

# Holding Foster Care Agencies Responsible for Abuse and Neglect

By Carolyn A. Kubitschek

We have all heard some version of the story.

For half his life, 8-year-old Marcus Smith has had to wear a helmet . . . to protect his brain, which has only the healed skin of his scalp to protect the right side of his head . . . When he was four, Marcus was beaten unconscious, his skull smashed like an eggshell, leaving his brain bruised and permanently damaged. . . . This would have been more than enough for city authorities to crash down doors to get the perpetrator, except for one thing: Marcus was a foster child at the time, taken from his mother and entrusted to the care of the city. Bob Port, *From Foster Care to Courts*, N.Y. DAILY NEWS, Feb. 20, 2001, at 24.

The blows that crushed Marcus's skull were allegedly inflicted by a teenage son of Marcus's foster mother. The foster care agency that oversaw Marcus's care had ignored complaints from the boy's mother and grandmother. Indeed, as the newspaper noted, "even as [Marcus] lay in intensive care with a shattered skull, caseworkers submitted an internal report saying he was in good health." *Id.*

When the government removes children from parents it claims are abusive, neglectful, or unfit, at a minimum the government must place the children in safer environments than those they left. In many cases, this does not happen. Throughout our country, foster children are placed in

homes and institutions where they suffer horrendous abuse and neglect, and sometimes even death, at the hands of their purported protectors. See, e.g., Glenn E. Rice, *Former Foster Mother Sentenced to Five Years Probation in Girl's Death*, KANSAS CITY STAR, Jan. 24, 2003, at B1; Richard Lezin Jones & Leslie Kaufman, *Foster Care Secrecy Magnifies Suffering in New Jersey Cases*, N.Y. TIMES, May 4, 2003, at A1.

"I know that there are good foster families out there, OK?" a former foster child said. "But I also know that every foster kid that I have ever talked to, including myself, has been abused in foster homes." *Frontline: Failure to Protect—A National Dialogue* (PBS television broadcast, Feb. 6, 2003), available at [www.pbs.org/wgbh/pages/frontline/shows/fostercare/etc/script2.html#dialogue](http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/etc/script2.html#dialogue). In New Jersey, the system has deteriorated to the point that Marsha Robinson Lowry, executive director of Children's Rights, Inc., concluded that "it is now a documented fact that no child is safe today in [the state's] foster care." Patterson, *Special Unit of DYFS Is Called Failure*, N.J. STAR LEDGER, May 23, 2003.

Our nation's most vulnerable children deserve better. Having been removed from their homes and families—and often from their neighborhoods, friends, schools, and religious institutions—they are helpless and at the mercy of the agencies that are

charged with providing substitute care. All too often, foster care agencies fail at their job. Government social workers also habitually fall short. Some children languish for years in abusive situations while the officials charged with protecting them either do not know what is going on or choose to see no evil, hear no evil, speak no evil, and write no evil in the case file.

Placing foster children in abusive homes is appalling. Failing to protect them, so that the abuse continues, is inexcusable. It is also unconstitutional. The U.S. Supreme Court has repeatedly ruled that people who are in government custody have a constitutional right to safe conditions during confinement and protection from injuries inflicted by others. The Court has extended its ruling to prisoners, suspects in jail awaiting trial, and involuntarily hospitalized mental patients. The Court has not yet decided whether foster children have the same right to protection as prisoners, criminal suspects, and mental patients. However, nine federal judicial circuits have ruled that foster children, who are innocent of any wrongdoing, are at least entitled to the same constitutional protections, in terms of safe conditions of confinement, as convicted felons. See *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134 (2d Cir. 1981); *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000); *Hernandez v. Texas Dep't of Protective & Regulatory Servs.*, 380 F.3d 872 (5th Cir. 2004); *Meador v.*

*Cabinet for Human Res.*, 902 F.2d 474 (6th Cir. 1990); *K.H. by Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990); *Norfleet v. Ark. Dep't of Human Servs.*, 989 F.2d 289 (8th Cir. 1993); *Miller v. Gammie*, 335 F.3d 889 (9th Cir. 2003); *Yvonne L. v. N.M. Dep't of Human Servs.*, 959 F.2d 883 (10th Cir. 1992); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987). When foster care agencies fail to provide those protections, they may be held liable.

The constitutional rulings have provided some redress for abused foster children. They may sue under 42 U.S.C. section 1983 to obtain compensation from the agencies that have wronged them. Importantly, the Constitution, as the supreme law of the land, trumps all state statutes and case law that might give full or partial sovereign immunity to government agencies or employees, or that might impose procedural prerequisites on children asserting claims against state or local governments. However, the law falls far short of providing a remedy for comprehensive damages for all abused foster children. Numerous hurdles remain for an abused foster child.

First, in states that provide foster care directly through a statewide program, the government agencies themselves are immune from suit in federal court under the Eleventh Amendment. (Where foster care is provided by counties or other local governments—as in New York, California, and some other states—the Eleventh Amendment does not prohibit lawsuits.) In all states, agency employees and officials may still be sued, however.

Second, in all lawsuits under 42 U.S.C. section 1983, the standard of

liability is much higher than the negligence standard of tort law. Foster care agencies, officials, and employees will not be held to account unless their behavior exhibits “deliberate indifference” to a risk of harm to the foster children. *Doe v. N.Y. City Dep't of Soc. Servs.*, 649 F.2d 134. This heightened standard of liability has been exploited by careless foster care agencies to avoid legal consequences of their careless mistakes.

A third problem for abused foster children seeking legal recourse is the issue of proximate cause. As in tort

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law, defendants are responsible for the consequences of only those injuries that they cause. Foster care agencies and staff do not normally abuse foster children directly. The abuse is usually inflicted by foster parents and family members, or other foster children in the household. The courts have held that foster care agencies will be liable for abuse inflicted by foster parents when the

agencies’ behavior was a “substantial factor” leading to the abuse. *Id.* If the chain of causation is found to be too attenuated, however, the agency will escape liability.

Finally, 42 U.S.C. section 1983 contains its own defense. All defendants can potentially claim the defense of qualified immunity and avoid paying damages if their actions or omissions violated a law that was not clearly established at the time, or if their actions or omissions were objectively reasonable, as determined by the judge (not the jury). While agencies themselves cannot claim qualified immunity, their employees can, and the employees have avoided compensating abused foster children by using that defense. *See Camp v. Gregory*, 67 F.3d 1286 (7th Cir. 1995).

Despite all the hurdles, many abused foster children can and do obtain compensation. Three years after his injury, Marcus has twice undergone surgery on his skull. A permanent plate has replaced his helmet and, except for the large scars on his head, Marcus looks like any other child. He is doing well in his special education class at school. When he turns eighteen, he will begin to receive a monthly annuity out of the \$1.25 million settlement of his lawsuit for the abuse he suffered in foster care. That sum in theory replaces the salary that Marcus will unfortunately never be able to earn.

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