

SPEAKING OF JUSTICE

NEWS FROM THE FLORIDA BAR FOUNDATION
Volume 8 Issue no. 2



COLIN HACKLEY

Jennifer Rodriguez and her son Alex, 11, wait for test results in the office of one of three pediatric subspecialists Alex sees regularly. Alex was one of five petitioners in a rule challenge that the Florida State University Public Interest Law Center filed after the Florida Department of Health began removing more than 13,000 children from a Medicaid specialty managed care program. The center is supported in part by a Children's Legal Services grant from The Florida Bar Foundation.

Project protects rights of chronically ill children to specialty care

When Jennifer Rodriguez got a call from a nurse case manager last May asking her to take a survey about her son Alex, 11, she had no idea that her responses could get him tossed from a Medicaid specialty managed care program for chronically ill and disabled kids.

"I answered her questions honestly but she needed a yes or a no, and to me some questions it's not a direct yes or a direct no," Rodriguez said.

The third question was one of those: "Is your child limited or prevented in any

way in his or her ability to do the things most children of the same age can do?"

Although Alex has a heart defect and kidney stones and sees a cardiologist, nephrologist and urologist regularly, Rodriguez answered no, as did parents whose children are blind, have cleft palates, birth defects, diabetes, and other medical problems that require coordinated and specialized care.

Based solely on parents' answers to the five survey questions, the Florida Department of Health (DOH) removed 13,074 children from Children's Medical

Services (CMS), a program their doctors had deemed necessary to ensure they could provide the care their patients needed.

The generalized application of the survey questions became the basis of a successful rule challenge brought by the Florida State University College of Law's Public Interest Law Center, where children's advocacy projects were funded in 2015 by a \$107,000 Children's Legal Services grant from The Florida Bar Foundation.

When Alex and several of his other patients were dropped from CMS, Dr. Louis St. Petery, a Tallahassee pediatric

Message from the President

Lebanese-American poet Kahlil Gibran wrote, "Progress lies not in enhancing what is, but in advancing toward what will be." This thought describes precisely our focus and commitment to access to justice. For instance, through the Florida Commission on Access to Civil Justice we have worked with and assisted a spectrum of statewide leaders focusing on the critical need for delivery of legal services to low- and moderate-income Floridians. Together with our partners, we are creating a new model which will embrace and harness new technology and improve access. We are also committed to making this powerful collaboration continue through a permanent Commission. In the interim, we are actively assisting with the Commission's first major initiative, a statewide online triage gateway that will direct hard-pressed Floridians to the form of legal assistance or information most appropriate for them. This system, which will be available on any computer or smartphone with Internet access, represents not an enhancement of what is, but an advancement toward what will be. True progress indeed.



Donny MacKenzie

Florida Bar sections continue to provide vital funding

Four Florida Bar sections have donated a combined \$200,000 to The Florida Bar Foundation in 2015-16, including a \$75,000 gift from the Family Law Section that is earmarked for Children's Legal Services grants. The Business Law Section and the Appellate Practice Section each gave \$50,000 and the Criminal Law Section contributed \$25,000. "In a year when we had less than \$8 million to distribute, \$200,000 represents a significant boost to our bottom line," Florida Bar Foundation President Donny MacKenzie said. "We could never adequately express our gratitude to those Florida Bar sections who have stepped up to help this year and in recent years."



Family Law Section Chair Maria C. Gonzalez, second from left, presented the section's \$75,000 gift at the Foundation's March 4 board meeting.



Business Law Section Chair G. Alan Howard, second from left, presented the section's \$50,000 gift in Jacksonville Oct. 9.



Appellate Practice Section Chair Christopher V. Carlyle, second from right, presented the section's \$50,000 gift at the Foundation's Sept. 18 board meeting.



Criminal Law Section Immediate Past Chair David Rothman, second from left, presented the section's \$25,000 gift at the Foundation's Dec. 11 board meeting.

40TH 40TH

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“The Florida Bar Foundation is not a come-lately. They have been for years supporting the Public Interest Law Center and children’s advocacy throughout the state of Florida.”

– **Professor Paolo Annino**
Florida State University
Public Interest Law Center

YOU CAN HELP

More than 40 percent of the Foundation’s funding for 13 Children’s Legal Services projects comes from donations. Florida Bar members can elect to support children’s legal advocacy through a voluntary donation on their Florida Bar annual fee statement, and anyone can donate online.

TheFloridaBarFoundation.org/children

cardiologist, began referring parents to Paolo Annino, director of the Public Interest Law Center’s Children’s Advocacy Clinic. Annino held meetings with law students Megan Shoemaker, Steven Reardon and Justin Karpf and pro bono attorney Mary Clark, a retired administrative law judge, to review the individual cases and figure out a legal strategy. Matthew Dietz, litigation director of Disability Independence Group Inc. also provided pro bono support.

After talking to several parents, the team realized the survey was being used to determine continued eligibility for the 78,000 pediatric Medicaid patients already in the program, which they believed made it an unadopted rule.

“Clients who’d never met got this same kind of call, the same kind of letter, got the same questions, gave the same kind of answers,” Karpf said.

Under Florida law, rules applied by state agencies in administering programs like CMS have to go through rulemaking procedures that include public input. In the case of CMS, that should have included input from medical professionals. But that hadn’t happened.

“The whole thing is so perverse,” said Dr. Jeffrey Goldhagen, chief of the division of community and societal pediatrics at UF Health Jacksonville.

“Imagine you have a medical problem and you are cared for in the intensive care unit. You have specialized nurses, you have specialized doctors, you have specialized systems and equipment and so forth,” Goldhagen said. “That’s what CMS is for children outside the hospital. Now imagine going into the intensive care unit and just removing kids, saying, ‘You don’t need to be here, you don’t need to be here, and you don’t need to be here.’ That’s what happened, and with a very inappropriate tool.”

Goldhagen said DOH officials claimed children could get comparable care from other Medicaid managed care organizations, but to him that was like saying patients

could get the same care on a regular floor of the hospital that they would get in the intensive care unit.

“The reason there is an intensive care unit is because that’s not true, and the reason we have CMS is because that’s not true,” Goldhagen said.

In June, a month after DOH began using the survey tool, Annino and his students filed the rule challenge, followed in July by individual fair hearings for each of their clients. Five of St. Petery’s patients, including Alex Rodriguez, were part of the rule challenge. At first DOH began screening all of the Children’s Advocacy Project’s clients back into CMS, thereby taking away their standing in the rule challenge.

But in negotiations DOH agreed to grant standing to avoid depositions and a hearing. Instead, each side submitted proposed orders to the Administrative Law Judge Darren Schwartz, whose Sept. 22 final order declared the screening tool invalid because it was not adopted through the rulemaking process. Schwartz directed the DOH to stop using it immediately.

Just two days after Schwartz issued his final order, Katy DeBriere, a staff attorney at Jacksonville Area Legal Aid, attended a conference funded by The Florida Bar Foundation for its Children’s Legal Services grantees at which Annino presented on the rule challenge.

As Annino explained, while the final order handed a huge victory to Florida’s chronically ill, low-income children, it said nothing about the more than 13,000 who had already been removed from CMS using the tool, an issue his team is working to address.

Through her work with the Northeast Florida Medical Legal Partnership, DeBriere knew Goldhagen, so she suggested that he could refer disenrolled children to Annino. Soon in addition to Dr. St. Petery’s cardiac patients, the legal team from FSU had 11 cleft palate patients from a CMS-certified cleft lip and palate program in Jacksonville. By March 8 they had gotten all of them

reenrolled.

In October, the DOH held a rulemaking workshop that led to the creation of a CMS Clinical Eligibility Attestation form with four pages of CMS-eligible diagnoses that doctors can select. Shoemaker and Karpf collected letters from doctors that resulted in nine diagnoses being included in the list. While the agency is still using parent surveys, doctors can override the survey with the form, and parents can request to have a doctor present when they answer the survey questions. The agency also allowed for an open comment period in April during which doctors and parents could request additions to the diagnoses on the new form.

Now, Annino and his students are working to figure out how to make sure the remainder of the children removed from CMS last summer will be made aware of the opportunity to be rescreened since the letter in which CMS notified parents that their child was no longer eligible did not provide any information about their right to appeal. They tried asking DOH to notify all of the affected parents, but the agency declined.

"You have to remember these parents don't know about administrative law, they don't know about due process, their right to a hearing, these federal cases and the precedent. This is not something that parents think about," Shoemaker said.

The next step for the FSU legal team will be to try to apply the law to force the agency's hand.

"The state needs to let those parents know that their kids were screened out by a tool that was declared invalid, and they have the opportunity to ask to be rescreened if they would like. Some of them will be on the attestation list, and that will make it easy. Others will answer yes to question 3, and that will make it easy," said St. Petery, who has been providing care under CMS for 42 years and once served as the program's statewide interim director.

"These kids don't have any advocates, and Paolo and his students are advocates for



Jennifer and Alex Rodriguez with FSU third-year law students Justin Karpf and Megan Shoemaker.

COLIN HACKLEY

them, and I try to advocate for them. The parents of poor children don't contribute to political campaigns. They don't have a voice, politically, so the system just runs over them. The kids we are advocating for didn't choose to be born into poor families. I think we owe it to these kids to do the best thing we can for them. And that's not easy in this system."

Although the students who worked on the rule challenge will be graduating in May, Annino will bring in new students to work on the CMS issue going forward and may also collaborate with more pro bono attorneys.

"There is a big need in Florida just because we are so miserly. I think other states may cut their highway departments, but we cut chronically ill kids. That's the reality of it," Annino said. "So there is just a lot of work to be done here to make sure federal protections and the state protections are enforced. And we couldn't do it without The Florida Bar Foundation. There is no way we could do it without them. The Florida Bar Foundation is not a come-lately. They

have been for years supporting the Public Interest Law Center and children's advocacy throughout the state of Florida."

For the FSU Public Interest Law Center's work on the rule challenge, The Florida Bar Foundation named it first runner-up for the 2016 Steven M. Goldstein Award for Excellence, which recognizes a project of significant impact undertaken by a Legal Assistance for the Poor grantee. The award memorializes Goldstein, a former legal services attorney and FSU law professor. Goldstein, who died in 1994 at the age of 49, was nationally revered for his dedication to upholding the constitutional rights of those with unpopular causes.

"This award has special meaning for me because Professor Goldstein was both my teacher and mentor," Annino said.

The award will be presented at the Foundation's annual dinner June 16 in Orlando at The Florida Bar Annual Convention. It comes with \$10,000 to be used by the Public Interest Law Center at its discretion and \$1,000 to be used as training funds.

Pro bono help brings a mother's six-year wait to a joyful end

For six years, Kimberly Conyers did everything in her power to regain custody of her son, writing letter after letter to the judge in her case, but it wasn't until she got pro bono help – both from a lawyer and a psychologist – that she was able to overcome the one barrier that had always stood in her way.

Conyers had voluntarily given custody of her son to her aunt in 2007 after she was sentenced to two years in prison for a drug charge. When she was released in September 2009, her aunt refused to relinquish custody, and the judge said he wouldn't consider her petition for custody until she'd had a parental evaluation.

"When I went calling around nobody knew what a parental evaluation was, and then when I did find doctors that knew they were trying to charge me hundreds and up to \$1,000 for the evaluation. And I was working a minimum-wage job and paying rent and lights, and I couldn't afford to pay all the money for the evaluation," Conyers said.

That's when she sought help from the Legal Aid Foundation (LAF) Tallahassee, a Florida Bar Foundation grantee, but she remained on a waiting list for five years until the organization launched a new pro bono program called Thunderdome Tallahassee. The program pairs participants with mentors and provides professional development opportunities in family law, which makes up 90 percent of LAF's cases.

Sid Bigham, then LAF president, brought the idea back from an American Bar Association Equal Justice Conference in 2014. Anne Munson, then LAF executive director, customized Thunderdome, modeling it on Leadership Tallahassee, a Chamber of Commerce program that combines education, service and networking opportunities.

Within months Thunderdome had cleared the LAF's waiting list of 30 cases, breathing new life into a program that had struggled after the Tallahassee Bar Association dropped mandatory pro bono.



COLIN HACKLEY

Kimberly Conyers was reunited with her son Jacquéz with help from a Thunderdome Tallahassee pro bono attorney.

Former Florida Bar Young Lawyers Division President Sean Desmond was a mentor to Gisela Rodriguez, a freshly minted lawyer who took on Conyers' case, and together their first order of business was to find a way around the thousand-dollar barrier of the parental evaluation.

"When I met with Sean to discuss the case the first thing he said is there is something wrong about this," Rodriguez said. "There is a constitutional aspect to this case because it seems like this judge is denying this person access to court."

Not wanting to get started off on the wrong foot with the judge by arguing the constitutionality issue, Rodriguez opted for cold-calling psychologists and asking them to give away \$1,000 worth of services. Finally she found Carol Oseroff, a licensed psychologist who was willing to do the parental evaluation for free.

Although Oseroff's report was favorable, its recommendations included two different types of drug tests, as well as background checks on both parents and proof of employment.

Since her release in 2009 Conyers had worked and remained drug free. She had no problem with the recommendations, except – once again – the cost. A series of a half-dozen random drug tests would run

about \$150, plus more than \$200 for a hair follicle test. She paid for the random drug tests, taking them whenever Oseroff called and told her to go, but not the follicle test.

"I couldn't afford that," Conyers said.

She and Rodriguez decided they had done enough. It was now up to the judge.

The judge's ruling came down Dec. 15. After six years, Conyers finally got her son back. When asked if she'd ever given up hope, Conyers didn't hesitate.

"Never," she said, her eyes beginning to water. "I don't know what parent would give up on their kids."

Jacquéz, who is developmentally disabled, is now 14 and happy to be living with his mom and his new baby brother.

When she thinks about the people who volunteered their time to reunite her with her son, Conyers feels overwhelmed.

"It's a blessing," she said.

"[Rodriguez] just was amazing, and I recommend anybody to come through Thunderdome."

LAF Executive Director Darby Kerrigan Scott said the support of The Florida Bar Foundation has been instrumental in the development of Thunderdome.

"Through all of this, and throughout its entire history LAF has relied heavily upon, and been extremely grateful for, the support of The Florida Bar Foundation," she said.

INNOCENCE, from p. 8

"None of this can happen without you. We have lots of funders, but The Florida Bar Foundation has been the principal funder of our project since our inception," Miller told the Foundation board.

In 1974, more than 10 years before DNA testing first became admissible in court, Bain had fallen asleep one evening while watching television with his sister. He awoke to find police officers asking him to go with them "to clear up an issue."

It would be three and a half decades before he'd see his home again.

Convicted at 18 of raping a 9-year-old boy in Lake Wales, Fla., Bain fell victim to an error common to more than 70 percent of convictions overturned through DNA testing nationwide: eyewitness misidentification.

When a 2001 Florida statute allowed cases to be reopened for DNA testing, Bain turned to the only person he knew who might be able to help him. With the help of another prisoner, Bain submitted four handwritten motions, and his case came before the court five times. It was denied five times. Then another inmate managed to get him a new hearing. As Bain awaited his hearing date, Miller sat on a plane reading Florida Law Weekly and saw a case that looked strange.

"So once the plane landed he called his staff members at the Innocence Project in Tallahassee and had them look into my case," Bain said.

Within eight months he was free.

As the Innocence Project of Florida's cases go, Bain's was straightforward. It involved less than \$5,000 in DNA testing. But sometimes proving a person's innocence is not that simple. Recently, the project had its first non-DNA exoneration in the case of Andre Bryant, another victim of eyewitness misidentification. Bryant was imprisoned for more than eight years for robbery at a Manatee County Walgreens.

"The surveillance video was presented at trial, yet it was put in the wrong machine, and it was very difficult to see," Miller said.

A student volunteer located the right machine for playing back the tape, which was then presented along with other evidence to the prosecutor.

"Without even fighting, they agreed to release our client. This is the new frontier of wrongful conviction work," Miller said.

"What we've learned through our work is that DNA is only a component in about 10 percent of all criminal cases that move through the system, but yet the same things that cause wrongful convictions in those DNA cases – eyewitness misidentification, false confessions, bad lawyering, bad forensics – they cause wrongful convictions in all cases, the other 90 percent as well."

The Florida Bar Foundation board approved a \$255,000 grant for the Innocence Project of Florida for 2016-17, including \$10,000 in the form of matching funds for a support fund that helps exonerees transition back into society.

Nearly seven years after his release, Bain is married with two children and works as a landscaper – a job the Innocence Project of Florida's social worker helped him obtain – and he still speaks to the organization's staff on a regular basis.

Sometimes it's because he needs their help with something, but often it's because they need him. He has become a leading advocate in the innocence movement, speaking all over the country and even internationally. He often attends conferences with Miller, whose son Gideon is 4, the same age as Bain's son, James Jr.

It's sometimes at these meetings, when Miller takes a brief pause from his 65-hour work weeks, that he realizes how his clients have put a stamp on his own life.

"For me, when I see my son and James' son play together at a conference in the pool, I just sit there and say, 'How unlikely is this?' " Miller said. "Not because our kids wouldn't be friends in the abstract – they would – but because how unlikely is this moment, but for our work? But for our partnership with the Bar Foundation, this moment doesn't exist."



James Bain leaves the Polk County Courthouse on Dec. 17, 2009, with his Innocence Project of Florida attorneys Melissa Montle and Seth Miller, the project's executive director.

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James Bain, who served 35 years in prison for a rape he did not commit, addressed The Florida Bar Foundation board March 4 along with Innocence Project of Florida Executive Director Seth Miller. At the suggestion of Foundation CEO Bruce Blackwell, Foundation board members honored Bain and Miller by donating funds to make them Fellows.

Partnership puts an end to 275 years behind bars

When James Bain embraced his sisters on the steps of the Polk County, Fla., courthouse on Dec. 17, 2009, a free man for the first time in 35 years, he had served more time in prison than anyone ever exonerated through DNA testing.

On March 4, 2016, 42 years to the day since the rape for which he was wrongfully convicted, a 59-year-old Bain stood in a hotel meeting room inside Orlando International Airport and shared his story with the board of The Florida Bar Foundation, the organization whose funding made Bain's exoneration possible.

Sharing the microphone with him was Seth Miller, executive director of the Innocence Project of Florida, which Miller modestly describes as "a small nonprofit criminal defense organization based out of Tallahassee." With just two full-time attorneys including Miller, the Innocence Project of Florida litigates three to four dozen cases a year. In the last decade it has engineered the freedom of 15 men who collectively served more than 275 years in prison.