

**Barton Child Law & Policy Clinic Comments
to Senate Juvenile Law Commission Deprivation Subcommittee**

The Barton Child Law & Policy Clinic of Emory Law School respectfully submits these comments to inform the committee chair of concerns, questions, and additional suggestions related to draft language presented at the August 1, 2005 meeting of the subcommittee on deprivation matters. The comments only address sections which raised questions or concerns or where additional changes are recommended.

Comments on draft revisions presented by Vivian Egan for the Division of Family and Children Services

15-11-58(b), currently 15-11-46(1): this provision ('the child's detention or care is required to protect the person or property of others or of the child') was deleted because it appears to only apply to delinquency cases. However, it could apply to abused children and should remain in this section.

15-11-50.1 et seq. For further clarification regarding which statutes apply only to deprivation matters and which statutes apply only to delinquency and unruly matters, the Barton Clinic proposes the use of terminology that is distinct for deprivation cases:

- the term 'detained' should be replaced with 'placed in shelter care'
- the phrase 'in detention' should be replaced with 'in shelter care'
- and the phrase 'informal detention hearing' be replaced with 'shelter care hearing.'

15-11-50.2(b), currently 15-11-49(b): is the language 'other than by informal adjustment' needed? Does informal adjustment occur in deprivation cases?

15-11-50.2(c)(2), currently 15-11-49(c)(4): deleting 'the child' is a substantive change that affects the procedural due process rights of children. To make it consistent with the rest of the deprivation code, it could be changed to 'the child if he or she is 14 or more years of age, and...' The Barton Clinic opposes deleting 'the child' from this section.

15-11-51, currently 15-11-35(3): this revision deletes the provision about accepting jurisdiction as provided in 15-11-88. 15-11-88 is 'disposition of a resident child received from another state' and deals with deprived children as well as delinquent and unruly children. Was this provision inserted elsewhere in this revision?

15-11-53, currently 15-11-39(b): the deletion of 'The summons shall also be directed to the child if he or she is 14 or more years of age' is a significant substantive change that negatively impacts the procedural due process rights of the child. The Barton Clinic opposes this change.

15-11-53(e), currently 15-11-39(e): deleting ‘other than the child’ may be considered a major substantive change and should not occur without further research into the full ramifications of such a change.

15-11-58 (a): addition of ‘as provided in para 2 of ...subsection’ is confusing and does not appear to be necessary.

Deletion of last sentence: Is it necessary to delete ‘such findings shall also be made....’ ASFA requires that reasonable efforts findings have to be made within 60 days of date of removal, within 12 months of removal, and at least once every 12 months thereafter while the child is in care (45 CFR 1356.21). Making this finding does not appear burdensome on the court (inquiries about this are generally made at every review) and deleting this sentence imposes a requirement that the correct language is included at every other place in the code when such inquiries are required.

15-11-58.1, currently 15-11-58(b): Case Plans which include efforts to reunify: about midway thru the paragraph the term ‘foster child’ is used and it appears to be the only time the child is referred to as ‘foster child.’ Based on child development and social work literature, this is an inappropriate reference (i.e. it labels the child rather than focusing on situation of child: ‘foster child’ versus ‘child in foster care’) and should be changed to ‘child’ which is how the child is referred to throughout the rest of the deprivation section of the code.

15-11-58.1(d), currently 15-11-58(a)(6), is more confusing with the addition of the language ‘a case plan or permanency plan which provides for...’ Is this language needed? There are other places in the juvenile code that refer to both permanency plans and case plans. If case plan and permanency plan are two different things, they should be probably be defined in 15-11-2. Inserted below is language from the federal regulations discussing comments on ASFA that may be helpful to the committee on this point.

On case plan versus permanency plan, See: 45 CFR Parts 1355, 1356 and 1357 Title IV–E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews; Final Rule, Federal Register, Vol. 65, No. 16, Tuesday, January 25, 2000, Rules and Regulations, page 4057

Comment: A commenter requested clarification on the differences between a case plan and a permanency plan.

Response: We use the term “‘case plan’” to refer to a plan developed to meet the statutory requirements of sections 422(b)(10)(B)(ii), 471(a)(16), 475(1) and 475(5)(A) of the Act. The case plan is a written document which includes, in part: a description of the child’s placement; a discussion of the safety and appropriateness of the placement; a plan for ensuring that the child and family receive services designed to facilitate the return of the child to a safe home or to another permanent placement; the health and educational records of the child; when appropriate, a description of the programs and services which will facilitate the child’s transition from foster care to independent living; and, documentation of the steps to place the child in a permanent living arrangement.

The “permanency plan,” while it may be described in the case plan or may be a portion of the case plan, is what the planned permanency living arrangement will be for the child, *e.g.*, reunification with the family, or adoption. We understand that some States use the term “permanency plan” synonymously with “case plan,” because it conveys what the case plan is designed to accomplish. We do not believe that it is necessary to require States to use distinct terminology, as long as States meet the requirements of the statute and regulations.

Also on proposed 15-11-58.1(d): Further research needs to be conducted to determine whether the addition of ‘a relative, other legal custodian’ complies with ASFA. It appears that the existing language [15-11-58(a)(6) ‘Reasonable efforts to place a child for adoption with a legal guardian may be made concurrently with...’] was included to bring Georgia into compliance with 42 USC § 671 (a)(15)(F) (“reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts of the type described in subparagraph (B)”). However, the implementing regulations at Section 1356.21(b)(4) say that concurrent planning can occur regardless of what the alternate permanent plan is. See “Section 1356.21(b)(4) Concurrent planning. Reasonable efforts to finalize an alternate permanency plan may be made concurrently with reasonable efforts to reunify the child and family.”

15-11-58.2 (a), currently 15-11-58(e), add sentence at the end ‘This hearing shall be called the non-reunification hearing.’ Right now this hearing is sometimes referred to as a permanency hearing (see 15-11-58(o)(1) and sometimes as the ‘non-reunification hearing.’ Giving this proceeding a distinct name will help to avoid confusion about the requirements of the hearing required by 15-11-58(e) and the hearing required by 15-11-58(o).

15-11-58.2 (c), currently 15-11-58(g), change it to read ‘At the non-reunification hearing, the representative...’ to be consistent with recommended change to 15-11-58.2(a).

15-11-58.2(e), currently 15-11-58(j), should read ‘At the non-reunification hearing, the court shall concurrently hold a permanency hearing in accordance...’ to be consistent with recommended change to 15-11-58.2(a).

15-11-58.4(a), currently 15-11-58(o)(1), should read: ‘With respect to each child ..., a permanency hearing shall be held concurrently with a non-reunification hearing or no later than twelve months after the child is considered to have entered foster care, whichever comes first. Thereafter, a permanency hearing shall be held not less frequently than every 12 months during the time the child continues in the custody of the Department of Human Resources.’ The last sentence should be deleted until further discussion occurs regarding whether a hearing on a motion to extend custody should be mentioned in this section. ASFA’s intent is to achieve permanency for children within very short timeframes and highlighting ‘motions to extend’ in a provision about permanency hearings appears to be contrary to the intent of ASFA.

15-11-58.4(d) and 15-11-58.5, currently 15-11-58(o)(4) and 15-11-58(p): throughout this revision of 15-11-58, references to ‘the provisions of subsection (p) of this Code section concerning notice, opportunity to be heard, authority of the court, and content of the court’s order are applicable to proceedings under this subsection’ have been deleted. This statement is important to include with each hearing for which such notice is required because it highlights the need for notice to certain participants who are not parties. Placing this provision only in 15-11-58.5, as this revision proposes, diminishes the likelihood that this provision will be appropriately applied and may diminish the perceived importance of insuring notice in all required hearings. Also, the listing of code sections to which the notice provisions apply, rather than listing which hearings, may create confusion.

With that said, 15-11-58.4(d) DOES appear to retain some of these notice requirements, which makes the code seem inconsistent and seems to place a priority on compliance for this particular hearing because the notice provision is required for several hearings but is only included specifically in the code section addressing one of those several hearings.

15-11-58.4(g), currently 15-11-58(o)(7): this section needs to be examined to see what was originally intended and whether this requirement is still necessary to include, given the new language of 15-11-58.4(a) (‘... , a permanency hearing shall be held concurrently with a non-reunification hearing.’) Is the old 15-11-58(o)(7) intended to set a time frame for *issuing a permanency order* or for *holding the permanency hearing*? Does this provision require that within 30 days of the non-reunification hearing, which can include a concurrent permanency hearing, the court order must be entered? If that is the intent, then the provision is needed but needs to be simplified and clarified. If this section is intended to comply with 42 USC Section 671(a)(15)(E) (‘a permanency hearing must be held within 30 days of a judicial determination that reasonable efforts are not required, unless the requirements of the permanency hearing are fulfilled at the hearing in which the court determines that reasonable efforts to reunify the child and family are not required’ [language is paraphrased]) then it needs to say ‘a hearing must be held...’ rather than ‘a supplemental order....’

15-11-58.5, currently 15-11-58(p), regarding the type of notice to be provided: changing the words from ‘consistent with the form and timing of notice to parties’ to ‘on or about the time that notice is required to be provided to parties’ is a significant substantive change and needs to be further examined in conjunction with the notice provisions of ASFA, the Georgia Foster Parent Bill of Rights and the Georgia grievance procedure for foster parents. This language change is included in HB333 as well.

15-11-59: Further research should occur into the impact of deleting the language ‘except as otherwise provided by law’ to ensure there are not provisions that could impact this in, for example, guardianship statutes, Title 49, or in Title 19 custody matters.

15-11-59(b), currently 15-11-58(n): the new proposed language appears to be contrary to the intent of ASFA, which is to move children to permanency quickly and to terminate

parental rights if children are in foster care more than 15 months and don't fall into the three exceptions. In addition, the Georgia Court of Appeals has held that § 15-11-41(f) provides that an order of disposition giving the department temporary custody of a deprived child can be extended for no more than two years. (*In The Interest of B. G.*, 231 Ga. App. 39, 497 S.E.2d 572). Additional research should be conducted to see how other states have handled this situation, knowing the reality that some children will not reach permanency within 24 months.

One suggestion is that the statute could state that 'custody to the Department cannot be extended any longer than two years unless the court finds that (1) at the option of the Division of Family and Children Services of the Department of Human Resources, the child is being cared for by a relative; (2) the case plan documents a compelling reason that extending custody to the Department would be in the best interests of the child; or (3) the Division of Family and Children Services of the Department of Human Resources has not provided to the family of the child, consistent with the specific time frames for the accomplishment of the case plan goals, such services deemed necessary for the safe return of the child to the child's home.'

15-11-60, currently 15-11-58.1: The title says 'duration of **other** disposition orders...' Does the title need to be clarified that these are orders other than custody to DFCS? If this code section is not read with the code section 15-11-60 the word 'other' does not provide information about the types of dispositions covered in this code section.

15-11-45(a)(4); this provision should remain in the code for delinquency and unruly matters because there are situations where this provision would be needed.

15-11-47: the change in the title for this section deletes most of the description about the various provisions in that section.

15-11-49.1: do the provisions of this section need to be included somewhere in the part of the code addressing deprivation matters?

Comments on 15-11-58 draft revisions presented by Judge Ellen McElyea on behalf of the Council of Juvenile Court Judges

Many of the suggestions in this document were concepts rather than specific language so the responsive comments are limited.

In response to suggestions about providing courts the authority to split legal and physical custody between the Department and a home identified by the court, it appears that this would be in violation of Title IV-E requirements (see Final Rule, Federal Register, Vol. 65, No. 16, Tuesday, January 25, 2000, Rules and Regulations, page 4089, Section 1356.21(g)(3):

Include a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the

case plan goal is reunification and a discussion of how the placement is consistent with the best interests and special needs of the child.

([Federal financial participation] is not available when a court orders a placement with a specific foster care provider).

In response to suggestions to revise 15-11-58(i), which provides for 36 month reviews of placements of children with relatives until the child turns 18, additional research is needed into proposed changes to address questions such as the following. If the reviews are eliminated, which also eliminates the applicable notice requirements of 15-11-58(p), what will the distinction be between this placement and guardianship? If there is no difference, then perhaps guardianship would be a more appropriate option. Also, if periodic reviews are eliminated (as well as notice), how does this impact the due process rights of parents and children. What is the functional difference between a custody order of this type and a termination of parental rights?

Other states characterize such a placement as a “permanent guardianship” and do not statutorily dictate a review process. Rather, states employing this system have a statutory procedure for revocation of permanent guardianship. For example, in Arizona permanent guardianship of any type, not just placement with a relative can be revoked if a petition is filed citing a significant change in circumstances such as: the parent is willing and able to care for the child or the child’s permanent guardian is unable to properly care for the child. The standard of proof is clear and convincing evidence. (See A.R.S. 8-873).