



A CHILD'S RIGHT TO COUNSEL, Fourth Edition

A NATIONAL REPORT CARD ON LEGAL REPRESENTATION FOR ABUSED & NEGLECTED CHILDREN

Executive Summary

In 2006, First Star released the first edition of *A Child's Right to Counsel*,ⁱ evaluating state laws relating to the legal representation of children in civil child abuse and neglect proceedings. Because quality legal representation has been associated with better outcomes and shorter times in foster care for children in dependency cases, the Children's Advocacy Institute joined First Star and First Star Instituteⁱⁱ in publishing three subsequent editions to review the extent to which states are providing appropriate legal representation for these children.

Since the first report, state grades have steadily increased, with 31 states showing improvement between 2009 and 2018. Currently, a record 19 states are now "A" states: Massachusetts, Connecticut, Louisiana, Oklahoma, New York, West Virginia, Georgia, Mississippi, Nevada, Nebraska, New Mexico, District of Columbia, Maryland, Missouri, Kansas, Michigan, Texas, Iowa and Vermont. At the other end of the spectrum, 11 states currently have laws that fall far short of providing children with quality legal representation, with Hawaii, Idaho, Indiana, Montana and New Hampshire receiving an "F" and Alaska, Illinois, Maine, North Dakota, South Carolina, and Washington receiving a "D". And in the middle, 21 "B" and "C" states provide counsel for these children to some extent, but fail in other respects.

Milestones in the last decade on this issue include the American Bar Association's passage of its Model Act Governing the Representation of Children in Abuse, Neglect and Dependency Proceedings (Model Act)ⁱⁱⁱ in 2011, setting forth a comprehensive client-directed model of representing children, allowing age to be taken into account through diminished capacity directives. Also, the first large-scale, federally-funded research on legal representation for children, conducted at the University of Michigan, concluded in 2016; this study tested various models for providing legal representation of children.^{iv} And notably, an increasing number of children's attorneys are obtaining national certification in this field, that of a Child Welfare Law Specialist (CWLS), a specialized program offered by the National Association of Counsel for Children (NACC).^v

Beginning in 2019, federal policy is facilitating further state action on the right to counsel in child abuse and neglect proceedings by opening up federal Title IV-E funds to be used to cover up to 50% of state costs of high-quality legal representation of children. This policy recognizes that legal representation of children, parents and agencies not only helps protect the parties' legal rights, but helps create better outcomes for children that ultimately save states money. Using these newly available funds in combination with Court Improvement Program grants, states can develop approaches that monitor successes as they continue to work to better the lives of abused children who come through the civil court system. First Star Institute and the Children's Advocacy Institute encourage states to make use of this assistance to ensure that children have the critical representation needed to be heard so that judges are better informed to make decisions that achieve better outcomes for these children.

A Child's Right to Counsel grades each state using criteria that assess statutory mandates for attorney representation of abused and neglected children, and the extent to which that representation is client-directed, encompasses all hearings (including appeals), requires multi-disciplinary training and maintains confidentiality and liability under Professional Responsibility standards applicable to children's counsel. In addition, extra credit is provided if a state statute sets caseload standards. More on these criteria is contained in the body of the report. All states were given an opportunity to review their grades and provide information and comments prior to publication.^{vi} This fourth edition of *A Child's Right to Counsel* confirms that states are continuing to move in the direction of quality representation of children: 31 states showed improvement since 2009, but almost a dozen states still fail on a grand scale to ensure legal representation to all abused and neglected children in dependency cases.

Highlights of Report Card Analysis

1. More than half of the states – 29 – are now A or B grade states (19 A and 10 B states.) This compares with 22 A and B states in 2008.
2. 11 states are now D or F states (6 D and 5 F states). This compares with 15 in 2008.
3. 11 states are now C states. This compares with 14 in the 2008.
4. Most states (34 of the 51) have statutes that require independent counsel for all children in abuse and neglect proceedings, but only 15 of those 34 require client-directed counsel under all reasonable circumstances.
5. Seven states have statutes that provide counsel for children only on a discretionary basis, with another 14% providing this representation with major restrictions.
6. When an attorney is appointed for a child in these proceedings, most state statutes (76%) provide that the attorney is appointed for all phases of the case, including appeal.
7. A slim majority of state statutes now want to at least hear the child's views (54%) although only a third of all states require client-directed child representation in these proceedings.
8. Most state statutes (76%) give the child all the rights of a party in child abuse and neglect proceedings.
9. The Rules of Professional Responsibility apply to attorneys in all states, but in 4% there is a statutory blanket immunity, and another 14% provide immunity for ordinary negligence.
10. While states reported that caseload standards were required in practice in a number of locales, our statutory review indicated that only 10% set a specified caseload standard, with another 12% acknowledging that a child's attorney needs to comply with reasonable caseload limits.
11. Trend analysis of grading from all editions of *A Child's Right to Counsel* report cards indicates that states *increasingly are* providing independent representation to children in child abuse and neglect cases and are providing this counsel through appeals; are providing party status to children in these cases, and are holding children's attorneys to professional responsibility standards of confidentiality and liability.

Call to Action

As of January 2019, federal dollars are available to all states to claim reimbursement for a portion of the costs of children's legal representation. This federal funding change is a victory for children, advocates and states seeking to assure basic civil and due process rights of abused and neglected children and provides clear opportunities for state action.

First Star Institute and the Children's Advocacy Institute call on all states to move forward in ensuring that quality legal representation is provided to all abused and neglected children.

Federal Action

Legislation

Federal legislation requiring that all children in dependency cases receive high-quality legal representation offers a more permanent way of ensuring the legal representation of abused and neglected children. Law is generally more enduring than practices or policies—which is why this Report Card evaluates state statutes and regulations rather than policies or practices. Legislative reform can be accomplished in several ways.

CAPTA has been and continues to be the only federal law that specifically addresses children’s representation in dependency proceedings. Although CAPTA’s legislative history clearly indicates Congressional interest in providing *legal* representation to children,^{vii} the law’s provisions should be clarified, and the statute’s funding significantly bolstered. The following four amendments to CAPTA would advance a child’s right to counsel:

1. Conform CAPTA to the Fostering Connections to Success Act to ensure that CAPTA’s legal representation mandate continues for youth who opt to remain in care past the age of 18.
2. CAPTA currently does not deem children parties to their own cases. CAPTA should be amended to explicitly grant party status to children in maltreatment cases. Party status would ensure that children are provided basic due process protections, such as notice of all proceedings and decisions, the right to appear in court, and the right to participate fully in court proceedings.
3. Fund research to provide additional data on the costs, benefits, outcomes, and return on investment on providing representation to children, and in particular legal versus non-legal representation to children and on models that incorporate both in dependency cases, such as multi-disciplinary teams, that may include attorneys. The legal versus non-legal question has been addressed in the Chapin Hall study out of West Palm Beach^{viii} and has been discussed in the QIC project from the University of Michigan,^{ix} but additional data on a national scale will be beneficial.
4. Amend CAPTA to require high-quality attorney representation for children in child maltreatment cases according to standards such as those set forth in the ABA Model Act and consistent with the Children’s Bureau memorandum^x and the Child Welfare Policy Manual change.^{xi}

As this report goes to print, legislators are debating the reauthorization of and appropriations for CAPTA. Although CAPTA has traditionally been the statute that addressed legal representation for children, it is by no means the only federal path to effect change on this issue. With the federal policy change allowing access to Title IV-E funds to recover a portion of the costs of children’s representation, codifying the representation of children and its funding could be the next step.

Administration/Regulation

First Star Institute and the Children’s Advocacy Institute applaud the Children’s Bureau’s decision to revise the Child Welfare Policy Manual and release Title IV-E funding for legal representation in child abuse and neglect proceedings. We suggest continued action to ensure implementation as follows:

- Technical assistance on how to access funds to help more states deliver high-quality representation to children.
- Meaningful oversight and enforcement of current law by the Children’s Bureau. CAPTA’s existing provisions on representation for children are not being properly executed throughout the nation.^{xii} Federal data consistently conveys that only about 20% of children are receiving adequate representation.^{xiii} The Office of Inspector General at DHHS^{xiv} is currently investigating this issue and we look forward to its report, expected by the end of 2019. More robust oversight could include and provide a fuller understanding of how many children are being represented, by whom, and to what end. More diligent enforcement might produce greater compliance, especially if CAPTA is reauthorized with funding levels better aligned with its mandates.
- Research to more fully explore representation of children, including multi-disciplinary teams and the foundational attorney/non-attorney question from a national return-on-investment perspective.

State Action

Legislation

As of 2019, federal funds are now available to help all states fund legal representation of children in child abuse and neglect proceedings. States now have financial support to effect change to help children and families in their states and enjoy reduced costs from better outcomes – increased permanency, shorter times in care and reduced trauma.

All states can utilize this federal funding:

- States that already provide legal representation for children in abuse and neglect cases can use these funds to continue to provide this representation or to further improve the representation.
- States that do not currently provide representation for children in these cases can seek these federal funds to support providing legal representation to children in these cases.
- States who provide a limited right to counsel can expand upon this representation in accordance with the Children’s Bureau’s policy.
- States that provide counsel to GALs or CASAs but not to children can expand their programs to provide legal representation directly to children.

New or improved state laws providing legal representation for children in dependency proceedings will continue to push the national consensus and aid abused and neglect children and youth in states throughout the country. Independent change through state policy, regulation or court rules can also advance the issue.

Litigation

Class action litigation can advance a right to counsel for children in dependency cases as placement in state custody triggers constitutional due process concerns. The pending and settled caselaw in this field over the last decade has helped move the issue forward. Future cases expanding the findings of *Kenny A* nationwide, including a pending federal class action brought by the Children’s Advocacy Institute, could result in a national right to counsel for dependent children.

Conclusion

This report analyzes and evaluates state laws throughout the 50 states and the District of Columbia through an assessment of criteria critical to effective legal representation of children in child abuse and neglect proceedings. This report documents and details a state law trend toward implementing these criteria. Moreover federal policy now recognizes the importance of quality legal representation in these proceedings and offers states financial support for this purpose. We encourage all states to make use of this federal support and to help their courts achieve better outcomes for the abused and neglected children in their states. Federal legislators can also look to codify a national right to counsel for every abused and neglected child.

For questions about the report, please contact either First Star Institute or the Children’s Advocacy Institute:

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ENDNOTES

ⁱ First Star, *A Child’s Right to Counsel* (2006).

ⁱⁱ First Star Institute was created as a national 501(c) (3) public charity following a reorganization of First Star and continues the policy advocacy and publications, such as this Right to Counsel Report to improve the lives of abused and neglected children.

ⁱⁱⁱ American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, dated August, 2011, available at https://www.americanbar.org/content/dam/aba/administrative/child_law/aba_model_act_2011.pdf

^{iv} <http://www.improvechildrep.org/Portals/0/PDF/QIC-ChildRep%20Brochure%20wRTC%20Language.pdf>

^v <https://www.naccchildlaw.org/>

^{vi} Please contact report authors for information on state contacts who received state grade prior to publication.

^{vii} See <https://files.eric.ed.gov/fulltext/ED081507.pdf>.

^{viii} See <https://www.issuelab.org/resources/1070/1070.pdf>.

^{ix} See <http://www.improvechildrep.org/Portals/0/PDF/QIC-ChildRep%20Brochure%20wRTC%20Language.pdf>

^x See <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

^{xi} See https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36; LeVezu, A., *Alone and Ignored: Children without Advocacy in Child Abuse and Neglect Courts*, Stan J of Civ Rts & Civ Lib XIV:125 (2018).

xii *See* <https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf>.

xiii *Id.*

xiv *See* <https://oig.hhs.gov/reports-and-publications/workplan/summary/wp-summary-0000005.asp>.