

## **Report to the Barbara McDowell & Gerald S. Hartman Foundation Children's Rights**

### Case Background

In June 2017, Children's Rights filed our reform case in Missouri, a state where foster children are prescribed powerful and potentially dangerous psychotropic medications in the absence of an effective system of oversight. Our plaintiffs include a three-year-old child in foster care who was put on psychotropic medications; a 14-year-old placed on 6 different psychotropic and antipsychotic medications simultaneously who experienced numerous adverse effects, including facial tics, slurred speech and an inability to stay awake during the day; and a 12-year-old girl who required psychiatric hospitalization when given the wrong dosage of her medications upon moving from one home to another with no written medical instructions.

### Progress Report

Since filing this lawsuit in June 2017, Children's Rights has been hard at work with our partners, John Amman of the St. Louis University School of Law Civil Litigation Clinic; attorneys at the National Center for Youth Law in Oakland; and the global law firm Morgan, Lewis & Bockius LLP. The case presents a direct challenge, the first of its kind, to a state's longstanding failure to ensure the safe administration of psychotropic and antipsychotic medications to children in state foster care.

In August 2017, the State of Missouri filed its Motion to Dismiss, and in October 2017, the parties met to explore mandated early mediation. Although the discussions were not fruitful, we have left open the possibility of revisiting settlement. Also in October, the parties completed briefing on the Defendants' Motion to Dismiss the case on legal grounds, and Children's Rights secured a Court Order appointing all of the adult Next Friends to represent our minor Named Plaintiffs.

In January 2018, United States District Judge Nanette K. Laughrey denied the majority of Defendants' motion to dismiss the case, stating that "the lack of a reasonable system of oversight and monitoring of the administration of psychotropic medications to children in its custody poses a substantial and ongoing risk of harm to the children." The judge wrote further that "there are clearly plausible allegations that Defendants ... actually knew of the serious risk of harm. Yet they have not adopted any systematic administrative review because Defendants can't find the medical records of the children. But the absence of the medical records itself creates an unreasonable risk of harm and the Defendants are aware of that risk as well."

The case is now in the fact-finding discovery phase. The parties have exchanged requests for document production and interrogatories and the Court has entered a protective order allowing the exchange of confidential information. Depositions have been taken and scheduled on both sides. In our impression, the Court appears to be moving this case on a fast track to trial.

### Anticipated Future Activities

Plaintiffs are scheduled to file a motion for class certification on March 9, 2018 and hope to have resolution of that issue by late spring. We will be working in earnest over the coming months to engage experts in the fields of child welfare and psychiatry to opine on the issues raised in the case, and will disclose those experts to the Defendants by June 15, 2018.

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The issue came to light after a volunteer contacted the girl's doctor, the judge said. When the girl was taken off the medication, "her aggressive behavior ceased."

The girl has "experienced hallucinations since she commenced taking psychotropic drugs," Laughrey wrote.

Another 12-year-old girl described by the plaintiffs spent six years in Missouri's custody. Over the years, her medical and mental health history allegedly "has become fragmented and dispersed between her assigned caseworker, foster caretakers, and health providers," according to court documents.

The girl allegedly was brought to a facility by a foster parent, who did not provide any medical records or prescription information. As a result, the girl was hospitalized for six days after a "severe reaction" from taking incorrect amounts of medicine.

Two other plaintiffs are toddlers who allegedly were on psychotropic medications at the ages of 3 and 2 years old while being placed in multiple foster homes.

Missouri's own report (<https://dss.mo.gov/cd/cfsplan/2015-2019/2016-health-oversight-and-coordination-plan.pdf>) to the federal government — in which the state admits to management issues with psychotropic drugs, such as antipsychotics and antidepressants — is among the material the plaintiffs cite.

"Many foster care children are prescribed multiple psychotropic medications without clear evidence of benefit and with inadequate safety data," Missouri's report says. "The use of multiple medications (psychotropic or otherwise) creates the potential for serious drug interactions."

Children may be particularly susceptible to adverse side effects from taking psychotropic drugs, and those harms could be compounded by poor prescription practices, Laughrey wrote. As the judge notes, "the full risk posed to children by psychotropic drugs is not yet even fully understood."

Attorney General Josh Hawley's office is representing the Department of Social Services in the case.

"We will continue to work with DSS as the litigation moves forward," said Loree Anne Paradise, a spokeswoman for Hawley.

Previously, lawyers in Hawley's office noted the challenges accompanying the state's attempts to collect comprehensive medical records and blamed physicians for allegedly provided untimely, "low-quality" records in response to state court orders.

"These unsuccessful efforts are not the equivalent of criminal recklessness, particularly when the cause of failure was physician non-compliance," the state argued, and "attempts to twist these efforts into evidence of deliberate indifference strains common sense and raises the chilling possibility that state agencies should forego attempts to systematically improve for fear of constitutional liability should they not immediately succeed."

Court documents filed by the state say the Missouri Children's Division has access to a web-based tool that allows workers to track prescription drug history for foster children.

Hawley's office also argued there was insufficient evidence that Missouri's foster children are exposed to more harmful prescribing practices within the state system than they might have experienced outside of it and questioned the state's alleged deficiencies with regard to the children cited by the plaintiffs.

The plaintiffs' attorneys contend that this is the first 14th Amendment case to successfully challenge a state's "failure to oversee the administration of powerful psychotropic medications to children in foster care."

"These children continue to be prescribed powerful and potentially dangerous drugs, often with unacceptable dosages and at alarming rates, without the proper oversight and coordination," a statement from the attorneys says. "Even worse, these medications are prescribed as a panacea for difficult behavior, rather than out of medical need. We are continuing to build our case and are prepared to protect these vulnerable youth at trial."

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# Missouri Can't Dodge Claims of Overmedicating Foster Kids

LORRAINE BAILEY January 9, 2018

(CN) – A federal judge refused to dismiss a landmark child advocacy case accusing Missouri of overprescribing psychotropic drugs to children in foster care and failing to maintain adequate medical records to monitor the potential abuse of such drugs.



In the first federal class-action lawsuit of its kind, child advocacy organizations Children's Rights and the National

Center for Youth Law sued Missouri on behalf of foster children last summer for allegedly overprescribing psychotropic drugs to foster care children.

According to child advocates, powerful psychotropic drugs are often prescribed to foster children not with the best

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interests of the child in mind, but simply to make the children less troublesome.

“Giving a pill to sedate the child or older person is a quicker and easier response than training caregivers and staff (to provide) non-pharmacological, safer and in many instances more effective treatment,” Bill Grimm, an attorney with the National Center for Youth Law, said in a statement in June.

On Monday, U.S. District Judge Nanette Laughrey denied the state’s motion to dismiss the children’s due process claims.

The judge was particularly concerned that the state, by its own admission, fails to maintain complete medical records for the foster children in its care, and does not provide updated health information to foster parents or doctors.

“The absence of the medical records itself creates an unreasonable risk of harm and the defendants are aware of that risk as well,” Laughrey wrote in a 33-page [opinion](#).

The state also has no oversight system for catching “red flags” regarding psychotropic prescriptions that may be an off-label use or an exceedingly high dosage for a young child, according to the ruling.

“Plaintiffs effectively allege that systematic administrative review is needed because doctors may not be acting, or may lack sufficient medical records to act, in the best interests of the children,” Laughrey wrote. “It is the defendants’ failure to implement specific administrative safeguards that puts plaintiffs at a substantially higher risk of serious harm. This risk is aggravated for foster children because psychotropic

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drugs may be prescribed to benefit social workers or foster parents, rather than for the interest of the child.”

More than 30 percent of Missouri’s 13,000 foster children are on at least one psychotropic medication, according to the ruling, with 20 percent taking two or more psychotropic medications at the same time. This is almost twice the national rate of such prescriptions.

One of the plaintiff children, a 14-year-old boy, has been prescribed up to seven different psychotropic drugs at once, and his medications have changed constantly during his two and half years in state custody, as he moved through eight different foster care placements.

He has suffered serious side effects as a result of the medications, including hypothyroidism, hearing voices, and suicidal thoughts.

Two other foster children named in the case, siblings aged 3 and 2, have already been prescribed psychotropic medications, at least one of which has not been approved for use in children under age 5, according to court records.

Judge Laughrey rejected the state’s argument that a doctor’s prescription of a medication itself protects the state from the due process claims when the doctor lacks access to a complete medical record.

“Plaintiffs allege that the physicians prescribing medications to foster children in Missouri are not provided with complete medical records for those children, and that the foster care givers or case workers presenting the children to the doctors

often lack adequate knowledge concerning the child's social and medical history," Laughrey said. "Thus, even if a fully informed physician's assessment that a child should be medicated might constitute sufficient process, it arguably cannot be sufficient in the absence of a full picture of the child's medical history and social profile."

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# After a Turbulent Childhood, on a Path to a Healthier Life

The Neediest Cases Fund

By EMILY PALMER JAN. 10, 2018

When he has an ache or a pain, Charles Louis does not take Advil. He has sworn off all medications, even over-the-counter painkillers.

He is so committed to a healthy lifestyle that he cooks meals from scratch for his Siberian husky, Spirit, often serving couscous, bulgur and boiled chicken, at their new home in Paterson, N.J.

On a recent morning, Mr. Louis, 24, settled in on his black couch with Spirit sprawled beside him and discussed the path that had led him to insist on a medication-free life.

At age 11, when he was in foster care on Long Island, doctors prescribed him two psychotropic medications for facial tics and attention deficit hyperactivity disorder, according to medical records released by his former adoption agency.

Mr. Louis quit all of his medications at 18, he said. Years later, Mr. Louis said that he felt quite different off the medications, noting his increased appetite. His medical records indicate that he took Ensure to supplement his diet while he was on the medications.



Many **psychotropic** drugs have not been approved by the Food and Drug Administration for use in children, and therefore standardized dosage guidelines for minors do not exist. One of Mr. Louis's prescriptions was not approved by the F.D.A. for use in children until years after he began taking it, although doctors can prescribe the drugs off label.

Children in foster care, who have experienced trauma and often lack the safety net of concerned adults questioning and tracking prescribed medications, are more likely to be put on such drugs, said Dr. Christopher Bellonci, vice president for policy and practice at Judge Baker Children's Center, a nonprofit in Boston that focuses on mental health. Dr. Bellonci said he did not consider the combination of Mr. Louis's prescriptions to be problematic.

**Psychotropic** medications were being taken by nearly one in five foster children in a 2008 to 2011 survey, the Government Accountability Office said, a higher rate than among privately insured children. "The risks these drugs pose specifically to children are not well understood," the office said in House testimony.

**Children's Rights**, a national nonprofit, is seeking class-action certification for lawsuits it filed last year alleging failures to monitor the use of **psychotropic** medications for children in state custody in Missouri and Iowa. On Monday, a Federal District Court judge denied Missouri's motion to dismiss the lawsuit.

Dr. Bellonci, who helped develop oversight and monitoring programs for foster children prescribed **psychotropic** medications across the country, said such drugs in conjunction with proper state management and trauma-based therapy may be acceptable. Often, however, such therapy is not provided. Mr. Louis's physical examination forms from his time in foster care mention no such therapy.

Mr. Louis entered foster care at 9, after what he described as unsteady early years punctuated by the family's stay in a homeless shelter. His father drank vodka when he could afford it and Listerine when he could not. When he drank, he became "a fire-breathing monster," his son recalled. Mr. Louis's father pleaded guilty in 2001 to endangering the welfare of a child after a report that he had shaken one of his other children in a car seat.

About a year after entering foster care, Mr. Louis was placed with a family on Long Island that would eventually adopt him and his siblings.

He said that he was glad to be reunited with his siblings and that at the time he viewed the adoption, at age 14, as the best alternative to living with his parents.

Over the years, Mr. Louis's relationship with his adoptive relatives frayed, though, and he went back and forth between his adoptive and biological families.

In 2014, two years after Mr. Louis graduated from high school, his father learned he had throat cancer. Mr. Louis said he quit the job-training program he was attending for low-income teenagers and adults, leaving Maine and returning to Long Island to help care for his father, whose health declined as he continued smoking and drinking. His father died later that year.

When Mr. Louis was evicted the next year, he slept in an S.U.V. or on air mattresses at churches. After taking a job at a warehouse on Long Island, where he made \$17 an hour, he moved into rented rooms and eventually saved enough money to buy Spirit, whom he took home on Christmas Day 2016. They were together for several months until Mr. Louis's living situation again took a turn for the worse.

He found Spirit a temporary placement through Craigslist, what he called "foster care," requiring applicants to provide three references. In April, he moved to Create Young Adult Residences in Harlem, a transitional housing program for men ages 18 to 25 that is affiliated with Catholic Charities Archdiocese of New York. Although Mr. Louis said he was thankful for a roof over his head, he was eager to be reunited with Spirit, who was not allowed to come with him. (Many shelters in the city have rules against pets.)

"I knew I had to get Spirit back," he said. "I had to get my life together."

The staff at Create helped Mr. Louis enroll in security guard training, and he was soon hired full time, earning \$11 an hour on weekdays as a security guard at a corporate office building in Manhattan and working a separate security job on weekends. As of late December he had only the weekend job, working 17 hours a week for \$13 an hour. He is currently looking for full-time employment.

In August, Catholic Charities, one of the eight organizations supported by The New York Times Neediest Cases Fund, used \$310 from the fund to buy Mr. Louis, who does not receive any public benefits, an alternate suit, shirt and tie.

In September, he moved to Paterson, taking an apartment in a gray wooden house amid a row of homes, some graffitied and the windows boarded. Now on his own, he is living a healthy lifestyle established by his own values, he said. The regimented diet for Spirit has encouraged Mr. Louis to eat healthier as well, and the two go for daily walks through the quiet neighborhood.

In November, Mr. Louis added to his family, adopting a silver tabby named Holy, who he says is growing used to Spirit. He plans to eventually open an animal boardinghouse.

“And I’m still going to be here,” he said, gesturing around his apartment. “I’m not moving from this spot.”

Susan C. Beachy contributed research.

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# Lawsuit over drugs for Missouri's foster kids proceeds

Jan. 13, 2018


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ST. LOUIS (AP) — A federal lawsuit alleging the Missouri Department of Social Services has failed foster children by prescribing psychotropic drugs and not providing proper oversight of the medications will be allowed to proceed, a federal judge ruled.

Attorneys for Children's Rights, the National Center for Youth Law and Saint Louis University School of Law Legal Clinics filed the lawsuit in June on behalf of several Missouri children currently or formerly in foster care. They are asking a federal district judge to order Missouri to implement systemic changes to reduce the potential overprescribing of the drugs.

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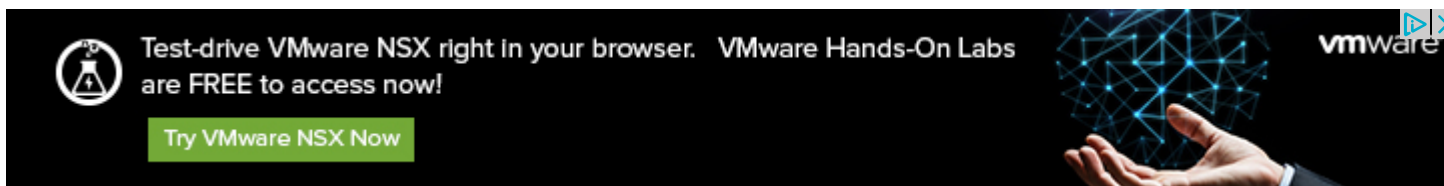
U.S. District Judge Nanette K. Laughrey this past week preserved claims in the lawsuit alleging that the state violated foster children's due-process rights regarding

medical records and prescription drug data, The Springfield News-Leader [reported](#) . She dismissed some claims related to informed consent procedures and possible violations of the Adoption Assistance and Child Welfare Act. A trial is scheduled for Jan. 14, 2019.

“There are clearly plausible allegations that (the Missouri officials) ... actually knew of the serious risk of harm,” Laughrey wrote. “Yet they have not adopted any systematic administrative review because (Missouri) can’t find the medical records of the children. But the absence of the medical records itself creates an unreasonable risk of harm and the Defendants are aware of that risk as well.”

The lawsuit claims psychotropic drugs are often prescribed as “chemical straight-jackets” for some of Missouri’s 13,000 foster care children with attention deficit hyperactivity disorder or conduct disorder, even though there are few or no federally approved uses for the drugs among children. The plaintiffs also contend little research has been done on how the drugs affect children’s brains and the drugs could cause dangerous side effects, such as suicidal thoughts.

The lawsuit alleges that the state doesn’t provide enough oversight of psychotropic medications and keeps shoddy medical records for children in foster care, making it difficult for foster parents to properly administer medications.

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One of the plaintiffs is a 12-year-old girl who was allegedly given up to five drugs at once, and her caregivers “had three different understandings of what daily dose of a particular psychotropic medication she was to receive, and they had no medical records to resolve the confusion,” Laughrey wrote. She began acting aggressively after a prescription change, but her caregivers didn’t make the correlation between

her behavior and the medication change, the judge wrote. After a volunteer contacted the girl's doctor, she was taken off the medication and her aggressive behavior ended, Laughrey said.

Attorney General Josh Hawley's office, which is representing the Department of Social Services, "will continue to work with DSS as the litigation moves forward," said his spokeswoman, Loree Anne Paradise.

Previously, lawyers in Hawley's office contended physicians provided untimely, "low-quality" records in response to state requests.

"These unsuccessful efforts are not the equivalent of criminal recklessness, particularly when the cause of failure was physician non-compliance," the state argued, and "attempts to twist these efforts into evidence of deliberate indifference strains common sense and raises the chilling possibility that state agencies should forego attempts to systematically improve for fear of constitutional liability should they not immediately succeed."

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