

## CLC PRACTICE POINT

No. 20

September 22, 2011

# ADVOCATING FOR FOSTER YOUTH WHO ARE PRESCRIBED PSYCHOTROPIC DRUGS

By Julia Hillel Larsen – CLC Staff Attorney

The information included in this practice point is based on a memorandum and recommendations prepared by and researched by Theresa Bevilacqua, Jonathan Bakewicz and Stephanie Friedland from the law firm of Dorsey and Whitney LLP. Many thanks to these dedicated lawyers for their thorough and invaluable research.

Over a third of child clients represented by the Children's Law Center of Minnesota (CLC) take psychotropic medications and many of these clients take more than one psychotropic medication at the same time. Youth in foster care are much more likely to be on psychotropic medications than youth in the general population.<sup>1</sup> Additionally, prescription of multiple psychotropic drugs at the same time is occurring at high rates for foster children.<sup>2</sup> Almost all psychotropic medications prescribed to children are not FDA-approved for use in children because the long-term health impact of these drugs on children is unknown.<sup>3</sup> Thus, there is cause for alarm about the appropriate use of psychotropic drugs for youth in foster care.<sup>4</sup>

One of the biggest concerns for youth in foster care who take psychotropic medications is that they usually do not have a single, clearly designated adult responsible for monitoring their mental health care.<sup>5</sup> Any youth taking psychotropic medications needs a committed adult to consistently evaluate if the drug is beneficial to the youth, if the youth is experiencing any harmful side effects or adverse reactions and if any negative symptoms are caused by the youth's mental health disorder versus symptoms triggered by the medications. In addition, youth in foster care often have behavioral issues caused by situational factors, such as past trauma; frequent placement changes which result in new schools, new workers and new doctors; and the uncertain future of their permanency outcomes, which might be better treated with alternative strategies.<sup>6</sup> While psychotropic drugs do help some children, the increased use of these drugs by children brings the additional responsibility of making sure that these children have access to other treatments that may ultimately replace or change the need for these medications.<sup>7</sup> As an attorney representing youth in foster care, there are several ways to ensure that your client receives appropriate treatment, case management services, and medication monitoring.

---

<sup>1</sup>Laurel K. Leslie et al., Multi-State Study on Psychotropic Medication Oversight in Foster Care, Tufts Clinical and Translational Science Institute, 1 (Sept. 2010) [hereinafter Multi-State Study]. Psychotropic medication use for youth in foster care ranges from 13%-52% as opposed to 4% for youth in the general population. \* Some US states report that more than 60% of foster children are prescribed mood altering drugs (at a rate 300% above the national average). \* Citizens Commission on Human Rights, Facts About Foster Care Children Abused With Psychotropic Drugs, [http://www.cchrstl.org/documents/facts\\_about\\_foster\\_care\\_children.pdf](http://www.cchrstl.org/documents/facts_about_foster_care_children.pdf) (last visited Sept. 8, 2011).

<sup>2</sup>Hearing on Utilization of Psychotropic Medication for Children in Foster Care Before the House Ways and Means Subcommittee on Income Security and Family Support, 6 (May 2008) [hereinafter Hearing] (testimony of Laurel K. Leslie MD MPH FAAP on behalf of the American Academy of Pediatrics).

<sup>3</sup>Karen Worthington, Psychotropic Meds for Georgia Youth in Foster Care: Who Decides? Prepared for the Georgia Supreme Court Committee on Justice for Children, 4 (Jan. 2011). In addition, 45%-74% of these medications are prescribed off-label, which means that they are prescribed in ways other than intended or approved by the FDA. Id. at 5.

<sup>4</sup>Many states have identified the overuse of psychotropic drugs as one of the leading issues facing their child welfare systems in the next few years. Hearing, supra, note 2, at 6.

<sup>5</sup>Multi-State Study, supra, note 1, at 2.

<sup>6</sup>Multi-State Study, supra, note 1, at 11.

<sup>7</sup>Hearing, supra, note 2, at 7.

I. UNDERSTAND THE LAWS AND PROCEDURES GOVERNING PRESCRIPTION AND ADMINISTRATION OF PSYCHOTROPIC DRUGS TO YOUTH IN FOSTER CARE

CONSENT

In Minnesota, psychotropic drugs can be prescribed and administered to minors without minors' consent. Consent from a parent or guardian for the prescription and administration of these drugs to minors is required, with the exception that consent will be delegated to the local social services agency, the child's social worker, for youth who are under state guardianship.<sup>8</sup> For youth who have been adjudicated a child in need of protection or services (CHIPS) or who have a pending CHIPS case, the youth's parent or guardian is responsible for consenting to the treatment with psychotropic drugs. If the parent is unable or unwilling to consent to the child's treatment with psychotropic medication recommended by a physician, the child's social worker may ask the court to order authorization of psychiatric care and treatment with psychotropic drugs.<sup>9</sup>

MENTAL HEALTH CASE MANAGEMENT SERVICES

Social services case workers in child protection cases often refer cases to children's mental health departments within the local social services agency when a foster youth has serious mental health issues to determine if the youth has a "severe emotional disturbance."<sup>10</sup> A youth deemed to have a "severe emotional disturbance" is entitled to an array of additional "case management services"<sup>11</sup> which are coordinated with "family community support services."<sup>12</sup> In some counties, a child's social services case worker will work in connection with an assigned mental health case worker to consent to and monitor treatment with psychotropic medications. In other counties, once a referral to the mental health department is made, the child's social services worker is replaced with a mental health case worker who consents to and monitors treatment with psychotropic drugs and takes over all case management.<sup>13</sup>

- ❖ TIP - It is crucial that CLC attorneys verify who specifically at the local social services agency is responsible for consenting to treatment with and monitoring of psychotropic medications on behalf of the CLC client. Further, if the social service case worker responsible for these duties is an inappropriate medical decision-maker,<sup>14</sup> CLC attorneys should consider asking the court to appoint a temporary, independent guardian authorized to consent to the prescription of medication.<sup>15</sup>

Youth who are participating in or are eligible for "family community support services"<sup>16</sup> are legally entitled to medication monitoring services for psychotropic drugs, which should assist the child (or the parent or legal representative) in obtaining information about the drugs; monitoring for physical and behavioral changes that may be related to the child's use of, misuse of, or failure to take the drugs; and obtaining access to the child's source of medical care.<sup>17</sup>

- ❖ TIP - While every client might not be receiving or eligible for these medical monitoring services, CLC attorneys should ensure that CLC clients who are supposed to be receiving such services are in fact receiving them. Even if

<sup>8</sup> Minn. R. 9560.0450 (2007). Minnesota does not provide an exception for minor children to consent to taking psychotropic medication, but does allow for only the child to receive information, plan and decide on whether or not to accept mental health case management services in certain circumstances. See Minn. Stat §§ 144.341-144.347 (2010); see also, Minn. R. 9520.0907 (2007).

<sup>9</sup> See, Minn. R. 9520.0907.

<sup>10</sup> Minn. Stat. § 245.4871, subd. 6 (2010). Please refer to the October 2010 Practice Point on the CLC website for a closer look at specific services available to children with severe emotional disturbances.

<sup>11</sup> Minn. Stat. §§ 245.4871, subd. 3, 245.4881 (2010).

<sup>12</sup> Minn. Stat. §§ 245.4871, subd. 17, 245.4881, 245.4884 (2010). Services specifically include medication monitoring. *Id.* See, Minn. R. 9535.4020, 9535.4041 (2007). See also, Minn. Stat. § 245.4871, subd. 31.

<sup>13</sup> Please call CLC to learn how the county in which you are representing a child proceeds with case management.

<sup>14</sup> Does the assigned case worker have the time, knowledge or caring commitment to consent to and monitor the child's mental health services and treatment with psychotropic medications? Kathi Grasso, Children and Psychotropic Drugs: What's an Attorney to Do? 3 [hereinafter Grasso]. Available at [http://psychrights.org/Kids/Whats\\_aLawyer2do.htm](http://psychrights.org/Kids/Whats_aLawyer2do.htm) (last visited July 20, 2010).

<sup>15</sup> *Id.* at 7.

<sup>16</sup> *Supra*, note 12.

<sup>17</sup> Minn. R. 9535.4041.

CLC clients are not eligible for medication monitoring services provided to children with severe emotional disturbances, the principles found in the family community support services program are useful for advocating for any CLC client who is being treated with psychotropic drugs by arguing for the best interests of the child.

Youth who qualify for severe emotional disturbance services are entitled to a case manager who is legally obligated to arrange for a standardized assessment of the side effects of any prescribed psychotropic drugs. A physician chosen by the child's parent, legal representative, or possibly the child should complete this assessment.<sup>18</sup>

- ❖ TIP - CLC attorneys should consult with CLC staff to identify physicians who are aware of the harms caused to children by over-prescribing psychotropic medications, and thus are deliberate in prescribing them, understand the side effects that might result from taking these medications, and will consider the full extent of trauma suffered by the CLC client in their assessment.
- ❖ TIP - CLC attorneys should make an objection if a CLC client has not received an assessment on the side effects related to the administration of the child's psychotropic medication and/or if a client age 12 or older, his attorney, or his guardians were not consulted in case management planning or physician selection.

## II. EDUCATE AND QUESTION THE EFFECTIVENESS AND SAFETY OF DRUGS PRESCRIBED TO YOUR CLIENT

You and your client should fully understand the prescribing doctor's reasons for prescribing the medication, the benefits and risks including potential harmful side effects of the prescribed medications and any possible treatment alternatives to taking the medication. As the child's attorney, you should know of any medications that your client is taking or has been prescribed in the past. Psychotropic medications as well as any drugs including over-the-counter medications can adversely affect behavior.

Familiarize yourself with your client's current medications and medication history by reviewing your client's records.<sup>19</sup> This includes hospital records, nurse's notes, child protection reports and evaluations from therapists or counselors. Pay close attention to how many times a child was started on a new drug and research whether reports of behavioral issues can be matched to the administration of a newly prescribed drug.<sup>20</sup> Speak with the person in charge of monitoring your client's medications and anyone who has frequent contact with the child such as teachers, doctors, therapists, foster parents, relatives and all mental health professionals involved in your client's care.<sup>21</sup> If you have questions about the drugs your client is prescribed or has taken in the past, you can consult the most recent version of the Physician's Desk Reference and the Essential Guide to Prescription Drugs.<sup>22</sup> In addition, call or look up on the internet the pharmaceutical company that produces the medication to ask for a copy of or to view the package insert for the drug.

Find out how your client feels about taking prescribed medications, and if they wish to be informed about the drugs they are prescribed. Ask your client if there was something that helped or did not help him in the past. Ask your client if he would like a second opinion about the prescribed drugs from a doctor who is unrelated to the court system.<sup>23</sup> Your client will be more likely to take his medications, if appropriate, as directed and to promptly report adverse side effects correctly, if he is included in the decision-making process.<sup>24</sup>

---

<sup>18</sup>Minn. R. 9520.0907. A child who is age 12 or older has the right to be included in the planning of case management services, which includes choosing the physician, unless a mental health professional determines the child's participation is clinically inappropriate to the child's mental health needs and the reasons behind such a determination are documented in the child's case record. *Id.* See also, Minn. R. 9520.0914, subp. 2.

<sup>19</sup>Hearing, *supra*, note 2, at 8. Ask the child's social worker for a medical history of the child's biological family or, if appropriate, contact the child's biological family since clients often come into the system without proper medical histories.

<sup>20</sup>Grasso, *supra*, note 14, at 4.

<sup>21</sup>*Id.* at 4-5. Contact CLC for a list of questions to ask on behalf of your client who is prescribed psychotropic medications.

<sup>22</sup>*Id.* at 5.

<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 4.

- ❖ TIP - If you suspect that your client is being under, over or ineffectively being prescribed psychotropic medications and your client wants a second opinion, ask the court to order the county to arrange for a second opinion from an independent doctor. CLC staff has the names of doctors who provide clean, unbiased assessments and who understand the effect that a traumatic past has on a child's behavior.

### III. ADDITIONAL LEGAL ARGUMENTS TO MAKE ON BEHALF OF A CLC CLIENT WHO WISHES TO PREVENT OR RESTRICT TREATMENT WITH PSYCHOTROPIC DRUGS

If a CLC client is being treated with psychotropic drugs, CLC attorneys should ensure that a CLC client's wishes on this topic are heard and may use a best interest argument to object to the CLC client's treatment with psychotropic medications. The following are examples of best interest arguments, consistent with growing medical trends, which can be used to object to treatment with psychotropic drugs on behalf of a CLC client.

- ❖ Alternative interventions and treatments besides the prescription of psychotropic drugs have not been properly considered or pursued. Trying less invasive treatments, like counseling, prior to the administration of psychotropic drugs is in the child's best interest.
- ❖ The prescribed psychotropic drug is not FDA-approved for children or the dosage prescribed exceeds maximum recommendations and therefore it is in the child's best interest to pursue alternative interventions.
- ❖ The prescribed psychotropic drug has many potential, adverse side effects and therefore it is in the child's best interest to pursue other options.
- ❖ The child was never properly informed of the risks of the medication by a doctor or anyone else. After understanding the listed side effects and serious risks associated with the drug, the child is adamantly opposed to taking the medication.
- ❖ The prescribed psychotropic drugs are not related to any diagnosis in the CLC client's medical history. It is in the child's best interest to get a diagnosis prior to taking psychotropic medication that may or may not be aligned with the child's diagnosis.
- ❖ It is not in the child's best interest to take the prescribed medication because the psychotropic drugs are inappropriate to the child's diagnosis or treatment plan, or more specifically, the mental health services being provided are not appropriate to the developmental age of the child and/or are not being provided in a manner most likely to facilitate progress toward treatment goals.
- ❖ A full medical and social history must be considered by a physician and is in the child's best interest before psychotropic medications are prescribed in order to prevent any negative reactions to a certain drug as well as prevent any unnecessary psychotropic drug treatment.
- ❖ There has been no exploration of any risk of adverse interaction between several other medications the child is currently administered and the newly prescribed psychotropic medication. This includes an exploration of any adverse interaction between street drugs or alcohol the child has a history of taking and the newly prescribed medication. It is in the child's best interest to have a medical professional explore and consider any adverse interactions before the child is administered psychotropic drugs.
- ❖ The listed side effects for the psychotropic drug prescribed include conditions that might never dissipate even after the drug is discontinued. It would be in the child's best interest to have a hearing to present and weigh the risks versus the potential benefits of taking the drug to the court.
- ❖ Due to the child's history of noncompliance with taking other medications and of running away it would be in the child's best interest to explore other options that do not have such drastic side effects if suddenly stopped.

All objections and legal arguments regarding a CLC client's psychotropic medications should be made at a client's review hearing or by motion to be heard if the matter needs to be addressed in a more timely manner than the client's next scheduled review hearing. Ask that specific requests that the court grants, such as assessment requests, verification of who is responsible for consent and medication monitoring and including the child in the decision-making process, are included in the written court review order. Document all correspondence with any of the parties relating to this topic and if necessary file a motion and memorandum of law on the issue presented to all the parties and the court. Ask the court to direct the agency to regularly submit progress reports on the psychotropic drug treatment of your client to evaluate if there is a necessity to continue with such treatment.<sup>25</sup>

#### IV. CONCLUSION

Ensuring CLC clients are getting proper mental health treatment affects all aspects of their lives, especially their education and permanency outcomes. We, as advocates, must guarantee that our clients are not being abused or neglected again due to a lack of appropriate and continuous monitoring of their mental health needs.

If you have any questions or require help with these issues, please call  
Children's Law Center of Minnesota at 651.644.4438.

---

<sup>25</sup>Id. at 6.