

Legal Representation for Children in the Child Welfare System
Written Testimony

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Chair Concannon, Vice-Chair Gossage and Committee Members:

My name is Natalece Washington and I serve as Policy Counsel at the National Association of Counsel for Children. NACC is a non-profit professional membership and advocacy organization founded in 1977 to advance justice for children, youth, and families. It is our vision that every child, parent, and family is well-supported in their community and has equitable access to justice through culturally responsive, client-centered legal representation. This testimony highlights key strategies this committee can take to strengthen state policy through the implementation and funding of high-quality legal representation.

High-quality, client-directed legal representation amplifies youth voice in decisions impacting their lives and futures.

Throughout today's agenda you have heard about best practices to improve the child protection system. High-quality legal representation is a best practice essential to a well-functioning child protection system. Children cannot represent themselves in court. Children's attorneys improve the quality of court proceedings by amplifying the child's voice and perspective for the court's consideration. Just like every other party to the case, youth must be heard by the court to ensure fair judicial proceedings.

Legal representation is client-directed when a licensed attorney follows the Model Rules of Professional Conduct, including ethical obligations for competence, diligence, loyalty, zealous advocacy, and communication,¹ and the client sets the goals of the representation. NACC's *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Cases* and the American Bar Association's *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* endorse the client-directed model of legal representation as the best means to promote judicial consideration of youth perspective, empower youth, improve their perception of fairness of the proceeding, mitigate potential attorney bias, and properly reserve conclusions on what is in a child's best interest to judicial officers.²

¹ Model Rules of Pro. Conduct (Am. Bar Ass'n 1983).

https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

² Nat'l Ass'n of Counsel for Child., *Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings* (2021), <https://www.naccchildlaw.org/page/StandardsOfPractice>.

A client-directed children's attorney must ascertain and zealously pursue the child-client's stated objectives.³ This does *not* mean that the attorney has reflexive, or "robotic allegiance"⁴ to each directive of the client. Just as for adult clients, the professional rules provide safeguards for attorney reporting of safety concerns when absolutely warranted.⁵ Children's attorneys advise clients of their rights, educate them about the legal process, inform them of their legal options, and counsel their decision-making. Children are typically the parties most profoundly affected by government interventions and judicial decisions, yet they are least equipped to independently communicate their desires to the court. Client-directed representation centers the youth's voice and perspective, recognizing youth are the experts of their own lives, but with the guidance and support of an attorney.

Distinguishing Representation of the Best Interest

Best-interest legal representation requires an attorney to develop an informed opinion about what is best for a child and then advance that best-interest determination in court. It leaves the attorney at risk for assessing situations based on their own values and experiences which may be starkly different than the child and family involved in the court proceeding. It may also leave a child's stated desires without a champion in the courtroom.

Valued by Youth with Lived Experience in Foster Care

Youth with lived experience in the child protection system overwhelmingly indicate a desire to be seen, heard, and represented by client-directed counsel. This model helps them meaningfully contribute to the decision-making processes that have long-term impact on their lives. The confidentiality of the attorney-client relationship allows children and youth to feel safe sharing sensitive and deeply personal information with attorneys that they might not otherwise be willing to discuss. For example, they can tell their attorney where they are safe and where they are not; who they hope to visit and who they do not; their concerns about their siblings and parents; and anything they are experiencing in foster care such as issues they are having with their placement or substitute caregivers.

Kansas should adopt specific strategies to promote and sustain high-quality legal services for children.

Policymakers can promote the provision of high-quality legal services by implementing legislation that requires centralized enforcement of initial and ongoing training requirements, ensures adherence to practice standards, establishes reasonable caseload limits, ensures fair and competitive compensation, provides appropriate oversight and supervision, and centralizes legal services.

Mandatory Training

Foundational training should be required before a children's attorney's first appointment, in addition to frequent, ongoing learning throughout their practice. Kansas is on the right track with mandatory training requirements but could improve upon ensuring adherence to requirements. Right now, judges are responsible for monitoring attorney completion of training requirements but there are inconsistencies in compliance. This committee could ensure consistency by designating a central office that oversees attorney compliance.

Practice Standards

Established practices standards for attorneys representing children are critical to promoting quality and uniformity of legal representation. Kansas has aptly promulgated practices standards for guardians *ad litem* representing children but must promote adherence to these standards through attorney supervision and

³ *Note on Diminished Capacity*

At times a child client's capacity to make considered decisions is diminished due to age, mental impairment, or some other reason. For all clients, even those who are very young or pre-verbal, legal representation is the best practice. Guidelines for legal representation of clients with diminished capacity have existed for 25 years and are included in the ABA Model Rules of Professional Conduct, the ABA Standards of Practice for Lawyers Who Represent Children in Child Abuse and Neglect Cases, and the NACC Recommendations for Legal Representation of Children and Youth. Children's attorneys must be trained in early childhood development, promote permanency and visitation, consult with clinicians, and know state and federal law pertaining to infants and children.

⁴ Nat'l Ass'n of Counsel for Child., *supra* note 2.

⁵ Model Rules of Pro. Conduct r. 1.14, *supra* note 1, (AM. BAR Ass'n 1983).

oversight. This can be facilitated through a centralized legal office staffed with supervising attorneys. Routine, semi-annual attorney performance reviews should use the state practice standards as the framework to determine if attorneys are meeting the expectations of quality representation.

Centralized Children's Law Offices

Centralized children's law offices provide children's legal representation through staff attorneys and/or independent contractors. Child protection law is complex and difficult to master on a part-time basis. Full-time staff attorneys are the preferred means to deliver high-quality legal services.⁶ The full-time position allows an attorney to develop expertise that comes primarily through experience gained from focusing one's practice on child protection cases.⁷ In contrast, independent contractor models with part-time contract attorneys that practice other areas of law and infrequently represent child-clients are limited in their ability to provide excellent child representation.⁸

A centralized child law office facilitates high-quality legal service delivery for children by providing an infrastructure for oversight and accountability. Some youth in foster care report that their attorney made all the difference for them; others have not had the same experience. Consistency is key, and centralization helps accomplish that. At the individual attorney level, supervision ensures adherence to practice standards, practical support, performance evaluations, training and accountability structures.⁹ Any legal service delivery system must provide a means for clients to raise concerns about an attorney's engagement or performance. Potential channels for feedback and oversight may include the use of online portals, review boards, surveys with incentivized participation, supervisory review, and/or systemic oversight (court offices, bar associations, ombudspersons).¹⁰

Multi-disciplinary Teams

Centralized child law offices staffed with full-time attorneys are the most effective means to implement another best practice in children's legal representation—the multidisciplinary team.¹¹ Ideally a child's multidisciplinary legal team will include investigators, social workers, peer advocates, and interpreters when necessary.¹² These different perspectives and expertise work in concert to improve the case strategy, litigation, and support for clients. Each professional strengthens quality legal representation for children in numerous ways:

- Peer Advocates: Assist with client engagement and communication, supporting the youth through various case events such as meetings and court hearings¹³;
- Investigators: Collect case records, interview witnesses, search for possible kinship supports;
- Social Workers: Identify relevant community resources, provide clinical insight for case planning, offer psychoeducation, assist with client engagement and communication.

⁶ Nat'l Ass'n of Counsel for Child., *supra* note 2.

⁷ Nat'l Ass'n of Counsel for Child., *supra* note 2.

⁸ Independent contractors who devote their entire law practice to child protection law are considered differently from others who spend part of their time working on child protection law, and the remainder on other areas of law like personal injury or criminal defense.

⁹ Fam. Just. Initiative, High Quality Legal Representation, Attribute 2: Interdisciplinary Practice Model (n.d.), <https://familyjusticeinitiative.org/model/high-quality-representation/>

¹⁰ Nat'l Ass'n of Counsel for Child., *supra* note 2.

¹¹ Fam. Just. Initiative, High Quality Legal Representation, *supra* note 8.

¹² *Id.*

¹³ Peer advocates are youth with lived experience in the foster care system who share their own experiences with current youth in care and help them better understand the legal process and services available to them. See Fam. Just. Initiative, Out of Court Advocacy (2021), <https://familyjusticeinitiative.org/wp-content/uploads/sites/48/2021/05/out-of-court-advocacy.pdf> (last visited Nov. 28, 2022)

Multidisciplinary team models are a demonstrated strategy to address the complex needs of families involved in the child protection system and enhance legal representation for children and youth.¹⁴ They improve communication, resolve cases more expeditiously, and preserve more family connections for children.¹⁵

Reasonable Caseloads

Competent representation can only occur if an attorney has adequate time for high-quality legal advocacy. Research shows that reasonable caseloads¹⁶ allow attorneys to invest the time necessary to engage in high-quality lawyering activities (investigation, document review, and legal case preparation).¹⁷ A reasonable caseload allows for frequent, high-quality client communication, out-of-court and in-court advocacy, and other core functions of children's legal representation. A typical caseload includes matters at various stages of the legal process. Some cases will be in active litigation, while others will not (ex. cases pending appeal). The attorney must respond to the changing, urgent, or unforeseen case circumstances which are inherent to the practice. Policymakers should ensure that legislation includes a plan to establish case load maximum caps of 40-60 cases to support the provision of high-quality legal representation.¹⁸

Use of *pro bono* attorneys and law school clinics are effective strategies to supplement Kansas' child protection attorney workforce.¹⁹ Staffed with volunteer attorneys or law students under the supervision of a licensed attorney, these models require fewer full-time personnel and can augment the number of children served when attached to existing delivery systems. Because *pro bono* volunteer attorneys²⁰ and students do not have the in-depth knowledge and experience of staff attorneys,²¹ these models should only be implemented with proper support, supervision, training, and accountability measures in place and never stand alone as a jurisdiction's primary children's legal services delivery system. Beyond direct legal representation, law students and volunteer attorneys can engage in a wide range of activities to support the legal representation of staff attorneys on pending cases. For example, they can take witness statements, conduct legal research, and draft motions and briefs. As an additional incentive, law school clinics provide students with a pathway to practice: exposure to a career trajectory in dependency law and an excellent forum for child law office recruitment.

Fair and Competitive Compensation

To ensure high-quality legal representation, attorneys must also be reasonably compensated. Attorneys in contract or assigned counsel systems can be paid by hour, event, by case, or by time period.²² Jurisdictions should utilize an hourly rate (rather than a flat case rate) and avoid inflexible caps on case hours, which may

¹⁴ *Id.*

¹⁵ Robbin Pott, *The Flint MDT Study: A Description and Evaluation of a Multidisciplinary Team Representing Children in Child Welfare*, in CHILDREN'S JUSTICE: HOW TO IMPROVE LEGAL REPRESENTATION OF CHILDREN IN THE CHILD WELFARE SYSTEM 189, 203-204 (Donald N. Duquette ed., 2016) (MDT impacted cases in positive ways including increasing the likelihood that cases would be dismissed at adjudication rather than have the court take jurisdiction; when removed, children more likely to be placed with relatives than in foster care; and fewer petitions to terminate parental rights were filed.).

¹⁶ Nat'l Ass'n of Counsel for Child., *supra* note 2. 2

(NACC Recommends a caseload range of 40-60 individual clients for attorneys representing children and youth in dependency cases.)

¹⁷ *Id.*

¹⁸ Nat'l Ass'n of Counsel for Child., *supra* note 2.

¹⁹ See Sarah Martinson, *Public Defender Shortages in West are Nationwide Norm*, LAW360 (Jan. 23, 2022), <https://www.law360.com/articles/1457317/public-defender-shortages-in-west-are-nationwide-norma>; Frederick Shelton, *The Great Resignation & Associate Shortage: Cause & Effect*, ATT'Y AT L. MAG. (Dec. 22, 2021), <https://attorneyatlawmagazine.com/the-great-resignation-associate-shortage-cause-effect>.

²⁰ Model Rules of Pro. Conduct r. 6.1, *supra* note 1, (AM. BAR Ass'n 1983). (The American Bar Association Model Rule 6.1 provides that all attorneys should aspire to provide at least 50 hours of *pro bono* service each year.)

²¹ Nat'l Ass'n of Counsel for Child., *supra* note 2.

²² 2022 ABA Public Defense Summit Management and Oversight of Assigned Counsel and Contract Systems, Am. Bar Ass'n, https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/public-education-events/public-defense-summit/agenda/ (last visited July 13, 2022).

disincentivize robust and uniform fulfillment of all attorney duties.²³ Hourly rates should be consistent for in-court and out-of-court time. Pay structures that do not cover out-of-court work like client meetings, case planning, family team meetings, or other attorney work negatively impact the quality of representation.²⁴

Insufficient compensation for attorneys in the public sector is associated with high caseloads²⁵ particularly in systems relying on contract attorneys who take more cases in order to earn sufficient income.²⁶ To attract and maintain a competent workforce, children’s attorneys—full-time salaried or independent contractors—must be paid fair, competitive²⁷ wages “adequate for the practice and accounting for overhead and other costs borne by the private professional.”²⁸ Systems should also ensure pay parity among public sector lawyers so as not to incentivize the representation of one party over another. For example, when considering fair compensation for children’s attorneys, Kansas should look to the salary scales of attorneys representing Kansas Department of Children and Families in these matters across the state.

Federal funding is available to supplement state funding of children’s and parent’s legal representation.

Resources for children’s legal representation exist beyond state coffers. Every state should examine the wide range of federal funding sources available to support access to legal services including Title IV-E of the Social Security Act, Medicaid, Social Services Block Grant, State Opioid Response Grant, STOP Violence Against Women Formula Grant, Substance Abuse Prevention and Treatment Block Grant and the Community Mental Health Services Block Grant, Temporary Assistance for Needy Families, Victims of Crime Act Victim Assistance Formula Grants, and Legal Services Corporation Funding.²⁹ Federal funding opportunities supplement state funding of high-quality legal representation for children experiencing foster care³⁰ or those at risk of involvement in the child protection system due to civil legal issues.³¹

Since 2018, federal policy allows child protection agencies to seek Title IV-E reimbursement for up to 50% of eligible costs of independent legal representation for children, parents, and tribes.³² Reimbursable administrative costs can include costs of paralegals, office support staff, social workers, and overhead.³³ Training costs are reimbursable at an even higher rate of 75%.³⁴ Consecutive administrations since 2017 have urged states to ensure high-quality legal representation for parties to a child protection case—underscoring the non-partisan nature of this reform.

²³ Nat’l Ass’n of Counsel for Child., *supra* note 2.

²⁴ Krista Ellis et al., *Child Welfare Attorneys National Compensation & Support Survey – 2017* (2018).

²⁵ Am. Bar Ass’n Ctr. on Child. & the L., *Effects of Funding Changes on Legal Representation Quality in California Dependency Courts* (2020).

²⁶ Debra Cassens Weiss, *Contract Public Defenders in This State Make About \$5 an Hour After Overhead*, *New Study Says*, Am. Bar Ass’n J. (July 9, 2020), <https://www.abajournal.com/news/article/contract-public-defenders-in-this-state-make-about-5-an-hour-after-overhead-study-says>.

²⁷ At a minimum, parents’ attorneys’ and children’s attorneys’ compensation should be equal to county or child welfare agency attorneys’ compensation, and consistent with other publicly funded attorneys’ compensation, including criminal defense attorneys.

²⁸ Fam. Just. Initiative, *Attribute 1: Caseloads and Compensation*, (n.d.), <https://familyjusticeinitiative.org/wp-content/uploads/sites/48/2020/03/fji-implementation-guide-attribute1-1.pdf>

²⁹ Just. in Gov’t Project, *Grants Matrix: State-Administered Federal Funds That Can Support Legal Aid* (2021), <https://legalaidresourcesdotorg.files.wordpress.com/2021/07/grants-matrix.pdf>.

³⁰ Just. in Gov’t Project, *Civil Legal Aid Helps Keep Families Together and Out of the Child Welfare System* (2021), <https://legalaidresourcesdotorg.files.wordpress.com/2021/04/foster-care-factsheet.pdf>

³¹ *Zero to Three, Supporting Sustainability for Infant-Toddler Court Teams: A Federal Funding Guide* (2021), <https://www.zerotothree.org/resources/3976-supporting-sustainability-for-infant-toddler-court-teams-a-federal-funding-guide>.

³² Child.’s Bureau, U.S. Dep’t of Health & Hum. Servs., *Technical Bulletin, Frequently Asked Questions: Independent Legal Representation* (2020), https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/title_iv/technical_bulletin_-_faq_s_on.pdf.

³³ *8.1B: Title IV-E, Administrative Functions/Costs, Allowable Costs – Foster Care Maintenance Payments Program*, in *Child Welfare Policy Manual at Q. 30* (2019) [hereinafter *8.1B: Title IV-E*], https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36

³⁴ Child.’s Bureau, *supra* note 31

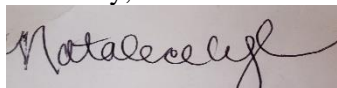
On May 10th 2024, the Administration For Children and Families released a final rule (effective July 9th 2024) regulating the reimbursement of Title IV-E funds for the costs of “independent legal representation.” It codifies existing policy allowing federal reimbursement for child and parent independent legal representation in child protection matters. It also expands this federal funding to include independent legal representation of kinship caregivers, tribes, custodians of a Native American child, and civil legal services designed to achieve the case plan goals of a child in foster care, or candidate for foster care.³⁵ Kansas can and should leverage IV-E funding to assist in high-quality service delivery.³⁶

Conclusion

Kansas has an opportunity to align state law and practice with nationally recognized best practices to improve outcomes for children in foster care. Policymakers should take action to centralize legal services in a statewide office and implement statewide strategic efforts to ensure high-quality legal services including mandating client-directed legal advocacy, enforcing training requirements and adherence to practice standards, providing supervision and oversight to attorneys, using multi-disciplinary teams, setting caseload limits, establishing reasonable compensation, and accessing federal funding opportunities.

Thank you for your consideration of these critical issues. We invite you to send any follow-up questions that you may have that are not answered in the live presentation.

Sincerely,



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³⁵ 45 CFR Part 1356, pg. 40404

³⁶ *States Experiences Claiming Title IV-E Funds for Parent and Child Attorneys*, https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/title_iv/iv-e_two_pager_1.pdf (last visited December 5, 2022).