

Overview of Kenny A. v. Perdue

What is Kenny A. v. Perdue?

Kenny A. v. Perdue is a class action lawsuit filed on behalf of children in foster care in Fulton and DeKalb Counties in Georgia.

Who are the parties in the case?

- Nine named plaintiff children represent a class that is defined as “all children who have been, are, or will be alleged or adjudicated deprived who (1) are or will be in the custody of any of the State Defendants; and (2) have or will have an open case in Fulton County DFCS or DeKalb County DFCS.”
 - Some of the named plaintiffs also represent a subclass defined as “all children in the class who are African-American and who have had, or are subject to the risk of having, their adoption delayed or denied on the basis of their race or color.”
- Department of Family and Children Services defendants are Sonny Perdue, Governor of Georgia; B.J. Walker, Commissioner of the Georgia Department of Human Resources; Steve Love, the Acting Director of the Georgia Division of Family and Children Services; Beverly Jones, Director of Fulton County DFCS; Walker Solomon II, Director of DeKalb County DFCS.
- County defendants are Fulton County and DeKalb County. As a body corporate, each county can be sued as a corporate entity. The counties are named defendants because they are responsible for paying for legal representation for deprived children, and at the time the lawsuit was filed, provided funding for the county DFCS emergency shelters.

Who is representing the parties?

- Plaintiffs are represented by Children’s Rights, Inc., located in New York, and Bondurant, Mixson & Elmore, LLP, located in Atlanta.
- State DFCS defendants are represented by attorneys in the Office of State Attorney General and by Special Assistant Attorneys General hired by the state including Troutman Sanders, LLP, located in Atlanta, and Davis & Davis, located in Decatur.
- County Defendants are represented by their respective county attorneys.

Who is the judge in the case?

- The Honorable Marvin H. Shoob, Senior Judge, United States District Court, Northern District of Georgia.

What are the causes of action in the lawsuit?

- Plaintiffs assert fifteen causes of action under federal and state law.
- The six federal law claims are brought pursuant to [42 U.S.C. § 1983](#) for alleged violations of plaintiffs’ federal constitutional rights to substantive and procedural due

process under the [Fourteenth Amendment](#) (Counts IV and XVII) and to liberty, privacy, and association under the [First](#), [Ninth](#), and [Fourteenth Amendments](#) (Count V); and for alleged violations of plaintiffs' federal statutory rights under the [Adoption Assistance and Child Welfare Act of 1980](#), as amended by the [Adoption and Safe Families Act of 1997](#) (Count VIII); the [Multiethnic Placement Act](#) of 1994, as amended by the Inter-ethnic Adoption Provisions of 1996 (Count XV); and the Early and Periodic Screening, Diagnosis, and Treatment Program of the Medicaid Act (Count XVI).

- The nine state law claims allege violations of plaintiffs' rights to substantive due process and equal protection under the Georgia Constitution (Counts III and XIV); violations of O.C.G.A. [§§ 49-5-12, 15-11-58, 15-11-13, and 20-2-690.1](#) (Counts VI, VII, IX, and X); nuisance (Count XI); breach of contract (Count XII); and inadequate and ineffective legal representation (Count XIII).
- The claims can be divided into claims against DFCS defendants and claims against Fulton and DeKalb Counties. There is a single claim that is only against Fulton and DeKalb Counties: the claim of inadequate and ineffective legal representation as required by the Georgia State Constitution and Title 15 of the Georgia Code. All other claims are against DFCS defendants, or, if the claim is related to the emergency shelters, against all defendants.

What are the factual allegations in the lawsuit?

Plaintiffs allege the following regarding the foster care systems in Fulton and DeKalb Counties (this list provides an example of the type of allegations and is not inclusive):

- Excessive numbers of cases assigned to inadequately trained and poorly supervised caseworkers
- Insufficient number of foster homes properly screened to ensure the plaintiff children's safety
- Failure to identify adult relatives who could care for the plaintiff children as an alternative to strangers or impersonal institutions
- Failure to provide relevant information and support services to foster parents in order to prevent foster placements from being disrupted
- Failure to develop administrative controls such as an information management system that ensures plaintiff children are expeditiously placed in a foster home matched to meet the children's specific needs
- Failure to provide timely and appropriate permanency planning, including failure to provide services that would enable plaintiffs to achieve their permanency planning goals
- Delays or denials of permanent placements for African-American children because of failure to place such children in permanent homes with parents who are not African-American
- Placement of plaintiffs in dangerous, unsanitary, inappropriate shelters and other placements
- Failure to provide appropriate and necessary mental health, medical, and education services to children in their custody

- Separation of teenage mothers in foster care from their own children and separation of siblings in foster care from each other without providing visitation
- Failure to facilitate plaintiffs' prompt reunification with their families whenever safe and appropriate
- Failure to provide adequate, appropriate and meaningful legal representation for plaintiffs

What relief was/is being sought?

- The suit asks the court to declare what the plaintiffs' rights are under the law and asks the court to stop defendants' ongoing violations of law and to ensure that defendants provide proper care, protection, treatment and services to children in foster care as required by law.
- When adequate facts have been ascertained, plaintiffs will seek a particularized order of permanent injunctive relief that will include professionally accepted standards that defendants must meet.
- Reasonable costs and expenses for the plaintiffs, including attorneys' fees.

When and where was this lawsuit filed?

- The case was originally filed on June 6, 2002 in the Superior Court of Fulton County. The case was later removed by defendants to the United States District Court in the Northern District of Georgia.

Why was this lawsuit filed?

- Plaintiffs assert three main allegations: 1) defendants have been operating an illegal and dangerous foster care system for years; 2) defendants have known about the pervasive and systemic problems for years; 3) defendants have failed to take actions to ensure that children in foster care are protected and cared for as required by law, despite repeated identification of the problems and recommendations for improvements.

Main events in *Kenny A.* through July 1, 2006

- On June 6, 2002 plaintiffs filed the lawsuit.
- Some of the allegations in the original complaint were specific to the operation of the county emergency shelters. The Fulton County shelter was closed on December 27, 2002, the DeKalb County shelter was closed on February 14, 2003, and the new DeKalb Children's Center has since opened.
- On August 18, 2003, the Court granted the plaintiffs' motion for class certification, which meant that the case was allowed to proceed as a class action lawsuit. In the same order, the Court granted the defendants' motion to dismiss the case in part and denied it in part. The Court granted the defendants' motion to dismiss with respect to claims about the operation of the Fulton County and DeKalb County emergency shelters. The shelters had already been closed at the time of the order, making the claims regarding the shelters moot. The Court denied the motion to dismiss the other claims because the federal court had appropriate jurisdiction over the case and because the plaintiffs had enforceable claims since the statutes allegedly violated by defendants created private rights of action in the plaintiffs.
- On December 14, 2004, the Court denied DFCS defendants' motion for summary judgment as there were genuine issues of material fact to be decided about plaintiffs' claims.

- On February 7, 2005, the Court denied county defendants' motion for summary judgment and found that children in all deprivation proceedings in Georgia have a statutory and state constitutional right to effective assistance of counsel, a statutory right to a guardian ad litem, and that the children are parties to these cases. This is the only published opinion from a federal judge finding that children have a statutory and state constitutional right to counsel in child abuse and neglect proceedings and the first time a federal judge has addressed the issue of effective assistance of counsel in this context. In the order, Judge Shoob stated that due process requires that deprived children have a right to counsel because of the children's fundamental liberty interests that are at stake in deprivation proceedings: their safety, health, and well-being; their interest in maintaining the integrity of the family unit; and their interest in having a relationship with their biological parents.
- The claims against the DFCS defendants were set for trial on February 14, 2005 but the trial was postponed because the court ordered the parties into mediation.
- On October 27, 2005, the DFCS defendants and plaintiffs entered into a consent decree approved by Judge Shoob. The consent decree will remain in effect until the DFCS defendants are in substantial compliance with the requirements of the consent decree for three consecutive six-month reporting periods and the Court approves a motion to terminate jurisdiction over the consent decree.
- On May 16, 2006, county defendants and plaintiffs entered into a consent decree approved by Judge Shoob. The DeKalb County consent decree will remain in effect until DeKalb County has remained in substantial compliance with two provisions of the decree for a continuous eighteen month period. The Fulton County consent decree will remain in effect until Fulton County has remained in substantial compliance with all provisions of the decree for a continuous eighteen month period beginning with the date on which Fulton County successfully complies with the workload standards incorporated in the decree.

What is the impact of the consent decree between the DFCS defendants and plaintiffs?

A consent decree was agreed to by the parties to resolve all pending issues without the expense, risks, delays and uncertainties of a trial. Entering into a consent decree is not an admission of the truth or validity of any claims made by plaintiffs.

The consent decree requires DFCS defendants to make system changes and to comply with thirty-one specific outcome measures. The system improvements are divided into eleven areas: (1) planning for permanency; (2) placement of children; (3) health services; (4) Statewide Automated Child Welfare Information System (SACWIS); (5) caseloads; (6) supervision of contract agencies; (7) training; (8) foster parent screening, licensing and training; (9) investigations of allegations of abuse in care; (10) corrective actions that must be taken immediately; (11) maximization of federal funding. Most of the thirty-one outcome measures correspond to the system improvements and provide specific ways to measure whether the system improvements are occurring.

The consent decree will remain in effect until the state is in compliance with all thirty-one outcome measures simultaneously for three consecutive six-month reporting periods and the court approves a motion to terminate jurisdiction. In addition to complying with the thirty-one outcome measures, state defendants must meet other goals such as having a fully implemented single statewide automated child welfare information system, case load limits for case managers, and training requirements for case managers.

Compliance with the consent decree will be monitored by two independent Accountability Agents, James T. Dimas, Senior Associate with Casey Strategic Consulting, an initiative of the Annie E. Casey Foundation, and Sarah Morrison of the Center for the Study of Social Policy. The Accountability Agents will issue public record reports on the defendants' performance relative to the terms of the consent decree to the Court and the parties each six month reporting period, commencing approximately ninety days after the close of the first reporting period. Many of the required system improvements and outcome measures in the consent decree are to be phased in over time so that the state is not required to be in substantial compliance with all thirty-one outcome measures until the end of the fifth reporting period, which ends in April 2008.

What is the impact of the consent decree between DeKalb County and plaintiffs?

A consent decree was agreed to by the parties to resolve all pending issues without the expense, risks, delays and uncertainties of a trial. Entering into a consent decree is not an admission of the truth or validity of any claims made by plaintiffs.

The primary factual allegation behind the claim of inadequate and ineffective assistance of counsel was that DeKalb County failed to provide adequate funding to hire enough child advocate attorneys to effectively and zealously represent deprived children. The consent decree is crafted to address this complaint and to clarify what child advocate attorneys must do to provide effective assistance of counsel. The consent decree establishes staffing requirements for the DeKalb County Child Advocacy Center; sets case load limits of no more than 130 cases per child advocate attorney; defines a case as 'the open file of each class member;' lists out the responsibilities of child advocate attorneys; and adopts principles, standards, policies and procedures for the DeKalb County Child Advocate Center that are included as appendices to the consent decree.

The consent decree will remain in effect until DeKalb County has remained in substantial compliance with two provisions of the decree for a continuous eighteen month period. The two provisions are Section 5, 'Caseload Obligation' and Section 7 'Responsibilities of Child Advocate Attorneys.' Compliance with the provisions of the consent decree will be monitored by an independent compliance agent, Karen Baynes, Deputy Director for the Carl Vinson Institute of Government at the University of Georgia, who will issue periodic compliance reports to counsel for DeKalb County and counsel for plaintiffs, who are to then file the reports with the court.

What is the impact of the consent decree between Fulton County and plaintiffs?

A consent decree was agreed to by the parties to resolve all pending issues without the expense, risks, delays and uncertainties of a trial. Entering into a consent decree is not an admission of the truth or validity of any claims made by plaintiffs.

The primary factual allegation behind the claim of inadequate and ineffective assistance of counsel was that Fulton County failed to provide adequate funding to hire enough child advocate attorneys to effectively and zealously represent deprived children. The consent decree is crafted to address this complaint and to clarify what child advocate attorneys must do to provide effective assistance of counsel. The consent decree requires three main changes by Fulton County. First, Fulton County must establish an office for the Fulton County Child Advocate Attorneys that is independent from the juvenile court and is a division of the Fulton County government. This office must initially be staffed by twelve full-time child advocate attorneys, two full-time investigators and three full-time support staff. Second, a workload study will be conducted by the Carl Vinson Institute of Government to decide how to appropriately measure the workloads of child advocate attorneys. The agreed-upon results of this study will then provide the basis for ongoing determinations of staffing requirements. Third, Fulton County Child Advocate Attorneys will abide by Guidelines for the representation of children that were developed as part of the settlement.

The consent decree will remain in effect until Fulton County has remained in substantial compliance with all provisions of the decree for a continuous eighteen month period beginning with the date on which Fulton County successfully complies with the workload standards incorporated in the decree. Compliance with the consent decree will be monitored by an independent accountability agent, Judge William Jones of Charlotte, North Carolina, who will issue six-month reports at six-month intervals after the completion of the workload study. The reports will be filed with the Court and provided to the parties.

Is this litigation unique?

- This lawsuit is not unique. Section 1983 class action civil rights cases are one of the ways in which the legal rights of marginalized and disenfranchised individuals and groups can be protected. For example, the U.S. Department of Justice Civil Rights Division sued the state of Georgia in 1997 under the Civil Rights of Institutionalized Persons Act because of inappropriate and illegal conditions in the juvenile justice system.
- Many states and municipalities have been engaged in systemic reform litigation concerning their foster care or child welfare systems. The National Center for Youth Law maintains a foster care litigation docket available at <http://www.youthlaw.org/fcrlldocket2000.pdf>.

- States and localities that have been sued regarding the operations of their child welfare systems include Alabama, Arizona, Arkansas, Florida, Illinois, Mississippi, New Jersey, New Mexico, New York City, Pennsylvania, Utah, and Washington D.C. (this list is representative and not exhaustive).
- In February 2006 the Child Welfare League of America and the American Bar Association Center on Children and the Law released *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005*, a study that examines child welfare class action litigation in 32 states, with consent decrees or settlements in 30 of these states. The report is an attempt to examine decrees or settlements currently in effect or having expired in the last 10 years. The study is available at <http://www.cwla.org/advocacy/consentdecrees.pdf>.

What is the potential impact of this lawsuit?

- Defendants' compliance with the settlement will be monitored and the defendants will need to provide the necessary resources to remain in compliance.
- Regarding the consent decree with the DFCS defendants, it is unclear what impact the consent decree will have on children throughout the state because the class is limited to children in Fulton and DeKalb Counties. It is unlikely that children in the custody of the state would receive extremely differential treatment based on the county in which they were brought into foster care. If such a situation does arise, however, it may give rise to equal protection claims.
- Regarding the consent decrees with the county defendants, the consent decrees will be limited to class members with cases before the respective juvenile courts. The impact it may have in other counties is unknown.
- With the entry of the consent decrees, Fulton and DeKalb Counties are the only counties in Georgia to have adopted performance standards for attorneys representing deprived children.
- The actual impact of the lawsuit as a whole depends on how the accountability and compliance agents interpret the terms of the consent decree and 'substantial compliance' with the decree, how compliance with the conditions of the order is monitored, and what enforcement mechanisms are used by the accountability and compliance agents, the parties, and the Court. Litigation is just the first part of class action reform. Implementation of the agreement and monitoring of the parties' compliance with the court order is a critical part of the process.
- Judge Shoob's published opinion dismissing defendant counties' motion for summary judgment addresses the legal question of what a child's right to legal counsel in Georgia is. Judge Shoob found that children in all deprivation proceedings in Georgia have a statutory and state constitutional right to effective assistance of counsel, a statutory right to a guardian ad litem, and that the children are parties to these cases. In the order, Judge Shoob discussed some minimum tasks an attorney must perform to provide effective assistance of counsel and discussed the issue of caseload limits for attorneys representing children. This is the only

published opinion from a federal judge finding that children have a statutory and state constitutional right *to counsel* in child abuse and neglect proceedings and the first time a federal judge has addressed the issue of *effective* counsel in this context.

In the order Judge Shoob stated that children have fundamental liberty interests in their safety, health, and well-being, and that they have an interest in maintaining the integrity of the family unit and in having a relationship with their biological parents. Due process requires that these children have a right to counsel because these interests are at stake in deprivation proceedings.

Judge Shoob's published order stands as a reported, citable opinion that can be used as persuasive authority in cases where a deprived child's right to counsel is at issue.

Sources of information:

Kenny A. v. Perdue et. al., No. 1:02-cv-1686-MHS (N.D. Ga. February 15, 2006) (Order granting joint motion for Preliminary Approval of Settlement Agreement, Class Notice, and Fairness Hearing).

- Preliminary Approval of Proposed Consent Decree with Fulton County

Kenny A. v. Perdue et. al., 356 F.Supp.2d 1353 (N.D. Ga. 2005)

- Denial of County Defendants' Motion for Summary Judgment

Kenny A. v. Perdue et. al., No. 1:02-cv-1686-MHS (N.D. Ga. December 13, 2004) (Order denying State Defendants' motion for summary judgment).

- Denial of State Defendants' Motion for Summary Judgment

Kenny A. v. Perdue et. al., 218 F.R.D. 277 (N.D. Ga. 2003)

- Granting of Defendants' Motion to Dismiss claims with regard to emergency shelters in DeKalb and Fulton Counties
- Denial of Defendants' Motion to Dismiss other claims
- Granting Certification of Class
- Granting Plaintiffs' Motion to Amend Complaint to add claim re: insufficient foster care maintenance payments

First Amended Complaint, Kenny A. v. Perdue et. al., No. 1:02-cv-1686-MHS (N.D. Ga. 2003)

- First Amended Complaint