

September 6, 2019

Senator Lamar Alexander, Chairman
U.S. Senate Committee on Health, Education,
Labor and Pension
428 Senate Dirksen Office Building
Washington, DC 20510

Senator Patty Murray, Ranking Member
U.S. Senate Committee on Health, Education,
Labor and Pension
428 Senate Dirksen Office Building
Washington, DC 20510

Re: *Stronger Child Abuse Prevention and Treatment Act – Right to Counsel Amendment*

Dear Chairman Alexander and Ranking Member Murray,

The National Association of Counsel for Children (NACC) is a non-profit association of over 1500 legal professionals dedicated to advancing the rights, well-being, and opportunities of children impacted by the child welfare system through high-quality legal representation. Our members include attorneys who represent children, parents, and agencies in these cases as well as judges, academic experts, CASAs, social workers, and pediatricians. Fundamental to our mission is the core belief that all parties, particularly children, deserve effective and zealous legal representation to ensure their voices are heard, to advocate for their needs, and to help navigate the complex labyrinth of child welfare processes that shapes their lives, safety, and well-being.

NACC supports a robust reauthorization of the *Stronger Child Abuse Prevention and Treatment Act (Stronger CAPTA)*, including \$500 million for Title I (which promotes prevention, research and innovation) and \$500 million for Title II (dedicated to primary prevention). Beyond funding, NACC also supports an amendment to ensure legal representation for children and ensure they are a party to their own case. Under CAPTA's current language, lawyers for children are optional and interchangeable with lay volunteers, perpetuating a fundamental misunderstanding of the need for legal representation. This proposed revision would ensure children access to a licensed legal advocate, align best practice with a growing body of research around permanency outcomes, and restore the original legislative intent of CAPTA.

Why Do Children Need Lawyers?

Every child subject to a child protection proceeding must be provided an independent, competent, and zealous attorney, trained in relevant law and social science, with adequate time and resources to handle the case. These are complex legal matters - often implicating numerous federal and state laws, expert testimony from clinicians, and the intersection of education, medical, and mental health systems. Displaced from home, school, and important relationships, 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. Children possess the most up-to-date and unvarnished information about their own physical and emotional safety, but without the assistance of counsel, their wishes, and even their participation in hearings, can be diminished by virtue of their age.

According to the 2019 edition of *A Child's Right to Counsel: A National Report Card on Legal Representation for Abused & Neglected Children*, eleven states still do not have laws that guarantee all children access to quality legal counsel. Lack of access to counsel denies children procedural and substantive due process as well as an attorney uniquely qualified to file motions and appeals, call and cross-examine witnesses, give voice to their client's counseled wishes, ensure treatment, develop plans for family or sibling reunification, insist on school stability, or pursue other well-being priorities. While a volunteer CASA or non-attorney GAL can be helpful in conveying information to the court, they are lay advocates for a best interest position, not substitutes for legal representation of a child. When a child has a medical problem, they need a doctor; when a child has a legal problem, they need a lawyer. In no other profession do we accept the substitution of a lay volunteer for a licensed professional.

There is a growing body of research linking the early appointment of trained counsel to improved outcomes for children. A rigorous 2008 study in Palm Beach County, Florida conducted by researchers at Chapin Hall, University of Chicago, found that children assigned lawyers achieved permanency at significantly faster rates and with more individualized case plans than children who did not have lawyers.¹ Another recent evaluation found children were 40% more likely to leave foster care within their first six months when the child's attorney was specially trained.² Trained attorneys spent more time than untrained counsel communicating with the child and other parties relevant to the case, spent more time preparing for the case; and engaged in more effective conflict resolution and legal advocacy.³ Workload also makes a measurable difference. With reasonable caseloads, children's attorneys spend more time with their clients, visit them in school, visit their placements, and achieve better outcomes faster. The federal Children's Bureau has affirmed the "widespread agreement in the field that children require legal representation in child welfare proceedings" which is "rooted in the reality that judicial proceedings are complex and that all parties, especially children, need an attorney..."⁴

Proposed Right to Counsel Revision

Currently, CAPTA requires "a guardian ad litem...who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in [child protection] proceedings."⁵ This language confuses and conflates the distinct functions of a lawyer and a lay advocate as if these roles were interchangeable and lets states

¹ Zinn, A. & Slowriver, J. (2008), *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*. Chapin Hall Center for Children at the University of Chicago.

² Duquette et. al, (2016) *Children's Justice: How to Improve Legal Representation of Children in the Child Welfare System*, p.185. ABA Publications; Orlebeke, B., Zhou, X., Skyles, A., & Zinn, A. (2016). See also, *Evaluation of the QIC-Children Best Practices Model training for attorneys representing children in the child welfare system*. Chicago, IL: Chapin Hall at the University of Chicago, https://www.chapinhall.org/wp-content/uploads/QIC-ChildRep_Chapin_Hall_Evaluation.pdf, p.14.

³ Id.

⁴ Administration for Children, Youth and Families Information Memorandum ACYF-CB-IM-17-02. "High Quality Legal Representation for All Parties in Child Welfare Proceedings." January 17, 2017. Available at: <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>

⁵ 42 U.S.C. § 5106a(b)(2)(B)(xiii)

decide between two vastly different roles. The result is an inconsistent patchwork where children in foster care have vastly different experiences of due process and case outcomes depending on the jurisdiction of their case and whether they had a lawyer.

NACC urges an amendment to *Stronger CAPTA* that requires appointment of legal counsel for each child and parent in every child protection case, but at a minimum clarifies a clear right to counsel for children. Specifically, NACC supports the incorporation of the following language into 42 U.S.C. § 5106a(b)(2)(B)(xiii):

Provisions and procedures requiring that in every case involving an abused or neglected child which results in a ***child protective*** judicial proceeding, a ***licensed attorney*** who has received training appropriate to the role, and ***who has adequate time and resources to provide effective legal representation in the proceeding, shall be appointed as legal counsel for the child. At the discretion of the court, a non-lawyer guardian ad litem, court appointed special advocate, or other designated individual*** who has received training appropriate to ***their*** role ***may also*** be appointed ***to advocate on behalf of the child's best interest*** in such proceedings.

This change would be consistent with CAPTA's legislative history, which demonstrates that Congress originally intended a "guardian *ad litem*" to mean an attorney. During the 1973 Children and Youth subcommittee hearings, Brian Fraser, staff attorney with the National Center for the Prevention and Treatment of Child Abuse and Neglect, specifically recommended that in every case of child abuse, a lawyer be appointed to represent the child's interest. His testimony pointed to the seminal U.S. Supreme Court case, In re Gault, 387 U.S. 1 (1967), which established due process rights - including the right to counsel - for youth in juvenile delinquency proceedings more than 50 years ago. Additionally, Dr. Henry Kempe, Chairman of the Department of Pediatrics at the University of Colorado Medical Center, similarly advocated for counsel, analogizing the "potential danger to a child's right to freedom and life is less in situations involving the adjudication of delinquency than in an abusive family situation."

Despite this history, after CAPTA was enacted, the term "guardian *ad litem*" was interpreted differently across states to mean either lay advocate, best interest attorney, or stated interest attorney. This legacy has created an uneven landscape of due process and access to justice, where – as Brian Fraser and Dr. Kempe originally warned against - children experiencing the abuse and neglect system have fewer legal tools at their disposal than children in the juvenile justice system. Some receive excellent legal representation, while others do not have anyone assigned to advise them of the law, to make their wishes known to the court, or to use all of the tools at a lawyer's disposal to move the case toward permanency. By amending *Stronger CAPTA* to include the right to legal counsel for children, Congress would be honoring the intent of the original legislation.

The federal Children's Bureau has recognized that, "[t]he U.S. legal system is based on the premise that parties have a due process right to be heard and that competent legal representation and

fair treatment produce just results.”⁶ Including a clear right to counsel for children in *Stronger CAPTA* would discontinue the insufficient status quo, honor the intent of the original legislation, and adhere to best practices and constitutional standards. Children need a voice in court to represent their views, advocate zealously for their position, and use the law to achieve the best possible outcomes for their futures. It is paramount that children have the benefit of legal counsel if we are ever to build a child welfare system worthy of the young people it serves.

Thank you for your consideration and please let me know if you have any questions or requests for additional information.

Sincerely,



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⁶ Administration for Children, Youth and Families Information Memorandum ACYF-CB-IM-17-02. “High Quality Legal Representation for All Parties in Child Welfare Proceedings.” January 17, 2017. Available at: <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>