2017.²⁵⁷ However, as the rates of abuse and neglect are still higher than they should be, this effort alone is not enough to ensure Texas's children in foster care are safe from harm. As such, caseworker pay should continue to increase and the increased pay should be coupled with improvements in the state's monitoring, investigatory, and oversight practices.

In addition to increasing caseworker pay, there needs to be incentives for individuals to become Statewide Intake workers and stay in their position, such as increased pay. As of now, there are not enough Statewide Intake workers²⁵⁸ and therefore not enough individuals to field reports to the Texas Abuse Hotline. This is likely a primary cause of the abandoned calls and inappropriate responses to reports of abuse and neglect that were discussed in Part IV.

Moreover, there are minor legislative changes that could potentially make a major difference for Permanent Managing Conservatorship children. Firstly, the Family Code could be amended so Permanent Managing Conservatorship children are afforded

(last visited Sep. 7, 2021).

²⁵⁷ See CASEY FAMILY PROGRAMS, HOW DID TEXAS DECREASE CASEWORKER TURNOVER AND STABILIZE ITS WORKFORCE? (2018), https://caseyfamilypro-wpengine.netdna-ssl.com/media/HO_Texas-turnover-reduction.pdf.

²⁵⁸ Robert T. Garrett, *Texas Hotline for Reporting Child, Elder Abuse Wins Praise but Could Use More Help*, DALLAS MORNING NEWS (Dec. 21, 2017), <https://www.dallasnews.com/news/politics/2017/12/21/texas-hotline-for-reporting-child-elder-abuse-wins-praise-but-could-use-more-help/>.

permanency hearings just as often as Temporary Managing Conservatorship children. While the needs of Permanent Managing Conservatorship children and Temporary Managing Conservatorship children differ in some respects, both classes of children deserve to have their case reviewed by a judge as frequently as possible. Further, with more frequent court deadlines, caseworkers and attorney ad litem will be forced to constantly refamiliarize themselves with a child's case in preparation of the permanency hearing.

Further, the standards for investigating abuse should be the same for children in the state's custody as they are for children that are not. Currently, children in foster care must meet a higher standard to warrant an investigation. However, foster care child children are no less deserving of having their outcries of abuse investigated than children outside the system. If the Residential Child Care Investigation division is required to investigate further when a report is vague, as is required for children outside the foster care system, the issue of underreported abuse and neglect of children in foster care may decrease.

Beyond that, an overhaul of the way the Department and Health and Human Services Commission collect data, specifically data about abuse both experienced and perpetrated by the children in the system, is necessary to reduce abuse and neglect in the system. As of now, this information often falls through the cracks. Without such data, children are not given the resources they need to deal with the trauma associated with abuse or put in placements that are suitable to their needs.

Further, all data related to abuse and neglect should be in one centralized location that is accessible to any party that would benefit from it, including the child's current caregiver. This data should include involvement in instances of abuse and neglect, including child-on-child abuse, from both before and after the child entered Permanent Managing Conservatorship of the state. Further, every piece of relevant information regarding investigations following reports and neglect should be included in the same centralized location. While this was recommended by Judge Jack, it was eventually overturned by the

Fifth Circuit because it would be too costly.²⁵⁹ However, even the Fifth Circuit admitted that the system was “best practice.”²⁶⁰ Further, the state has poured hundreds of millions of dollars into the system over the last few years with varying results, so they are capable of investing in what they deemed a “multimillion” dollar system.²⁶¹ Additionally, the Department has shown they are capable of merging data through their effort to auto populate the Common Application with data from IMPACT.²⁶² The state currently claims that it would be too costly and difficult to unify their data systems, such as IMPACT and CLASS, because the systems use different identifiers. However, this argument is not particularly convincing when the state has shown they are capable of completely overhauling the foster care system through CBC.²⁶³

It is difficult to pick an appropriate starting point for foster care reform when the reform is not informed by accurate data. Even when the state undertook a painstaking effort to avoid paying additional fines²⁶⁴ and prove compliance with Judge Jack’s orders, they were unable to provide all the necessary data. As a consequence of lacking data, the Texas Legislature is making drastic reform efforts in the dark.²⁶⁵ The breadth of legislation in the past few years is evidence that the state wants to fix the cracks in the system and protect the children in the foster care system. While there are scattered success stories, this is not enough. Thus, perhaps it is time that the legislature stops

²⁵⁹ See *M.D. v. Abbott*, 929 F.3d 272, 279 (5th Cir. 2019).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Common Application Form in IMPACT 2.0: Job Aid*, TEX. DEP’T FAMILY & PROTECTIVE SERVS. (Feb. 18, 2019), https://www.dfps.state.tx.us/Doing_Business/IMPACT_Modernization/documents/CVS/Common_Application_Form.pdf.

²⁶³ See FOWLER & RYAN, *supra* note 4, at 18-19.

²⁶⁴ Roxanna Asgarian, *Judge Holds Texas Child Welfare in Contempt ... Again*, IMPRINT (Sept. 4, 2020), <https://imprintnews.org/foster-care/judge-holds-texas-child-welfare-in-contempt-again/47218> (showing that in 2019, the State was ordered to pay \$150,000 in fines for not complying with Judge Jack’s orders).

²⁶⁵ FOWLER & RYAN, *supra* note 4, at 18.

speculating about what will best serve the children in its custody and take a step back and see what the data say.