

# PROVISIONAL CUSTODY BY MANDATE AND SCHOOL ENROLLMENT

IAN M. ELLIS, LOUISIANA APPLESEED

MARCH 6, 2013

---

## I. INTRODUCTION

Many Louisiana public school districts do not permit student enrollment under the Provisional Custody by Mandate scheme codified in Louisiana Revised Statutes, sections 951 through 954. Instead, these districts require a court-issued custody order adjudicating custody in favor of the non-parent guardian.

St. Tammany, Acadia, Allen, and East Baton Rouge parishes have all indicated that they will not accept provisional custody by mandate affidavits (CBM affidavits) as valid *proof of custody*. Jefferson, St. Bernard, and St. Mary Parish School Boards, by contrast, have *residence verification* policies that require court-issued custody orders when a nonparent seeks to enroll a student, thereby undermining (and sometimes precluding) the ability of students to enroll on the basis of CBM affidavits. Finally, Tangipahoa School Board has reportedly refused to accept CMB affidavits, arguing that they violate a decades-old consent decree under which the Board operates.

This memorandum examines whether there is a legal basis for public schools to refuse to enroll a student when presented with a properly executed CBM affidavit. It addresses all three types of action identified above. It concludes that public schools likely do not possess a legal basis to prohibit the enrollment of students by provisional custodians possessing properly executed CBM affidavits. Nevertheless, this memorandum briefly presents an alternative method of enrolling students by affidavits provided for under Louisiana Revised Statutes, section 9:975, which expressly grants schools immunity for enrolling students on the basis of such affidavits. Finally, a few possible solutions to the more pressing CBM affidavit issue are briefly identified.

## II. KEY ISSUES AND SHORT ANSWERS

### **A. Whether public school districts may lawfully require proof of custody in addition to a properly executed CBM affidavit before allowing non-parents to enroll students.**

Probably not. Both the statutory text and legislative history of the Custody by Mandate scheme indicate that it empowers a legal guardian to transfer provisional custody to a nonparent and has the effect of a court order. Louisiana public schools most likely cannot reject properly executed provisional custody affidavits as proof of custody.

### **B. Whether school boards may use their authority to establish residency requirements to block the enrollment of students with properly executed CBM affidavits.**

Probably not. While each public school board has authority to establish its own residence requirements, it does not appear that the schools can craft residence policies that frustrate the purpose of the Custody by Mandate scheme by requiring court-issued proof of custody in the case of non-parent provisional custodians.

### **C. Whether Louisiana school boards may refuse to accept CMB affidavits for enrollment on the basis of applicable federal desegregation and consent decrees.**

Probably not. Both desegregation and consent decrees must expressly contemplate very specific limitations on the means of enrolling students because they may furnish a basis for refusing enrollment to a student presenting a CBM affidavit.

### **D. Whether an alternative and perhaps more palatable method of enrolling students by affidavit currently exists.**

Yes. The affidavits provided for under Louisiana Revised Statutes section 9:975 are an alternative means of enrolling students and schools might be more willing to accept these affidavits because school officials relying on such affidavits cannot be held liable for doing so.

### III. LEGAL ANALYSIS

#### A. Louisiana public school districts most likely cannot reject properly executed Custody by Mandate Affidavits as proof of custody.

The Custody by Mandate scheme is codified in Louisiana Revised Statutes sections 9:951 *et seq.* The scheme provides that, for a period not to exceed one year, parents, grandparents, or tutors with legal custody of a child may transfer legal responsibility for that child’s care, custody, and control to another legal adult. (La. Rev. Stat. § 9:951.) Custody is transferred through execution of a Provisional CBM affidavit, the formalities for which are set forth (along with a suggested form) in Louisiana Revised Statutes, section 9:954. Among other things, a CBM affidavit may provide for a child’s education, including “[e]nrolling the child in such schools or educational institutions as may be deemed necessary for his due and proper education.” (La. Rev. Stat. § 9:953.)

The Custody by Mandate scheme was introduced in direct response to the policies of the East Baton Rouge and Jefferson Parish School Boards, which required that parents or natural tutors “actually file a petition with the court and get the court to appoint a provisional tutor.” (La. Comm. on Education (1992) HB811 (Rep. Roach), p. 33.) Legislators intended for execution of an affidavit to “alleviate [] the need for [a court order].” (*Ibid.*) As the regime’s foremost proponent explained, “[w]e’re not requiring that you go to court to [transfer provisional custody] in terms of filing the petition with the judge. We’re just saying you can do this by . . . [a] special power of attorney.” (La. Comm. on Education (1992) HB811 (Rep. Roach) p.34.) The intent of the law, then, is for a properly executed custody by mandate affidavit to carry the force of a court order.

Though the scheme’s validity has never been subjected to appellate review, both the plain text of the relevant statutes and the legislative purpose for which the regime was designed appear to empower parents to transfer provision custody to non-parents without a court order. The statutes and legislative history also indicate that provisional custodians are empowered to enroll students in public schools without a court order.

To the extent that some public school boards—for example, St. Tammany Parish<sup>1</sup>—require a court order to establish custody, those districts are seemingly in error. (See La. Rev. Stat. § 9:951 *et seq.*) However, as discussed in the next section, this situation is not so apparent when school boards require a court order to prove a student’s residency, and, therefore, the student’s eligibility to enroll in the school.

**B. Louisiana public school districts most likely cannot reject properly executed CBM affidavits on the basis of their residence policies.**

Potentially complicating the Custody by Mandate scheme described above is Louisiana Revised Statutes section 17:104.1. Section 17:104.1 states that sections 9:951 *et seq.*, the Custody by Mandate regime, shall not limit the authority of a public school board to prescribe rules and regulations for “the assignment, transfer, and continuance of pupils[,] . . . including but not limited to the determination of student residency for school attendance[.]” (La. Rev. Stat. § 17:104.1.)<sup>2</sup> In short, section 17:104.1 allows school boards to make rules regarding proof of *student residency* for purposes of school attendance. (See La. Rev. Stat. § 17:104.1.)

Louisiana public school boards generally accept documents such as leases, voter registration cards, and utility bills as sufficient indicia of student residency. However, some school boards insist that provisional custodians (those empowered by CBM affidavits) furnish court-issued custody orders to establish proof of residency. St. Bernard Parish,<sup>3</sup> Jefferson Parish,<sup>4</sup> and St. Mary Parish<sup>5</sup> School Boards each have

---

<sup>1</sup> St. Tammany Parish School Board requires “[p]arents or guardians granted custodial rights of a student must present at registration the custody papers granted through a court system.” (St. Tammany Parish School Bd., Registration, [http://www.stpsb.org/schools\\_registering.php](http://www.stpsb.org/schools_registering.php), last visited Dec. 9, 2012.)

<sup>2</sup> An attempt to analyze legislative history for section 17:104.1 was unsuccessful. An Appleseed Volunteer was variously sent incorrect committee meeting minutes, told that no minutes of the correct committee meetings were ever recorded, and that the committee meeting was recorded but that the document was only available on an audio cassette recorded at a nonstandard playback speed.

<sup>3</sup> See *Levert v. St. Bernard Parish Sch. Bd.*, (La. App. 4 Cir. 2000) 772 So. 2d 236, 237.

residency policies of this type. By requiring nonparent custodians to provide a court order as proof of residency when registering a student, these boards have frustrated enrollment of students by means of CBM affidavits.

Whether school boards may lawfully craft residency rules that circumvent the Custody by Mandate scheme is an unsettled question. *Lever v. St. Bernard Parish School Board*, the only case to present the issue, was dismissed on procedural grounds, preventing the court from reaching the merits of the school board's action. (See 772 So. 2d at 237 [dismissing as untimely a writ challenging the St. Bernard Parish School Board's Residency Policy requiring temporary custodians to produce "court orders" of custody].)

Nor is it a simple matter to predict how a court might resolve the issue. On the one hand, section 17:104.1 expressly indicates that school boards' authority to craft residency requirements is not limited by sections 9:951 *et seq.* (See La. Rev. Stat. § 17:104.1.) This fact would seem to weigh in favor of current school board policies. On the other hand, because section 17:104.1 is silent regarding school board powers to require proof of legal custody, the statute does not appear to furnish a legal basis for a school board to reject provisional custody affidavits. Moreover, the willingness of these school boards to accept the other documents (leases, voter registration cards, and utility bills) as sufficient indicia belies any claim by the school boards that their insistence upon court issued custody orders has anything to do with verification of residency.

Louisiana canons of statutory interpretation provide that, "[i]f two statutes can be reconciled by a fair and reasonable interpretation, [courts] must read the statutes so as to give effect to each." (*Green v. Louisiana Underwriters Ins. Co.* (La. 1990) 571 So. 2d 610, 616 [citing *Johnson v. Sewage Distr. No. 2 of Caddo Parish* (La. 1960) 120 So. 2d

---

<sup>4</sup> See Jefferson Parish Public School System, Registration, <http://www.jpss.k12.la.us/district/AnnouncementTemplate.aspx?id=2147508552&terms=registration> (last visited Feb. 23, 2013).

<sup>5</sup> See St. Mary Parish School Bd. Policy Manual, Verification of Residence, <http://www.stmary.k12.la.us/personnel/Forethought/StMaryCAPS.htm> (last visited Dec. 9, 2012).

262, 268].) Honoring the schools' policies requiring court orders from provisional custodians frustrates the Legislature's intent that CBM affidavits suffice for a court order and facilitate student enrollment. By contrast, interpreting section 17:104.1 narrowly—so as not to frustrate the Custody By Mandate scheme—would still leave school boards with a host of reasonable alternatives (short of a court order) for verifying student residency. It is unlikely that a court would conclude that school boards may use their power under section 17:104.1 in a manner that undermines the purpose of the CBM scheme.

**D. Federal Desegregation Orders and Consent Decrees do not Furnish a Basis for Louisiana Public School Boards to Refuse to Enrollment by CBM Affidavit Unless Those Orders and Decrees Expressly Prohibit Acceptance of CBM Affidavits.**

The Louisiana State Bar Association's Access to Justice Policy Committee recently advised Louisiana Appleseed that Tangipahoa Parish School Board (TPSB) has refused to enroll of students by CBM affidavit on the basis of its desegregation decree (the TPSB decree). The TPSB's contention lacks merit. The below analysis of the TPSB's contention could apply to other parish school boards to the extent that they also refuse to enroll CBM students on the grounds of an applicable federal desegregation decree.

It is highly unlikely that a federally imposed desegregation decree furnishes the TPSB with a legal basis for refusing to enroll any student when presented with a properly executed CBM affidavit. The TPSB decree dates back to the late 1960s and remains in force today. (*See, e.g., Moore v. Tangipahoa Parish School Board* (E.D. La. 1969) 304 F. Supp. 244, 246; *Moore v. Tangipahoa Parish Sch. Bd.* (E.D. La. Apr. 30, 2008) 2008 U.S. Dist. LEXIS 35238, \*24-\*26.) Though the TPSB decree imposes many conditions and limitations on the school board, it does not impose any limitations on which children may enroll or how children may enroll at TPSB schools. (*See generally Moore v.*

*Tangipahoa Parish School Board* (E.D. La. 1969) 304 F. Supp. 244, 246 at 252-55 [decree as of 1969].)<sup>67</sup>

The absence of any decree-imposed limitations on student enrollment at TPSB schools is notable. In conducting research for this memorandum, I did not come across any case law indicating that injunctive relief (like a desegregation decree) can serve to limit conduct that the injunction itself does not contemplate. Since the decree does not purport to limit student enrollment in any way, it is difficult to understand how the TPSB can refuse enrollment to students using CBM affidavits, which supply just one of several bases for student enrollment.

None of this is to say that the TPSB decree could not be altered to limit the means by which students enroll. However, a party seeking to prevent CBM students from enrolling in a school on grounds of the decree would likely have to go to court, reopen decree proceedings, and have a court declare that regulation of the CBM regime is appropriately related to the purposes of the desegregation decree. Absent such a modification, it does not appear that the TPSB decree (or similar decrees) furnishes a legal basis for barring enrollment by means of CBM affidavits.

Much same is true for consent decrees entered into voluntarily by other public school boards. “[C]onsent decrees are to be construed only by reference to the ‘four corners’ of the order itself.” (*United States v. Chromalloy Am. Corp.* (5th Cir. 1998) 158 F.3d 345, 350 [quoting *Robinson v. Vollert* (5th Cir. 1979) 602 F.2d 87, 92].) Thus, if a consent decree does not prohibit or restrict the means by which students may be enrolled, such decrees would not likely furnish a basis for a school board’s refusal to enrollment to students using CBM affidavits.

---

<sup>6</sup> Subsequent modifications to the decree have not limited enrollment. (*See, e.g., Moore v. Tangipahoa Parish Sch. Bd.* (E.D. La. Nov. 26, 2007) 2007 U.S. Dist. LEXIS 89358; *Moore v. Tangipahoa Parish Sch. Bd.* (E.D. La. Apr. 30, 2008) 2008 U.S. Dist. LEXIS 35238.)

<sup>7</sup> The issue of student enrollment is distinct from that of assignment to a particular school with TPSB. The TPSB decree does impose certain restrictions on assignment.

### **E. Section 9:975 Affidavits Present an Attractive Alternative Method for Enrolling Students through use of an Affidavit.**

Under Louisiana Revised Statutes section 9:975, non-legal custodians may execute an affidavit authorizing them to give legal consent for children in their “custody to receive any medical or educational services for which parental consent is usually required.” (La. R.S. 9:975(a) (1).) The statute expressly provides that “[n]o person who acts in good faith reliance on a non-legal custodian properly executed affidavit . . . shall be subject to civil liability or criminal prosecution . . . for any action which would have been proper if the facts had been as he believed them to be.” (La. R.S. 9:975(b)(1).) Accordingly, those acting in good faith reliance on a non-legal custodial affidavit cannot be held liable for doing so. Though I did not come across case law interpreting this safe harbor provision, its broad wording suggests that it would apply to school officials.

No safe harbor provision is expressly available under the CBM regime codified in La. R.S. 9:951-954. Legislative history indicates that immunity provisions similar to those in La. R.S. 9:975 were deleted from an early draft of section 9:951. (See La. Comm. on Education, Minutes (1992) HB811 p.16.) This is not to say that school officials are subject to liability for enrolling students under the CBM regime—they are obligated to honor properly executed affidavits—but they do not have the added security of a safe harbor provision like the one found in La. R.S. 9:975. This safe harbor provision may make the section 9:975 preferable to the CBM affidavit in the eyes of many cautious school administrators.

### **III. POSSIBLE SOLUTIONS TO SCHOOL BOARDS’ PRESENT RESISTANCE TO CBM AFFIDAVITS.**

Given the foregoing, the following suggested courses of action could help clarify the law and increase access to education through the use of CBM affidavits:

#### **1. Education:**

Disseminate information to Louisiana Public School Boards clarifying that provisional custody affidavits were created as a substitute for court orders. This



information should also make clear that a validly executed affidavit provides provisional custodians with a special power of attorney to, among other things, enroll students in school.

**2. Legislation:**

Seek amendment of La. Rev. Stat. § 17:104.1 clarifying that school boards may not require court-issued custody orders to verify or establish residency.

**3. Litigation:**

Pursue a declaratory judgment stating that section 17:104.1 does not entitle public school boards to require a court-issued custody order for proof of residency when a provisional custodian seeks to enroll a student on the basis of a properly executed provisional custody affidavit.

**IV. CONCLUSION**

The text of the Custody by Mandate scheme clearly prescribes a method of transferring provisional custody. The legislative history and statutory text both suggest that this law was passed with the specific intent of permitting provisional guardians to enroll students in school without requiring them to obtain a court order. The current policies of many public schools frustrate this regime. Despite a dearth of case law on the subject, all other available sources suggest that schools should not prevent students enrolling through use of CBM affidavits.