



# Kids Matter

Child Protection and Advocacy Law Section Summer 2014

EPSDT: Medicaid Eligible Children's  
Right to Prompt Access to all Medically  
Necessary Care



# From the Chair

By Nicki Noel Vaughan



Welcome to the Summer 2014 issue of Kids Matter. Thanks, as always, to our Editor, Tonya Boga, for bringing the membership an interesting and informative newsletter. In addition to a spotlight article on Judge Peggy Walker's swearing-in as the President of the National Association of Juvenile

and Family Court Judges, this issue offers a wide variety of articles on Medicaid, adoption, the Georgia Family Connection Program and a new pro bono opportunity to assist foster care children facing school disciplinary tribunals. Again, we welcome volunteers to serve on the Editorial Board or to submit an article for publication.

## MEMBERSHIP:

The Section ended last year with over 350 members. Thank you all for your continued support, and don't forget to renew your section membership when you pay your Bar dues.

## ACTIVITIES OF THE QUARTER:

I am happy to announce that the Child Protection and Advocacy Section was again, for our second year, honored with a Section Achievement Award by the State Bar at its 2014 Annual Meeting in June! Thanks to all of you for your involvement and support.

## EDUCATION/TRAINING

An exciting opportunity has arisen for a joint effort of our section and Georgia Applesseed to train interested lawyers to serve as pro bono

counsel for foster care children who are facing school disciplinary action and have no other representation. We are working with ICLE in a special project to provide the three-hour training and to film it so that it can be replicated throughout the state. The pilot program will assist children in Fulton and DeKalb Counties, and it is hoped that we can expand it to other counties as the need is studied. Please see the article about this project elsewhere in this newsletter.

As many of you know, Trish McCann, who chaired our Education/ Training Committee, moved to Chicago. Fortunately, Jan Hankins, who is replacing her as Training Director for the GPDSC and who is also the liaison with the Georgia Supreme Court Committee on Justice for Children ("J4C") to coordinate training for parent attorneys in dependency cases, has agreed to take her place. Please send her any suggestions you have for training needs. We need to know what the membership needs and wants so that we can use the section resources to meet those needs.

## EXPEDITED JUVENILE COURT APPEALS

Thanks to those of you who have responded to the survey sent out, this committee is making progress. As with most things legal, progress takes time.

## WE WANT AND NEED YOUR HELP!

State Bar Sections exist to serve their members. Let us know what you need and what you would like to see the section provide. Thank you all for your continued interest and support.

Nicki Noel Vaughan

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The opinions expressed within *Kids Matter* are those of the authors and do not necessarily reflect the opinions of the State Bar, the Child Protection and Advocacy Section, the Section's executive committee or the editor.

# EPSDT: Medicaid Eligible Children's Right to Prompt Access to all Medically Necessary Care

By Josh Norris

Many of us in the child advocacy world are frequently confronted with situations where a child requires significant supports and services related to his or her mental or physical health. In advocating for appropriate supports, we often find limited availability of services, irrelevant services or no services at all. For Medicaid eligible children, this should not be the case.

In 1989, Congress made a promise to Medicaid eligible children and youth under 21 that they would have prompt access to all medically necessary care to correct or ameliorate their conditions and illnesses. This promise is embodied in the Early and Periodic, Screening, Diagnostic and Treatment services (EPSDT) provision of the Medicaid Act. 42 U.S.C. §§ 1396a(a)(43), 1396d(a)(4)(B), 1396d(r). One Court has described the scope of EPSDT as "no Medicaid-eligible child in this country, whatever his or her economic circumstances, will go without treatment deemed medically necessary by his or her clinician." *Rosie D. v. Romney*, 410 F.Supp.2d 18, 22 (D. Mass. 2006). Don't worry, EPSDT is not just for children in Massachusetts; it applies in Georgia too. Georgia participates in Medicaid and EPSDT is a mandatory part of every state's Medicaid program. *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1232-33 (11th Cir. 2011).

## What is Medicaid?

Medicaid is a federal-state partnership designed to provide health care to eligible participants. The Medicaid Act, 42 U.S.C. §1396 et seq., overall framework and requirements of the Medicaid program. Each state devises its own state Medicaid plan subject to the basic requirements of the Medicaid Act. The federal government provides partial reimbursement for services provided under the Medicaid program. In Georgia, the federal government reimburses the state approximately 65 cents on every dollar spent on Medicaid services. The Georgia Department of Community Health (DCH) is the agency that administers Medicaid in Georgia. The federal agency that provides oversight to the Medicaid program is the Centers for Medicare and Medicaid Services (CMS). CMS provides guidance to the states in fulfilling their obligations under the Medicaid Act. In this capacity, CMS has published "*EPSDT - A Guide for States: Coverage in the Medicaid Benefit for Children and Adolescents* (June 2014)." [hereafter "CMS Guide"] The CMS Guide can be found here: [http://www.medicare.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT\\_Coverage\\_Guide.pdf](http://www.medicare.gov/Medicaid-CHIP-Program-Information/By-Topics/Benefits/Downloads/EPSDT_Coverage_Guide.pdf).

## What is EPSDT?

The goal of EPSDT is to provide Medicaid eligible children and youth with comprehensive health care such that they "get the health care they need when they need

it." CMS Guide at 1. EPSDT is designed to promptly and effectively address the health problems of children before they become worse and treatment is more difficult and costly. *Id.* It entitles Medicaid eligible children and adolescents to preventive screening and *any treatment or service covered by the Medicaid Act determined necessary to "correct or ameliorate" any mental or physical condition or illness.* 42 U.S.C. §1396d(r). The Medicaid Act covers 29 broad categories of services. See 42 U.S.C. §1396d(a). This includes mental health and behavioral health interventions, treatments, and therapies; treatments for substance use disorders; home health services, including medical equipment and supplies such as incontinence briefs; and corrective dental treatments.

## Screening Services

EPSDT covers all regular health check-ups (screenings) for Medicaid-eligible children and adolescents. 42 U.S.C. §1396d(r) (1). This includes screening for vision, hearing and dental health. 42 U.S.C. §1396d(r)(2)-(4). These screenings are designed to identify any health or development issues early so that children may access appropriate treatment. They include a comprehensive health and development history that assess for both physical and mental health, as well as substance use disorders. CMS Guide at 4. DCH is required to establish a periodicity schedule for each type of screening (e.g., medical, vision, dental, etc.) that sets the frequency by which the screening services will be provided and covered. 42 C.F.R. §441.58. Again, DCH is required to inform the parents and guardians of Medicaid-eligible children of the availability of screening services and provide them whenever they are requested. 42 U.S.C. §1396a(a)(43) (A)&(B).





In addition to coverage for regular check-ups, EPSDT also requires coverage of any necessary “interperiodic” screening. CMS Guide at 5. These are screenings that occur whenever a child interacts with a health professional such as a pediatrician, nurse practitioner or any other health professional. An example would be a child visiting the pediatrician for a sore throat and fever. The interperiodic screens are not limited and don’t require prior authorization. *Id.* Additionally, any licensed practitioner operating within the scope of their license to practice can provide a screen. The practitioner does not have to be a Medicaid provider in order for the service to qualify as a screen under EPSDT. CMS Guide at 6.

### Treatment Services

If any illness or condition is found during a screen that requires treatment, DCH (or any third party vendor) is required to arrange for the treatment - either directly or through referral to appropriate providers or licensed practitioners. 42 U.S.C. §1396d(a)(43)(C). This affirmative obligation on the state Medicaid agency to arrange for care is one of the components that makes EPSDT unique. If you are working with a child whose treating physician or other licensed clinician is ordering or recommending as medically necessary a particular treatment or diagnostic testing, coverage is triggered under EPSDT and DCH is obligated to arrange for it. 42 U.S.C. §§1396a(a)(43); 1396d(r)(5). Coverage is triggered even if the physician or clinician is a non-Medicaid provider.

EPSDT provides for coverage of all medically necessary services that are included within the 29 categories of services listed in 42 U.S.C. §1396d(a). DCH is obligated to ensure that Medicaid-eligible children and youth have access to the full range of services covered by the Medicaid Act. If a service or treatment is not covered in the state Medicaid Plan, DCH is nonetheless required to provide the service or treatment so long as it is included within the categories of services listed at 42 U.S.C. §1396d(a). Moreover, DCH is prohibited from placing hard limits or monetary caps on EPSDT services. CMS Guide at 23-24; see *Moore*, 637 F.3d at 1259.

EPSDT provides coverage for a wide range of services, including physician and hospital services, private duty nursing, personal care services, home health and medical equipment and supplies, case management, occupational, physical and speech therapy services, dental services, hearing and vision services, incontinence supplies, organ transplants, specially adapted equipment such as a car seat or eating utensils, and nutritional supplements. 42 U.S.C. §1396d(a); *Pittman ex rel. Pope v. Secretary, Florida Dep’t of Health & Rehab. Servs.*, 998 F.2d 887 (11th Cir. 1993) (per curiam); CMS Guide at 16.

The broad scope of covered services under EPSDT is reflected in the definition of rehabilitative services, which are defined to include:

any medical or remedial services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level.

### 42 U.S.C. §1396d(a)(13)(C).

This broad category of services can be used to cover many treatments for mental health and substance use issues such as:

- ◆ Community-based crisis services, such as mobile crisis teams, and intensive outpatient services;
- ◆ Individualized mental health and substance use treatment services, including non-traditional settings such as a school, a workplace or at home;
- ◆ Medication management;
- ◆ Counseling and therapy, including to eliminate psychological barriers that would impede development of community living skills; and
- ◆ Rehabilitative equipment, for instance daily living aids.

### CMS Guide at 11.

*EPSDT does not require coverage of experimental or investigational treatments or services. CMS Guide at 24. The state may cover these services at its discretion if it is determined that the treatment or service would be effective to address the child’s condition. Id.*

### Medical Necessity

EPSDT requires the state to provide coverage for those services covered by the Medicaid Act found during a screen to be necessary to “correct or ameliorate” an individual child’s mental or physical conditions. 42 U.S.C. §1396d(r)(5). EPSDT does *not* require a service or treatment to “cure” a condition in order for that service or treatment to be covered. So long as the treatment is “ameliorative,” it should be covered. Included within ameliorative care are services that maintain or improve a child’s current health condition, prevent it from worsening or prevent development of additional health problems. CMS Guide at 10. Similarly, Georgia law defines “correct or ameliorate” as:

to improve or maintain a child’s health in the best condition possible, compensate for a health problem, prevent it from worsening, prevent the development of additional health problems, or improve or maintain a child’s overall health, even if the treatment or services will not cure the recipient’s overall health.

### O.C.G.A. §49-4-169.1(1).

Services such as nursing services or physical or occupational therapy services are covered when they maintain a child’s health, prevent it from getting worse, or reduce pain or discomfort. Similarly, medical equipment and supplies can serve ameliorative purposes. Some examples are mattresses and cushions to prevent pressure ulcers, incontinence supplies, and augmentative communication devices.

*The state is not required to cover services unless they are medically necessary for the child. The treating clinician has the primary responsibility of determining whether a treatment is medically necessary. Moore, 637 F.3d at 1255. But both the treating clinician and the state have roles to play in determining whether a treatment or service is medically necessary. Id. The state must make its determination of whether a service is medically necessary on a case-by-case basis, taking into account the particular needs of the child. CMS Guide at 23. CMS instructs that the state’s consideration of medical necessity for a particular child should go beyond simply immediate needs:*

The state (or managed care entity as delegated by the

state) should consider the child's long-term needs, not just what is required to address the immediate situation. The state should also consider all aspects of a child's needs, including nutritional, social development, and mental health and substance use disorders. States are permitted (but not required) to set parameters that apply to the determination of medical necessity in individual cases, but those parameters may not contradict or be more restrictive than the federal statutory requirement. *Id.*

In making requests for EPSDT treatments and services, it is important for treating clinicians to make requests for services based upon the health and development needs of the child and not based upon what they think Medicaid will cover in order for Medicaid-eligible children to realize the full EPSDT benefit to which they are entitled. The request should document the medical necessity of the treatment or service. This should include a description of the child's condition and health history, the prescribed or recommended treatment or service, and the corrective or ameliorative purpose of the treatment or service. The request should also state the amount of the service or treatment requested and specify a length of time for the treatment. For treatments or services for chronic conditions, the request should indicate the continuing need for the treatment or service beyond the indicated length of time. Many treatments and services are approved by DCH for three- to six-month periods of time. So long as a service or treatment is necessary to correct or ameliorate a child's condition, the treating clinician will need to make further requests for these necessary ongoing treatments and services as appropriate.

### *EPSDT & State Waiver Programs*

Medicaid Waivers are often used to provide services to Medicaid-eligible children with significant chronic conditions. While Medicaid Waivers may provide some of the services these children need, they should not be considered a substitute for EPSDT. CMS prohibits services that could be provided through EPSDT from being provided in a Medicaid Waiver. Additionally, Medicaid Waivers have defined limits or cost caps to services, both prohibited by EPSDT.

*What are Medicaid Waivers?* Medicaid Waivers are vehicles states can use to deliver and pay for health care services in their Medicaid programs. Section 1915(c) Home and Community-Based Services Waivers (HCBS Waivers) are a type of Medicaid Waiver that permit states to provide long-term care services in home and community settings rather than institutional settings (i.e., a hospital, nursing facility or intermediate care facility for people with developmental disabilities). See 42 U.S.C. § 1396n(c)(1); CMS Guide at 26. These HCBS Waivers allow Georgia to tailor a package of home and community-based services and target a specific population that would otherwise be subject to or at risk of institutionalization. Georgia can offer a variety of services under an HCBS Waiver program, including a combination of standard healthcare services covered by 42 U.S.C. §1396d(a) and other services not traditionally covered by Medicaid, such as respite services, habilitative services and home modifications.

Georgia has a variety of HCBS Waivers:

- ◆ The Independent Care Waiver Program (ICWP)
- ◆ Service Options Using Resources in a Community Environment (SOURCE)
- ◆ Community Care Services Program (CCSP)

- ◆ Comprehensive Supports Waiver Program (COMP)
- ◆ New Options Waiver Program (NOW)

Each of these waivers provides a defined package of home and community based services such that people can be supported to live in their own homes and communities. Each waiver has limits on the type and amount of services available for participants. Information about each waiver program can be found on the Department of Community Health website, <http://dch.georgia.gov/waivers>.

Waiver services are intended to be in addition to the state Medicaid plan. They do not supplant state Medicaid plan services. If a service or treatment is covered by Georgia's state Medicaid plan, the state Medicaid benefit must be exhausted first before the same service or treatment may be furnished under an HCBS Waiver. For example, if 50 nurse visits are included within the state plan and an HCBS Waiver also includes nurse visits, the nurse visits under the state Medicaid plan must be exhausted before the waiver is permitted to cover the nurse visits.

*What does this mean for EPSDT covered services?* Because the Medicaid Act mandates that all Medicaid-eligible children receive all medically necessary services listed in 42 U.S.C. §1396d(a) regardless of whether such services are specifically included in the state Medicaid plan, HCBS Waivers *may not* provide for the coverage of services that could be furnished to children under EPSDT. See 42 U.S.C. §1396d(r)(5); CMS, *Instructions, Technical Guide and Review Criteria for § 1915(c) Home and Community Based Waiver 112* (January 2008), available at <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/Downloads/Technical-Guidance.pdf>. In other words, if a service is available to a Medicaid-eligible child under the state plan or could be furnished as an expanded EPSDT benefit under the provisions of 42 U.S.C. §1396d(r), it *may not* be covered as an HCBS Waiver service for children. *Id.* at 130.

EPSDT and HCBS Waivers can be used together to provide a comprehensive benefit to eligible children. CMS Guide at 26. HCBS Waivers can provide services not otherwise covered by Medicaid such as respite or home modifications. When these HCBS Waivers services are coupled with the broad array of services available under EPSDT, effective supports can be crafted to enable children to be well supported to remain in their homes and communities. CMS describes the potential interplay as the HCBS Waiver services serving as a "wrap-around" to the EPSDT services. CMS Guide at 26.

### *Notice and Hearing Requirements*

In some cases, the state (or its contracted third party vendor) may not agree with the treating clinician's prescribed or recommended treatment. If the state either approves less service, or denies or terminates the service, the Medicaid-eligible child is entitled to written notice of the decision and an opportunity for a hearing. 42 U.S.C. §1396a(3); 42 C.F.R. §431.200; *Goldberg v. Kelly*, 397 U.S. 254 (1970). The notice must be in writing and must include a statement of what action the state is taking, the reason for the action, the specific regulation or change in state or federal law that supports the action, the right to a hearing, and the circumstances under which Medicaid services are continued if a hearing is requested. 42 C.F.R. §431.210.

In Georgia, a consent order was entered in a class action in the Superior Court of Athens-Clarke County, *Favors v. Toal*, No. SU-92-CV-1734-G (1994), that applies to all Medicaid recipients in the State

of Georgia who are denied prior approval of Medicaid coverage for medical procedures or services on the ground that such procedures or services are medically unnecessary. *Favors* requires DCH to provide notice of the denial that includes:

- ◆ The medical procedure or service for which DCH is refusing to grant prior approval;
- ◆ Any additional information needed from the recipient's medical provider that could change the decision;
- ◆ The *specific reason* supporting DCH's determination that the procedure or service is not medically necessary to the Medicaid recipient;
- ◆ The right of the Medicaid recipient to request a fair hearing to contest the decision; and
- ◆ The right of the Medicaid recipient to be represented by a legal representative at the fair hearing.

*Favors* at 2-3.

*Favors* requires DCH to provide both an informal review and a formal appeal. DCH must provide an informal review process where Medicaid recipients may contact DCH by telephone and request an informal review of their claim. *Id.* at 3. DCH must also afford all Medicaid recipients denied prior approval for services a fair hearing before an administrative hearing officer. *Id.*

The Medicaid Act specifies a variety of safeguards to the hearing process provided by the state Medicaid agency. The Medicaid-eligible individual must be allowed to present his or her case to an impartial decision-maker and present evidence and witnesses. 42 C.F.R. §§431.240, 431.242. Before the hearing, beneficiaries must have the right to examine the case file and all documents that will be used at the hearing. 42 C.F.R. §431.242. The beneficiary is also entitled to have representation at the hearing, including legal counsel, a relative or a friend. 42 C.F.R. §431.206(b)(3). If the state

is proposing to reduce or terminate a service, the beneficiary has a right to continued coverage pending the hearing decision *if he or she requests a hearing within ten (10) days of receiving the notice of termination or reduction.* 42 C.F.R. §431.230. Once the agency issues a final decision, the beneficiary has the right to appeal that decision to state court.

Children served through managed care plans have access to a grievance and appeal process within the managed care plan in addition to the notice and hearing requirements provided by the Medicaid Act. 42 C.F.R. §438.402. The state can require the child to first exhaust the internal grievance process of the managed care plan before proceeding to a state fair hearing. The child must be provided written notice of the action taken by the managed care plan. The notice must explain the action taken, the reason for the action, and the procedures for using the in-plan grievance and state fair hearing process, including the right to continued benefits. 42 C.F.R. §438.404.

Violations of EPSDT or the notice and hearing requirements of the Medicaid Act may also be enforced in federal court pursuant to 42 U.S.C. §1983. This may be appropriate depending upon the nature of the violation and the need for effective relief. Children with chronic conditions who are denied access to necessary EPSDT services, who have limited access to those services, or who are confronted with repeated reductions or denials of services may require injunctive relief in order to receive the full EPSDT benefit to which they are entitled.

### Conclusion

Achieving EPSDT's broad goal of ensuring that all Medicaid-eligible children and youth under 21 receive the health care they need requires potent and effective advocacy. Congress and CMS have provided powerful advocacy tools that can be used to access necessary care for children in Georgia under EPSDT. It is incumbent upon all of us in the child advocacy community to use them.

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# Benefits Hotline, Georgia Legal Services Program – 888-632-6332

By Callan Wells, Senior Paralegal & Vicky Kimbrell, Attorney at Law

## *Barriers to Healthcare for Georgia's Children*

Last year a grandmother called in to Georgia Legal Services Program's Benefits Hotline. In the previous two months, she said, her grandson's grades had dropped significantly, he had been suspended, and she did not know where to turn. The boy, diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), did not have access to the medication which stabilized his mood and behavior.

When it was time to renew the boy's Medicaid, his mother, who works two jobs to support him, had taken the necessary paperwork and documentation to the local Division of Family and Children's Services (DFCS) office but in the mass of paperwork the offices receive each month, copies of her check stubs were mislaid, and her son's Medicaid was terminated and with it access to vital medication was lost.

Healthcare has broad-reaching affects in a child's life, many of which are not immediately obvious. Medicaid and PeachCare are state administered, mostly federally funded programs which are supposed to ensure access to health care for low-income children. Generally, the Medicaid program serves children under 19 years old whose families have income up to 133 percent of the federal poverty guideline or about \$2,645 per month for a family of four. You can determine Medicaid financial eligibility through the Division of Family and Children's Services ODIS website.<sup>1</sup> PeachCare serves children through the age of 18 whose families have income up to 247 percent of the federal poverty level or about \$4,911 for a family of four<sup>2</sup>. Georgia's Medicaid program is required to provide all medically necessary care for children under their EPSDT (Early, Periodic, Screening, Diagnosis and Treatment) obligations. While these programs are absolutely essential to ensuring the well-being of Georgia's children, many administrative barriers prevent families from getting and maintaining benefits.

In the case of the little boy whose school work and test scores suffered, his Medicaid was terminated due to missing paperwork. In the onslaught of papers DFCS gets each month, his mother's pay stubs were lost. This is a common issue with new Medicaid applications and renewals, and it can be devastating for children and their families. Medicaid recipients must renew their benefits every 6 months with a paper renewal form and, often, a telephone interview. While this is a seemingly simple renewal process, lack of access to technology, a central state phone line that does not work, late mail, and a flood of paperwork can keep children from getting their healthcare.

Recently, DFCS decided that the forms needed to renew Medicaid will no longer be mailed to recipients but will be available only online. While this may be convenient for those with computer access, many low-income families, seniors, or those who live in rural areas do not

have access to computers or the internet. Now recipients who need a paper form are told to call a main phone number to request one, but the call in number is more often than not inaccessible due to dropped calls or hours-long wait times. Medicaid recipients no longer have case workers, so getting through to a live person for help is nearly impossible. If a recipient is able to get a paper renewal completed, a letter is mailed out about scheduling a phone interview. These letters, as well as those informing recipients that their renewal is due, are notoriously late, often arriving after the interview date. In October of 2013, late notices caused more than 100,000 people to lose Medicaid and food stamp benefits.

This cumbersome process has many opportunities for error and, ultimately, children are being impacted. Lack of access to healthcare can affect students' lives at home and at school. Families can be left with crippling medical bills or inadequate healthcare that can have lifelong consequences.

GLSP's Benefits Hotline staff was able to get this little boy his Medicaid and his medication within two days of his grandmother's call simply by contacting DFCS staff and informing them of the errors. While our services are invaluable to our clients, not every child's family knows to call us. To fix these problems it is essential that we streamline the application and renewal process for these vital benefits, as well as ensure that there are enough workers to process cases in a timely fashion. While technology can help those with access, we still must insure that those that don't have access to the technology can access their healthcare benefits. For the system to work for children:

The phone system has to work. Every recipient or would-be recipient is told to call a central intake line. Someone MUST be available to answer these calls.

Paper application and renewal forms must be made widely available as many low-income Georgians have no other way to apply for benefits.

The renewal process should be streamlined and the amount of paperwork required should be cut. DFCS workers should have access to statewide databases that could confirm the work and income status of clients without the constant exchange of paper check stubs, affidavits, and tax forms.

The Benefits Hotline has identified these and other barriers to Medicaid or Peach Care access which must be eradicated to ensure that children do not continue to lose access to critically needed health care.

### (Endnotes)

- 1 2014 Medicaid eligibility qualifications and criteria are available at the Georgia Online Directory at: <http://odis.dhr.state.ga.us/>.
- 2 Information on PeachCare for Kids is available at [www.peachcare.org/](http://www.peachcare.org/).

888-632-6332  
GLSP Benefits  
Hotline

# Georgia Family Connection:

## *A Statewide Network of Creative Solutions for Georgia's Most Vulnerable Citizens*

By Elizabeth Bradley Turner

In 1990, the Annie E. Casey Foundation published the first-ever KIDS COUNT report, "a national and state-by-state effort to track the well-being of children in the United States." Georgia fared dismally, ranking 48th in the nation. Upon examining Georgia's resources, then-Gov. Zell Miller found that youth and social service organizations throughout the state were detached from one another. Agencies were not communicating and were serving the same families without coordination, or even an awareness of each other's involvement.

In response, Miller created a two-year pilot initiative in 1991 called Georgia Family Connection. The initiative aimed to streamline services for the physical, educational, social, and economic well-being of Georgia's most vulnerable citizens through collaboration at the local level. That same year, the Joseph B. Whitehead and Kirbo foundations invested in 15 counties that volunteered to pioneer the initiative. Those counties were asked to be innovative and specific, to test strategies, and to modify services to the unique needs of their community. Each county brought together a cross-section of its community—including social workers, educators, nurses, sheriffs, teachers, ministers, judges, business leaders, elected officials, and parents. Then, through that collaboration, the counties figured out the best way to help their local kids and families thrive.

From there, Family Connection grew into a statewide network by 2002, with local Family Connection Collaboratives serving all of Georgia's 159 counties. Each community's Collaborative organization is unique, but each shares a common vision of a Georgia where all children are healthy, ready to start school and do well when they get there, and where every family is stable and self-sufficient. Every Family Connection Collaborative also seeks to achieve these results by applying five common principles: collaboration, local decision-making, accountability, public-private partnerships, and leveraging resources.

### *Connecting the Network to Yield Accountability and Results*

While all Family Connection county Collaboratives are managed by local directors and are governed by local boards, the statewide

network of organizations is connected and supported by Georgia Family Connection Partnership (GaFCP), a public-private entity. GaFCP exists to provide technical assistance, support, and training to the statewide network of local Collaboratives. GaFCP also:

- ◆ convenes and connects regional, state, and national partners around issues that affect families and children; and
- ◆ provides data, research, and evaluation on both family and children issues and on collaborative techniques and best practices for achieving outcomes.



In addition, GaFCP is the KIDS COUNT grantee for the state of Georgia, and tracks 45 indicators of child well-being in the five result areas of healthy children; children ready to start school; children succeeding in school; stable, self-sufficient families; and strong communities. The organization reports trends and disparities on child well-being to inform planning, budget, and policy decisions at the local and state levels. County Collaboratives use these data to select their priority issues and to evaluate their progress locally, while GaFCP evaluates trends on a statewide level.

### *A Learning Organization*

The Georgia Family Connection network is the only one of its kind in the nation. Funders, agencies, academics,

and other nonprofits from across the country study and recognize Georgia Family Connection as an effective model for improving indicators of child and family well-being. However, as an organization, GaFCP acknowledges that the model will only remain effective if it is flexible enough to meet the needs of each community in this diverse state, and if it is capable of evolving with changing times and circumstances.

The year 2011 marked the 20th anniversary of the Family Connection initiative. Upon achieving that milestone, GaFCP began an effort to assess the strengths, weaknesses, and the current and emerging needs of the existing network. The assessment was multi-pronged, and included a literature review on effective collaboration practices and a statewide data collection process dubbed, the "Listening Tour." For the Listening Tour portion of the assessment, GaFCP staff members—including professional evaluators—visited all



159 Georgia counties to collect feedback on the local Collaboratives' work and the support GaFCP provides.

From that multi-pronged assessment, GaFCP learned that:

- ◆ all Georgia Family Connection Collaboratives operate within one of three functional types;
- ◆ each of the three functional types that emerged during the assessment are effective ways of collaborating;
- ◆ technical assistance and other support can be customized to a Collaborative's functional type to help it achieve outcomes; and
- ◆ despite the differences between functional types, there are some important commonalities among local Family Connection Collaboratives – including certain activities and standards to which each is held accountable both to and by others in the network.

GaFCP has begun implementing changes through its interactions with local Collaboratives and state-level partners based on the learnings from the 20-year assessment. As the organization approaches its 25<sup>th</sup> anniversary in 2016, it will use that milestone to prepare for its next several years of work. And, as it always has, Georgia Family Connection will continue to innovate and evolve to help address the changing needs and challenges of Georgia's families and children.

### *Join in the Collaboration*

To locate your local Family Connection Collaborative and learn about its priority work, or to learn how you can get involved locally or access local resources, visit [gafcp.org/connect](http://gafcp.org/connect).

To access state and local-level data regarding children and families in Georgia, visit [gafcp.org/count](http://gafcp.org/count).

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# Georgia Juvenile Court Judge Sworn in as President of National Council

By Tonya Boga

The Child Protection and Advocacy Section congratulates Georgia Juvenile Court Judge Peggy Walker who was sworn in as President of the National Council of Juvenile and Family Court Judges (NCJFCJ) in Chicago, Ill. on July 15, 2014.

The VISION of the National Council of Juvenile and Family Court Judges is for a society in which every family and child has access to fair, equal, effective and timely justice.

The MISSION of the National Council of Juvenile and Family Court Judges is to provide all judges, courts and related agencies involved with juvenile, family, and domestic violence cases with the knowledge and skills to improve the lives of the families and children who seek justice.

Judge Walker is a frequent contributor to this newsletter and a dedicated juvenile court judge. She was sworn in by Presiding Justice P. Harris Hines, Supreme Court of Georgia. Before being sworn in last month as the President of NCJFCJ, Walker served as secretary, treasurer and president-elect of the organization.

She presides over the Juvenile Court of Douglas County and has served as full-time judge there since 1998. Judge Walker also serves as chair of the Georgia Alliance for Drug Endangered Children. We are so proud of Judge Walker!!!!



# The Pre-Placement Home Study Requirement for Third-Party Adoptions Under O.C.G.A. § 19-8-5

By Sherry V. Neal, Neal & Wright LLC

In 2011, the Georgia Legislature enacted and the Governor signed SB 172, which imposed a pre-placement home study requirement on all persons seeking to adopt under O.C.G.A. § 19-8-5, the third-party (or “independent”) adoption provisions of the Georgia Code. Prior to passage of this law, those petitioning for adoption under O.C.G.A. § 19-8-5 were not required by law to complete a home study (though many, if not most, adoption petitioners did so). Prior to passage of SB 172, people seeking independent adoptions were required to complete an investigation pursuant to O.C.G.A. § 19-8-16 and to submit the completed Court Report following the investigation. This requirement remains in place.

The purpose of this article is to remind practitioners about the requirements of the pre-placement home study provisions and provide a few tips for advising clients in various stages of the adoptive placement process.

## A. What Does O.C.G.A. § 19-8-5 Require?

The key provisions of SB 172 are:

1. All petitioners in third-party adoptions must complete a favorable home study prior to placement of any child in the home for adoption. O.C.G.A. § 19-8-5(a). The term “placement” is not defined. In general adoption parlance, “placement” usually refers simply to the date that the child leaves the biological parent’s (or parents’) care and goes into the care of the adoptive parent or parents. The federal Department of Labor has defined “adoptive placement” for purposes of the obligations of group health plans under section 609(c) of the Employee Retirement Income Security Act (ERISA), as amended, to mean “the assumption and retention by such person of a legal obligation for total or partial support of such child in anticipation of adoption of such child.” Thus, it is arguable that placement may not have occurred until the potential adoptive parents assume a legally recognized obligation for the child’s care, but the statute seems to contemplate the more basic definition.

The term “home study” is defined as “an evaluation by an evaluator of the petitioner’s home environment for the purpose of determining the suitability of the environment as a prospective adoptive home for a child. Such evaluation shall consider the petitioner’s physical health, emotional maturity, financial circumstances, family, and social background and shall conform to the rules and regulations established by the department for child-placing agencies for adoption home studies.” O.C.G.A. § 19-8-1(5.1). The rules and regulations are found at Office of Residential Child Care (ORCC) Rules and Regulations § 290-9-2-.06.

The statute also provides guidance about the “evaluator,” who “shall be a licensed child-placing agency, the department, or a licensed professional with at least two years of adoption related professional experience, including a licensed clinical social worker, licensed master social worker, licensed marriage and family therapist, or licensed professional counselor; provided, however, that where none of the foregoing evaluators are available, the court may appoint a guardian ad litem or court appointed special advocate to conduct the home study.” O.C.G.A. 19-8-1(4.1). In general, the adoption petitioner gets to select the evaluator but may request appointment by the Court if none is known or available.

2. If no home study has been done prior to placement, the petitioner must file a motion, along with the petition for adoption, “seeking an order authorizing placement of such child prior to the completion of the home study.” O.C.G.A. § 19-8-5(m). The petitioner must show that placement is in the best interest of the child. O.C.G.A. § 19-8-5(n). Once the proper showing is made and the court enters an order, the child remains in the potential adoptive home. O.C.G.A.



§ 19-8-5(o)(1). In addition, the clerk of court must deliver a copy of the order to the Department of Human Services and the evaluator within 15 days of entry. O.C.G.A. §§ 19-8-1(4) and 19-8-5(o)(2). Then, the evaluator must initiate the home study within 10 days of receipt of the order. O.C.G.A. § 19-8-5(o)(3).

The statute offers no guidance about what should happen if the motion is not granted. Presumably this is something that would be worked out on a case-by-case basis with the judge. The statute also does not address what should happen if the home study is not completed prior to placement but is completed prior to filing of the adoption. On occasion, adoptive placements occur unexpectedly when a family is in the process of completing a home study. Because O.C.G.A. § 19-8-5(k) requires that petitions filed under O.C.G.A. § 19-8-5 be filed within 60 days of the date of surrender, there may be sufficient time for the family to complete the home study following placement. Practically speaking, neither birth parents nor adoptive families want to delay placement while a home study is completed. Because the statute is silent on what is to occur in this event, I recommend that full disclosure be made to the court at the time of filing, either in the petition or in a separate motion with an order approving the placement and completion of the home study in the period between placement and filing.

3. The requirement for a pre-placement home study may be waived when the child lives in the adoptive home "pursuant to a court order of guardianship, testamentary guardianship, or custody." O.C.G.A. § 19-8-5(m). The statute does not address what is to happen when the child lives in a home with a parent or guardian who has custody or guardianship by

operation of law and not by court order, such as may occur in a second parent adoption or when a child lives with a testamentary guardian who has not probated the will.

4. The petitioner must provide the court with a copy of the home study report. O.C.G.A. § 19-8-13(a)(3)(I).
5. Surrender forms for parents and guardians should be revised to include the following language:

*Furthermore, I understand that under Georgia law an evaluator is required to conduct and provide to the court a home study and make recommendations to the court regarding the qualification of each person named above to adopt a child concerning the circumstances of placement of my child for adoption. I hereby agree to cooperate fully with such investigations.*

O.C.G.A. § 19-8-26(c).

### *B. How Do I Advise My Clients?*

The full practical implications of the revisions are still being worked out in law offices and courtrooms, but some best practices are emerging.

1. The Potential Adoptive Parent (PAP) Who Does Not Yet Have an Adoptive Placement.

Perhaps obviously, the best situation is when a PAP interested in a third-party adoption reaches out to an attorney at the very beginning of the adoption process before a placement is made. At this point, the attorney can direct the PAP to an experienced adoption attorney, or, if she has the requisite experience, work with the PAP to make sure that an evaluator is selected and that the home study is completed in a timely manner prior to placement. With proper planning, home studies can be completed prior to placement, even if they must be done on an expedited basis.

It is important, however, to prepare PAPs for the possibility that they may unexpectedly match with a birth mother who is due prior to the date the home study can reasonably be completed; that the birth mother with whom they have already matched may go into labor early, making placement desirable prior to the completion date of the home study; or that there may be other circumstances that make placement desirable prior to completion of the home study. Which leads us to...

2. The PAP Who Has an Adoptive Placement but Not a Completed Pre-Placement Home Study.

Not every birth parent makes an adoption plan in advance, and babies can be born unexpectedly before their due date. A family interested in adoption but without a completed home study may learn about an infant or child who is available for immediate placement. In these circumstances, the attorney must prepare the PAP for added cost and, potentially, a longer period of time between placement and finalization of the adoption. There are several options open to PAPs who find themselves in one of these positions.



The PAPs may choose to take placement and complete the home study during the sixty days allowed to elapse between surrender and filing of the adoption petition. As noted above, the statute does not have specific provision for this procedure, so there may be additional cost down the road if the issue must be specially addressed with the court.

The PAPs may go ahead and file the petition and pursue an order authorizing placement prior to completion of the home study under O.C.G.A. § 19-8-5(m), as outlined above. In this case, the PAPs should expect additional attorney fees for the preparation and filing of the appropriate motion and order. They should also have a plan of action in the unlikely event that the court denies the motion. It is ideal to assist the PAP with identifying the evaluator and not leave the decision to the judge. That way, the PAP has the best opportunity to select an evaluator with a fee schedule and personality that fits their needs.

Another option is for the PAPs to obtain Probate Court guardianship of the minor child prior to or simultaneously with placement. This would, of course, require the cooperation and consent of birth parents to occur quickly, but guardianship is an option even where publication would be required for those families where time is not an issue but cost is an issue. For the PAP who is capable of pursuing his or her own guardianship petition, the cost savings could be substantial. Compare the \$1,500 – \$2,500 fees charged by agencies for a home study to the approximately \$250 – \$300 that could be expected for court costs to pursue temporary guardianship in Probate Court. The cost could still be relatively low even if, before filing, the PAP had his or her attorney review the guardianship paperwork at the attorney's hourly rate. The time to complete a guardianship proceeding may, in some cases, be shorter than the time required to complete a home study, since guardianship hearings are routinely set three to four weeks after filing when both parents consent to the granting of the guardianship. PAPs must be aware, however, that some courts will order a home study even if the PAP has guardianship.

Finally, the PAP could seek custody through Superior Court prior to filing the adoption petition. This action could delay the adoption process substantially, depending on the Superior Court schedule in the particular jurisdiction, and could cost as much as pursuing a home study. However, if the birth parent or parents consent and the PAP can file a custody petition with a settlement agreement and proposed order attached, the process may go quickly. This may not be the most desirable step in all adoptions, but some clients may be interested in discussing the option.

3. The PAP Who Has an Adoptive Placement and a Completed Pre-Placement Home Study.

The PAP with both a pre-placement home study and an adoptive placement in place should expect a less paperwork-intensive and cheaper path to finalization since no "extra" legal work should be required.

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# 2014 Tribunal Project

By Rachel Platt

The Young Professionals Council (YPC) of Georgia Appleseed is pleased to announce a new pilot project, in collaboration with Fulton County Department of Family and Children Services (DFCS) and the Georgia Office of the Child Advocate (OCA). Its purpose is to insure that attorneys are trained and available to represent children in foster care who are facing school disciplinary tribunal hearings. During its pilot phase, the project will be focused on children in the legal custody of Fulton County DFCS who attend schools in Fulton or DeKalb counties or the City of Atlanta. It is anticipated that the project will be rolled out around the state as more DFCS offices join in the protocol and the pro bono attorney capacity grows.

The project arises from the work of Georgia Appleseed through its YPC. Its mission is to increase justice in Georgia through law and policy reform. The YPC engages younger professionals (39 and under) in the systemic level social justice work of Georgia Appleseed and is the author of the pro bono attorney training manual that will be the foundation of this collaborative pilot. This project fits Georgia Appleseed's mission and is one where members of the Child Protection and Advocacy Section are specifically sought to join in the effort.

In 2012, the YPC created the *Representing Students in School Tribunals in Georgia Attorney Training Manual* (<http://www.gaappleseed.org/docs/representing-students.pdf>) to provide attorneys with the information and practice guidance they need to become competent advocates in Georgia school tribunal hearings on behalf of students who are facing disciplinary charges. The YPC got involved in this effort as an outgrowth of Georgia Appleseed's projects focused on keeping more kids in class and out of juvenile court. The underlying legal research was spearheaded by pro bono lead law firm Kilpatrick Townsend Stockton. One of the team's recommendations for systemic change was the creation of a cadre of trained attorneys willing to accept pro bono representation of students from low income families facing school tribunal hearings so as to increase the opportunities for alternatives to out of school suspension, especially for minor misbehaviors or zero tolerance policies inappropriately applied to the facts of the case. The manual provides tools to assist attorneys in navigating the process of representing a student at a tribunal. The YPC has already used the manual to train attorneys.

Under Georgia law, K-12 public school students faced with proposed out of school suspension of more than 10 days, or with expulsion, are entitled to dispute the proposed disciplinary action at an administrative hearing often referred to as a 'tribunal.' The statute provides for basic due process protections related to notice, the opportunity to present witnesses and evidence, cross examine witnesses and the right to have counsel represent the student in the proceeding. Because of the impact a long term suspension or expulsion may have on a student's academic success and on the flow in the "school to prison pipeline," it is important that the tribunal process provide meaningful due process to a student, all the more so for students in foster care who sometimes face a tribunal hearing alone.

It was brought to the attention of Sharon Hill, executive director of Georgia Appleseed, that some foster children were attending tribunals not only without legal representation but also without any adult at their side. Unfortunately, due to the short timelines involved in the

school tribunal process, foster parents and the child's case worker are often unable to attend the tribunal. The child is left to fend for himself. Sometimes, the child feels like it is already a "lost cause," so they opt to engage in negative behaviors at the hearing, itself, in an effort to "get it over with," which can lead to longer suspensions or even expulsion. For children in foster care, who have already endured significant trauma based on the circumstances giving rise to their dependency cases, any negative behaviors displayed at school may technically be violations of school rules, but with proper representation, may be more appropriately addressed through trauma-informed interventions. To get to that outcome, the student needs an advocate who knows both the law and the alternatives to addressing negative behaviors in a proactive, positive way. Thus, the project was born.

The YPC will use its recently developed manual to continue training lawyers to represent students at the school discipline tribunals; lawyers will then have the opportunity through the pilot to volunteer to represent a foster child in need of assistance. The YPC has partnered with the Fulton County Department of Family and Children Services (DFCS) as well as the Office of the Child Advocate (OCA) to ensure that the students in need of assistance are identified and matched with an attorney. The three organizations have developed a protocol by which OCA will maintain an updated list of trained, available attorneys and will provide the updated list to DFCS. When a student is in need of representation, DFCS will match the student with an attorney trained by the YPC, and the attorney will represent the student at the tribunal.

The Mission of the OCA is to protect the children of the State of Georgia and to assist and restore the security of children whose well-being is threatened by providing independent oversight of persons, organizations, and agencies responsible for providing services to or caring for children who are victims of child abuse and neglect or whose domestic situation requires intervention by the state. This includes identifying patterns of treatment and service for children and making recommendations for necessary policy implications and systemic improvements. The partnership between the YPC and the OCA is one that directly impacts the safety of children in foster care and their education. If a child in foster care is suspended or expelled from school without the opportunity to contest the allegations on a fully informed and legal basis, the results can be devastating: reunification efforts can be undermined and the child might end up in the school to prison pipeline. Too often, after a tribunal hearing where there was no representation and the exclusionary punishment is not only imposed, but is extended, the foster parent ends up calling the case manager to insist on having the suspended or expelled child removed to a new placement ("I don't trust that child to be in my home while I am away at work.") and so the cycle of education instability, abandonment, and growing anger at "the system" continues for the child in foster care. This project seeks to put an end to that cycle and, if successful with Fulton County DFCS, will be poised for expansion around the state.

Georgia Appleseed's YPC, Fulton County DFCS and the Georgia Office of the Child Advocate are all very excited about this pilot project and look forward to its success. The YPC also looks forward to a joint pro bono attorney training effort with the Child Protection and Advocacy Law Section through ICLE in the near future.