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Massachusetts Children in Need of Services: Trapped by the Legacy of *Isaac* and *Jeremy*

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MASSACHUSETTS CHILDREN IN NEED OF SERVICES: TRAPPED BY THE LEGACY OF *ISAAC* AND *JEREMY*

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Abstract: In 1995, the Supreme Judicial Court of Massachusetts severely limited the power of courts to review Department of Social Services (DSS) decisions regarding children in its care, in companion cases *Care and Protection of Isaac* and *Care and Protection of Jeremy*. All Massachusetts children in DSS' care are affected by these cases. *Isaac* and *Jeremy* may conflict with the federal Adoption and Safe Families Act, which mandates regular review of out-of-home placements for children. In addition, these decisions disproportionately affect children of color. To protect the interests of children in DSS care, the negative impact of *Isaac* and *Jeremy* must be addressed by judicially or legislatively overruling them. Other states provide useful statutory examples of addressing this problem.

Introduction

On March 6, 2005, four-year-old Dontel Jeffers arrived at a hospital having already been dead for three hours.[1] Dontel died from one of the two major internal injuries he received in the home of his foster mother; his small intestine had been pushed into his spine, causing a hemorrhage one to two days before he died, and a bone inside his throat had been bruised, "indicat[ing] 'forceful squeezing of the child's neck.'"[2] At the time of his death, Dontel had been living in his foster home for eleven days.[3] The Department of Social Services (DSS) had selected this foster home for him.[4]

When Dontel was an infant, his mother left him in his father's care.[5] When his father was deported, a judge granted custody to Don-

* Senior Articles Editor, Boston College Third World Law Journal (2007–2008).

[1] Mac Daniel, *Injuries Detailed in Boy's Death*, Boston Globe, Oct. 4, 2005, at B2; John Ellement, *Prosecutor Says Boy Was Dead at Least 3 Hours*, Boston Globe, July 2, 2005, at A1.

[2] Daniel, *supra* note 1 (quoting Suffolk County Assistant District Attorney David A. Deakin).

[3] Ellement, *supra* note 1.

[4] *Id.* DSS is the state child welfare organization.

[5] Patricia Wen, *After One Life Turns Around, Another Is Lost*, Boston Globe, July 4, 2005, at B1.

tel's mother despite her suspected cocaine use.[6] Not long after, DSS discovered Dontel's mother's cocaine use and removed him from her care, charging her with neglect.[7] Thereafter, DSS placed Dontel in Bridge Home, a residential facility where children are evaluated for problems after abuse or neglect, for three months.[8] Following his stay at Bridge Home, DSS placed Dontel in the home of a foster mother, despite repeated requests from his grandmother that she be allowed to care for him.[9] The twenty-four-year-old foster mother was supposed to provide Dontel with therapeutic care.[10] While she had previously taken in adolescent foster children, she had never worked with a young child.[11] The consequences were tragic: Dontel died and the foster mother was indicted on a charge of second-degree murder.[12]

Because Dontel was in DSS custody, his placement could only be reviewed by a court for legal error or abuse of discretion.[13] The outcome of Dontel's case clearly demonstrates why his placement with the foster mother was unsafe: the foster mother had never worked with a young child, she was very young herself, and based on Dontel's injuries she treated him in a violent manner.[14] DSS' selected foster home for Dontel was dangerous, and the fact that the courts were powerless to review that decision is troubling.[15] If a court had had an opportunity to review DSS' placement, perhaps it could have corrected the situation. Dontel's grandmother was willing and able to provide kinship care for him; a court could have taken advantage of that option and placed Dontel with her.[16] But regardless of the specifics of Dontel's case, the court should have had the authority to review evidence and make a

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[6] *Id.* The court could have given custody of Dontel to his grandmother, but chose his mother despite her drug problem. *See id.*

[7] John Ellement & Patricia Wen, *Foster Mother Charged in Death of Boy, 4*, Boston Globe, July 1, 2005, at A1; Wen, *supra* note 5.

[8] Ellement & Wen, *supra* note 7.

[9] *Id.* DSS apparently felt that Dontel would benefit from a therapeutic foster home, rather than being with his grandmother. *Id.*

[10] *Id.*

[11] Wen, *supra* note 5.

[12] Suzanne Smalley, *Another Charged in Foster Death*, Boston Globe, Aug. 23, 2005, at B1. Corinne Stephen was convicted of involuntary manslaughter on November 16, 2007. Brian R. Ballou, *Jury Convicts Foster Mother*, Boston Globe, Nov. 17, 2007, at B1.

[13] *See* Care & Prot. of Jeremy, 646 N.E.2d 1029, 1033 (Mass. 1995).

[14] *See* Daniel, *supra* note 1.

[15] *See id.*

[16] *See* Ellement & Wen, *supra* note 7.

determination to provide Dontel with the healthiest, safest possible placement and to take into consideration his long-term well-being.[17]

The juvenile court could not review DSS' decision in Dontel's case because Massachusetts courts are generally precluded from reviewing such DSS choices.[18] In 1995, the Massachusetts Supreme Judicial Court (SJC) issued companion decisions, *Care and Protection of Isaac* and *Care and Protection of Jeremy*, which bolstered the authority of DSS over children in its care.[19] These decisions severely limited the power of juvenile courts over children in DSS custody by limiting judicial oversight.[20] The juvenile courts may only review DSS decisions for abuse of discretion under an arbitrary or capricious standard.[21] In Massachusetts, the juvenile courts and DSS have jurisdiction over "care and protection" cases, and also over "children in need of services" (CHINS) cases.[22] Because children in either of these situations may be committed to DSS, *Isaac* and *Jeremy* apply to them.[23]

Massachusetts law does not conform to federal law under the regime created by *Isaac* and *Jeremy*. In 1997, Congress passed the Adoption and Safe Families Act (ASFA) in an effort to improve permanency

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[17] *See infra* notes 166–70, 192–230, and accompanying text; *see also* MASS. GEN. LAWS ch. 119, § 1 (2004).

[18] *See* Care & Prot. of Isaac, 646 N.E.2d 1034 (Mass. 1995); *Jeremy*, 646 N.E.2d at 1029.

[19] *See Isaac*, 646 N.E.2d at 1034; *Jeremy*, 646 N.E.2d at 1029.

[20] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033.

[21] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033.

[22] *See* §§ 39E, 51B. When a court receives allegations that a child

> (a) is without necessary and proper physical or educational care and discipline; (b) is growing up under conditions or circumstances damaging to the child's sound character development; (c) lacks proper attention of the parent, guardian with care and custody or custodian; or (d) has a parent, guardian or custodian who is unwilling, incompetent or unavailable to provide any such care,

then the court may summon the parents to determine whether the child is in need of care and protection. § 24. CHINS is defined in the statute as

> a child below the age of seventeen who persistently runs away from the home of his parents or legal guardian, or persistently refuses to obey the lawful and reasonable commands of his parents or legal guardian, thereby resulting in said parent's or guardian's inability to adequately care for and protect said child, or a child between the ages of six and sixteen who persistently and willfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.

§ 21.

[23] *See* MASS. GEN. LAWS ch. 119, § 39G(c) (2004); *Isaac*, 646 N.E.2d at 1039; *Jeremy*, 646 N.E.2d at 1033.

planning for children out of their parents' care.[24] ASFA includes mandates for state child welfare agencies such as DSS, and therefore relates to both children in need of care and protection and CHINS.[25] ASFA requires that hearings regarding permanent placement of these children take place earlier and more frequently than its predecessor did; hearings now must occur no more than twelve months after the child's initial placement and no less than every twelve months thereafter.[26] These permanency hearings are to include review of the child's placement by either a court or an administrative body appointed or approved by the court.[27] Federal courts interpreting this provision have assumed that such review will include judicial oversight of agency decisions.[28] The Commonwealth of Massachusetts, however, refuses to allow court review of such agency decisions under *Isaac* and *Jeremy*.[29]

The failure of Massachusetts law regarding court oversight of DSS decisions to comply with federal requirements under AFSA costs the Commonwealth much-needed federal funds and disproportionately affects children of color.[30] Massachusetts has already lost funds due to its failure to comply substantially with certain federal requirements under ASFA.[31] Specifically, its case review system, including the review of cases by the court, was an area found not to be in substantial compliance, causing the state to lose significant funding.[32] Furthermore, the demographics of children in DSS care do not match the demographics of children in the general population: children of color have

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[24] Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at scattered sections of 42 U.S.C.).

[25] *See id.*

[26] *See id.* § 302, 111 Stat. at 2128. The Adoption Assistance and Child Welfare Act of 1980 had required that such hearings take place only once every eighteen months. *Id.* (amending 42 U.S.C. § 675(5)(C) (2000)).

[27] 42 U.S.C. 675(5)(C) (2000).

[28] *See, e.g.*, Vt. Dep't of Soc. & Rehab. Servs. v. U.S. Dep't of Health & Human Servs., 789 F.2d 57, 60 (2d Cir. 1986); Occean v. Kearney, 123 F. Supp. 2d 618, 625 (S.D. Fla. 2000); Lynch v. King, 550 F. Supp. 325, 355 (D. Mass. 1982), *aff'd sub nom.* Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

[29] *See Isaac*, 646 N.E.2d at 1038; *Jeremy*, 646 N.E.2d at 1031, 1033.

[30] *See* notes 158–82 and accompanying text.

[31] *See* Admin. for Children & Families, U.S. Dep't of Health & Human Servs., Massachusetts Department of Children and Families Title IV-E Foster Care Eligibility Review 1, 9 (2003) [hereinafter IV-E Review], *available at* http://www.acf.hhs.gov/programs/cb/cwmonitoring/final/primary/ma.pdf.

[32] Admin. for Children & Families, U.S. Dep't of Health and Human Servs. Child and Family Services Review: Final Assessment: Massachusetts 11 (2001) [hereinafter CFSR] (those lacking access to the official report may wish to access it by searching google.com using the following search terms: "administration for children and families final assessment Massachusetts 2001").

been placed in DSS care in numbers disproportionate to their representation in the state's population as a whole.[33] Because such children are involved with the system in disproportionate numbers, they bear a disproportionate portion of the negative effects of the SJC's decisions in *Isaac* and *Jeremy*.[34]

This note will argue that Massachusetts courts should be able to force DSS to make appropriate placement decisions for children who have been adjudicated CHINS in its custody. In order for courts to have such authority, the decisions in *Isaac* and *Jeremy* must be overruled, either legislatively or judicially, because these holdings excessively restrict the courts' control over DSS placement decisions.[35] Part I will give a brief overview of *Isaac* and *Jeremy*, and will explain how they apply to CHINS under the Massachusetts status offender law. Part II will explore the relevant parts of the Adoption and Safe Families Act as well as the federal decisions which have interpreted it; these decisions suggest that courts should have the power to review agency decisions. Part III will demonstrate the need for a change in the law in light of the disproportionate number of children of color involved with DSS, and then will examine the intersection between the federal cases and Massachusetts' compliance with ASFA in the context of the CHINS law of Massachusetts then. Part IV will lay out potential remedies to the problem created by the SJC's decisions in *Isaac* and *Jeremy*. This note argues that *Isaac* and *Jeremy* should be overruled by the SJC or by the Massachusetts state legislature, and looks to statutes in other states for possible solutions.

I. The Cases

Isaac and *Jeremy* were decided on the same day, March 7, 1995, by the SJC.[36] Both dealt with children who had been committed to the custody of DSS in care and protection cases, although *Isaac* addressed a child who had been committed permanently, while in *Jeremy* the child had been committed temporarily.[37] In both cases, the court held that when children are in the custody of DSS, the department may make

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[33] Mass. Dep't of Soc. Servs., Quarterly Report, Fiscal Year 2007, 2nd Quarter 3 (2007) [hereinafter Quarterly Report].

[34] *See id.*

[35] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033; *infra* notes 71–103, 192–242, and accompanying text.

[36] Care & Prot. of Isaac, 646 N.E.2d 1034, 1034 (Mass. 1995); Care & Prot. of Jeremy, 646 N.E.2d 1029, 1029 (Mass. 1995).

[37] *Isaac*, 646 N.E.2d. at 1036; *Jeremy*, 646 N.E.2d at 1030.

decisions regarding the "normal incidents of custody," including "a child's specific place of abode."[38] These decisions significantly limit the degree to which courts may oversee such decisions, leaving open the possibility that a child may be subjected to such considerations as DSS' funding needs, rather than being placed in an environment which will serve his or her best interests.[39] Thus *Isaac* and *Jeremy* set a dangerous precedent for allowing DSS almost free reign over children whom the courts have placed in the department's custody.[40]

A. *A Limited "Arbitrary and Capricious" Review Standard:* Care and Protection of Isaac

Isaac was one of four siblings, all of whom were adjudicated children in need of care and protection by the juvenile court.[41] Custody of all four children was granted to DSS and Isaac was placed in a residential school, the Robert F. Kennedy School, on September 4, 1991.[42] Isaac became self-abusive and aggressive, leading to disruptions in the school setting.[43] Eventually, in September of 1993, the school assigned a staff member to work individually with Isaac, but his behavior failed to improve under this close supervision.[44] On October 15, 1993, he was admitted to a psychiatric hospital, but made no progress there either.[45] On November 8, 1993, Isaac's treating psychiatrist recommended, and Isaac's guardian ad litem (GAL) agreed, that Isaac should return to the school and that his behavior should be monitored at all times.[46] DSS, however, objected that the cost of this change in placement was prohibitive.[47] There was a consensus that the school was no longer an ap-

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[38] *Isaac*, 646 N.E.2d at 1038; *see also Jeremy*, 646 N.E.2d at 1033 ("We have concluded that G.L. c. 119 allots to the department the authority to determine the residence of a child committed to its custody on a temporary basis.").

[39] *See Isaac*, 646 N.E.2d at 1035 (noting that DSS refused to follow the recommendation of Isaac's treating psychiatrist partly because following it would come at extra expense to DSS).

[40] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033.

[41] *Isaac*, 646 N.E.2d at 1035.

[42] *Id.* at 1035, 1036. Isaac's older brother was placed at the school with him. *Id.*

[43] *Id.* at 1036.

[44] *Id.*

[45] *Id.*

[46] *See Isaac*, 646 N.E.2d at 1036. A guardian ad litem is "[a] guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." Black's Law Dictionary 725 (8th ed. 2004).

[47] *Isaac*, 646 N.E.2d at 1036. In general, DSS had ceased funding individual attention, such as that recommended for Isaac, in 1990 because of its cost. *Id.*

propriate long-term placement for Isaac.[48] Isaac's GAL wanted him transferred to another placement right away, but DSS wanted him to remain at the hospital until an alternate long-term placement became available.[49] The court returned Isaac to the school anyway, with the increased staff supervision.[50]

Although Isaac was eventually placed in a long-term residential setting approved by both DSS and the judge, DSS moved to vacate the court's initial order that Isaac be returned to the school with one-on-one supervision.[51] Arguing that it had a statutory mandate which it could put into practice whenever it chose, DSS insisted that decisions such as placement of a child have an impact on its budget, which is finite and must be divided among a large group of children.[52]

The trial court denied this motion, although it acknowledged that DSS has primary responsibility for these types of decisions.[53] According to the judge, courts do have discretion to resolve disputes between DSS and other parties regarding the residential placements of children in DSS custody.[54] This authority includes the ability to dictate specific placements for the children based on consideration of chapter 119 of the General Laws in its entirety.[55] In 1995, the SJC disagreed.[56]

On appeal, the SJC stated that the issue in this case was the degree of control the care and protection statute gives to a judge reviewing a DSS decision regarding the residential placement of a child in DSS custody.[57] The court held that separation of powers dictated against courts attempting to exercise the functions of executive agencies.[58] Courts can order an agency to do anything it is legally obligated to do, but where an agency chooses how it will fulfill that obligation courts may not dictate the means.[59] If there is only one possible way for an agency to fulfill a mandate, then the court may order it to take that step.[60]

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 1035–36.

[51] *See id.* at 1036 & n.2.

[52] *See Isaac*, 646 N.E.2d at 1036–37.

[53] *See id.* at 1037.

[54] *Id.*

[55] *Id.* Chapter 119 is entitled "Protection and Care of Children, and Proceedings Against Them." MASS. GEN. LAWS ch. 119 (2004).

[56] *Isaac*, 646 N.E.2d at 1037.

[57] *Id.* at 1038. The case came to the SJC after a single justice heard the case and reported it to the full court. *Id.* at 1036.

[58] *Id.* at 1037.

[59] *Id.*

[60] *Id.*

More specifically, Isaac had been placed in the permanent custody of DSS, so decisions "related to normal incidents of custody . . . [were] committed to the discretion of the department" by statute, which included power to make decisions regarding the child's place of residence.[61] Although such decisions are subject to judicial review, the SJC held that it would be inappropriate to engage in a de novo examination of the case.[62] Instead, such agency decisions may be reviewed only for error of law or abuse of discretion under an "'arbitrary or capricious'" test.[63] The court laid out three factors for determining when an agency decision qualifies as arbitrary or capricious: whether the decision interferes with a goal of reuniting a child with his or her biological parents; whether the agency has given appropriate consideration to maintaining relationships with siblings and other family members; and whether the department has complied with its own regulations in making the decision in question.[64]

The SJC also laid out guidelines for how lower courts should handle challenges to DSS decisions regarding placement of children in its custody.[65] The court noted that although there is often a superfluity of information, if a judge deems it necessary, she may ask for additional evidence.[66] DSS must then produce evidence supporting its decision regarding the child's residential placement.[67] The party challenging DSS' action has the burden of proving that DSS did not comply with the law or that it abused its discretion.[68] This ruling places a significant encumbrance on the child or the parent dissatisfied with DSS' choice, who will then be left to fight against a powerful bureaucracy.[69] Had the SJC decided that trial courts could order DSS to place children in specific settings, the court would then have been free to follow the rec-

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[61] *Isaac*, 646 N.E.2d. at 1038.

[62] *See id.* at 1039.

[63] *See id.* (quoting Caswell v. Licensing Comm'n, 444 N.E.2d 922, 930 (Mass. 1983)).

[64] *Id.* at 1041. Although the court mentions agency regulations, it does not mention statutory requirements. *See id.* The court may have overlooked federal mandates, such as those included in the Adoption Assistance and Child Welfare Act, ASFA's predecessor. *Compare id. with* discussion *infra* notes 112–126 and accompanying text. This oversight supports the notion that *Isaac* and *Jeremy* should be overruled either legislatively or judicially, since the SJC failed to take account of something so fundamental as federal law. *See* discussion *infra* notes 192–242 and accompanying text.

[65] *Isaac*, 646 N.E.2d at 1041.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See, e.g.*, *Jeremy*, 646 N.E.2d at 1030–31.

ommendations of Isaac's GAL, the person best qualified to determine what setting would best serve Isaac's needs.[70]

B. *Further Limits on Court Authority and An Invitation for Change:* Care and Protection of Jeremy

On September 29, 1993, DSS filed a care and protection petition for Jeremy and two of his siblings.[71] The court gave DSS temporary custody of the children.[72] Jeremy initially resided with the former foster sister of his father, but when she moved to Florida in December 1993, Jeremy was moved to a foster home.[73] From this point on, he was moved from one foster home to another because of his aggressive and disruptive behavior.[74] It was not until March 17, 1994, that DSS sought permission from the court to look for a long-term residential program for Jeremy.[75] Jeremy's attorney and his father both objected to such a placement and argued for specialized foster care, a less restrictive setting.[76] While this issue was in debate, Jeremy was placed in two different short-term residential facilities.[77] On June 7, 1994, the court finally entered an order for DSS to place Jeremy in specialized foster care while waiting for the conclusion of the hearing on placement, which had been ongoing.[78] Although DSS attempted to do so, it was apparently unable to find a specialized foster home for Jeremy, and it moved for relief and to vacate the order.[79] The judge denied these motions, but granted DSS more time to place the child.[80] Jeremy was eventually moved to a long-term residential facility.[81]

A single justice of the SJC vacated the order, declaring that the trial judge had "improperly substituted her 'view of what is in the best interest of the child for that of the [d]epartment.'"[82] Jeremy, through

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[70] *See* Prob. & Fam. Ct. Standing Order 1-05 (The purpose of a GAL is to "gather and report factual information that will assist the court in making custody, visitation, or other decisions related to the welfare of a child.").

[71] *Jeremy*, 646 N.E.2d at 1030.

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Jeremy*, 646 N.E.2d at 1030 & n.3.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Jeremy*, 646 N.E.2d at 1031 n.5.

[82] *Id.* at 1030–31 (quoting trial court).

his attorney, and his father both appealed, but the SJC affirmed the single justice's order.[83]

The court began its opinion by citing *Isaac*, once again holding that DSS decisions are only reviewable for abuse of discretion under an arbitrary or capricious test.[84] The court supported this deference to the agency by discussing the construction of the care and protection statute.[85] It noted that although some parts of it appeared to give a judge the power to make placement decisions, others did not and, taken as a whole, the statute left the authority to DSS.[86] For example, courts are authorized to transfer custody of a child to DSS, a licensed agency, or an individual foster family in an emergency situation.[87] Similarly, where a child is removed from his or her parents during the pendency of a care and protection proceeding, the court may place the child in a foster family, licensed agency, or in the custody of DSS.[88] Within this range of options, however, courts may not require a child to be placed in a specific residential setting.[89] Although children should generally be placed in foster homes, if the child is in need of specialized care, treatment, or education, he or she should be placed in a residential facility.[90] The court held that such decisions are at the discretion of DSS.[91]

The SJC rejected arguments under section 26(2), which outlines options for courts.[92] Section 26(2) states that whether a court chooses to give custody to a foster parent, an agency, or DSS, such a decision may be subject to conditions and limitations set by the court.[93] The SJC, however, read this provision in such a way that, in the context of the statute as a whole, it could not be viewed as granting judges authority to override a reasonable DSS decision under sections 24 and 25 of the same statute.[94] Section 24 states that if there is an emergency situation and it is necessary to protect the child from severe abuse or neglect, "the

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[83] *Id.* at 1031.

[84] *Id.* In *Isaac*, the court had stated that "'review' requires, in the context of judicial consideration of an administrative decision, a reexamination of an agency's actions, and not a de novo consideration of the merits of the parties' positions." *Isaac*, 646 N.E.2d at 1039; *see supra* notes 63–62 and accompanying text.

[85] *See Jeremy*, 646 N.E.2d at 1031–33.

[86] *See id.*

[87] MASS. GEN. LAWS ch. 119, § 24 (2004); *Jeremy*, 646 N.E.2d at 1031–33.

[88] § 25; *Jeremy*, 646 N.E.2d at 1031–33.

[89] *See Jeremy*, 646 N.E.2d at 1031.

[90] § 32.

[91] *Jeremy*, 646 N.E.2d at 1031.

[92] *See* § 26(2); *Jeremy*, 646 N.E.2d at 1032.

[93] *See* MASS. GEN. LAWS ch. 119, § 26(2) (2004); *Jeremy*, 646 N.E.2d at 1032–33.

[94] *See Jeremy*, 646 N.E.2d at 1032.

court may issue an emergency order transferring custody of the child to the department or to a licensed child care agency or individual."[95] Section 25 states that the court is to hold a hearing and that pending such a hearing the court has similar options with regard to a child's placement: "the court may allow the child to be placed in the care of some suitable person or licensed agency providing foster care for children or the child may be committed to the custody of the department, pending a hearing on said petition."[96] It bears noting that the options of placing a child with either foster parents or an agency are set in opposition to the option of placing the child in DSS custody by the use of the word "or," which is perhaps the source of the court's argument that once a child has been given into the custody of DSS, DSS may place the child wherever it sees fit.[97]

The SJC also rejected arguments under section 29, which states that "[n]otwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society."[98] The court held that the section is intended to safeguard a judge's ability to grant temporary custody to DSS, another agency, or a foster family even if there is not compliance with the other provisions of this section.[99] The justices refused to view this sentence as a grant of power to judges over the exercise of DSS' custodial powers.[100]

The SJC did note, however, that "[t]he Legislature may wish to examine the statute to state more definitively the scope of a court's authority when passing on those decisions," suggesting that the court would be open to greater judicial leeway to oversee such decisions if the statute were more explicit.[101] This last sentence of the decision provides impetus to increase courts' control over DSS placement decisions.[102] The SJC acknowledged here that the current situation is detrimental to children and that it would be willing to allow courts to have more control over DSS placement decisions.[103] Given this invitation from the court, it is imperative to examine *Isaac* and *Jeremy*, to understand the broad impact

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[95] § 24.

[96] § 25.

[97] *See* §§ 24, 25; *Jeremy*, 646 N.E.2d at 1032.

[98] § 29; *Jeremy*, 646 N.E.2d at 1033.

[99] *Jeremy*, 646 N.E.2d at 1033.

[100] *Id.*

[101] *See id.*

[102] *See id.*

[103] *See id.*; *see also* Adoption of Hugo, 700 N.E.2d 516, 521 n.8 (Mass. 1998) (noting in dicta that DSS placement plans are not entitled to more weight than plans from any other source).

they have on the current legal framework, and to recognize and address the problems that stem from them.

C. *Applicability to the CHINS Context*

One effect of *Isaac* and *Jeremy* is that they govern not only children involved with DSS through care and protection petitions, but also those involved through CHINS petitions; both children in need of care and protection and CHINS may be committed to DSS and fall within the jurisdiction of the juvenile court.[104] *Isaac* and *Jeremy* both involved children who had been committed to the custody of DSS because they had been adjudicated in need of care and protection.[105] If a child falls within the jurisdiction of the juvenile court as a CHINS, the court may award to custody to DSS; but under *Isaac* and *Jeremy*, the court cannot then review DSS' placement of the child.[106] The Massachusetts legislature laid out its goals for the juvenile court system, saying, "[t]he health and safety of the child shall be of paramount concern and shall include the long-term well-being of the child."[107] These goals are equally applicable to all children who fall under the jurisdiction of chapter 119, including both children in need of care and protection and children in need of services.[108] For this reason, CHINS are also subject to the provisions of ASFA.[109]

II. The Adoption and Safe Families Act

Several provisions of ASFA govern the issue addressed in *Isaac* and *Jeremy*.[110] The decisions rendered by various federal courts interpreting

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[104] *See* Mass. Gen. Laws ch. 119 §§ 1, 39G(c) (2004) (courts may "with such conditions and limitations as the court may recommend, commit the child to the department of social services"); *Isaac*, 646 N.E.2d at 1035; *Jeremy*, 646 N.E.2d at 1030; *infra* notes 106–09 and accompanying text.

[105] *Isaac*, 646 N.E.2d at 1035; *Jeremy*, 646 N.E.2d at 1030.

[106] §§ 1, 39G; *Isaac*, 646 N.E.2d at 1035; *Jeremy*, 646 N.E.2d at 1030.

[107] § 1.

[108] *See generally* ch. 119. The statute also includes those children who have been adjudicated delinquent and those who are youthful offenders. *See* §§ 52–64. Because such children are committed to the Department of Youth Services, however, rather than the Department of Social Services, they are are not controlled by *Isaac* and *Jeremy*, and are beyond the scope of this note. § 58.

[109] *See* 42 U.S.C. § 672(a)(2) (2000).

[110] *See, e.g.*, §§ 672, 675, 678. The Act is an amendment to Title IV of the Social Security Act. *See* Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at scattered sections of 42 U.S.C.).

the provisions of ASFA help clarify the application of ASFA to CHINS cases through the lens of scenarios such as those in *Isaac* and *Jeremy*.[111]

A. The Statute

The Act gives grants to states which comply with certain requirements for out-of-home care for children.[112] In order for a state's children to be eligible for benefits under ASFA, including reimbursements for children needing to be placed outside the home, it must submit a plan for review and approval by the Secretary of Health and Human Services.[113] Although ASFA seems primarily to address children who have been abused or neglected, in Massachusetts it is equally applicable to children who have been placed outside the home through a CHINS petition, since these children may be committed to the same agency, DSS, as those who have been abused or neglected.[114]

Several provisions of ASFA support the argument that *Isaac* and *Jeremy* should be overruled in order to comply with its mandate.[115] Particularly relevant is § 672, which states that a child eligible for ASFA benefits may either be placed voluntarily or be subject to a judicial determination that remaining in the child's home would be contrary to her or his welfare.[116]

Section 675 lays out procedures for both regular review of the child's placement and permanency planning for the child.[117] As part of the state's required case review system, it must ensure that each child's status is reviewed at least once every six months.[118] This review may be conducted either by a court or by an administrative body.[119] The reviewing body must address the child's safety, the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress toward reducing the need for out-of-home care.[120] With regard to permanency planning,

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[111] *See, e.g.*, Vt. Dep't of Soc. & Rehab. Servs. v. U.S. Dep't of Health & Human Servs., 789 F.2d 57, 60 (2d Cir. 1986); Occean v. Kearney, 123 F. Supp. 2d 618, 625 (S.D. Fla. 2000); Lynch v. King, 550 F. Supp. 325, 355 (D. Mass. 1982), *aff'd sub nom.* Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983).

[112] 42 U.S.C. § 671(a).

[113] *Id.*

[114] *See* Mass. Gen. Laws ch. 119, § 39G (2004).

[115] *See, e.g.*, 42 U.S.C. §§ 672, 675, 678 (2000).

[116] § 672(a)(3).

[117] § 675(5)(B), (C).

[118] § 675(5)(B).

[119] *Id.*

[120] *Id.*

ASFA's requirements are more stringent.[121] The hearing must be held either in a court of competent jurisdiction, such as a family or juvenile court, or before an administrative body which has been appointed or approved by a court.[122]

Lastly, § 678 provides that ASFA is not to be "construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in section 671(a)(15)(D)."[123] Although the statute gives states a choice between courts and agencies, nothing in the statute precludes courts from reviewing the decisions of agencies, and in fact, § 678 suggests exactly the opposite, that courts *should* review agency decisions.[124] Congress clearly expressed an intention that courts should be able to make determinations regarding children's best interests; the section makes no references to deferring to the decisions of administrative agencies.[125] This legislative intent has been embraced by several federal courts in cases where the decisions of administrative agencies were contravened by the courts.[126]

B. Interpreting the Statute

Particularly useful in evaluating *Isaac* and *Jeremy* is a federal case, *Lynch v. King*, initially decided by the District Court for the District of Massachusetts, and later upheld by the First Circuit.[127] This case arose out of a class action on behalf of all children in foster care and their foster and natural families.[128] The plaintiffs alleged that the Massachusetts foster care system did not meet federal expectations.[129] The class claimed, among other things, that their rights under the Social Security

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[121] *See* 42 U.S.C. § 675(5)(C) (2000).

[122] *Id.*

[123] § 678; *see also* § 671(a)(15)(D). The final clause of this sentence renders it even more likely that the provisions of the ASFA may be applied to CHINS. *See* 42 U.S.C. § 678. The section mentioned in the statute, § 671(a)(15)(D), covers children who have been severely abused or whose parents have been convicted of especially violent crimes, but § 678 also clearly states that courts have considerable discretion in many different types of cases. *See id.*; § 671(a)(15)(D).

[124] *See* §§ 675(5)(B), 678.

[125] *See* § 678.

[126] *See, e.g., Vt. Dep't of Soc. & Rehab. Servs.*, 789 F.2d at 60; *Lynch*, 719 F.2d at 507–08; *Ocean*, 123 F. Supp. 2d at 625; *King*, 550 F. Supp. at 355.

[127] *See* 550 F. Supp. 325, *aff'd sub nom. Lynch*, 719 F.2d 504.

[128] *Id.* at 327 n.1. Because CHINS may be placed in foster care, this decision applies to them as well. *See* MASS. GEN. LAWS ch. 119, § 39G (2004).

[129] *King*, 550 F. Supp. at 327–28.

Act were not being met by the Massachusetts child welfare system.[130] They sought an injunction against the Commonwealth which the court granted in part, noting that "the facts are that children have suffered unspeakable injuries to body and spirit" because "DSS is failing to comply substantially with the dictates of sections 675(1), (5)(B)."[131] Particularly informative is the court's order, in which it enumerated requirements for the mandatory "periodic reviews" by state courts.[132] The court noted that although such reviews may be conducted either by a court or by an administrative agency, they must include findings regarding both the continuing necessity for, and appropriateness of the placement, as well as the extent of compliance with the case plan.[133] Moreover, decisions were to be made "consistent with the best interests and special needs of the child."[134] Such a mandate gives the reviewing body some discretion regarding the child's placement.[135]

This decision was upheld on appeal.[136] The First Circuit found that the district court had not abused its discretion.[137] Specifically, the court rejected the Commonwealth's contention that the district court failed to give DSS discretion to determine how it would comply with Title IV-E of the Social Security Act.[138] The court held that it is appropriate for district courts to declare what is necessary to comply with federal spending programs; if the state wishes to retain federal funding then it must develop a plan for complying with federal law which will be subject to the approval of those courts.[139] The appellate court agreed with the district court that children's placements could be subject to review by the courts.[140]

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[130] *Id.* at 329. Although this case was decided prior to the enactment of ASFA, a number of provisions the court interpreted in its decision were contained in earlier versions of the Social Security Act and were not changed by the adoption of ASFA. *See* 42 U.S.C. §§ 670–677; *King*, 550 F. Supp. at 328 n.2. Therefore, this decision remains relevant to the interpretation of ASFA. *See King*, 550 F. Supp. at 328 n.2.

[131] *King*, 550 F. Supp. at 327, 328, 353.

[132] *See id.* at 355.

[133] *Id.*

[134] *Id.* at 357.

[135] *See id.*; *see also* Bruce A. Boyer, *Jurisdictional Conflicts Between Juvenile Courts and Child Welfare Agencies: The Uneasy Relationship Between Institutional Co-Parents*, 54 MD. L. REV. 377, 384 (1995) ("[J]uvenile courts are vested with broad dispositional powers that include the power to second-guess—or even direct—agency action on specific dispositional matters.").

[136] *Lynch*, 719 F.2d at 506.

[137] *Id.*

[138] *See id.* at 513.

[139] *See id.* at 513–14.

[140] *See id.* at 506; *King*, 550 F. Supp. at 355. Not only did the court uphold the trial court's ruling that state courts may render decisions regarding children's placement, but it

Two other federal decisions are also informative, although not binding on the Commonwealth.[141] In *Vermont Department of Social and Rehabilitation Services v. U.S. Department of Health and Human Services*, the Vermont department filed suit because its application for federal funding under the Adoption Assistance and Child Welfare Act was denied.[142] When the Administration for Children and Families, under the auspices of the Department of Health and Human Services, reviewed Vermont's system, the federal agency found that Vermont's statutory scheme was not adequate to meet the requirements of federal law.[143] Specifically, Vermont law did not require frequent enough review of out-of-home placements.[144] Also, such review only included a hearing in court if a party requested one, or if a court ordered one in its own discretion.[145] Following this finding, the legislature modified the statute to provide for more frequent review and for review of the child's placement by a court or a body appointed or approved by the court.[146] The court cited to the Congressional Record from the debate over the Adoption Assistance and Child Welfare Act, highlighting the testimony of Senator Cranston, who had argued, "'[y]early judicial reviews of the child's placement too often become perfunctory exercises with little or no focus upon the difficult question of what the child's future placement should be.'"[147] Furthermore, the court noted that the federal Grant Appeals Board, in deciding whether Vermont had complied sufficiently with the federal law to receive funds, had stated that simple judicial approval of agency decisions would be insufficient; any administrative body conducting placement hearings had to be judicially approved.[148] Thus, the court upheld the decision of the Grant Appeals Board that Vermont was not eligible because of its failure to provide

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also held that federal courts may oversee state agencies. *See Lynch*, 719 F.2d at 506. By analogy, this suggests that agencies are not immune to the decisions of courts and that state court decisions are equally binding on state agencies. *See id.*

[141] *See generally Vt. Dep't of Soc. & Rehab. Servs.*, 798 F.2d 57; *Occean*, 123 F. Supp. 2d 618.

[142] *See* 798 F.2d at 59. This case, like the Massachusetts cases previously discussed, was decided before ASFA was passed. *See id.* at 57. It did, however, address provisions of the Adoption Assistance and Child Welfare Act, which preceded ASFA, similar to those in the current Act. *See id.* at 59–60. Therefore, it is still a useful tool for evaluating the Massachusetts scheme under ASFA. *See id.*

[143] *See id.* at 61.

[144] *See id.*

[145] *See id.*

[146] *See id.* at 60–61.

[147] *See Vt. Dep't of Soc. & Rehab. Servs.*, 798 F.2d at 63 (quoting 125 Cong. Rec. S22684 (daily ed. Aug. 3, 1979) (statement of Sen. Cranston)).

[148] *See id.* at 65 (quoting Grant Appeals Board decision).

adequate hearings.[149] As in *King*, a federal court declared that there was a clear legislative intent that decisions regarding placement of children who have been removed from their homes and are in agency care should be overseen by courts.[150]

Lastly, and most recently, in a Florida case, *Occean v. Kearney*, the plaintiff was a foster child whose foster care benefits were summarily terminated without his having been afforded notice or an opportunity to be heard.[151] The plaintiff had been removed from his home and placed in foster care, and was later transferred to a behavioral modification facility, where he wished to remain until he completed his GED.[152] On his eighteenth birthday, however, his case was closed and he was told to pack and get on a bus with only a few of his belongings and fifty dollars.[153] The district court held that because the plaintiff had not been given a hearing prior to his dismissal from the facility, his right to procedural due process had been violated, and that there was an affirmative obligation placed on states that accept federal funds to provide such procedural protections.[154] The court's holding effectively stated that children who have been in the custody of a state agency are entitled to procedural protection.[155]

Taken together, these cases indicate that the federal government intends for courts to have the authority to oversee agency decisions.[156] Since judicial review of agency decisions is not the practice in Massachusetts, its laws must be updated to bring the Commonwealth into compliance with federal mandates and to better serve the children in DSS custody.[157]

III. The Need for Change

There is a "wide gap in Massachusetts between the legal standards for the care and protection of children and the actual practices of the

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[149] *See id.*

[150] *See id.* at 62–65.

[151] 123 F. Supp. 2d at 620.

[152] *Id.*

[153] *Id.*

[154] *See id.* at 623, 625 ("When limitations exist on agency discretion to terminate or extend benefits, procedural due process must be afforded.").

[155] *See id.*

[156] *See* discussion *supra* notes 127–55 and accompanying text.

[157] *See* 42 U.S.C. §§ 672, 675, 678 (2000); Care & Prot. of Isaac, 646 N.E.2d 1034, 1036 (Mass. 1995); Care & Prot. of Jeremy, 646 N.E.2d 1029, 1033 (Mass. 1995); Carrie Leonetti, *In the Interests of Children: The Role of the Massachusetts Department of Social Services in Private Custody Proceedings*, 10 Am. U. J. Gender Soc. Pol'y & L. 67, 92 (2002).

Department of Social Services."[158] This gap may stem from courts giving cursory review to the actions of DSS, which has sometimes circumvented the requirements of the law, thereby creating a dangerous combination for the children whom DSS and the courts are intended to protect.[159] Attempts to mold the relationship between the juvenile court and DSS into the confines of a traditional court-agency relationship further widen the gap.[160] In contrast to normal agency-court relationships, DSS and the juvenile court share the mission of protecting children's interests and therefore should not be set in opposition to each other.[161] When a child welfare agency is performing its mission of protecting children's interests adequately, then there is little need for courts to overrule its decisions.[162] When such an agency places children where it is convenient for it to do so, however, and not necessarily where the children's needs dictate they be placed, then courts must have the power to order appropriate placements.[163] The federal government, through ASFA, has agreed with this formulation.[164] As such, Massachusetts should bring its CHINS law into compliance with ASFA to avoid the risk of losing additional federal funding. The need for change is particularly apparent in light of the disproportionately large number of children of color in DSS care, who are therefore inordinately affected by *Isaac* and *Jeremy*.[165]

A. *Disproportionate Impact on Children of Color*

"Child welfare is not usually viewed as a civil rights issue," but perhaps it should be.[166] DSS itself states that "Black children and Hispanic children are over-represented at all stages in the DSS system."[167] According to the 2000 Census, 79% of children in Massachusetts were

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[158] Leonetti, *supra* note 157, at 92.

[159] *See id.* at 68, 93.

[160] *See* Boyer, *supra* note 135, at 379.

[161] *See id.*

[162] *See id.* at 384.

[163] *See id.*; *see also* Care & Prot. of Isaac, 646 N.E.2d 1034, 1036 (Mass. 1995) (noting that DSS allowed the child to continue to live in a hospital while it waited for a more suitable placement at least partly because of budgetary constraints).

[164] 42 U.S.C. § 678 (2000).

[165] *See* 42 U.S.C. § 671(a) (2000) (laying out requirements for states to be eligible to receive payments under the act); Quarterly Report, *supra* note 33, at 3.

[166] *See* Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. Ill. L. Rev. 171, 171.

[167] Quarterly Report, *supra* note 33, at 3.

white, 7% black, 4% Asian, and 11% of Hispanic origin.[168] Of the 9203 children in DSS placement at the end of the second quarter of 2007, 60% were white, 18% black, 1% Asian, and 26% of Hispanic origin.[169] From these numbers it is apparent that both black and Hispanic children are disproportionately represented among children in DSS care. Although the data addresses the DSS population as a whole, it seems reasonable to assume that the same disparities apply to CHINS.[170]

Given that *Isaac* and *Jeremy* authorize DSS to place children in its care anywhere the agency sees fit, whether or not that decision is appropriate to their particular needs, and given that more children of color are involved with DSS through CHINS, these decisions must disproportionately affect such children.[171] Although the statistics cannot explain why children of color are so over-represented in the DSS population, this disproportionate impact is a primary reason that *Isaac* and *Jeremy* should be overruled either legislatively or judicially.[172]

B. *Updating Massachusetts Law to Comply with ASFA*

The other reason *Isaac* and *Jeremy* should be overruled is that Massachusetts has been subject to federal review under ASFA to determine whether or not its child welfare system is in compliance with federal regulations, and it has not performed spectacularly.[173] Among the indicators sought in such reviews are judicial determinations that: (1) there will be state responsibility for placement and care of the child after a court order has verified the need to remove the child; (2) the family has been preserved where appropriate; and (3) a permanency

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[168] Kids Count Census Data Online, Race of Children by Age Group in the 2000 Census, Analysis of Data from U.S. Census Bureau, 2000 Census Summary File 1 (tbl.P12A–P12G), cited in Quarterly Report, *supra* note 33, at 3.

[169] *Id.* at 1, 3.

[170] *See id.* at 3.

[171] *See Isaac*, 646 N.E.2d at 1041; Care & Prot. of Jeremy, 646 N.E.2d 1029, 1033 (Mass. 1995).

[172] *See Isaac*, 646 N.E.2d at 1038; *Jeremy*, 646 N.E.2d at 1033; Quarterly Report, *supra* note 33, at 3; *infra* notes 192–242 and accompanying text.

[173] *See* IV-E Review, *supra* note 31, at 1, 9; CFSR, *supra* note 32, at 11. Under the IV-E review, whose purpose was to determine whether Massachusetts had complied sufficiently with federal law to receive benefits under Title IV-E, nine out of eighty cases sampled were determined to have been handled erroneously and therefore the state was not found to be in substantial compliance. IV-E Review, *supra* note 31, at 1. The state was required to return $120,580 in foster care payments and to pay $56,342 in administrative costs, which the state's children can ill afford, as well as to develop a Program Improvement Plan. *See id.* at 1, 2, 9.

plan has been finalized.[174] Requiring court oversight of all of these different decisions assumes that courts may review agency decisions for more than just abuse of discretion.[175] In fact, in its initial review by the federal government, one of Massachusetts' weaknesses was that its case review system was deemed not to be in substantial compliance because permanency hearings were found to be brief and generally inadequate.[176] This finding suggests that the federal government envisions a more active role for state courts in placement decisions.[177] The review stated that Massachusetts "courts often had extremely brief and perfunctory permanency hearings that did not adequately address the ASFA requirements for these hearings."[178] It also mentioned that the way in which judges view the permanency hearing, which may be inferred from the statement that "brief" hearings are occurring, may be a barrier to substantive and effective hearings.[179]

From these findings, it is apparent that court practices for children in DSS care need to change.[180] Given the grave nature of the decisions being made, it is imperative that they be given due consideration.[181] Although DSS has the opportunity to make these decisions itself, the courts should have the chance to review them in order to

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[174] 45 C.F.R. § 1356.21(b), (c) (2007).

[175] *See id.* Although neither *Isaac* nor *Jeremy* mentions the issue, the notion of separation of powers underlies both decisions. *See generally Isaac*, 646 N.E.2d at 1034; *Jeremy*, 646 N.E.2d at 1029. Judicial scrutiny of agency decisions, however, is presupposed by any number of different people and entities. *See, e.g.*, 45 C.F.R. § 1356.21(b), (c); *supra* notes 117–150 and accompanying text. One author has said that separation of powers on the state level is of a different quality than on the federal level, particularly since the concept originated in state constitutions, many of which predate the federal constitution. *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 Rutgers L.J. 1057, 1066 & n.46 (1993). In fact, states deliberately sought to incorporate judicial review into their systems of government because they saw it as an important method of restraining legislative behavior. *Id.* Those who presume the legality of judicial oversight of agency decisions are presumably relying on the logic that such decisions are permissible under the state, as opposed to federal, doctrines of separation of powers. *See id.* at 1067.

[176] *See* CFSR, *supra* note 32, at 2, 11.

[177] *See id.*

[178] *Id.* at 11.

[179] *See id.* at 33.

[180] *See id.* at 11; IV-E Review, *supra* note 31, at 9.

[181] *See, e.g.*, Wen, *supra* note 5 (describing the death of Dontel Jeffers in his foster mother's home after he had been placed with her by DSS, despite his grandmother's willingness and desire to care for him).

ensure that DSS' decisions have not been driven by considerations unrelated to children's best interests.[182]

IV. Remedies

Given the negative effects of *Isaac* and *Jeremy*, it is apparent that steps must be taken not simply to comply with the federal scheme, but also to guarantee equal treatment of all children in the system.[183] Since negative effects are stemming from these decisions, neither the courts nor DSS are living up to the mandate that the child's health and safety are supposed to come first.[184] Although the problem is complex, there may be some simple remedies.[185] In *Isaac* and *Jeremy* the court read the statutes as preventing courts from reviewing DSS' placement decisions except in cases of abuse of discretion.[186] This reading was not the only possible interpretation; the SJC could have interpreted the statutes differently and should take the opportunity to revisit these decisions in the future.[187] The SJC noted that it might be open to taking a different view of things in the future if the statutes were amended, to give courts more clear authority in such cases.[188] The legislature should accept the court's invitation and address the problem by amending the relevant statutes to give the juvenile court power to oversee DSS placement decisions.[189] Massachusetts is not the only state to face issues of conflict between courts and child welfare agencies, but other states have resolved cases like *Isaac* and *Jeremy* by granting courts more authority to prevent tragedies such as the death of Dontel Jeffers.[190] Massachusetts should draw inspiration from these other states.[191]

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[182] *See, e.g.*, *Isaac*, 646 N.E.2d at 1035 (noting that DSS refused to place the child in accordance with the recommendation of both his psychiatrist and his GAL at least in part because it did not want to fund the placement).

[183] *See supra* notes 158–182 and accompanying text.

[184] *See* Mass. Gen. Laws ch. 119, § 1 (2004); Care & Prot. of Isaac, 646 N.E.2d 1034, 1036 (Mass. 1995); Care & Prot. of Jeremy, 646 N.E.2d 1029, 1030 (Mass. 1995); *supra* notes 36–103, 158–182 and accompanying text.

[185] *See infra* notes 192–258 and accompanying text.

[186] *See Isaac*, 646 N.E.2d at 1039; *Jeremy*, 646 N.E.2d at 1033.

[187] *See infra* notes 192–230 and accompanying text.

[188] *See Jeremy*, 646 N.E.2d at 1033.

[189] *See id.*; *infra* notes 231–42 and accompanying text.

[190] *See, e.g.*, Md. Code Ann., Cts. & Jud. Proc. § 3-820(a) (LexisNexis 2006) (stating that courts may order specific placements for children in need of assistance); Ellement & Wen, *supra* note 7.

[191] *See infra* notes 243–258 and accompanying text.

A. *Overruling* Isaac *and* Jeremy

1. Case Law since *Isaac* and *Jeremy*

Since the passage of ASFA, relatively few Massachusetts cases have addressed court oversight of DSS placements of children in its care.[192] Of the few, the most notable are *Adoption of Hugo* and *In re Angela*.[193] *Hugo* addressed a boy with special needs who had been cared for in a foster home for a significant period.[194] DSS determined that he should be moved to the home of his aunt in another state, since she had raised a son who had disabilities similar to Hugo's, despite the fact that Hugo was very attached to his foster mother and had been calling her "mommy."[195] Although the SJC grudgingly affirmed the trial court's decision to remove Hugo to his aunt's care, it noted in dicta that

> a plan proposed by DSS [is not] entitled to any special weight, even if an alternative plan does not implicate the fitness of the biological parents. A judge should provide an "even handed" assessment of all the facts surrounding both the department's plan and any competing custody or adoption plan.[196]

The SJC suggested here that DSS decisions about children's placement are less binding on courts than *Isaac* and *Jeremy* say they are.[197] The court, however, did not mention *Isaac* or *Jeremy*.[198] The ambiguity created by the inconsistency between *Hugo* and *Isaac* and *Jeremy* leaves open the question of how this decision fits within the structure the earlier cases created, or even whether they were tacitly overruled.[199]

In *Angela*, the court held that prior to continuing an out-of-home placement for an additional six months in a CHINS case, the judge must conduct an evidentiary hearing.[200] At this hearing, the court must find by a preponderance of the evidence that the purposes of the disposition have not been accomplished and that continuing the placement would be reasonably likely to further these purposes.[201] *Angela* appears to give

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[192] *See, e.g.*, *In re* Angela, 833 N.E.2d 575, 579 (Mass. 2005); Adoption of Hugo, 700 N.E.2d 516, 521 n.8 (Mass. 1998).

[193] *See Angela*, 833 N.E.2d 575; *Hugo*, 700 N.E.2d 516.

[194] *See Hugo*, 700 N.E.2d at 518, 519.

[195] *See id.* at 519.

[196] *Id.* at 520, 521 n.8.

[197] *See id.* at 521 n.8.

[198] *See id.* at 516.

[199] *See Hugo*, 700 N.E.2d 516.

[200] *Angela*, 833 N.E.2d at 577.

[201] *Id.*

courts the power not only to oversee DSS' placement of a child but also the power to continue the placement.[202] In fact, the court distinguished CHINS proceedings from other commitment proceedings because the juvenile court has control over the child's treatment, whereas in other proceedings the person is committed to an agency or department which then determines the person's treatment.[203]

As in *Hugo*, the court did not mention *Isaac* or *Jeremy* in its opinion.[204] The failure to mention these decisions suggests that the *Angela* court implicitly distinguished *Isaac* and *Jeremy* by holding that CHINS commitments are different from other types of commitment.[205] Failure to mention the earlier decisions raises the question of whether the SJC was trying to tacitly overrule them.[206] Given that the SJC has not explicitly addressed the decisions, they must be handled in a more direct manner; they remain dangerous precedents that may impede the treatment of children who are supposedly being served by DSS.[207]

2. Statutory Developments Since *Isaac* and *Jeremy*

Section one of chapter 119 of the Massachusetts General Laws, which addresses "Protection and Care of Children, and Proceedings Against Them," states:

> In all matters and decisions by [DSS], the policy of [DSS], as applied to children in its care and protection or children who receive its services, shall be to define the best interests of the child as that which shall include, but not be limited to . . . the child's fitness, readiness, abilities and de-velopmental levels; the particulars of the service plan de-signed to meet the needs of the child within his current placement . . . and the effectiveness, suitability and ade-quacy of the services provided and of placement decisions, including the progress of the child or children therein.[208]

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[202] *See id.* at 580.

[203] *Id.*

[204] *See Angela*, 833 N.E.2d 575.

[205] *See id.* at 580; *Isaac*, 646 N.E.2d at 1038; *Jeremy*, 646 N.E.2d at 1033.

[206] *See Angela*, 833 N.E.2d 575.

[207] *See Jeremy*, 646 N.E.2d at 1030, 1033; *see also Isaac*, 646 N.E.2d at 1036, 1038 (noting that DSS based its placement decision in this case in part on budgetary constraints).

[208] MASS. GEN. LAWS ch. 119, § 1 (2004).

This paragraph was added in 1999, after *Isaac* and *Jeremy* had been decided.[209] Therefore the SJC's decisions in these cases were rendered without the benefit of the guidance the Assembly provided in section one.[210] In light of the new language, *Isaac* and *Jeremy* should be overruled to effect the affirmative duty imposed on DSS, and to provide the courts with the authority to enforce that duty.[211]

3. A Different Reading of Existing Statutes

Even without the benefit of the rewritten section one, a different interpretation of pre-existing sections could also support the argument for judicial rejection of *Isaac* and *Jeremy*.[212] The court based its decisions primarily on sections of chapter 119, which addresses care and protection of children, as well as proceedings against them.[213] Sections 24 and 25 present particularly useful examples of provisions the court could have interpreted differently.[214] Section 24 states, "the court may issue an emergency order transferring custody of the child to the department or to a licensed child care agency or [other qualified] individual."[215] This language seems to grant the court the freedom to choose which of the enumerated options it prefers for the individual child appearing before it.[216] Section 25 is similarly phrased and states "the court may allow the child to be placed in the care of some suitable person or licensed agency providing foster care for children or the child may be committed to the custody of the department."[217]

The court noted in *Jeremy* that these two provisions represent alternatives for judges, but focused on the section which allows DSS to decide when a child needs to be placed in a residential facility. [218] That section does not state that only DSS may order such a placement.[219] In fact, another section provides courts with even more options, stating

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[209] *See* 1999 Mass. Acts 3; *Isaac*, 646 N.E.2d at 1034; *Jeremy*, 646 N.E.2d at 1029.

[210] *See Isaac*, 646 N.E.2d at 1034; *Jeremy*, 646 N.E.2d at 1029.

[211] *See* § 1; *Isaac*, 646 N.E.2d at 1035; *Jeremy*, 646 N.E.2d at 1030.

[212] *See Isaac*, 646 N.E.2d at 1037–39; *Jeremy*, 646 N.E.2d at 1031–33.

[213] *See* §§ 24–26, 29, 32; *Isaac*, 646 N.E.2d at 1037–39; *Jeremy*, 646 N.E.2d at 1031–33.

[214] *See* MASS. GEN. LAWS ch. 119, §§ 24–25 (2004).

[215] § 24.

[216] *See id.*

[217] § 25.

[218] *Jeremy*, 646 N.E.2d at 1031; *see also* § 32 ("[A]ny child who upon examination is found to be in need of special care, treatment or education may, if it is found by the department to be in the best interest of the child, be placed in a public or private institution or school . . . .").

[219] *See* § 32.

that once a child has been adjudicated in need of care and protection, the court may "*subject to such conditions and limitations as it may prescribe,* transfer temporary legal custody to" a foster home, an agency or organization, or DSS.[220] The SJC, however, refused to read this provision as giving the court power to determine the child's specific placement.[221] The court's only explanation for this holding was that this statute "logically [cannot] be read to override a reasonable placement decision made by the department for a child in its temporary custody."[222] Given the additions to section 1 since *Isaac* and *Jeremy* were handed down, the definition of reasonable may need to be adjusted.[223]

Lastly, the court rejected arguments under the section which states "[n]otwithstanding the provisions of this section, the court may make such temporary orders as may be necessary to protect the child and society."[224] The court held that this provision merely served to bolster a court's authority to commit the child to DSS, not to give judges power to oversee DSS decisions regarding the child.[225]

Although the SJC relied on statutory provisions relating to care and protection proceedings in *Isaac* and *Jeremy*, these provisions may be analogized to CHINS cases. The CHINS statute lists persons and organizations, similar to those in the sections on care and protection, to which the child may be committed, also subject to such limitations and conditions as the court sees fit.[226]

Despite the significant amount of leeway given to the court by the statutes, the SJC declined to accept the task of evaluating whether DSS' decisions were appropriate.[227] The court also refused to make placement decisions, leaving them to the whims and hazards of DSS' discretion.[228] Despite its unwillingness to act affirmatively, the court encouraged the legislature to make changes.[229] As the court still refuses to reexamine these decisions, legislation seems a more likely venue for change.[230]

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[220] MASS. GEN. LAWS ch. 119, § 26(2) (2004) (emphasis added).
[221] *See Jeremy*, 646 N.E.2d at 1032.
[222] *Id.*
[223] *See* § 1.
[224] § 29.
[225] *See Jeremy*, 646 N.E.2d at 1033.
[226] *See* MASS. GEN. LAWS ch. 119, § 39G (2004).
[227] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033.
[228] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033.
[229] *See Jeremy*, 646 N.E.2d at 1033.
[230] *See id.*

B. *Living up to the Mandate of* Jeremy*: Legislative Change*

At the end of its decision in *Jeremy*, the SJC stated that legislative action should be considered to remedy any problems caused by the court's self-imposed restraint.[231] Because the SJC refused to allow courts to select appropriate placements for juveniles in DSS custody, including CHINS, who need to enter residential facilities or foster care, courts can avoid taking responsibility for the outcomes of DSS decision-making.[232] This lack of accountability renders children in DSS custody vulnerable and leaves them with very little recourse.[233]

An example of possible legislative action comes from the Pew Commission on Children in Foster Care's report.[234] The report detailed recommendations for legislatures to take in addressing the nationwide deficiencies in the foster care system.[235] One of the Commission's primary recommendations was that courts should take the lead in implementing reforms and improvements.[236] More specifically, the Commission recommended that there be strong and effective collaboration between courts and child welfare agencies.[237] Given the SJC's unwillingness to take on any tasks that have not been explicitly and unquestiona-

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[231] *Id.* ("The Legislature may wish to examine the statute to state more definitively the scope of a court's authority when passing on those decisions.").

[232] *See id.*; *see also Isaac*, 646 N.E.2d at 1036 (taking note of child's extended stay in hospital because DSS had not found a more suitable placement for the child and the court was unable to order it to do so); Leonetti, *supra* note 157, at 68 ("Massachusetts Department of Social Services has repeatedly circumvented the requirements governing substitute care and custody of minor children whose best interests it is supposed to protect.").

[233] *See* Leonetti, *supra* note 157, at 92.

[234] *See* Pew Comm'n on Children in Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care 3 (2004), *available at* http://pewfostercare.org/research/docs/FinalReport.pdf [hereinafter Pew Commission Report]. The Commission was composed of an interdisciplinary group of professionals from fields such as law, health, and social work. *Id.*

[235] *See id.*

[236] *Id.* at 18 ("Chief Justices and state court leadership must take the lead, acting as the foremost champions for children in their court systems . . . .").

[237] *Id.* at 38. It is worth noting that the Commission cited a number of states as positive examples of the recommendations it made. *Id.* at 42. It did not provide any negative examples of states that were not living up to its standards, but rather kept those designations non-state specific. *See generally id.* Nowhere, however, did Massachusetts appear as one of the positive examples. *See id.* Moreover, in an update produced by the Pew Commission, Massachusetts was not included among states that had made progress toward adopting the recommendations for court involvement in these cases. *See* Pew Comm'n on Children in Foster Care, The Pew Commission Recommendations: A Progress Report (2006), http://pewfostercare.org/docs/index.php?DocID=67.

bly delegated to it, the most useful way to implement this recommendation would be through legislation.[238]

Some courts have been given broad powers to overrule or even command agencies with regard to dispositions.[239] Such a grant of power ensures that ultimate authority rests with the court.[240] Since the child's interests are the primary factors for consideration in any case the juvenile court hears, a certain amount of judicial supervision of agency decisions should be expected and desired.[241] This proposition is strengthened by the fact that in delinquency dispositions, a court may direct the child's placement.[242]

C. *Lessons from Other States*

Not all states have refused to allow court oversight of child welfare agency decisions.[243] For example, a Maryland statute states that,

> [a]fter a [Children in Need of Assistance] disposition, when the court has ordered a specific placement of a child, a local department may remove the child from that placement prior to a hearing only if: (1) Removal is required to protect the child from serious immediate danger; (2) The child's continued placement in the court-ordered placement is contrary to the welfare of the child; or (3) The person or agency with whom the child is placed has requested the immediate removal of the child.[244]

This statute demonstrates that it is possible for courts to oversee agency placement decisions.[245] Although the statute provides that in certain cases an agency may unilaterally remove a child from a court-ordered placement, it normally requires that there be a hearing first.[246] Thus, the statute provides for significant court oversight of children's place-

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[238] *See Isaac*, 646 N.E.2d at 1041; *Jeremy*, 646 N.E.2d at 1033.

[239] Boyer, *supra* note 135, at 384.

[240] *See id.* at 385, 387.

[241] *See id.* at 399; *see also* Mass. Gen. Laws ch. 119, § 1 (2004) ("The health and safety of the child shall be of paramount concern . . . .").

[242] *See, e.g.*, *In re* Ronnie P., 12 Cal. Rptr. 2d 875, 882 (Ct. App. 1992) ("In making a dispositional order, of course, the juvenile court can not only direct an appropriate placement but may also issue orders concerning the minor's conduct.").

[243] *See id.*

[244] Md. Code Ann., Cts. & Jud. Proc. § 3-820(a) (LexisNexis 2006).

[245] *See id.*

[246] *See id.*

ments.[247] Furthermore, Maryland law also provides that if a court determines that a child is in need of assistance, the court may "[c]ommit the child on terms the court considers appropriate to the custody of . . . a local department, the Department of Health and Mental Hygiene, or both, *including designation of the type of facility where the child is to be placed.*"[248] The statute goes on to list a host of other actions the court may take, showing that the Maryland courts have a much broader range of options than those in Massachusetts.[249] Had the trial courts in *Isaac* and *Jeremy* had such a range of options, perhaps those two boys would not have wound up in placements so wildly inappropriate to their needs.[250]

In Wisconsin, the statute simply declares that, "[t]he court has exclusive original jurisdiction over a child alleged to be in need of protection or services which can be ordered by the court."[251] The legislature intended for courts to oversee children's placements and indeed gave the courts great leeway in making orders regarding these children.[252]

Georgia explicitly gives judges power, not only to place a child in a wide variety of settings, but also to

> conduct sua sponte a judicial review of the current placement plan being provided to said child. After its review the court may order the division to comply with the current placement plan, order the division to devise a new placement plan within available division resources, or make any other order relative to placement or custody outside the Department of Human Resources as the court finds to be in the best interest of the child.[253]

This statute gives the court broad authority not only to select the appropriate placement for a child, but also to review that placement as needed, a particularly useful function if the Department of Human Resources is not placing children in appropriate settings.[254]

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[247] *See id.*

[248] § 3-819(b)(1)(ii)(2) (emphasis added).

[249] *Compare* § 3-819(c), *with* Mass. Gen. Laws ch. 119, §§ 24–26, 29 (2004), *Isaac*, 646 N.E.2d at 1039–41 (interpreting those sections) *and Jeremy*, 646 N.E.2d at 1031–33 (interpreting those sections).

[250] *See* Md. Code Ann. Cts. & Jud. Proc. § 3-819; *Isaac*, 646 N.E.2d at 1036, 1041; *Jeremy*, 646 N.E.2d at 1030, 1033.

[251] Wis. Stat. Ann. § 48.13 (West 2006).

[252] *See id.*

[253] Ga. Code Ann. § 15-11-55(c) (2005).

[254] *See id.*

In Nebraska, the Department of Health and Human Services, or any other person or agency to which the court grants custody may determine the placement of the child as well as what other services the child should receive.[255] The statute also grants the courts authority to order the Department to propose a plan for the care of the child, and "modify the plan, order that an alternative plan be developed, or implement another plan that is in the juvenile's best interests."[256]

It is apparent from these examples that other states have found that allowing courts to oversee the decisions of relevant agencies better serves children.[257] Given the example set by these states, Massachusetts should follow it by either enacting legislation similar to that in Maryland, Wisconsin, Nebraska, and Georgia, or through common law by overruling *Isaac* and *Jeremy*.[258]

Conclusion

The SJC's decisions in *Care and Protection of Isaac* and *Care and Protection of Jeremy* do not serve the best interests of children who are in DSS care through a CHINS petition. In order to comply with federal law and to avoid losing further funding for the state's children, they should be reversed. Because there are a disproportionate number of children of color involved with DSS and therefore in the CHINS system, the decisions are having a disproportionate impact on these children, further bolstering the need for change. Given the state statutes enacted since the decisions were rendered, *Isaac* and *Jeremy* should be reconsidered to ensure compliance with current statutes. The decisions could have been decided differently under existing state law and could therefore be judicially overruled. They might also be legislatively overruled, as the SJC suggested at the end of *Jeremy*. The practices of other states may provide useful models on which to base changes in Massachusetts. Ultimately, whatever means is used to bring about changes, they must be made in order for DSS and the juvenile courts of Massachusetts to live up to the mandate laid for them: serving the health and safety of the child.[259]

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[255] Neb. Rev. Stat. § 43-285(1) (2005).

[256] § 43-285(2).

[257] *See* Ga. Code Ann. § 15-11-55; Md. Code Ann. Cts. & Jud. Proc. § 3-819(b)(1)(ii)(2) (LexisNexis 2006); Neb. Rev. Stat. §43-285(1); Wis. Stat. Ann. § 48.13 (2007).

[258] *See* Ga. Code Ann. § 15-11-55; Md. Code Ann. Cts. & Jud. Proc. § 3-819(b)(1)(ii)(2); Neb. Rev. Stat. § 43-285(1); Wis. Stat. Ann. § 48.13; *supra* notes 192–230 and accompanying text.

[259] *See* Mass. Gen. Laws ch. 119, § 1 (2004).