Georgia’s Responsibilities Toward Children In Foster Care: A Reference Manual

Author
Danette Joslyn-Gaul, Esq.,
For the Barton Child Law and Policy Clinic
Emory Law School

Editor
Karen Worthington, Esq.,
Director, Barton Child Law and Policy Clinic

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**Obtaining this Document**

This document can be obtained from the Barton Child Law & Policy Clinic at Emory School of Law by contacting 404-727-6664 or info@childwelfare.net. A $20 fee will be charged for the document.

Postal inquiries should be sent to:
Barton Child Law & Policy Clinic
Emory School of Law
1301 Clifton Road
Atlanta, Georgia 30322

This document is also available free of charge on the world wide web at www.childwelfare.net.

**Corrections and Updates**

This manual was written in 2004 and provides information current through December 2004. Child welfare practices, policies, and laws change regularly so information in this manual will become outdated. Readers are advised to consult the most current versions of policy and practice materials cited as sources, as well as current statutory and case law. This manual is not intended to be used in lieu of legal advice and is not intended to create a lawyer-client relationship between the author and any reader.

Readers are encouraged to send corrections, comments and updates regarding this manual to info@childwelfare.net, using the subject heading: “comment on state's responsibilities manual.”
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Every system of care for children has responsibilities toward the children in that system, whether the system is a family, a community, a school or a state child welfare agency. An overarching goal of systems of care for children is to help children grow into productive, successful adults who contribute to society. The responsibilities of the systems derive from this goal: what does each system need to provide in order to ensure that every child in that system reaches adulthood safely and successfully?

In debating the first real federal child welfare legislation, the Social Security Act of 1935, Congress was deeply concerned about the desperate situation many children in America were in, due in large part to the Depression. That sweeping legislation was enacted after testimony specifying that the heart of any program for social security must be the child. Before that landmark legislation was enacted and since that time, child welfare reforms and systems have been fraught with the tension of preserving the family versus permanent placement away from a troubled home. This dichotomy has created shifting priorities towards children in this country for the better part of a century.

Regardless of the dichotomy, however, the reality is that the number of children in foster care in this country is growing. Each year across the United States thousands of children are removed from their homes and placed in temporary custody by the state. According to the Georgia Department of Human Resources, in July of 2003, there were 14,481 children in the custody of the state, with the vast majority being in non-relative foster homes. The length of stay in foster care is increasing as well, leading many to wonder how “temporary” such state custody actually is.

The statistics relating to foster children’s future as adults are troubling. Former foster children often face many challenges as adults. The Child Welfare League of America has found that three in ten of the nation’s homeless adults report a foster care history. According to the Casey Family Programs, of a study group being researched in the early 1990s, fewer than one in five were self supporting up to four years after they left foster care. Incarceration rates are also greater

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among the population of former foster children. Children also have greater challenges than normal while in foster care, including social, behavioral, and special educational issues at greater percentages than the average population.\(^6\)

When the state breaks through the historically strong rights of parents to raise their children, the state is acting *in loco parentis* (in place of the parent) and takes on many of the responsibilities of the parent as well as a new duty toward the child. That responsibility is developed through state and federal agencies, laws, regulations and practices that govern the duty to the child, all of which are extensive and confusing. In the State of Georgia alone, juvenile courts, superior courts, the Department of Human Resources (hereinafter DHR), law enforcement, hospitals, physicians, educators, the Department of Education, the Department of Community Health, County Departments of Family and Children Services and others have their own responsibilities to these children. There are even more entities that have been charged with the responsibility to make sure that the listed entities are in fact doing what they are required by law to do, such as the state’s Child Advocate.\(^7\)

This document provides an overview of the legal responsibilities that the State of Georgia has towards children in foster care. First, it briefly traces the historic development of child welfare in the United States. Second, it examines the development of Georgia law designed to comport with those federal requirements, and the rules, regulations and policies of the Georgia Department of Human Resources related to foster care. Third, it will address the issue of remedies that may be available when the state fails to live up to its responsibilities toward children in state custody, and how the state’s obligations can be enforced by the children as the intended beneficiaries of these obligations. The hope is that the document will provide a clear approach to examining foster care requirements and will provide an opportunity to examine gaps in practice.

## II. Federal Child Welfare Laws

Although informal private attempts to address child welfare have existed for centuries, formalized public social services for children have existed for less than 100 years.\(^8\) Federal efforts began with the development of public welfare efforts

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\(^7\) Among other things the Child Advocate is charged to identify, receive, investigate, and seek resolution of complaints made on behalf of children concerning any action, omission, or practice of an agency or any contractor that may affect the health, safety, or welfare of children. O.C.G.A. § 15-11-173(1)(2004).

in the 1930s, and even then states were allowed broad latitude regarding child welfare practices. Real federal requirements on state conduct occurred only after the 1962 publication of the seminal work *The Battered Child Syndrome* by Dr. C. Henry Kempe and Dr. Ray Heller.\(^9\) The battered child syndrome was a diagnosis of traumatic injuries to a child, most commonly to children under three at the hands of their parents, that highlighted the problem of child abuse.\(^10\) As a result of such research and associated advocacy, Congress became more active in developing national child welfare requirements.

Child welfare laws and systems in every state, including Georgia, are governed by a series of federal laws enacted since the 1970s. Pertinent federal laws related to child welfare for purposes of this paper include:

- 1974 Child Abuse Prevention and Treatment Act and subsequent reauthorizations (CAPTA)
- 1993 Family Preservation and Support Program
- 1997 Adoption and Safe Families Act (ASFA)
- Foster Care Independence Act of 1999
- Promoting Safe and Stable Families Amendments of 2001
- Keeping Children and Families Safe Act of 2003 (CAPTA reauthorization)

In addition to those federal laws there are other federal statutes impacting children in foster care. An extensive list of federal laws related to child welfare since 1974 is included in Appendix A.

The development of child welfare services in Georgia can be traced through these federal laws. The 1974 CAPTA required states to establish measures to protect children from neglect and abuse in their homes, including mechanisms for receiving reports of abuse. That in turn increased the number of children reported as abused or neglected, and therefore increased the number of children in foster care. Congress enacted the Adoption Assistance and Child Welfare Act of 1980 to alleviate the burden on the foster care system and to try to force states to find permanent placements for children lingering in foster care. That Act established reasonable efforts requirements to keep children at home or reunify them with their families. When reasonable efforts requirements did not result in permanent placements for children, Congress throughout the 1990s established additional funding schemes, grant programs, and eventually limited reunification efforts and made safety and permanency the priorities for children in out of home care. The specific requirements of each Act and Georgia’s response will be discussed below in Section II.

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\(^10\) Id.
A. Child Abuse Prevention and Treatment Act

The first large scale federal legislation enacted in response to the research on the battered child syndrome was the 1974 Child Abuse Prevention and Treatment Act (CAPTA). In addition to establishing a National Center on Child Abuse and Neglect, CAPTA offered states grants and the opportunity to enter into contracts with public agencies or nonprofits for demonstration programs and projects designed to prevent, identify, and treat child abuse and neglect. CAPTA also required that the states develop specific child protection laws to be eligible for certain funding.

In order to qualify for the federal appropriation approved under CAPTA, the states were required to enact certain laws related to abuse and neglect. CAPTA mandates, and responsive Georgia laws, are:

1. establishing immunity for those reporting child abuse and neglect (O.C.G.A. § 19-7-5(f));
2. requiring reporting for known and suspected instances of child abuse and neglect (O.C.G.A. § 19-7-5 (c)(1));
3. requiring investigations promptly upon any such report of child abuse or neglect and, in substantiated cases, to take immediate steps to protect the health and welfare of the abused and neglected child (O.C.G.A. § 19-7-5(e));
4. demonstrating that administrative procedures and state personnel were sufficient to handle child abuse and neglect cases effectively in the state;
5. providing for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians (O.C.G.A. § 19-7-5 (i));
6. cooperation of law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services (O.C.G.A. § 49-5-1, et. seq.);
7. requiring that in all cases involving an abused or neglected child which results in a judicial proceeding the appointment of a guardian ad litem to represent the child (O.C.G.A. § 15-11-9); and
8. dissemination of information regarding child abuse and neglect (O.C.G.A. § 49-5-41)

CAPTA established the first federal child welfare requirements on states, and resulted in a dramatic increase in the number of reports of abused and neglected children. The provisions of CAPTA have been modified several times since its original enactment, most recently during the 2003 reauthorization called the Keeping Children and Families Safe Act, discussed below in Section II(G).

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12 Id. at Sec. 4(b).
13 Id.
14 Kindred, supra note 8, at 445.
B. Adoption Assistance and Child Welfare Act of 1980

The Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act)\textsuperscript{15} established extensive federal requirements for states. The Child Welfare Act created a new funding class, Title IV-E funding, which provides for foster care maintenance payments. The term “foster care maintenance payments” is defined in Title IV-E of the Act as follows:

payments to cover the cost of (and cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as is necessarily required to provide the items described in the preceding sentence.\textsuperscript{16}

Title IV-E was established as a new class of funding under the Social Security Act, while all prior funding remained under Title IV-B of the Social Security Act. The Child Welfare Act specified that Title IV-B funding must relate to child welfare services, with such services defined as follows:

public social services which are directed toward the accomplishment of the following purposes: (A) protecting and promoting the welfare of all children, including handicapped, homeless, dependent or neglected children; (B) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children; (C) preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible; (D) restoring to their families children who have been removed, by the provision of services to the child and the families; (E) placing children in suitable adoptive homes, in cases where restoration to the biological family is not possible or appropriate; and (F) assuring adequate care of children away from their homes, in cases where the child cannot be returned home or cannot be placed for adoption.\textsuperscript{17}

The Child Welfare Act conditioned continued funding of foster care, adoption assistance, and child welfare services on the states’ fulfillment of statutory requirements. The funding schemes were created as part of the larger effort to promote permanency for children. It has been argued that the Child Welfare Act

\textsuperscript{16} Id. at Sec. 475(4). Title IV-E funds can also be used to recruit prospective foster/adoptive parents. See 45 C.F.R. § 1356.60.
\textsuperscript{17} Id. at Sec. 425 (a)(1).
resulted in a substantial increase in the number of children in foster care due to the fact that the federal funding scheme favored foster care by making foster care payments uncapped, whereas the social services referenced in the act were from capped funding.\(^{18}\)

The Child Welfare Act required a comprehensive state plan to be developed under both Title IV-E and Title IV-B, submitted to the federal government for approval, and once approved, applied consistently throughout the state.\(^{19}\) It also required a case plan for each child entering the foster care system, with detailed requirements and case review processes with timeline requirements.\(^{20}\)

Congress also federalized rules for entering foster care, obligations of states to families with children in foster care, and made explicit the conditions and timelines under which children may remain in foster care.\(^{21}\)

1. **Title IV-E and Title IV-B State Plans**

The Child Welfare Act as originally enacted required each state, including Georgia, to develop state plans with certain requirements. The plans must receive federal approval by the Department of Health and Human Services before any payments are made to the state under either Title IV-E Foster Care and Adoption Assistance or Title IV-B Child Welfare Services. The Georgia Title IV-E state plan under the Child Welfare Act as originally enacted was required to include the following:

1. A foster care maintenance payment system in accordance with federal requirements, including that there be a judicial determination of a need to remove a child from the home, that the child’s custody is the responsibility of the named state agency (in Georgia it is the Department of Human Resources, hereinafter “DHR”), and that the child is income eligible to receive public assistance.
2. That the same agency required to administer the prior federal requirements (Title IV-B) supervise the administration of the plan required by this Act; in Georgia that is DHR.
3. That the plan be in effect in all Georgia counties, and, if administered by them, be mandatory upon them.
4. Coordination of programs at the local and state level.
5. That those personnel administering the programs conduct personnel decisions on a merit basis.
6. DHR must make such reports as may be required from time to time by the Secretary of Health and Human Services.
7. DHR must monitor and conduct periodic evaluations of activities carried out pursuant to the Child Welfare Act.
8. Georgia must provide safeguards to restrict the use of or disclosure of information concerning individuals assisted under the state plan.

\(^{18}\) *Id.*
\(^{19}\) *Child Welfare Act, supra* note 15, at Sec. 471(a).
\(^{20}\) *Id.*
9. Georgia must inform the appropriate court or law enforcement agency of any reason to believe that the home or institution in which a child resides whose care is being paid for in whole or in part by either Title IV-B or Title IV-E funds is unsuitable for the child because of the neglect, abuse, or exploitation of the child.

10. That the standards referred to in Section 2003(d)(1)(F) be applied by the state to any foster family home or child care institution receiving funds under either Title IV-E or Title IV-B.

11. Periodic reviews of the standards and amounts paid as foster care maintenance payments to assure their continued appropriateness.

12. DHR must provide an opportunity for a fair hearing to any individual whose claim for benefits available pursuant to Title IV-E is denied or is not acted upon with reasonable promptness.

13. DHR is required to arrange for a periodic and independently conducted audit of the programs under Title IV-E and Title IV-B, at least once every three years.

14. Specific goals with respect to the maximum number of children who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and a description of the steps taken by the state to achieve such goals.

15. In each case effective October 1, 1983, reasonable efforts shall be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.

16. The development of a “case plan” for each child receiving foster care maintenance payments under the state plan, and a case review system which meets established timeline requirements outlined in the act.

The Georgia Title IV-B state plan as provided under the Child Welfare Act as originally enacted was required to include the following:

1. DHR will administer the plan required under Title IV-B, and to the extent that child welfare services are furnished by the same entity administering the plan, a single organizational unit will be responsible for furnishing the services (in Georgia it is the Division of Family and Children Services, hereinafter “DFCS”).

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22 The case plan is defined in the Act as: “a written document which includes at least the following: A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the judicial determination made with respect to the child in accordance with Section 472(a)(1); and a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.” Child Welfare Act, supra note 15, at Sec. 475(1).

23 Id. at Sec. 471(a).
2. Coordination between all child welfare services, irrespective of federal funding source.

3. Standards and requirements for other day care services pursuant to federal law shall apply with respect to day care services under this part, except insofar as eligibility is involved.

4. Training and effective use of paid paraprofessional staff, emphasizing full-time or part-time employment of low-income people, and for the use of volunteers in providing services.

5. A description of the services to be provided and geographic service areas covered.

6. A description of the steps Georgia will take to provide child welfare services and to make progress in covering additional political subdivisions, reaching additional children in need, and expanding and strengthening the range of existing services and developing new types of services, along with staff development and training plans.

7. Use the facilities and experiences of voluntary agencies in services for children.

8. DHR shall provide such reports, containing such information and participating in evaluations as the Secretary of the Department of Health and Human Services may require.

2. Reasonable Efforts

The Child Welfare Act required that in each case of a child alleged to have been abused or neglected, “reasonable efforts” will be made (a) prior to the placement of a child in foster care to prevent or eliminate the need for removal of the child from his or her home, and (b) to make it possible for the child to return to his or her home.

The term “reasonable efforts” was never defined. Generally speaking, it refers to the state’s efforts to eliminate the threat to the child and to preserve the family before taking the child from the home, or to provide services in an effort to reunify the child with the family. In reaction to the federal legislation, some states provided specific examples of what constitutes reasonable efforts. Although Georgia has codified reasonable efforts in response to the Child Welfare Act, there is no definition of the term itself in Georgia law. This issue was not clarified until the Adoption and Safe Families Act of 1997 was enacted, as discussed below in Section II(E).

24 Id. at Sec. 422 (b).
25 Id. at Sec. 471(a)(15).
27 Id. at 295 (citing various states’ efforts to specify reasonable efforts requirements).
3. Case Plans and Case Reviews
The Title IV-E state plan required the development of a case plan for each child receiving foster care maintenance payments, and for a case review system which meets certain federal requirements with respect to each of those children. Case plans are written documents that provide information about the child, including a description and rationale for the type of home in which a child is to be placed; a plan for assuring that the child receives proper care; a plan for assuring that services are provided to the parents, child, and foster parents in order to improve conditions in the parents’ home and facilitate return of the child to his own home or another permanent placement; and details about how the child’s needs will be addressed while in foster care.

A “case review system” is defined as a procedure for assuring that each child has a case plan designed to achieve placement in the least restrictive “most family like” setting available and in close proximity to the child’s home, consistent with the special needs of the child. It also requires that the child’s status be reviewed periodically, with specified reviews at six-month intervals to review the placement, compliance with the case plan, and the progress being made toward either reunification or adoption. A dispositional hearing is required to be held at eighteen months after the original placement to determine the future status of the child. The system is also required to have procedural safeguards in place for the parents regarding removal of the child from the child’s home, a change in the child’s placement, and any determination affecting visitation privileges of parents.

The requirements of the Child Welfare Act’s case plan, case review and reasonable efforts requirements, along with subsequent amendments to that Act, are codified in Georgia in the juvenile code at O.C.G.A. § 15-11-58, et. seq. The specific Georgia requirements are explained in greater detail in Section III(G) below.

C. 1993 Family Preservation and Support Program
In 1993 Congress provided additional funding for family support and preservation through Title IV-B by creating the Family Preservation and Support Program. Family preservation services help families at risk or in crisis and include programs designed to help children, pre-placement preventive services

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30 Id. at Sec. 475(1).
31 Id. at Sec. 475(5)(A).
32 Id. at Sec. 475(5)(B).
33 Id. For a more detailed discussion of changes to this requirement under ASFA, see infra Sec. II(E)(1).
34 Id. at Sec. 475(5)(C).
programs, programs designed to provide follow-up care, respite care and services designed to improve parenting skills.\textsuperscript{36}

The 1993 Family Preservation and Support Program also provided grants to the highest state courts in participating states so that they could conduct assessments of the implementation of foster care and adoption proceedings conducted pursuant to federal requirements.\textsuperscript{37} The assessments were to include the roles, responsibilities, and effectiveness of state courts in carrying out state laws requiring proceedings that implement parts of the Child Welfare Act, the advisability or appropriateness of foster care placement, whether to terminate parental rights, and whether to approve the adoption or other placement of a child.\textsuperscript{38}

In Georgia these grants are manifested in the Georgia Supreme Court’s Child Placement Project which was created by the Supreme Court of Georgia to assess and evaluate court proceedings involving abused, neglected, and deprived children as they move through Georgia’s superior and juvenile courts.\textsuperscript{39}

\textbf{D. Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996}

The Multi-Ethnic Placement Act was passed in 1994 to facilitate permanency for children by “decreasing the length of time that children wait to be adopted; preventing discrimination in the placement of children on the basis of race, color, or national origin; and facilitating the identification and recruitment of foster and adoptive families that can meet children’s needs.”\textsuperscript{40} Section 553 of MEPA was repealed in 1996 and replaced by language that clarifies that discrimination in placement of children or selection of foster and adoptive parents is illegal and strengthens the enforcement and compliance procedures of MEPA. The amendments to MEPA were included in the Small Business Job Protection Act of 1996.\textsuperscript{41}

MEPA-IEP has three basic mandates:

1. It prohibits states and other entities that are involved in foster care or adoption placements, and that receive federal financial assistance under title IV-E, title IV-B, or any other federal program, from delaying or denying a child’s foster care or adoptive placement on the basis of the child’s or the prospective parent’s race, color, or national origin;

\textsuperscript{36} \textit{Id.} at Sec. 13712
\textsuperscript{37} \textit{Id.}
\textsuperscript{38} \textit{Id.}
\textsuperscript{39} \textit{See generally} Georgia Supreme Court Child Placement Project, available at \texttt{http://www2.state.ga.us/Courts/supreme/cpp/index.html} (last visited Dec. 10, 2003).
\textsuperscript{40} Improving America’s Schools Act of 1994 (Howard M. Metzenbaum Multiethnic Placement Act of 1994), Pub. L. No. 103-382, Sec. 552(b); 108 Stat. 3518 (1994).
2. It prohibits these states and entities from denying to any individual the opportunity to become a foster or adoptive parent on the basis of the prospective parent's or the child’s race, color, or national origin; and
3. It requires that, to remain eligible for federal assistance for their child welfare programs, states must diligently recruit foster and adoptive parents who reflect the racial and ethnic diversity of the children in the state who need foster and adoptive homes.\textsuperscript{42}

\textbf{E. 1997 Adoption and Safe Families Act}

The legislative history of the 1997 Adoption and Safe Families Act, ASFA shows that the foster care caseload in the United States was roughly 500,000 by 1997.\textsuperscript{43} Due to the large number of children in foster care and the fact that children removed from home spent on average three years in foster care, there were concerted efforts to reform the system in such a way as to provide permanency for children in foster care.\textsuperscript{44} Committee testimony indicated barriers to adoptions were due to many factors, not the least of which was the “reasonable efforts” provisions in the Child Welfare Act.\textsuperscript{45} Despite the view that permanent placements for these children were preferable to “foster care drift,” courts often erred on the side of protecting the rights of parents.\textsuperscript{46}

The legislative history reflects that the bipartisan group that proposed the 1997 legislation believed that “rather than abandoning the federal policy of helping troubled families, what is needed is a measured response to allow states to adjust their statutes and practices so that in some circumstances states will be able to move more efficiently toward terminating parental rights and placing children for adoption.”\textsuperscript{47} ASFA encourages concurrent planning, which allows for attempts at reunification while simultaneously seeking alternative placements.\textsuperscript{48} It was previously thought that efforts for alternative placements could not be made at the same time that reasonable efforts were being made to reunite the child with the parent, but the growing problem of foster care drift forced legislators to rethink this position. In addition, ASFA encourages the placement of children with relatives. ASFA required the creation of an Advisory Panel on Kinship Care, and the submission of recommendations for needed changes in public policy on kinship care.\textsuperscript{49}

\begin{footnotes}
\footnotetext[44]{Id.}
\footnotetext[45]{Id.}
\footnotetext[46]{Id.}
\footnotetext[47]{Id. at 8.}
\footnotetext[48]{ASFA, supra note 43, at Sec. 101(a)(15)(F).}
\footnotetext[49]{Id. at Sec. 304.}
\end{footnotes}
1. New Emphasis on Safety and Permanence for Children

The passage of ASFA affirmatively shifted the focus of child welfare and juvenile court systems from parental rights and family preservation to safety and permanence for children. For instance, reasonable efforts requirements were clarified by providing that in making any required reasonable efforts, “the child’s health and safety shall be the paramount concern.”\(^{50}\) ASFA further clarified the reasonable efforts requirement by saying that reasonable efforts are required prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home and to make it possible for a child to safely return to the child’s home.\(^{51}\) However, ASFA also provides that if continuation of those reasonable efforts is inconsistent with the permanency plan for the child, reasonable efforts are to be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.\(^{52}\) It also authorizes states to bypass the reasonable efforts criteria under certain aggravated circumstances and, in those circumstances, to make efforts to place children for adoption or other permanent placement.\(^{53}\)

In addition, ASFA underscored that the safety of the children shall be of paramount concern in administering and conducting service programs by requiring the state to “develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of children.”\(^{54}\)

To further the goal of expeditious permanency for children, ASFA promotes adoption by rewarding states with incentive payments, particularly for special needs children,\(^{55}\) and requires states to initiate proceedings to terminate parental rights in the case of children who had been in foster care for 15 of the previous 22 months.\(^{56}\) There are three exceptions to the requirement to begin proceedings to terminate parental rights: (1) the child is being cared for by a relative at the option of the state; (2) a state agency has documented in the case plan a compelling reason for determining that filing such a petition would not be in the best interests of the child; or (3) the state has not provided to the family of the child, consistent with the time period in the state case plan, such services as the state deems necessary for the safe return of the child to the child’s home if reasonable efforts are required to be made.\(^{57}\)

In the case of children with a permanency goal of adoption or other permanent placement, states must document steps taken both to find an adoptive or other

\(^{50}\) Id. at Sec. 101 (a)(15)(A).
\(^{51}\) Id. at Sec. 101 (a)(15)(B).
\(^{52}\) Id. at Sec. 101 (a)(15)(C).
\(^{53}\) Id. at Sec. 101 (a)(15)(D).
\(^{54}\) Asfa, supra note 43, at Sec. 308.
\(^{55}\) Id. at Sec. 201(A).
\(^{56}\) Id. at Sec. 103(a)(3)(E).
\(^{57}\) Id. at Sec. 104(3).
permanent home for the child, including placement in the custody of another fit and willing relative, and to finalize the adoption or placement.\textsuperscript{58}

To help facilitate permanency, ASFA expanded the notice requirements for any review or hearing by requiring notice to foster parents and relatives and allowing them to be heard, rather than merely including the participation of the biological parents.\textsuperscript{59}

Finally, ASFA underscores the desire for permanency by requiring a “permanency hearing” instead of a “dispositional hearing,” and requires this proceeding to occur when the child has been in care twelve months, rather than eighteen.\textsuperscript{60}

The requirements of ASFA are codified in Georgia’s juvenile code, specifically at O.C.G.A. § 15-11-58, \textit{et. seq.}

\section{2. Criminal Record Checks}

ASFA mandates criminal record checks for prospective foster and adoptive parents. Prospective foster or adoptive parents due to receive federal funding through foster care maintenance payments or adoption assistance payments are prohibited from receiving the child if a record check reveals a felony conviction for certain crimes.\textsuperscript{61} Georgia also requires criminal record checks prior to granting any petition for adoption, regardless of whether the adoptive parent will receive federal funding pursuant to ASFA.\textsuperscript{62}

\section{3. Child and Family Services Reviews}

Along with promoting safety and permanency for children, ASFA established a new, results-focused approach to monitoring state compliance with their IV-B and IV-E plans. ASFA required the Administration for Children and Families, in coordination with states, to “develop a set of outcome measures including length of stay in foster care, number of foster care placements, and number of adoptions,” against which state performance would be assessed.\textsuperscript{63} Out of this directive were developed the state child and family services reviews that assess state compliance with federally set benchmarks in two areas: (1) seven outcomes related to safety, permanency, and child and family well-being; and (2) seven systemic factors related to the successful operation of systems for monitoring cases of children in foster care, training staff, providing appropriate services, recruiting and licensing foster and adoptive parents, and ensuring high quality services.\textsuperscript{64}

\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at Sec. 302.
\textsuperscript{61} Id. at Sec. 106.
\textsuperscript{62} O.C.G.A. § 19-8-16.
\textsuperscript{63} ASFA, \textit{supra} note 43, at Sec. 203.
Georgia’s child and family services review occurred in 2001. Georgia was not in substantial conformity with any of the seven outcome measures related to safety, permanency and child and family well-being, and was in substantial compliance with four of the seven systemic factors. Georgia, along with 22


65 Comprehensive information, including copies of the federal report and Georgia’s Program Improvement Plan, is available at http://www.childwelfare.net/cfsreview/ (last visited December 27, 2004).

66 U.S. Department of Health and Human Services. Administration for Children and Families, Region IV, Child and Family Services Reviews Final Report Georgia (July 2001), available at http://www.acf.hhs.gov/programs/cb/cwrp/staterpt/ga.htm (last visited Dec. 27, 2004). The list of outcomes with the items included in the outcomes, the list of systemic factors, and whether Georgia was in substantial conformity with each, is listed below.

**Child Safety Outcomes**

**Outcome 1:** Children are, first and foremost, protected from abuse and neglect. Georgia was not in substantial conformity with this outcome.

- Item 1: Timeliness of initiating investigations on reports of child maltreatment
- Item 2: Repeat maltreatment (Recurrence of maltreatment and Incidence of child abuse and/or neglect in foster care)

**Outcome 2:** Children are safely maintained in their own homes whenever possible and appropriate. Georgia was not in substantial conformity with this outcome.

- Item 3: Services to family to protect child(ren) in home and prevent removal
- Item 4: Risk of harm to child(ren)

**Permanency for Children Outcomes**

**Outcome 3:** Children have permanency and stability in their living conditions. Georgia was not in substantial conformity with this outcome.

- Item 5: Foster care re-entries
- Item 6: Stability of foster care placement
- Item 7: Permanency goal for child
- Item 8: Reunification, guardianship, or permanent placement with relatives, including the length of time to achieve permanency goal of reunification
- Item 9: Adoption, including the length of time to achieve permanency goal of adoption
- Item 10: Permanency goal of other planned permanent living arrangement

**Outcome 4:** The continuity of family relationships and connections is preserved for children. Georgia was not in substantial conformity with this outcome.

- Item 11: Proximity of foster care placement
- Item 12: Placement with siblings
- Item 13: Visiting with parents and siblings in foster care
- Item 14: Preserving connections
- Item 15: Relative placement
- Item 16: Relationship of child in care with parents

**Child and Family Well-being Outcomes**

**Outcome 5:** Families have enhanced capacity to provide for their children’s needs. Georgia was not in substantial conformity with this outcome.

- Item 17: Needs and services of child, parents, foster parents
- Item 18: Child and family involvement in case planning
- Item 19: Worker visits with child
- Item 20: Work visits with parent(s)

**Outcome 6:** Children receive appropriate services to meet their educational needs. Georgia was not in substantial conformity with this outcome.
other states and 1 territory, was not in substantial conformity with any of the seven outcome measures related to safety, permanency, and child and family well-being. No state has been in substantial conformity on all 14 outcomes and systemic factors.

As a result of its performance on the review, Georgia developed a plan that was approved by the federal government to bring it into substantial conformity with the federal outcomes and systemic factors. This program improvement plan (PIP), which was approved in October 2002, included specific action steps to address noted deficiencies, with quarterly progress reports and a re-assessment in two years. Penalties, estimated at $2.4 million, were suspended for the duration of Georgia’s two years. The PIP was due to be completed in October 2004 and should have been followed by a full re-assessment. However, as of January 2005, no penalties or re-assessment have been announced. States that do not show adequate progress as a result of the PIP implementation risk losing substantial federal child welfare funds.

Item 21: Education needs of the child
Outcome 7: Children receive adequate services to meet their physical and mental health needs.
Georgia was not in substantial conformity with this outcome.
Item 22: Physical health of child
Item 23: Mental health of child.

Systemic Factors
Systemic factor 1: Statewide information system. Georgia was not in substantial conformity with this systemic factor.
Systemic factor 2: Case review system. Georgia was in substantial conformity with this systemic factor.
Systemic factor 3: Quality assurance system. Georgia was in substantial conformity with this systemic factor.
Systemic factor 4: Training. Georgia was in substantial conformity with this systemic factor.
Systemic factor 5: Service array. Georgia was not in substantial conformity with this systemic factor.
Systemic factor 6: Agency responsiveness to the community. Georgia was in substantial conformity with this systemic factor.
Systemic factor 7: Foster and adoptive parent licensing, recruitment, and retention. Georgia was not in substantial conformity with this systemic factor. Id.

68 Id.
71 45 C.F.R. § 1355.36. See also U.S. General Accounting Office Report to Congressional Requestors, Child and Family Services Reviews, Better Use of Data and Improved Guidance Could Enhance HHS’s Oversight of State Performance, 7 (April 2004), available at http://www.gao.gov/new.items/d04333.pdf. “As of January 2004, no financial penalties had been applied, but according to data on the 41 states for which final CFSR reports have been released through December 2003, potential penalties range from $91,492 for North Dakota to $18,244,430 for California.” Id.
F. Promoting Safe and Stable Families Amendments of 2001

In 2001 Congress acted to enable states to establish, expand, or operate coordinated programs of family support services and family preservation services using Title IV-B funds. It also extended the program for the court improvement project started in 1993 and authorized expenditures for those improvements that the highest state courts deemed necessary as a result of the assessments of child welfare systems. Those improvements include providing for the safety, well-being, and permanence of children in foster care, and implementing a corrective-action plan, as necessary, resulting from reviews of child and family service programs.

G. Keeping Children and Families Safe Act of 2003

The Keeping Children and Families Safe Act of 2003 amends and reauthorizes CAPTA and expands the authorized expenditure of Title IV-B funds in a number of ways. This Act places certain requirements on states, including that court appointed special advocates (CASAs) and guardians ad litem receive appropriate training; that states must conduct criminal background record checks for all adults residing in prospective foster and adoptive households; and that state policies regarding public access to court proceedings to determine child abuse and neglect ensure the safety and well-being of the child, parents, and families. It also adds the following responsibilities to the existing work of citizen review panels: (1) provide for public outreach and comment in order to assess the impact of current procedures and practices upon children and families in the community; (2) review of Child Protective Services (CPS) “practices” as well as policies and procedures; and (3) submit recommendations to improve child protection services system at the state and local levels. Furthermore, it requires the annual state data reports to include: (1) a summary of the activities of the state citizen review panels; and (2) the number of children under the care of the state child protection system who are transferred into the custody of the state juvenile justice system. Finally, the 2003 amendments require states to have “provisions and procedures for referral of a child under the age of 3 who is involved in a substantiated case of child abuse or neglect to early intervention services funded under Part C of the IDEA.” Georgia’s response to the 2003 Act, as well as the other federal acts related to child welfare, are discussed in more detail below in Section III.

73 Id. at Sec. 107.
75 Id. at Sec. 114.
76 Id.
77 Id.
H. Funding for Foster Care

The status of being a child in foster care does not preclude a child from receiving the benefit of any funds available for children in Georgia. However, various funding sources exist specifically for children in foster care, including Title IV-E Foster Care, Title IV-B Child Welfare Services, Medicaid, and independent living funds. Title IV-E and Title IV-B are described in this section. Medicaid for children in foster care is described below in Section V(A)(1), which pertains to the health needs of the child. Independent living services are described in Section V(D)(1) pertaining to the special requirements of older children in foster care.

Maximizing all available sources of financial support for individual children and the operation of Georgia’s child welfare system as a whole is critical to ensuring that children in state custody receive the services they need in a timely manner. Toward this end, when children enter care, the case manager must make a referral to economic support within five days to determine IV-E and Medicaid eligibility.

1. Title IV-E Foster Care Payments

As mentioned earlier, Title IV-E was created as part of the Child Welfare Act of 1980. The Title IV-E Foster Care program’s purpose is to help states provide proper care for eligible children who need placement outside their homes, either in a foster family home or an institution. This program provides funds to assist with the costs of foster care maintenance for eligible children; administrative costs to manage the program; and training for foster parents and private and state agency staff.

This program is an open-ended entitlement program, which means that there is no limit on the amount of money Georgia may be reimbursed by the federal government, provided the expenses qualify and appropriate procedures are followed. In other words, in theory at least, the federal government cannot arbitrarily refuse to provide the funding. For every Georgia dollar expended for eligible expenses for foster care maintenance or for the foster care program under Title IV-E, Georgia is reimbursed at the same rate as it is reimbursed for medical assistance payments under Medicaid, which was 60 cents on the dollar.

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79 Georgia Department of Human Resources, Social Services Manual, Chapter 1000, Sec. 1016, available at http://www.childwelfare.net/DHR/policies/odis_fc_index.html (last visited Dec. 26, 2004) [hereinafter Manual]. The DHR Social Services Manual is a fluid document, as transmittals are issued by the state office as needed. The manual that is posted online states that the effective date is 7/1/2003. However, some parts of the DHR Social Services Manual are not available online, and dates are not available for the hard copies used, although great care was taken to ensure the hard copies were the most current version in existence.

80 Id. at Sec. 1003.2.

For administrative expenditures pertaining to foster care, the state is reimbursed at 50 cents on the dollar, and for state training expenditures, at 75 cents on the dollar.\(^\text{83}\)

In order for a child to qualify for this funding source, and thereby permit Georgia to request that the federal government match the child’s foster care maintenance expenses, the child must meet both IV-E eligible and IV-E reimbursable.\(^\text{84}\) IV-E eligibility is determined on a one-time basis when a child enters care and is “based on the child’s situation at the time of removal.”\(^\text{85}\) For a child to be IV-E eligible, the first court order sanctioning the removal of the child must contain language indicating that “continuation in the home is contrary to the welfare of the child” or that “placement is in the best interest of the child.”\(^\text{86}\) In addition, there must be a court finding within 60 days after the child was placed in care regarding reasonable efforts made by DFCS.\(^\text{87}\) Finally, there must be “AFDC Relatedness” with the child, which means that the “child must have a relationship to the Aid to Families with Dependent Children program within six months prior to or during the eligibility month.”\(^\text{88}\) AFDC relatedness has to do in large part with the income of the household from which the child was removed and is based on the AFDC program and its policies that were in effect in Georgia on July 16, 1996; it is explained in great detail in the DFCS foster care policy manual.\(^\text{89}\)

While eligibility for Title IV-E is only determined once, determination of IV-E reimbursement is made every six months and depends on the child’s placement, the child’s financial need, and judicial determinations.\(^\text{90}\)

2. Title IV-B Child Welfare Services

Title IV-B Child Welfare Services are issued with the goal of keeping families together.\(^\text{91}\) While Title IV-E funds are solely for the support and maintenance of the foster care and adoption systems, Title IV-B funds can be used for family support, family preservation, time-limited family reunification services, and services to promote and support adoptions.\(^\text{92}\) Unlike Title IV-E funds, Title IV-B funds are not based on the financial need of the child or the child’s family.

\(^{82}\) Id. The federal government contributes between 50 percent and 83 percent of the payment for services provided under each state’s Medicaid program. The federal matching assistance percentage (FMAP) varies from state to state and year to year because it is based on the average per capita income for each state. States with lower per capita incomes receive a higher FMAP. The FMAP for Administrative costs is uniform across the states at 50 percent. Health Care Financing Administration and Department of Health and Human Services: “A Profile of Medicaid: Chartbook 2000,” at 8, available at http://www.cms.hhs.gov/charts/medicaid/2tchartbk.pdf.

\(^{83}\) ACF Website, supra note 81.

\(^{84}\) Manual, supra note 79 at Sec. 1002.1

\(^{85}\) Id.

\(^{86}\) Id. at Sec. 1003.4.

\(^{87}\) Id.

\(^{88}\) Id. at Sec. 1003.6.

\(^{89}\) Id.

\(^{90}\) Id. at Sec. 1003.9.

\(^{91}\) ACF Website, supra note 81.

\(^{92}\) Id.
Instead, the eligibility for Title IV-B funds is based on the state’s compliance with federal law as evidenced by the monitoring of the state’s plan, as discussed in Section II(B)(1).

Also unlike Title IV-E funds, Title IV-B funds are capped and, therefore, limited. As a result, states prefer to tap funds from Title IV-E where possible for foster care maintenance payments, and reserve Title IV-B funds for other services.

While IV-B is a federal funding stream, in Georgia’s foster care policy manual, the term “IV-B” is used to refer to children in foster care who are ineligible for IV-E funding. These children are classified as “Child Welfare Foster Care” or “IV-B,” and services provided for the child and his family are paid for through a mix of federal and state dollars (but not from IV-E).

3. Foster Care Per Diems

Foster parents or other care providers are paid a per diem rate for the care of children in state custody. The Level of Care system governs payment rates to private providers. The per diem rate paid to DFCS foster homes is set by the Legislature and approved by the Governor; in 2003, it was based on the age of the child: birth to five, $12.75; ages six to twelve, $13.50; ages thirteen and above, $14.25. The Relative Care Subsidy, which provides financial support for children who were in DFCS custody and then after a court order of non-reunification were placed in the custody of a relative until age 18, is $10.00 per day.

Children in foster care receive an initial clothing allowance since they are often brought into state custody under emergency circumstances with no time to gather their belongings. In addition, there is an annual clothing allowance. In 2002 the initial clothing allowance for children from birth to age twelve was $150, and for those children ages thirteen and over it was $300. The annual clothing allowance for all children in foster care was $100 in 2002.

4. Other Sources of Income for the Child in Foster Care

The county DFCS may receive income on behalf of a child from a number of different sources, and those funds must be maintained in a restricted fund for the benefit of the child and to offset expenses made on behalf of the child. Sources include child support, Supplemental Security Income (SSI), Veterans Administration (VA) benefits, and Social Security to name a few. The case manager is required to closely monitor the child’s account to ensure that the

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93 Id.
94 See generally, Manual, supra note 79, at Sec. 1003.3.
95 Id. at Sec. 1016.24.
96 Id. at Sec. 1016.31.
97 Id. at Sec. 1016.9.
98 Id. at Sec. 1016.10.
99 Id. at Sec. 1016.9.
100 Id. at Sec. 1016.10.
101 Id. at Sec. 1016.33.
102 Id.
child’s income does not exceed income eligibility requirements for various benefits. Fiscal policies require, with a few exceptions, that all of the child’s income be applied first to offset per diem expenses, second to pay for other state reimbursable items, and finally to pay for the personal needs of the child not reimbursable from state or county funds; e.g. clothing, supplemental supervision, unusual medical, or child restraint devices to name a few. DFCS policies govern the release of the child’s restricted funds.

Another form of income for some children is through the Zebley Trust. As a result of the 1990 United States Supreme Court decision Sullivan v. Zebley, 493 U.S. 521 (1990), certain foster children who had been denied Supplemental Security Income in the past due to prior eligibility criteria received sizeable Supplemental Security Income lump sums. After the court decision some children became eligible to receive the SSI payment retroactively. The lump sums were deposited in the “Zebley Trust Fund” and held for these “Zebley Children” until the child reaches 18 or 21 depending on how long the child remains in placement. Setting aside these funds in a trust “protects the money from being counted as resources for the SSI child” and therefore is not used to offset current expenses.

The trustee makes the decision on whether to release the funds, and this decision is based on the person’s intended use of the funds for her long-term needs plus the youth’s self-sufficiency and maturity to manage the funds. The disbursement is also governed by regulations of the Social Security Administration.

III. Georgia Child Welfare Laws: Obtaining Custody of Children

Like other states, Georgia responded to the federal requirements by creating a statutory framework to meet the federal mandates regarding child welfare. The agency deemed responsible for complying with these federal laws is DHR. DHR’s responsibilities are described in the Children and Youth Act, which establishes DHR as the exclusive agency for virtually all aspects of public child welfare and youth services. DHR is responsible for creating the state plans under both Title IV-E and Title IV-B, as well as regulations, policies and

103 Id.
104 Id.
105 Id.
106 Id. at Sec. 1016.33 (referring generally to Sullivan v. Zebley, 493 U.S. 521 (1990)).
107 Id.
108 Id.
110 Id.
111 Id.
112 O.C.G.A. §§ 49-5-1 – 49-5-23.
procedures to implement those plans. In the creation of such rules and regulations, DHR is bound by the rules of the Georgia Administrative Procedure Act. DHR’s responsibilities include:

1. providing social services and facilities for children and youths who require care, control, protection, treatment, or rehabilitation and for the parents of such children;
2. setting standards for social services and facilities for children and youth;
3. cooperating with public and voluntary agencies, organizations, and citizen groups in the development and coordination of programs and activities on behalf of children and youth; and
4. promoting community conditions and resources that help parents to discharge their responsibilities for the care, development and well-being of their children.
5. It is the further purpose...to provide for a qualified group of citizens and leading professionals who will identify and study the problems of youth, recommend and effect possible solutions, and work actively for state and local action to prevent children and youths from becoming inmates of our prisons, patients in our mental hospitals, and persons dependent on public assistance programs.

Georgia also created a statutory framework for child deprivation and termination of parental rights proceedings in response to the federal laws referred to in the prior section. This framework also includes mandatory reporting requirements for abuse and neglect, and the investigation of a child abuse report by DHR, any local department of family and children services, law enforcement agency, or district attorney.

Before a state may remove a child from the home and place her in foster care, however, it must receive temporary custody of the child. Once the child is in state custody, DHR has many obligations toward children who cannot be adequately cared for in their own homes. Case law, consent decrees, statutes, rules, regulations, policies and procedures create these duties to children in foster care. The section below describes the steps necessary to remove a child from the home, the decision to place a child in foster care, the requirements involved in determining whether reunification is appropriate, Georgia’s obligations while the child is in state custody, and the termination of parental rights.

A. Mandated Reporters

Georgia requires certain individuals to report allegations of abuse to a child welfare agency, or if there is no such agency, to an appropriate law enforcement

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\(^{114}\) O.C.G.A. § 49-5-2.
\(^{115}\) See generally O.C.G.A. § 15-11-94.
\(^{116}\) O.C.G.A. § 19-7-5.
\(^{117}\) Id.
authority or district attorney.\textsuperscript{118} The list of persons required to report such abuse is lengthy, but includes physicians or hospital personnel, dentists, licensed psychologists, teachers, counselors, child welfare agency personnel, child counseling personnel, and law enforcement personnel.\textsuperscript{119} To encourage reports of alleged abuse without fear of reprisal, such persons are immune from civil or criminal liability that might otherwise be incurred or imposed. In fact, any person making such a report in good faith, whether required by law to do so or not, is immune from liability.\textsuperscript{120}

In 2003 the Georgia Supreme Court reaffirmed the good faith basis of immunity for those who report child abuse allegations.\textsuperscript{121} In \textit{O’Heron v. Blaney} the Court held that the physician reporting alleged abuse was immune from liability because the trigger for the duty to report is reasonable cause to believe, and that is based on whether the information available at the time would lead a reasonable person in the position of the person reporting to suspect abuse.\textsuperscript{122} Once reasonable cause has been established, the person reporting the alleged abuse is by definition acting in good faith and the person is immune from liability.\textsuperscript{123}

\subsection*{B. Confidentiality}

The Georgia Code provides that each and every record concerning reports of child abuse, which includes records relating to children who are deemed

\begin{itemize}
\item \textsuperscript{118} O.C.G.A. § 19-7-5(e).
\item \textsuperscript{119} O.C.G.A. § 19-7-5(c)(1)
\item \textsuperscript{120} O.C.G.A. § 19-7-5(f).
\item \textsuperscript{121} O’Heron v. Blaney, 276 Ga. 871 (2003).
\item \textsuperscript{122} \textit{Id.} at 873.
\item \textsuperscript{123} \textit{Id.}
\end{itemize}
neglected, that are in the custody of DHR or other state or local agencies are declared to be confidential.\textsuperscript{124} Access to those records is prohibited except under very specific enumerated exceptions,\textsuperscript{125} which are discussed below.

Certain entities are required to have reasonable access to records concerning reports of child abuse.\textsuperscript{126} DHR or a county or other state or local agency may permit access to records and may release information to a number of entities when deemed appropriate by such department.\textsuperscript{127} Those entities include an

\textsuperscript{124} O.C.G.A. §49-5-40(b).
\textsuperscript{125} Id.
\textsuperscript{126} O.C.G.A. § 49-5-41(a).

Those entities entitled to such information include (1) a legally mandated child protective agency that is investigating a report of child abuse or treating a child or family which is the subject of a report; (2) a court in camera by subpoena when it finds that access may be necessary for determination of an issue, or not in camera if otherwise admissible; (3) a grand jury by subpoena upon its determination that access to such records is necessary in the conduct of its official business; (4) a district attorney or any assistant district attorney in Georgia who may seek such access in connection with official duty; (5) any adult who makes a report of suspected child abuse as required by Georgia law, but such access is limited to the child concerning whom the report was made, shall disclose only whether the investigation by the department or governmental child protective agency of the reported abuse is ongoing or completed and, if completed, whether child abuse was confirmed or unconfirmed, and shall only be disclosed if requested by the person making the report; (6) any adult requesting information regarding investigations by the department or a governmental child protective agency regarding a deceased child when such person specifies the identity of the child, but such access is limited; (7) the State Personnel Board by administrative subpoena upon a finding by an administrative law judge that access to such records may be necessary for a determination of an issue involving departmental personnel and that issue involves the conduct of such personnel in child related employment activities with certain limitations; (7.1) a child advocacy center which is certified by the Child Abuse Protocol Committee of the county where the principal office of the center is located and which is operated for the purpose of investigation of known or suspected child abuse and treatment of a child or family which is the subject of a report of abuse under certain circumstances; (8) police or any other law enforcement agency or any medical examiner or coroner investigating a report of known or suspected abuse or any child abuse protocol committee or subcommittee; and (9) the Governor, the Attorney General, the Lieutenant Governor, or the Speaker of the House of Representatives when he or she makes a written request to the commissioner of DHR which specifies the name of the child for which access is sought and which describes the need to have access in order to determine whether the laws are being complied with or whether the laws need to be changed to protect children.

\textsuperscript{127} O.C.G.A. § 49-5-41(c).

The department or a county or other state or local agency may permit access to records concerning reports of child abuse and may release information from such records to the following persons or agencies when deemed appropriate by such department:

(1) A physician who has before him a child whom he reasonably suspects may be abused;

(2) A licensed child-placing agency, a licensed child-caring institution of this state which is assisting the Department of Human Resources by locating or
providing foster or adoptive homes for children in the custody of the department, or an investigator appointed by a court of competent jurisdiction of this state to investigate a pending petition for adoption;

(3) A person legally authorized to place a child in protective custody when such person has before him a child he reasonably suspects may be abused and such person requires the information in the record or report in order to determine whether to place the child in protective custody;

(4) An agency or person having the legal custody, responsibility, or authorization to care for, treat, or supervise the child who is the subject of a report or record;

(5) An agency, facility, or person having responsibility or authorization to assist in making a judicial determination for the child who is the subject of the report or record of child abuse, including but not limited to members of officially recognized citizen review panels, court appointed guardians ad litem, certified Court Appointed Special Advocate (CASA) volunteers who are appointed by a judge of a juvenile court to act as advocates for the best interest of a child in a juvenile proceeding, and members of a county child abuse protocol committee or task force;

(6) A legally mandated public child protective agency or law enforcement agency of another state bound by similar confidentiality provisions and requirements when, during or following the department's investigation of a report of child abuse, the alleged abuser has left this state;

(7) A child welfare agency, as defined in Code Section 49-5-12, or a school where the department has investigated allegations of child abuse made against any employee of such agency or school and any child remains at risk from exposure to that employee, except that such access or release shall protect the identity of:
   (A) Any person reporting the child abuse; and
   (B) Any other person whose life or safety has been determined by the department or agency likely to be endangered if the identity were not so protected;

(8) An employee of a school or employee of a child welfare agency, as defined in Code Section 49-5-12, against whom allegations of child abuse have been made, when the department has been unable to determine the extent of the employee's involvement in alleged child abuse against any child in the care of that school or agency. In those instances, upon receiving a request and signed release from the employee, the department may report its findings to the employer, except that such access or release shall protect the identity of:
   (A) Any person reporting the child abuse; and
   (B) Any other person whose life or safety has been determined by the department or agency likely to be endangered if the identity were not so protected;

(9) Any person who has an ongoing relationship with the child named in the record or report of child abuse any part of which is to be disclosed to such person but only if that person is required to report suspected abuse of that child pursuant to subsection (b) of Code Section 19-7-5, as that subsection existed on January 1, 1990;

(10) Any school principal or any school guidance counselor, school social worker, or school psychologist who is certified under Chapter 2 of Title 20 and who is counseling a student as a part of such counseling person's school employment duties, but those records shall remain confidential and information obtained therefrom by that counseling person may not be disclosed to any person, except that student, not authorized under this Code section to obtain those records, and such unauthorized disclosure shall be punishable as a misdemeanor; and
agency or person having the legal custody, responsibility, or authorization to care for, treat, or supervise the child who is the subject of a report or record of child abuse, including citizen review panels, court appointed guardians ad litem, certified Court Appointed Special Advocate (CASA) volunteers who are appointed by a judge of a juvenile court to act as advocates for the best interest of a child in a juvenile proceeding, and members of a county child abuse protocol committee or task force.

Foster parents and child-placing agencies are permitted reasonable access to non-identifying information from placement records compiled by any state department or agency having custody of a child who has been placed in the care or custody of the agency or foster parent or for whom foster care is being sought, except for records that cannot be re-disclosed under state or federal law. The entity that is holding the record is to respond to a request by either the foster parent or agency within 14 days of receipt, and the foster parent or agency will be permitted access to: reports of abuse, social history of the child and the child’s family, the medical history including mental health history of the child as permitted by law, and educational records as well as any plan of care or placement plan developed by the department provided no identifying information is given.

Birth parents have access to documents in the DFCS case records as outlined in the J.J. v. Ledbetter consent decree. Georgia law and DFCS policies are

(11) The "Department of Early Care and Learning or the Department of Education, Division of School Readiness. Id.

128 O.C.G.A. §§ 49-5-41(c)(4) and (5).

129 O.C.G.A. § 49-5-41(d).

130 Id.

131 Manual, supra note 79, at Sec. 1013.2.

Any parent/guardian of a child for whom Department has placement authority, is entitled to receive copies, upon request, of all the following portions of the case record pertaining to the parent/guardian and the child:

1. Contact sheets summarizing information observed or given orally by parents and others to the Case Manager except as expressly prohibited (see below).

2. Family Assessment, 30-Day Case Plan (Form 389), Case Review (Form 390), Written Transitional Living Plan (Form 391), Social Services - Case Plan (Form 387), Case Plan: Goals and Steps (Form 388), Case Review Summary.

3. Other summary reports prepared by county department staff.

4. Court petitions and orders.

5. Service plans, goals and objectives, and service agreements other than those in 2 above.

6. Pictures of abuse and neglect (pictures may be viewed by the client and/or his attorney at reasonable times arranged with the Case Manager. The following portions of the case record shall not be released to the parent/guardian by the county department:

7. Any initial or corroborating reports of child abuse and neglect or information in the case record quoted from third parties constituting a direct report of child abuse or neglect.

8. Medical records (e.g., hospital records or physicians, psychologists, psychiatrists, evaluation and treatment summaries).

silent regarding a child’s access to his or her DFCS case records and court records.\textsuperscript{132}

There are misdemeanor criminal provisions associated with violations of the confidentiality protections of case records, for those who provide or authorize anyone access to records who is not among the enumerated entities entitled to access,\textsuperscript{133} as well as anyone who obtains or seeks to obtain access knowing he or she is not entitled to access the records.\textsuperscript{134}

Child abuse and deprivation records (except medical and mental health records which have separate confidentiality protections) are not confidential for a child who dies (1) while in the custody of a state department, agency or foster parent; (2) while receiving protective services from DFCS, while DFCS has an open case file on the child, or who has been, or whose siblings, parents, or other caretakers have been, the subject of a report to the division within the previous five years; or (3) and at the time of death was the subject of an investigation, referral, or complaint by the state of Georgia’s Child Advocate.\textsuperscript{135} In all three instances, those records are available under Georgia’s Open Records Act.\textsuperscript{136}

**C. How the State Obtains Custody**

A child may be brought into temporary state custody in a number of ways, including a parent voluntarily placing the child, a physician taking a child into care under certain circumstances, a juvenile court order finding the child deprived, and a superior court order directing placement of the child in state custody.

The most prevalent method of granting custody of the child to the state is via a deprivation hearing in juvenile court. In Georgia the number of deprivation cases filed in 2001 was 16,509.\textsuperscript{137} The juvenile court has sole authority to determine that a child should be removed, even temporarily, from the home.\textsuperscript{138} Often there

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\textsuperscript{132} But see O.C.G.A. § 15-11-79 (explicitly providing access for “counsel or the accused” to certain court documents in a delinquency case in which the juvenile has been adjudicated delinquent for use in conjunction with subsequent offenses).

\textsuperscript{133} O.C.G.A. § 49-5-44(a).

\textsuperscript{134} O.C.G.A. § 49-5-44(b).

\textsuperscript{135} O.C.G.A. § 49-5-41(e).

\textsuperscript{136} Id.


are a number of steps required before a petition alleging deprivation is brought before the juvenile court.

Once a report of suspected abuse is made, there are policies and procedures requiring child protective services personnel to investigate the allegations within a specified period of time.\textsuperscript{139} In the event that DHR determines that the allegations are warranted, it has a number of options. These include offering services to the family to ensure the protection of the child without removing the child, with follow up visits to ensure improved conditions; seeking removal of the child on an emergency basis pending a hearing before the juvenile court on the deprivation petition;\textsuperscript{140} leaving the child at home and determining whether to file a petition for deprivation.\textsuperscript{141} As an overarching requirement in determining the best option for a particular circumstance, DFCS’ policies require attention to the following:

Preserving and strengthening families to prevent the unnecessary removal of children from their homes is an integral part of permanency planning. It recognizes that most children’s need for permanency is best met by insuring the continuity of family relationships.\textsuperscript{142}

While at the same time, however, DFCS policies also require that:

The health and safety of children is the paramount concern when making critical decisions about whether a child should be removed from the home as the only alternative for the child to be protected and safe.\textsuperscript{143}

DFCS’ foster care policies also acknowledge the lasting effect removal may have on the child by noting that removal represents the “most extreme alternative the county department can take to assure a child is protected.”\textsuperscript{144} The DFCS foster care policies go on to note: “[t]ypically a child feels much self-blame for what has happened...Fears are exaggerated in the child’s mind, and removal is equated with the loss of family, perhaps even permanently.”\textsuperscript{145}

When DFCS determines that a child should be removed from the home, Georgia law provides for detailed procedures to assure the safety of the child as well as the rights of parents, all of which will be described below.

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\textsuperscript{139} Child Protective Services also have procedures and policies for assessment which focus on investigating the incident, ensuring the safety of the child and determining the risk of future maltreatment. A case plan is developed to respond to the family in need of services.

\textsuperscript{140} O.C.G.A. § 15-11-45(a)(4).

\textsuperscript{141} O.C.G.A. § 15-11-38.

\textsuperscript{142} Manual, supra note 79, at Sec. 1002.1.

\textsuperscript{143} Id.

\textsuperscript{144} Id.

\textsuperscript{145} Manual, supra note 79, at Sec. 1009.

\textsuperscript{145} Id.
D. Emergency Removal Requirements

If it is determined that a child should be removed from the home immediately, even before a hearing, a child may be placed with a relative or other person who is able to bring the child to court when required, or an order for the child’s detention or shelter care may be made by the court. \(^\text{146}\) Shelter care is the last alternative, and if chosen, shelter care may only be provided in a licensed foster home or home approved by the court which may be either a public or private home, the home of the non-custodial parent or other relative, or a facility operated by a licensed child welfare agency. \(^\text{147}\)

If a child is brought before the court or delivered to a detention or shelter care facility designated by the court, the intake officer is required to make an investigation immediately and release the child unless it appears that the detention or shelter care is warranted or required. \(^\text{148}\)

If a child is removed from the home without a hearing, an informal detention hearing must be held no later than 72 hours after the child is placed in shelter care. \(^\text{149}\) The statute requires that reasonable notice of the hearing be given to a child and the parents, guardian, and other custodian if they can be found. \(^\text{150}\) In order for the child to remain in care outside of his or her home, a judge must find probable cause at the detention hearing that the child is deprived and that the child should not remain in the home pending the deprivation hearing. \(^\text{151}\)

A hearing and finding that a child is deprived is required before a juvenile court may determine that the temporary custody of the child should be with someone other than the child’s parent or legal custodian. The term deprived is defined in the Georgia code, but essentially describes a child who has been abused or neglected by his or her legal caretakers, including parents. The statutory definition of a deprived child is a child who:

1. Is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for the child’s physical, mental, or emotional health or morals;

\(^{146}\) O.C.G.A. § 15-11-46.
\(^{147}\) O.C.G.A. § 15-11-48(f).
\(^{148}\) O.C.G.A. § 15-11-49(a).
\(^{149}\) O.C.G.A. § 15-11-49(c)(3) (providing that, if the 72 hour time period expires on a Saturday, Sunday, or legal holiday, the hearing shall be held on the next day which is not a Saturday, Sunday, or legal holiday).
\(^{150}\) O.C.G.A. § 15-11-49(c)(4) (relating to the informal detention hearing pertaining to a child alleged to be deprived: “[r]easonable notice of the hearing specified in this subsection, either oral or written, stating the time, place, and purpose of the detention hearing, shall be given to the child and, if they can be found, to the child’s parents, guardian, or other custodian. In the event the child’s parents, guardian, or other custodian cannot be found, the court shall forthwith appoint a guardian ad litem. Prior to the commencement of the hearing, the court shall inform the parties of their right to counsel and to appointed counsel if they are indigent persons and of the child’s right to remain silent with respect to any allegations of delinquency or unruly conduct.”) (emphasis added).
\(^{151}\) See generally O.C.G.A. § 15-11-46.
2. Has been placed for care or adoption in violation of law; 
3. Has been abandoned by his or her parents or other legal custodians; or 
4. Is without a parent, guardian, or custodian.\textsuperscript{152}

Courts in Georgia have found that children are deprived within the meaning of the above statute when the parent did not provide appropriate supervision or proper discipline, when a child suffered from poor personal hygiene, repeated absences from school, and due to the emotional or mental instability of the custodial parent.\textsuperscript{153} The juvenile court is the only body authorized to issue an order to remove a child from the home and to place the child in the temporary custody of the state of Georgia. Therefore the role of the juvenile court is absolutely critical in Georgia in determining the future of the child. The Georgia General Assembly noted the importance of the juvenile court system in child welfare by expressing that the construction and purpose of Georgia juvenile courts should be liberally construed to the end of protecting children, preferably in their own home, with the care, guidance, and control that will be conducive to the child’s welfare and the best interests of the state.\textsuperscript{154}

\textbf{E. Deprivation Proceedings}

Before a juvenile court may hear allegations of deprivation, such allegations must be brought before it in the form of a petition.\textsuperscript{155} Anyone can file a petition alleging deprivation.\textsuperscript{156} The court is required to notify the parties to the proceeding of the time and place of the proceeding, and the summons is to state that a party is entitled to have the court provide counsel to the parties.\textsuperscript{157} Representation by legal counsel is entitled at all stages of any proceeding alleging deprivation, and if a person is indigent, the court is required to appoint someone on the party’s behalf.\textsuperscript{158} A party has to request counsel and express a desire for counsel once informed that he or she is entitled to it.\textsuperscript{159}

\textbf{1. Who is a party?}

The law is clear that a party to the proceeding is entitled to counsel, but it is not as clear as to what constitutes a “party” in a deprivation proceeding. Although there is no definition of party for purposes of establishing the right to counsel, Georgia law broadly defines party to include one who is directly interested in the subject matter of the litigation, has the right to adduce testimony, to cross-

\textsuperscript{152} O.C.G.A. § 15-11-2(8).
\textsuperscript{154} O.C.G.A. § 15-11-1.
\textsuperscript{155} O.C.G.A. § 15-11-35(4).
\textsuperscript{156} O.C.G.A. § 15-13-38. “Subject to Code Section 15-11-37, the petition alleging delinquency, deprivation, or unruliness of a child may be made by any person, including a law enforcement officer, who has knowledge of the facts alleged or is informed and believes that they are true.” \textit{Id}.
\textsuperscript{157} O.C.G.A. §§ 15-11-39(c) and (d).
\textsuperscript{158} O.C.G. A. §15-11-6(b).
\textsuperscript{159} \textit{Id}. 37
examine witnesses, to control the proceedings, and to appeal from the judgment.\textsuperscript{160}

Georgia courts have found that a party to a proceeding does not have to be an individual, and therefore an organization may also be entitled to counsel. If an organization brings a petition alleging deprivation of a child, it may be entitled to counsel in the form of the district attorney or other lawyer to bring the action. In \textit{In re K.R.C.}, for example, the Georgia Court of Appeals found that the trial court did not err by appointing counsel to represent CASA at a hearing to terminate parental rights.\textsuperscript{161} It determined that since CASA filed the deprivation petition, counsel could be appointed for CASA since the juvenile court on its own motion could appoint counsel for such purposes if the district attorney is unable to assist.\textsuperscript{162}

Georgia law is not clear about whether a child in a deprivation proceeding is a party. Georgia case law specifies that a party in these proceedings, one who is “directly interested in the subject matter of the litigation,” is entitled to counsel,\textsuperscript{163} and also specifies that when a “court does appoint a guardian ad litem to represent the minor, the minor is in effect made a party to the action and has standing through the guardian ad litem to appeal.”\textsuperscript{164} In addition, in the deprivation case of \textit{McBurrough v. Department of Human Resources}, the Georgia Court of Appeals stated, “Under our juvenile code, all parties, including the child, should be represented by an attorney.”\textsuperscript{165} This statement implies both that children are parties and that as such, they should be represented by attorneys.

2. Notice

Georgia law provides explicit guidance regarding notice and hearing rights for parents at all hearings. For the shelter care hearing, only reasonable notice is required.\textsuperscript{166} For the hearing on the deprivation petition, summons should be issued to the parents, guardian, or other custodian requiring them to appear in court and containing a copy of the petition.\textsuperscript{167} For the permanency hearing and periodic reviews, the court is required to provide written notice or ask an entity to provide written notice of a review or hearing, and such notice must include the right of the parents to be participants at such review or hearing.\textsuperscript{168}

The law is less clear regarding the notice and hearing rights of children, the custodian of the child, the foster parents of the child, and any preadoptive parents or relatives providing care for the child. Regarding children, a child is

\textsuperscript{162} Id. (citing O.C.G.A. § 15-11-41(c)).
\textsuperscript{166} O.C.G. A. §15-11-49(c).
\textsuperscript{167} O.C.G. A. §15-11-39(b).
\textsuperscript{168} O.C.G. A. §15-11-58(p).
required to receive reasonable notice of the shelter care hearing.\textsuperscript{169} For the hearing on the deprivation petition, if the child is 14 years or older, the child is to receive a summons with a copy of the petition.\textsuperscript{170} The code does not state what notice is required for a child younger than 14. The level of participation a child has in hearings and the notice that may be required for permanency hearings and periodic reviews may depend on whether a court considers a child a party to the case, as discussed above in Section III(E)(1).

For the custodian of the child, the foster parents of the child, and any preadoptive parents or relatives providing care for the child, notice must be provided for the permanency hearing and periodic reviews and they must be given the opportunity to provide oral or written testimony.\textsuperscript{171} However, the statute specifically provides that notice is not construed to require a custodian, foster parent, preadoptive parent, or relative caring for the child to be made a party to the hearing solely on the basis of such notice and an opportunity to be heard.\textsuperscript{172}

In 2003 SB 236 passed the Georgia General Assembly and was signed into law. That legislation provided many changes to the notice requirements and other provisions of Code Section 15-11-58, and those changes have been incorporated into the above discussion.\textsuperscript{173}

3. Right to Representation

Although a parent or other party to the deprivation proceeding may request the assistance of counsel,\textsuperscript{174} a representative must be provided for a child not represented by the child’s parent, guardian or custodian.\textsuperscript{175} In the event the interests of the other party conflict or may conflict with the child’s interests, the court will appoint a guardian ad litem for the child.\textsuperscript{176} Although the Georgia code does not define guardian ad litem, it is defined in Barron’s Law Dictionary, Third Edition, as a guardian who is appointed by the court to represent a ward in a legal proceeding. In hearings to find a child deprived, as well as case reviews and permanency hearings, an attorney or court appointed special advocate, or both, may be appointed as the child’s guardian ad litem.\textsuperscript{177}

Guardians ad litem in Georgia are frequently Court Appointed Special Advocates, or CASAs. CASAs are volunteers under the umbrella organization National Court Appointed Special Advocate Association, and those volunteers handle a variety of services for courts depending on local court rules or the wishes of a

\textsuperscript{169} O.C.G. A. §15-11-49(c).
\textsuperscript{170} O.C.G. A. §15-11-39(b).
\textsuperscript{171} O.C.G.A. § 15-11-58(p).
\textsuperscript{172} Id.
\textsuperscript{173} For information on implementing the provisions of SB236, see Guide to the Implementation of SB 236, a Project of the Georgia Model Courts Committee, a Joint Project of the CJCJ Permanency Planning Committee and the Child Placement Project (November 2003).
\textsuperscript{174} O.C.G.A. § 15-11-6 (b).
\textsuperscript{175} O.C.G.A. § 15-11-9 (b).
\textsuperscript{176} Id.
\textsuperscript{177} Id.
When a CASA serves as a guardian ad litem, the charge to the volunteer is to advocate for the child throughout the judicial process including reunification, often in a way that goes beyond legal interests and takes other factors into consideration to determine the child’s desires and best interests. A CASA is a volunteer who has been screened and trained regarding deprivation, child development and juvenile court procedures and has been appointed a guardian ad litem by the court in a deprivation case. A CASA serves as an officer of the court and is expected to tell the court what she or he believes is in the child’s best interests.

Georgia’s statutes addressing the representation of children and the appointment of guardians ad litem are conflicting and send mixed messages to the bench and bar regarding when a child is entitled to legal representation in a deprivation case. It is settled in Georgia law that a child must be represented by a lawyer at any hearing to terminate parental rights. It is unsettled, however, whether a child is considered a party in deprivation proceedings, how the federal requirement that a child be represented by a guardian ad litem at all stages of proceedings is implemented, and how Georgia’s conflicting statutes regarding representation of a deprived child should be reconciled.

4. Burden of Proof

Georgia law provides that at any hearing on a petition alleging deprivation of a child, the court shall make and file its finding as to whether the child is a deprived child by clear and convincing evidence. Georgia courts have found that present deprivation is required; in other words, the juvenile courts do not have jurisdiction over a child who has allegedly been or will allegedly be deprived, but instead only as to one who is deprived presently. It is also settled that the definition of deprived child focuses on the need of the child, and not the intent or fault of the parent.

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178 Although beyond the scope of this document, the history of CASA is of benefit and more information about this volunteer grassroots organization can be found on its website, www.casanet.org. Furthermore, the responsibilities of appointed CASAs are outlined in part in the Manual, supra note 79, at Sec. 1013.20.
179 O.C.G.A. § 15-11-9(a).
180 See O.C.G.A. § 15-11-98 (child must be appointed an attorney for termination of parental rights proceedings); § O.C.G.A. 15-11-9 (at any stage of proceedings, the court shall, at request of a party or on its own motion, appoint a guardian ad litem, which can be an attorney or a CASA, for the child); and O.C.G.A. 15-11-6(b) (a child has a right to legal representation, attorney, in deprivation proceedings).
181 O.C.G.A. § 15-121-98(a).
182 For a more detailed and expansive review of these conflicting provisions, see generally Beth Locker and Melissa Dorris, A Child’s Right to Legal Representation in Georgia Abuse and Neglect Proceedings, GA BAR J. Vol. 10, no. 1 (August 2004).
183 O.C.G.A.§ 15-11-54(c).
5. Required Court Findings

If a court determines that the child should be removed from the home, the order must be based on the court’s finding that continuation in the home would be contrary to the welfare of the child. Such a finding is required by federal law in order for Georgia to recover foster care maintenance payments from the federal government under Title IV-E. If the court places the temporary legal custody of the child in DHR-DFCS, it must determine whether reasonable efforts were made by DFCS and any other appropriate agencies to preserve and reunify the family prior to the placement of the child in the custody of DHR. In determining “reasonable efforts,” the child’s health and safety shall be the paramount concern. The court order must find that reasonable efforts were made to keep the child in his or her home prior to placing the child in DHR’s custody, and also that reasonable efforts are being made to permit the child to return home safely or to have another permanent placement finalized.

There are statutory circumstances in which reasonable efforts to reunify children with their families are not required, and these include a parent having subjected the child to certain aggravated circumstances such as sexual abuse, a parent having committed other specified crimes against a child, or a parent having had the rights to another child terminated involuntarily.

If reasonable efforts are not required to reunify based on the parents’ prior acts or crimes, i.e. if the court approves a non-reunification plan, a permanency hearing for the child must be held within 30 days of the approval of the non-reunification plan, and reasonable efforts must be made to achieve permanent placement for the child in a timely manner in accordance with the permanency plan.

188 O.C.G.A. § 15-11-58(a).
190 O.C.G.A. § 15-11-58(a).
191 O.C.G.A. §§ 15-11-58(a)(4)(A),(B) and (C):
(4) Reasonable efforts of the type described in paragraph (2) of this subsection shall not be required to be made with respect to a parent of a child if a court of competent jurisdiction has determined that:
(A) The parent has subjected the child to aggravated circumstances which may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse;
(B) The parent has:
   (i) Committed murder of another child of the parent;
   (ii) Committed voluntary manslaughter of another child of the parent;
   (iii) Aided or abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of another child of the parent; or
   (iv) Committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
(C) The parental rights of the parent to a sibling have been terminated involuntarily. Id.
6. Disposition

Once an order finding a child deprived has been entered, the juvenile court has a number of options related to the disposition of the case. The dispositional hearing permits a wide variety of evidence to determine the appropriate disposition.\textsuperscript{193} Dispositional options include returning the child to the home subject to conditions and limitations as the court may prescribe; transferring temporary legal custody to any individual who is found by the court to be qualified to receive and care for the child; transferring temporary legal custody to an agency or other private organization licensed or otherwise authorized by law to receive and provide care for the child; or, transferring temporary legal custody to any public agency authorized by law to receive and provide care for the child.\textsuperscript{194}

Any disposition order must outline the provisions and conditions of temporary legal custody and must include a provision that the court alone can approve or direct the transfer of the physical custody of the child back to the parents, guardian or other custodian either upon the occurrence of specified circumstances or in the discretion of the court.\textsuperscript{195} Georgia law requires that prior to transferring temporary legal custody to DFCS in a dispositional order, DHR and the court must conduct a reasonably diligent search for a parent or relative of the child or other persons “who have demonstrated an ongoing commitment to the child.”\textsuperscript{196} That search must be conducted within 90 days from the date on which the child was removed from the home, and the results of the search are to be documented in writing and filed with the court at the time of the first review.\textsuperscript{197}

F. DFCS’ Obligations to the Child

Once legal custody is obtained, there are many responsibilities that accompany that new status. Legal custody is defined as the legal status created by court order, and embodies the following rights and responsibilities:

1. the right to have the physical possession of the child or youth;
2. the right and the duty to protect, train and discipline him;
3. the responsibility to provide him with food, clothing, shelter, education and ordinary medical care; and

\textsuperscript{193} O.C.G.A. § 15-11-56(a) specifies:
In dispositional hearings under subsection (c) of Code Section 15-11-54 and in all proceedings involving custody of a child, all information helpful in determining the questions presented, including oral and written reports, may be received by the court and relied upon to the extent of its probative value even though not otherwise competent in the hearing on the petition. The parties or their counsel shall be afforded an opportunity upon request to examine and controvert written reports so received and to cross-examine individuals making the reports, except that portions of such reports not relied on by the court in reaching its decision which, if revealed, would be prejudicial to the interests of the child or any party to the proceeding may be withheld in the court's discretion. Confidential sources of information need not be disclosed. \textit{Id.}

\textsuperscript{194} O.C.G.A. § 15-11-55(a).
\textsuperscript{195} O.C.G.A. § 15-11-55(a)(2).
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
4. the right to determine where and with whom he shall live.\textsuperscript{198}

Beyond the extensive requirements of the juvenile court proceedings governing reasonable efforts to find permanent placement for a child, there are little statutory guidelines for the placement of a child in foster care or the obligations of DFCS once the child is in foster care. The juvenile code does require that when temporary custody is given to DFCS, an individual within DFCS be assigned to the child’s case plan and listed as responsible for providing whatever services are necessary to ensure permanent placement pursuant to the mandated case plan.\textsuperscript{199} DFCS generally refers to such individuals as case managers, although that term is not codified in Georgia for foster care purposes.

\textbf{G. Permanency Planning}

Once the court determines that the child should be removed from the home and placed in temporary state custody, two efforts are underway at once. First, until judicially determined otherwise, reasonable efforts are required to reunify the child with his or her parents or to find another permanent placement. That process is painstakingly codified in the juvenile code with timelines, hearings, and notice requirements.\textsuperscript{200} Second, while that process is underway, efforts are made to guarantee that the health and well-being of the child are provided for while the child is in foster care, a process that is not as clear in state statutes. Instead, those guarantees are provided through federal statutes, case law, regulations, and policies and procedures as more particularly described below in Section IV.

As noted above, Georgia has established an elaborate statutory scheme to make sure that efforts are underway to reunify the child with the family as quickly and safely as possible, or alternatively to find permanent placement for the child. In addition to the paramount interest of the health and safety of the child, federal law requires the state to make substantial efforts to find permanent placement for children as quickly as possible. The DFCS foster care manual provides that the placement process must be carefully managed in order to minimize the impact of separation and loss experienced by the child. Reunification should occur when safety can be assured for the child, and aftercare services should be offered to support the reunified family and better assure that the child can be safely maintained in his or her home.\textsuperscript{201}

Timelines for permanency determinations, the development of the child’s case plan, and periodic reviews of the case plan are all established and explained in Georgia’s juvenile code. The timelines that trigger different actions are based on the date the child is considered to have entered foster care, which is specifically defined in Georgia statute as the date of the first judicial finding that the child has

\textsuperscript{198} O.C.G.A. § 49-5-3(12).
\textsuperscript{199} O.C.G.A. § 15-11-58(c)(5).
\textsuperscript{200} See generally O.C.G.A. § 15-11-58.
\textsuperscript{201} Manual, supra note 79, at Sec. 1009.
been subjected to child abuse or neglect, or the date that is 60 days after the date on which the child is removed from the home, whichever is earlier.\footnote{202}{O.C.G.A. § 15-11-58(k).}

The permanency planning process, including regular case reviews, requires input from many sources, including parents, foster parents, any preadoptive parents (those who are interested in adopting a particular child), guardians ad litem, DFCS, and judicial citizen review panels. Judicial citizen review panels are panels of volunteers appointed by the juvenile court and used frequently in juvenile court proceedings for case reviews and other processes. Panels usually review cases and make findings and recommendations to the judge regarding the case.\footnote{203}{Id.} The procedures for their appointment and deliberations are found in the Georgia Uniform Juvenile Court Rules, Chapter 24, which among other things requires certain training for panel members.\footnote{204}{Ga. Unif. Juv. Ct. Rules, Chapter 24 (2003), available at http://georgiacourts.org/councils/cjcj/uniform_rules.htm.}

1. Case Plans

Developing a case plan for each child in state custody is one of the first steps in the permanency timeline, is mandated in federal law, and codified in Georgia law.\footnote{205}{Child Welfare Act definition of case plan, supra note 22.} To develop the case plan, a meeting must be held between DFCS, a judicial citizen review panel if applicable, and the parents and children when available.\footnote{206}{O.C.G.A. § 15-11-58(b).} Notice to the parents is provided five days in advance of the meeting and must explain that the report generated from the meeting will be considered as part of the court’s order.\footnote{207}{Id.} At the conclusion of the meeting, DFCS must submit a written report to the court that either includes a case plan to reunify the child with the family or one that recommends that reunification is not appropriate.\footnote{208}{Id.} The report becomes part of the case record of the child, and contains any dissenting information or additional recommendations by either the judicial citizen review panel or the parents.\footnote{209}{Id.} If the plan is for reunification, the parents must receive a copy of the report at the same time that it is submitted to the court.\footnote{210}{Id.} The parents then have five days to request a hearing on the plan; without such a request, the plan is considered by the court without a hearing.\footnote{211}{Id.} The plan is supposed to be developed within 30 days of when the child enters care and in practice the case plan often becomes part of the court order during the dispositional hearing. “A copy of … [the portions of the] plan that involve the permanency goal and the services to be provided to the child” must be provided

\footnote{202}{O.C.G.A. § 15-11-58(k).}
\footnote{203}{Id.}
\footnote{205}{Child Welfare Act definition of case plan, supra note 22.}
\footnote{206}{O.C.G.A. § 15-11-58(b).}
\footnote{207}{Id.}
\footnote{208}{Id.}
\footnote{209}{Id.}
\footnote{210}{O.C.G.A. § 15-11-58(d).}
\footnote{211}{Id.}
\footnote{212}{O.C.G.A. § 15-11-58(b).}
to the child’s custodian, foster parents, and preadoptive parents or relatives caring for the child.\(^{213}\)

If reunification is the recommendation to the court, the report and any order must include the following, which then becomes the case plan:

1. The purpose for which the child was placed in foster care, including a statement of the reasons why the child cannot be adequately protected at home and the harm which may occur if the child remains in the home and shall also include a description of the services offered and the services provided to prevent removal of the child from the home;
2. A discussion of how the plan is designed to achieve a placement in a safe setting that is the least restrictive, most family-like, and most appropriate setting available and in close proximity to the home of the parents, consistent with the best interests and special needs of the child;
3. A clear description of the specific actions to be taken by the parents and the specific services to be provided by the Division of Family and Children Services of the Department of Human Resources or other appropriate agencies in order to bring about the identified changes that must be made in order for the child to be safely returned home; provided, however, that all services and actions required of the parents which are not directly related to the circumstances necessitating separation cannot be made conditions of the return of the child without further court review;
4. Specific time frames in which the goals of the plan are to be accomplished to fulfill the purpose of the reunification plan;
5. The person within the Division of Family and Children Services of the Department of Human Resources or other agency who is directly responsible for ensuring that the plan is implemented; and
6. Consideration of the advisability of a reasonable visitation schedule which allows the parents to maintain meaningful contact with their children through personal visits, telephone calls, and letters.\(^{214}\)

If the recommendation is that reunification is not appropriate, the report should address each reason requiring removal and should include several things. First, it should include the reason for placing the child in foster care, with a clear statement of why the child cannot be safely protected at home and what harm may occur if the child remains, and the services provided in an effort to prevent removal. Second, it should include a clear statement of the reasons the court should find that reasonable efforts to reunify the child will be detrimental to the

\(^{213}\) O.C.G.A. § 15-11-58(d).

\(^{214}\) O.C.G.A. § 15-11-58(c).
child, and that such services need not be provided. Finally, the report should state whether any of the grounds for terminating parental rights exist.\textsuperscript{215}

2. Nonreunification Plans

If the report by DFCS includes a determination that reunification is not appropriate, the court is required to hold a hearing to review the report and DFCS’ determination that reunification services should not be provided.\textsuperscript{216} A plan which does not provide for reunification services is commonly referred to as a non-reunification plan and can be submitted to the court at any time while the child is in state custody. The court hearing on the non-reunification plan must be held within 30 days of the filing of the report and the parents are to receive notice of the hearing.\textsuperscript{217} At this hearing, DFCS is required to “notify the court whether and when it intends to proceed with termination of parental rights….”\textsuperscript{218} If DFCS says it will not do so, the court may appoint a guardian ad litem to determine whether proceeding to terminate parental rights is appropriate.\textsuperscript{219} Hearings on non-reunification plans are commonly called “permanency hearings,” as are the hearings held when the child has been in foster care for twelve months.\textsuperscript{220} When the permanency hearing is held as a result of a non-reunification plan, the judge must hold the hearing rather than a judicial citizen review panel.\textsuperscript{221}

When reviewing a recommendation that reunification is not appropriate, a court is required to find by clear and convincing evidence “whether reasonable efforts to reunify a child with his or her family would be detrimental to the child and that reunification services … should not be provided….”\textsuperscript{222} Certain instances create a presumption that reunification is not appropriate, and they include:

1. the parent has unjustifiably failed to comply with a previously ordered plan [for reunification];
2. a child has been removed from the home on at least two prior occasions and reunification services were made available on those occasions;
3. any of the grounds for terminating parental rights exist…; or
4. [if the statutory aggravating circumstances exist which would preclude reunification, including that parental rights by the same parent(s) to a sibling have been terminated involuntarily.]\textsuperscript{223}

If the court determines that reasonable efforts are not required to reunify a child with his or her family but that termination of parental rights is not in the best

\textsuperscript{215} O.C.G.A. § 15-11-58(f).
\textsuperscript{216} O.C.G.A. § 15-11-58(e).
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} O.C.G.A. § 15-11-58(g).
\textsuperscript{220} Id.
\textsuperscript{221} See O.C.G.A. § 15-11-58(j).
\textsuperscript{222} O.C.G.A. § 15-11-58(o)(3)(the hearing has to be conducted by judge when it is as a result of a finding that reunification is not appropriate).
\textsuperscript{223} Id.
interests of the child, the court can “enter a custody order which shall remain in
effect until the child's eighteenth birthday [with one of the following provisions]:

1. Placing the child in the custody of a relative of the child if such
a person is willing and ... is found by the court to be qualified
to receive and care for the child;
2. Placing the child in the custody of any nonrelative individual
who ... is found by the court to be qualified to receive and care
for the child;
3. Placing the child in the custody of a suitable individual
custodian in another state ...; or
4. In the case where the court has found a compelling reason
that [the above-mentioned placements are] not in the child's
best interest, placing the child in the custody of an agency or
organization licensed or otherwise authorized by law to
receive and provide care for the child which is operated in a
manner that provides such care, guidance, and control as
would be provided in a family home as defined in the court's
order.224

Despite the “permanent” custody arrangement ordered by the court for these
children at the permanency hearing, these custody arrangements may be
modified following a petition for modification by a party or upon motion of the
court at any time.225 In addition, if a child is placed with a relative, the court
requires a review of placement every 36 months by a probation officer, judicial
citizen review panel, or other person or agency designated by the court.226 If the
court places the child with a qualified non-relative or suitable individual custodian
in another state, the review of placement must occur every twelve months.227 The
parent shall receive notice of placement reviews and has the opportunity to
request modification of such an order.228

3. Periodic Reviews

All cases of children in DFCS custody are to be reviewed within 90 days of the
entry of the dispositional order, but no later than six months following the child’s
placement.229 The review may be conducted by either a judge or by judicial
citizen review panels.230

At each review of a child in state custody, DFCS is required to notify the court
whether DFCS plans to terminate parental rights.231 If DFCS does not plan to
initiate termination proceedings, the court may decide to appoint a guardian ad

224 O.C.G.A. § 15-11-58(i).
225 Id.
228 O.C.G.A. § 15-11-40(c); O.C.G.A. § 15-11-58.
229 O.C.G.A. § 15-11-58(k).
230 Id.
231 Id.
litem to determine whether a petition to terminate parental rights should be filed.\textsuperscript{232}

If a judicial citizen review panel conducts the review, the panel is required to transmit its report and recommendations along with any revised plan for reunification or other permanency plan to the court and the parents within five days after review.\textsuperscript{233} If a party does not request a hearing within five days of receipt of the report, the court will enter a supplemental order with any revised plan if necessary.\textsuperscript{234} If there is a hearing, notice requirements must be met and the judge is required to enter a supplemental order within a reasonable time afterwards.\textsuperscript{235} The supplemental order shall provide that the child will either return home with or without conditions, that the child will continue in the current placement, or that the child will continue in the current placement but that it is no longer appropriate for his or her needs.\textsuperscript{236} In the event the supplemental order finds the latter, the court will direct DFCS to submit a new plan for court approval within ten days.\textsuperscript{237} “A copy of those portions of the report of the judicial citizen review panel that involve the recommended permanency goal and the recommended services to be provided to the child” must be provided to the child’s custodian, foster parents, and preadoptive parents or relatives caring for the child.\textsuperscript{238}

In the event the judicial citizen review panel determines that termination of parental rights should be considered because the parents have failed to comply with a reunification plan, the panel may recommend that a petition to terminate parental rights be prepared.\textsuperscript{239} Any party or officer of the court may file such a petition and the court may appoint a guardian ad litem to determine whether such a petition should be filed.\textsuperscript{240}

4. Permanency Hearings

Dispositional orders placing a child in foster care are only good for 12 months,\textsuperscript{241} and may be extended only once for 12 months.\textsuperscript{242} If DFCS wants to extend custody beyond 24 months, DFCS must file a new petition for deprivation.\textsuperscript{243}

When a child has been in foster care for 12 months, a permanency hearing must be held.\textsuperscript{244} DFCS is required to submit a report containing a recommended

\textsuperscript{232} ld.
\textsuperscript{233} ld.
\textsuperscript{234} O.C.G.A. § 15-11-58(l).
\textsuperscript{235} Id.
\textsuperscript{236} O.C.G.A. § 15-11-58(l)(1)(3).
\textsuperscript{237} O.C.G.A. § 15-11-58(l)(3).
\textsuperscript{238} O.C.G.A.§ 15-11-58(k).
\textsuperscript{239} O.C.G.A. § 15-11-58(l).
\textsuperscript{240} Id.
\textsuperscript{241} O.C.G.A. § 15-11-58(k).
\textsuperscript{244} O.C.G.A. § 15-11-58(o)(1).
permanency plan that includes when the child shall be returned home, referred for termination of parental rights and adoption, referred for legal guardianship, placed with a willing relative permanently, or placed in another planned permanent living arrangement.\textsuperscript{245} These placements are listed in the order of preference stated in ASFA.\textsuperscript{246} If DFCS recommends another planned permanent living arrangement, it must document compelling reasons why none of the other options are in the best interests of the child.\textsuperscript{247} The agency’s report must include documentation of the steps to be taken by DFCS to finalize the permanent placement of the child.\textsuperscript{248} When the permanency plan recommended is referral for termination of parental rights and adoption, the report shall include child specific efforts to recruit adoptive parents.\textsuperscript{249}

A judicial citizen review panel may conduct the permanency hearings and they may be conducted in the same manner as a case review.\textsuperscript{250} Notice provisions to the legal custodian, foster parents, and any preadoptive parents apply and the panel is required to transmit its report, including its findings and recommendations as well as those of DFCS, to the court and the parties within five days of the end of the hearing.\textsuperscript{251}

Any party may request a court hearing on the panel’s recommendations and if no request is made, the court may enter a supplemental order without a hearing.\textsuperscript{252} Any supplemental order must include “when the child is to be returned home, referred for termination of parental rights and adoption, referred for legal guardianship, or placed permanently with a fit and willing relative.”\textsuperscript{253} If the court finds that none of those options is in the child’s best interests, then the court must document the compelling reason why no alternative options are suitable, and provide that the child be placed in another planned permanent living arrangement.\textsuperscript{254}

The court or judicial citizen review panel that conducts the permanency hearing is required to find as a matter of fact whether DFCS has made reasonable efforts to finalize the permanency plan in effect.\textsuperscript{255} For those children who have been placed out of state, those placements are to be reviewed to determine whether they are “appropriate and in the best interest of the child.”\textsuperscript{256} For children who have attained the age of 14, the court shall identify services needed to assist the child to transition from foster care to independent living.\textsuperscript{257} Factual findings are

\begin{itemize}
  \item \textsuperscript{245} O.C.G.A. § 15-11-58(o)(2).
  \item \textsuperscript{246} ASFA, supra note 43, at Sec. 302
  \item \textsuperscript{247} O.C.G.A. § 15-11-58(o)(2).
  \item \textsuperscript{248} Id.
  \item \textsuperscript{249} Id.
  \item \textsuperscript{250} O.C.G.A. § 15-11-58(o)(3).
  \item \textsuperscript{251} Id.
  \item \textsuperscript{252} Id.
  \item \textsuperscript{253} O.C.G.A. § 15-11-58(o)(5).
  \item \textsuperscript{254} Id.
  \item \textsuperscript{255} O.C.G.A. § 15-11-58(o)(6).
  \item \textsuperscript{256} Id.
  \item \textsuperscript{257} Id.
\end{itemize}
made a part of the report of the judicial citizen review panel and any supplemental order.\textsuperscript{258}

**H. Terminating Parental Rights**

A petition to terminate parental rights is the most extreme action that can be taken to impact the relationship between a parent and child. It ends all parental rights and obligations with respect to the child, and all rights and obligations of the child to the parent arising out of the parental relationship, including rights of inheritance.\textsuperscript{259} After a parent’s rights are terminated, he or she is not afforded notice rights or the right to object or participate in adoption proceedings.\textsuperscript{260} It is also quite a significant event in the life of the child since a termination of parental rights also serves to sever the child’s legal relationship with all blood relatives, including siblings.

1. **15/22 Requirement**

In the event a child has been in foster care under the responsibility of DFCS for 15 of the most recent 22 months, DFCS shall file a petition to terminate the child’s parental rights.\textsuperscript{261} In the event another party has instituted such a proceeding, DHR is required to seek to be joined as a party to the petition for termination of parental rights.\textsuperscript{262} However, bringing or joining a proceeding to terminate parental rights does not have to occur if one or more of the following circumstances apply:

- if a relative is caring for the child;
- if the case plan documents a compelling reason that terminating parental rights is not in the best interests of the child;
- if DFCS has not provided services to the family deemed to be necessary for reunification within the timeframes allotted in the case plan.\textsuperscript{263}

If DFCS files a petition to terminate parental rights, it must concurrently “identify, recruit, process, and approve a qualified family for adoption.”\textsuperscript{264}

2. **Grounds for TPR**

A determination that parental rights should be terminated is based on clear and convincing evidence of parental misconduct or inability. That finding should be based on whether the child is deemed deprived due to the lack of proper parental control, that the deprivation is likely to continue, and that the continued

\textsuperscript{258} \textit{Id.}
\textsuperscript{259} O.C.G.A. § 15-11-93.
\textsuperscript{260} \textit{Id.}
\textsuperscript{261} O.C.G.A. § 15-11-58(m).
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} \textit{Id.}
deprivation will cause or is likely to cause serious emotional, physical, mental or moral harm to the child.\textsuperscript{265}

To determine whether the deprived child lacks proper parental control, the court may consider a number of factors. Some of the factors include chronic and unrehabilitated use of alcohol or drugs, severe neglect, and injury to the child.\textsuperscript{266}

In addition to those factors, when the child is not in the custody of the parent against whom the termination proceedings are based, the court can consider whether the parent in the prior year has failed:

- to develop and maintain a parental bond with the child in a meaningful, supportive manner;
- to provide for the care and support of the child as required by law or judicial decree; and
- to comply with a court ordered plan designed to reunite the child with his or her parents.\textsuperscript{267}

In \textit{In Re R.J.P.}, for example, the Georgia Court of Appeals found that a father’s failure to comply with a DFCS case plan, even though the father had been incarcerated during that time, was properly considered by the trial court.\textsuperscript{268} The Court of Appeals determined that even if the father could not visit the children the incarceration did not prevent him from writing or calling the children.\textsuperscript{269}

\section*{3. Notice}

Summons for the hearing on the termination petition is to be sent to the child’s parents, guardian, lawful custodian, and to the person with present physical custody of the child.\textsuperscript{270} The child is required to attend unless the court deems otherwise. If the child was born out of wedlock and paternity was already established, the biological father is to be served with summons and has a right to be heard unless parental rights have been relinquished.\textsuperscript{271}

If there is a biological father who is not the legal father and has not surrendered his legal rights (often referred to as the putative father), he must also be notified and have a right to be heard under certain conditions. For those fathers, one of the following must occur prior to having the right to be heard: (1) his identity must be known; (2) he must have acknowledged paternity and be registered on the putative father registry; (3) he must be on the putative registry indicating possible paternity of a child of the child’s mother two years prior to the birth of the child at issue; or (4) he must have performed various acts of support, either emotionally or financially.\textsuperscript{272}

\begin{itemize}
  \item \textsuperscript{265} O.C.G.A. § 15-11-94(b)(4)(A).
  \item \textsuperscript{266} O.C.G.A. § 15-11-94(b)(4)(B).
  \item \textsuperscript{267} O.C.G.A. § 15-11-94(b)(4)(C).
  \item \textsuperscript{268} In re R.J.P, 222 Ga. App. 771, 772 (1996).
  \item \textsuperscript{269} \textit{Id}.
  \item \textsuperscript{270} O.C.G.A. § 15-11-96(a).
  \item \textsuperscript{271} O.C.G.A. § 15-11-96(d).
  \item \textsuperscript{272} O.C.G.A. § 15-11-96(e).
\end{itemize}
A known biological father must file a petition to legitimate and provide the court where the termination is pending with a notice of the filing of the petition to legitimate within 30 days of receipt of the notice to terminate, or he loses all rights to the child, including the right to object to the termination of his rights.\textsuperscript{273} This information must be provided in the termination notice.\textsuperscript{274}

If there is a biological father who is not the legal father and the identity is not known, the mother is to execute an affidavit indicating that he has not provided various means of either emotional support or financial support to her or the child from pregnancy to the date of the petition. Furthermore, there may not be an entry on the putative father registry acknowledging paternity or indicating possible paternity of another child by the same mother within two years of the birthdate of the child at issue. In such a case it will be rebuttably presumed that the biological father is not entitled to notice. There are specific forms of notice requirements for unknown fathers in some circumstances, including publication requirements.\textsuperscript{275}

### IV. Georgia Child Welfare Laws: Placement of Children

The foster care manual of DHR specifies the mission and goals of foster care services in Georgia. Each is noted here:

**Mission:**

The mission of Georgia’s Foster Care Program is to strengthen families, protect children from further abuse and neglect, and to assure that every child has a permanent family.\textsuperscript{276}

**Goals:**

1. Preventing the disintegration of families;
2. Protecting children from further abuse and neglect; and
3. Fostering permanency for children in custody by:
   • Assessing the needs of the child, the birth family and the foster family;
   • Ensuring the safety, stability and security of children;
   • Helping to rebuild families where possible;
   • Moving expeditiously toward permanency and minimizing placement disruptions; and

\textsuperscript{272} O.C.G.A. § 15-11-96(i).
\textsuperscript{274} O.C.G.A. § 15-11-96(h).
\textsuperscript{275} O.C.G.A. § 15-11-96(g).
\textsuperscript{276} Manual, supra note 79, at Sec.1001.
• Meeting the needs of children and families to prevent reentry into care.²⁷⁷

Both the juvenile code and the Children and Youth Act require that the safety of the child be paramount. Safety concerns are communicated in many ways, including through approval requirements for the places where the children are housed.²⁷⁸ DHR has two ‘systems’ for placing children: Level of Care and DFCS itself. The Level of Care system is how DHR purchases placement services for children from private providers. In addition to contracting with private agencies for child placement services, DFCS approves and manages placements that are directly under the control of the agency. Child-placing agencies are defined as any institution, society, agency or facility, whether incorporated or not, which places children in foster homes for temporary care or for adoption.²⁷⁹ DHR is authorized to contract with a licensed child-placing agency to provide services associated with the child in foster care, and a license issued to a child placing agency is deemed to be approval of all foster family homes approved, supervised, and used by the licensed child-placing agency as a part of its work.²⁸⁰

As an alternative to a child-placing agency, DFCS may choose to place children in its own foster homes. State law does not require the licensure of publicly owned child welfare agencies, but the department is authorized to make periodic inspections of such agencies, facilities and institutions.²⁸¹ DFCS does grant levels of approval to foster homes: full, temporary, or special, and the foster home must maintain the appropriate approval requirements in order to receive DFCS children.²⁸²

In addition to the initial licensure requirements, DHR is required to inspect all licensed child welfare agencies including all foster homes used by child placing

²⁷⁷ Id.
²⁷⁸ See O.C.G.A. § 49-5-12(b)(2).
²⁷⁹ O.C.G.A. § 49-5-3(2).
²⁸⁰ O.C.G.A. § 49-5-12(b)(2).
²⁸¹ O.C.G.A. § 49-5-12(o).
²⁸² Manual, supra note 79, at Sec. 1015.2. DFCS assigns all foster homes an approval type of "Full Approval, Special Approval or Temporary Approval." A foster home is granted "full approval" when the home meets the "Minimum Standards and requirements of the Family Assessment/Portfolio" (See Sec. 1014.45). A previously approved foster home is granted "Special Approval" when any of the following circumstances occur: An unrelated person resides in the foster home; family day care is provided in the foster home; more than six (6) children, including the foster parents’ own children, under the age of 16 reside in the foster home so that a sibling group can be kept together; more than two (2) children under the age of two reside in the foster home; a room other than a bedroom is used for sleeping space; a DFCS foster or adoptive home is dually approved as a foster/adopt home for the placement of a child on foster/adopt status; a DFCS foster home is approved as an adoptive home by a private child-placing agency or the foster home of a private child-placing agency is approved as an adoptive home by DFCS. A foster home is granted temporary approval when the following minimum requirements are met: at least one family consultation is conducted; the required number of IMPACT training sessions are completed (or a State level waiver has been obtained); a criminal records check (including fingerprints) is completed and the results received; forms 35 and 36 and other health requirements are met; a minimum of 2 personal references are contacted).
Child-placing agencies are required to investigate each home and the character and reputation of the persons residing in it and are required to provide adequate supervision to each home during the period of care. DHR may also require periodic reports from child welfare agencies.

Variances and waivers are permitted for any of the rules or regulations for child placing agencies. The variances or waiver requests are considered only after written application to DHR by the child-placing agency. DHR may grant the variance or waiver request only if the rule is not applicable, to allow “experimentation and demonstration of new approaches to the delivery of services,” or if the child placing agency has “met the intended purpose through equivalent rules.”

There are criminal and civil sanctions for any institution caring for children without licensure. Code Section 49-5-12.1 of the Official Code of Georgia Annotated provides that any person who “hinders, obstructs, or otherwise interferes with any representative of the department in the discharge of that person’s official duties in making inspections... or in investigating complaints... shall be guilty of a misdemeanor.” In addition, the same code section also provides that any person who “violates any licensing or registration provision” or any “term, condition, or limitation of any license or registration certificate thereby subjecting a child in care to injury or a life-threatening situation; or commits any violation for which a license or registration certificate may be revoked may be subject to a civil penalty, to be imposed by the department, not to exceed $500.” The statute also provides that “if any violation is a continuing one, each day of such violation shall constitute a separate violation for the purpose of computing the applicable civil penalty.” DHR also has the authority to seek an injunction on the operation of any center contrary to the laws or regulations and policies of DHR.

Although there is a statutory and regulatory framework in place for privately run child placing agencies and by extension their foster homes, DFCS operated placements for children are only regulated via the policy and procedures of DFCS itself. The foster care policy manual of DFCS is developed in response to federal law, regulations, state law changes, and what is considered good practice in child welfare. Once a policy is drafted, it is circulated for review by a team of field and state office administrators and consultants all across program lines.

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283 O.C.G.A. § 49-5-12(k).
284 O.C.G.A. § 49-5-12(j).
285 O.C.G.A. § 49-5-12(n).
286 See GA. COMP. R. & REGS. r. 290-9-2-.10(b),(c) (2004).
287 Id.
288 O.C.G.A. § 49-5-12.1(b)(1).
289 Id.
290 O.C.G.A. § 49-5-12(r).
291 Telephone Interview with Linda Doster, Program Consultant, Foster Care Unit in the Department of Human Resources (Dec. 8, 2003). Since this interview a new DHR director and an interim DFCS director have been appointed so the policy development process described may no longer be in place.
as well as a team of county staff and supervisors who participate on what is referred to as the "quality taskforce." The task force reviews the proposed policy, looks for implementation issues, and provides comment and feedback. Historically the policies have also been presented to the DFCS management team so that management and administrators in the field can discuss the policy as well as its impact when implemented. Once the draft of the policy or policy changes is approved, about 3000 copies are distributed statewide to county DFCS offices. The manual is divided into various sections which are updated and sent to case managers on an as needed basis. The policy manual is now online at http://www.odis.dhr.state.ga.us.

A. Foster Home Licensure Requirements

Licensure requirements for private child-placing agencies are found in the DHR Rules and Regulations. They include requiring that the agencies maintain non-profit status, and that they be established in Georgia with specific functions of the board and qualifications of the Executive Director. In addition, the regulations require at least one casework supervisor for the placement services provided by the agency, and for the designation or approval of foster families. The child-placing agency is required to have a written manual of operating policies and procedures regarding its services. Child-placing agencies are highly regulated for foster care services. The regulations include requirements for prospective foster parent orientation prior to the foster care application, training for prospective foster care parents, minimum requirements for prospective foster families, services prior to foster care placement, services during the foster care placement, maintenance of foster care records, agency records and reports, application guidelines, enforcement provisions, and civil penalties. There are also extensive requirements for the neighborhood, and physical standards for the home, including space and sleeping arrangements.

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292 Id.
293 Id. DFCS Management Team was comprised of county directors, the division director, section directors and occasionally field directors.
294 Id.
296 Id.
297 Id. at 290-9-2-.04(4) (2004).
298 Id at 290-9-2-.05 (2004).
299 Id. at 290-9-2-.07 (2004).
300 Ga. Comp. R. & Regs. r. 290-9-2-.07(5)(a)(9) (2003) (applies only to private child-placing agencies and their foster homes, and noting, for example, that only bedrooms are to be used as sleeping space for children: a maximum of two children may share a bed, and only if they are of the same sex and under five years of age, no child over one year shares a bedroom with an adult, children over three of different sexes do not share a bedroom, and children have adequate space for clothing and possessions); but see Manual, supra note 79, at Sec. 1015.2 (applies only to DFCS foster homes and provides that "there should be no more than six children under the age of 16 placed in the foster care home, and that only two children can be under the age of two. The children should be sleeping in bedrooms, and it is preferred that each child has his or her own bed. However, if this is not possible, only two children of the same sex may share a bed that is double or larger. A child and an adult may not share a bed. Up to three children can share a
Under certain circumstances a variance or waiver of the requirements may be received.\textsuperscript{301}

DFCS foster homes are also “regulated” extensively even if the requirements are not promulgated. The requirements for DFCS foster homes are provided in Section 1015 of the policy manual and include similar requirements to the child-placing agencies housing children in DFCS custody. There is also an opportunity to apply for a variance or waiver of any of the foster home approval requirements.\textsuperscript{302}

**B. Procedures for Becoming a Foster Parent**

The rules and regulations for DHR list minimum qualifications for prospective foster parents for a private child placing agency. The agency is required to make a thorough evaluation of each prospective family and document it, including the motivation for foster parenting, emotional stability, evaluation of marriages and family life as well as parenting practices, and the physical and mental health including a physical exam.\textsuperscript{303}

Physical standards of the home are also considered, including that only bedrooms are used as sleeping space for children and sleeping arrangements are appropriately based on age and gender.\textsuperscript{304} In addition, the prospective foster home’s provisions related to firearms, swimming pools, pets, heaters, hazardous items, smoke alarms, and other items, is examined to make sure that the home is safe for children.\textsuperscript{305}

In addition to the above, the adults in the prospective foster home are required to undergo a criminal records check and pre-service training, and to provide three character references that meet certain criteria, as well as a description of the type of child desired by the foster family.\textsuperscript{306} In the event a criminal records check

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\textsuperscript{301} GA. COMP. R. & REGS. r. 290-9-2-.10 (2004) (examples of pending requests for a variance or waiver include: requirement that the executive director be a Georgia resident just as the agency starts up; that the program director have a Master’s Degree in social work; that the executive director have two years of human services experience when the clinical supervision would be handled by the clinical director. Example of a granted variance is when a child placing agency can employ as a casework supervisor a person with a Master’s Degree who does not have two years of casework experience provided certain conditions are met. An example of a denied waiver is the request to waive the requirement that no more than six children non-related to the foster parents may reside in the foster home, denied in part because the foster home had not complied with other requirements.) To view variance/waiver requests, either pending, granted, or denied go to: \url{http://www.ganet.org/rw_sch/search.cgi} and enter the rule number to be searched.

\textsuperscript{302} Manual, supra note 79, at Sec. 1015.2.

\textsuperscript{303} GA. COMP. R. & REGS. r. 290-9-2-.07(5)(a) (2004).

\textsuperscript{304} \textit{Id.} at r. 290-9-2-.07(5)(a)(9).

\textsuperscript{305} \textit{Id.}

\textsuperscript{306} O.C.G.A. § 49-5-69.1(a)(criminal records check); see GA. COMP. R. & REGS. r. 290-9-2-.07 (2004) (other cited requirements).
is deemed unsatisfactory, the homes cannot be used by the child-placing agency as foster homes.\textsuperscript{307}

There are even more specific requirements for those who wish to become foster parents for DFCS. In order to be approved to provide foster care to children in DFCS custody, applicants must complete a program of preparation and selection that until mid-2004 was called the Model Approach to Partnerships in Parenting (MAPP).\textsuperscript{308} Although it is not yet reflected in the DFCS Policies and Procedures online, MAPP has been replaced by IMPACT, which stands for Initial Interest, Mutual Selection, Pre-Service Training, Assessment, Continuing Development and Teamwork.\textsuperscript{309} All adults age 19 and over residing in the home who will be involved in parenting the child must be involved in the training required by DFCS.

In addition to participating in the IMPACT program, a family portfolio shall be completed within six weeks of the completion of the program. The “Family Assessment Portfolio” consists of a number of items including medical reports, health statements on children in the home, professional qualifications, interviews of birth children living elsewhere, and three references.\textsuperscript{310} If foster parents and the home are approved, foster parents must complete 15 hours of continued parent development activities each calendar year.\textsuperscript{311}

Licensure of foster homes under the child placing agency and also for DFCS are for a year, and for DFCS foster homes, anything less than full licensure shall not exceed 12 consecutive calendar months. All foster homes must be in an approved status at all times to receive children.\textsuperscript{312}

\textbf{C. Selecting the Most Appropriate Placement}

Foster care is defined in the DHR rules and regulations as “supervised care in a substitute home or child caring institution on a 24 hour full-time basis for a temporary period of time.”\textsuperscript{313} A foster home is a private home, which has been approved to provide 24 hour care, lodging, supervision, and maintenance for no more than six children unrelated to the foster parent.\textsuperscript{314}

Both the rules and regulations of DHR and the DFCS manual provide procedures for placement of children once temporary custody has been granted. For child-

\begin{footnotesize}
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\begin{enumerate}
\item See O.C.G.A. § 49-5-69.1(b).
\item Manual, supra note 79, at Sec.1014.1.
\item Georgia Division of Family and Children Services, Foster Care, IMPACT Continuum Introduction, available at http://dfcs.dhr.georgia.gov (last visited on Dec. 26, 2004).
\item Manual, supra note 79, at Sec. 1014.45.
\item Id. at 1014.47.
\item Manual, supra note 79, at Sec. 1015.4. For Full Approval and Special Approval foster homes, the termination date is “the last day of the 12\textsuperscript{th} consecutive calendar month following that approval.” For Temporary Approval, the termination date is the last day of the third consecutive month. Id. at 1015.3. Any change in approval status must be documented in writing, approved by the director. When a foster home requires “Special Approval,” the County Director must provide “prior written approval” or verbally confirm with the written follow-up in five (5) working days for emergency situations. Id. at Sec. 1015.4.
\item Ga. Comp. R. & Regs. r. 290-2-5-.03(k) (2003).
\end{enumerate}
\end{footnotesize}
placing agencies, the rules specifically provide that the selection of a foster home for a particular child will be based on an assessment of the child’s total needs and how well a particular home can meet the child’s needs. The Comprehensive Child and Family Assessment is described in more detail below in Section V. Furthermore, children of the same family are required to be kept together whenever possible unless it has been determined that it is not desirable to do so, although family itself is not defined. The DFCS foster care policy manual states that placing siblings apart should be done only rarely, and only if placement together would be contrary to the developmental, treatment, and safety needs of a child, and in such circumstances the reasons should be documented in the case record. In addition, the DFCS foster care manual provides in fact that “all placement planning must honor and preserve the child’s right to maintain ties with his or her kinship network provided that the safety and general well-being of the child is not jeopardized.  

1. Kinship Care

Foster care policies and procedures require that when a child enters DFCS custody, all possible kinship placement resources should be explored and evaluated. This preference for placement with relatives or persons who have demonstrated an ongoing commitment to the child can be found in state and federal law as well as DFCS policy. There are two types of formal kinship care in Georgia, a “relative home,” and a “relative foster home.” A relative home refers to placement in the home of a relative who does not receive a per diem for the care of the child. A relative foster home refers to the home of a relative which is required to meet the same requirement as a regular foster home and therefore is eligible to receive a foster care per diem reimbursement rate.

Before any kinship care is authorized, regardless of the status of the relative home, both the courts and DFCS require that an assessment of the relatives and stability of the household be undertaken. In fact, kinship care may be deemed inappropriate if the relatives are unable to meet the on-going needs of child, parental influence in the placement would negatively affect the child, or relatives are either not willing to accept the placement or are negative toward either the parent or the child. Relatives who agree to have ‘permanent’ custody of a

315 Id. at 290-9-2-.07(6)(a)(2004).
316 Id.
317 Manual, supra note 79, at Sec. 1009.8.
318 Id. at Sec. 1004.
319 Id.
320 See, e.g., O.C.G.A. § 37-3-166; ASFA, supra note 43, at Sec. 304.
321 A detailed discussion of kinship care is beyond the scope of this manual. However, for additional information, readers may want to see “Grandspalce”, available at http://www.grandspalce.com/gp8/ga.html (last visited December 22, 2004).
322 Manual, supra note 79 at Sec. 1004 1.1. Note that there are circumstances in which requirements may be waived, but only the County Director/designee may grant an initial waiver. Waivers of foster parent training may only be approved at the state level, and safety requirements cannot be waived under any circumstances. Manual, supra note 79, at Sec. 1015.2.
323 Id. at 1004 1.1.
child until the child turns 18 (if there is a non-reunification order for the child) can receive a ten dollar per day Relative Care Subsidy after their home is approved by DFCS.  This Relative Care Subsidy is not considered a foster care per diem and is paid from state funds.

2. Level of Care

Family foster homes are only explored as the least restrictive and most family-like placement setting when relatives are not available or appropriate to be a placement resource. In order to ensure that a child is placed in the best possible foster family home to suit his or her needs, an assessment of the child’s situation in the child’s own home is required to be maintained in the child’s case plan.

DFCS uses a classification system referred to as “Level of Care” to help guide placement determinations. Placement decisions depend in large measure on the health needs of the child, both physical health and mental health. In the Level of Care system, there are six different Levels of Care. Level One is the least restrictive form of care, and Level Six requires twenty-four hour supervision, treatment and medical care.

3. Pre-Placement Activities

In addition to evaluating kinship arrangements and the level of care needed for the child’s placement, DFCS must discuss with the foster family the needs of the prospective foster child to inform the family about the child and to explain any adjustments and problems that may be encountered during placement or any specialized services to be provided. Both the regulations and the manual provide for pre-placement activities including a pre-placement visit, with the manual providing detailed instructions on how to acquaint the child with the foster family so that the transition is as smooth as possible for the child. The child is to be actively involved in pre-placement activities and in fact, the DFCS manual specifically states, “All children age one year and older should have placement discussed in language appropriate to their age and developmental level prior to the pre-placement visit.”

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324 Id. at 1004.1 and 1004.5
325 Id. at 1004.3.
327 Id.
328 Id. at 6-8, 27.
330 Ga. Comp. R. & Regs. r. 290-9-2-.07(6); See Manual, supra note 79 at Sec. 1008.
331 Manual, supra note 79 at Sec. 1008-1008.2.
332 Id. at Sec. 1008.1.

“The pre-placement discussion includes the following topics:

A. An explanation of why placement out of the home is necessary. (When possible, the parent should participate in the explanation. The parent
As a part of those activities DFCS is required to obtain developmental information from various sources and record it in the child’s record. Once the developmental information is obtained, the case manager should work with foster parents and birth parents to address developmental needs, such as self-esteem, cultural identity, positive guidance, social relationships, and age-appropriate responsibilities. The DFCS foster care manual refers to a Life Book, which is a book about the child’s life and reason for coming into care. The manual requires the case manager to assist the child in developing a life book that includes the dates, locations, and names of caregivers for each placement, documentation of the child’s achievements, and birth family information.

In both DFCS foster homes and homes with child-placing agencies, complete written and signed placement agreements are required to be developed with the involvement of the child, the foster parents, the parent(s) or guardian(s) and the placing agency. The child-placing agency agreements shall include both a written authorization to care for the child and a written authorization to obtain medical care as well as a written agreement with the foster parent regarding policies and procedures. The foster care manual provides that the Agreement Supplement be signed, which in addition to establishing the requirements of being a foster parent generally, also provides the foster parent and DFCS with a written and dated confirmation of the child being placed into (or removed from) a foster home.

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333 Id. at Sec. 1011.6.
334 Id.
335 Id. at Sec. 1009.2; GA. COMP. R. & REGS. r. 290-9-2-.07(6)(f) (2003).
336 GA. COMP. R. & REGS. r. 290-9-2-.07(6)(f),(g) (2004).
337 Manual, supra note 79, at Sec. 1009.2.
4. Monitoring Placements

A critical tool for ensuring a child’s needs are being met in foster care is regular contact with the child and the child’s caregivers. There are minimum contact standards for children in care, depending on the type of placement for the child.\textsuperscript{338} For children placed through child-placing agencies, the private agency case worker is required to conduct home visits “at least monthly, and [the home visits] shall include the foster child and at least one foster parent.”\textsuperscript{339} For these children DFCS is required to have quarterly face-to-face visits with the child and monthly contacts with the child-placing agency.\textsuperscript{340}

For children in DFCS foster home placements, the case manager is responsible for one face-to-face meeting with the child per month, as well as one face-to-face meeting with the foster parent per month, but is only required to meet in the home itself “at least every other month.”\textsuperscript{341} The face-to-face requirement is not defined, although presumably it implies the manner of contact (in person) and does not mean that one contact per month is sufficient since the manual specifies that the number of contacts each month will vary depending on the needs of the child and the foster parent.\textsuperscript{342}

V. Georgia Child Welfare Laws: Caring for Children

When a child enters foster care, the state has “the responsibility to provide him with food, clothing, shelter, education and ordinary medical care.”\textsuperscript{343} To meet this responsibility DFCS is required to conduct a thorough assessment of the child and his or her family within 30 days following removal, and to update that assessment every two years.\textsuperscript{344} This thorough assessment is referred to as the “Comprehensive Child and Family Assessment” and is geared for those children and families who have not been assessed in the prior twelve months.\textsuperscript{345} The earliest point of referral is a court recommendation at the 72-hour detention hearing; if a referral is not made at the detention hearing, DFCS is required to initiate the assessment within five working days of that hearing.\textsuperscript{346} The case manager determines the need for a comprehensive assessment, and the

\textsuperscript{338} Manual, supra note 79, at Sec. 1011.15.
\textsuperscript{340} Manual, supra note 79, at Sec. 1011.15.
\textsuperscript{341} Id.
\textsuperscript{342} Id.
\textsuperscript{343} O.C.G.A. § 49-5-3(12).
\textsuperscript{344} Manual, supra note 79, at Sec. 1006.1.
\textsuperscript{345} Id.
\textsuperscript{346} Id.
The assessment provider must be licensed and meet certain standards for child and family assessments.\textsuperscript{347}

If a waiver is granted allowing the Comprehensive Assessment to be completed beyond the required 30 days following the removal of the child from her home, the initial case plan should be filed with the court and the results of the assessment should be amended to that case plan.\textsuperscript{348}

Since 1998 the Comprehensive Child and Family Assessments (Comprehensive Assessment) have also been referred to as First Placement/Best Placement; this concept was developed in an effort to ensure the best possible placements for children in foster care.\textsuperscript{349} The effort began in March 1998 in a five-county demonstration program, and is now statewide.\textsuperscript{350} However, as of January 1, 2005, the assessment process is being modified and is no longer called First Placement/Best Placement; instead it will be known as the Comprehensive Child and Family Assessment (CCFA).\textsuperscript{351} The standard components of a Comprehensive Assessment include the following evaluations: medical, psychological or developmental, educational, and family.\textsuperscript{352} In addition, the case manager is required to explore all sources of possible information about the family which will assist in conducting a comprehensive assessment.\textsuperscript{353}

A multi-disciplinary team staffing is conducted at the conclusion of the assessment process. The assessment provider is to arrange the staffing, which is prescribed according to a publication referred to as the \textit{Blue Book: Standards for Child and Family Assessments}, a publication that is given to all providers who are approved for assessments.\textsuperscript{354} The composition of the body to conduct the staffing is described in the Blue Book, and includes representatives from at least three disciplines, as well as the child and his or her family.\textsuperscript{355} The findings are reviewed and recommendations are made regarding permanency, placement planning, and service needs of the child and family.\textsuperscript{356}

\textbf{A. The Child’s Health Needs}

The case manager is responsible for arranging medical care and for obtaining health-related documents for the case record. Once a child is placed initially, the

\begin{footnotesize}
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  \item\textsuperscript{347} Id.
  \item\textsuperscript{348} Id. at Sec. 1006.1.
  \item\textsuperscript{349} Georgia Association of Homes and Services for Children, \textit{First Placement/Best Placement (FP/BP), Georgia’s Plan for Foster Care Reform}, at \url{http://www.gahsc.org/fpbp/fepbp990528dhrquestionsheet.html} (last visited May 28, 2004).
  \item\textsuperscript{350} Georgia Association of Homes and Services for Children, \textit{First Placement/Best Placement, Georgia’s Foster Care Reform Initiative}, at \url{http://www.gahsc.org/fepbp/febpbguidingprinciples.html} (last visited May 28, 2004).
  \item\textsuperscript{352} Manual, supra note 79, at Sec. 1006.1.
  \item\textsuperscript{353} Id.
  \item\textsuperscript{354} Id.
  \item\textsuperscript{355} Id.
  \item\textsuperscript{356} Id. at Sec. 1011.
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case manager is required to obtain as much information as possible about the child’s health history, including family health history, and the information is required as part of a Comprehensive Assessment. In addition, a case manager is required to arrange for an initial health examination as soon as possible after placement, but no later than 45 days after removal. There are different health requirements if a child is placed via a child placing agency, including a physical examination within 72 hours of placement. Dental examinations must also be conducted regardless of whether the child is being placed in a DFCS foster home or through a child-placing agency. Foster parents are required to receive a copy of the health information of the child.

Following the initial health assessment of the child, the case manager is required to provide follow-up on any of the recommendations made by the health care provider for further treatment and care of the child in a timely fashion. In addition, the case manager is required to collaborate with the foster family (or other provider) to arrange and use available resources so that the child in care receives appropriate and timely medical services. After the initial health assessment, well checks are to be scheduled in periodic intervals based on the child’s age to meet the recommendations of the American Academy of Pediatrics.

Dental care is also required. Routine dental care is required to begin at age three; but may begin earlier if a referral is necessary. Prior to and at the time of placement, the case manager is required to obtain information from the parent

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357 Manual, supra note 79, at Sec. 1011.2 (noting that when a child is initially placed, the case manager is to: obtain as much information as possible about the child’s health history prior to or at the time of initial placement; discuss the following information at a Family Conference (or at any other time when meeting with the parent): the child’s known medical problems, including drug or other allergies, serious accidents or injuries, surgeries, hospitalizations, and seizures; types of immunizations the child has received and dates of those immunizations; any medications the child is presently taking; any physical, mental health or developmental problems that parent has observed or has concerns about; names and addresses of doctors and other health care providers that the child has seen; and any other available or relevant health information; obtain and record health information on the child’s family; secure a release of information from the parent to obtain copies of all available health records; obtain a birth certificate for the child.)

358 Id. (“Arrange for initial health examination as soon possible after placement. Information concerning the child’s initial health status and needs should be obtained no later than 45 days from removal.”) But see Id. at Sec. 1006.1, which indicates that the health examination must be completed within 30 days, absent special circumstances (“[the SSCM r]eceives the completed Comprehensive Assessment Report from the provider (usually within 30 days from the date of referral, unless a waiver is granted”). See also January 2005 draft of Comprehensive Child and Family Assessment (CCFA)/Wrap-Around Standards, available at http://dfcs.dhr.georgia.gov/portal/site/DHR-DFCS/menuitem.5d32235bb09bde9a50c8798dd03036a0/?vgnextoid=4ee92b48d9a4ff00VgnVCM100000bf01010aRCRD (last visited Jan. 16, 2004) (“Children entering foster care will have a Health Check (Early and Periodic Screening, Diagnostic, and Treatment—EPSDT) within ten days of the child’s placement in foster care…..” Id.).

359 Id.
360 Id.
361 Id.
362 Id. at Sec. 1011.4.
on the child’s dental history and where any dental records may be on file.\textsuperscript{363} An inspection of the mouth is part of each screening under the health check program, which is described in more detail below in Section V(A)(1)(a)(ii). Medicaid is billable for medically necessary dental services when the provider is enrolled in Georgia Medicaid.\textsuperscript{364}

Although the county department acts as legal custodian, unless stated otherwise in the court order a parent retains certain rights related to the health of the child until parental rights are terminated. For example, the parent retains the right to grant permission for major, non-emergency surgery, although in some instances the court order may indicate what will occur in the event parental consent is not possible.\textsuperscript{365} Routine healthcare rights by the parent are forfeited, however, when a parent loses temporary custody of the child.\textsuperscript{366} As illustration, in the case of \textit{In re C.R.}, a child was placed in the temporary custody of his grandmother after being adjudicated deprived while in his mother’s care.\textsuperscript{367} The child’s mother brought an action in an attempt to prevent the grandmother from allowing the child to receive various immunizations.\textsuperscript{368} The Georgia Court of Appeals held that the mother’s religious objections to immunizations were not relevant because state law dictates that a deprived child’s temporary custodian has the right and obligation to determine routine medical care.\textsuperscript{369}

Children in Georgia may not refuse unwanted medical care. Some states permit children of a certain age to refuse or consent to medical care under some or all circumstances\textsuperscript{370} but there is no such exception in Georgia to the general rule that only adults may refuse unwanted care.\textsuperscript{371} Therefore, in general, until the age of majority in Georgia (18), a child does not have the right to make decisions about his or her health. There are circumstances in which a minor in Georgia may consent to procedures without the consent of the guardian or custodian, however, and those are provided below in Section V(D)(2).

\begin{itemize}
\item \textsuperscript{363} \textit{Id.}
\item \textsuperscript{365} \textit{Manual, supra note 79, at Sec. 1002.3.}
\item \textsuperscript{366} \textit{In re C.R.}, 257 Ga. App.159 (2002).
\item \textsuperscript{367} \textit{Id.} at 159.
\item \textsuperscript{368} \textit{Id.}
\item \textsuperscript{369} \textit{Id.} at 161.
\end{itemize}
1. Paying for Health Care

a. Medicaid
Almost all children in foster care are eligible for Medicaid, but the ultimate determination is based on income and residential eligibility. There are several different Medicaid programs that may be utilized by children in foster care. The distinctions between the programs relate to the funding source the Department of Community Health uses to pay for the services rather than the services offered. The programs are briefly described in the chart below:

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372 Telephone Interview with Fran Ellington, Director of Recipient and Third Party Services, Georgia Department of Community Health (Dec. 05, 2003) [hereinafter Ellington Interview]. Based on numbers available in March 2004 (the most recent numbers available), there were over 19,500 foster children in Georgia enrolled in Medicaid at some time during the previous year. Id.


374 Ellington Interview, supra note 372.
<table>
<thead>
<tr>
<th>Health Insurance Program</th>
<th>Eligibility Requirements</th>
<th>Placement Requirements</th>
<th>Maximum Age for Coverage</th>
<th>Services Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title IV-E Foster Care Medicaid</td>
<td>Child must initially be IV-E eligible, which is based on a combination of findings documented in the court order and AFDC Relatedness (AFDC Relatedness considers income of the “removal home.”)(^{375}) Ongoing eligibility for IV-E Medicaid is only based on the child’s income.</td>
<td>In out-of-home placement via Court Order or Voluntary Placement Agreement (may be in custody of DJJ or other authorized agency, not just DFCS)</td>
<td>Continues through the month in which the child turns 18</td>
<td>All that are deemed medically necessary, with certain services requiring prior approval by the Department of Community Health (DCH)</td>
</tr>
<tr>
<td>Child Welfare Foster Care or Title IV-B Medicaid</td>
<td>Children who are ineligible for IV-E; only the financial circumstances of child (not the family) are considered</td>
<td>Children must be in DFCS custody</td>
<td>Continues through the month in which the child turns 21 (if child is still in DFCS custody)</td>
<td>All that are deemed medically necessary, with certain services requiring prior approval by DCH</td>
</tr>
<tr>
<td>Right From the Start Medicaid</td>
<td>Children who are ineligible for IV-E; only the financial circumstance of child (not the family) are considered; higher income limits are allowed than for IV-B Medicaid; income limits based on percentage of Federal Poverty Level</td>
<td>No limitations</td>
<td>Continues through the month in which the child turns 19</td>
<td>All that are deemed medically necessary, with certain services requiring prior approval by DCH</td>
</tr>
</tbody>
</table>

\(^{375}\) For a complete explanation of the criteria for “AFDC Relatedness”, see Manual, supra note 91, at Sec. 1003.6.
<table>
<thead>
<tr>
<th>Health Insurance Program</th>
<th>Eligibility Requirements</th>
<th>Placement Requirements</th>
<th>Maximum Age for Coverage</th>
<th>Services Covered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Peachcare for Kids</td>
<td>Children who do not qualify for Medicaid and who have no other health insurance</td>
<td>No limitations</td>
<td>Continues until age 18</td>
<td>All that are deemed medically necessary, with certain services requiring prior approval by DCH</td>
</tr>
<tr>
<td>Medically Needy Medicaid</td>
<td>For children whose monthly medical bills are so high that monthly income minus the medical bills equals an amount within Medicaid’s financial limits</td>
<td>No limitations</td>
<td>Continues through the month in which the child turns 18</td>
<td>All that are deemed medically necessary, with certain services requiring prior approval by DCH</td>
</tr>
</tbody>
</table>

As soon as possible, but no later than five working days after a child enters care, DFCS should contact the economic support division to enroll the child in the appropriate health insurance program.\(^{376}\) The Medicaid determination usually only takes a few days, at which point, if deemed eligible, the child’s eligibility extends back to the first day of the month. Under some unusual circumstances eligibility may apply back to prior months, but generally in such a case the income of the parents or guardian must be taken into consideration.\(^{377}\) As a requirement of Medicaid eligibility, the parent(s) of the child must be referred to the local child support enforcement office.\(^{378}\) In the event a child’s parent(s) have insurance, Medicaid becomes the secondary payor.

**i) Covered Services**

Medicaid covers virtually every medical service for children in foster care, including hospital visits, doctors, dental, vision, prescription drugs, long-term care

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\(^{376}\) *Manual, supra* note 79, at Sec. 1003.

\(^{377}\) *Ellington Interview, supra* note 372.

\(^{378}\) *Manual, supra* note 79, at Sec. 1003.15.
(nursing homes and other providers).\footnote{379} Medicaid also covers non-emergency transportation to and from doctor’s appointments.\footnote{380} In the event certain services are less ordinary, prior approval may be required to cover those services. The Georgia Department of Community Health contracts Medicaid’s prior approval requirements for Medicaid to the Georgia Medical Care Foundation (GMCF). There are rights to a hearing associated with the prior approval determination. One of the most important features of Medicaid for children is that as long as a service is determined to be medically necessary for a child, Medicaid will cover the services.\footnote{381}

**ii) Early and Periodic Screening, Diagnosis and Treatment Service**

The Early and Periodic Screening, Diagnosis and Treatment (EPSDT) service is Medicaid’s comprehensive child health program. It requires states to provide comprehensive services for Medicaid eligible children.\footnote{382} Federal statutes and regulations define the services for which a child is eligible and mandate coverage of those services to children when medically necessary.\footnote{383} All services to children that are medically necessary are covered, irrespective of whether an adult would be covered under Medicaid for the same service. Therefore, under federal law, children enrolled in Medicaid should not have any medically necessary services denied, nor should there be a denial of “such other necessary health care, diagnostic services, treatment, and other measures … to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.”\footnote{384} This means that services provided do not have to cure a condition; they can be provided even if they only correct, compensate for, or improve a condition.\footnote{385}

EPSDT services are paid for from Medicaid funds, which are 40% state dollars and 60% federal dollars.\footnote{386} In Georgia the services are called Health Check. Health Check requires that Medicaid eligible children get screened at certain times for a variety of medical conditions and that appropriate well checks and

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\footnote{379}{Id.}
\footnote{380}{See Medicaid Covered Services on Department of Community Health website, available at www.dch.state.ga.us (last visited on Jan. 12, 2004).
\footnote{381}{42 U.S.C § 1396d(r)(5) (2003) (provides that states must cover all services listed in 42 U.S.C. § 1396 (a) regardless of whether such services are covered under the State plan).
\footnote{383}{42 U.S.C § 1396d(r)(5) (2003) (provides that states must cover all services listed in 42 U.S.C. § 1396 (a) regardless of whether such services are covered under the State plan).
\footnote{384}{Id.}
\footnote{385}{Id. (citing HCFA Medicaid State Bulletin- 231 (Sept. 10 1992); HCFA, Letter to Region VIII (Oct. 29, 1991)).
immunizations are given through age 21.\textsuperscript{387} It also requires mental health, mental retardation, and alcohol and drug abuse screenings and services for children under age twenty-one.\textsuperscript{388} Once a thorough screening is conducted, those same federal requirements require that the needed services be provided. The services must be sufficient to achieve their purpose in a reasonable fashion, and may not be denied arbitrarily or reduced solely because of the child’s diagnosis, type of illness, or condition.\textsuperscript{389} All of those services are based on medical necessity.\textsuperscript{390}

A Medicaid-qualified provider must prescribe services, and the state has the ultimate responsibility of approving what is medically necessary.\textsuperscript{391} However, the decisions must be made on an individual basis and must consider the treating physician’s recommendations. Moreover, when a physician’s request for reimbursement of costs is denied, the physician can ask for a reconsideration of the denial and can bring action on behalf of the child.\textsuperscript{392} In Georgia prior approval decisions rest with the Georgia Department of Community Health, which contracts out any prior approval determination of medical necessity to the Georgia Medical Care Foundation.\textsuperscript{393} For children in foster care, notice and hearing rights associated with prior approval determinations rest with DFCS or the child, not the parent.\textsuperscript{394}

b. PeachCare for Kids

PeachCare for Kids, Georgia’s version of the federal Children’s Health Insurance Program, is a comprehensive health care program for uninsured children living in Georgia.\textsuperscript{395} The health benefits for covered children include primary, preventive, specialist, dental care and vision care. PeachCare also covers hospitalization, emergency room services, prescription medications, and mental health care. Each child in the program has a primary care provider through the Georgia Better Health Care managed care program that is responsible for the state’s children


\textsuperscript{388} Georgia Department of Community Health, Provider Manual Part II, Community Mental Health Services, Sec. 902(C).

\textsuperscript{389} Lowe, A Parent’s Guide to EPSDT Medicaid Benefits, supra note 382 (citing HCFA State Medicaid Manual, EPSDT Services, Sec. 5110).

\textsuperscript{390} Id.

\textsuperscript{391} Id. See, e.g., Weaver v. Reagen, 886 F.2d 194 (8th Cir. 1989); See also Hilburn by Hilburn v. Maher, 795 F.2d 252 (2d Cir. 1986); See S. Rep. No, 404, 89th Cong. 1st. Sess., reprinted in 1965 U.S.C.C.A.N., 1943, 1986 (“the physician is to be the key figure in determining utilization of health services….it is the physician who is to decide upon admission to a hospital, order tests, drugs, and treatments[.]”).


\textsuperscript{393} See generally website for Georgia Medical Care Foundation, at http://www.gmcf.org.

\textsuperscript{394} Ellington Interview, supra note 372.

\textsuperscript{395} PeachCare for Kids, Georgia Department of Community Health website, at http://www.dch.state.ga.us (last visited Dec. 8, 2003).
health insurance program. There are income limits for eligibility for PeachCare which are based on a percentage of the federal poverty guidelines that change annually. There are premiums for the PeachCare programs, but the requirement to pay premiums is waived by the state for children in foster care. PeachCare covers all services that Medicaid covers except non-emergency transportation and certain case management services.

c. Unusual Medical/Dental Funds

Very few children in foster care do not qualify for either Medicaid or PeachCare, but those who do not qualify for those programs may qualify for emergency medical assistance or some other coverage. In this event, other state funds may be tapped to cover in-hospital care and unusual medical and dental through funding sources within DHR.

2. Mental Health Care

As part of the Comprehensive Assessment of all children in foster care, the psychological needs of the child must be documented. In the event the child is not required to undergo a comprehensive assessment, a psychological or psychiatric evaluation must be completed within 180 days of the date of removal from the home unless the child is under six years old or has had an evaluation within the previous six months. This too becomes part of the Level of Care determination made by DFCS.

As noted in DFCS’ foster care manual, “all children entering foster care have experienced difficult and/or traumatic conditions in their own homes or in previous placements. As a result, they will likely require the assistance of mental health providers in assessing and treating…: emotional or behavioral problems evidenced in the foster home or other placement provider, school or community; the degree of attachment to the parent or the foster parent; learning problems or the appropriateness of school placement; readiness for moving into an adoptive placement or other setting; placement resource who is best able to meet the child’s needs; and the need for immediate or intensive residential treatment.”

Most children who are removed from their homes will require some level of counseling or other services due to the psychological effects of such disruption, not to mention whatever physical abuse or trauma that may have caused them to be removed from their homes. In addition, many children who are referred to child protective services but who remain in their homes will need counseling. EPSDT requires screening, diagnosis and treatment of mental health illnesses,

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396 Id.
397 Id.
398 See Ellington Interview, supra note 372.
399 Id.
400 Id. at Sec. 1011.4(4).
401 Id. at Sec. 1011.1.
402 Id. at Sec. 1011.5.
403 Id.
so all children enrolled in Medicaid should have access to medically necessary mental health treatment.\textsuperscript{404}

Some children will require intensive counseling; children with severe emotional disturbances (SED) may require treatment in residential settings. Before a child is referred to residential treatment, a diagnosis is required, and appropriate procedures must be followed to ensure a child’s protection when a child in state custody requires commitment proceedings.\textsuperscript{405} Even with children who are diagnosed with serious psychological needs, the preferred placement is with relatives or through community-based programs.\textsuperscript{406} As noted above in Section V(A)(1)(a), mental health, mental retardation, and alcohol and drug abuse screenings, diagnosis and treatment are all required services under EPSDT and should therefore be paid through Medicaid.

The reality is, however, that these services are not always provided through Medicaid, particularly with regard to residential psychiatric and psychological services. The state’s method for purchasing placement services based on a child’s needs is called Level of Care.\textsuperscript{407} Prior to March 2004, the process for purchasing residential treatment for SED children (who are now classified as Levels 4, 5, or 6) was known as the Multi-agency Team for Children Program (MATCH). The process for assigning a level to a child and obtaining services at that level are similar to the old MATCH processes.\textsuperscript{408} What had been referred to as local MATCH committees remain the same.\textsuperscript{409} Those committees determine whether community-based programs are available for the child in need. If not, the local committees refer the cases to the state level.\textsuperscript{410} What used to be referred to as the statewide MATCH committee, comprised of representatives of the Department of Juvenile Justice, DFCS, the Mental Health Division of DHR, and the Department of Education, continues to evaluate those cases to determine whether residential treatment is needed, what the child’s level of care should be, and which programs are available in the state to care for the particular child.\textsuperscript{411}

The premise of the Level of Care system is that a child should be placed in the most appropriate, least restrictive placement environment.\textsuperscript{412} It is not clear whether the new Level of Care program guarantees the timely provision of medically necessary services to children as required by EPSDT, because of the

\textsuperscript{404} See generally 42 U.S.C § 1396d(r)(5) (2003).
\textsuperscript{406} Manual, supra note 79, at Sec. 1005.1.
\textsuperscript{407} Telephone Interview with Sherry Sanders, Policy Specialist, Provider Support Unit, “Office of Child Protection,” Division of Family and Children Services of the Georgia Department of Human Resources (January 30, 2004) [hereinafter 1/30 Sanders Interview].
\textsuperscript{409} Id.
\textsuperscript{410} Id.
\textsuperscript{411} 1/30 Sanders Interview.
use of waiting lists for children needing services and the limited funding available for higher level children.\footnote{413} Medicaid reimburses the state for a portion of the per diem rates paid to the providers, a program referred to as the Medicaid and Treatment Residential (TRIS) Programs, and there is also state funding available to assist in meeting the needs of these children.\footnote{414} The hope is that this new level of care system will permit more appropriate services for children in communities closer to their homes, and that it will cost less overall due to money spent being based on care actually provided.\footnote{415}

Providers are paid a set per diem rate based on the service level needs of the children.\footnote{416} As of July 2004 there were roughly 1000 children categorized at the higher end of the spectrum (levels 4, 5, and 6), which equate to therapeutic foster care, intermediate residential, and intensive residential treatment programs.\footnote{417} Since March of 2004 private providers in the state have been eligible to participate in the program and children are being assessed out to those providers based on the level of care needed and the ability of the private providers to provide such care.\footnote{418}

There are differences between the programs, but all have specific licensure requirements\footnote{419} and all correspond to the Level of Care analysis that is part of the Comprehensive Assessment to determine placement. Therapeutic foster care is for children who have a mental health diagnosis and moderate problems or occasional major problems in one or more areas. It provides individualized treatment and support services in a family setting. The “therapeutic foster parents” are specially recruited, screened, and trained, and working with clinical staff they provide a therapeutic environment to benefit the child.\footnote{420} Therapeutic foster homes are regulated by DHR.

Intermediate residential treatment is for children who have serious mental health diagnoses and substantial problems in one or more areas. This form of treatment provides a structured physical environment and a treatment program where children live in cottages in an open campus setting or in group homes in residential communities. Most activities are therapeutically designed to improve the social, emotional and educational functioning of the children served.

\footnote{413} Id.\footnote{414} Ellington Interview, supra note 372.\footnote{415} 7/30 Sanders Interview, supra note 395.\footnote{416} 1/30 Sanders Interview.\footnote{417} Telephone Interview with Sherry Sanders, Policy Specialist, Provider Support Unit, “Office of Child Protection,” Division of Family and Children Services of the Georgia Department of Human Resources (July 30, 2004) [hereinafter 7/30 Sanders Interview].\footnote{418} Id.\footnote{419} See e.g., Ga. Comp. R. & Regs. r.290-4-4-.04 et. seq. (2004) (residential treatments); Id. at r. 290-2-7-.01 et. seq. (2004)(therapeutic camps).\footnote{420} Manual, supra note 79, at Sec. 1005.2.
Professional staff are employed on a full time, part time or consulting basis depending on the size of the program and the needs of the children. 421

Therapeutic residential wilderness camps provide services to children who have a serious mental health diagnosis and who exhibit substantial problem behaviors in a variety of settings. 422 This program provides care, supervision and treatment in an outdoor setting where physical, environmental, athletic and other activities are designed therapeutically to assist the child. 423 Staff includes a psychiatrist, nurse and therapists or social workers. The camps have on-ground schools.

Intensive residential treatment is for children who have severe mental health diagnoses and who are unable to function in multiple areas. These children present moderate to severe risks of causing harm to themselves or others. This program provides a highly structured program with 24-hour supervision. Children are allowed access to community activities, public school participation and other normalizing situations as promptly and fully as is consistent with their treatment plans. 424

In the event a child is deemed ineligible for what were formerly known as MATCH programs, there are other resources available. These resources should be explored prior to a referral to what was formerly known as the statewide MATCH committee. 425 The Division of Mental Health, Developmental Disabilities and Addictive Diseases within DHR has various community-based programs to assist children in need, including outdoor programs, substance abuse programs, autism services, developmental disability, and mental retardation services. 426 The Department of Education has a tuition grant program that may be used for residential treatment, and the Individualized Education Plan (IEP) process (described in more detail in Section V(B)(1) below) determines whether residential treatment is recommended by the local school system. 427 Each Department of Juvenile Justice region has a residential placement specialist who is responsible for administering these programs to children who are both in the custody of DFCS and committed to the Department of Juvenile Justice. 428 In addition, Level of Care funds are available to provide support services to a limited number of children in DFCS custody who are most critically in need due to diagnosed medical and/or emotional or behavioral conditions. 429

Under all of these circumstances it is the case manager who has the responsibility to advocate for the child’s special needs and to pursue all available treatment resources for the child. 430 In the event a child in foster care should be

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421 *Id.*
422 *Id.*
423 *Id.*
424 *Id.*
425 *Manual, supra note 79, at Sec. 1005.3.*
426 *Id.* at Sec. 1005.3(A)(still utilizing the predecessor division name of Division of Mental Health, Mental Retardation and Substance Abuse).
427 *Id.* at Sec. 1005.3(B).
428 *Id.* at Sec. 1005.3(C).
429 *Id.* at Sec. 1005.3(D).
430 *Id.* at Sec. 1005.9.
committed to a mental health facility, the United States Supreme Court has determined that an agency such as DFCS cannot do so on its own, but rather a neutral fact-finder must make such a determination.431

3. Services for Children Under Age 3

One of the new requirements of the CAPTA reauthorization through the passage of the Keeping Children and Families Safe Act of 2003 is that states must have “provisions and procedures for referral of a child under the age of 3 who is involved in a substantiated case of child abuse or neglect to early intervention services funded under Part C of the IDEA.”432 In Georgia, the Early Intervention Program (EIP) authorized by Part C of the Individuals with Disabilities Education Act (IDEA)433 is called Babies Can’t Wait and is administered through the Georgia DHR Division of Public Health.434

Children who are referred to the Babies Can’t Wait program are evaluated and assessed by a multi-disciplinary team.435 If the child is found eligible, the team (including the parents) develops an Individual Family Service Plan (IFSP) to assist the child’s family to meet the child’s developmental needs.436 Children from ages 0 – 3 are eligible for the program if they are residents of the state of Georgia and experiencing a significant delay in one or more of the following areas of development: physical, cognitive, communication, social/emotional, or adaptive; or because they have a diagnosed mental or physical condition that has a high probability of resulting in significant delay.437 In order to be eligible for services through Babies Can’t Wait, the child (1) must be diagnosed with a specified mental or physical condition (Category 1 eligibility); or (2) have a significant developmental delay confirmed by a qualified multidisciplinary team (“MDT”) (Category 2 eligibility).438 A MDT is composed of at least two professionals from two different disciplines in addition to the family and the service coordinator.439

Services that are available through an IFSP include assistive technology, audiology, family training and counseling, health services, medical diagnostic services, nursing services, nutritional services, occupational therapy, physical therapy, psychological services, social work services, special instruction, speech-language services, vision services, and transportation services.440

431 Parham, 442 U.S. 584 at 606-607.
436 Id.
437 Id.
438 Id.
439 Id.
The program is voluntary and parental consent (or the consent of a trained surrogate parent) must be obtained before a child can be evaluated or services can be provided. One of the powerful aspects of this entitlement program is that services are not only provided to the child, but also to the child’s family in the child’s home or other appropriate place. Foster parents may benefit from the services if they are caring for a child who is eligible for Babies Can’t Wait services.

Once a referral is made to Babies Can’t Wait, the IFST should be developed within 45 days. Disagreements regarding eligibility and the services provided are resolved through a due process hearing.

4. Privacy Concerns with Medical Records

Medical records’ privacy has been the source of extensive federal and state laws and regulations. Georgia law has provided protections for medical records by exempting them from Open Records Act (Georgia’s “sunshine law”) requirements, and by providing for specific confidentiality provisions within mental health, litigation, and other contexts.

With respect to mental health records at mental health institutions, patients have the right to access the records and to request that any inaccuracies be corrected. The term patient is not limited to adults in the mental health context; in fact it is defined as “any mentally ill person who seeks treatment under this chapter or any person for whom such treatment is sought”. Therefore it appears that children would have the same rights as adults with respect to mental health records.

Federal law has underscored the confidentiality provisions of medical records. The Health Insurance Portability and Accountability Act (“HIPAA”) was enacted in 1996 primarily to provide for the portability and continuity of health insurance when people changed jobs. Part of that Act called for new safeguards to protect the security and confidentiality of health information. HIPAA required the Department of Health and Human Services to promulgate regulations covering health information maintained by health plans, health care clearinghouses, and those health care providers who conduct certain financial and administrative transactions (e.g., enrollment, billing and eligibility verification) electronically.

Most health insurers, pharmacies, doctors and other health care providers were

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441 34 C.F.R. § 303.322(e) (2000).
443 O.C.G.A. § 37-3-166.
444 O.C.G.A. § 24-9-42.
446 O.C.G.A. § 37-3-1 (13).
required to comply with these federal standards beginning April 14, 2003.\textsuperscript{449} As provided by Congress, certain small health plans have an additional year to comply with these requirements.\textsuperscript{450} The regulations provide for patient protections, including provisions related to access to medical records in which patients may request and identify errors and mistakes in health records, notice of privacy practices, limits on the way in which personal medical information may be used, and prohibitions on marketing health information.\textsuperscript{451} In addition they provide a process in which consumers may file a formal complaint regarding privacy practices.\textsuperscript{452}

With respect to access to a minor’s health records under HIPAA, generally the parent would be the minor’s personal representative, allowing the parent access to the minor’s medical records. There are three exceptions to that rule, however, and the most important for foster care purposes is when the minor obtains care at the direction of a court or a person appointed by the court.\textsuperscript{453} Furthermore, as is the case with respect to all personal representatives under the Privacy Rule, a physician or other provider may determine that a parent should not be treated as a personal representative if the provider believes that the child has been or may be subjected to domestic violence, abuse or neglect at the hands of the parent.\textsuperscript{454}

There are no restrictions on an individual’s right to access medical records based on foster care status, nor is there much case law on the issue. Indeed it appears that children are entitled to access their information, at the very least, through their guardian ad litem. The Georgia Court of Appeals indirectly referred to the issue of medical records of children in foster care in the case of \textit{In re A.V.B.}.\textsuperscript{455} In that case the Georgia Court of Appeals found that an agency can have access to a child’s medical records over the objections of DFCS if the agency’s mission is related to the request for access.\textsuperscript{456} In \textit{In re A.V.B.}, the Georgia Advocacy Organization (GAO), an organization that advocates for the mentally ill, sued
Dougherty County DFCS because that DFCS office had failed to seek reviews of the status of children in mental health institutions. The Court of Appeals found that since the GAO was legally mandated to investigate abuse of the mentally ill, GAO was permitted to have reasonable access to the child’s confidential records.

B. The Child’s Educational Needs

Every child in Georgia is required to attend school until the age of 16 and, if the child follows the school’s rules, is guaranteed an education until that time. The state’s obligation to educate children in foster care is no less than its obligation to educate children who are not in foster care. There are criminal penalties for anyone who has control or charge of a child or children who violates those mandatory education provisions, with each day of a child’s absence from school constituting a separate offense. The juvenile court code specifies that all those with legal custody of a child have both the right and duty to “provide for the care, protection, training, and education and the physical, mental, and moral welfare of the child subject to the conditions and limitations of the order and to the remaining rights and duties of the child’s parents or guardian.”

Therefore, children in foster care are required to attend school just like any other children, and those responsible for the foster children have a duty to make sure that they attend. This also means that children in foster care are permitted to drop out of school at age 16, just like other children. However, DFCS’ foster care policy manual acknowledges that children should be helped to achieve their maximum capacity for formal education. Further education or training should be sought for those “whose aptitudes, personalities, and school records document that they are willing and capable of benefiting from such educational opportunities.”

One of the components of the Comprehensive Child and Family Assessment is the educational needs of the child. The Comprehensive Assessment includes a determination of the educational strengths and needs of the child through collaboration with the school, the parent(s) and the foster parents. Children in care are to attend the public school in the community unless the public school determines that the child’s needs cannot be met, and they must be assisted in

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457 Id.
458 Id. at 245.
460 O.C.G.A. § 20-2-690.1(b).
461 O.C.G.A. § 15-11-13 (emphasis added).
462 It should be noted that a child who drops out of foster care is less likely to be allowed to remain in foster care after age 18 because most WTLPs include completion of educational goals and compliance with the WTLP is a major factor in the DFCS decision to grant a youth’s request to remain in care. See generally Manual, supra note 79 at Sec. 1002.23.
463 Manual, supra note 79, at Sec. 1011.7.
464 Id.
obtaining the greatest benefits possible from their “school experience” and in
achieving the maximum level of education they are capable of attaining.\footnote{465}

Indeed children should be allowed to continue at the same school as when they
were at their own homes whenever feasible and in the child’s best interests,\footnote{466} as
discussed in more detail in the McKinney-Vento Act discussion in Section V(B)(2)
below. Often children in foster care are moved from one placement to another,
and moving to different schools may mean a child falls even farther behind. One
study in Oregon found that children who experienced multiple foster placements
throughout a school year had a lower chance of being above grade level or being
engaged in extracurricular activities at school than children in more stable long-
term foster placements.\footnote{467} Any change in school placement for children in foster
care in Georgia requires prior approval by DFCS case managers.\footnote{468}

The educational needs of the child may be some of the hardest to decipher while
a child is in foster care. The policy manual designates the case manager as the
person responsible for advocating with the school system or arranging for any
necessary educational supports or services the child may need.\footnote{469} The policy
manual also recognizes the fact that “since many children in care are
academically behind, it is critical for the placement provider and the Case
Manager to work closely with school staff in coordinating educational
opportunities and needed services.”\footnote{470} In the event the child requires special
education services, however, the issue becomes more complicated.

1. \textbf{Children with Special Needs}

Federal law provides safeguards for the education of children with disabilities
through a statutory framework that attempts to guarantee both a free and
appropriate education for those children.\footnote{471} It was apparent in the early 1970s
that disabled children throughout the country were not receiving the educational
assistance they needed and often did not have access to public schools. Some
federal courts during that time held that children with disabilities should receive
the same access to education as other children.\footnote{472} Those cases established
mechanisms for public school systems to follow, and Congress responded in kind
by enacting legislation to create safeguards for those children. The Individuals
with Disabilities Education Act (IDEA) is actually a series of amendments to the

\begin{footnotes}
\item[465] Id.
\item[466] Id.
\item[469] Manual, supra note 79 at Sec. 1011.7
\item[470] Id.
\end{footnotes}
1975 Education for All Handicapped Children Act. This legislation, along with Section 504 of the Rehabilitation Act, established safeguards and procedures for children with disabilities.

IDEA provides conditional funding to states, not unlike federal child welfare legislation, that authorizes expenditures to states only if the state establishes measures outlined in the federal legislation. Section 504 of the Rehabilitation Act, IDEA, and case law interpreting these laws create the process to develop Individualized Education Plans (IEPs) for children with disabilities. IDEA provides conditional funding to states, with the conditions being the way in which states approach educating children with special needs. The focus of IDEA is on equal access to services, not on equality of outcomes, and the equal access guarantee is ensured through procedural mechanisms focused on the parent as the primary advocate for the child.

IDEA requires that each eligible child receive a free appropriate public education (FAPE) in the least restrictive environment possible. It does that through an individualized plan for the child, referred to as the Individualized Education Program (IEP), which is required to be developed annually in conjunction with the child’s parents. Furthermore there are “child find” provisions that require school systems to seek out children who require additional assistance. One of the most significant aspects of IDEA is the IEP, an assessment that brings school officials and parents together in response to the child’s needs. An IEP goes beyond academic needs to consider mental health stability and transition to adulthood.

In addition to the IEP requirement, IDEA also entitles designated children to the provision of services. School districts are required to provide the following services:

transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. The term also


\[\text{\textsuperscript{475}} \text{Caught Between Two Systems, supra note 435 at 92-3.}\]


\[\text{\textsuperscript{477}} 20 \text{ U.S.C. § 1414 (d)(1)-(4) (2003).}\]


\[\text{\textsuperscript{479}} \text{Caught Between Two Systems, supra note 435 at 92-3.}\]
includes school health services, social work services in schools, and parent counseling and training.\textsuperscript{480}

Many of the services provided to children in foster care from Medicaid and Title IV-B sources, such as counseling and medical services for diagnostic or evaluation purposes, can likely be provided from funding pursuant to IDEA.

With children in foster care, the implementation of IDEA becomes more difficult. Since the primary advocate for the child in IDEA is the parent, and since the parents of children in foster care have limited involvement with the child, there is a void. All the procedural safeguards for IDEA are through the parents. IDEA acknowledges that circumstances exist in which parents are unable or unwilling to participate and calls for states to develop procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot locate the parents, or the child is a ward of the state, including the assignment of an individual to act as a surrogate for the parents.\textsuperscript{481}

The Georgia Department of Education has promulgated regulations to determine how to appoint a surrogate parent. The Georgia regulations note that in order to provide every student eligible for a public education with the protection of procedural due process, a surrogate parent shall be appointed by the local school system or state operated program when:

1. No parent can be identified;
2. The local school system or state operated program, after reasonable efforts, cannot discover the whereabouts of the parent(s); or
3. The student is a ward of the state under the laws of the state.\textsuperscript{482}

The regulations require each local school system or state operated program to have procedures to address the determination that a student needs a surrogate parent and to assign an individual to act as a surrogate for the parent or guardian of the student. Surrogate parents may represent the student in all matters relating to the identification, evaluation, educational placement and the provision of a FAPE for the student.\textsuperscript{483}

There are also requirements for surrogate parents, including that each local school system must ensure that those selected as surrogate parents have no interest that conflicts with the interests of the student he or she represents.\textsuperscript{484} In addition, they will have received in-service training regarding provisions of a FAPE and have knowledge and skills that ensure adequate representation of the student. They cannot be persons employed by the state agency, local school system or any other agency or entity that is involved in the education or care of

\textsuperscript{480} 34 C.F.R § 300.24 (a) (2004).
\textsuperscript{482} \textit{GA. COMP. R. & REGS. r. 160-4-7-.06}(1).
\textsuperscript{483} \textit{id. at 160-4-7-.06}(2).
\textsuperscript{484} \textit{id. at 16-4-7-.06}(3).
the student, although some exceptions are noted.\textsuperscript{485} Each local school system or state operated program responsible for educating students with disabilities is required to maintain a list of eligible persons serving as surrogate parents.\textsuperscript{486}

Although the provisions relating to surrogate parents are not statutory, there is a statutory immunity from civil liability for surrogate parents for any actions done while performing their duty as a surrogate parent, except for acts or omissions to act constituting gross, willful or wanton negligence.\textsuperscript{487}

2. Children Awaiting Placement

In addition to the provisions relating to special education, there are also federal protections for the education of homeless children. The McKinney-Vento Act originally passed in 1987 and was reauthorized in 2001 as part of President Bush’s No Child Left Behind Act of 2001.\textsuperscript{488} Under this law the term “homeless” includes an individual who lacks a fixed, regular, and nighttime residence.\textsuperscript{489} Students are considered homeless if they are awaiting foster care placement or living in an emergency or a transitional shelter.\textsuperscript{490} School districts are required to provide or arrange transportation for children in homeless situations to stay at their schools of origin, even if students move to a different city, county or school district. If a student is living in the same school district as the school of origin, then that school district has to provide transportation. If the student moves across district lines, then both districts have to work together to provide transportation.\textsuperscript{491}

Children and youth in homeless situations have the right to go to the local school where they are living if they do not want to stay at their school of origin. The local school must let students experiencing homelessness go to classes and participate fully in school activities as soon as they come to the school, even if they don’t have documentation (e.g. birth records, proof of district residence, immunizations) immediately required to enroll.\textsuperscript{492} In order to ensure that occurs,

\begin{itemize}
  \item \textsuperscript{485}Id. at 160-4-7-.06(2) and (4). Exceptions are as follows:
    \begin{enumerate}
      \item [\textsuperscript{4})] Exceptions.
        \begin{enumerate}
          \item [(a)] The LSS/SOP may select persons to serve as surrogates who are employed by a nonpublic agency that only provides non-educational care for the student and who meet the standards in paragraphs (3)(a) and (c) of this rule. [refer to 34 CFR 300.515(c)(3)]
          \item [(b)] A person who otherwise qualifies to be a surrogate parent under paragraph (3) of this section is not an employee of the LSS/SOP solely because he or she is paid by the LSS/SOP to serve as a surrogate parent. [refer to 34 CFR 300.515(d)] Id.
        \end{enumerate}
    \end{enumerate}
  \item \textsuperscript{486}Id. at 160-4-7-.06(5).
  \item \textsuperscript{489}42 U.S.C. § 11302(a)(1) (2004).
  \item \textsuperscript{491}42 U.S.C § 11432(g)(1)(J)(iii)(II)(2004).
  \item \textsuperscript{492}42 U.S.C. § 11432(g)(3)(C)(i)(2004).
\end{itemize}
local school systems must name a person as “liaison” who is in charge of making sure students who are homeless can enroll and succeed in school. In fact, schools are required to give students in homeless situations all the services they need, including pre-school, school meal programs, programs for language minority students, special education and other programs for students with disabilities, Title I services, programs for gifted and talented students, vocational and technical education, and before and after school programs.493

C. The Child’s Social, Spiritual and Recreational Needs
The DFCS foster care policy manual provides that “a child in care is to have opportunities for family and community recreational activities and for the development of special abilities and interests, such as hobbies, sports, music, scouting, arts, and crafts.”494 These opportunities may be categorized as visitation with family members, spiritual needs, and recreational activities.

1. Visitation with Family Members

a. Parents
Subject to the limitations of the order granting temporary custody and removing the child from the home, the parent not only retains the right to visit the child,495 but visitation is considered a critical aspect of the child’s case plan and reunification plan.496 The manual explains that the reason for the visitation is its aid to the child, in part because the child’s confusion and anxiety can be greatly reduced by arranging some form of contact with his or her birth family as soon as possible.497 Not only do visitations reassure the child that the parent is still available and concerned about him or her, but visits may also permit the child to sense parental “permission” for being placed away from the parent which could alleviate some guilt many children feel.498 The policy manual encourages the first visitation with the parents to occur the first week of placement if at all possible.499

b. Siblings
Georgia regulations require child placing agencies to ensure that children of the same family be kept together when possible unless it has been determined through casework services that it is not desirable.500 The DFCS foster care policy manual states that placing siblings apart should be done only rarely, and

494 Manual, supra note 79, at Sec. 1011.9
495 In re K.B., 188 Ga. App. 199 (1988) (noting that visitation rights of a parent of a child in the custody of DFCS are a residual “parental tie” which is not severed by the mere placement of the child in the temporary custody of the department, without a specific finding as to the visitation right).
496 O.C.G.A. §15-11-58(c)(6).
497 Manual, supra note 79, at Sec. 1009.3.
498 Id.
499 Id.
only if placement together would be contrary to the developmental, treatment, and safety needs of a child. In such circumstances the reasons should be documented in the case record, and may include lack of available resources, pattern of disrupted placements, and that the individual needs of a child could only be met in separate placements. If siblings cannot be placed together, frequent and regular contacts are to be maintained. All contacts between siblings should be documented in the case record.

There is little case law or statutory authority in Georgia for the proposition that siblings have certain rights of association, although there are procedural requirements to try to assure the same placement. Furthermore, courts across the country have either refused to acknowledge such association or have refused to hear the issue. A recent Northern District of Georgia federal opinion that is still on appeal does, however, acknowledge a viable claim of a constitutional right to family integrity, including visits with parents and siblings.

As a result of the lack of helpful case law on the subject, many states have enacted legislation that specifies a right of a child to associate with his or her siblings. Georgia has not yet enacted such a provision, although there was legislation proposed in the 2004 Session of the Georgia General Assembly to create such an association.

c. Grandparents

The county DFCS office may grant the request of a grandparent to visit the child in care if it is deemed important for the child. Depending on the interaction between the grandparent and the child, the agency can supervise the visits when needed. Should DFCS not grant grandparent visitation, the grandparent has the legal right to petition the court for visitation rights with a minor child under

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501 Manual, supra note 79, at Sec. 1009.8.
502 Id.
503 Id.
504 Id.
505 Adoption of Hugo, 700 N.E.2d 516 (Mass. 1998), cert. denied, 526 U.S. 1034 (1999)(denying cert after Massachusetts Supreme Court found sibling association only one factor to consider in making custody decisions thereby rejecting the argument that sibling association is a fundamental liberty interest); compare with L. v. G., 497 A.2d 215 (N.J. Super. Ct. Ch. Div. 1985) (holding that siblings possess the natural, inherent and inalienable right to visit with each other).
508 HB 1025, sponsored by Rep. Mary Margaret Oliver, says in part “The General Assembly finds that sibling relationships are an integral aspect of the family unit, and therefore seeks to ensure the preservation and strengthening of the child’s family ties by requiring reasonable efforts to place sibling groups together in foster care.” The bill defines ‘sibling’ as “a child related by blood, adoption, or affinity through a common legal or biological parent.”
509 Manual, supra note 79, at Sec. 1009.9.
510 Id.
Georgia Code Section 19-7-3. That Code Section provides unique opportunities to grandparents to file an original action to gain visitation rights, or to intervene in and seek to obtain visitation rights in any action in which the custody of a minor child is at issue, proceedings are underway to terminate the parental rights of either parent, visitation rights regarding the child are at issue, or whenever the child has been adopted by the child’s blood relative or by a stepparent.511

If grandparents intervene in such an action or bring their own petition for visitation, the court may grant them visitation rights under certain circumstances. The court must find both that “the health or welfare of the child would be harmed unless such visitation is granted,” and that the best interests of the child would be served by such visitation.512 Those determinations must be based on facts that are noted in the court’s order. In addition, there is no presumption in favor of visitation by any grandparent. Once those visitation rights are granted there are still opportunities for modification because the legal custodian, guardian, or parent may petition for revocation or amendment of the grandparent’s visitation rights.513 The court may appoint a guardian ad litem to represent the child during all proceedings to determine grandparent visitation rights.514

d. Significant Others

“Other family members or friends with whom the child has had a significant, positive relationship before entering care, may visit when the county department deems it important for the child.”515 The county DFCS office must know about and approve all contacts the child has with adult friends and family.516 When parents object to certain individuals visiting their children while in DFCS custody, the case manager should understand the basis of the parents’ objections and determine if in fact such contact is contrary to the well-being of the child.517 Should DFCS arrange visits or other contact notwithstanding the objections of the parent, the case plan should clearly document the reasons for the parent’s objections, and DFCS must obtain a court order permitting the contact.518

2. Spiritual Needs

Meeting the spiritual needs of children in foster care can be a complex undertaking. First, the right of the parent to direct the child’s spiritual upbringing is well-established.519 Second, the child’s own religious beliefs, independent of

511 O.C.G.A. § 19-7-3(b).
512 O.C.G.A. § 19-7-3(c).
513 Id.
514 O.C.G.A. § 19-7-3(d).
515 Manual, supra note 79, at Sec. 1009.10.
516 Id.
517 Id.
518 Id.
519 Wis. v. Yoder, 406 U.S. 205, 230 (1972) (holding that parents’ direction of religious upbringing may only be encroached upon by a showing of substantial threat to the “physical or mental health of the child or to the public safety, peace, order or welfare”); Pierce v. Soc’y of Sisters, 268 U.S. 510, 534-35 (1925).
his or her parents, may merit some consideration. Third, the prospective foster parents have their own rights of free exercise of religion which might affect the placement of the child. Finally, federal and state laws and regulations require the state to provide temporary placement to children safely and quickly, a doctrine which may preclude religious considerations from being the primary factor to determine placement.

The Georgia Rules and Regulations provide that placement considerations by child placing agencies shall include the potential for children’s participation in religious and cultural activities in accordance with their cultural or ethnic heritage. The DFCS foster care manual is considerably more detailed:

To the extent possible, the child should attend his or her own church, synagogue, mosque or other place of worship. If the wishes of the parent and other family members are unknown, then the foster parent and the Case Manager must plan how to best meet the spiritual needs of the child. Parents retain certain residual rights, even though DFCS holds temporary custody. Determining the child’s religious affiliation is one of these.

Additionally, the foster parents must consult and obtain approval from DFCS before making any religious practice decisions (e.g. baptism, confirmation, etc.) for the child. Even if temporary custody is granted to the state, the parent has the authority to indicate the spiritual preferences for the child. In such an event all efforts are made to continue those wishes in foster care. In the event no spiritual preference is given, the foster parent and case manager determine what spiritual practices best meet the child’s spiritual needs.

3. Recreational Activities
Research indicates that extracurricular activities are extremely beneficial to the development of children and youth. In Georgia a child in DFCS' care is to

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520 See Thomas J. Cunningham, Considering Religion as a Factor in Foster Care in the Aftermath of Employment Division, Department of Human Resources v. Smith and the Religious Freedom Restoration Act, 28 U. RICH. L. REV. 53 (Winter, 1994) [discussing In re Glavas, 121 N.Y.S.2d 12 (1953)(holding that a child does not hold a right to free exercise of religion until he or she is old enough to determine what religion he wants to follow as well as being able to comprehend the ethical concepts and life in response to that determination); In re Santos, 105 N.Y.S.2d 716 (1951), appeal dismissed, 109 N.E.2d 71 (1952)(considering the religion of the children themselves to be weighed in the placement); Zummo v. Zummo, 574 A.2d 1130, 1148-50 (Pa. Super. Ct. 1990)(holding that while no uniform age of discretion is set, children age 12 or over are generally considered mature enough to assert a religious identity, while children eight and under are not)].
521 Id. at 91(citing Orzechowski v. Perales, 153 Misc. 2d 464 (N.Y. Sup. Ct. 1992)).
522 Id. at 95.
524 Manual, supra note 79, at Sec. 1011.8.
525 Id. at Sec. 1015.16.
526 Id. at Sec. 1011.8.
527 Kristin A. Moore, Ph.D., and Tamara G. Halle, Ph.D., Preventing Problems vs. Promoting the Positive: What Do We Want for Our Children? CHILD TRENDS (July, 1999) (Prepared for the
have opportunities for family and community recreational activities and for the development of special abilities and interests, such as hobbies, sports, music, scouting, arts, and crafts. The DFCS policy manual acknowledges that “play is an important learning experience for all children to develop their social and intellectual skills.” Placement providers should encourage the participation of children in recreational activities. Many children in care will not have had previous experiences with engaging in such activities. They may need special help in learning to participate appropriately.

A child in foster care should have opportunities to participate in extra-curricular and recreational activities. DFCS offers such programs for children in foster care. For example, for children fourteen and under who are in DFCS’ custody and in a foster home or pre-adoptive home, $252 is available per eligible child per summer for a summer safety and enrichment program. These activities offer learning or cultural activities in the community and are available through such programs as the Red Cross, YMCA, school, or church-related camps. The allocation of funds is based on the number of children in care.

For children fourteen and over, enrichment activities are available for programs throughout the year, but a specific process to enroll is required through the case manager. Whether the state will fund the enrichment activities for children 14 and over is based on whether the activity is part of their Written Transitional Living Plan (WTLP) and whether the extracurricular activity is reasonably necessary to achieve the goal of the WTLP, as discussed more fully in Section V(D)(1)(b) below.

4. Discipline of Children

Corporal punishment is not allowed for any children in state custody. Under DFCS policy any physical or emotional punishment to a child is prohibited by foster parents and any other approved placement resources. Furthermore, they may not “authorize any other individual or agency to administer such punishment as a method of discipline.” Physical punishment is defined as “any deliberately inflicted pain to the body, [and] foster parents are required to know the difference

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Communitarian Network, April 1999, with support from the NICHD Family and Child Well-Being Research Network and the Office of the Assistant Secretary for Planning and Evaluation, DHHS.

528 Manual, supra note 79, at Sec. 1011.9.
529 Id.
530 Id.
531 Id.
532 Id.
533 Id.
534 Telephone Interview with Millicent Houston, Policy Specialist and State Coordinator for Independent Living, Office of Child Protection, Division of Children and Family Services, Georgia Department of Human Resources (July 30, 2004) [hereinafter 7/30 Houston Interview].
535 Id. at 1016.13.
536 Id.
537 7/30 Houston Interview, supra note 513.
538 Id. at 290-9-2-.07(8)(c)(9) (2003); Manual, supra note 79, at Sec. 1015.20.
539 Id. at Sec. 1015.21.
between punishment and discipline." Additional prohibited practices include “those behaviors that demean, humiliate, degrade, create anxiety and fear, and deny children their basic right to be reared in a manner that is instructive, firm, loving and humane.” It also prohibits name-calling and the criticism or deprecation of a child’s racial or ethnic heritage and socioeconomic station.\footnote{Id. at Sec. 1015.20.} The policy further prohibits the denial of communication and visits with family as a form of punishment.\footnote{Id. at Sec. 1015.21 and at Appendix N-2. (In addition, GA. COMP. R. & REGS. r 290-9-2.07(8)(c) states: “the following forms of discipline are prohibited and shall not be used: (1) assignment of excessive or unreasonable work tasks that are not related to the child’s misbehavior; (2) denial of meals and hydration; denial of sleep; (3) denial of shelter, clothing, or essential personal needs; (4) denial of essential services; (5) verbal abuse, ridicule or humiliation; (6) chemical or medical restraints; (7) denial of communication and visits with family unless restricted by case plan or court order; (8) corporal punishment; (9) confining a child to a room or area which may reasonably be expected to cause physical or emotional discomfort to the child; or (10) confinement of a child to a room or area for periods longer than those appropriate to the child’s age, intelligence, emotional makeup and previous experience, or without the supervision or monitoring necessary to ensure the child’s safety and well-being. In addition, per GA. COMP. R. & REGS. r. 290-9-2-.07(8)(d) “Children are not permitted to discipline other children.” In addition, physical and/or emotional abuse to children in foster care is strictly prohibited. This includes, among other things, denying mail, refusing telephone contact with birth family or case manager, destroying property, creating fear, locking children in a room. Manual, supra note 79, at Sec. 1015.21 and at Appendix N-2.)

Corporal punishment of children in foster care is also prohibited in the school system.\footnote{Id. at Sec. 1015.22.} The case manager is required to inform the school in writing of the identity of the child in foster care and a statement that corporal punishment is prohibited as a means of discipline or correction.\footnote{Id. at Sec. 1015.23.}

Any violation of the discipline policy, as in other violations of the policy for foster homes, may result in either temporary or permanent closure of the home. In the case of a private agency foster home, the home may no longer be used for the placement of DFCS children.\footnote{Id. at Sec. 1015.22.} Section VI(A) below describes the procedures to be taken in the event this policy or others are violated while a child is in DFCS foster care.
D. The Older Child’s Needs

In the legislative history of ASFA, the legislative report divulged that in some states the average child removed from the home spends almost three years in foster care.\textsuperscript{547} Furthermore, it was evident that many of those children would never return home, or would return home intermittently but never be permanently reunified at home.\textsuperscript{548} That sentiment along with the prevailing view that adoption was preferable to foster care drift led to the passage of ASFA, an attempt to encourage permanency by returning the child home or finding alternative permanent placement.

Despite all best efforts, however, many children remain in foster care and, in fact, “age out” of the system. Older children in foster care have unique issues, related to decisions from reproductive rights to transitional issues to prepare these youths for adulthood.

1. Aging Out of Foster Care

Despite the federal efforts to the contrary, each year over 20,000 youths “age out” of foster care, meaning they exit foster care only because they turn eighteen years old.\textsuperscript{549} Many of these teenagers aging out of foster care lack the support that others receive after their eighteenth birthday. Those children who age out of foster care are unlikely to have the stable family, emotional, financial and social support that many others receive from their families and communities. Furthermore, many of these teens are likely to lack the skills necessary to transition to adulthood until their twenties or thirties. For example, a longitudinal study of children leaving foster care found that teenagers aging out of foster care have a greater risk of homelessness, low earnings, public assistance, delinquent acts, incarceration, and insufficient health care.\textsuperscript{550}

In an effort to address the needs of older children and improve outcomes for them, Congress enacted and the president signed the Foster Care Independence Act of 1999, also referred to as the John H. Chafee Foster Care Independence Program (Chafee Program).\textsuperscript{551} The program was designed to provide states with flexible funding to enable programs to be designed and conducted:

1. to identify children who are likely to remain in foster care until eighteen years of age and to help those children make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention,

\textsuperscript{548} Id.
training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities;

2. to help children who are likely to remain in foster care until 18 years of age receive the education, training and services necessary to obtain employment;

3. to help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions;

4. to provide personal and emotional support to children aging out of foster care through mentors and the promotion of interactions with dedicated adults; and

5. to provide financial, housing, counseling, employment, education and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood.\(^{552}\)

There are many requirements to comply with in order for a state to receive funds from the Chafee Program. A state is required to use objective criteria for determining eligibility for benefits and services, and for ensuring fair and equitable treatment of benefit recipients. In addition, a state must certify the occurrence of many things, including that the state will provide assistance and services to children who have left foster care because they are between the ages of eighteen and twenty-one, that the adolescents participating in the program participate directly in designing their own program activities that prepare them for independent living, and that they accept personal responsibility for living up to their part of the program.\(^{553}\)

The Chafee Program also provides a state option of Medicaid coverage for adolescents leaving foster care. That option allows states to provide Medicaid coverage for “independent foster care adolescents” who are between the ages of 18 and 21 and who were in foster care on the child’s 18th birthday. In Georgia, Medicaid coverage is provided until the age of 18, unless the child has signed up to remain in the system, at which point Medicaid coverage is provided until the age of 19. (See discussion \textit{infra} Sec. V(A).) Georgia has not opted for additional Medicaid provisions under the Foster Care Independence Act.

\textbf{a. Independent Living Program}

In response to the Chafee Program, Georgia made changes to its independent living program for children in foster care and created additional services targeting the teens aging out of foster care. Georgia’s Independent Living Program (ILP)

\(^{552}\) Id. at Sec. 477(a)(1)-(5).

\(^{553}\) Id. at Sec. 477(b)(3)(A) and 477(b)(3)(H).
aims to “provide an environment for eligible youth to maximize their potential and achieve successful adult transition to self-sufficiency.”

For a youth to be eligible for the ILP, the youth must meet one of two criteria: be between the ages of fourteen and twenty-one in the foster care system regardless of the permanency plan, or be under twenty-one and eligible for independent living services when the state’s custody of the child ended.

For those children who are between the ages of 14 and 21 in the foster care system, the case manager is required to make a “referral to Independent Living” which refers the youth to an independent living coordinator in his or her county. The state is divided into regions for purposes of independent living coordinators, so that there is at least one coordinator per region. Some regions, due to the number of youth in the programs, have more than one independent living coordinator. Referrals should be made no later than 30 days after the youth meets eligibility criteria. Youth age 16 or over and in agency custody “shall periodically be advised verbally and in writing of the agency’s criteria for granting approval to continue in foster care placement beyond age 18.”

Upon reaching age 18, a youth who wants to stay in foster care placement must sign a consent form to remain in foster care provided that DFCS and the youth mutually agree that continued foster care placement is consistent with the Written Transitional Living Plan (WTLP) goals. If the county department is not in agreement with the youth’s request to remain in care, the youth may request a staffing with the Field Director or Social Services Director. At least sixty days in advance, written notice is provided to the youth should DFCS determine that continued foster care cannot be provided. Reasons to support this decision are documented in the record. A staffing must be held with the youth to plan for transition after foster care.

Youth who are in foster care and wish to remain in care beyond age 21, and youth who are in Aftercare status and wish to continue receiving services beyond age 21, may request services for six months beyond their 21st birthday for exceptional reasons such as completing the educational requirements of their WTLP. Such waivers must be approved by the Division Director.

b. Written Transitional Living Plan

Young people in foster care between the ages of 14 and 21 are required to have a written transitional living plan (WTLP) that serves as a guide or road map in determining services needed for the youth. With the input and assistance of

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554 Manual, supra note 79, at Sec. 1012.
555 Id. at Sec. 1012.1.
556 7/30 Houston Interview, supra note 534.
557 Manual, supra note 79, at Sec. 1012.2.
558 Id. at Sec. 1002.22.
559 Id. at Sec. 1002.23.
560 Id.
561 Id. at Sec. 1012.9.
562 Id. at Sec. 1007.10.
the independent living coordinator, an assessment is conducted of the youth’s transitional living skills and needs.563 Everything is required to be documented fully, including transitional strengths and needs, mutually identified goals or steps which will ultimately result in successful emancipation, and time frames for achievement. Pursuant to federal requirements, the foster youth is required to be involved in the development of the WTLP. The youth is to give input as to what he perceives as his strengths, needs and abilities.564 If the youth has any objections to the plan, the objections are to be documented in writing.565

The parent or representative family member, the youth and the case manager should sign the WTLP.566 It is to be made a part of the child’s case plan.567 It should be reviewed at least once every six months when the court or judicial citizen review panel reviews the child’s case plan.568

c. Transitional Living Assistance

Those who did not remain in foster care after the age of 18, but who are younger than 21 are considered youth in Aftercare status and may be eligible for transitional living services.569 This program is “designed to aid the transition from foster care to self-sufficiency.”570 Services available through this program include a comprehensive transitional living assessment to determine readiness for transitional living. It will also cover transportation expenses, start-up funds, money for supplies and furniture, counseling fees, and housing and utility subsidies. To be eligible for these funds, a youth must be employed and must demonstrate a level of maturity necessary to live alone.571 There are requirements for life-skills training and money management as a condition of receipt of this money.572 This funding is also available to youth who are still considered in the custody of the state, at which point a per diem is provided to the custodian and the custodian assists the youth as they transition to independent living.573 Youth in this program may receive up to $8,000 per year of financial support.574 All of this information is required to be included in the WTLP. The Independent Living Program Coordinator assists those youth who

563 Id.
564 Id. at Sec. 1007.11.
565 Id.
566 Id. at Sec. 1007.12.
567 Id. at Sec. 1007.14.
568 Id. at Sec. 1003.14.
569 Id. at Sec. 1012.15 (Youths otherwise eligible but who are in the custody of relatives do not qualify for transitional living services; however, they are eligible for other independent living services. Id.)
570 Id. at Sec. 1012.8.
571 Telephone interview with Millicent Houston, Policy Specialist and State Coordinator for Independent Living, Division of Children and Family Services, Georgia Department of Human Resources (Jan. 28, 2004) [hereinafter 1/28 Houston Interview].
572 Id.
573 Id.
574 Id.
are no longer in the custody of the state, and the case manager assists those youth who continue to be in the state’s custody.\textsuperscript{575}

d. Enrichment and Education Activity Funds
Youth in the independent living program are eligible to receive financial assistance and services related to education and enrichment activities while in high school. Allowable expenses include tutoring, graduation fees, independent living conferences, life skills training or workshops, driver’s education, school sponsored clubs or athletics, Boy or Girl Scouts, transportation to educational or cultural events, and support groups.\textsuperscript{576} The funds for this program are from state dollars for this purpose, and are accessed through the case manager and Independent Living Coordinator.\textsuperscript{577} The expenses must be demonstrated as a need through the WTLP, and there is no cap on the dollars that may be expended per child.\textsuperscript{578}

e. Postsecondary Education Related Expenses
Those youth eligible for independent living services are eligible for postsecondary education related expenses.\textsuperscript{579} The independent living coordinator and the case manager should identify educational or vocational goals and determine the financial need of the youth based on the WTLP. The Independent Living Coordinator signs an authorization for billing, and it is valid for six months from the date it is issued. Allowable expenses under this program include application fees, registration fees, tuition, room and board, course books and supplies, driver’s education, tutoring, testing, educational stipends and transportation assistance. These funds are provided to supplement rather than replace other financial assistance available for post-secondary education.\textsuperscript{580} There is no cap on the state funding permitted to be expended per child, and as of August 2003, federal dollars are available to youth in the form of “education and training vouchers.”\textsuperscript{581} Those “vouchers” are for up to $5000 per youth per federal fiscal year, and the state expends those dollars for the youth’s needs before spending state dollars for postsecondary education expenses.\textsuperscript{582}

In August 2003, $260,000 in state dollars was appropriated for the first time to permit youth up to age 25 to achieve a Bachelor’s degree.\textsuperscript{583} In order to be eligible for those funds, the student had to be eligible for independent living program services at the time the state’s custody of the child terminated either

\textsuperscript{575}Id.
\textsuperscript{576}Manual, supra note 79 at Sec. 1012.11.
\textsuperscript{577}1/28 Houston Interview, supra note 571.
\textsuperscript{578}Id.
\textsuperscript{579}Id.
\textsuperscript{580}Manual, supra note 79 at Sec. 1012.10.
\textsuperscript{581}1/28 Houston Interview, supra note 571.
\textsuperscript{582}42 U.S.C. § 677 (2004).
\textsuperscript{583}1/28 Houston Interview, supra note 571.
through adoption or the expiration of the custody order.\textsuperscript{584} Prior to that state appropriation, postsecondary education expenses ended at age 21.\textsuperscript{585}

Youth in ILP can return to their foster home during college breaks and holidays. Foster parents receive a per diem for the days/weeks the youth is staying in the foster home.\textsuperscript{586}

\textbf{2. Reproductive Rights}

The DFCS foster care manual provides that the case manager and the foster parent or facility staff should help children and teens learn about and respond to matters related to sexual development and sexuality.\textsuperscript{587} If the parents’ rights have not been terminated, the case manager should attempt to include him or her in the decision making process, including issues relating to dating and sexuality.\textsuperscript{588} In these areas the foster parent is not authorized to make decisions regarding the child without at least the case manager’s consultation and approval. All teens 17 and under, regardless of foster care status, have the right in Georgia to obtain contraceptives, pregnancy tests, pre-natal care, counseling, information and treatment for sexually transmitted diseases and an abortion without the permission of his or her parents. All of these issues will be discussed below.

With respect to treatment, medical care, or surgical services related to sexually transmitted diseases, the consent of a minor is adequate to authorize medical or surgical care or services by a hospital, public clinic or physician. The consent is considered as binding as a consent given by an adult, and no other consent is required. Despite those rights, a treating physician or member of the medical staff may inform the minor’s custodian or guardian as to the treatment given or needed. The information may be given to the minor’s custodian or guardian without the consent of the minor patient.\textsuperscript{589}

No consent is required related to the purchase of over the counter contraceptives. Females regardless of age are authorized to consent on their own behalf with respect to medical procedures or treatment in connection with pregnancy, prevention of pregnancy, or childbirth.\textsuperscript{590} That consent is limited, however. Consent is governed by whether the treatment being offered is in fact being given in conjunction with pregnancy or childbirth.\textsuperscript{591}

\textsuperscript{584} \textit{Id.}
\textsuperscript{585} \textit{Id.}
\textsuperscript{586} \textit{Manual, supra note 79 at Sec. 1016.11.}
\textsuperscript{587} \textit{Id. at Sec. 1011.2 (8).}
\textsuperscript{588} \textit{Id. at Sec. 1015.16.}
\textsuperscript{589} \textit{See generally O.C.G.A. § 31-17-7 (b).}
\textsuperscript{590} \textit{O.C.G.A. § 31-9-2(a)(5).}
\textsuperscript{591} 1971 Op. Att’y Gen. N. 71-177 (noting that the determination of what constitutes “in connection with pregnancy or childbirth” must result in a fact-specific inquiry because of “the myriad types and possibilities of medical treatment which may be offered as an adjunct to family planning services, along with the absence of any court decisions construing which medical treatments are given in connection with pregnancy or childbirth”).
Medicaid covers the costs of family planning services, and no parental consent is required so long as treatment is made in connection with pregnancy, prevention of pregnancy, or childbirth. Prescription contraceptives, Norplant, Depo Provera and condoms are covered through Medicaid.\footnote{592} Federal regulations prohibit Medicaid from covering abortion services unless the life of the mother would be endangered if the fetus were carried to term, or if the mother is a victim of rape or incest.\footnote{593} The Medicaid provider manual also requires that prior to reimbursement a “Certificate of Necessity for Abortion” accompany the claim.\footnote{594}

Abortion rights of minors in Georgia are specified in statute.\footnote{595} The parent, custodian or guardian of an unemancipated minor, i.e. those under 18 and still under the parent or other guardian’s control, must be notified prior to the minor receiving an abortion. Although consent by the parent, guardian or custodian is not required, an abortion cannot be performed without either: a) a signed statement by the parent or other custodian that he or she has been notified, or b) the physician providing 24 hours’ actual notice including the name and place where the abortion is to be performed.\footnote{596} Once notice has been provided, the minor must sign a consent form prior to the procedure.

In the event the minor or physician does not want to provide the notice described in statute, or if the parent or person standing in loco parentis of the child cannot be located, there is an opportunity for a judicial bypass of the notice requirements.\footnote{597} The judicial bypass is initiated by the minor’s petition to the juvenile court for a waiver of the requirement. The procedures for that hearing are also defined in statute and the court may determine that the notification requirements be waived if the court finds either:

1. that the unemancipated minor is mature enough and well enough informed to make the abortion decision in consultation with her physician, independently of the wishes of such minor’s parent, guardian, or person standing in loco parentis; or

2. that the notice to a parent, or, if the minor is subject to guardianship, the legal guardian or person standing in loco parentis ....would not be in the best interests of the minor.\footnote{598}

If a child in foster care is or becomes pregnant, Medicaid covers prenatal services for the mother and fetus. There are two issues that are involved in the scenario of a child in foster care having a child. The first question is whether the infant will remain in the custody of its mother or whether the infant will be placed in foster care. The second question is whether the infant will be placed with the

\footnote{593} 42 C.F.R. § 441.203; Georgia Department of Community Health Provider Manual, “Part II: Policies and Procedures for Hospital Services” Chapter 900, 911.1 (Oct. 1, 2003).
\footnote{594} Id.
\footnote{596} O.C.G.A. § 15-11-112 (a)(1)(A)-(C).
\footnote{597} O.C.G.A. § 15-11-114.
\footnote{598} O.C.G.A. § 15-11-114(c)(1)-(2).
mother in the event the infant is placed in foster care. With respect to the infant, it is not automatic that the infant will remain with his or her mother in foster care. There are a number of considerations governing whether the infant will remain in the mother’s custody or whether DFCS will receive temporary custody. Some of the factors include the maturity and age of the young mother, the permanency plan for the mother and baby, the support network for the mother and baby, and the capabilities and desires of the mother. After those considerations are taken into account, DFCS makes a determination about whether to petition the juvenile court to receive custody of the child, and then whether the child should receive the same placement as the mother.

If the infant remains with the mother in her custody, the infant is not considered to be a foster child and therefore does not have foster care status. However, good practice suggests that the minor parent’s case plan include the needs of the infant and that these needs and interests be addressed during the six-month periodic reviews and permanency hearings held on behalf of the minor parent.

3. Marriage

Under Georgia law a person must be at least 16 years old to marry without parental consent. This age limitation does not apply to the female if she is pregnant or if both parties are parents of a child born out of wedlock. When a probate court judge receives an application for a marriage license, it is the duty of the court to determine the age of the applicants. If an applicant appears younger than 25, the person requesting the marriage license is required to submit proof that he or she is 16 or older, which may include providing a copy of the birth certificate.

In those instances in which the applicants for a marriage license are not 16, there is no child born out of wedlock to them, and when the female is not pregnant, parental consent is required before they can marry. The term “parental consent” includes consent by guardians which is defined to include a court appointed guardian among others. Since children in foster care are not mentioned specifically, it is not clear from the statute whether birth parents whose rights have not been terminated, foster parents, or DFCS would be considered a parent or “court appointed guardian” for purposes of consent.

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599 Telephone Interview with James Graves, Interstate Compact for Placement of Children Consultant, Georgia Department of Human Resources (Jan. 30, 2004) [hereinafter 1/30 Graves Interview]; see also Manual, supra note 79, at Sec. 1003.13.
600 1/30 Graves Interview, supra note 600.
601 Id.
602 Id.
603 Id.
604 Id.
605 O.C.G.A. § 19-3-2(2).
606 Id.
607 O.C.G.A. § 19-3-36(a).
608 Id.
609 O.C.G.A. § 19-3-37(b).
The juvenile court has exclusive original jurisdiction over children who request judicial consent to marry, and the probate court issues the marriage license. For all those who marry who are under 17 when parental consent is not required, the judge performing the ceremony is required to notify the parents by mail.

4. Enlisting in the Military

The juvenile court has exclusive original jurisdiction over children who want to enlist in the armed services without parental consent. Children who have been deemed “deprived” are considered children until the age of 18. To enlist in the armed services, one must be 17 with parental consent, or 18 without. If the parents are unavailable, consent may be provided by the guardian with a court order demonstrating guardianship, and therefore a 17-year-old child in foster care may receive permission from the court to enlist.

5. Driving Privileges

Those in the permanent or temporary custody of DFCS may, under certain circumstances, obtain a learner’s permit and a driver’s license. In order to be considered for approval to obtain a learner’s permit, the youth must make satisfactory progress toward the completion of his or her WTLP. If the youth is in temporary custody, the County must obtain the written permission of the birth parent(s) for the youth to obtain a driver’s license or operate a motor vehicle. The birth parent(s) must also assume liability for damages and injuries that may occur as a result of the youth operating a motor vehicle.

In addition, for those in either temporary or permanent custody, the caregiver must also consent to allow the foster care youth to drive. The caregiver must also assume liability for damages and injuries that may occur as a result of the youth’s operating a vehicle. That liability is not automatic, as Georgia courts have held that a foster child is not necessarily considered a “relative” for purposes of coverage and therefore express coverage must be acquired. Driver’s education is required of all children in either temporary or permanent custody of DFCS; costs for such are covered under independent living.

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612 O.C.G.A. § 19-3-38.
616 Manual, supra note 79, at Sec. 1012.12 and Sec. 1012.13.
617 Id. at Sec. 1012.12(2).
618 Id. at Sec. 1012.13.
619 Id.
620 Id.
621 Id.
622 See generally Ledford v. State Farm, 189 Ga. App. 866 (1989) (holding that minor child driving foster parent’s vehicle at time of accident was not a relative as described in the foster parent’s automobile insurance since the foster parents were being paid by the state for his custody).
services. Youth under the age of 18 may not own a vehicle, but those 18 or over may own a vehicle with written approval of the County Director.

In order to obtain a driver’s license, again the youth must make satisfactory progress toward the completion of his or her WTLP. Youth must have been in foster care a minimum of 18 months, and there must be some indication that the current placement will last at least until age 18. If in temporary custody, final approval is with the County Director. If in permanent custody, final approval is with the Division Director. In all cases, the policy manual expressly declares, “liability rests with the birth parent(s) and or caregiver(s), and not with the State of Georgia.”

The foster care policy manual provides an entire host of practice issues and procedures to be considered before approval is granted to permit the youth to obtain a driver’s license, including completion of a driving contract, maturity, school performance, history of substance abuse, and successful completion of the Georgia Alcohol and Drug Awareness Program to name a few.

6. Employment
The DFCS foster care manual provides that youth in the independent living program are encouraged to work in order to gain work experience, develop a work ethic, gain experience in saving and budgeting money, and in developing independence. The case manager, foster parent, and possibly the birth parent will decide if the youth is a good candidate for employment. Factors considered in determining youth’s eligibility to work include the youth’s responsibility, compatible school and work schedule, supportive work environment, and flexible work hours which allow recreation, educational, and social time. In preparing to seek employment, the youth may utilize job-preparation services offered through the independent living program. These services include conferences and workshops on job readiness. The youth may keep the earnings from work, but the case manager must report the earnings so the earnings will not affect the youth’s Medicaid and Title IV-E eligibility. The foster parent is responsible for monitoring the youth’s experience of working.

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623 Manual, supra note 79, at Sec. 1012.12.
624 Id. at Sec. 1012.14.
625 Id. at Sec. 1012.13(2).
626 Id. at Sec. 1012.13.
627 Id.
629 Id.
630 Id.
631 Id.
VI. Avenues of Redress

Even in the best run systems, things will go wrong. This section will describe the administrative remedies available to address certain policy violations by DFCS, foster parents, and other service providers, as well as the fluid civil rights available through the judicial system to ensure the protection of children in foster care.\textsuperscript{632}

A. Policy Violations by Care Providers

DFCS is required by its own policies to establish a written internal office procedure to assure that identified staff is notified when the county receives a report of a discipline or other foster care policy violation involving a child placed in DFCS foster homes or foster/adopt homes.\textsuperscript{633} Furthermore, at a minimum, the procedures for notification should include notification to the County Director, Child Placement Services, and Placement Supervisor(s), the child’s case manager, and the resource development case manager and supervisor, if applicable. If adoption is pending for the child, the county also notifies the adoption case manager and supervisor. It is the foster care supervisor’s responsibility to evaluate any foster care policy violations by a foster home to determine whether they warrant investigation by child protective services. Suspicion of child abuse is immediately reported to the child protective services supervisor, who will pursue investigations according to the child protective services’ own policies and procedures.\textsuperscript{634}

1. Assessment of Reported Violations

The Placement Supervisor conducts the assessment of a foster home for reported disciplinary policy violations within 36 hours of the receipt of the referral.\textsuperscript{635} The Placement Supervisor conducts the assessment of a foster home for non-disciplinary foster care policy violations within 72 hours of the receipt of the referral.\textsuperscript{636} The assigned case manager schedules a visit in the foster home to assess the circumstances and validity of the report. This requires close observation and assessment of the situation, in conjunction with interviewing the foster parent, the child, and other children in the home as well as collateral

\textsuperscript{632} There are also criminal sanctions relating to child endangerment that will not be discussed in this document. See O.C.G.A. §§ 16-5-70, 16-5-72 and 16-5-73.

\textsuperscript{633} Manual, supra note 79, at Sec. 1015.25.

\textsuperscript{634} Id.

\textsuperscript{635} Id. at Sec. 1015.26.

\textsuperscript{636} Id.
contacts and witnesses. The results of a foster care policy violation assessment are recorded using a specified format.

The county department is required to hold a staffing or other consultation and make a decision within 48 hours following the completion of the assessment to determine whether the children should be removed from the home. If the assessment determination is unsubstantiated, the home may remain open, but may be closed if the family is uncooperative or if issues regarding the safety and well-being of the child are of concern. If the assessment determination is substantiated, the home may remain open and a Corrective Action Plan is developed, agreed upon, signed by all participants, and instituted, but only under the following circumstances: a) this is the first discipline violation and the safety of the child in the home does not give rise to concern; b) this is the second violation occurring outside of the three-year time frame; or c) the violation was minor or reactive and the family is amenable to correction and change.

Although there are specific procedures related to closing a home, removal of a child may occur at any time for various reasons. The decision to remove the child is made as soon as it is determined that a child is at risk for further maltreatment.

2. Corrective Action Plan

The purpose of the Corrective Action Plan is to support foster parents by developing and utilizing more appropriate methods of meeting the needs of children in care, and to clarify the agency’s role in preventing further violations of the foster care policy, thereby ensuring the safety and well-being of the child in the home. A Corrective Action Plan is implemented when a violation of foster care policy has occurred and when the home is to stay open. The case manager is required to implement the Corrective Action Plan within three working days of the completion of the staffing or consultation following the assessment of the foster home. The case manager is required to use the Corrective Action Plan to identify the problem, create a plan to change the behavior, and evaluate the results. Results must be measurable, visible, time-limited, and are documented in the foster home case record. The plan may be adjusted if necessary. Both the case manager implementing the plan and the foster parents sign it. A copy is given to the foster parents and one copy is filed in the foster home record. At least two monthly in-home visits are required during the corrective action period.

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637 Id.
638 Id. at Sec. 1015.27.
639 Id.
640 Id.
641 Id. at Sec. 1015.33.
642 Id. at Sec. 1015.27.
643 Id. at Sec. 1015.30.
3. Determining Whether to Close the Foster Home

If the assessment substantiates the allegations, and the following circumstances are present, the home is closed: (a) child abuse or neglect; (b) this is the second discipline or other foster care policy violation within a three-year period; (c) this is the third violation of the discipline or other foster care policy regardless of the time frame; or (d) the caretaker is not amenable to corrective action or agency intervention.\(^{644}\)

In the event of an allegation of maltreatment, child protective services (CPS) and the placement supervisor must review the report to determine whether it is a violation of the discipline policy or if it should be referred for CPS investigation. CPS then assigns the investigation of the foster home to a CPS case manager within the county who has not worked with the family or the children placed in the home. If that is not possible, a CPS case manager or supervisor from out-of-county investigates. If neither is possible, a Special Investigations Unit investigator conducts the investigation of the home.\(^{645}\) Law enforcement is included if necessary pursuant to the county child abuse protocol.\(^{646}\)

Within 48 hours following the completion of the investigation, a staffing is scheduled to determine whether the child should be removed from the home. If a sexual offense is substantiated on the foster or adoptive parent, or any other adult residing in the home, the home is closed. If child protective services determine the allegations are accurate, the home is closed. If the child protective services case determination is that the allegations were not accurate, the home may remain open.\(^{647}\)

The County Director is required to submit a report to the Social Services Section Director within 10 working days of the conclusion of the assessment. The Social Services Section Director reviews the assessment data and issues a concurrence or non-concurrence memorandum to the County Director following the review. In the event of non-concurrence, the Section Director will issue a detailed letter of explanation and instructions to the County Director.\(^{648}\)

The County Director may request a waiver from the Social Services Section Director to keep a home open if it should be closed following DFCS policy. There are specified policies and procedures which must be followed before a waiver is requested, and the social services director is required to respond to the waiver request within ten working days of the receipt of the request.\(^{649}\)

Closing a foster home is mutually determined by the county department and the foster parent whenever possible, but otherwise a case manager makes a decision to do so after consultation with the supervisor. Foster parents have an

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\(^{644}\) Id. at Sec. 1015.27 (4).
\(^{645}\) Id. at Sec. 1015.31.
\(^{647}\) Manual, supra note 79, at Sec. 1015.32
\(^{648}\) Id. at Sec. 1015.28.
\(^{649}\) Id. at Sec. 1015.29.
opportunity to file a grievance related to the decision to close the home except when allegations of child abuse and neglect are substantiated.\textsuperscript{650}

In addition, in 2004 the Georgia General Assembly passed a “Foster Parents Bill of Rights.” HB 1580, among other things, provides that foster parents have the right to be provided a fair and timely investigation of complaints concerning the operation of a foster home, the right to an explanation of a corrective action plan or policy violation relating to foster parents; and the right, to the extent allowed under state and federal law, to have an advocate present at all portions of investigations of abuse and neglect at which an accused foster parent is present.\textsuperscript{651}

4. Private Child-Placing Agencies

For private child-placing agencies, special reports must be made to the Child Care Licensing Office of DHR within 24 hours, and confirmed in writing within five days, regarding serious occurrences involving children in care. Serious occurrences include serious accident or injury requiring extensive medical care or hospitalization, death, abuse, or any incident which results in any federal, state or private legal action by or against the Agency that affects any child, the conduct of the Agency, or any person affiliated with the Agency.\textsuperscript{652}

Child-placing agencies are required by regulation to develop and implement policies and procedures for children to voice grievances and to submit written grievances without fear of retaliation. All written grievances submitted by a child shall be recorded in the case record showing the grievance, description or method of explanation or resolution, and involved staff.\textsuperscript{653} There are no grievance procedures for children specified in the foster care policy manual.

B. Private Causes of Action under State and Federal Law

Litigation in both state and federal court has often succeeded in establishing protections for children in foster care, or in requiring additional administrative procedures to protect children. State and local compliance with many federal child welfare statutes is enforced through complicated reporting and funding mechanisms.\textsuperscript{654} Often, this oversight involves several purely procedural requirements that do little to improve state child protective services.\textsuperscript{655} Further, because ‘the federal government’s leverage to encourage and influence good practices in states’ child protection services stems almost entirely from the ability to withhold funding from noncompliant states [and the federal government has

\textsuperscript{650} \textit{Id. at Sec.} 1015.32.
\textsuperscript{652} G A. C OMP. R. & R EGS. r. 290-9-2-.08(6) (2004).
\textsuperscript{653} G A. C OMP. R. & R EGS. r. 290-2-5-.15 (2004).
\textsuperscript{654} For a more in depth discussion of the federal reporting and enforcement mechanisms, see Crossley, supra note 26, at 282-288.
\textsuperscript{655} \textit{Id. at} 285.
not effectively exercised its withholding power," states are left to follow federal guidelines only if and when they see fit.\(^{656}\)

In several instances federal courts have found that a private right of action exists to enforce federal child welfare laws.\(^{657}\) The best known case on whether and when children have a private right of action under federal child welfare laws is *Suter v. Artist M.*, decided by the US Supreme Court in 1992.\(^{658}\) In *Suter*, the Supreme Court found that there is no private right of action to enforce the reasonable efforts requirements of the Child Welfare Act. However, in 1994 Congress clarified that it did not mean to preclude the possibility of a private right of action under the Child Welfare Act by passing an amendment to the Social Security Act.\(^{659}\)

Both before and after *Suter*, federal courts have found that a private right of action exists to enforce some child welfare laws. Once a cause of action is allowed, federal courts have attempted to remedy administrative lapses by ordering reform. See *Juan by and through Lynch v. Weicker*, 37 F.3d 874 (2d Cir. 1994) (district court issued a consent decree regarding revision of the hiring process of the new Department of Children and Families employees and the Court of Appeals upheld the decree); *L.J. by and through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988) (court upheld the district court’s preliminary injunction regarding redress of deficiencies in the administration of the child welfare program); *LaShawn A. by Moore v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993) (§ 1983 provided for a federal remedy for violations of the federal Adoption Assistance Act. Washington D.C.’s Prevention of Child Abuse Act and Youth Residential Facilities License Act created a private right of action for foster children); *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983) (Court of Appeals held that a private

\(^{656}\) Id at 286.


\(^{659}\) In response to *Suter*, Congress amended the Social Security Act in 1994 to try to permit individuals to bring actions. Part of those amendments included the following:

(a) IN GENERAL.-Part A of title XI of the Social Security Act (42 U.S.C. 1301-1320b-13) is amended by inserting after section 1122 the following:

SEC. 1320a-2. EFFECT OF FAILURE TO CARRY OUT STATE PLAN.

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, [503 U.S. 347] (1992), but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 471(a)(15) of the Act [42 USCS §671(a)(15)] is not enforceable in a private right of action. 42 U.S.C. § 1320a.
cause of action existed under § 1983 against the state for noncompliance with case plan and review obligations under Title IV-E); and G.L. by and through Shull v. Zumwalt, 564 F. Supp. 1030 (D.C. Mo. 1983) (district court ordered a consent decree providing for the licensing of foster homes, pre-placement process, prohibition on use of improper punishment, elimination of overcrowding, and rate of reimbursement of foster families). The National Center for Youth Law maintains a foster care reform litigation docket on its website that provides information on the status and background of child welfare reform cases.  

Federal actions have assisted in protecting the rights of foster children in Georgia. In Taylor v. Ledbetter, 818 F.2d 791 (11th Cir. 1987) (discussed below), the Court of Appeals for the 11th Circuit held that children are entitled to a safe environment in foster care through the substantive due process protections of the 14th Amendment to the United States Constitution. The strength of the holding has been challenged in Georgia since that time, just as other judicial remedies available to children have been tested. The various state and federal causes of action to protect children in Georgia’s foster care system are described in more detail below.


The purpose of 42 U.S.C. § 1983 was to offer individuals a right to bring actions in federal courts because states during the civil rights era were failing to hold their officials accountable for violations of civil rights and other rights guaranteed by the 14th Amendment to the Constitution. 42 U.S.C. § 1983 states:

Every person who under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

This means that actions can be brought pursuant to § 1983 alleging violations of either state or federal laws. The propriety of using § 1983 to enforce the provision of rights provided under child welfare laws is not settled in the United States. Neither is it settled whether children in foster care can use § 1983 to

660 See generally http://www.youthlaw.org/dockets/.
enforce violations of their due process rights. The United States Supreme Court has not ruled on the issue of due process rights, but the Court did mention the issue in *DeShaney v. Winnebago County Department of Social Services.*\(^{663}\) In *DeShaney* the Court addressed the issue of state liability when a child known to social service workers was not removed from his home and later was beaten so severely he was left profoundly retarded and institutionalized. In that case, despite repeated allegations of abuse and visits by the state’s child welfare agency in which the maltreatment was documented, the Court held that the state had no constitutional duty to protect a child from abuse by his father.\(^{664}\) The Court opined that the abuse occurred at the hands of the father who was a private party, not a state actor; that the state had not violated any liberty interests of the child; and therefore there was no due process violation.\(^{665}\)

Although the Court did not address whether liberty interests would have been violated had the child been a foster child and the parent a foster parent, the Court did indicate in a footnote the following:

> Had the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect. Indeed, several Courts of Appeals have held...that the State may be held liable under the Due Process Clause for failing to protect children in foster homes from mistreatment at the hands of their foster parents... We express no view as to the validity of this analogy, however, as it is not before us in the present case.\(^{666}\)

**a. § 1983 Liability in the Eleventh Circuit**

The Eleventh Circuit Court of Appeals, which includes Georgia, has found a constitutional right to safe foster care and, by extension, authorizes a § 1983 cause of action against state and county officials, though a state itself is generally not considered a person for § 1983 liability.\(^{667}\) In *Taylor v. Ledbetter,* a child was removed from her home and custody was granted to Gwinnett County DFCS who placed her in foster care.\(^{668}\) While in foster care she suffered severe injuries as a result of being “willfully struck, shaken, thrown down, beaten and otherwise severely abused by the foster mother,” and at the time of the opinion was in a coma.\(^{669}\) The action brought on behalf of the child was against the state and county officials involved in her placement in the foster home, and alleged that the county officials were grossly negligent and deliberately indifferent to her welfare when deciding to place her, and then leaving her, in the foster home.\(^{670}\)

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\(^{663}\) *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189 (1989).

\(^{664}\) *Id.* at 191.

\(^{665}\) *Id.* at 200.

\(^{666}\) *Id.* at 201, n.9.


\(^{668}\) *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987).

\(^{669}\) *Id.* at 792.

\(^{670}\) *Id.* at 792-93.
also claimed that the Georgia statutory foster care scheme mandates that officials follow guidelines “and take affirmative actions to ensure the well-being and promote the welfare of children in foster care.” Therefore, the children could state a claim based upon deprivation of a liberty interest.

The Eleventh Circuit in *Taylor v. Ledbetter* found that a § 1983 action could be brought in such a circumstance in part because the State’s action in assuming the responsibility of finding and keeping the child in a safe environment placed an obligation on the State to insure the continuing safety of that environment. The State’s failure to meet that obligation, as evidenced by the child’s injuries, in the absence of overriding societal interests, constituted a deprivation of liberty under the fourteenth amendment.

In *Taylor* the court reasoned that foster care was analogous to the line of cases by the Supreme Court regarding inmates or individuals in mental institutions which meant liability is based on whether officials demonstrated “deliberate indifference” to the foster child. In other words, “[a] child abused in foster care, in order to successfully recover from state officials in a § 1983 action, will be faced with the difficult problem of showing actual knowledge of abuse or that agency personnel deliberately failed to learn what was occurring in the foster home.”

In *Taylor* the court also held that the Georgia scheme for child welfare services encompassed the responsibility of DHR, licensure requirements for foster homes, duties to inspect, establishment of case plans for children, and placements in foster care. All of these procedures were found to create a procedural due process claim based upon deprivation of a liberty interest, sometimes called a Roth claim, in personal safety actions when the officials failed to follow the established requirements.

The *Taylor* decision and resulting consent decree resulted in additional duties by the state, including notice rights and hearings for parents. Therefore, *Taylor* shows that injury or death while in foster care is legally actionable under certain circumstances. A later decision clarified that the cause of action exists whether the parents voluntarily placed the child in DFCS custody or whether they are there through involuntary custody. The Eleventh Circuit has also held that foster parents, even if indisputably the cause of the harm to

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671 Id. at 799.
672 Id.
673 Id. at 795.
674 Id. at 796.
675 Id. at 798.
676 Id. at 799. In *Bd. Of Regents v. Roth*, procedural due process rights under the 14th Amendment were found to be applicable to deprivations of interests in specific benefits acquired through state law. Claims of this nature are called “Roth Claims.” 408 U.S. 564 (1972)
677 Miracle v. Spooner, 978 F. Supp. 1161, 1169 (N.D. Ga. 1997)(holding that “from the child’s point of view, foster care will always constitute involuntary custody because the state does not give the child an alternative to the home the state has chosen.”).
the child, cannot be defendants in a § 1983 action because they are not state actors.

b. Affirmative Defenses to § 1983 Actions

Despite the holding in Taylor, decisions since that time may be construed to limit its holding. Limitations on § 1983 actions, including affirmative defenses available to state actors, such as immunity based on the Eleventh Amendment (which generally prohibits states from being sued in federal court) and the qualified immunity doctrine (which prohibits state officials from being sued in their individual capacities under certain circumstances), have been expanded in judicial opinions since Taylor. These issues will be discussed below.

In McCall v. Department of Human Resources, the plaintiff brought an action in federal court in the Middle District of Georgia seeking damages based on injuries her son received while in foster care. The child in that case suffered severe injuries to his head at the hands of other foster children in the home who had known propensities for violence. As a result of the abuse and injuries, the child sustained physical, mental and emotional damages. The court found that a cause of action could not exist against defendant DHR for the injuries because neither a state nor its officials acting in their official capacities are persons under § 1983. For the same reason the court dismissed the action against the employees of county DFCS offices acting in their official capacities.

The court in McCall did permit the claims as against the DFCS employees in their individual capacities for § 1983 “persons” definition, but then examined whether the claims against the individuals would be barred under the affirmative defense of qualified immunity. Qualified immunity protects government officials performing discretionary functions from civil trials and from liability if their conduct violates no “clearly established statutory or constitutional rights of which a reasonable person would have known.” The court applied a two-part analysis required by the Eleventh Circuit. First, the defendant must prove that he or she was acting within the scope of his discretionary authority at the time of the alleged violation. Second, in order to continue bringing the action, if the defendant demonstrates that he or she was acting within his or her discretionary authority, the plaintiff must prove that the defendant’s acts violated clearly established law of which a reasonable person would have known at the time the alleged violation occurred.

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678 See generally Rayburn v. Hogue, 241 F.3d 1341 (11th Cir. 2001). This only deals with the issue of § 1983 liability, not whether state liability would apply, which is discussed infra Sections VI(B)(1)(b), VI(B)(3).
679 Id. at 1363.
681 Id. at 1365.
The United States Supreme Court has since overruled the opinion that formed the basis of the McCall court’s decision on qualified immunity. In Hope v. Pelzer, a 2002 case, the United States Supreme Court limited the qualified immunity doctrine by saying it is too limiting to grant immunity under all circumstances except when the prescribed actions violated clearly established law.\(^{684}\) Instead the Court held that the defendant need only have “fair warning” that the actions violated law.\(^{685}\) The Supreme Court has therefore narrowed the definition of qualified immunity and has made it somewhat easier to bring claims against state officials through §1983 actions.

Procedural due process claims were also severely restricted in McCall. The Roth analysis was eliminated in McCall because the court determined that the reasoning in Taylor was no longer applicable in light of the enactment of the Georgia Tort Claims Act in 1992. The court in McCall cited a Supreme Court decision to hold that when a “state official’s random and unauthorized actions deprive a person of a liberty interest protected by the Fourteenth Amendment, a state may satisfy its procedural due process obligations by providing an adequate post-deprivation remedy.”\(^{686}\) The court determined that the Georgia Tort Claims Act bars any separate action under § 1983 for procedural due process violations of the Fourteenth Amendment by finding that the Tort Claims Act provides appropriate post-deprivation remedies to satisfy the procedural due process concerns.\(^{687}\)

Although the rulings of the Middle District Court in McCall do not overrule decisions of the Eleventh Circuit such as Taylor, decisions such as McCall demonstrate the restrictions placed on § 1983 actions in federal courts for foster care abuses.


Although the Eleventh Circuit in Taylor determined that a § 1983 due process action could arise in the event of injury to a child, bringing a § 1983 action regarding alleged violations of federal legislation such as the Child Welfare Act is a different matter. In 31 Foster Children v. Bush, the plaintiffs sought declaratory and injunctive relief relating to the operation of Florida’s foster care system.\(^{688}\) The plaintiffs alleged both due process violations under §1983 and §1983 violations of federal statutes by claiming, among other things, that: the defendants had failed to provide for the plaintiffs’ basic needs, safety, freedom from being placed into unnecessary state-created danger; deprivation of state-created entitlements without an adequate and fair procedure; unnecessary

\(^{685}\) Id. at 739-40.
\(^{686}\) McCall, 176 F. Supp. 2d at 1369 (citing Hudson v. Palmer, 468 U.S. 517, 530-33 (1984)).
\(^{687}\) McCall, 176 F. Supp. 2d at 1368.
separation of siblings and denial of visitation; and failure to comply with the Adoption Act and Medicaid Act.\textsuperscript{689}

The Eleventh Circuit in \textit{31 Foster Children v. Bush} relied in part on a prior decision of the Supreme Court in \textit{Suter v. Artist M}.\textsuperscript{690} In \textit{Suter} the plaintiffs were children in foster care who brought an action to try to enforce the reasonable efforts requirements under the Child Welfare Act to keep children with families or to reunify them once removed from the home. The Supreme Court determined that the reasonable efforts requirements did not create a private right of action for the plaintiffs.\textsuperscript{691} Instead it determined that the intended beneficiary of those provisions was the state, not any individual child or family. In response to \textit{Suter}, Congress amended the Social Security Act in the hopes of permitting such individual actions.\textsuperscript{692}

The Eleventh Circuit in \textit{31 Foster Children} held that neither the Child Welfare Act’s requirement of a case review system, nor the Adoption and Safe Families Act requirement that proceedings to terminate parental rights occur within a specified time frame, create a basis for private enforcement under § 1983.\textsuperscript{693} Instead, the court found that those specific federal statutes’ enforcement mechanisms are through federal spending power and audit provisions. In other words, in the event of violation the only available remedy is for Congress to withhold funds from the state.\textsuperscript{694} The court reasoned that no private right of action for individuals existed in these federal statutes because in neither statute did Congress speak with a clear voice “manifesting an unambiguous intent for those provisions to provide a basis for private enforcement.”\textsuperscript{695} The court found that the intended beneficiary of those statutes is the state, not individuals, to determine the manner in which they could receive federal funding.\textsuperscript{696}

The Eleventh Circuit made such a determination after applying the test developed by the United States Supreme Court in \textit{Wilder v. Virginia Hospital Association}, 496 U.S. 498 (1990). In \textit{Wilder} the Court determined that the following must be met before a federal statute will be read to confer a right enforceable under §1983:

1. Congress must have intended that the provisions in question benefit the plaintiff;
2. the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial resources; and

\textsuperscript{689} Id. at 1261.
\textsuperscript{690} Suter, 503 U.S. 347 (1992).
\textsuperscript{691} Id. at 364.
\textsuperscript{692} See discussion supra note 659.
\textsuperscript{693} 31 Foster Children, 329 F.3d, supra note 688, at 1273-74.
\textsuperscript{694} See generally Id.
\textsuperscript{695} Id. at 1274 (quoting Gonzaga Univ. v. Doe, 122 S. Ct. 2268 (2002)).
3. the provision giving rise to the asserted right must be couched in mandatory terms.

Despite that holding, in a recent ruling in the Northern District of Georgia, Judge Shoob in *Kenny A.* held that a private right of action to individuals did exist with respect to the Child Welfare Act, the Adoption and Safe Families Act, and the EPSDT provisions of the Medicaid Act. Judge Shoob distinguished the recent ruling from *31 Foster Children* by stating that the plaintiffs in this action relied on more extensive portions of all of the acts and, importantly, found that foster children are the intended beneficiaries of the provisions on which the plaintiffs relied. That case is still being litigated, so it is not clear whether the Eleventh Circuit will rule on the district court’s distinction to *31 Foster Children*.

Both cases do underscore the requirement of independent analysis of each federal statute to determine whether a § 1983 private cause of action exists for violations. Those cases also provide that if a federal statute has its own individual enforcement mechanism, e.g. IDEA, such mechanisms may preclude a separate § 1983 action.

As a result, in both procedural and substantive due process claims brought pursuant to §1983, and in actions alleging violations of federal statutes, available rights of action are not clear. The duty of care to be provided when children are in foster care, the intended beneficiaries of that care, who is considered to be acting under color of law, Eleventh Amendment immunity, and qualified immunity doctrines all make rights of action under § 1983 unclear in this context.

### 3. Causes of Action under State Law

#### a. Breach of Contract as Third Party Beneficiary

It is fairly well established that plans submitted by states in response to federal statutory requirements essentially form a contract between the state and the federal government. Therefore, in theory at least, there is a possibility of an action by children in foster care against the state as third party beneficiaries of those contracts. The Georgia Code provides that the beneficiary of a contract made between other parties for his or her benefit may bring an action on the contract, and such beneficiaries are referred to as “third party beneficiaries.”

A federal district court has recently held in *Kenny A.* that children in foster care may bring an action alleging claims as third party beneficiaries, but there is an important caveat. Even in that recent order in the Northern District of Georgia, the court acknowledged federal precedent that plaintiffs could not circumvent the holding that the Adoption Act and another federal statute do not create

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697 *Id.*

698 *Shoob Opinion, supra* note 506.

699 *Id.* at 287-288.

700 *Suter*, 503 U.S. at 360, n. 11.

701 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (recognizing that legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions).

702 O.C.G.A. § 9-2-20(b).
 enforceable rights under 42 U.S.C. §1983 by asserting a state claim of third party beneficiary claim. The *Kenny A.* decision is being appealed by the State of Georgia.

Therefore, it appears that the viability of a §1983 claim on violations of federal statutes may determine whether third party beneficiary actions are permitted. In other words, if it has been adjudicated that a particular group was not the intended beneficiary for purposes of bringing a § 1983 action against the state, a third party beneficiary action in state court against the state may not be viable.

At least one federal district court in Georgia has also rejected the notion that a third party beneficiary action may be brought by children in foster care due to an alleged breach of contract between foster parents and the state. In that instance the court opined that such an action was not really a contract action, but rather a tort action in disguise. In that case the mother of three brought an action alleging in part that the sexual abuse caused by an unrelated foster child while her children were in a foster home represented a breach of contract between the state and the foster parents, and that her children were third party beneficiaries of that contract. The court held that the agreement that is entered into between DFCS and a foster parent does not include foster children as an intended beneficiary, but instead the duty of care owed to foster children exists independently of the agreement with DFCS.

b. Actions in Tort

The State of Georgia has sovereign immunity from actions in tort brought against it. Under the Georgia Constitution, the General Assembly is authorized to waive the state’s sovereign immunity by enacting a State Tort Claims Act. Pursuant to that authority the General Assembly enacted the Georgia Tort Claims Act, which provides a limited waiver of the state’s sovereign immunity. With certain enumerated exceptions, the “state waives its sovereign immunity for the torts of state officers and employees while acting within the scope of their official duties or employment.” Foster parents and foster children are specifically included in the definition of “state officer or employee”. As a result of that statute, under certain circumstances individuals may bring a tort action against the state.

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705 *Id.*
706 *Id.* at 1336-37.
707 *Id.* at 1342-43.
710 O.C.G.A. §§ 50-21-20 to 50-21-37.
711 O.C.G.A. § 50-21-23(a).
Even in this context there are several prohibitions on private rights of action, and they can be broad reaching. One is the performance of a “discretionary function or duty” by a “state employee.” Discretionary function or duty is defined as “a function or duty requiring a state officer or employee to exercise his or her policy judgment in choosing among alternate courses of action based upon a consideration of social, political, or economic factors.” In other words, if the action giving rise to the claim under the Georgia Tort Claims Act is a discretionary function or duty of a state employee, there is no relief for a private citizen if the function involved a policy judgment.

In cases involving the alleged negligent handling of child deprivation, the Georgia Supreme Court has permitted actions by narrowing the discretionary function exception to liability. In Brantley v. Department of Human Resources, a two-year-old’s foster parents left the child unsupervised in their backyard pool where she slipped and drowned. The Georgia Supreme Court rejected the argument that a foster parent’s supervision of a child placed in his or her custody is a discretionary function. Instead, the Court held that the decision by the foster parent to leave the child unattended was one of “routine child care” and did not fall within the discretionary function exception.

Intentional acts are sometimes viewed differently and actions are harder to bring against the state when the actions are intentional. In Rayburn v. Farnesi, the mother through her children brought an action against the foster parents based on allegations of sexual abuse that occurred at the hands of other children in the home. The court determined that intentional torts are barred by the Georgia State Tort Claims Act if the employee was acting within the scope of his or her duty at the time of injury, regardless of intent or malice. The mother was therefore barred from bringing an action against the foster parents.

The court went on to note:

> the Court believes that the Georgia State Tort Claims Act protects foster parents at all times. The duties and responsibilities of a foster parent are a constant responsibility. Everything that foster parents do regarding their foster children represents an action within the scope of their official duty. Consequently, the Court rejects Plaintiffs' argument that the Hogues acted outside the scope of their official duty. Because the undisputed evidence demonstrates that the Hogues acted within the scope of their

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714 O.C.G.A. § 50-21-22(2).
716 Allen, supra note 714, at 806.
718 Id. at 575.
719 Rayburn, 70 F.Supp. 2d at 1342.
720 Id. at 1342-43 (citing O.C.G.A. § 50-21-24).
official duties or employment with the State of Georgia while the alleged torts were committed, they are entitled to immunity under the Georgia Tort Claims Act and to summary judgment with respect to Plaintiffs' state law tort claims.\textsuperscript{721}

Therefore, based on the above analysis, whether one can bring an action against the state of Georgia through the Georgia State Tort Claims Act is determined by whether the official was acting within the scope of official duties, whether the action was based on a “policy judgment,” and whether the action was intentional.

c. State Statutory Claims

Plaintiffs may also have an opportunity to bring actions arising under certain state statutes related to foster care specifically and child welfare generally. In \textit{Kenny A. v. Perdue}, the district court for the Northern District of Georgia found that a private right of action could exist with respect to certain state statutes.\textsuperscript{722} Although the court acknowledged that there is little Georgia authority on the subject, it found private rights of action in statutes providing for properly screened and supervised homes; case plans and their implementation and permanent placement; and right to care, protection, training, education, and physical, mental and emotional welfare.\textsuperscript{723}

The court reached that conclusion after looking to the statute as a whole to determine whether the legislature impliedly intended to allow a private right of action. It looked at a couple of issues. The first question is whether the plaintiff is one of the class for whose especial benefit the statute was enacted. Second, whether there is any indication of legislative intent either to create or deny such a remedy. Third, whether it is consistent with the underlying purpose of the legislative scheme to imply such a remedy for the plaintiff.\textsuperscript{724} After applying all of those factors, the court determined that causes of actions exist for each of those statutes.\textsuperscript{725}

\textbf{C. Other Avenues for Children to Address Grievances}

In addition to the state administrative procedures or legal actions in state or federal courts, children have other opportunities to address grievances while in state custody. A few of these options are noted below.

1. Contacting the Child’s Representative or Guardian Ad Litem

In the event a child has concerns about her placement or other issues related to state custody, she may contact her guardian ad litem to express her concerns.

\textsuperscript{721} \textit{Id.} at 1342.
\textsuperscript{722} \textit{Shoob Opinion, supra} note 506, at 294-295.
\textsuperscript{723} \textit{Id.} at 294-296. \textit{See O.C.G.A. §§ 49-5-12(j) (properly screened and supervised homes); 15-11-58(c), (j), and (m) (implementation of case plans and permanency); and 15-11-13 (care, protection, education, and welfare).}
\textsuperscript{724} \textit{Shoob Opinion, supra} note 506, at 294.
\textsuperscript{725} \textit{Id.} \textit{See O.C.G.A. §§ 49-5-12(j); 15-11-58(c), (j), and (m); 15-11-13.
The guardian ad litem’s responsibility, as noted above, is to provide representation for the child at all stages of deprivation proceedings. An attorney or guardian ad litem attorney may file motions with the court to address concerns raised by the child, or may take other appropriate action in response to the child’s concerns.726

2. Contacting the Office of the Child Advocate
In addition to contacting the child’s representative or guardian ad litem, the child may contact the State Office of the Child Advocate to address any issues arising while in state custody. Among other things, the Child Advocate is charged with the duty to “identify, receive, investigate, and seek the resolution or referral of complaints made by or on behalf of children concerning any act, omission to act, practice, policy, or procedure of an agency or any contractor or agent thereof that may adversely affect the health, safety, or welfare of the children.”727

The State Office of the Child Advocate is empowered to communicate privately, by mail or orally, with any child and with each child’s parent or guardian.728 In addition, the Child Advocate has access to all records and files of any public entity or court concerning or relating to a child placed for care or treatment within the state.729 The Child Advocate may also enter and inspect any and all “institutions, facilities, and residences, public and private” where a child has been placed by a court or DHR and is currently residing.730 Furthermore, the Child Advocate may apply to the Governor to bring legal action via a writ of mandamus or injunction to “require an agency to take or refrain from taking any action required or prohibited by law involving the protection of children.”731

3. Contacting the Division of Family and Children Services
Children may contact DFCS with any problems arising while in state custody. The contacts may be made through a case manager or may be directed to others within the division.

4. Contacting the Judge
The judge who is responsible for the child’s case may also be contacted with any concerns arising out state custody. Children, pro se or through their representative, their parents, or their foster parents, may write the judge with any issues or concerns, or may petition the judge to modify any order relating to placement.

727 O.C.G.A. § 15 -11-173(1).
A child can get the contact information from her guardian ad litem, case manager, or she can contact the State Office of the Child Advocate for additional assistance in locating the judge responsible for her case.

5. Contacting Other Organizations

Other organizations have developed resources relating to the rights of children in foster care. The Youth Leadership Council (YLC) was a group of youth in foster care age 14-22 that advocated for children in Georgia’s foster care system. Many of those members found that they were not getting the answers they needed to questions regarding the foster care system. As a result, the YLC developed a handbook to try to address many of the frequent questions arising in foster care. Although the Youth Leadership Council is not currently meeting, the handbook may be available from DFCS Independent Living Coordinators.

Atlanta Legal Aid is another organization that is developing resources around the rights of children in foster care. The Atlanta Legal Aid has created a website that outlines legal regulations and DFCS policies on child welfare issues. That website is located at http://www.legalaid-ga.org/.

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Appendix A

Federal Child Welfare Laws

1978-
1986-
1988-
  • Abandoned Infants Assistance Act, Pub. L. 100-505 (1988).
1990-
1993-
  • Family and Medical Leave Act, Pub. L. 103-3 (1993).
1996-

1997-
- Individuals with Disabilities Education Act, Pub. L. 105-17 (1997).

2000-

2001-

2003-
APPENDIX B

State Grant Programs

(Reprinted from Administration for Children and Families Website*)

The **Title IV-E Foster Care** program provides funds to states to assist with: the costs of foster care maintenance for eligible children; administrative costs to manage the program; and training for staff, for foster parents and for private agency staff. The purpose of the program is to help states provide proper care for children who need placement outside their homes, in a foster family home or an institution.

This program is an open-ended entitlement program. Federal financial participation in state expenditures for foster care maintenance is provided at the Medicaid match rate for medical assistance payments, which varies among states from 50 percent to 78 percent. Monthly payments to families and institutions made on behalf of foster children also vary from state to state. Federal financial participation is made at an open-ended 50 percent match rate for state administrative expenditures and at an open-ended 75 percent for state training expenditures.

The **Title IV-E Adoption Assistance** program provides funds to states to assist in providing ongoing financial and medical assistance for adopted children (AFDC or SSI eligible) with special needs, e.g., children who are older or handicapped. Funds are also used for the administrative costs of managing the program and training staff. The goal of this program is to facilitate the placement of hard to place children in permanent adoptive homes and thus prevent long, inappropriate stays in foster care.

Adoption Assistance is an open-ended entitlement program. Federal financial participation in state maintenance expenditures is provided at the Medicaid match rate for medical assistance payments, which varies among states from 50 percent to 78 percent. State adoption subsidy rates made on behalf of individual children are negotiated for each family but may not exceed comparable foster family care rates. State administrative costs are matched at an open-ended 50 percent match rate; training at an open-ended 75 percent match rate.

The **Foster Care Independence Act of 1999** which enacted the John H. Chafee Foster Care Independence Program (CFCIP) offers assistance to help current and former foster care youths achieve self-sufficiency. Grants are offered to states who submit a plan to assist youth in a wide variety of areas designed to support a successful transition to adulthood. Activities and programs include, but are not limited to help with education, employment, financial management, housing, emotional support and assured connections to caring adults for older youth in foster care as well as youth 18-21 who have
aged out of the foster care system. A reporting system for states and a program evaluation component will be used to attain more knowledge about the outcomes of youth transitioning to adulthood. Many questions and their answers regarding the CFCIP can be found in the Child Welfare Policy Manual. In addition, the Children’s Bureau has funded two contracts designed to develop a performance assessment system for CFCIP: Developing a System of Program Accountability Under the CFCIP and Developing Data Elements, Instruments, and an Implementation Plan for a Reporting System Under CFCIP.

The Title IV-B, subpart 1, Child Welfare Services program helps state public welfare agencies improve their child welfare services with the goal of keeping families together. State services include preventive intervention, so that, if possible, children will not have to be removed from their homes; services to develop alternative placements like foster care or adoption if children cannot remain at home; and reunification so that children can return home if at all possible.

The Title IV-B, subpart 2, Promoting Safe and Stable Families program provides funds to states to provide family support, family preservation, time-limited family reunification services, and services to promote and support adoptions. These services are primarily aimed at preventing the risk of abuse and promoting nurturing families, assisting families at risk of having a child removed from their home, promoting the timely return of a child to his or her home, and if returning home is not an option, placement of a child in a permanent setting with services that support the family. As part of this program, the Court Improvement Program provides grants to help state courts improve their handling of proceedings relating to foster care and adoption. After an initial assessment of court practices and policies, states use these funds for improvements and reform activities. Typical activities include development of mediation programs, joint agency-court training, automated docketing and case tracking, linked agency-court data systems, one judge / one family models, time-specific docketing, formalized relationships with the child welfare agency, and legislative change.

CAPTA State Grants provide funds for states to improve their child protective service systems. Reauthorized by the CAPTA Amendments of 1996, the grant program requires states to submit a five-year plan and an assurance that the state is operating a statewide child abuse and neglect program that includes several programmatic requirements including: establishment of citizen review panels; expungement of unsubstantiated and false reports of child abuse and neglect; preservation of the confidentiality of reports and records of child abuse and neglect, and limited disclosure to individuals and entities permitted in statute; provision for public disclosure of information and findings about a case of child abuse and neglect that results in a child fatality or near fatality; expedited termination of parental rights (TPR) for abandoned
infants, and provisions that make conviction of certain felonies grounds for TPR.

**Community-Based Family Resource Program Grants** are provided to states to develop and implement, or expand and enhance, a comprehensive, statewide system of community-based family resource services. To receive these funds, the State Chief Executive Officer must designate an agency to receive and implement the program. Federal, state, and private funds are blended and made available to community agencies for child abuse and neglect prevention activities and family resource programs. In FY 2001, 56 jurisdictions received grants totaling $31.2 million.

**The Children's Justice Act** helps states to develop, establish, and operate programs designed to improve the investigation and prosecution of child abuse and neglect cases, particularly cases of child sexual abuse and exploitation, in a manner which limits additional trauma to the child; and to improve the handling of cases of suspected child abuse or neglect related fatalities. Funds for this program are allocated from the Department of Justice's Victims of Crime Fund. In **FY 2002**, $17,000,000 is available for distribution.

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