Office of the Public Defender
State of Hawai‘i

Testimony of the Office of the Public Defender,
State of Hawai‘i to the Senate Committee on Human Services

January 31, 2019

S.B. No. 449: RELATING TO CHILDREN

Chair Ruderman, Vice Chair Rhoads and Members of the Committee:

The Office of the Public Defender opposes S.B. No. 49.

Our office has serious concerns regarding the following provisions: Section 3 (UNIFORM CHILD WITNESS BY ALTERNATIVE METHODS ACT), and Section 5 (§806- Expedited proceedings; continuances; trial).

As to Section 3:

We strongly oppose permitting a presiding officer (i.e., judge) to allow a child witness to testify by an alternative method other than in full view of the finder of fact and face-to-face with the defendant. We firmly believe that the Hawai‘i State Constitution protects the fundamental principle that a person accused of a crime has the right to confront and observe their accuser, even if the accuser is a child witness. We understand the very real concerns that have been raised about child witnesses. It is our belief that the presiding officers, including Judges, have the means and ability to be flexible and to control a proceeding to minimize any negative impact on a child witness. The Courts especially have been very sensitive to the particular needs of child witnesses and have made reasonable accommodations to ease any needless stress on child witnesses. However, the right to confrontation is a fundamental principle of our State Constitution.

We do acknowledge that the United States Supreme Court, in Maryland v. Craig, 497 U.S. 836 (1990), by a 5-4 decision, held that the federal right to confront accusatory witnesses may be satisfied absent a face-to-face where

denial of such confrontation is necessary. However, the Hawai‘i Supreme Court has repeatedly held that it may afford the people of the State of Hawai‘i more protection than by the federal constitution "when the United States Supreme Court's interpretation of a provision present in both the United States and Hawai‘i Constitutions does not adequately preserve the rights and interests sought to be prohibited." State v. Bowe, 77 Hawai‘i 51, 57, 881 P.2d 538, 544 (1994) (*quoting* State v. Lessary, 75 Haw. 446, 453, 865 P.2d 150, 154 (1994) (citations omitted)). We submit that this Legislature should reject the Craig majority, as its reasoning does not adequately preserve the right to confrontation guaranteed under article I, section 14 of the Hawai‘i Constitution. *See* Bowe, 77 Hawai‘i at 57, 881 P.2d at 544.

Moreover, the Craig dissent written by Justice Scalia succinctly pointed out, "For good or bad, the Sixth Amendment requires confrontation, and we are not at liberty to ignore it." 497 U.S. at 870. Justice Scalia's reasoning is persuasive:

> The Sixth Amendment provides, with unmistakable clarity, that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The purpose of enshrining this protection in the Constitution was ***to assure that none of the many policy interests from time to time pursued by statutory law*** could overcome a defendant's right to face his or her accusers in court. . . .
>
> Because of this subordination of explicit constitutional text to currently favored public policy, the following scene can be played out in an American courtroom for the first time in two centuries: A father whose young daughter has been given over to the exclusive custody of his estranged wife, or a mother whose young son has been taken into custody by the State's child welfare department, is sentenced to prison for sexual abuse on the basis of testimony by a child the parent has not seen or spoken to for many months; and the guilty verdict is rendered without giving the parent so much as the opportunity to sit in the presence of the child, and to ask, personally or through counsel, "it is really not true, is it, that I -- your father (or mother) whom you see before you -- did these terrible things?" Perhaps that is a procedure today's society desires; perhaps (though I doubt it) it is even a fair procedure; but it is assuredly not a procedure permitted by the Constitution.

497 U.S. at 861 (emphasis added). We caution that a dilution of the right to confrontation would be detrimental to the fundamental principles of due process and the right to a fair trial.

As to Section 5:

We also strongly oppose the provision mandating that no more than three continuances are permissible by either party and that trials must commence within twelve months of the charge or indictment. We believe this requirement is out of touch with the complications of modern criminal justice practice and fails to take into account legitimate and necessary continuances.

Due process and the right to effective assistance of counsel entitle a criminally accused to "fair and reasonable time to prepare a defense and to allow defense counsel sufficient time to prepare adequately for trial." State v. Soto, 60 Haw. 493, 494, 591 P.2d 119, 120 (1979) (citing White v. Ragen, 324 U.S. 760, 65 S.Ct. 9778, 89 L.Ed. 1348 (1945)).

We believe any conviction based upon this arbitrary rule, and a defendant who is required to commence his/her trial simply because he/she has exhausted his/her three continuances or because twelve months had lapsed from the charge or indictment, would have a legitimate appeal and that an appellate court will likely find that he/she had suffered prejudice and overturn the conviction if his/her counsel did not have adequate time to prepare for trial. As a result, this may necessitate the alleged child victim to testify a second time.

Ideally, defendants and defense counsel, just like alleged child abuse victims, prefer trials to commence sooner than later. Trials, however, may require continuances for a variety of reasons, many of which are unanticipated. For example, sexual assault cases may involve DNA analysis, which can be a lengthy process and may necessitate independent analysis and consultation with expert witnesses. Trials may be delayed because of ongoing mental health examinations that complicate whether a defendant or a witness is fit to proceed to trial. Moreover, cases in which the incidents were alleged to have occurred several years prior are especially problematic in preparing a defense as it is often difficult to locate and interview witnesses. Trials may be continued due to illness or because a witness is unavailable and may need to be flown to Hawai‘i from out-of-state.

Rather than place a limit on the number of continuances or institute an arbitrary deadline, a judge should be allowed to use its discretion in determining whether a continuance is reasonable and warranted. Indeed, judges only grant continuances upon a showing of good cause. In determining whether a defense continuance should be granted or denied, judges examine the following factors: (1) the length of time for preparation; (2) the complexity of the case on the facts and the law; (3) the performance of defense counsel; (4) the availability of work product of other attorneys involved in the case; and (5) the defendant's accountability for his or her attorney's unpreparedness. *See* State v. Torres, 54 Haw. 502, 506-507, 510 P.2d 494, 497 (1973).

Thank you for the opportunity to comment on S.B. No. 449.

The Judiciary, State of Hawai‘i

Testimony to the Senate Committee on Human Service
Senator Russell Ruderman, Chair
Senator Karl Rhoads, Vice Chair

Friday, February 1, 2019 2:45 PM
State Capitol, Conference Room 016

WRITTEN TESTIMONY ONLY
by
Judge Glenn J. Kim, Chair
Hawai‘i Supreme Court Standing Committee
on the Hawai‘i Rules of Evidence

Bill No. and Title: Senate Bill No. 449, Relating to Children.

Purpose: Establishes in the department of the attorney general a child abuse investigation unit. Allows the department of the attorney general to intervene in adjudications in family court. Enacts the Uniform Child Witness Testimony by Alternative Methods Act, which authorizes courts to allow for children to testify in a place other than an open forum or away from the finder of fact, court, or parties. Requires the court and the prosecution to take appropriate action to ensure a prompt trial in order to minimize the length of time a child abuse victim or minor witness must endure the stress of the child's involvement in the proceedings.

Judiciary's Position:

The Hawai‘i Supreme Court’s Standing Committee on Rules of Evidence respectfully opposes Senate Bill 449, Section 3, pages 4 to 15, which would adopt the “Uniform child witness testimony by alternative method act” in Hawai‘i. This measure should not be adopted as it is unnecessary and probably offensive to the constitutional right of confrontation in at least some of its predictable applications.

Hawaii Rule of Evidence 616, entitled “Televised testimony of child,” and adopted in 1993 in response to Maryland v. Craig, 497 U.S. 836 (1990)(approving a Maryland statute allowing televised broadcast into a courtroom of testimony of a child crime victim taken at a remote location under carefully specified conditions), adequately protects a child victim-witness who would suffer “serious emotional distress” if required to give testimony in an accused’s presence. And HRE 611, enabling trial courts to “exercise reasonable control over the mode and order of

interrogating witnesses and presenting evidence" so as to ascertain the truth and protect witnesses "from harassment or undue embarrassment," vests in the trial judge the power to adopt any procedure that the HB 129 measure would countenance in a civil case. This committee is an arm of the Judiciary, and we are aware of no instance in which HRE 611 and 616 were inadequate to protect a child witness from the stresses of the courtroom. Had there been such a development, it would certainly have been brought to our attention. To the contrary, judges report that their courtrooms, equipped as they are to implement the remote TV procedure of HRE 616, are more than adequate to protect child witnesses in criminal cases, and that their inherent power, restated in HRE 611, to adapt courtroom procedures to comport with the needs of litigants and witnesses, includes the necessary leeway to fashion appropriate modes of eliciting child testimony in civil and family court cases.

The vice of this measure lies in its utterly permissive approach to methodology. Rather than carefully specify the conditions and procedures for taking testimony from children, this bill defines an alternative method as follows:

> " 'Alternative method' means a method by which a child witness testifies that does not include all of the following:
> (1) Having the child witness present in person in an open forum;
> (2) Having the child witness testify in the presence and full view of the finder of fact and presiding officer; and
> (3) Allowing all of the parties to be present, to participate, and to view and be viewed by the child."

To begin with, it seems clear that a "method" that does not include any of the specified criteria will nonetheless qualify as a method that does not include all of them. The bill as drafted may reflect an expectation that the language *implies* that at least two of the criteria should be present, but relying on implication on a matter that directly challenges the "facing" prerequisite of the Sixth Amendment right to confrontation reveals a dangerous vagueness and overbreadth that countenances procedures that will violate the Constitution. See Maryland v. Craig, supra, and Coy v. Iowa, 487 U.S. 1012 (1988)(striking down a procedure allowing placement of a screen between an accused and two complaining witnesses in such a way that it blocked him from their view as they gave their testimony). Would the Coy procedure be a permitted "alternative method" in the Senate Bill 449 scheme of things? Of course the trial judge would know about Coy and would presumably follow the U.S. Supreme Court law and disallow the screen. But the vice of overbreadth is that it will permit an entire range of process that will also offend the law, and statutes implementing criminal procedures should not be written in this way. Compare the Hawai'i scheme, which employs a tightly circumscribed criminal rule -- HRE 616 -- and a broadly fashioned HRE 611 to allow maximum discretion in civil and family cases.

Section -3 of this measure makes it applicable "in a criminal or noncriminal proceeding," and the commentary makes clear that maximum discretionary leeway in interpreting the open ended term, "alternative method," is intended.

Finally, as to the taking of the testimony of a child by an alternative method, the term is defined broadly in Section 2(1) to mean not only alternative methods currently recognized among the several states for taking the testimony of a child, such as audio visual recordings to be later presented in the courtroom, closed-circuit television which is transmitted directly to the courtroom, and room arrangements that avoid direct confrontation between a witness and a particular party or the finder of fact, but also other similar methods either currently employed or through technology yet to be developed or recognized in the future.

Such breadth is desirable in family court, where the best interests of children are the governing criterion. But HRE 611 is equally flexible, and family court judges can be counted on, with or without this "uniform" measure that its proponents boast has been adopted in four states, to continue to administer justice with ample regard to the psychological well-being of the child witnesses who appear before them.

Thank you for the opportunity to comment on this measure.

TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

ON S.B. No. 449
RELATING TO CHILDREN.

BEFORE THE SENATE COMMITTEE ON HUMAN SERVICES

DATE: Friday, February 1, 2019, at 2:45 p.m.
LOCATION: Conference Room 016, State Capitol

PERSON(S) TESTIFYING: KEVIN P. H. SUMIDA or ELIZABETH KENT
Commission to Promote Uniform Legislation

Chair Ruderman, Vice Chair Rhoads, and Members of the Senate Committee on Human Services:

My name is Kevin Sumida and I am one of Hawaii's uniform law commissioners. Hawaii's uniform law commissioners support the passage of S.B. No. 449, Relating to Children, which incorporates much of the ULC's the ***Uniform Child Witness Testimony by Alternative Methods Act*** **(hereinafter "Act")**.

This Act was approved by the National Conference of Commissioners on Uniform State Laws in 2002 to address the complicated issues involved in child witness testimony.

The Act was promulgated to provide uniformity in an area of law where there was extreme diversity among state jurisdictions. Uniform laws are necessary when addressing alternative methods for taking the testimony of a child in order to protect children, guard the rights of parties, and provide predictability and clarity for attorneys and judges. The ***Uniform Child Witness Testimony by Alternative Methods Act*** is an important complement to the Uniform Rules of Evidence and our own Hawaii Rules of Evidence, and should be adopted by every state.

The Act provides a clear and effective method of protecting children from the emotional trauma associated with giving testimony, while continuing to protect the 6th Amendment rights of defendants and respondents. Presiding officers are given clear authority to allow children to testify using alternative methods in criminal, civil, and administrative matters, without displacing the existing practices of a state.

The Act creates a framework that integrates current state practice with alternative methods of taking testimony. This allows judges, presiding officers, and attorneys to apply fair and predictable standards to the process. The Uniform Child Witness Testimony by Alternative Methods Act is effective because:

- There is presently no method provided for allowing a child to testify in a proceeding other than by giving live testimony, except in criminal proceedings under Hawaii Rules of Evidence Rule 616. See below. The Act gives a presiding officer clear authority to allow children to testify using alternative methods in criminal, civil, and administrative matters.
- Hearings to determine need for an alternative method. A presiding officer may order a hearing to determine whether to allow a child to testify by an alternative method. Clear standards are established for making the determination in both criminal and non-criminal cases.
    - ✓ In a **criminal proceeding**, HRE Rule 616 provides that a child's testimony may be taken by way of a two-way closed circuit video equipment, "if the court finds that requiring the child to testify in the physical presence of the accused would likely result in serious emotional distress to the child and substantial impairment of the child's ability to communicate." Under the Act, a similar standard will apply: a presiding officer must determine upon clear and convincing evidence that a child would suffer serious emotional trauma that would substantially impair the child's ability to communicate with the finder of fact.

- ✓ In a **non-criminal proceeding**, the presiding officer must find upon a preponderance of the evidence that allowing the child to testify by an alternative means is necessary to serve the best interests of the child or to enable the child to communicate with the trier of fact. The officer is directed to consider the nature of the proceeding, age and maturity of the child, relationship of the child to the parties, nature and degree of possible emotional trauma, and any other relevant factors.
- ✓ If the proper standard is met, the Act specifies additional factors to be considered by the presiding officer in deciding whether to allow presentation by an alternative method.

- Protection of the rights of defendants and respondents. The Act directs the presiding officer to employ an alternative method that is no more restrictive of the rights of the parties than is necessary under the circumstances. It requires that the chosen method must permit full and fair opportunity for cross-examination of the child witness by each party.

To date, the ***Uniform Child Witness Testimony by Alternative Methods Act*** has been adopted by four states (Idaho, Nevada, New Mexico, and Oklahoma), and endorsed by the American Bar Association.

We urge your support of this bill.

SB-449
Submitted on: 1/31/2019 12:51:14 PM
Testimony for HMS on 2/1/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Rene Siracusa	Testifying for Malama O Puna	Support	No

Comments:

This bill is really a no-brainer. Children who have been abused should be protected from legal proceedings that may needlessly exacerbate the trauma. Testimony can be taken in a comfortable non-threatening venue by someone with training in and skilled at dealing with traumatised children in a kind manner. Why haven't we been doing this all along? Most of us are parents and/or grandparents who can empathize with a child in such a situation. Such a victim should not be victimized further, even if it is by a government proceeding mandated to pursue justice. As a mother, grandmother and community activist, I urge you to support this bill. Mahalo and malama pono.

SB-449
Submitted on: 1/31/2019 2:41:58 PM
Testimony for HMS on 2/1/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Melodie Aduja	Testifying for O`ahu County Committee on Legislative Priorities of the Democratic Party of Hawai`i	Support	No

Comments:

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
THIRTIETH LEGISLATURE, 2019

LATE

ON THE FOLLOWING MEASURE:
S.B. NO. 449, RELATING TO CHILDREN.

BEFORE THE:

SENATE COMMITTEE ON HUMAN SERVICES

DATE: Friday, February 1, 2019 **TIME:** 2:45 p.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Clare E. Connors, Attorney General, or
Erin K. S. Torres, Deputy Attorney General

Chair Ruderman and Members of the Committee:

The Department of the Attorney General requests additional time to work with this Committee to clarify the bill's intent and accomplish its purpose.

This measure establishes a child abuse investigation unit within the Department of the Attorney General and authorizes the child abuse investigation unit to intervene in Child Protective Act cases. It also enacts the Uniform Child Witness Testimony by Alternative Methods Act and requires the court and prosecution to ensure prompt trials in certain criminal proceedings that involve minor witnesses or minor victims.

The bill seeks to create a child abuse investigation unit but does not clearly state whether the Legislature would like the unit to conduct civil or criminal investigations. Sections 2 and 4 of the bill reference chapter 587A, Hawaii Revised Statutes, also known as the Child Protective Act, which is a civil statute focused on ensuring the safety of children. On the other hand, sections 3 and 5 of the bill propose amendments for criminal statutes, which are focused on the prosecution of child abusers. It is important to clarify whether the newly created unit will be tasked with civil or criminal investigations because there is a substantial difference between civil and criminal standards and procedures in the law.

The Department also notes that there are constitutional concerns in sections 3 and 5 of the bill. Although there is a strong public policy interest in the protection of

child victims and child witnesses, this cannot override the right of a defendant to confront witnesses, to have the effective assistance of counsel, and to due process.

The Department requests an opportunity to consult with this Committee and further assess this measure. Once the purpose of the newly created investigation unit is made clear in the wording of the bill, we can determine the impact it would have on the operation of the Department. An assessment of the resources needed to staff and fund the unit is also necessary.

LATE

SB-449
Submitted on: 1/31/2019 8:39:41 PM
Testimony for HMS on 2/1/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Robert H. Pantell, MD	Testifying for Kapiolani Medical Center for Women and Children	Support	Yes

Comments:

Senator Russell E. Ruderman, Chair

Senator Karl Rhoads, Vice Chair

Committee on Human Services

Friday, February 1, 2018

Support for SB 449, Relating to Children

This letter from the Child Advocacy and Protection Center of Kapiʻolani Medical Center for Women and Children is in strong **support** of SB449, designed to reduce the emotional trauma of child abuse victims.

Allowing child abuse victims to testify via alternative methods to prevent further emotional distress was established by the United States Supreme Court in 1997 and Hawaiʻi Revised Statutes in that year. This bill would strengthen and clarify HRS 801D-7 Televised Testimony, and Rule 616, Televised testimony of child.

In February 2017, the American Academy of Pediatrics, an organization of more than 67,000 pediatricians, announced a policy statement entitled The Child Witness in the Courtroom (Pediatrics, volume 139, number3, March 2017). The first of its 12 recommendations was to support the Uniform Child Witness Testimony by Alternative Methods Act as mirrored in this bill.

However, I believe the bill could be expanded beyond child abuse victims to all children who have witnessed violent acts and who are witnesses in court to reflect the AAP's second policy statement. Having been involved in a case where two of my patients

witnessed their father brutally murder their mother, it is clear that these children were further emotionally scarred by the courtroom process.

Furthermore, there should be language to assure implementation of the bill's intent. Child televised testimony has been law in Hawai‘i for 22 years. However, I have not seen it utilized and I cared for one 15 year old sexual assault victim who refused to testify after being told televised testimony was not an option. In conversations with both veteran defense attorneys and prosecutors, there is no recollection of it ever being used.

In addition, in establishing the likelihood a child witness would suffer serious emotional distress, I would recommend considering regular use of a forensic, child psychiatrist to advise the presiding officer.

Finally, I am in strong support of trials being conducted in a time frame within a year as well as all measures that will work towards improving the care of children subjected to child maltreatment.

Respectfully Submitted,

Robert H. Pantell, MD

Clinical Professor of Pediatrics, UH JABSOM

Medical Director

Kapi'olani Child Advocacy and Protection Center

Kapi‘olani Medical Center for Women & Children

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LATE

SB-449
Submitted on: 1/31/2019 9:19:01 PM
Testimony for HMS on 2/1/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
Sherry Pollack	Individual	Support	No

Comments:

LATE

SB-449
Submitted on: 1/31/2019 9:35:05 PM
Testimony for HMS on 2/1/2019 2:45:00 PM

Submitted By	Organization	Testifier Position	Present at Hearing
maria Tijerina	Individual	Support	Yes

Comments:

Dear sirs and madams,

Thank you for hearing my testimony today.

My daughter was a victim of first, second and third degree sexual abuse. She had the courage to speak out and her abuser was indicted by a grand jury on six counts. This happened while she was in the first grade, now she will be entering junior high next year and we are still waiting for a trial. Last week I received a supeana to appear in court on February 11th but I do not know if we will actually go to trial until Feb 5th. At that point, we will only have a week to prepare for the trial. This is extremely nerve wrecking and yet this is a procces I have been through nearly 20 times in the past four years. No parent should ever have to choose between justice and their daughter's childhood as I have. My daughter's therapist has come to me twice to ask me to drop the case because of the trauma of prepping for a trial that never comes. With this bill in place no other child will have to go though this. Please help bring justice to the children in our system without subjecting them to further abuse from the courts.

Thank you

Maria Teresa Tijerina

DAVID Y. IGE
GOVERNOR

PANKAJ BHANOT
DIRECTOR

CATHY BETTS
DEPUTY DIRECTOR

STATE OF HAWAII
DEPARTMENT OF HUMAN SERVICES
P. O. Box 339
Honolulu, Hawaii 96809-0339

LATE

February 1, 2019

TO: The Honorable Representative Senator Russell E. Ruderman, Chair
Committee on Human Services

FROM: Pankaj Bhanot, Director

SUBJECT: **SB 449 – RELATING TO CHILDREN**

Hearing: Friday, February 1, 2019, 2:45 p.m.
Conference Room 016, State Capitol

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent of SB 449 as DHS is committed to improving the system's response to child abuse and neglect and the impacts of childhood trauma. However, we offer comments and require clarification.

PURPOSE: Establishes in the department of the attorney general a child abuse investigation unit. Allows the department of the attorney general to intervene in adjudications in family court. Enacts the Uniform Child Witness Testimony by Alternative Methods Act, which authorizes courts to allow for children to testify in a place other than an open forum or away from the finder of fact, court, or parties. Requires the court and the prosecution to take appropriate action to ensure a prompt trial in order to minimize the length of time a child abuse victim or minor witness must endure the stress of the child's involvement in the proceedings.

DHS defers to the Department of the Attorney General regarding proposed changes to section 28, Hawaii Revised Statutes. DHS requests clarification as to whether the proposed investigations unit is to perform both civil and criminal investigations, as the Section 1 refers to speedy trials in the criminal context as provided to alleged perpetrators by the U.S.

Constitution or just civil investigations. Chapter 587A, HRS, is the state's Child Protective Act and all of these proceedings are civil proceedings. The purpose of Chapter 587A is twofold: to provide children with prompt and ample protection from harm, with the opportunity for timely reconciliation with their families if the families can provide a safe family home.

Currently, Child Welfare Services Branch (CWSB) investigates allegations of abuse and neglect that include information from multiple sources in the Chapter 587A context; CWSB does not conduct investigations related to violations of crime which is generally the purview of law enforcement.

Further, provisions may need be included to address potential conflict of interests, as CWSB is represented by the Department of the Attorney General in Chapter 587A proceedings, while parents are represented by private attorneys or court appointed attorneys; and Court appointed Guardian Ad Litem represent the child's best interests.

DHS provides comments regarding Section 3 related to the Uniform Child Witness Testimony By Alternative Methods Act. In Chapter 587A cases, child victims are interviewed by trained social workers, and the results of those interviews are reported to the Court and parties generally through a written report. Child victims generally do not testify in Chapter 587A court proceedings related to the underlying allegations of abuse.

We include a link to the 2017 article "The Child Witness in the Courtroom," Robert H. Pantell, M.D., FAAP, PEDIATRICS, Volume 139, number 3, March 2017, that discusses standards of testimony and the different impacts and long-term consequences of child witnesses. http://pediatrics.aappublications.org/content/pediatrics/139/3/e20164008.full.pdf

Depending upon the age and intensity of the abuse, the outcome of the trial, and the quality of testimony, the impact of testifying could be long lasting. The American Academy of Pediatrics has 12 significant policy recommendations that would support child witnesses, however, investment in the community's capacity to support and respond to child trauma will also need to be significant.

Thank you for the opportunity to provide testimony on this matter.

POLICY STATEMENT Organizational Principles to Guide and Define the Child Health Care System and/or Improve the Health of all Children

American Academy of Pediatrics
DEDICATED TO THE HEALTH OF ALL CHILDREN™

The Child Witness in the Courtroom

Robert H. Pantell, MD, FAAP, COMMITTEE ON PSYCHOSOCIAL ASPECTS OF CHILD AND FAMILY HEALTH

Beginning in the 1980s, children have increasingly served as witnesses in the criminal, civil, and family courts; currently, >100 000 children appear in court each year. This statement updates the 1992 American Academy of Pediatrics (AAP) policy statement "The Child as a Witness" and the subsequent 1999 "The Child in Court: A Subject Review." It also builds on existing AAP policy on adverse life events affecting children and resources developed to understand and address childhood trauma. The purpose of this policy statement is to provide background information on some of the legal issues involving children testifying in court, including the accuracy and psychological impact of child testimony; to provide suggestions for how pediatricians can support patients who will testify in court; and to make recommendations for policy improvements to minimize the adverse psychological consequences for child witnesses. These recommendations are, for the most part, based on studies on the psychological and physiologic consequences of children witnessing and experiencing violence, as well as appearing in court, that have emerged since the previous AAP publications on the subject. The goal is to reduce the secondary traumatization of and long-term consequences for children providing testimony about violence they have experienced or witnessed. This statement primarily addresses children appearing in court as victims of physical or sexual abuse or as witnesses of violent acts; most of the scientific literature addresses these specific situations. It may apply, in certain situations, to children required to provide testimony in custody disputes, child welfare proceedings, or immigration court. It does not address children appearing in court as offenders or as part of juvenile justice proceedings.

BACKGROUND

Children were first allowed to provide courtroom testimony with the 1895 US Supreme Court decision allowing a 5.5-year-old to serve as a witness. It is now estimated that substantially more than 100 000 children appear in court each year.[1] With growing awareness of child abuse and a continual increase in reported abuse cases, a 1982 Presidential Task Force on Victims of Crime recommended 62 reforms,

abstract

FREE

Department of Pediatrics, University of California San Francisco, San Francisco, California, and Department of Pediatrics, John A. Burns School of Medicine, University of Hawaii, Honolulu, Hawaii

Dr Pantell conceptualized and drafted the initial manuscript critically reviewed the revised manuscript, and approved the final manuscript as submitted.

DOI: 10.1542/peds.2016-4008

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including some intended to benefit child victims. However, despite the task force's recommendations, "children remained unheard and re-victimized in criminal and delinquency courts."[2]

A growing body of scientific literature on the psychological and physiologic consequences of children witnessing and experiencing violence, as well as appearing in court, has supported modifications of courtroom procedures.[3–7] To decrease the stress experienced by children appearing in courts, various accommodations were developed, ranging from allowing children to hold comforting objects to being accompanied by a support person while testifying. Recently, specially trained facility dogs have been allowed to offer comfort for witnesses (www.courthousedogs.com). These accommodations have been challenged legally, particularly those attempting to allow children to testify outside the presence of the accused. Notably, in the 1988 decision *Coy v Iowa*,[8] the US Supreme Court ruled that a screen between a child witness and defendant violated the confrontation clause of the sixth amendment. However, in 1990, in *Maryland v Craig*,[9] the US Supreme Court ruled that closed-circuit televised testimony is acceptable when there is a "case specific finding of necessity." Also in 1990 came the passage of the Victims of Child Abuse Act,[10] which has been subsequently modified and provides protection to both child victims and witnesses.[11] Guidelines from the US Attorney General followed in 2005,[12] which state that "A primary goal of such (justice department) officials, therefore, shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system." Although the federal statute and guidelines offer substantial protection for children who are victims or witnesses of a crime, particularly live testimony by 2-way closed-circuit television or videotaped testimony, most cases are tried not in federal court but rather in courts under state jurisdiction. The National Conference of Commissioners on Uniform State Laws drafted The Uniform Child Witness by Alternative Methods Act in 2002,[13] which encouraged states to allow victims and witnesses younger than 13 years to testify by alternative (closed-circuit) methods, which, to date, has only been enacted in a small number of states. However, all states have laws to minimize the impact on children of appearing in court through allowing support people or comfort objects or provisions for excluding the press. However, some states, such as California, have codes that apply only to victims of physical and sexual abuse and exclude children who witness violence; these children are covered by the federal statute.

To further protect the rights of child victims and witnesses, the 2005 Attorney General's report provided for the appointment and payment of a guardian ad litem (GAL) to protect the interests of the child.[7] However, title 18[11] provides for GALs only in cases involving child abuse or exploitation in child welfare proceedings and criminal cases but does not address children witnessing other violent crimes, such as murder of a mother by a father. Nevertheless, some states have expanded the provisions set by the federal code to offer services to children witnessing violence. (For more information about state laws, contact the American Academy of Pediatrics [AAP] Division of State Government Affairs at stgov@aap.org.) In addition to GALs, a network of nearly 1000 community programs train and support citizen volunteers to advocate for the best interests of abused and neglected children in courtrooms and communities as court-appointed special advocates (www.casaforchildren.org).

Violence in the home and directed toward children is responsible for a substantial proportion of court actions involving children. The National Child Abuse and Neglect Data System reported 3.4 million child protective service referrals, 686 000 substantiated unique instances of abuse, 146 000 removals from the home (in 44 states), and 1640 deaths in 2012. Whether confirmed reports of child abuse reach court is highly variable. In the United States, 21.4% cases of child abuse reach court, ranging from 3.2% of cases in Mississippi to 56.0% of cases in New Hampshire.[14] The number of these cases in which children testify is unknown. The percentage of children with court-appointed representation also is highly variable, with a national average of 17.0%, but only 0.7% in Virginia compared with 69.7% in Arizona and 49.4% in Hawaii.[14]

In addition, the number of cases being tried in which children are not victims but witnesses to violence is unknown. In 2009, it was reported that one-quarter of children in the United States had witnessed violence and 9.8% had witnessed intrafamilial violence.[15]

COMPETENCE

The purpose of child testimony in court is to provide trustworthy evidence. The qualifications for a child to provide testimony include the following:

- sufficient intelligence, understanding, and ability to observe, recall, and communicate events;
- an ability to comprehend the seriousness of an oath; and
- an appreciation of the necessity to tell the truth.

The ability of children to provide trustworthy testimony must be considered in terms of a developmental context as well as

the circumstances of the event precipitating a court appearance, the ongoing influences in the current home, and the environment and processes leading up to and including appearance in the courtroom. The ability to recall events evolves throughout childhood, as does the ability to understand and contextualize these events, including the ability to distinguish an experience and thoughts as one's own or someone else's. Truthfulness and lying also have different meanings throughout an individual's moral development. Building on the work of Piaget and Kohlberg, Ekman[16] has developed a comprehensive view of lying as a developmental process. The development of abstract thinking and moral development continues throughout childhood and adolescence and into adulthood. Indeed, the US Supreme Court's recognition that brain maturation and cognitive development continue well into adulthood was part of the basis for its decisions prohibiting capital punishment (*Roper v Simmons*[17]) and mandatory life imprisonment without parole (*Miller v Alabama*[18]) for individuals younger than 18 years.

Substantial research has been conducted on the abilities of children to provide trustworthy testimony.[6,19–26] The following are some of the findings.

- Memory: Memory development begins at birth as infants quickly develop the abilities to recognize the faces and voices of their caregivers. Memory underscores basic language development as older infants and toddlers develop the ability to associate words with objects and actions, and children as young as 3 years can recall and articulate experiences. For purposes of court testimony, there is an extensive experimental literature on the validity and reliability of children's recall of events,[19] with a study of a medically invasive event being recalled reliably by 3- to 7-year-olds (mean age: 5.3 years).[20] However, over time and under variable external circumstances, information provided in interviews can change. Ceci and Bruck[24] pointed out that memory may change over time as a result of constructive processes that serve to fill in the gaps that occur as the original memory weakens. Some of this change occurs because, as children gather more experience, they may embellish an event with circumstances that occurred in a similar, although unrelated event. In experimental studies, the accuracy of information retained over time is challenging for both children and adults; because of the wide variability in recall, predictors of accuracy could not be determined.

- Assessing children's memories of their maltreatment, especially sexual abuse, has substantial methodologic challenges. Nevertheless, Goodman et al[23] indicate that "maltreatment should lead to enhanced memory for negative emotionally laden or stressful information in most individuals, but also that certain subsets of maltreated individuals may have memory deficits for negative or traumatic experiences." These subsets include individuals with dissociative symptoms and individuals who experienced particularly severe abuse. A major research challenge is to develop a valid and reliable predictive tool[23] for the accuracy of children's recall of their maltreatment.

- Suggestibility: Suggestibility, as defined by Ceci and Bruck,[24] "refers to the degree to which children's encoding, storage, retrieval and reporting of events can be influenced by a range of social and psychological factors." Experimental studies showed that young children can be induced to recall events that did not occur and that they are less likely to deny events that did occur. In a classic experiment, "the Sam Stone study," which took place over 10 weeks, 3- to 4-year-olds in a control group had excellent recall, and only 10% assented to false statements.[25] However, if the character in the study was stereotyped with "clumsiness," 42% of children assented to false statements; adding questioning suggestive to stereotyping raised the false assenting rate to 72%. Older children 6 to 8 years of age had a false assenting rate only half as high as that in 3- to 5-year-olds and followed a similar stepwise pattern.[25] Substantial experimental literature exists on children being subject to suggestibility by parents and authority figures as well as intimidation during police or courtroom procedures.[19,25] In addition, because of their willingness to be responsive to adults, children are more likely to answer complex, ambiguous questions than adults.[26] This tendency can be exploited by attorneys interested in diminishing the credibility of a child's testimony.

- Lying: Ekman[16] has defined lying as when "one person intends to mislead another, doing so deliberately" and has stated, "there are two primary ways to lie: to conceal and to falsify." He points out that all children (and adults) lie and that making statements that are knowingly untruthful occurs in children as young as 3 years but that the underlying motivation for and understanding of lying differs according to age, stage of moral development, and external factors. Experimental studies have documented that 3- to 4-year-olds lie and that they are more likely to lie to cover up the misbehavior of a friend than a stranger.[16] If caught doing something they were

asked not to do (in a videotaped study), one-third of 4- to 6-year-olds will deny the act, with girls being much more likely to do so than boys.[16] Developmentally, although 3- to 4-year-olds are more likely to label anything that is not true as a lie, older children can distinguish between a mistake and intentional misrepresentation. Given that many children lie spontaneously in experimental situations that have no immediate consequences for the child, it is not surprising that under coercive situations, especially if asked by a parent or authority figure to do so, children will lie. Younger children may be coerced into lying to please parents, and older children may lie if threatened. The ability to detect whether a child is lying for professionals, including psychologists, psychiatrists, and law enforcement, is no better than chance and often significantly less than chance.[25,27–32]

Although a child's stage of development is the most likely factor influencing the quality of testimony in a courtroom appearance, other critical components include the nature of and duration of time since the event, the postexperience interviews, the preparation for court, and the nature of the courtroom experience. A conceptual model for the interplay of important variables influencing the accuracy of child testimony has been developed by Sas.[33]

Because trustworthy information is critical in achieving justice for the child and accused individual, principles have been established to address the needs of children before, during, and after trials. As research identified potential challenges of forensic interviews, including variability in responses in differing circumstances, the Eunice Kennedy Shriver National Institute of Child Health and Human Development issued a protocol for interviewing that has been documented to improve the accuracy of children's testimony (http://www.nichdprotocol.com/the-nichd-protocol).[34] Various states have adopted specific forensic interviewing protocols to ensure uniformity of practice. These forensic interviews generally are conducted within Child Advocacy Centers, known in some states as Child Justice Centers. The American Bar Association Center on Children and the Law also has issued a handbook discussing the language capabilities of children for use during court procedures.[35]

IMPACT OF TESTIFYING

The support of children after they have provided testimony, although critically important, has received insufficient attention. Assessing the consequences of children testifying in court has many methodologic challenges; however, long-term studies have documented a number of issues, which are summarized here.[6,36,37] Studies have established clearly that children experience anxiety surrounding court appearances and that the main fear is facing the defendant. Other fears include being hurt by the defendant, embarrassment about crying or not being able to answer questions, and going to jail. The more frightened a child is, the less he or she is able to answer questions. The greatest predictors of inadequate responses are young age and severity of abuse. Postponements cause emotional difficulties, and having to testify more than once is associated with long-term mental health problems. The use of shielding procedures, such as testifying via a 2-way video-monitoring system, is less stressful for children than court appearances, and children providing shielded testimony give more accurate and detailed information. Although mock trials indicate that juries do not provide different verdicts for shielded or courtroom testimony, some studies have suggested that jurors are less likely to believe child witnesses who give shielded testimony.[37] It also has been documented that children have more long-term emotional problems if the assailant receives a light sentence; this finding is especially true for children who did not testify.[37] Therefore, testifying may improve outcomes for some children. For older children, experience as a witness in court has a negative effect on their view of legal system. International studies have documented that with substantial preparation of children for trial, emotional consequences are not different between those testifying inside the courtroom and those testifying outside the courtroom. For short-term consequences, in a matched control study in 218 children, those who testified, compared with those who did not testify, were more likely to experience anxiety and indicated that delay in testifying increased their anxiety.[38] Anxiety diminished after the trial, except for those without maternal support. Documented[37] and theoretical benefits for children testifying in court include decreased anxiety, feeling less victimized, and having a greater sense of control. A child's anxiety can be decreased through the use of child advocates and other support people.

In a study of long-term consequences, 176 children were interviewed 12 years after testifying.[6] Children who testified when they were younger had more severe externalizing symptoms. Testifying repeatedly was associated with worse mental health outcomes, and testifying about severe abuse had higher levels of trauma-related problems. Children who did not testify had worse outcomes if the accused received a light sentence.

These studies indicate the need for ongoing psychosocial support and counseling, not only for any

victimization that may have occurred but also for children's experiences of testifying at trial. The recognition of these consequences and the provision of postwitness counseling services can be provided through existing public resources, privately funded organizations, and volunteer organizations.

IMMIGRATION COURTS

Current AAP policy asserts that no child, under any circumstance, should be required to represent himself or herself in an immigration proceeding.[39] However, by some estimates, nearly 70% of unaccompanied children and >70% of families with children must represent themselves, without attorneys, in immigration court.[40,41] Not surprisingly, children without counsel are far more likely to be deported.[3] Although federal regulations require that immigration courts provide interpreters for children who prefer languages other than English,[42] children may also experience difficulties in understanding proceedings as a result of age, development, culture, and a history of trauma. Similar to recommendations involving children in other courtroom proceedings, recommendations for immigration court cases involving unaccompanied alien children offer strategies that courts can use to support children in immigration proceedings, including preparation of children, use of child-sensitive questioning, allowing a young child to bring a toy or personal item into the courtroom, permitting the child to testify while seated next to an adult or friend, and removal of the judge's robe.[43] Although immigration courts do not appoint GALs for children placed in removal proceedings,[43,44] a personal representative or a GAL has the potential to increase children's understanding of proceedings and offer support for children in the courtroom.[43]

ROLE OF THE PEDIATRICIAN

The pediatrician can help a child who is scheduled to appear in court in a number of ways, as follows:

1. If a pediatrician becomes aware of an impending divorce and potential custody dispute in which a child will be testifying, advising the parents to be aware of the stress and potential impact on the child's mental health is appropriate. Referring the child for mental health services, advising the parents not to use the child as a pawn or a messenger, and suggesting family counseling all may be appropriate, depending on the circumstances.
2. If, in the course of caring for a child, the pediatrician learns of a pending appearance in court, he or she can elicit the child's concerns, assure the child that he or she will not be judged for truthful answers, and help refer the family to individuals who can arrange an advance court visit. Court-appointed victims' advocates and GALs generally can arrange these services. Some states allow, and others mandate, special child advocates, including GALs, who may be lawyers. (For more information on your state, contact the AAP Division of State Government Affairs at stgov@aap.org.) The role of a GAL is to represent the child's best interests. State laws vary about whether a GAL is appointed, up to what age a GAL will represent a child, and GAL qualifications. In some situations, a lawyer may represent the wishes of the child, the traditional role of legal representation, whereas another individual represents a different position reflecting the child's best interests.[27] Pediatricians should be wary of appearing to coach the child, which can be used to the detriment of the prosecution in a criminal case. Similarly, pediatricians should obtain whatever extensive history is needed for the medical care and immediate safety of the child but should avoid trying to become "investigators."
3. A referral to a mental health provider is strongly recommended for the event causing the court appearance as well as to help deal with the stress of encountering the legal system.
4. The pediatrician can make efforts to request coordination of interviews to lessen fatigue on the child. Coordination of interviews is mandated in federal legislation but varies across states. The function of Children's Advocacy Centers is to bring the various investigative groups together to witness a single interview by a skilled forensic interviewer. They are specifically designed for the purpose of reducing the number of interviews, providing support to child victims, and eliciting forensic information.
5. When a child will appear in court, it should be encouraged, in states where it is allowed, for the child to be permitted accompaniment by support people and comfort objects. Pediatricians can encourage supportive family/friends to attend court to reduce the child's unfamiliarity with surroundings.
6. The pediatrician is encouraged to become aware of state statutory accommodations and judicial allowances if a patient is to appear in court. These include potential exclusion of the press and nonessential people, shielding of witness identity, and limiting repetition of questions. Depending on state law, judges may have substantial discretion in what will be allowed. Pediatricians

can work with the attorneys in the case (whether prosecutor, child's attorney, GAL, etc) and ask that they petition for these accommodations.

7. Appeals are common and may lead to retrials. Children experience anxiety while waiting to learn whether there will be a second trial and whether they will need to endure testifying in court again. This situation creates continuing stress and an emotional rollercoaster for children.[45] Consequently, ongoing and long-term follow-up by the pediatrician usually is necessary to monitor a child for depression, sleep disorders, and changes in school functioning, with appropriate referral for counseling and mental health services. Being alert to parent/guardian depression also is important because of the potential impact on the child.
8. As a child advocate, the pediatrician may encourage the parent, guardian, or GAL to obtain for the child witness all of the special accommodations, services, and judicial allowances available under federal and state law (eg, coordination of interviews, comfort objects, exclusion of the press and nonessential people from court, shielding of witnesses' identity, attendance by supportive people). By assuming a supportive role, the pediatrician not only promotes the best possible and least traumatizing court experience for the child but also, by allowing the child to accurately provide information, potentially contributes to the integrity of the legal process.
9. Pediatricians are likely to encounter children traumatized in a variety of situations. In addition to being aware of and able to recognize psychological trauma, they should be willing to respond. Psychologists experienced in trauma management are available in many communities and can be a valuable resource for pediatricians. In addition, the AAP resource "Helping Foster and Adoptive Families Cope With Trauma" may be helpful for children in foster or adoptive families who must testify in court.

AAP POLICY RECOMMENDATIONS

1. The AAP supports the 1990 Child Victims' and Child Witnesses' Rights Act,[10] the comprehensive legal reforms of the 2002 Uniform Child Witness Testimony by Alternative Methods Act,[13] and the 2005 Attorney General guidelines.[12]
2. The AAP, in concurrence with portions of the federal guidelines, encourages state chapters to support state legislation expanding rights currently granted to sexually and physically abused witnesses to all children who have witnessed violent acts and who are testifying in court.
3. The AAP urges state chapters to advocate that state courts do whatever is necessary, within the framework of existing state laws and resources, to prevent psychological harm to the child victim/witness as a result of participating in the judicial process.
4. The AAP supports expanding specific statutory and judicial accommodations, consistent with the development of new evidence that supports the ability of child witnesses to provide accurate information, to support their well-being during and after a trial. A supportive interview enhances the accuracy of a child's testimony,[46] and accurate testimony by a child, in turn, supports the best interests of society and adults involved in the legal proceeding.
5. Given the complexities of the legal system and the documented stresses experienced by children in the courtroom, the AAP recommends that state chapters advocate for the judicial system to appoint and pay for GALs routinely to represent the best interests of children during all legal procedures.
6. In forensic interviews preceding a trial, the use of a validated format for interviewing, such as that of the *Eunice Kennedy Shriver* National Institute of Child Health and Human Development, is strongly recommended. As new validated instruments are developed, the AAP recommends state chapters ensure that such measures are used appropriately in the court system.
7. The AAP recommends the application of developmentally appropriate and scientifically effective methods for addressing children who are to be witnesses; questions should be developmentally appropriate, nonambiguous, and nonthreatening. To limit fatigue and improve the accuracy and reliability of child responses, there should be a limited number of questions per hour, specified breaks consistent with age, and prohibition of irrelevant questions designed to embarrass the child or that are demeaning or imply the child is incompetent. In addition, it is recommended that only individuals with qualifications and experience working with child witnesses be allowed to question children.
8. The AAP recommends that confidentiality be maintained with respect to child witnesses before, during, and after any courtroom appearance. Publicity and loss of privacy may prolong the child's sense of shame and stigma stemming from the

abuse beyond the immediate courtroom appearance. Furthermore, public disclosure of events precipitating a school-aged child's appearance in court has the potential to lead to exclusionary behavior and bullying by other children.[47]

9. On the basis of studies of the psychological consequences of children testifying, the AAP recommends mandatory state-funded, evidence-based therapies for traumatized children, including child victims and child witnesses. In federal court, these services should be supported similarly.
10. State chapters should consider identifying an individual with expertise in children testifying (child abuse pediatrician or individual with legal, legislative, or related experience) who is willing to assist with advocacy issues and to consult with pediatricians and parents about the process of helping children who will become or already are witnesses in court.
11. Given the substantial gaps in knowledge despite important work by several groups of investigators, funding of research should be increased by states to improve and ensure the ability of children to provide accurate information in court. Federal funding also should be made available to develop interventions to improve outcomes for children appearing in court.
12. For immigrant children facing deportation proceedings that include serving as a child witness, the AAP supports universal access to pro bono legal representation and recommends that GALs or community-based court advocates be encouraged to support them.

FUTURE RESEARCH

Substantial gaps exist in our knowledge of how to optimize the care of children in the courtroom. A limited number of long-term follow-up studies on the adverse consequences of child testimony have been conducted, and no prospective studies on the benefits of specific system improvements to benefit the child or the legal system have been performed. Adding questions to ongoing national and longitudinal data collection efforts would be invaluable in providing partial answers to some of these questions. Because a number of accommodations for courtroom appearances have been implemented by some states, a natural study of comparative effectiveness could be accomplished by comparing interstate data. Finally, with advances in technology and changes in law, interventions should be developed and tested for their ability to reduce adverse consequences and improve outcomes for children interacting with the judicial system.

ADDITIONAL RESOURCES

American Academy of Pediatrics. helping foster and adoptive families cope with trauma. Available at: www.aap.org/traumaguide

American Bar Association, Center on Children and the Law. Bar-youth empowerment. Available at: www.americanbar.org/groups/child_law

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ABBREVIATIONS

AAP: American Academy of Pediatrics
GAL: guardian ad litem

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