

SYMPOSIUM: IMPLEMENTATION OF THE RIGHT TO COUNSEL FOR CHILDREN IN JUVENILE COURT DEPENDENCY PROCEEDINGS: LESSONS FROM KENNY A.

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Text

[*407] I. INTRODUCTION

For more than 400,000 children currently in the custody of state-run foster care systems,¹ and for over a million more who will become subjects of dependency court litigation in the next decade,² the American Bar Association's [*408] (ABA's) 2011 Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings³ (2011 Model Act) offers tremendous hope. To be sure, the 2011 Model Act is a ringing reaffirmation of the ABA's 1996 pronouncement of what child advocacy should look like.⁴ However, the 2011 Model Act is also a concession by the ABA that the promulgation of standards of practice was insufficient to convince states to actually provide adequate, effective, and zealous counsel to all children in the child welfare system.⁵ With the 2011 Model Act, the ABA now takes the official policy position that states should implement a very specific approach to child representation--one that guarantees that all children in dependency cases are

¹ Based on data from fifty states, 408,425 children were in the custody of state-run foster care systems on September 30, 2010. U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., THE AFCARS REPORT 1 (2011), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report18.htm.

² Based on data from forty-three states, 17.6% of child victims had court actions in 2009. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009 85 (2009), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf>. In the same year, an estimated "702,000 . . . children were victims of maltreatment." *Id.* at 21. Additionally, an estimated 98,339 child victims had court actions in 2009. *Id.* at 93. If the maltreatment numbers stay consistent, 983,390 child victims will have court actions over the next ten years. *See id.*

³ *See generally* MODEL ACT GOVERNING THE REPRESENTATION OF CHILDREN IN ABUSE, NEGLECT, & DEPENDENCY PROCEEDINGS (2011) [hereinafter 2011 Model Act].

⁴ *Compare id.*, with STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE & NEGLECT CASES (1996) [hereinafter STANDARDS OF PRACTICE].

⁵ Sadly, there has not yet been any clear action at the federal level, either through specific federal legislation or through the judicial recognition of a federal constitutional right to counsel for children in all dependency proceedings.

provided a lawyer who is well trained, decently paid, committed to the fundamental principles of lawyering, and who has a reasonable caseload.⁶

Unquestionably, the practice of child welfare law has matured greatly in the forty years since the Child Abuse Prevention and Treatment Act first required states to provide a "guardian ad litem" to all children in dependency cases, as a mandate in exchange for each state's receipt of federal financial support for child abuse programs.⁷ Most states now require the appointment of a lawyer in these circumstances,⁸ and a variety of professional organizations,⁹ training programs,¹⁰ academic scholarship,¹¹ and financial resources [*409] are now available to support this advocacy work. The National Association of Counsel for Children (NACC), based in Denver, has over 2000 members--mostly child welfare lawyers and judges--and offers a certification program in thirty-one states, providing experienced attorneys an appropriate credential to show the world their expertise in child welfare law and elevate the reputation of the profession generally.¹²

Despite this progress, states' performance in implementing the *Standards of Practice for Lawyers Who Represent Children in Abuse & Neglect Cases (ABA Standards)* lags. In a recent national report card by First Star and Children's Advocacy Institution (CAI),¹³ assessing the degree to which states are fulfilling the promise of counsel

⁶ 2011 MODEL ACT, *supra* note 3, § § 1-4.

⁷ Child Abuse Prevention & Treatment Act (CAPTA) of 1974, Pub. L. No. 93-247, § 4(b)(2)(G), [88 Stat. 4, 7](#).

⁸ See CAPTA Reauthorization Act of 2010, [42 U.S.C. § 5106a](#)(b)(2)(B)(xiii) (2006 & Supp. IV 2010).

⁹ Among other organizations that support the development of child welfare law and its practice are the NAT'L ASS'N OF COUNSEL FOR CHILDREN, NACC RECOMMENDATIONS FOR REPRESENTATION OF CHILDREN IN ABUSE AND NEGLECT CASES 5 (2001), available at http://www.naccchildlaw.org/resource/resmgr/docs/nacc_standards_and_recommend.pdf; About the Center, A.B.A. CTR. ON CHILDREN & THE L., http://www.americanbar.org/groups/child_law.html (last visited Feb. 26, 2012); Children's Rights Litigation Committee, A.B.A. SEC. OF LITIG., <http://apps.americanbar.org/litigation/committees/childrights/about.html> (last visited Feb. 26, 2012).

¹⁰ Noteworthy training opportunities in child welfare law include the NACC's Annual Child Welfare, Juvenile and Family Law Conference, Red Book Trainings, and Curriculum Development. See David Lansner, The National Conference on Children and the Law, A.B.A. SEC. OF LITIG. (Oct. 25, 2011), <http://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2011-national-conference-children-law.html>; Trainings, Accreditation and Assessments FAQs, NACC, <http://www.naccchildlaw.org/?page=FactSheet> (last visited Feb. 26, 2012).

¹¹ The scholarship in the area of child representation is extensive. See, e.g., CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010); Annette Ruth Appell, *Representing Children Representing What?: Critical Reflections on Lawyering for Children*, [39 COLUM. HUM. RTS. L. REV. 573 \(2008\)](#); Michael J. Dale & Louis M. Reidenberg, *Providing Attorneys for Children in Dependency and Termination of Parental Rights Proceedings in Florida: The Issue Updated*, [35 NOVA L. REV. 305 \(2011\)](#); Martin Guggenheim, *How Children's Lawyers Serve State Interests*, [6 NEV. L.J. 805 \(2006\)](#); Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, [22 TOURO L. REV. 745 \(2006\)](#); Jane Spinak, *When Did Lawyers for Children Stop Reading Goldstein, Freud and Solnit? Lessons from the Twentieth Century on Best Interests and the Role of the Child Advocate*, [41 FAM. L.Q. 393 \(2007\)](#).

¹² *Become an NACC Certified Child Welfare Law Specialist*, NACC, <http://www.naccchildlaw.org/?page=Certification> (last visited Feb. 26, 2012).

¹³ FIRST STAR & CHILDREN'S ADVOCACY INST., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED AND NEGLECTED CHILDREN (2d ed. 2009), available at http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_Ir.pdf.

for children, researchers determined that only eleven states earned an "A."¹⁴ Fifteen states earned a "D" or "F," and roughly one-third of the states do not require the appointment of counsel at all.¹⁵ Notably, the First Star and CAI report card only analyzed the law, not its implementation.¹⁶ Anecdotally, children's lawyers around the nation--even in those states that earned an "A" on the First Star and CAI report card--regularly complain that they have far too many cases, not enough training, and inadequate pay.¹⁷ In short, it is well known in this field, if not openly recognized within the legal profession, that well-meaning and [*410] talented lawyers who want to do the right thing for their child-clients are nonetheless committing malpractice every day.

At the very least, the 2011 Model Act provides an opportunity for renewed attention, energy, and commitment to the principle that every child who is the subject of an abuse or neglect petition should have an effective lawyer at all stages of his or her experience in the dependency courts.¹⁸ With its passage, advocates are well poised to press legislatures and court officials in many states to enact its language and fulfill its promises. Any state that adopts the 2011 Model Act is likely to earn an "A" on the next report card.

Importantly, the question remains whether an "A" for excellence in legislative drafting translates to something meaningful for children on the ground. Certainly, successful implementation will depend on who is involved in the translation effort and what steps they take. This essay describes one radical, systemic transformation of child advocacy--one that was inspired by the *ABA Standards*--and pushed in part by impact litigation-- and how it happened. Because this change was grounded in core principles that later found animation in the 2011 Model Act, the story of how this overhaul happened may be instructive for those jurisdictions interested in implementing the 2011 Model Act. This is the story of the *Kenny A. ex rel. Winn v. Perdue*¹⁹ litigation.

II. ESTABLISHING THE RIGHT TO COUNSEL

Anyone familiar with the American child welfare system knows of the significant challenges state and local governments have faced over the last forty years in safely and effectively caring for foster children.²⁰ While a full recitation of the often sorry state of public child welfare systems is beyond the scope of this essay, it is worth noting that Kenny A.'s right-to-counsel narrative is part of a broader story of a failing foster care system in metropolitan Atlanta. As they had done successfully in many other jurisdictions, in 2002, lawyers from the national non-profit advocacy group, Children's Rights--in conjunction with prominent local counsel²¹--brought a class action [*411] suit on behalf of all 3000 foster children in the custody of Georgia's child welfare agency whose cases originated in

¹⁴ *Id.* at 8.

¹⁵ *See id.*

¹⁶ *Id.* at 6.

¹⁷ *Id.* at 13-14.

¹⁸ *See* 2011 MODEL ACT, *supra* note 3, § 3(a).

¹⁹ [218 F.R.D. 277 \(N.D. Ga. 2003\)](#). The authors were part of the team of lawyers who represented the plaintiff foster children in *Kenny A.* *Id.* at 283. No confidential or privileged material is described in this essay.

²⁰ *See, e.g., First Star Foster Children Issues and News: Foster Care Challenge Continues*, FIRST STAR (Oct. 22, 2011), <http://www.firststar.org/about-first-star/first-star-newsfeed/itemid/355/vw/1.aspx>.

²¹ The authors would be remiss if they did not recognize the extraordinary contribution of Jeffrey O. Bramlett, an attorney and partner at the firm of Bondurant Mixson & Elmore, L.L.P. in Atlanta, who has continued to serve as co-lead counsel from the very beginning of the *Kenny A.* reform campaign, and actively illustrates the power of partnership between the private bar and public interest organizations in civil rights reform litigation.

Fulton and DeKalb Counties. ²² The claims that would become known as the "state case" alleged that as a direct result of systemic agency failures, Georgia officials--in their official capacities--were violating the federal constitutional and statutory rights of children to be safe while in state custody in foster care, to receive required services, and to be provided opportunities for and efforts toward finding a permanent home. ²³ As with Children's Rights' other cases, the allegations lodged against the Georgia system were deservedly explosive: Children who had been removed from their parents' homes for their own safety were being severely abused, horribly neglected, denied basic health care and educational services, and left to languish for years if not their entire childhood in state custody. ²⁴ The complaint laid out the utter brokenness of the State's Department of Human Resources and its statewide Division of Family and Children's Services, as operated in metropolitan Atlanta (Fulton and DeKalb Counties). ²⁵

Of course, no child ends up in foster care without the approval of a juvenile court judge; and as plaintiffs' counsel investigated the problems in the Atlanta area foster care system, they discovered that the provision of counsel for foster children in the Atlanta juvenile courts was illusory. ²⁶ Indeed, those charged with protecting individual foster children's interests during the pendency of their child protection cases in juvenile court--the "child advocate attorneys"--were unable to perform the minimum duties one might expect of them, due to crushing caseloads of 500 or more children per lawyer. ²⁷ The children were thus "caught in the grip of an uncaring, unconstitutional vice [*412] where even their own putative advocates were unable to help them." ²⁸ Advocates for children in metropolitan Atlanta were galvanized by the need for significant reform in the representation of children in the juvenile court. Because Georgia law makes each of the 159 counties responsible for providing lawyers in juvenile court proceedings to litigants who cannot afford them, plaintiffs in *Kenny A.* named Fulton and DeKalb Counties as defendants, in addition to state officials. ²⁹ The right-to-counsel aspect of the lawsuit thus became known as the "county case."

²² First Amended Complaint exh. A at 14, *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (No. 1:02-CV-1686-MHS), available at http://www.childrensrights.org/wp-content/uploads/2009/01/2003-0820_amended_complaint_file_stamped.pdf; see also *Kenny A.*, 218 F.R.D. at 283. *Kenny A.* was originally filed in state court, although it included federal claims. Notice of Removal at 1-2, *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003) (No. 1:02-CV-1686-MHS). Shortly after it was filed, the defendants removed the matter to federal court. *Id.*; *Kenny A.*, 218 F.R.D. at 284. Plaintiffs later filed an amended complaint. First Amended Complaint, *supra* at 1.

²³ First Amended Complaint, *supra* note 22, at 3-6, 34-37; see *Kenny A.*, 218 F.R.D. at 283.

²⁴ See First Amended Complaint, *supra* note 22, at 3-5.

²⁵ See generally *id.*

²⁶ See *id.* at 5, 48-50; Erik Pitchal, *Children's Constitutional Right to Counsel in Dependency Cases*, 15 TEMP. POL. & CIV. RTS. L. REV. 663, 668-69 (2006).

²⁷ First Amended Complaint, *supra* note 22, at 5; Pitchal, *supra* note 26, at 669.

²⁸ Pitchal, *supra* note 26, at 669 (describing *Kenny A.* litigation). The "vice" turned out to be an important element of the complaint when it came to staving off the state's motion to dismiss on *Younger* abstention grounds. See *Kenny A.*, 218 F.R.D. at 285-87; State Defendant's Motion to Dismiss at 1-2, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. Nov. 4, 2002). Under the *Younger* abstention doctrine, providing a rare and extraordinary exception to a federal court hearing cases properly before it, *Younger v. Harris*, 401 U.S. 37, 41 (1971), federal courts must abstain from deciding cases when, among other things, to do so would interfere with an ongoing state court proceeding involving the same litigants. In *Kenny A.*, plaintiffs successfully argued that the *Younger* test was not met, among other things, because--as alleged in the complaint--they were not able to obtain any meaningful relief in Juvenile Court on account of their advocates' overwhelming caseloads. *Kenny A.*, 218 F.R.D. at 287. The court was also persuaded that the defendants had waived any abstention argument when they voluntarily removed the case from state court to the federal forum. *Id.* at 285.

²⁹ First Amended Complaint, *supra* note 22, at 9-13; Pitchal, *supra* note 26, at 667-69.

The county case was aggressively litigated. During discovery, plaintiffs deposed several key leaders in the counties, including the Fulton County Juvenile Court Administrator and the Chief Judge of the DeKalb County Juvenile Court.³⁰ Plaintiffs' counsel also deposed child advocate attorneys from each county, learning more details about their inability to, among other things, meet each client on their caseload and conduct robust, independent investigations of each case.³¹ One of the attorneys characterized the task of meeting with each child client as "aspirational."³² Plaintiffs' counsel also deposed the then-executive director of the NACC regarding the NACC's recommendation that a full-time children's attorney in dependency court should have no more than 100 open child clients at any time, including adequate support staff.³³ By the time discovery ended, caseloads were down to an average of 439 in Fulton County and 183 in DeKalb County--lower than [*413] at the initiation of the case, but still well above the NACC recommendation.³⁴

At the close of discovery, the counties moved for summary judgment, essentially arguing that foster children in Georgia do not have the right to counsel in juvenile court dependency cases.³⁵ Because children lacked this right--the argument went--the counties' decision to provide lawyers who may be practicing below minimum standards was of no legal significance.³⁶ Thus, the first challenge of the case--and the first major victory--was to establish, as a matter of law, that foster children have the right to a lawyer in dependency court.³⁷ Plaintiffs' right-to-counsel claim was based on the Georgia State Constitution's due process clause, but the district court analyzed the issue under the *Mathews v. Eldridge*³⁸ test because under Georgia law, due process protections are co-extensive with the federal analogue.³⁹ *Mathews* teaches that when determining whether a given procedural protection is required, courts must balance three factors: 1) the liberty interest at stake; 2) the risk of erroneous results without the desired protection; and 3) the state's interest, including fiscal considerations.⁴⁰

³⁰ See Kenny A. *ex rel.* [Winn v. Perdue](#), 356 F. Supp. 2d 1353, 1362-63 (N.D. Ga. 2005); see also Pitchal, *supra* note 26, at 669 n.33, 670.

³¹ [Kenny A.](#), 356 F. Supp. 2d at 1362-63.

³² [Id.](#) at 1363.

³³ [Id.](#) at 1362; NAT'L ASS'N OF COUNSEL FOR CHILDREN, *supra* note 9, at 7.

³⁴ [Kenny A.](#), 356 F. Supp. 2d at 1356; NAT'L ASS'N OF COUNSEL FOR CHILDREN, *supra* note 9, at 7. There were two reasons for the drop in caseloads. First, there was a decline in the foster care census--something that was outside the control of the counties--a trend that continued in the years following. See JAMES T. DIMAS & SARAH A. MORRISON, PERIOD 10 MONITORING REPORT 126, 128 (2011) [hereinafter STATE TENTH PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2011/06/2011-0606_ga_period_10_monitoring_report.pdf. Second, between the filing of the case and the resolution of the summary judgment motion, DeKalb County--the smaller of the two--had hired an additional three child advocate attorneys, bringing their total staffing to five. See [Kenny A.](#), 356 F. Supp. 2d at 1356, 1356 n.3.

³⁵ See generally Memorandum of Law in Support of State Defendants' Motion for Summary Judgment, Kenny A. *ex rel.* Winn v. Perdue, No. 1:02-cv-1686- [MHS](#), 2004 WL 5503780 (N.D. Ga. Dec. 13, 2004).

³⁶ See generally *id.*

³⁷ See generally *id.* Less challenging was prevailing on the related argument that if there is a right to counsel, then there is also a right to effective counsel. See [Evitts v. Lucey](#), 469 U.S. 387, 395 (1985) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel." (quoting [McMann v. Richardson](#), 397 U.S. 759, 771 n.14 (1970) (internal quotation marks omitted))).

³⁸ [424 U.S. 319 \(1976\)](#).

³⁹ See [Kenny A.](#), 356 F. Supp. 2d at 1355, 1360; [Hood v. Carsten](#), 481 S.E.2d 525, 527 (Ga. 1997).

⁴⁰ [Mathews](#), 424 U.S. at 321.

As one of us has previously written,⁴¹ the court's decision in *Kenny A.* was as straightforward in approach as it was remarkable in outcome. Finding that foster children have a liberty interest at stake in all dependency cases, [*414] due to the possibility that they could be placed by the public agency in an environment restrictive of their physical movements, and finding that the imprecise standards used in juvenile court proceedings led to an unacceptably high risk of erroneous outcomes, the court held that no remedy short of appointing a lawyer to every child would suffice for constitutional purposes.⁴² If anything, the court could have better justified its decision by defining children's liberty interests far more broadly, which would have perhaps been more persuasive to other courts considering the same issue in the future.⁴³ In any event, upon holding that foster children in Georgia have the right to counsel in all abuse, neglect, and dependency proceedings, the court concluded that plaintiffs had demonstrated a genuine issue of material fact as to whether they were receiving effective assistance of counsel, making summary judgment for the defendants inappropriate.⁴⁴

III. DEFINING EFFECTIVE COUNSEL FOR CHILDREN

Once the court denied the counties' summary judgment motions, the parties quickly came to the settlement table to discuss a mutually agreeable outcome.⁴⁵ Separate mediated settlement negotiations were held with each county,⁴⁶ as the factual and political landscape in each locale was quite different. After several months of negotiations, separate consent decrees were agreed to, and following preliminary approval, notice, and a fairness hearing, the district court so-ordered them.⁴⁷ The main features of the decrees are summarized in this table:

Principle	DeKalb decree n48
Caseloads	130 cases maximum per full-time lawyer will be allowed.
Staffing	Seven new attorneys will be hired within a year, for a total of eleven lawyers plus a director

⁴¹ See Pitchal, *supra* note 26, at 675.

⁴² [Kenny A., 356 F. Supp. 2d at 1360-61.](#)

⁴³ See Pitchal, *supra* note 26, at 681.

⁴⁴ [Kenny A., 356 F. Supp. 2d at 1362-64.](#)

⁴⁵ [Id. at 1364](#); see Notice of Proposed Settlement Regarding the Right of Children to Have Lawyers in Deprivation Cases at 2, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. Mar. 24, 2006) (ordering proposed settlement) [hereinafter DeKalb County Notice of Proposed Settlement]; Notice of Proposed Settlement Regarding the Right of Children to Have Lawyers in Deprivation Cases at 2, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. Feb. 13, 2006) (ordering proposed settlement) [hereinafter Fulton County Notice of Proposed Settlement].

⁴⁶ See DeKalb County Notice of Proposed Settlement, *supra* note 45, at 2; Fulton County Notice of Proposed Settlement, *supra* note 45, at 2.

⁴⁷ Order at 1-2, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. Mar. 24, 2006) [hereinafter DeKalb County Order]; Order at 1-2, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. Feb. 15, 2006) [hereinafter Fulton County Order].

	Principle	DeKalb decree n48
	Standards of Practice	<p>(then subsequently maintaining compliance with the required caseload). Child Advocate Attorneys must practice in accordance with a set of nine "responsibilities of child advocate[s]," which are enforceable by plaintiffs; performance is to be evaluated by a neutral accountability agent.</p>
	Principle	Fulton decree n49
Caseloads	Staffing	<p>The findings and requirements of an independent workload study will be automatically incorporated into the decree unless a party objects. A total of twelve attorneys, two investigators, and three support staff must be hired by the signing of an agreement (then subsequently in compliance with the workload study standard).</p>
Standards of Practice		<p>Practice standards (contained in an appendix to the decree and incorporated by reference) are more detailed and specific than in DeKalb and are also enforceable, with performance evaluated by a neutral accountability agent.</p>

In addition to the substance, both decrees had detailed provisions regarding enforcement and duration.⁵⁰ Generally speaking, each county had to be in substantial compliance with the caseload, staffing, and performance [*416] provisions for a sustained period of eighteen months before it could request an exit from the federal court.⁵¹

With respect to the caseloads in Fulton (caseloads in DeKalb County were limited to 130) the workload study (conducted by the University of Georgia) concluded that there were too many additional factors that impacted the efficiency of child advocate attorneys to settle on one static caseload maximum.⁵² Instead, the study identified a list of structural impediments within the Juvenile Court and the state's public child welfare agency ("external" problems), as well as ongoing issues within the Child Advocate Office ("internal" concerns).⁵³ The study concluded that if no reforms took place, then the maximum caseload for child advocate attorneys should be eighty child-clients at a time.⁵⁴ If the internal issues were resolved, then the caseloads could appropriately rise to 100 per attorney, and if the external impediments were also removed, then child advocate attorneys could effectively represent up to 120 child-clients at any one time.⁵⁵ Neither party objected to the workload study's conclusions, so its recommendations were incorporated automatically into the consent decree as enforceable caseload requirements.⁵⁶

The performance standards required by both decrees are the type of lawyering tasks that have wide acceptance in the field as fundamental activities required of all attorneys representing children. Indeed, as the decrees were being drafted and negotiated, we relied explicitly on the *ABA Standards*,⁵⁷ and in many cases incorporated the ABA's approach verbatim.⁵⁸ For example, both decrees require the child advocate attorney to "establish and maintain an attorney-client relationship" with the child-client.⁵⁹ These provisions were inspired by ABA Standard C-1, which states that "[e]stablishing and maintaining a relationship . . . is the foundation of representation" and calls on children's lawyers to meet with their clients--regardless of age--before [*417] court hearings and whenever a case development warrants it.⁶⁰ Not surprisingly, the 2011 Model Act has a similar requirement.⁶¹ Other provisions in the decrees that came directly from the *ABA Standards* (and were later codified in the 2011 Model Act) included: file

⁵⁰ DeKalb County Consent Decree, *supra* note 48, at 8-10; Fulton County Consent Decree, *supra* note 49, at 8-10.

⁵¹ DeKalb County Consent Decree, *supra* note 48, at 9-10; Fulton County Consent Decree, *supra* note 49, at 9.

⁵² See GOVERNMENTAL SERVS. DIV., CARL VINSON INST. OF GOV'T, CHILD ADVOCATE ATTORNEY REPRESENTATION AND WORKLOAD STUDY 142, 152 (2007) [hereinafter FULTON COUNTY WORKLOAD STUDY], available at http://childrensrights.org/wp-content/uploads/2008/06/2007-06-25_ga_fulton_workload_study.pdf.

⁵³ See *id.* at 67-70.

⁵⁴ *Id.* at 4.

⁵⁵ *Id.*

⁵⁶ See Fulton County Consent Decree, *supra* note 49, at 6-7.

⁵⁷ See STANDARDS OF PRACTICE, *supra* note 4, at 1-15.

⁵⁸ See DeKalb County Consent Decree, *supra* note 48, at 3, 5-6; Fulton County Consent Decree, *supra* note 49, at 3-4.

⁵⁹ DeKalb County Consent Decree, *supra* note 48, at 6; Fulton County Consent Decree, *supra* note 49, at 3.

⁶⁰ STANDARDS OF PRACTICE, *supra* note 4, at 7.

⁶¹ 2011 MODEL ACT, *supra* note 3, § 7(c).

pleadings,⁶² request services by court order if necessary,⁶³ enforce compliance with court orders that favor the client,⁶⁴ negotiate settlements,⁶⁵ and participate in appeals.⁶⁶

The county case, along with the state case, plainly met the requirements of [Federal Rule of Civil Procedure 23\(a\)](#) and [23\(b\)\(2\)](#), and indeed the *Kenny A.* litigation was directed at reforming a system in which agency-wide (state case) and county-wide (county case) failures harmed children and exposed them all to risks of harm in violation of their rights.⁶⁷ Discretion in individual cases--or, unfortunately, the absence of discretion--was occurring within a fundamentally broken system. However, in terms of implementing the right-to-counsel remedy in the county case, the parties agreed that the exercise of professional legal discretion did not require every lawyering task to be done on every case.⁶⁸ Thus, the language in the consent decrees around practice standards provided some flexibility.⁶⁹ For example, in DeKalb, most performance standards were said to be required as "necessary in the reasonable exercise of professional judgment."⁷⁰ An exception was to "establish and maintain an attorney-client relationship" with each child as the parties agreed **[*418]** that this was something that simply had to be done in every case.⁷¹ Similarly, in Fulton, many of the standards were applicable "[w]here appropriate and necessary to the case," though again, the requirement to meet with and establish an attorney-client relationship with the child was required in every case.⁷²

⁶² STANDARDS OF PRACTICE, *supra* note 4, at 9; see also DeKalb County Consent Decree, *supra* note 48, at 5; Fulton County Consent Decree, *supra* note 49, at 3; 2011 MODEL ACT, *supra* note 3, § 7(b).

⁶³ STANDARDS OF PRACTICE, *supra* note 4, at 9; DeKalb County Consent Decree, *supra* note 48, at 6; Fulton County Consent Decree, *supra* note 49, at 4; see also 2011 MODEL ACT, *supra* note 3, § 7(b).

⁶⁴ STANDARDS OF PRACTICE, *supra* note 4, at 9; DeKalb County Consent Decree, *supra* note 48, at 6; Fulton County Consent Decree, *supra* note 49, at 4; see also 2011 MODEL ACT, *supra* note 3, § 7(b)(9).

⁶⁵ STANDARDS OF PRACTICE, *supra* note 4, at 10; DeKalb County Consent Decree, *supra* note 48, at 6; see 2011 MODEL ACT, *supra* note 3, § 7(b).

⁶⁶ STANDARDS OF PRACTICE, *supra* note 4, at 15; DeKalb County Consent Decree, *supra* note 48, at 6; Fulton County Consent Decree, *supra* note 49, at 4; see also 2011 MODEL ACT, *supra* note 3, § 7(b).

⁶⁷ Fulton County Order, *supra* note 48, at 1; see [FED. R. CIV. P. 23\(a\)](#), (b)(2); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 286 (N.D. Ga. 2003).

⁶⁸ See DeKalb County Consent Decree, *supra* note 48, at 5-6; Fulton County Consent Decree, *supra* note 49, at 3-4.

⁶⁹ See DeKalb County Consent Decree, *supra* note 48, at 4-5; Fulton County Consent Decree, *supra* note 49, at 5.

⁷⁰ DeKalb County Consent Decree, *supra* note 48, at 5.

⁷¹ *Id.* at 6.

⁷² See Fulton County Consent Decree, *supra* note 49, app. A at 4. The parties did not negotiate for a specific provision regarding the role that the child advocate attorneys should play--client-directed or "best interests." See *id.* app. A at 3-4; DeKalb County Consent Decree, *supra* note 48, at 5. It certainly would have been a reasonable position to argue that "right to counsel" means the right to a traditional lawyer who operates in accordance with the *ABA Model Rules of Professional Conduct*, including Rule 1.14's directions concerning the representation of a client with a disability (such as minority). See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2011). Instead, as implemented, *Kenny A.* focused more on the right to have a lawyer functioning as an attorney--establishing a relationship, investigating the case, developing a theory, and being a zealous advocate. See DeKalb County Consent Decree, *supra* note 48, at 6; Fulton County Consent Decree, *supra* note 49, at 3. If the position advocated was the lawyer's view of the client's best interests as opposed to the child's wishes, the parties were content to let that lie. See DeKalb County Consent Decree, *supra* note 48, at 5-6; Fulton County Consent Decree, *supra* note 49, at 3. As it turned out, the DeKalb Child Advocate Office took the following position regarding the role of its lawyers:

[*419] For the objective "input" requirements of the right-to-counsel decrees such as caseloads, staffing, and training, a neutral monitor was required to review and validate county data and records.⁷³ However, assessing the counties' performance with the agreed-upon lawyering standards required the involvement of a neutral party to essentially look over the shoulders of the attorneys.⁷⁴ In each county, an "Accountability Agent" was selected to determine whether or not the lawyers were practicing in accordance with the input requirements and performance standards.⁷⁵ On the latter, if in a given case a lawyer did not file a particular motion, for example, it would also be up to the accountability agents to determine if this was a reasonable exercise of professional judgment or a practice error outside such judgment.⁷⁶

IV. IMPLEMENTING THE RIGHT TO COUNSEL

Designing a monitoring regime that balanced the imperative to assess the quality of counsel with the need to respect legal professional judgment was challenging, and made more difficult because *Kenny A. was sui generis*.⁷⁷ The implementation phase of the county case raised an interesting performance question: Assuming that it is possible to judge quality lawyering in the first place, how "good" is "good enough"? In other words, what is the *minimum* quality job performance that would still be considered "effective" under the consent decrees and would satisfy children's procedural due process rights? Certainly, the assertion by one of the deponents early in the

Counsel's principal duty is to zealously advocate for the client's best interests. The lawyer's duty is to form a principled position of the child's best interests and advocate for that position. Nevertheless, the child advocate attorney also has an obligation to inform the court of the child's desires, even when the child's wishes diverge from the attorney's determination of the child's best interests. The determination of a child's best interests must be formed by an explicit analysis of the actual available options.

DeKalb County Consent Decree, *supra* note 48, app. B at 3-4. Fulton took a view somewhat closer to the 1996 *ABA Standards*:

In Fulton County, child advocate attorneys represent the best interests of the child, while at the same time representing the child's expressed preferences. This model allows the child to explain what he or she believes is in his or her best interests. If the child advocate determines that the child's expressed preference would be seriously injurious to the child (as opposed to merely being contrary to the lawyer's opinion of what would be in the child's interests), the child advocate attorney may request appointment of a separate guardian ad litem and continue to represent the child's expressed preference as the child's attorney, unless the child's position is prohibited by law or without any factual foundation.

Fulton County Consent Decree, *supra* note 49, app. A at 3. In 2009, a new director of the Fulton Child Advocate Office, who had many years of experience as a public defender, was hired. See WILLIAM G. JONES, FOURTH KENNY A. REPORT FOR FULTON COUNTY 19 (2010) [hereinafter FULTON COUNTY FOURTH PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2010/11/2010-1112_fulton_county_fourth_monitoring_report.pdf. Under his leadership, Fulton changed its model of child representation to client-directed, and the consent decree was modified to reflect this. See Modified Consent Decree app. A at 2, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS (N.D. Ga. May 18, 2009) [hereinafter Fulton County Modified Consent Decree], available at http://www.childrensrights.org/wp-content/uploads/2009/10/2009-05-19_ga_fulton_county_modified_consent_decree.pdf. The 2011 Model Act reflects this same standard. See 2011 MODEL ACT, *supra* note 3, § 7(c).

⁷³ Fulton County Consent Decree, *supra* note 49, at 7. After delineating the many duties of a child's lawyer, the 2011 Model Act notes that "lawyers must have caseloads that allow realistic performance of these functions." 2011 MODEL ACT, *supra* note 3, § 7(b) cmt.

⁷⁴ See Fulton County Consent Decree, *supra* note 49, at 8.

⁷⁵ See *id.* For Fulton County, the parties agreed on the appointment of Judge William Jones, a retired dependency judge from North Carolina with a national reputation. *Id.* at 7. For DeKalb County, the parties selected Karen Beatrice Baynes-Dunning, a former Georgia juvenile court judge and Associate Director of the Governmental Services Division at the University of Georgia's Carl Vinson Institute of Government. DeKalb County Consent Decree, *supra* note 48, at 6, 11.

⁷⁶ See Fulton County Consent Decree, *supra* note 49, at 5-8, app. A 4.

⁷⁷ See *id.* app. A at 1.

litigation that meeting each of her clients was "aspirational," if considered a normative claim, would be repugnant. But is there a difference between "best practices" and the constitutional minimum? The *Kenny A.* decrees and the monitoring protocols developed to implement them did not address this issue directly.⁷⁸

[*420] In both counties, after the accountability agents verified that the structural requirements of the decrees had been met--and both defendants complied with the staffing and caseload obligations in relatively short order⁷⁹-- their focus turned to assessing compliance with the performance standards [*421] set forth in each decree.⁸⁰ They did this by looking carefully at a sample of individual cases, assessing whether the attorneys' performance on a variety of measures was acceptable in each case, and then aggregating the data to get a systemic view of quality.⁸¹ It was left to the parties to decide whether the accountability agents' findings would support a judicial finding of

⁷⁸ See generally Fulton County Consent Decree, *supra* note 49. Nor did they need to as a legal matter. A clear line of Supreme Court precedent allows parties to a consent decree to agree and enforce terms beyond federal constitutional or statutory minima, and plaintiffs are not required to re-prove constitutional violations in an original complaint against challenges over compliance with a decree that goes beyond such minima. See Frew *ex rel. Frew v. Hawkins*, 540 U.S. 431, 439-40 (2004) (showing the remedy was one that the defendant state officials "had accepted when they asked the District Court to approve the decree" and "[o]nce entered, a consent decree may be enforced"); *Suter v. Artist M.*, 503 U.S. 347, 354 n.6 (1992) ("[P]arties may agree to provisions in a consent decree which exceed the requirements of federal law." (citing *Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 389 (1992))); *Rufo*, 502 U.S. at 389-90 ("The position urged by [the defendants] 'would necessarily imply that the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards. . . . Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements." (quoting *Plyler v. Evatt*, 924 F.2d 1321, 1327 (4th Cir. 1991))); *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986) ("[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial."). The Supreme Court's decision in *Horne v. Flores*, 129 S. Ct. 2579, 2594-95 (2009)--in which the Court, in the context of *FED. R. CIV. P. 60(b)(5)*, instructed lower courts to evaluate whether a "durable remedy" had been achieved and to make sure that "responsibility for discharging the State's obligations is returned promptly to the State and its officials' when the circumstances warrant"--did not alter this precedent. See, e.g., *Juan F. v. Rell*, No. 3:89-*CV-859*, 2010 WL 5590094, at *3 (D. Conn. Sept. 22, 2010) ("*Horne* . . . did not turn 60(b)(5) motions into vehicles to relitigate the original claims of the underlying litigation, in an effort to determine whether ongoing violations of federal law exist."); *Evans v. Fenty*, 701 F. Supp. 2d 126, 171 (D.D.C. 2010) (emphasizing that a court "may not rewrite the existing consent orders so as to reduce defendants' promise to some ill-defined constitutional floor"); see also LaShawn A. *ex rel. Moore v. Gray*, 412 F. App'x 315, 315 (D.C. Cir. 2011) (per curiam) (affirming the district court's rejection of a claim under 60(b)(5) of "durable statutory compliance" under *Horne*).

⁷⁹ See KAREN B. BAYNES, DEKALB COUNTY CHILD ADVOCACY CENTER COMPLIANCE REPORT 4-5 [hereinafter DEKALB COUNTY FIRST PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/06/2007-0724_ga_dekalb_1st_compliance_report.pdf (last visited Feb. 26, 2012); WILLIAM G. JONES, THIRDKENNY A. REPORT FOR FULTON COUNTY 4-8 (2009) [hereinafter FULTON COUNTY THIRD PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2009/11/2009-10-30_ga_fulton_county_third_period_monitoring_report.pdf. DeKalb was in compliance with the caseload standard of 130 almost from the day the court so-ordered the decree, as officials there increased staffing dramatically even before the summary judgment motion was decided. See DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* at 4-5. Fulton lagged behind somewhat, as the structural impediments identified by the authors of the Workload Study remained in place for approximately eighteen months, triggering a caseload obligation of eighty. See FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* at 5, 18. It was not until the Third Monitoring Report found that all of the structural blocks had been removed that the caseload requirement changed to 100. See *id.* at 18.

⁸⁰ See DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79, at 5-7; FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79, at 13-14, 64-66.

⁸¹ FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79, at 13-15; KAREN B. BAYNES, DEKALB COUNTY CHILD ADVOCACY CENTER COMPLIANCE REPORT 2 (2008) [hereinafter DEKALB COUNTY THIRD PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/07/2008-07-22_ga_dekalb_3rd_compliance_report1.pdf.

"substantial compliance" with the consent decrees in the legal sense;⁸² by agreement of the parties, the accountability agents did not draw this ultimate legal conclusion themselves.⁸³

Constructing a metric for assessing lawyer performance was a challenge, but a familiar one for anyone charged with determining compliance with a standard as opposed to a rule. Courts, of course, are used to working in the world of standards. The advantage of having a rule as opposed to a standard is that it provides clarity as to what is expected and how one's performance will be measured. The child advocate attorneys and attorney supervisors in DeKalb and Fulton certainly wanted clarity, but they also wanted flexibility.⁸⁴ For example, the DeKalb County decree required attorneys "[t]o establish and maintain an attorney-client relationship with each Class Member client and to maintain such contacts with the client as are necessary in the reasonable exercise of professional judgment to ensure adequate and effective legal representation."⁸⁵

The Fulton County decree contained similar language.⁸⁶ One could easily imagine a rule that would operationalize this standard more concretely such as: The child advocate attorney shall meet with each client within thirty days of the case opening, once a quarter thereafter, and within ten days of any placement move. This rule would provide clarity to the lawyer about [*422] what is expected and to the monitor about what to look for.⁸⁷ However, in the context of legal services, the parties decided against a minimum number of contacts and instead agreed upon implementation and measurement that was flexible.⁸⁸

The accountability agent in each county constructed a protocol to analyze several dozen lawyer activities--activities that came from the requirements of each respective decree.⁸⁹ In both counties, a random sample of cases was selected during each monitoring period--approximately every six months--to be reviewed using the protocol.⁹⁰ A numerical scale was created, and each activity in each case was scored on the scale.⁹¹ In DeKalb, the accountability agent looked at the child's attorney file for each case in the sample and then interviewed the attorney

⁸² DeKalb County Consent Decree, *supra* note 48, at 10-11; Fulton County Consent Decree, *supra* note 49, at 7-9.

⁸³ See DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79, at 23; FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79, at 5.

⁸⁴ See DeKalb County Consent Decree, *supra* note 48, at 5-6; Fulton County Consent Decree, *supra* note 49, app. A at 1.

⁸⁵ DeKalb County Consent Decree, *supra* note 48, at 6.

⁸⁶ Compare *id.*, with Fulton County Consent Decree, *supra* note 49, app. A at 3-5.

⁸⁷ See 2011 MODEL ACT, *supra* note 3, § 7(b)(5), (8). The 2011 Model Act requires lawyers to meet with child-clients before every court hearing, after every placement change, and at least once a quarter. *Id.*

⁸⁸ See DeKalb County Consent Decree, *supra* note 48, at 5-6; Fulton County Consent Decree, *supra* note 49, app. A at 1, 3-5.

⁸⁹ KAREN B. BAYNES, DEKALB COUNTY CHILD ADVOCACY CENTER COMPLIANCE REPORT 20 [hereinafter DEKALB COUNTY SECOND PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/06/2007-12-19_ga_dekalb_2nd_compliance_report.pdf (last visited Feb. 26, 2012); WILLIAM G. JONES, FIRST FULTON COUNTY KENNY A. REPORT 10-11 (2008) [hereinafter FULTON COUNTY FIRST PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/06/2008-0111_ga_fulton_1st_compliance_report.pdf.

⁹⁰ DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 2; FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 49.

⁹¹ DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 2; e.g., FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 49, 51-52.

to get a better understanding of what did and did not occur in that particular case.⁹² The accountability agent assigned a score of zero to four⁹³ for each item on the protocol for each case and aggregated the data by item.⁹⁴ The Fulton accountability agent also used a protocol for file reviews, but supplemented this with a separate protocol, which he used to assess in-court performance.⁹⁵ He used a scale of zero to three for each item on these protocols.⁹⁶

[*423] The accountability agents operationalized the requirement to "establish and maintain an attorney-client relationship," for example, by looking for evidence of meetings with clients and content containing the client's position.⁹⁷ In reviewing the DeKalb files, the accountability agent looked for content evidencing "client interviews" and also assessed whether the attorney notes contained the "child's position."⁹⁸ She rated each file on the zero-to-four scale for these items.⁹⁹ Similarly, in Fulton, the file review protocol looked at child interviews, but there were five separate items assessed under this category, including the: 1) child's position, 2) number of contacts, 3) explanation of the court process, 4) length of contact, and 5) attorney-client relationship.¹⁰⁰ The court observation protocol contained an item called "[c]ourt informed of [c]hild's [p]osition."¹⁰¹ All of these items were rated on the Fulton zero-to-three scale.¹⁰²

This approach to monitoring lawyer performance raised interesting measurement challenges. For a given case, what distinguishes "client interviews" that need improvement from those that are satisfactory? From an attorney file alone, is it possible to say that an attorney's explanation of the court process to a ten year-old met expectations, as opposed to exceeded them? What factors are used to determine whether the overall attorney-client relationship met expectations? The parties simply trusted the neutrality and experience of the accountability agents to be able to

⁹² DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79, at 8. A master's-level social worker also reviewed each file to determine whether the child's needs were being met. DEKALB COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 81, at 2.

⁹³ An item scored "0" was deemed not applicable for that given case. DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79, at 8. Otherwise, "1" was for poor performance, "2" for needs improvement, "3" for satisfactory, and "4" for excellent. *Id.*

⁹⁴ DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 14.

⁹⁵ FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 49; FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79, at 14.

⁹⁶ FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79, at 14. Initially, the Fulton agent used a zero-to-four scale similar to that in the DeKalb study. See FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 65. Later the scale was changed to zero-to-three. FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79, at 14. Under the revised scale, an item scored "zero" was deemed not applicable for that given case. *Id.* Otherwise, "1" was for performance that did not meet expectations, "2" was for performance that did meet expectations, and "3" was for performance that exceeded expectations. *Id.*

⁹⁷ See DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 24, 27.

⁹⁸ *Id.*

⁹⁹ DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79, at 8.

¹⁰⁰ FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 59.

¹⁰¹ *Id.* at 70.

¹⁰² FULTON COUNTY FOURTH PERIOD MONITORING REPORT, *supra* note 72, at 74.

assess performance, giving appropriate deference to the professional judgment of the attorneys, while still holding them accountable for a certain base level of performance.¹⁰³

[*424] The aggregation of this data presented a legal enforcement challenge and, at least in theory, a constitutional question. If, for example, in 75% of cases the number and length of the contacts were satisfactory or better, but in only 30% of cases did the attorney satisfactorily explain the court process,¹⁰⁴ has there been effective assistance of counsel in the constitutional sense? What percentage of items, in what percentage of cases, have to be at the "satisfactory" level or higher to say that there has been "substantial compliance" with the decree? To say that constitutionally effective representation has been provided? To say that the 1996 *ABA Standards* or the 2011 Model Act standards have been met?

The parties never had to confront these questions in *Kenny A.* because the conclusions that could be drawn from each monitoring report were quite clear.¹⁰⁵ DeKalb showed evidence of compliance with the decree from the first monitoring report and sustained this level for eighteen months, entitling it to court-approved exit from court supervision.¹⁰⁶ Fulton initially struggled to meet the caseload requirements of its decree, and it took multiple monitoring reports before it began to show consistent compliance with the performance requirements.¹⁰⁷ Once it demonstrated compliance with the quality standards, there was no dispute, and after sustaining its performance for eighteen months, Fulton also exited with court approval.¹⁰⁸

The changes over the life of the *Kenny A.* litigation in both counties' approaches to child advocacy and actual performance were remarkable. In 2002 when the case was filed, the child advocate attorneys had upwards of 500 clients each, could not have possibly--and had not--met most of their clients, and had no support staff, investigators, or access to social workers or [*425] independent experts.¹⁰⁹ They were hired and supervised directly by the Juvenile Court judges before whom they appeared, often functioning more as courtroom managers than as advocates or lawyers.¹¹⁰ Fulton County had four lawyers with virtually no support,¹¹¹ and DeKalb County had

¹⁰³ The consent decrees did not preclude challenges to the findings of the respective accountability agents. See DeKalb County Consent Decree, *supra* note 48, at 6-8; Fulton County Consent Decree, *supra* note 49, at 6. Additionally, the accountability agents shared drafts of their findings and each of their monitoring reports for comment before finalizing them and before they were filed with the court. See, e.g., DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 13. As it turned out, the parties never disputed the findings. See generally DEKALB COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 81; DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89; DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79; FULTON COUNTY FOURTH PERIOD MONITORING REPORT, *supra* note 72; FULTON COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 79; WILLIAM G. JONES, KENNY A. REPORT SECOND FULTON COUNTY (2008) [hereinafter FULTON COUNTY SECOND PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/08/2008-08-01_ga_2nd_fulton_monitoring_report.pdf; FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89.

¹⁰⁴ See, e.g., FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 59.

¹⁰⁵ And again, in terms of the enforcement of consent decrees versus constitutional minima, they did not need to. See *supra* note 78 and accompanying text.

¹⁰⁶ DeKalb County Consent Decree, *supra* note 48, at 3, 10; *Georgia County Exits Court Oversight After Reform of Legal Representation for Foster Children*, CHILDREN'S RIGHTS (Oct. 14, 2008), <http://www.childrensrights.org/news-events/press/georgia-county-poised-to-exit-court-oversight-after-reform-of-legal-representation-for-foster-children/>.

¹⁰⁷ FULTON COUNTY FOURTH PERIOD MONITORING REPORT, *supra* note 72, at 10.

¹⁰⁸ *Georgia's Fulton County Poised to Exit Court Oversight*, CHILDREN'S RIGHTS (Apr. 12, 2011), <http://www.childrensrights.org/news-events/press/georgia%E2%80%99s-fultoncounty-poised-to-exit-court-oversight/>.

¹⁰⁹ *Georgia County Exits Court Oversight After Reform of Legal Representation for Foster Children*, *supra* note 106.

¹¹⁰ *Id.*

two.¹¹² In contrast, when DeKalb exited in 2008, attorneys there had caseloads ranging from sixty-five to ninety.¹¹³ There was an independent Child Advocacy Center staffed by a director and eleven full-time case-carrying attorneys-- including two supervisors, as well as four investigators and four paralegals;¹¹⁴ regular internal performance reviews were being conducted, with corrective action plans instituted where appropriate;¹¹⁵ attorneys attended trainings on a regular basis on child welfare law and related topics, at both local and national conferences;¹¹⁶ and the level of advocacy was consistently high.¹¹⁷ In the words of the DeKalb accountability agent, "[t]here is a systemic and deliberate process of quality improvement that while originally mandated [as part of] the consent decree, has now become [part of] the culture of the [Child Advocacy] Center."¹¹⁸

Likewise, by the time Fulton exited in 2011, all internal reforms called for by the workload study had been implemented, triggering a caseload maximum of 100;¹¹⁹ caseloads were in fact consistently far under 100;¹²⁰ an independent Child Advocate Board had been established under county government, which was responsible for hiring and supervising the director of the Child Advocate Office;¹²¹ the Child Advocate Office was staffed with the director, sixteen full-time attorneys--including one supervisor, four administrative support staff, four investigators, two social services coordinators, and one educational advocate;¹²² the staff participated in a variety of comprehensive training courses;¹²³ the rate and number of client contacts and attorney [*426] participation in extra-judicial meetings and proceedings was exceptionally high;¹²⁴ and for most of the items on the attorney file and court observation protocols, the accountability agent found the performance to meet or exceed expectations in well over 90% of the cases.¹²⁵ Remarkably, during the final year of the consent decree, the assistant county attorney who had represented Fulton County throughout the *Kenny A.* case elected to leave his position and become the director of the Child Advocate Office,¹²⁶ surely having been inspired by the level of practice the office had achieved and the challenge of sustaining it once the incentive of satisfying the federal court's order was gone.

¹¹¹ See *Georgia's Fulton County Poised to Exit Court Oversight*, *supra* note 108.

¹¹² See *Georgia County Exits Court Oversight After Reform of Legal Representation for Foster Children*, *supra* note 106.

¹¹³ *Id.*

¹¹⁴ DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 3.

¹¹⁵ *Id.* at 12-13.

¹¹⁶ DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79, at 6.

¹¹⁷ DEKALB COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 89, at 5.

¹¹⁸ DEKALB COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 81, at 6.

¹¹⁹ *Georgia's Fulton County Poised to Exit Court Oversight*, *supra* note 108.

¹²⁰ *Id.*

¹²¹ FULTON COUNTY SECOND PERIOD MONITORING REPORT, *supra* note 103, at 40.

¹²² FULTON COUNTY FOURTH PERIOD MONITORING REPORT, *supra* note 72, at 21.

¹²³ *Id.* at 42-51.

¹²⁴ See *id.* at 59, 61.

¹²⁵ *Id.* at 75.

¹²⁶ *Id.* at 19.

A number of factors explain this dramatic turnaround and the counties' successful experience under the *Kenny A.* right-to-counsel reform effort. Clearly, a significant but-for cause was the existence of the litigation itself; there is no action quite like a civil rights class action to protect and remedy violations of the rights of vulnerable citizens by a government defendant. Securing the right to counsel and negotiating a favorable consent decree was only part of the litigation story, however; the implementation that followed was successful for independent reasons. First, the presence of the accountability agents in the case and the seriousness of purpose with which they approached their role cannot be overstated. Judge Baynes was local and was deeply familiar with the Georgia Juvenile Court and child welfare systems, and she had the credibility and back-up support from the University of Georgia.¹²⁷ While Judge Jones was based in North Carolina, he spent countless days and weeks on-site in Fulton County, not only conducting his reviews but also offering meaningful technical assistance to the Child Advocate Office leadership and staff as they revamped processes and procedures and created a new culture of advocacy. Both Judges Baynes and Jones had enormous credibility with the parties from the beginning.¹²⁸

Second, there was complete commitment from local leadership; both within the new child advocacy structures in each county as well as the broader county government, and the county leaders involved in *Kenny A.* set their [*427] sights early on full and sustained compliance. After trying a few different ways to structure the program, Fulton County ultimately settled on the creation of an independent Child Advocate Board to oversee the office, removing it from the Fulton County Juvenile Court.¹²⁹ DeKalb hired a charismatic and passionate attorney to direct its new Child Advocacy Center,¹³⁰ and she made compliance with the *Kenny A.* decree her number one management priority.

Third, while Plaintiffs' counsel maintained the ability to enforce the decrees through contempt litigation (and had done so in the state case),¹³¹ the ongoing monitoring and negotiation process in the county case very quickly took on an atmosphere of open sharing of problems and collaboration among the parties, and the accountability agents effectively acted as both reporters of performance and conveners of the parties, sometimes by effectively utilizing shuttle diplomacy.¹³² This factor, without question in our view, limited the delay and expense of separate enforcement litigation.

Undoubtedly, compliance in both counties was aided by a fourth reason outside the parties' control: a rapidly declining foster care census. Many of the problems in the delivery of effective, adequate, and zealous counsel flowed from grossly unmanageable caseloads. Because of changes at the state level (among other reasons), the overall caseloads that child advocate attorneys carried in DeKalb County dropped from approximately 900 when the

¹²⁷ See DeKalb County Notice of Proposed Settlement, *supra* note 45, at 6.

¹²⁸ Judge Baynes was also the author of the Fulton County Child Advocate Attorney Representation and Workload Study. Fulton County Consent Decree, *supra* note 49, at 6. Plaintiffs readily agreed to Fulton County's request that a study be conducted in order to set the caseload requirements. *Id.* at 5. The fact that the study was so well done, by a respected former judge, who was part of a respected institute at the University of Georgia, eliminated the prospect of further litigation and created conditions for buy-in and conciliation. See *id.* at 6-7.

¹²⁹ *Id.* at 4-5.

¹³⁰ DEPARTMENT DIRECTORS, OFFICE OF THE CEO, DEKALB COUNTY, http://www.co.dekalb.ga.us/portals/ceo/trenny_stovall.html (last visited Feb. 26, 2012).

¹³¹ See Plaintiffs' Motion for Order for Defendants to Show Cause Why They Should Not be Adjudged in Civil Contempt & Sanctioned at 1, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-cv-1686-MHS (N.D. Ga. Aug. 19, 2008); Stipulation Regarding Plaintiffs' Contempt & Discovery Motions & Assertion of State Defendants' Noncompliance with Outcome Measures 9 & 10 at 1, *Kenny A. ex rel. Winn v. Perdue*, No.1:02-cv-1686-MHS (N.D. Ga. Dec. 11, 2008), available at http://www.childrensrights.org/wp-content/uploads/2008/06/2007-06-25_ga_fulton_workload_study.pdf.

¹³² See generally DEKALB COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 79; FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89.

case was filed to 750 when DeKalb exited in 2008.¹³³ The decline in Fulton was from approximately 2000 when the case was filed to 1005 in 2010.¹³⁴ Notwithstanding the enormous increase in staffing in both counties, the drop in the foster care census made the caseload ratios in the county decrees more quickly attainable.

[*428] V. WHAT DIFFERENCE DOES A LAWYER MAKE?

Asserting the *Kenny A.* right-to-counsel claims in tandem with claims seeking comprehensive reforms in the state child welfare agency allowed the dangerously poor Atlanta foster care system to provide a compelling context for the need for counsel for children in the juvenile courts. As it turned out, *Kenny A.* offers something of a natural experiment in which to observe the impact of improvements in child advocacy with parallel improvements in outcomes for the lawyers' clients. At the same time that the county case was progressing, the plaintiffs' claims against the state--with respect to the operation of the foster care system in metropolitan Atlanta--were moving forward. The state case was settled with a negotiated consent decree in 2005, requiring the state to increase its performance on thirty-one outcome measures, many of them phased-in over several years, related to the safety, permanency, and well-being of class members.¹³⁵ The State Consent Decree also included process and infrastructure requirements in many areas, including, among others, caseload limits for agency case managers and supervisors assigned to foster children;¹³⁶ the investigation of reports of abuse or neglect;¹³⁷ limits on the use of non-family placements--shelters, groups, homes, and institutions--for foster children;¹³⁸ the oversight of private providers under contract with the state to deliver services for foster children;¹³⁹ the delivery of medical, dental, and mental health for foster children; and the requirements of a child welfare management information system.¹⁴⁰

To date, in several areas of the State Consent Decree, significant progress has been made for foster children in DeKalb and Fulton County. For example, the State Consent Decree requires children who enter foster care along with one or more siblings to be placed together with all of their siblings;¹⁴¹ from 2006 to 2010, compliance increased from 73% to 94%.¹⁴² The State Consent Decree also requires the state to make appropriate arrangements **[*429]** for parent-child visits when the child's permanency goal is reunification;¹⁴³ from 2007 to

¹³³ DEKALB COUNTY THIRD PERIOD MONITORING REPORT, *supra* note 81, at 7.

¹³⁴ FULTON COUNTY FIRST PERIOD MONITORING REPORT, *supra* note 89, at 41; FULTON COUNTY FOURTH PERIOD MONITORING REPORT, *supra* note 72, at 25.

¹³⁵ Consent Decree at 31-38, *Kenny A. ex rel. Winn v. Perdue*, No. 1:02-CV-1686-MHS [hereinafter State Consent Decree], <https://www.gascore.com/forms/docs/ConsentDecree.pdf> (last visited Feb. 26, 2012).

¹³⁶ *Id.* at 22-23.

¹³⁷ *Id.* at 28.

¹³⁸ *Id.* at 15-19.

¹³⁹ *Id.* at 23-24.

¹⁴⁰ State Consent Decree, *supra* note 135, at 20-22.

¹⁴¹ *See id.* at 6.

¹⁴² JAMES T. DIMAS & SARAH A. MORRISON, PERIOD III MONITORING REPORT 41 (2007) [hereinafter STATE THIRD PERIOD MONITORING REPORT], available at http://www.childrensrights.org/wp-content/uploads/2008/06/2007-12-17_ga_state_period3_monitoring_report.pdf; STATE TENTH PERIOD MONITORING REPORT, *supra* note 34, at 7, 13.

¹⁴³ State Consent Decree, *supra* note 135, at 36.

2010, compliance increased from 25% to 88%.¹⁴⁴ Additionally, according to data compiled by the state and verified by the court-appointed "Accountability Agents" in the state case, improvements have been made and sustained in placing foster children closer to their home communities and limiting the use of facilities and institutions as placements for foster children, especially young children.¹⁴⁵

The correlation between reforms in the right-to-counsel decrees from 2006 to 2010 and some of the positive outcomes for foster children under the state decree are striking. Needless to say, however, correlation does not necessarily indicate causation. Many variables contribute to success in child welfare outcomes. For example, while zealous advocacy by child advocate attorneys may well have contributed to keeping more siblings together in foster care or ensuring more visits with children and their parents, the continued pressure of the *Kenny A.* state case and increased resources and tools available to agency case managers likely played a role as well. Absent a tightly designed, randomized control group study--in which the control group gets "regular" advocacy, the experimental group gets a model of advocacy based on the requirements of the *Kenny A.* county decrees, and all other variables are controlled for--it would be nearly impossible to draw causal links between the "input" of adequate, effective, and zealous advocacy in the juvenile courts and measurable improvements in child welfare outcomes.¹⁴⁶

[*430] Importantly, is such research even desirable to show the utility of adopting the 2011 Model Act? Even if one could design and conduct such research and draw causal inferences, it is not at all clear that such a project would be good for children or for the rule of law. The normative value of providing lawyers to those who face a significant liberty deprivation--the clarion promise of *Gideon v. Wainwright*,¹⁴⁷ *In re Gault*,¹⁴⁸ and *Mathews*-- outweighs the cold calculus of whether or not these lawyers contribute, in the aggregate, to faster permanency or increased placements of siblings together, among other desirable outcomes. Firstly, the lawyer's *charge* is to zealously represent the individual client, without regard to what, in the aggregate, constitutes a "good" outcome for a class of children. Indeed, the *Kenny A.* right to counsel litigation sought to establish a right to counsel, ensure lawyers had the tools to do their work--caseload caps, training, etc.--and ensure at least a minimal quality of lawyering in practice.¹⁴⁹ The *Kenny A.* case never sought particular outcomes in individual cases.

Secondly, and perhaps more vitally, lawyers serve an inherently critical role in the justice system that far exceeds quantifiable outcomes, whether in the aggregate or in individual cases. To be sure, lawyers seek to achieve

¹⁴⁴ STATE THIRD PERIOD MONITORING REPORT, *supra* note 142, at 41; STATE TENTH PERIOD MONITORING REPORT, *supra* note 34, at 45.

¹⁴⁵ STATE TENTH PERIOD MONITORING REPORT, *supra* note 34, at 6, 102. To be sure, despite areas of progress, the defendants in the state case still lag in making required improvements in a number of areas, such as efforts to move children into permanent homes out of state custody, particularly through adoption; the timely investigation of reports of child abuse or neglect for foster children already in state custody; the delivery of mental health and development screens and treatment for foster children; and providing required services for children before they are discharged from custody. *See id.* at 23-29, 53-59, 63-66, 93-97, 105-06, 110, 112-15.

¹⁴⁶ At least one national project currently underway has the potential to evaluate the delivery of quality representation for children in dependency cases. *Overview*, QIC-CHILDREP, <http://www.improvechildrep.org> (last visited Feb. 26, 2012). "In . . . 2009, the U.S. Children's Bureau [selected the] University of Michigan Law School [for] the National Quality Improvement Center on the Representation of Children in the Child Welfare System (QIC-ChildRep)." *Id.* According to the official website of the QIC-ChildRep, "[t]he QIC-ChildRep, is a five-year, [five] million dollar project to gather, develop and communicate knowledge on child representation, promote consensus on the role of the child's legal representative, and provide one of the first empirically-based analyses of how legal representation for the child might best be delivered." *Id.*

¹⁴⁷ [372 U.S. 335 \(1963\)](#).

¹⁴⁸ [387 U.S. 1 \(1967\)](#).

¹⁴⁹ *Kenny A. ex rel. Winn v. Perdue*, [356 F. Supp. 2d 1353, 1357, 1362 \(N.D. Ga. 2005\)](#).

outcomes that can be said to be "good" for their clients.¹⁵⁰ But they also directly and indirectly work zealously to protect, enhance, and champion their clients' procedural rights. As a voice for the voiceless, lawyers for children--as well as lawyers for indigent clients throughout the civil and criminal systems--"make a difference" by telling clients' stories and seeking justice regardless of outcomes. Regardless of how many criminal trials end in a guilty verdict, we do not question the value of defense lawyers' advocacy merely because it cannot be proven that they achieve "good" outcomes for their clients.¹⁵¹

[*431] VI. CONCLUSION: LESSONS LEARNED FROM KENNY A. FOR PROPONENTS OF THE 2011 MODEL ACT

Unsurprisingly, many provisions of the 2011 Model Act are very similar to the 1996 *ABA Standards*.¹⁵² Because the *Kenny A.* county decrees drew upon the *ABA Standards*, anyone interested in implementing the 2011 Model Act can fairly look to the *Kenny A.* experience for lessons on how to put its principles into practice.

A. Implementation Matters

The right to counsel, like all rights--especially positive rights--requires ongoing, systematic attention to transform it from a principle into practice. In the absence of a meaningful implementation plan that addresses all core components, the right will at best be provided in an idiosyncratic, ad hoc way.

B. Caseloads Matter

By far the biggest controlled "input" under the right-to-counsel county decrees was the workloads of lawyers.¹⁵³ Without question, at a certain level, caseloads become so high that the right to counsel is compromised.¹⁵⁴ Before performance standards or other aspects of the right to counsel can be fully addressed, the caseload issue must be tackled.

¹⁵⁰ This is true even for children's lawyers in the dependency context, whether they follow a client-directed or a best interests model; the only difference is who gets to decide what a "good" outcome looks like--the client, or the lawyer. *QIC Best Practice Model of Child Representation*, QIC-CHILDREP, <http://www.improvechildrep.org/DemonstrationProjects/QICChildRepBestPracticeModel.aspx> (last visited Feb. 26, 2012).

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[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

[Gideon, 372 U.S. at 344.](#)

¹⁵² Compare 2011 MODEL ACT, *supra* note 3, with STANDARDS OF PRACTICE, *supra* note 4.

¹⁵³ See Fulton County Modified Consent Decree, *supra* note 72, at 4; see also FULTON COUNTY WORKLOAD STUDY, *supra* note 52, at 4.

¹⁵⁴ Fulton County Modified Consent Decree, *supra* note 72, at 4.

C. Leadership Matters

Implementation of the right to counsel for all children in all dependency cases represents a major change in values for most jurisdictions. To be effective, the reform efforts must be led by creative, passionate, and dedicated [*432] leaders who can simultaneously understand the big picture while focusing on details. They need to be able to form and maintain good relationships with many stakeholders while still being advocates for their program in order to develop the internal capacity within the advocacy office for maintaining fidelity to the practice model and to be able to develop policies and procedures, mentor staff, identify problems, and self-correct.

D. Client Directed Representation is Achievable

Fulton County, the largest urban county comprising metropolitan Atlanta, ¹⁵⁵ made the change relatively smoothly while meeting all the performance standards for quality representation in the decree. ¹⁵⁶

E. Training and Support Matter

Child welfare law is a specialized area of practice. Implementing the right to counsel in this area requires a comprehensive training plan and adequate support from social workers, investigators, and paraprofessionals. ¹⁵⁷ Fulton and DeKalb County were successful because program leaders recognized this and political leaders made an appropriate investment in these areas.

F. Independence from the Judiciary Matters

States vary in how their programs for appointing counsel to indigent clients are operated. Some are administered by an executive branch agency and some are by the administrative office of the courts; some are run as a state government function and others are at the county level. ¹⁵⁸ Regardless, it is critical that the individuals who serve as court-appointed counsel do so independently of the bench officers before whom they appear.

[*433] G. Performance Can Be Measured Without Invading Professional Discretion or Requiring "Good Results"

When the client population is too young to lodge formal complaints and lacks the capacity and resources to select their own counsel, there must be a mechanism to ensure quality professional performance. The *Kenny A.* experience shows this can be done effectively even in the absence of consensus over what "good outcomes" are or an easy ability to measure causation--in addition to the questionable utility in measuring causation. ¹⁵⁹ It is important to develop a culture of process in which it is accepted wisdom that lawyers are an essential protection for children regardless of how any one case turns out.

Our experience in the investigation, litigation, settlement, and implementation phases of the *Kenny A.* litigation strongly suggests that ultimately, while impact litigation created a needed push, these two county defendants genuinely recognized that providing effective counsel to all children in abuse, neglect, and dependency proceedings was, and remains, the right thing to do. That realization, perhaps more than any factor, transformed the system for representing children in those counties.

¹⁵⁵ *Fulton County, Georgia QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/13/13121.html> (last visited Feb. 26, 2012).

¹⁵⁶ See FULTON COUNTY FOURTH PERIOD MONITORING REPORT, *supra* note 72, at 4.

¹⁵⁷ NAT'L ASS'N OF COUNSEL FOR CHILDREN, *supra* note 9, at 4-5, 8.

¹⁵⁸ See Child Abuse Prevention & Treatment Act (CAPTA) Amendments of 1996, Pub. L. No. 104-235, § 107(b)(2)(A)(v)(I-VI), (vii), **110 Stat. 3063, 3073**.

¹⁵⁹ See *supra* Part V.

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