



CENTER FOR THE RIGHTS
OF ABUSED CHILDREN

Center for the Rights of Abused Children

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Interim Study Committee on Courts and the Judiciary

Indiana Statehouse
200 W. Washington St.
Indianapolis, IN 46204

RE: Right to Counsel for Children in Foster Care Improves Permanency Outcomes

Dear Members of the Interim Study Committee on Courts and the Judiciary:

As you consider improving permanency outcomes for children in foster care, the Center for the Rights of Abused Children (Center) invites you to investigate client-directed counsel for abused and neglected children.

Typically, when lawmakers ask for a single reform that will do the most to protect foster children in their state, we always answer the same - appointing client-directed attorneys to represent children in foster care. For the reasons outlined below, the Center strongly encourages Indiana lawmakers to give children of all ages a meaningful voice in court by appointing a traditional attorney to represent their position and to protect their rights.

Children and Justice Demand Client-Directed Counsel

In a landmark decision, [*In re Gault*](#), the United States Supreme Court guaranteed the right to counsel for children in delinquency proceedings. Such representation is

crucial to protect their life and liberty interests. Because the rights and liberties of children in foster care are in question, the right to counsel should be extended to abused and neglected children as well.

Yet, repeatedly, we hear foster youth condemning the system, quipping, "Nobody listens to us," or "Nobody cares what we think or what we want." These children and youth need more than another grown-up telling them what is best for them without engaging them and adequately weighing their wishes.

Abused and neglected children need an advocate - someone who can zealously protect their rights to safety, stability, family, and swift permanency. Providing children with client-directed counsel gives them this advocate. The Center strongly encourages Indiana legislators to grant ***all*** children in the dependency system client-directed attorneys with all the ethical duties of loyalty and care associated with an attorney-client relationship.

Giving children a voice through an attorney improves outcomes.

The Center operates a pro bono law clinic. One of our pro bono cases involved an 8-year-old girl. Adopted by relatives due to severe physical abuse, this young girl thought she had found safety. Sadly, her nightmare had just begun. Doctors discovered grim physical evidence of sexual abuse.

She told workers about the repeated abuse she had suffered, but the child welfare agency didn't seek her protection. Instead, the agency sought reunification and forced her to visit her abusers. The child was so frightened that she could not get through the front door of their home without wetting herself.

The Center took Baylee's¹ case and won. Without an attorney in her corner, Baylee would have been returned to her rapists.

This is not an isolated case. A developing body of [research](#) shows children in foster care with client-directed legal representation have better outcomes than those without. Children with counsel spend less time in foster care and group settings and move more quickly to adoption, guardianship, or reunification. Consider the following:

- ***Children with counsel exit foster care for family up to 3.5 times faster.***
 - Represented children exited to *any type of permanency* at rates 1.4 and 1.6 times higher than comparison children.³
 - Most of this difference appears driven by higher adoption rates (between 2.8 and 2.9) and long-term custody (between 1.7 and 3.5) as a permanency outcome compared to comparison children. Represented children were also slightly more likely to be reunified with their biological parent (up to 1.23 times higher than comparison).⁴
 -
- ***Children and parents with legal representation obtain better results than those who do not, including less time in foster care or group settings, shorter time to adoption or guardianship, and more successful reunifications.***
 - Children represented by specially trained legal counsel were:

¹ Child's name modified to protect their identity.

² Andrew E. Zinn and Jack Slowriver, "Expediting Permanency: Legal Representation for Foster Children in Palm Beach County," Chapin Hall Center for Children at the University of Chicago (May 21, 2008), <https://search.issuelab.org/resource/expediting-permanency-legal-representation-for-foster-children-in-palm-beach-county.html>.

³ Id.

⁴ Id.

- 40% more likely to leave foster care within six months;⁵
 - 45% higher reunification rate with their biological parents;⁶
 - 30% reduction in the rate of placement moves;⁷ and
 - 65% reduction in the rate of unnecessary school moves.⁸
- Further, a cost-benefit analysis of a Washington program offering legal representation to dependent youth found a hypothetical cost savings of over \$1.2 million without accounting for potential cost savings outside the child welfare system, such as in the educational, employment, health, or criminal justice domains.⁹

The Solution

The fundamental rights of children are at stake in abuse and neglect proceedings. These cases have the power to remove children from their homes, to determine with whom they reside and for how long, and to decide whether they will ever see their families again. Given the high stakes, any solution to improving child welfare in Indiana requires the appointment of a client-directed attorney for every child before filing an abuse and neglect action to represent the child all the way through permanency.

⁵ Natalece Washington, *Counsel for Kids Information Sheet*, "National Association of Counsel for Children (2022), <https://zmcc18.p3cdn1.secureserver.net/wp-content/uploads/2022/02/Counsel-for-Kids-Information-Sheet-2022.pdf>.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid.

⁹ "Evaluation of the Washington State Dependent Child Legal Representation Program, 2021," Washington State Center for Court Research (2021), <https://www.courts.wa.gov/subsite/wscrcr/docs/DCLR%20Report%202021.pdf>.

We thank the Interim Committee for their work to improve child safety and welfare in Indiana. We encourage the state to ensure children have a meaningful voice in abuse and neglect proceedings. Client-directed counsel will give children the voice they deserve regarding momentous, life-altering decisions.

Frequently Asked Questions

What does Indiana offer abused and neglected children by way of representation?

Under current law, Indiana does not guarantee a right to counsel for children in abuse and neglect proceedings.¹⁰ The Indiana system loosely contemplates some form of “representation” through the discretionary appointment of a guardian ad litem (GAL) or a court-appointed special advocate (CASA).¹¹ Additionally, neither the child’s GAL nor the CASA need to be an attorney.¹² Ironically, the GAL or CASA can be appointed an attorney, but one is not guaranteed to the child.¹³ The individual appointed to serve as a GAL or CASA for the child is tasked with representing and protecting the child’s best interests – the representation of an opinion and an idea, instead that the child and the child’s wishes – and are considered officers of the court, rather than the advocate for the child.¹⁴

How would client-directed attorneys be funded?

Undoubtedly, when implementing these solutions, policymakers are curious about how attorneys for children in foster care would be funded. While children are not afforded legal representation, current law already contemplates payment of fees to GALs and CASAs.¹⁵ Consequently, funding already exists for some form of child representation. It should be repurposed to provide court-appointed attorneys for

¹⁰ Counsel for Kids, *Right to Counsel Map*, <https://counselforkids.org/right-to-counsel-map/>.

¹¹ Ind. Code Ann. § 31-32-3-1.

¹² Ind. Code Ann. § 31-32-3-3.

¹³ Ind. Code Ann. § 31-32-3-4.

¹⁴ Ind. Code Ann. § 31-32-3-6 & 7.

¹⁵ Ind. Code Ann. § 31-32-3-9.

children in need of care. Additionally, federal funds are available for representation in CINA proceedings. This includes competitive grants to nonprofits and courts and pass-through funds to states and local governments. See **Appendix A** for sample grant opportunities.

Also, federal matching funds through Title IV-E of the Social Security Act help pay the costs of attorneys representing certain children and their parents in child welfare legal proceedings.¹⁶ Although pulling down IV-E funds, Indiana appears to not be utilizing that federal source of funding for parent or child representation.¹⁷

A federal information memorandum, [Utilizing Title IV-E Funding to Support High-Quality Legal Representation and Promote Child and Family Wellbeing](#), explains how Title IV-E agencies can claim federal financial participation (FFP) for administrative costs of independent legal representation provided by attorneys representing children in Title IV-E foster care, children who are candidates for Title IV-E foster care, and their parents for "preparation for and participation in judicial determinations" in all stages of foster care legal proceedings. See **Appendix B**. Additionally, a federal regulatory

¹⁶ "Title IV-E Reimbursement for Lawyers Representing Children, Parents, and Pre-Petition Prevention Opportunities," National Center for State Courts, https://www.ncsc.org/data/assets/pdf_file/0027/79524/Title-IV-E-Reimbursement.pdf; "Title IV-E Funding for Legal Representation," National Association of Counsel for Children, <https://www.naccchildlaw.org/page/TitleIVforLegalRepresentation>; "Utilizing Title IV-E Funding to Support High-Quality Legal Representation and Promote Child and Family Well-Being," The Office of the Administration for Children and Families (January 20, 2021), <https://www.acf.hhs.gov/cb/policy-guidance/im-21-06>.

¹⁷ Family Justice Initiative, *Claiming IV-E Funds for Attorneys for Children & Parents*, <https://familyjusticeinitiative.org/wp-content/uploads/sites/48/2023/01/States-Progress-Drawing-IV-E-funds-12-22-2022.pdf>.

change expressly allows Title IV-E agencies to claim FFP, "for the administrative costs of an attorney providing ... independent legal representation of a child."¹⁸

How do client-directed attorneys work with young children?

The best-interest model presumes a child's incapacity and relies on the judgment of an adult to determine what the child needs. A client-directed model flips the presumption on its head. It presumes the child is capable and relies on the attorney to determine the extent of incapacity.

In a traditional attorney-client relationship, attorneys are already accustomed to ethically representing clients with diminished capacity. Indiana Rules of Professional Conduct, state:

*When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.*¹⁹

*... [A] client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own wellbeing. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody. So also, it is recognized that some persons of advanced age can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.*²⁰

¹⁸ U.S. Dep. of Health & Human Services, Administration of Children and Families, "Foster Care Legal Representation," ACF-2023-0008-0001 (Sep. 27, 2023), <https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption>.

¹⁹ IN ST RPC Rule 1.14.

²⁰ *Id.* at Comment 1.

When a child cannot direct the representation, a lawyer could be permitted to substitute judgment. Current ethical rules permit lawyers to take protective action for their clients with diminished capacity. "Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools."²¹ However, when contemplating protective action, "...the lawyer should be guided by ... the wishes and values of the client to the extent known, the client's best interests, and the goals of intruding into the client's decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections."²²

Even in this traditional relationship, a GAL is not out of the question. Current ethical rules permit the appointment of a GAL "[w]hen the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."²³

Arizona Example of Substitute Judgement

When providing attorneys for all children in care, the Arizona Supreme Court implemented a substitute judgment mechanism when a child cannot direct the representation. In relevant part, the rules state:

Substituted Judgment. During any period in which a normal attorney-client relationship is not reasonably possible to

²¹ *Id.* at Comment 5.

²² *Id.*

²³ *Supra*, note 11.

maintain, the child's attorney must make a substituted judgment. The attorney must advise the court of the determination of capacity that requires substituted judgment and any subsequent change in that determination. A substituted judgment includes determining what the child would decide if the child was capable of making an adequately considered decision and representing the child in accordance with that determination. The attorney should take direction from the child as the child develops the capacity to direct the attorney.²⁴

Determine Capacity. It is the ethical obligation of an attorney for a child to determine their client's capacity to make adequately considered decisions regarding the case. In making this determination for the child, the attorney must meet with the child in person, become acquainted with the child and the child's situation, and assess the child's ability to express wishes and direct the representation. The attorney should also consult other individuals such as family, foster placements, medical experts, and others with relevant information to determine the child's capacity.

Diminished Capacity. If the child's attorney determines that the child cannot express wishes and direct representation, the attorney must make a good-faith effort to determine the child's needs and wishes. As far as possible, the attorney must maintain a normal attorney-client relationship with the child. Accomplishing both points requires regular in-person meetings with the child and, often, consistent communication with the child's caregivers.

Substituted Judgement. If the child's attorney determines the child has diminished capacity, the attorney must inform the court of the determination and

²⁴ AZ ST JUV CT Rule 306.

substitute the attorney's judgment, advocating what the child's wishes would be if the child could adequately consider decisions. To do this effectively, the attorney must continue to meet with the child, the child's caregivers, and others with knowledge of the child's wellbeing; engage fully in all court proceedings, including keeping up with records, testimony, and case reports; and keeping the child updated on the status of the case and pending hearings or other court obligations.

Will confidentiality further harm children?

No. While some raise concerns about withholding information from courts, hampering best-interest determinations, and returning children to unsafe homes, this need not be the case. When there is a reasonable belief that the child is at risk of “substantial physical, financial, or other harm,” the lawyer can take protective action.²⁵

Lawyers representing children should be bound by ethical duties of loyalty and care, including confidentiality. However, properly structured, lawyers who genuinely believe that there is imminent danger or believe that the child's position is harmful can request a GAL to investigate the facts and circumstances and make recommendations in line with the GAL's independent determination as to the child's best interests and, accordingly, make a recommendation to the court. However, the lawyer is and should always remain an advocate for their child client's expressed wishes and rights.

²⁵ *Supra*, note 20.