

**JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION
OF THE VIRGINIA GENERAL ASSEMBLY**

**Follow-Up Report:
Custody Relinquishment
and the Comprehensive
Services Act**

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Follow-Up Report: Custody Relinquishment and the Comprehensive Services Act

On December 11, 2006, the Joint Legislative Subcommittee Studying the Comprehensive Services Act asked JLARC staff to examine the extent to which the opinion issued by the Attorney General (December 6, 2006) would impact the size of the caseload and expenditures of the Comprehensive Services Act (CSA) program. In this opinion, the Attorney General (AG) concludes that the *Code of Virginia* requires the State and localities to serve children who are at risk of foster care placement without requiring their parents to relinquish custody. The opinion indicates that some localities have chosen to interpret the *Code of Virginia* too narrowly, and are improperly requiring parents to relinquish custody in order to obtain services. Our review confirms this finding, but the fiscal impact of the opinion may be limited given the high percentage of localities that already apply the law in a manner consistent with the AG's interpretation with regard to community-based services.

In reviewing the issue of custody relinquishment raised by the AG opinion, it became apparent that a State policy that restricts access to residential services for children at risk of foster care placement has a more significant impact than local interpretation of State law. The State does not appear to have a legal basis for this policy. Furthermore, Virginia law appears to provide access to all needed services for children who are at risk of foster care placement and meet other eligibility criteria for CSA funding without parents having to relinquish custody or enter into non-custodial agreements. Consequently, the State's policy of allowing access only to community-based services for children who are at risk of foster care placement appears to be inconsistent with State law. Because the legal basis of the State's current policy is in question, the Joint Legislative Subcommittee Studying the Comprehensive Services Act may wish to consider requesting that the Attorney General review and validate this finding.

This follow-up report is one of several efforts to address the issue of custody relinquishment this year. The 2007 General Assembly passed Senate Bill 1332, which would provide access to services so that parents do not have to relinquish custody in order to obtain mental health treatment for their child. This bill contains a 2008 reenactment clause. In addition, a budget amendment directs the Office of Comprehensive Services (OCS) to collect additional information and estimate the fiscal impact of SB 1332 in order to

further inform lawmakers' decision about reenacting the bill. Finally, the Joint Legislative Subcommittee Studying the Comprehensive Services Act will continue to examine opportunities to improve the CSA program.

SUMMARY OF ATTORNEY GENERAL'S OPINION

The Attorney General's opinion on the issue of custody relinquishment makes three key points that could affect who is able to access mandated services through CSA.

- The Comprehensive Services Act emphasizes the importance of keeping families together. For example, CSA's first stated purpose is to "ensure that services and funding are consistent with the Commonwealth's policies of preserving families and providing appropriate services in the least restrictive environment." Consequently, interpreting eligibility criteria in a manner that leads to custody relinquishment runs counter to the intent of CSA as well as State and federal policies aimed at family preservation.
- To support the CSA program's interest in preserving family integrity, the *Code of Virginia* created a mandated category of funding for children who are at risk of foster care placement. Considering custody relinquishment inherently constitutes a risk of foster care placement. Consequently, children whose parents are contemplating custody relinquishment are at risk of foster care placement, and are eligible for Foster Care Prevention funding if they meet the other criteria for CSA eligibility, such as being in need of services.
- A court determination is not necessary to find a child "in need of services" for purposes of establishing eligibility for Foster Care Prevention funding.

ELIGIBILITY FOR CSA FUNDING CAN GIVE RISE TO CUSTODY RELINQUISHMENT ISSUE

At the heart of the custody relinquishment dilemma is the fact that the availability of CSA funding varies by eligibility category. Children with severe emotional and behavioral problems are eligible for CSA services, as detailed in §2.2-5212 of the *Code of Virginia*. However, being eligible for services does not guarantee access to funding for all children. Only children who are in foster care, at risk of placement in foster care, or in need of special education services that extend beyond the regular classroom are entitled to receive services. Funding must be provided in a sum-sufficient amount to children who fall into one of these "mandated" categories. In contrast, any child who is eligible for CSA services

but falls outside of one of these categories is considered to be “non-mandated,” and limited funding exists to serve them.

Nonmandated funding is generally regarded as inadequate to meet the needs of children who are eligible for CSA services but not mandated to receive them. In FY 2005, the State and localities spent \$9.5 million to serve nonmandated children, compared to \$263.7 million for mandated children. In addition, more than one-third of local programs did not serve nonmandated children at all. When nonmandated funding is unavailable, families may resort to relinquishing custody of their child so that they can access the full range of services available to children in foster care.

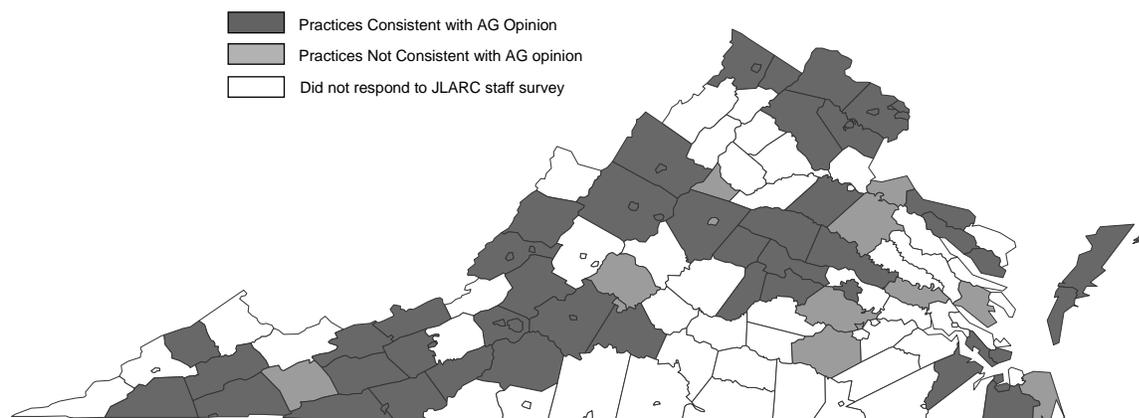
In the context of this report, custody relinquishment refers to situations in which parents voluntarily transfer legal and physical custody of their child to the State in order to gain access to publicly-funded services for which they would otherwise be ineligible. When relinquishing legal custody, parents may retain certain responsibilities for the care and control of the child, but they lose final authority to determine what placement is most appropriate for their child. A court must review and approve children’s service plans at prescribed intervals.

As an alternative to relinquishing legal custody, families can enter into non-custodial agreements with a local department of social services. Under such agreements, families retain legal custody of their child while accessing the services available to children who are in foster care. Because parents remain in control of their child’s placement and treatment, this option is generally considered different from and preferable to custody relinquishment. However, these cases are subject to all foster care review requirements such as service planning and court review, and children who are the subjects of non-custodial agreements are considered to be in foster care under federal and State regulations.

OPINION CITES LOCAL RESTRICTIONS AS REASON FOR CUSTODY RELINQUISHMENT

Restrictions that localities have imposed in CSA program implementation appear to force some parents to confront custody relinquishment, but most localities report already following practices that are consistent with the AG’s interpretation of Virginia law with respect to services provided in the community. Eighty percent of localities responding to a 2007 JLARC staff survey report using Foster Care Prevention funding to provide community-based services to children who are at risk of being placed in foster care unless they receive treatment (Figure 1). The 61 local CSA

Figure 1: Most Localities Responding to JLARC Staff Survey Follow Practices Consistent with Opinion



Source: JLARC staff analysis of survey data reported by local CSA programs in February 2007.

programs that responded to the survey represent 73 localities and account for 70 percent of the total CSA program caseload. In addition, two-thirds of localities are amenable to entering into non-custodial agreements with families when a child requires residential or longer-term services that currently cannot be provided with Foster Care Prevention funding. However, when these options are not available, parents are faced with either relinquishing custody of their child so that they can access needed services, or retaining custody, in which case their child will generally not receive services.

Foster Care Prevention Funding Not Consistently Used for Children in Need of Services. The Attorney General states that families can be confronted with the issue of custody relinquishment because certain localities fail to use Foster Care Prevention funding as intended by the *Code of Virginia*. The *Code* provides sum-sufficient funding for children who are at risk of foster care placement and either (a) abused or neglected or (b) “in need of services” because their behavior or condition poses a threat to themselves or, if they are under the age of 14, a threat to others. A JLARC staff analysis confirmed that approximately 20 percent of localities responding to a recent staff survey do not serve children who are a threat to themselves or others, and instead reserve Foster Care Prevention funding strictly for children who are abused or neglected. In these instances, local interpretation appears to run counter to statutory intent and creates situations whereby families must consider custody relinquishment.

The AG’s opinion also raises the issue of requiring a court determination in order to find a child “in need of services” for purposes of establishing eligibility for Foster Care Prevention funding. This requirement can act as a barrier for parents who are unable or

unwilling to initiate court proceedings, and can ultimately preclude children from accessing needed services. However, this issue appears isolated because only two out of 61 local CSA programs indicated that they required such a court determination, according to the survey. Children served in these localities comprised less than three percent of the reporting localities' caseload. Moreover, the majority of local program staff reported that court involvement rarely acts as a barrier for parents seeking to secure services for their child.

Some Localities Do Not Enter Into Non-Custodial Agreements. Local departments of social services can enter into a non-custodial agreement with parents whose children need services but are ineligible for mandated funding. This option is generally explored for children who meet the eligibility criteria for Foster Care Prevention but require residential or longer-term services that are not currently purchased with this funding source. While these agreements are considered preferable to custody relinquishment, 34 percent of localities have adopted a policy not to enter into these types of agreements. Moreover, one-third of the localities that choose to accept them place limits on the number and/or cost of non-custodial agreements they will enter into. Consequently, custody relinquishment may be the only alternative in approximately 56 percent of localities when residential or longer-term services are needed.

OPINION COULD REDUCE INCIDENCE OF CUSTODY RELINQUISHMENT AND INCREASE ACCESS TO MANDATED SERVICES

Changes in program caseload and expenditures will occur only in those localities that either elect to proactively adopt practices that are consistent with the AG's opinion, which is not binding, or are forced to do so because of a lawsuit. In these localities, fewer families would be faced with custody relinquishment and up to 225 additional children could be served at an approximate cost of \$1.5 million per year. To the extent that additional localities choose to adopt practices consistent with the AG's interpretation that children who are "in need of services" and at risk of foster care placement should be served with Foster Care Prevention mandated funding, fewer families would be forced to relinquish custody, and some children who are currently unserved could begin to access needed treatment. However, these changes would occur only for children who require community-based services that can be successfully completed within six months, given current State policy. Parents whose children need either residential care or long-lasting community-based services would still be required to relinquish custody in order to obtain services, and would remain unserved if they choose not to relinquish custody.

Most Local Programs Would Not Be Affected by Opinion

Any impact upon local programs will be limited given that most localities have already implemented practices that are consistent with the AG's interpretation of the CSA statute with respect to community-based services. Of the 20 percent of localities that reported not using Foster Care Prevention funding to provide any services to children unless they are abused or neglected, half of them indicated they would not change their practices because the opinion is not binding, and the rest were not yet sure how they would proceed. None of these localities stated that they would voluntarily conform to this interpretation. Therefore, it is not clear that the opinion will have much immediate impact on program implementation. However, the *Code of Virginia* appears to clearly stipulate that children "in need of services," defined in §16.1-228 as being a threat to themselves or others, are mandated to receive foster care services. Consequently, the Office of Comprehensive Services should issue guidance to ensure that all localities are consistently applying eligibility criteria in interpreting this provision and providing services to the children who are entitled to them by law.

In the two local programs that currently require a court determination in order to find children "in need of services," more children could be served to the extent that parents have been making the decision not to seek services for their children because of the court approval requirement. These localities reported that court approval was a barrier more than ten percent of the time. Therefore, if these localities adopted practices consistent with the interpretation of the AG opinion and no longer required a court determination, their Foster Care Prevention caseload could be expected to rise. However, one of the localities indicated it was not planning on conforming to the AG's interpretation, and the other was not sure whether it would.

Fiscal Impact of Opinion Primarily Driven by Increased Access to Mandated Services

If all localities were to adopt practices that are consistent with the AG's opinion while still restricting access to residential and longer-term care pursuant to State policy, fewer families would have to relinquish custody, and more children could receive community-based services through Foster Care Prevention.

Lower Incidence of Custody Relinquishment. In those localities with practices that are not currently consistent with the AG's opinion, fewer families would be forced to relinquish their child's custody in order to secure community-based services because eligible children would be served under the Foster Care Prevention cate-

gory instead of having to enter foster care. According to the Department of Social Services, 96 children are believed to have entered foster care for the sole purpose of obtaining mental health services in 2006. However, not all of these children can be adequately served with short-term, community-based care that can be purchased with Foster Care Prevention funding under current State policy. As a result, some of them would still need to enter foster care in order to receive needed residential or longer-term services.

The shift in eligibility category for the children who could be served with Foster Care Prevention funding would have only a minimal fiscal impact because this population is already served through CSA. However, this shift could reduce the demands placed upon social services, court, and other local agency staff who are involved in administering the Foster Care program.

Greater Access to Mandated CSA Funding for Currently Unserved Children. In those localities with practices that are not consistent with the AG's interpretation, children who are currently unserved because their parents did not relinquish custody could now be served under the Foster Care Prevention category if they are at risk of foster care placement. These cases would be an addition to the current program caseload and expenditures because they are not currently served through CSA.

Based on the proportion of Foster Care Prevention cases that are for reasons other than abuse or neglect in those localities with practices that are already consistent with the AG's opinion, it is estimated that up to 225 additional children could begin receiving community-based services through Foster Care Prevention (Table 1). Serving these children would cost the State and localities approximately \$1.5 million per year, based on the average annual cost per child served with Foster Care Prevention funding for reasons other than abuse or neglect in FY 2005 (\$6,690). Based on the FY 2005 average local match required for CSA funding, the State would assume approximately \$0.9 million of this amount and localities the remaining \$0.6 million.

The estimated number of additional children who could be served may be overstated for two reasons. Some of these children may already be served because their parents have relinquished custody, but existing data does not allow this number to be isolated. In addition, some children may also be served with nonmandated funding and would simply shift eligibility category to Foster Care Prevention. If this shift occurs, some nonmandated funding will become available to serve additional nonmandated children who currently do not receive services through CSA. The impact of serving these additional children is captured in the estimate.

Table 1: Estimated Increase in CSA Program Caseload If All Localities Followed Practices Consistent with Opinion with Regard to Community-Based Services

	Localities Consistent with AG's Opinion	Localities Not Consistent with AG's Opinion	Localities Not Reporting Current Practice	Total
Population of Children Up to Age 19	1,138,126	298,271	500,714	1,937,111
Actual Foster Care Prevention Cases (Not Abuse/Neglect)				
Number of Foster Care Prevention Cases	891	97	303	1,291
Proportion of Foster Care Prevention Cases	0.078%	0.033%	0.061%	0.067%
Expected Foster Care Prevention Cases (Not Abuse/Neglect) Using Proportion Among Abiding Localities				
Number of Foster Care Prevention Cases	891	234	392	1,516
Proportion of Foster Care Prevention Cases	0.078%	0.078%	0.078%	0.078%
Additional Foster Care Prevention Cases Given Proportion in Localities Consistent with Opinion				
	0	137	89	225

Note: Current State policy precludes the use of Foster Care Prevention funding to purchase residential or longer-term community-based services.

Source: JLARC staff analysis of data from the Office of Comprehensive Services (FY 2005).

One factor that limits the certainty of this estimate is that localities following practices that are already consistent with the AG's opinion may have different socioeconomic and demographic characteristics than other localities, and may therefore have differing needs for foster care and foster care prevention. However, localities with practices that are not consistent with the AG's opinion appear to have more favorable characteristics than other localities, as evidenced by their lower rate of foster care. As a result, these localities are unlikely to have more candidates for Foster Care Prevention funding than localities whose practices are already consistent with the AG's opinion.

Potential Reduction in Nonmandated Spending and Children Served

An increase in the number of mandated children who must be served through CSA will increase the budgetary pressures already experienced by the State and localities. In order to mitigate this effect, localities impacted by the AG's opinion may exercise their discretion to reduce funding for nonmandated cases, and divert this funding stream to mandated children whom they are obligated to serve. As a result, fewer nonmandated children could be served across the State. In FY 2005, approximately 70 percent of localities whose practices are not consistent with the AG's opinion were serving nonmandated children.

CUSTODY RELINQUISHMENT DILEMMA RAISED IN OPINION MAY BE DRIVEN LARGELY BY STATE POLICY RATHER THAN LOCAL RESTRICTIONS

Local restrictions imposed upon the implementation of the CSA program have contributed to the custody relinquishment dilemma described in the AG opinion. However, State policy that restricts access to residential services for Foster Care Prevention children may have had a greater impact on the incidence of custody relinquishment given that most localities have already implemented practices consistent with the AG's interpretation with regard to community-based services. This policy appears to have no legal basis and seems inconsistent with Virginia law.

Use of Foster Care Prevention Funds Restricted Statewide

Current State policy limits the use of Foster Care Prevention funds to community-based services. As a result, State and local Foster Care Prevention funding is not used to purchase residential care. In addition, State policy prescribes that Foster Care Prevention services should be completed within six months, at which point an extension is required if additional services are needed. Due to the inherent severity of the mental health needs of children whose parents contemplate foster care placement, most of them require residential care and/or long-term services which make them ineligible for Foster Care Prevention funding.

The practical effect of this policy is that in many Virginia localities, parents with children at risk of foster care placement who need residential or longer-term services are faced with either placing their child in foster care through custody relinquishment or a non-custodial agreement, or letting their child go unserved. Based on a JLARC staff survey conducted in July 2006, it appears that in 56 percent of Virginia localities, a parent in this situation would not necessarily have the option of entering into a non-custodial agreement because these localities either do not use them or limit the number that they will use. Even in localities that use non-custodial agreements without limitation, parents needing to access residential services for their child still face the burdens associated with placing their child in foster care under the current State policy. Moreover, these families become part of a foster care system that is designed to serve children who are abused or neglected by their caregivers rather than solely trying to access services.

History of State Policy Restricting Use of Foster Care Prevention Funding

State policy guiding the use of Foster Care Prevention funding became increasingly restrictive over the years. In 1999, the Commis-

sioner of the Department of Social Services issued a policy memorandum providing guidance on the provision of foster care services. The memorandum provided that children who are at risk of foster care placement are eligible to receive Foster Care Prevention funding for residential treatment if a non-custodial agreement is executed and the period of care is less than six months.

A policy memorandum dated July 14, 2000, issued by the Director of the Office of Comprehensive Services provided further guidance regarding children at risk of foster care placement in need of residential services. The memo stated that if the duration of the out-of-home placement was initially uncertain or likely to last more than six months, then the non-custodial agreement for the child would no longer be considered as foster care prevention but rather as a foster care case.

A subsequent memorandum issued by the director dated April 25, 2002, stated that all non-custodial agreements would be considered foster care rather than foster care prevention cases. As a result, children at risk of foster care placement would have to be placed in foster care through a non-custodial agreement or relinquishment of custody by their parent in order to receive residential services.

Current State Policy Does Not Appear to Have Legal Basis and May Be Inconsistent with State Law

The *Code of Virginia* expressly establishes the target populations of children who are to be served through the Comprehensive Services Act. Section 2.2-5211(B) of the *Code* establishes five categories of children who can be served with CSA funding:

- children placed for purposes of special education (§2.-5211(B)(1)),
- children with disabilities placed by local social services agencies or the Department of Juvenile Justice in private residential facilities or private, special education day schools (§2.-5211(B)(2)),
- children for whom foster care services are being provided to prevent foster care placement or who are placed in foster care (§2.-5211(B)(3)),
- children placed by a juvenile and domestic relations court in a private or locally operated public facility or nonresidential program, or in community or facility-based treatment program (§2.-5211(B)(4)), and

- children committed to the Department of Juvenile Justice and placed by it in a private home or public or private facility (§2.-5211(B)(5)).

The *Code* further states in §2.2-5211(C) that the General Assembly and localities shall appropriate annually sufficient funds to provide needed special education and foster care services to children in the first three categories (§2.-5211(B)(1) - (B)(3)), without exception. The term "foster care services" is broadly defined in the *Code of Virginia* to include "a full range of casework, treatment and community services."

Based on these statutory provisions, it is apparent that under Virginia law, children at risk of placement in foster care, who are expressly included in the third category (§2.-5211(B)(3)), are entitled to receive funding sufficient to pay for needed residential or non-residential services without restriction or exception. Moreover, there is no indication in statute or regulation that children in foster care are entitled to a broader array or longer length of services than children who are at risk of foster care prevention. Both sub-categories of children come within the third category set forth in §2.-5211(B)(3) and, based on the plain language of the statute, are both entitled to the full array of foster care services needed, including residential treatment, for as long as needed. In addition, foster care policy developed by the Department of Social Services clearly states that "any service available to a child in foster care placement shall be available to a child and his family to prevent foster care placement."

Therefore, there does not appear to be any legal basis under Virginia law for the current State policy that requires children to be placed in foster care, either via custody relinquishment or non-custodial agreement, in order to receive residential services. Moreover, restricting access to residential services for children at risk of foster care placement appears to be inconsistent with State law.

Next Steps

Because the legal basis of the State's current policy is in question, the Joint Legislative Subcommittee Studying the Comprehensive Services Act may wish to consider requesting that the Attorney General review and validate this finding. In addition, the Joint Subcommittee may wish to request a fiscal impact estimate from the Office of Comprehensive Services. OCS has already been directed through the Appropriation Act to collect data and estimate the fiscal impact of Senate Bill 1332 (2007), which addresses similar issues and children as those discussed in this report.

Furthermore, the Office of Comprehensive Services should take the lead in ensuring that current policies are consistent with State law and issue any needed clarifications to localities. Guidelines should be developed to ensure that localities fairly and consistently determine eligibility for services funded through CSA Foster Care Prevention and provide services to those children who are eligible for them under Virginia law.

In particular, the process through which children are deemed “in need of services” and “at risk of foster care placement” appears inconsistent across localities in part because these terms have not been clearly defined. Local interpretation of these terms could have substantial ramifications for the number of children who are found eligible for Foster Care Prevention services. For example, seven percent of localities reported using Foster Care Prevention funding to serve children even if their needs did not rise to the level of posing a threat to themselves or others, according to a JLARC staff survey. In addition, survey responses suggested a lack of consensus around the operational definition of “at risk of foster care placement.” While local flexibility is a critical component of CSA, a standardized approach for accurately identifying children who are eligible for Foster Care Prevention funding could help ensure that only children who are entitled to services are served.

OTHER CONSIDERATIONS

The cost of requiring localities to properly implement the CSA program is likely to be significant because affected children need intensive services such as residential and long-term community-based care. The fiscal impact of this policy shift will be compounded by the fact that community-based services are not sufficiently available in most parts of the State. When the most appropriate community-based services are not available, many children are served in residential facilities instead, according to local CSA staff. Residential care tends to be much more costly than community-based alternatives, averaging four times as much in FY 2005. In addition, the *Code of Virginia* specifies that CSA services should be provided in the least restrictive environment that is appropriate for a child, and local CSA staff indicated that failing to adhere to this philosophy was detrimental to children. Consequently, addressing gaps in the availability of community-based services could mitigate the fiscal impact of changing State policy on Foster Care Prevention while also helping to improve the quality and decreasing the cost of services for existing cases. Critical service gaps and potential recommendations to address them are discussed in detail in the 2006 JLARC report entitled *Evaluation of Children’s Residential Services Delivered Through the Comprehensive Services Act*.