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CHAPTER 119. PROTECTION AND CARE OF CHILDREN, AND PROCEEDINGS AGAINST THEM

PROTECTION OF CHILDREN

Chapter 119: Section 39E. Petitions seeking determination that child is in need of services; jurisdiction; standing

Section 39E. The divisions of the juvenile court department may receive and hear petitions seeking a determination that a child is in need of services as defined in section twenty-one,¹ in accordance with the provisions of this section and of sections thirty-nine F to thirty-nine I, inclusive.² Proceedings pursuant to sections thirty-nine E to thirty-nine I, inclusive, shall not be deemed criminal proceedings.³ The jurisdiction of the Boston juvenile court for the subject matter of this section shall extend to the territorial limits of Suffolk county.⁴

A parent or legal guardian of a child⁵ having custody of such child, or a police officer may apply for a petition in one of said courts alleging that said child persistently runs away from the home of said parent or guardian⁶ or persistently refuses to obey the lawful and reasonable commands of said parent or guardian resulting in said parent's or guardian's inability to adequately care for and protect said child.⁷

Any supervisor of attendance,⁸ duly appointed pursuant to section nineteen of chapter seventy-six may apply for a petition in said court alleging that said child persistently and wilfully fails to attend school or persistently violates the lawful and reasonable regulations of his school.

¹ Revise definitions in section 21 to more specifically define the elements of each offense. For example, how many unexcused absences in what period of time constitute grounds for filing a truancy complaint?

² Add stated purpose to the CHINS proceedings.

³ Add "and shall data from these proceedings shall not be entered in the Criminal Offender Record Information (CORI) system or _____ (CARI) system." This will ensure that children are not given a record for their conduct that will "label" them as status offenders and adversely affect their eligibility for programs.

⁴ This sentence is not necessary now that there is a statewide juvenile court. There should be a reference to the statute, _____, giving the Gloucester and Brookline District Courts a juvenile session.

⁵ Add between the ages of six and sixteen.

⁶ (Discuss more) DSS takes custody of runaway children under the authority given the department in G.L. c. 119, § 23E.

⁷ The definition for a "stubborn" is quite vague. There is a question whether parents should have standing to bring for low threshold behavioral or parent-child difficulties. Should the statute include language similar to that in the statute governing mental health commitments that requires some kind of endangerment to the child?

⁸ Some cities and towns do not have supervisors of attendance. Change to "the designated representative of the school district of any city or town."

If the child is not brought into court on arrest⁹, the clerk shall set a date for a¹⁰ hearing to determine whether a petition should issue, shall¹¹ notify the child of such hearing¹² and shall request the chief probation officer¹³ or his designee to conduct a preliminary inquiry to determine whether in his opinion the best interests of the child require that a petition be issued. The court shall hold a¹⁴ hearing in which¹⁵ it shall receive the recommendation of the probation officer and shall either (i) decline to issue the petition because there is no probable cause to believe that the child is in need of services; (ii) decline to issue the petition because it finds that the interests of the child would best be served by informal assistance without a trial on the merits, in which case the court shall, with the consent of the child and his parents or guardian, refer the child to a probation officer for assistance; or (iii) issue the petition and schedule a trial on the merits.¹⁶ If the child is brought in on arrest,¹⁷ the petition shall issue if it has not already issued, and the court shall immediately request the probation officer promptly to make like inquiry and thereafter¹⁸ ~~report to the court his recommendation as to whether the interests of the child can best be served by informal assistance without a trial on the merits. Upon receiving such recommendation, the court may hold a hearing and shall decide whether to proceed with a trial on the merits or to refer the child to the care of a probation officer for assistance.~~

Whenever a child is referred to a probation officer for assistance, such officer shall have the authority to refer the child to an appropriate public or private organization or person for psychiatric, psychological, educational, occupational, medical, dental or social services and shall have the authority to conduct conferences with the child and the child's family¹⁹ for the purpose of effecting adjustments or agreements which are calculated to resolve the situation which formed the basis of the application or petition and which will eliminate the need for a judicial trial on the merits.²⁰ During the pendency of such referrals or conferences, neither the

⁹ It is confusing to refer to arrest here. The unusual conditions warranting arrest are discussed in section ____.

¹⁰ Most courts refer to this as the "preliminary hearing." Add "preliminary" here. Or, it could be called a "probable cause" hearing.

¹¹ G.L. c. 119, § 39F requires courts to appoint counsel for the child "at all hearings." Add "shall appoint counsel for the child."

¹² Add "the petitioner and counsel" to the notice provision. Define how the clerk's office gives notice to the child and the attorney. What about the child's parents?

¹³ In civil proceedings in the Probate and Family Court, the equivalent of a "probation officer" is a family service officer. That position has similar functions, salary and status.

¹⁴ Add "preliminary."

¹⁵ Add "the petitioner shall present evidence and."

¹⁶ If the court will have dispositional authority to commit the child to the temporary custody of the department of social services at this point, the procedure for holding a temporary custody hearing in 72-hours should be described. To satisfy equal protection, the procedures, the standard of proof and the burden of proof should be the same as care and protection procedures and *sua sponte* 23(C) procedures, including a right to counsel for indigent parents, both custodial and non-custodial.

¹⁷ For better clarity of the procedures, the discussion of what happens if a child is brought in on arrest should be consolidated in one paragraph.

¹⁸ This should be a preliminary hearing. The procedures should be the same as for the preliminary hearing described above. The court shall appoint counsel for the child. The petitioner should give evidence to prove that the child is in need of services. Where does the bail hearing come in?

¹⁹ Add and the petitioner? If the school is the petitioner, shouldn't the school be included in the discussion about how to enable the child to successfully attend school?

²⁰ Restate public policy in favor of using community based services and strengthening families.

child nor his parents may be compelled to appear at any conferences, produce any papers, or visit any place. However, if the child or his parents fail to participate in good faith in the referrals or conferences arranged by the probation officer, the probation officer shall so certify in writing, and the clerk shall²¹ issue a petition, if one has not already been issued, and shall set a date for a trial on the merits.²² ~~The judge who conducted the hearing on the issuance of a petition shall not preside at any subsequent hearing on the merits.~~²³ ~~If the child is being detained in any facility pending the determination as to whether a petition shall issue, or pending a trial on the merits, and a determination is made either not to issue the petition or to refer the child to the probation officer, the person in charge of the facility wherein the child is detained shall be notified immediately and the child shall be immediately released.~~²⁴ Conferences and referrals arranged under this section may extend for a period not to exceed six months²⁵ from the date that the application was initially made for the petition, unless the parent and child voluntarily agree in writing to a continuation of such conferences or referrals for an additional period not to exceed six²⁶ months from the expiration of the original period. Upon the expiration of the initial six-month period, or of such additional six-month period, the petition, if any, shall be dismissed and the child and his parents discharged from any further obligation to participate in such conferences and referrals, or a petition shall, if not already issued, be issued and a date set for a trial on the merits.²⁷ No statements made by a child or by any other person during the period of inquiries, conferences, or referrals may be used against the child at any subsequent hearing²⁸ for the purpose of adjudicating him a child in need of services, but such statements may be received by the court after adjudication for the purpose of disposition.^{29 30}

Upon the filing of a petition³¹ under this section, the court^{32 33} may issue a summons,³⁴ to which a copy of the petition shall be attached, requiring the child named in such petition to

²¹ Is the determination as to whether the family had failed to participate in good faith a judicial determination? If so, add detail describing that the court will schedule, give notice to counsel and the petitioner and hold a second preliminary hearing where the same due process procedures are followed as the first preliminary hearing except the issue is the failure to cooperate. The probation officer bears the burden of offering evidence to show the family's failure to cooperate. If the petition issues, the court should be required to give notice to child's counsel, the petitioner.

²² If the petition issues, the court should be required to give notice to child's counsel, the petitioner and the child's parents, custodial and non-custodial.

²³ It is not necessary to exclude the first judge from hearing the trial on the merits. Most family cases are assigned to one judge.

²⁴ This procedure does not occur in CHINS cases.

²⁵ Should the time frames be reduced to an initial three months and an additional three months?

²⁶ three

²⁷ Very confusing. Isn't this a preliminary hearing? See footnote 21, above.

²⁸ Instead of "any subsequent hearing," specify "the preliminary hearing or trial on the merits?"

²⁹ The discussion about what occurs during the period of informal assistance should be moved up to precede the discussion of what happens if the family fails to participate, the sentence beginning "[h]owever.

³⁰ Additionally, the fact that discussions with the child, and other persons during the informal period are confidential should be moved to the section about the trial on the merits, section 39G.

³¹ Isn't this a reference to the issuance of the petition after the preliminary hearing? Or is it a reference to the filing of the application? If it is the filing of the application, this discussion should be moved to the beginning of the statute. What about the service provider, DSS, DMH or school's responsibilities?

³² Add "shall notify the petitioner and counsel for the child of the date and time of the trial on the merits."

³³ Add a separate sentence describing the petitioner's right, as given in Custody of Gail, to withdraw the petition at any point in the proceeding up to the point [of the trial on the merits or the adjudication?].

appear before said court at the time named therein. If such child fails to obey the summons, said court may issue a warrant³⁵ reciting the substance of the petition and requiring the officer to whom it is directed forthwith to take and bring such child before said court. Notice of the hearing shall be given to ~~the department of youth services and~~³⁶ to the department of social services.

Where the court summons such child, the court shall in addition issue a summons to both parents of the child³⁷, if both parents are known to reside in the commonwealth, or to one parent if only one is known to reside within the commonwealth, or, if there is no parent residing in the commonwealth, then to the parent having custody or to the lawful guardian of such child. Said summons shall require the person served to appear at a time and place stated therein at a hearing³⁸ to determine whether or not such child is in need of services.³⁹

Unless service of the summons required by this section is waived in writing, such summons shall be served by the constable or police officer, either by delivering it personally to the person to whom addressed, or by leaving it with a person of proper age to receive the same, at the place of residence or business of such person, and said constable or police officer shall immediately make return to the court of the time and manner of service.

~~The hearing of a petition filed under section thirty-nine E in a division of the district court department or of the juvenile court department shall be by a jury of six, unless the child files a written waiver and consent to the petition being heard without a jury, subject to his right of appeal therefrom for trial by a jury of six pursuant to section thirty-nine I. Such waiver shall not be received unless the child is represented by counsel or has filed, through his parent or guardian, a written waiver of counsel. Such trials by jury in the first instance shall be in jury sessions designated for their respective departments by the administrative justices of the district and juvenile courts for the hearing of appeals claimed pursuant to section thirty-nine I. All provisions of law and rules of court relative to the hearing and trial of such appeals shall apply also to jury trials in the first instance.~~⁴⁰

Chapter 119: Section 39F. Right to counsel; determination of indigency; assessment of costs

³⁴ Should the summons be issued to the custodian of the child to bring the child or to the child him or herself? Counsel for the child has been assigned. The court should give notice of the date of the trial on the merits to the petitioner and to child's counsel.

³⁵ In juvenile court this is a precept, isn't it?

³⁶ Delete. The department of youth services is not involved in CHINS cases.

³⁷ For clarity add "including a non-custodial parent." Now the court only gives notice to the parent the child was living with at the time the petition was filed, the custodial parents. If loss of parental custody is a dispositional option after the trial on the merits, due process requires the court to notify both parents.

³⁸ Change to "trial on the merits" for consistency and clarity.

³⁹ Add reference to section 39I.

⁴⁰ Delete right to trial by jury and de novo appeal to jury of six. In section 39G specify appellate rights to appeal to the Appeals Court from an adjudication.

Section 39F. ~~⁴¹When a child alleged to be in need of services is brought before a juvenile court or a juvenile session of a district court pursuant to section thirty nine E, said child shall be informed that he has a right to counsel at all hearings, and if said child is not able to retain counsel, the court shall appoint counsel for said child.~~ The court shall determine whether the parent or guardian of a child alleged to be in need of services is indigent. If the court determines that the parent or guardian is not indigent, the court shall assess a \$300 fee against the parent or guardian to pay for the cost of appointed counsel. If the parent is determined to be indigent but is still able to contribute toward the payment of some of said costs, the court shall order the parent to pay a reasonable amount toward the cost of appointed counsel.⁴²

Chapter 119: Section 39G. Hearing⁴³; determination of child in need of services

Section 39G. At any hearing⁴⁴ to determine whether a child is in need of services, said child and his attorney shall be present.⁴⁵ If the court finds the allegations in the petition have been proved at the hearing beyond a reasonable doubt⁴⁶, it may adjudge the child named in such petition to be in need of services. Upon making such adjudication the court, taking into consideration the physical and emotional welfare of the child, may make any of the following orders of disposition⁴⁷:

(a) subject to any conditions and limitations the court may prescribe, including provision for medical, psychological, psychiatric, educational, occupational and social services, and for supervision by a court clinic or by any public or private organization providing counseling or guidance services, permit the child to remain with his parents⁴⁸;

(b) subject to such conditions and limitations as the court may prescribe, including, but not limited to provisions for those services described in clause (a), place the child in the care of any of the following:

(1) a relative, probation officer, or other adult individual who, after inquiry by the probation officer or other person or agency designated by the court, is found to be qualified to receive and care for the child; (2) a private charitable or childcare agency or other private organization, licensed or otherwise authorized by law to receive and provide care for such

⁴¹ Change to “when an application is filed, the court shall appoint counsel for the child.”

⁴² Should the parents bear the cost of counsel if they did not initiate the proceeding?

⁴³ Change “hearing” to “trial on the merits” for clarity.

⁴⁴ Change to “trial.”

⁴⁵ Add “The petitioner will bear the burden of presenting evidence proving that the child is in need of services.” The discussion about the confidentiality of statements made by the child or other persons during informal assistance from section 39E can be inserted here.

⁴⁶ Change burden of proof to “by a preponderance of the evidence.”

⁴⁷ Need new section describing temporary custody hearing within 72 hours, and due process that applies.

⁴⁸ Add continue temporary custody with the department of social services and say that if temporary custody is continued the court will convene a team of service providers or an interdepartmental team pursuant to ____?

children; or (3) a private organization which, after inquiry by the probation officer or other person or agency designated by the court, is found to be qualified to receive and care for the child; or

(c) subject to the provisions of sections 32 and 33 and with such conditions and limitations as the court may recommend, commit the child to the department of social services. At the same time, the court shall consider the provisions of section 29C and shall make the written certification and determinations required by said section 29C. The department shall give due consideration to the recommendations of the court. The department may not refuse out-of-home placement of a child if the placement is recommended by the court provided that the court has made the written certification and determinations required by said section 29C. The department shall direct the type and length of such out-of-home placement. The department shall give due consideration to the requests of the child that the child be placed outside the home of a parent or guardian where there is a history of abuse and neglect in the home by the parent or guardian.

A child found to be in need of services shall not be committed to any county training school. A child found to be in need of services shall not be committed to an institution designated or operated for juveniles adjudicated delinquent. However, such child may be committed to a facility which operates as a group home to provide therapeutic care for juveniles regardless of whether juveniles adjudicated delinquent are also provided care in such facility and may, in addition, be referred to the department of youth services for placement in individual foster care.

Any order of disposition pursuant to this section shall continue in force for not more than six months⁴⁹; provided, however, that the court which entered the order may, after a hearing, extend its duration for additional periods, each such period not to exceed six months if the court finds that the purposes of the order have not been accomplished and that such extension would be reasonably likely to further those purposes.

No order shall continue in effect after the eighteenth birthday of a child named in a petition authorized to be filed by a parent or a legal guardian having custody, or a police officer, under the provisions of the second paragraph of section thirty-nine E, or after the sixteenth birthday of a child named in a petition authorized to be filed by a supervisor of attendance under the provisions of the third paragraph of said section thirty-nine E.

Chapter 119: Section 39H. Arrest of child; notification and placement; bail; detention; right of appeal

Section 39H. A child may be arrested for committing the behavior described in the definition of child in need of services in section twenty-one, only if such child has failed to obey a summons issued pursuant to section thirty-nine E, or if the arresting law enforcement officer

⁴⁹ Change to three months with three month extensions. Cap the period of temporary custody. See Gail.

has probable cause to believe that such child has run away from the home of his parents or guardian and will not respond to a summons.

Whenever such child is arrested and the court with jurisdiction over the case is not in session, the law enforcement officer in charge of the police station or town lockup to which the child has been taken, or his designee, shall immediately notify (1) the probation officer of the division of the juvenile court department within whose district such child was arrested or resides, or such other probation officer who may have knowledge of the child and (2) a representative of the department of social services, if the law enforcement officer has reason to believe that the child is or has been in the care or custody of such department, and shall inquire into the case.

The law enforcement officer, in consultation with the probation officer, shall then immediately make all reasonable diversion efforts so that such child is delivered to the following types of placements, and in the following order of preference:

(i) to one of the child's parents, or to the child's guardian or other responsible person known to the child, or to the child's legal custodian including the department of social services or the child's foster home;

(ii) to a temporary shelter facility licensed or approved by the office for children, a shelter home approved by a temporary shelter facility licensed or approved by said office for children, or a family foster care home approved by a placement agency licensed or approved by said office for children; provided, however, that such a placement is available and, in the view of the probation officer, appropriate for the child; provided, further, that such a placement furnish said law enforcement officer with a written statement that it will make reasonable efforts to secure the child's appearance at the next available court session and that such placement will furnish the necessary transportation to such placement and to the court, unless the law enforcement officer chooses to furnish said transportation, provided, further, that such child may not be securely detained in a police station or town lockup.

Notwithstanding the foregoing requirements for placement, any such child who is arrested shall, if necessary, be taken to a medical facility for treatment or observation.

If the court finds that a child alleged to be a child in need of services by reason of persistently refusing to obey the lawful and reasonable commands of his parents or legal guardian is likely not to appear at the preliminary inquiry or at the hearing on the merits, the court shall order the child to be admitted to such bail or to be released upon such terms and conditions as it determines to be reasonable. A child who does not post bail and is not otherwise released may be detained under such terms and conditions as the court may impose in a facility operated by or under contract with the department for the care of juveniles, provided that no such child is so detained for more than fifteen days without being brought again before the court for a hearing on whether such detention should be continued for another fifteen day period. If the court decides to so continue said detention, it shall note in writing the detailed reasons for its decision. Any child aggrieved by such decision shall have an immediate right to appeal to the superior court under the procedures set forth in section fifty-eight of chapter

two hundred and seventy-six; provided further, however, that in no event shall any child be detained under this section for more than forty-five days. If a child fails without good cause to respond to a summons, the court may similarly admit the child to bail, or release the child upon conditions set by the court, or, if the child fails to post bail, and is not otherwise released, detain the child subject to the above limitations. Whenever bail is imposed under this section, the provisions of section fifty-eight of chapter two hundred and seventy-six shall be applicable.

Chapter 119: Section 39I. Appeal; trial de novo, with or without jury; rights and procedures

Section 39I. Any child who is adjudicated a child in need of services may appeal for a trial de novo in a jury-of-six session of the juvenile court department for the county where the hearing is held, as designated by the chief justice of the juvenile court department. Such appeal shall be made by filing a written notice of same by the end of the next business day after the entry of judgment or adjudication, or within such further time as the court may allow.

The child may waive his claim to jury trial and have the appeal heard by a judge without jury. When an appeal is claimed, the clerk of the court in which said claim is filed shall forward forthwith all papers in the case to the clerk of the court designated to hear such appeals. The verdict of the jury shall be unanimous and the court shall enter and record its findings upon the verdict of the jury.

All the rights and procedures provided in sections thirty-nine E to thirty-nine H, inclusive, shall apply at the trial of the appeal. The justice presiding at said trial shall have all the powers and duties of a justice sitting in a juvenile court under this chapter. No justice shall preside over a trial on appeal in a case in which he presided at the initial trial. The trial on appeal in a district court jury session shall be heard in a session set apart from the other business of the district court and devoted exclusively to juvenile cases. This shall be known as the juvenile appeals session and shall have a separate trial list and docket.

An appeal shall not stay the order, judgment or decree appealed from, but the district court or juvenile court may otherwise order, on application and hearing consistent with this chapter, if suitable provision is made for the care and custody of the child.

Review may be had in the appeals court in the same manner as is provided for trials of civil cases held in the superior court department.

Chapter 119: Section 39J. Payment of expenses for services by counties under Secs. 39E to 39I

Section 39J. Expenses for services provided children alleged or adjudicated to be children in need of services shall be paid by the county in which the court sits upon written certification thereof by the court. The clerk of court shall collect and transmit to the county treasurer, or, in Suffolk county, to the auditor of Boston, hereinafter included in the term "county treasurer", together with an attested copy of the court's order, all bills and vouchers for the costs of any services authorized by the court under the provisions of sections thirty-nine E to thirty-nine I, inclusive. The county treasurer shall keep a record of all payments made for said services, including therein the name of the child, the name or names and addresses of any public or private organization or persons to whom payment is made, the services for which payment is made, and the date upon which payment was made. Periodically, according to a schedule established by the treasurer and receiver-general of the commonwealth, the several county treasurers shall requisition funds from the commonwealth to cover such payments made by the counties during the preceding period. The state treasurer shall pay said requisitions from such sums as may have been appropriated or are otherwise available therefor, and he may require any documentation that he deems appropriate before making payment. Any state agency, department or secretariat which provides, operates, maintains, supervises or funds a program under which any of the services authorized in sections thirty-nine E to thirty-nine I, inclusive, are available may, to the extent consistent with the purposes of such program, provide such services or release funds to the state treasurer for reimbursement by him to the counties for services provided by others which are within the scope of the services authorized in said sections thirty-nine E to thirty-nine I, inclusive.

The state treasurer shall on or before December first of each year render a written report to the general court containing statistics showing the purpose and amounts of expenditures for said services by the various counties for which the commonwealth has made reimbursement, and making such recommendations for change in the law as he shall see fit.