

STUNNING VICTORY FOR ARKANSAS CHILDREN

by Martha Matthews

In July 1991, NCYL attorneys, in cooperation with local legal services and other advocates in Arkansas, filed a lawsuit, *Angela R. v. Clinton*,¹ on behalf of the state's foster children and children reported as abused or neglected.² The named plaintiffs included:

sixteen-year-old Angela, who suffered from epilepsy and other physical and emotional problems. During four years of state custody she was in 40 placements, many with foster parents who lacked training in caring for a child with her problems; thirteen-year-old Jesse, who was moved 10 times during his first eight months in care. The frequent moves severely exacerbated his emotional disturbance and contributed to his placement in a residential treatment center. The child welfare agency's plan for Jesse was to return him to the father who had been convicted of sexually molesting him. The remaining named plaintiffs recited similar stories of multiple placements, lack of necessary health care, and overall callous indifference to their needs by the state Department of Human Services.

Only eight months after the complaint was filed, the litigation led to a detailed and comprehensive settlement covering

practically all aspects of Arkansas' child welfare system, including staffing and training of agency workers; child protective services; prevention and family reunification services; standards for foster care; health care for foster children; and case planning, case review, and quality assurance mechanisms. This may be the fastest and one of the most comprehensive settlements ever reached in a child welfare reform lawsuit.

Background

The class action lawsuit was filed in response to severe and persistent problems in the Division of Children and Family Services (DCFS) of the Arkansas Department of Human Services (DHS), including understaffing and poor training of caseworkers, insufficient numbers of foster homes and other placement resources, inadequate training, oversight, and support services for foster parents, inadequate services to prevent foster placement and to reunite families, and poor medical, dental, and mental health care for foster children. Numerous internal administrative and licensing reviews, expert studies, and advocates' reports had documented these problems, but the Arkansas government failed to take effective action to remedy them.

Early in 1991, before the case was filed and following a year during which they gathered a great deal of information about the state's child welfare system, the plaintiffs' attorneys, in a meeting with the governor and his staff, made a comprehensive settlement offer. This offer, however, was

¹ *No. LRC-91-415 (D. Ark, filed July 8, 1991).*

² *See Grimm, "Abused Children Sue Arkansas Child Welfare Agency," Youth Law News (July-August 1991). NCYL's work on this case was supported by the Edna McConnell Clark Foundation.*

rejected by the state.

During the February 1991 legislative session, Governor Bill Clinton did designate funds for an expert panel to study the system's problems and make recommendations. An earlier expert panel had been appointed in 1987, however, and had issued recommendations that were largely ignored. Thus, given the state's record of disregarding proposals for reform and its rejection of the settlement offer, the plaintiffs' attorneys decided not to delay filing the lawsuit. Soon after the complaint was filed, the state's counsel expressed interest in settlement negotiations. Settlement meetings began in earnest, however, only after the Governor's expert panel had completed its hearings and issued its preliminary report, on October 22, 1991.

The Panel's preliminary report fully supported the plaintiffs' position, stating that "the current child welfare system has serious deficiencies." The panel recommended, among other things, that DCFS hire more caseworkers, give caseworkers better training, improve prevention and family reunification services, recruit more foster parents, give foster parents better training and support, and ensure that foster children receive adequate medical care. The preliminary report ended with a call for increased funding. The panel's final report, issued on November 18, 1991, reiterated the findings of systemic deficiencies, and made more detailed recommendations which closely paralleled those of previous reports, including the proposal submitted to--and rejected by--Governor Clinton by plaintiffs' counsel in February 1991.

The Panel's sweeping indictment of the child welfare system, issued by Arkansas' own experts after hearing testimony from Arkansas families, caseworkers, foster parents, private service providers and others,

may have been an key factor in the state's willingness to settle the case. Moreover, extensive media coverage of the Angela R. lawsuit, and of several tragic cases of death or severe injury to Arkansas children,³ kept pressure on state officials to resolve the problems--especially in light of Governor Clinton's bid for the Democratic presidential nomination.

The Settlement Negotiations

From October 1991 through January 1992, attorneys from the National Center for Youth Law, Central Arkansas Legal Services, and Ozark Legal Services met almost bi-weekly with the state's negotiating team, which included two gubernatorial appointees--the Senior Assistant on Children, Families, and Youth and an Implementation Coordinator--as well as an Assistant Attorney General and the Chief Counsel of DHS. The newly-appointed interim Director of DCFS also participated in many of the settlement meetings.

Early in the settlement process, the parties stipulated to certification of the plaintiff class.⁴ The parties also agreed to suspend discovery during settlement

³ See the box headed "Children's Deaths May Have Spurred Reform in Arkansas" accompanying this article.

⁴ The class was defined as:
All children who, since July 1, 1988, have or will become known to DHS by reason of a complaint of abuse or neglect, and all children who are now or will be in the custody of DHS as the result of an emergency 72-hour placement or an abuse, neglect, or Family in Need of Services (FINS) petition.
Angela R. v. Clinton, No. LRC-91-415 (D.Ark., Order of October 9, 1991).

negotiations.⁵ Between September 1992 and February 1992, a total of 14 days of settlement meetings were held.

During the negotiations, each major substantive area covered by plaintiffs' complaint was addressed in turn: health care for foster children; standards for foster care and other out of home placements; preventive and reunification services; child abuse/neglect investigations and protective services; staffing and training of caseworkers; case planning, case review, and quality assurance. After initial discussion of problems and possible remedies in each area, plaintiffs' counsel drafted a section of the proposed settlement for review and discussion with the defense team. Plaintiffs' counsel were assisted in this process through consultation with various experts including physicians specializing in health care for foster children, experts in national child welfare standards, and attorneys involved in other child welfare reform efforts.

This arduous process resulted in a detailed and comprehensive proposed settlement, entitled the "Arkansas Child Welfare Reform Document."⁶ Some of the more dramatic changes it requires include:

- substantial increases in foster care board rates, and in the number of therapeutic foster homes (those intended for children with special needs);

⁵ *The plaintiffs' attorneys were able to agree to suspend discovery without harming their case because of the extensive information they had gathered about the state's child welfare system during the year preceding the filing of the lawsuit.*

⁶ *See the box head "Terms of Settlement" accompanying this article.*

- C initial health screening of all foster children within 72 hours of entering DCFS custody (24 hours in cases of severe abuse, illness or injury), comprehensive health assessments within 30 days of entering DCFS custody, and a requirement that all treatment recommended as a result of these assessments be promptly provided;
- C maximum caseload standards of 15 for abuse/neglect investigations, in-home family services cases, and out of home placement cases (to be attained by phased-in hiring from 1992 to 1994);
- C statewide availability of certain basic prevention and reunification services by January 1993;
- C initiation of all child abuse/neglect investigations within 72 hours (24 hours in severe cases), and completion of all investigations within 30 days.

The parties reached agreement on the substance of the settlement with remarkable speed; the two four-member teams of plaintiffs' and defense counsel worked constructively together, sharing expertise and information. This may have been due to various factors: the long and painstaking pre-filing investigation conducted by plaintiffs' counsel; the fact that Arkansas' problems were well-documented and longstanding, and local advocates had been pushing for reform for many years; political pressure generated by Governor Clinton's presidential campaign, etc.

Even after the substance of the settlement was agreed on, however, major obstacles remained: obtaining legislative support and funding for the settlement, and planning for its submission to the court, implementation, and enforcement. The last phase of the negotiations involved drafting a proposed order stating how the settlement had been reached, removing the case from the court's active docket, providing for the eventual dismissal of the action upon full compliance with the settlement, and creating a procedure for arbitration of compliance issues by a five-member Child Welfare Compliance and Oversight Committee.⁷

Although the Governor might have been able to settle the case without legislative authorization, the parties agreed that, to ensure the long-term political viability of the reform process, it was essential to get the legislature "on board." Instead of funding the settlement from other sources, defendants decided to request a legislative appropriation--a risky tactic, but one that might foster a sense of ownership and democratic process regarding the settlement. Regular sessions of the Arkansas legislature take place biennially, but the Governor can call the legislature into special session between regular sessions. During the substantive negotiations, the defense team and other state officials were laying the political groundwork for a special legislative session.

⁷ *Each party has the right to choose two members of this Committee, then these four members choose the fifth. The defendants are obligated to provide for the Committee's expenses and support staff, and give the Committee all necessary information to monitor compliance with the settlement.*

The Special Legislative Session

The proposed settlement and order were completed just in time for the special legislative session called by Governor Clinton on February 24, 1992. The Governor opened the session with a strong statement supporting the settlement, accompanied by endorsements from many community groups. Then, both plaintiffs' and defendants' counsel anxiously stood by as first the Joint Budget Committee, and then the House and Senate, took up bills appropriating funds (approximately \$15 million) to begin implementation of the settlement⁸ and authorizing the creation of the Compliance and Oversight Committee.

Despite the legislators' fiscal concerns, and some negative statements by Arkansas' Attorney General (who argued that the Supreme Court's pending decision in Artist M. v. Suter⁹ would eliminate many of the plaintiffs' claims), the bills passed without substantial opposition.¹⁰ Governor Clinton signed the bills amid a flurry of press coverage, and then, on February 27, 1992, the parties submitted the settlement to the

⁸ *Arkansas' budget analysts estimated that the settlement would cost a total of \$60 million over a period of three years or more, approximately doubling the previously budgeted amount.*

⁹ *See "Supreme Court Denies Children's Right to Sue for 'Reasonable Efforts'" in this issue.*

¹⁰ *The vote was unanimous in the Senate; the House passed the bill unanimously but for one nay vote from a Representative who believed that the settlement did not adequately address the needs of minority families.*

district court.

The Approval Process

In class action cases, the district judge has the responsibility to determine whether a proposed settlement is fair and adequate to protect the interests of the plaintiff class, and to ensure that class members receive notice of, and opportunity to object to, a proposed settlement.¹¹ At a hearing on April 4, 1992, federal district judge George Howard expressed concerns about giving notice to the plaintiff class and resolving the issue of attorneys' fees. A fairness hearing was scheduled for April 30, 1992, and the parties submitted proposals for notice.

Notifying plaintiffs in large class actions of a proposed settlement, and of their right to submit written objections or appear at a fairness hearing, is often difficult. The difficulty in this case was compounded in that the class members are children, many of whom are too young to understand the lawsuit and assert their rights. Therefore, it was essential to give notice to the people best situated to protect the class members' interests: their parents, foster parents, and guardians ad litem.

Notifying foster parents was relatively easy, because the state maintains mailing lists for monthly board payments. Notices were drafted to be included with the April board payment, along with a simplified notice to be given or read to all foster children in each home. Similar notices were sent to group homes, shelters, and other residential placements. These forms of notice, however, would not reach parents, or children reported as abused or neglected but not removed from home. In an innovative

¹¹ *Fed.R.Civ.Pro.* 23.

effort to reach these parents and children, a graphic artist contacted by plaintiffs' counsel designed an eye-catching poster¹² that was displayed at county welfare offices, juvenile courts, legal services offices, etc.

Plaintiffs' counsel hoped that these methods of giving notice would effectively inform parents, children, foster parents and other concerned citizens about the Angela R. settlement and its potential benefits for vulnerable children and their families, and will ensure that their questions and concerns are addressed by counsel and the court.

On April 30, the court held the fairness hearing. The attorneys had received about 15 letters and phone calls in response to the notices. Most of these contacts were simply requests for more information; some were questions about how the settlement would affect a particular child's case. None of the contacts raised objections to the settlement. After hearing testimony about these contacts, Judge Howard entered his final approval of the settlement as fair, reasonable, and adequate to protect the interests of the plaintiff class.

Impact of Artist M. on the Settlement

Ten days before the fairness hearing, the defendants filed a "Motion to Review Class Definition," asking the district court to narrow the class of children protected by the settlement, in light of the Supreme Court's decision in Artist M. v. Suter.¹³ The plaintiff

¹² *A reproduction of the 12 by 17-inch poster accompanies this article.*

¹³ *The Supreme Court held in that case that children do not have the right to sue in federal court to enforce the "reasonable efforts" requirement of the Adoption Assistance and Child Welfare Act. See*

class included children reported to the state as abused or neglected, as well as children in state custody. The defendants argued that "pre-placement" children--children who are not actually in state custody--no longer have any enforceable rights under federal law, so the district court no longer had jurisdiction over them and should exclude them from the plaintiff class.¹⁴ The defendants also asked the court to indicate which provisions of the settlement agreement it still had jurisdiction to enforce, after Artist M.

The plaintiffs' attorneys opposed this motion, arguing that the pre-placement children still have constitutional claims, and claims under federal statutory provision not at issue in Artist M. Plaintiffs also pointed out that there was nothing to prohibit the relief provided in a settlement from being broader than that which a court could order after trial,¹⁵ and that defendants could not try to get out of a settlement agreement on the basis of a change in law that they could anticipate at the time they signed the agreement.¹⁶ Finally, plaintiffs argued that Arkansas had waived any objection to the

"Supreme Court Denies Children's Right to Sue for "Reasonable Efforts" in this issue.

¹⁴ *Defendants' motion would greatly reduce the number of children who have rights under the settlement. Each year, over 16,000 children are reported as abused or neglected in Arkansas; only about 1200 children are in state custody each year.*

¹⁵ *See Local Number 93 v. City of Cleveland, 1106 S.Ct. 3067 (1986) (often called the Firefighters case).*

¹⁶ *See Rufo v. Inmates of Suffolk County Jail, 112 S.Ct. 748, 762-763 (1992).*

district court's enforcement of the settlement, by enacting legislation that provided for such enforcement.

The district court heard oral argument on this motion at the fairness hearing on April 30. Judge Howard denied the motion, and found that it was not submitted in good faith. His reasons were that parties can agree to broader relief than what a court could order after trial; that Arkansas had waived any immunity to enforcement of the settlement by enacting the legislation; and that this legislation itself created constitutionally protected liberty and property interests.¹⁷

What's Next?

Plaintiffs' counsel must now turn to the ongoing task of working with the Compliance and Oversight Committee to monitor the state's compliance with the settlement, and thus ensure that its detailed and ambitious provisions translate into real change for Arkansas children.

Martha Matthews is a staff attorney at NCYL and one of the attorneys for the plaintiffs in Angela R. For more information about the case, contact her or Bill Grimm at NCYL.

¹⁷ *Judge Howard indicated that he would issue a written ruling later.*