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## PRIVACY Programs and Protection for Children and Youth: Amend Article 2 of Chapter 5 of Title 49, Relating to Child Abuse and Deprivation Records, so as to Define a Certain Term, Provide for Access by Certain Governmental Entities and Certain Persons to Records Concerning Reports of Child Abuse; Provide That Certain Records Relating to Child Fatality or Near Fatality Shall Not Be Confidential; Repeal Conflicting Laws; and for Other Purposes.

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## PRIVACY

***Programs and Protection for Children and Youth: Amend Article 2 of Chapter 5 of Title 49, Relating to Child Abuse and Deprivation Records, so as to Define a Certain Term, Provide for Access by Certain Governmental Entities and Certain Persons to Records Concerning Reports of Child Abuse; Provide That Certain Records Relating to Child Fatality or Near Fatality Shall Not Be Confidential; Repeal Conflicting Laws; and for Other Purposes.***

CODE SECTIONS:	O.C.G.A. §§ 49-5-40 (amended); 49-5-41 (amended)
BILL NUMBER:	SB 79
ACT NUMBER:	16
GEORGIA LAWS:	2009 Ga. Laws 16
SUMMARY:	The Act expands the definition of “child abuse” by providing for a definition of “near fatality.” It also changes who may access records of child abuse and deprivation to include any governmental agency and certain other persons as defined by the Act. Additionally, it makes cases of near fatality accessible to these agencies and individuals. In doing so, the Act prohibits personally identifiable information from disclosure in these cases.
EFFECTIVE DATE:	July 1, 2009

### *History*

In April 2008, the Children’s Advocacy Institute (CAI) and First Star issued a report card for each state’s public disclosure practices relating to child abuse and neglect entitled, “State Secrecy and Child

Deaths in the U.S.” (CAI report).<sup>1</sup> Georgia, along with nine other states in the nation, received a glaring “F” for failure.<sup>2</sup> Among the reasons for the low grade of fifty out of one hundred points was the state of the law at the time of report.<sup>3</sup> At that time, Georgia did not provide access to records of child abuse resulting in near fatalities—only actual fatalities.<sup>4</sup>

The distinction between actual and near fatalities comes from a federal law, the Child Abuse Prevention and Treatment Act (CAPTA). This law conditions federal grants to state child abuse prevention programs upon states’ first developing laws about disclosing the records of cases of child abuse or neglect.<sup>5</sup> CAPTA provides that states need to have in place not only laws about access to records in cases of child abuse resulting in fatalities, but also near fatalities.<sup>6</sup> Because Georgia previously only required disclosure of records for actual fatalities, the state received a failing grade by the CAI report.<sup>7</sup> Georgia Child Advocate Tom C. Rawlings was a motivating force for introducing Senate Bill (SB) 79, along with Commissioner B.J. Walker and the Department of Human Resources. Rawlings explains:

When you receive a poor grade is not the time to start making excuses. Rather, it’s the time to focus attention on building the skills at issue and figuring out how to improve. . . . Now that [the

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1. EMILY REINIG, ROBERT C. FELLMETH & AMY HARFELD, STATE SECRECY AND CHILD DEATHS IN THE U.S.: A JOINT REPORT OF THE CHILDREN’S ADVOCACY INSTITUTE AND FIRST STAR 5 (2008) (noting that fifteen states received a grade of “D+” or below).

2. REINIG, *supra* note 1, at 5, 9, 11–12, 24 (also failing are Maryland, Montana, New Mexico, North Dakota, Pennsylvania, South Dakota, Tennessee, Utah, and Vermont).

3. Tom C. Rawlings, *Shining More Sunlight on Georgia’s Child Welfare System*, para. 6, [http://gachildadvocate.org/vgn/images/portal/cit\\_1210/0/28/119022595GA%20CW%20System.pdf](http://gachildadvocate.org/vgn/images/portal/cit_1210/0/28/119022595GA%20CW%20System.pdf) (last visited Oct. 17, 2009).

4. See O.C.G.A. §§ 49-5-40 to -41 (Supp. 2008).

5. Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5106a(b)(2)(A)(x) (2006).

6. *Id.*

7. REINIG, *supra* note 1, at 24.

CAI report has] pointed out this gap in our state law, we will begin working to fix the problem.<sup>8</sup>

Georgia began addressing the problem in 1990 when the legislature created child fatality review panels to further investigation, treatment, and prevention in child abuse cases.<sup>9</sup> This legislation was spurred on by a series of articles published in the Atlanta Journal-Constitution, drawing attention to the surprising statistic that “Georgia was one of only ten states without a record of the number of children killed by parents or relatives.”<sup>10</sup> Although Georgia is catching up on gathering and supplying information regarding child fatalities, there is now a drought of information about incidents of *near* fatalities. It is critical to have the most information possible about abuse causes because the Georgia Child Fatality Review Panel report for 2006 posits that 80% of the “reviewed child deaths with preventability data were definitely or possibly preventable” with more preventative information.<sup>11</sup>

Further support for changing Georgia law is the report that Georgia has the “third highest rate of deaths for any state in the nation” resulting from child abuse and neglect, with “about 3.22 children d[ying] from abuse and neglect per 100,000 children in Georgia every year.”<sup>12</sup> In 2005 alone, seventy-six children in Georgia died from abuse and neglect.<sup>13</sup> Nationally, during 2005, a total of 899,000 children “were determined to be victims of abuse or neglect.”<sup>14</sup> Out of those children, 1,460 died as a result of the abuse or neglect,<sup>15</sup> leaving 897,540 abused children alive. The Department of Health and

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8. Rawlings, *supra* note 3, at para. 3, 7.

9. 1990 Ga. Laws 1785 (codified at O.C.G.A. § 19-15-3 (1990)).

10. ARTHUR L. KELLERMANN ET AL., EMORY U. ROLLINS SCH. OF PUBLIC HEALTH CENTER FOR INJURY CONTROL, THE BEST OF INTENTIONS: AN EVALUATION OF THE CHILD FATALITY REVIEW PROCESS IN GEORGIA 6, <http://www.childdeathreview.org/reports/Georgia%20Child%20Fatality%20Review.htm> (last visited Oct. 17, 2009).

11. GEORGIA CHILD FATALITY REVIEW PANEL, 2006 ANNUAL REPORT 10 (2008).

12. REINIG, *supra* note 1, at 2 (citing U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2005 Table 4-1 (2007)).

13. U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD MALTREATMENT 2005 Table 4-1 (2007) [hereinafter CHILD MALTREATMENT 2005].

14. *Id.* at xiv.

15. *Id.* at xv.

Human Services (DHHS) did not explicitly state how many of these 897,540 children experienced near fatal health conditions, but there were sure to be many.<sup>16</sup>

### *Bill Tracking of SB 79*

#### *Consideration and Passage by the Senate*

Senators Seth Harp (R-29th), Renee Unterman (R-45th), Tommie Williams (R-19th), Bill Hamrick (R-30th), and David Alderman (D-42nd), respectively, sponsored SB 79.<sup>17</sup> The Senate read the bill for the first time on February 2, 2009.<sup>18</sup> The bill was referred to the Senate Judiciary Committee.<sup>19</sup>

The Committee made two proposed amendments to the bill language in Section 2(a)(6).<sup>20</sup> The first proposed amendment, to broaden the type of information accessible under the law, specifies that the type of information available will be “available facts and findings.”<sup>21</sup> As originally proposed, the bill would not have expanded access in terms of the type of information available, continuing to limit access to “disclosure regarding whether there is an ongoing or completed investigation of such fatality of near fatality.”<sup>22</sup> This language has been stricken by the Committee in the proposed Amendment.<sup>23</sup> These changes to the bill were made to increase transparency to interested parties and agencies to better evaluate the effectiveness of the services provided by the Department of Children’s Services.<sup>24</sup>

The second proposed amendment made by the Judiciary Committee was to include an additional sentence at the end of

16. *Id.* at xiv–xv.

17. *See* SB 79, as introduced, 2009 Ga. Gen. Assem.

18. State of Georgia Final Composite Status Sheet, SB 79, Apr. 3, 2009.

19. *Id.*

20. SB 79 (SCA), § 2, p. 3, ln. 88–92, 2009 Ga. Gen. Assem.

21. *Id.* at ln. 88; *see also* Interview with Tom Rawlings, State Child Advocate (Apr. 6, 2009) [hereinafter Rawlings Interview]; Interview with Sen. Seth Harp (R-29th) (Mar. 26, 2009) [hereinafter Harp interview].

22. SB 79 (LC 21 0204), § 2, p. 3, ln. 86–88, 2009 Ga. Gen. Assem.

23. SB 79 (SCA), § 2, p. 3, ln. 88, 2009 Ga. Gen. Assem.

24. *See* Rawlings Interview, *supra* note 21.

Section 2(a)(6), delineating types of information related to the privacy rights of the child in question that should not be made available.<sup>25</sup> “Any identifying information, including but not limited to the child or caretaker’s name, race, ethnicity, address, or telephone numbers and any other information that is privileged or confidential, shall be redacted to preserve the confidentiality of the child, other children in the household, and the child’s parents, guardians, custodians, or caretakers.”<sup>26</sup> This addition was made to assure the privacy rights of the living child who suffered a “near fatality.”<sup>27</sup> Previously, only information related to cases resulting in fatalities was available, so no privacy rights were implicated.<sup>28</sup> With the expansion to include “near fatalities” as the driving force behind the bill, privacy rights language needed to be incorporated throughout the bill to ensure the rights of these still living children.<sup>29</sup> The Senate Judiciary Committee passed these amendments, and favorably reported the Committee substitute on February 17, 2009.

SB 79 was read for a second time on February 18, 2009, and for a third time on February 24, 2009.<sup>30</sup> On February 24, 2009, before voting on SB 79, the Senate heard a proposed amendment from Senator Seth Harp.<sup>31</sup> Senator Harp’s proposal was to incorporate the language the Judiciary Committee had already crafted, detailing the types of information that must be redacted to preserve rights of privacy.<sup>32</sup> The Senate passed by substitute SB 79 by a vote of 45 to 0.<sup>33</sup>

### *Consideration and Passage by the House*

On February 25, 2009, the House first read the bill.<sup>34</sup> The bill was read for a second time the following day, and Speaker of the House

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25. SB 79 (SCA), § 2, p. 3, ln. 88–92, 2009 Ga. Gen. Assem.

26. *Id.*

27. See Rawlings Interview, *supra* note 21.

28. See *id.*; see also Harp Interview, *supra* note 21.

29. See also Rawlings Interview, *supra* note 21.

30. State of Georgia Final Composite Status Sheet, SB 79, Apr. 3, 2009.

31. SB 79 (SCS), 2009 Ga. Gen. Assem.

32. *Id.*

33. Georgia Senate Voting Record, SB 79 (Feb. 24, 2009).

34. State of Georgia Final Composite Status Sheet, SB 79, Apr. 3, 2009.

Glenn Richardson (R-19th) assigned it to the House Committee on Children and Youth.<sup>35</sup>

Tom C. Rawlings from the Office of the Georgia Child Advocate spoke on behalf of the bill to the Committee.<sup>36</sup> Representative Mark Hamilton (R-23rd) expressed his caution at the increase in availability of records without knowing what the penalty for improper dissemination of information would be.<sup>37</sup> Mr. Rawlings pointed out that the bill, in two places, provides for the possibility of not releasing information that in any way implicates privacy rights.<sup>38</sup> Without amendments, the House Committee favorably reported SB 79 on March 9, 2009 as a result of a unanimous vote to pass.<sup>39</sup> The House read the bill for a third time on March 19, 2009, and passed SB 79 on the same day by a vote of 163 in favor and one in opposition.<sup>40</sup>

### *The Act*

The Act amends Article 2 of Chapter 5 of Title 49 to expand access of local, state, and national agencies to records of child abuse and deprivation.<sup>41</sup> Additionally, the Act expands the type of cases of child abuse whose records are accessible.<sup>42</sup> This expansion fulfills the dual purposes of increasing the ability to evaluate the effectiveness of services provided by the Department of Child Services, and also aligns the language of Georgia law closer to that of CAPTA.<sup>43</sup>

Section 1 of the Act revises subsection (a) of Code section 49-5-40, which provides definitions of applicable terms.<sup>44</sup> The term “child

35. *Id.*

36. Video Recording of House of Representatives Children and Youth Committee Hearing, Mar. 9, 2009 at 0 hr., 9 min., 15 sec. (remarks by Tom Rawlings, Georgia Child Advocate), [http://www.legis.state.ga.us/legis/2009\\_10/house/Committees/childrenAndYouth/childrenArchives.htm](http://www.legis.state.ga.us/legis/2009_10/house/Committees/childrenAndYouth/childrenArchives.htm) [hereinafter House Committee Video].

37. *Id.* at 0 hr., 19 min., 27 sec. (remarks by Rep. Mark Harmon (R-23d)).

38. *Id.* at 0 hr., 22 min., 25 sec. (remarks by Tom Rawlings, Georgia Child Advocate).

39. State of Georgia Final Composite Status Sheet, SB 79, Apr. 3, 2009.

40. *Id.*; see also Georgia House of Representatives Voting Record, SB 79 (Mar. 19, 2009).

41. See Rawlings Interview, *supra* note 21; Harp Interview, *supra* note 21.

42. *Id.*

43. Harp Interview, *supra* note 21.

44. O.C.G.A. § 49-5-40(a) (Supp. 2009).

abuse” is defined in subsection (a)(3), and three changes are made to the previous language.<sup>45</sup> First, the word “that” is added in subsection (a)(3)(A), helping to clarify that “physical forms of discipline may be used as long as there is no physical injury to the child.”<sup>46</sup> Second, the definition of child abuse is expanded by the addition of the term “or” in (a)(3)(C).<sup>47</sup> This change means sexual abuse or sexual exploitation of a child will both qualify under the definition of “child abuse” independently of one another.<sup>48</sup> Third, the language previously under (a)(3)(E) is incorporated into (a)(3)(D), spelling out the spiritual treatment exception to child abuse.<sup>49</sup>

The most important change in language the Act adds is in Code subsection 49-5-40(a)(4). This new subsection provides the definition for a “near fatality,” a term borrowed from CAPTA.<sup>50</sup> A child suffers a “near fatality” when the injury sustained is certified by a physician as placing the child in “serious or critical condition.”<sup>51</sup>

Section 2 of the Act revises subsection (a) of Code section 49-5-41, delineating who has access to the records.<sup>52</sup> The previous definition of persons and agencies with access was eliminated under (a)(1) and replaced with a broader definition, granting access to, “[a]ny federal, state, or local government entity,” and any agency of any of these entities, provided that it has a need for the information contained in the reports it is seeking, to “carry out its legal responsibilities to protect children from abuse and neglect.”<sup>53</sup>

Section 2 further revises subsection (a) of Code section 49-5-41 to increase the type of information available to be shared and to protect the privacy rights of living children whose records may be shared.<sup>54</sup>

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45. *Id.* § 49-5-40(a)(3); *see also* SB 79, as passed Senate, 2009 Ga. Gen. Assem.

46. *Id.* § 49-5-40(a)(3)(A).

47. *Id.* § 49-5-40(a)(3)(C).

48. *See id.*

49. *Id.* § 49-5-40(a)(3)(D); *see also* SB 79, as passed Senate, 2009 Ga. Gen. Assem.

50. O.C.G.A. § 49-5-40(a)(4) (Supp. 2009); *see also* Rawlings Interview, *supra* note 21; 42 U.S.C. § 5106a(b)(2)(A)(x) (2006) (public disclosure for fatality or near fatality provisions) and § 5106a(b)(4)(A) (defining near fatality).

51. 42 U.S.C. § 5106a(b)(4)(A) (2006).

52. O.C.G.A. § 49-5-41(a) (Supp. 2009); *see* Rawlings Interview, *supra* note 21; Harp Interview, *supra* note 21.

53. O.C.G.A. § 49-5-41(a)(1) (Supp. 2009); *see also* SB 79, as passed Senate, 2009 Ga. Gen. Assem.

54. O.C.G.A. § 49-5-41(a) (Supp. 2009).

Subsection (a)(6) expands access from records relating to fatalities to records of cases resulting in fatalities or near fatalities.<sup>55</sup> This access will be granted unless “such disclosure of information would jeopardize a criminal investigation or proceeding.”<sup>56</sup> The amount of information made available is also expanded to include “the available facts and findings.”<sup>57</sup> This is a significant change from the past code language, which only allowed disclosure of whether there is an investigation of the incident, and, if so, whether child abuse was confirmed.<sup>58</sup> Finally, the Act amends (a)(6) by delineating what types of information may not be shared.<sup>59</sup> Any information identifying the child, the parents, guardians, or custodians, or other children living in the same house must be redacted from any documents.<sup>60</sup> This information includes, “name, race, ethnicity, address, or telephone numbers, and any other information that is privileged and confidential.”<sup>61</sup> This supplementary language is a crucial addition because living children, who retain privacy rights interests, are now potentially affected by the law due to the “near fatality” provision.<sup>62</sup> This provision was necessary to both protect the privacy interests of these potentially affected children, and to defuse potential opposition to the bill from politicians and organizations that expressed concern about the potential impact the bill might have on privacy rights.<sup>63</sup>

Section 3 of the Act revises subsection (e) of Code section 49-5-41, relating to persons and agencies with access to records, to reflect and agree with the above amendments.<sup>64</sup> The Act replaces “death” with “fatality or near fatality” in subsection (e).<sup>65</sup> The language elucidated in Section 2 establishing the boundaries of the information to be made available, in protecting the privacy interests of involved

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55. *Id.* § 49-5-41(a)(6).

56. *Id.*

57. *Id.*

58. *See* SB 79 (CSFA), § 2, p. 3, ln. 88, 2009 Ga. Gen. Assem.

59. O.C.G.A. § 49-5-41(a)(6) (Supp. 2009).

60. *Id.*

61. *Id.*

62. Rawlings Interview, *supra* note 21.

63. Rawlings Interview, *supra* note 21; *see also* House Committee Video, *supra* note 36, at 0 hrs., 22 min., and 0 sec. (remarks by Rep. Mark Harmon and Tom Rawlings, Georgia Child Advocate).

64. O.C.G.A. § 49-5-41(e) (Supp. 2009).

65. *Id.*; *see also* SB 79, as passed Senate, 2009 Ga. Gen. Assem.

parties, is added here as well.<sup>66</sup> This Section provides that all information related to a case, including the investigation, any reports, referrals, or the complaint are open records, with the caveat that any “identifying information” shall be redacted.<sup>67</sup> The Act specifies that once documents have been released pursuant to these guidelines, “the department may comment publicly on the case.”<sup>68</sup>

### *Analysis*

Revising the child abuse and neglect statutes to include the language of SB 79 will lead to several immediate results in Georgia. First, it will serve to bring Georgia in line with other states that have updated their child abuse and prevention laws to comply with the 1996 CAPTA Amendments.<sup>69</sup> Other states that allow access to records of near fatality have been able to reap the benefits of federal funding for child abuse prevention programs, and now Georgia will be able to as well.<sup>70</sup>

Second, opening up Georgia’s child abuse and neglect records to include disclosure of cases of near death will provide for more transparency in how child protective agencies operate,<sup>71</sup> requiring disclosure of agency records on children who have been abused to the point of near death, without requiring actual death.<sup>72</sup> The Division of Family and Children Services (DFCS), for example, would have to open their records on children such as Adrianna Swain, who was “[b]eaten to within inches of her life,” after DFCS recommended she be returned to her biological parents, despite adverse wisdom of her

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66. O.C.G.A. § 49-5-41(e) (Supp. 2009).

67. *Id.* § 49-5-41(e)(3).

68. *Id.*; *see also* Rawlings Interview, *supra* note 21. This caveat may have been added to help placate the First Amendment interests favoring broader access and disclosure. *Id.*

69. REINIG, *supra* note 1, at 2 (“[M]ost states are generally in compliance with the limited letter of the statute.”).

70. 42 U.S.C. § 5106a(a) (2006) (stating that the goal of CAPTA grants is “improving the child protective services system of each . . . [s]tate”).

71. Rawlings, *supra* note 3, at para. 5 (“[M]ore public information . . . helps reassure Georgians that the child welfare system they pay for with their tax dollars is working.”).

72. 42 U.S.C. § 5106a(b)(2)(A)(x) (2006).

Court Appointed Special Advocate and her guardian ad litem.<sup>73</sup> DFCS has “claim[ed] a duty of confidentiality to protect Adrianna’s records from public inspection,” which SB 79 will likely not allow.<sup>74</sup> A former advocate of abused and neglected children, Allyson Anderson, declared last year that “[a]ll Georgians deserve to know what went wrong and why, and what was done to hold key decision-makers accountable. Why must DFCS insist that a child die before the public can know it, too?”<sup>75</sup>

Third, changing the language of who has access to these records will ensure that any attorneys who previously may have been hesitant to provide access to this information for fear of violating the privacy rights of the child in question due to a narrow interpretation of the previous definition, will no longer feel so constrained.<sup>76</sup> The Act also foresaw the potential for unwillingness to share information for the same privacy reasons in multi-jurisdictional scenarios, and wanted to ensure that attorneys feel free to share with their opposites in other states and federal agencies when information is requested of them.<sup>77</sup>

### *Constitutional Concerns*

The privacy rights of abused children are, of course, paramount in cases of abuse and neglect.<sup>78</sup> The Act provides for redaction of “the child or caretaker’s name, race, ethnicity, address, or telephone numbers and any other information that is privileged or confidential” to protect the privacy of not only that child, but also “other children in the household” and “parents, guardians, custodians, and caretakers.”<sup>79</sup> This language is again repeated in a later section.<sup>80</sup> This right to privacy, some would argue, however, infringes upon

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73. Allyson W. Anderson, Opinion, *DFCS Must Exercise Transparency in Cases of Severe Child Abuse*, ATLANTA J.-CONST., Nov. 13, 2008, at A19.

74. *Id.*

75. *Id.* (“[Adrianna] would want all of us to learn from what happened to her so that it never happens to another toddler again.”).

76. Rawlings Interview, *supra* note 21.

77. *Id.*

78. See House Committee Video, *supra* note 36, at 0 hr., 21 min., 36 sec. (remarks by Rep. Mark Harmon and Tom Rawlings, Georgia Child Advocate).

79. O.C.G.A. § 49-5-41(a)(6) (Supp. 2009).

80. *Id.* § 49-5-41(e).

free speech rights.<sup>81</sup> First Amendment attorneys, for example, would like to see more freedom to delve into the records of abused children without the opaqueness of name hiding.<sup>82</sup>

*Public Policy Benefits*

With more access to child abuse and neglect records, the public will be able to evaluate abuse prevention systems with a broader view. The Act provides that “[u]pon the release of documents pursuant to this subsection, the departments may comment publicly on the case.”<sup>83</sup> This public comment, and more generally the disclosure of records, would help prevent child abuse and neglect incidents from occurring. The CAPTA grant system is put in place to assist states “in improving [their] child protective services system[s]”<sup>84</sup> through “developing and delivering information to improve public education”<sup>85</sup> and “to prevent and treat child abuse and neglect at the neighborhood level.”<sup>86</sup> Likewise, amending the Georgia laws to include disclosure of near fatalities will bring Georgia up to date on providing public access so that “citizens and policymakers [can] understand the situations causing these children to suffer so horribly . . . [and] be in a better position to research and find ways to prevent these deaths. More information yields better policies and better laws.”<sup>87</sup>

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81. See GA. CONST. art. I, § 1, para. 5.

82. Rawlings Interview, *supra* note 21.

83. O.C.G.A. § 49-5-41(e) (Supp. 2009).

84. 42 U.S.C. § 5106a(a) (2006).

85. *Id.* § 5106a(a)(11).

86. *Id.* § 5106a(a)(12).

87. Tom Rawlings, *supra* note 3, at para. 5.