

# Seen, Heard, and Represented: Zealous Advocacy for Youth in Foster Care

**Rise, Resist, Represent**

**National Public Defense Virtual Conference**

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**Policy Counsel, National Association of Counsel for Children**

**March 15, 2024 12:15 pm - 1:15 pm**

**NACC**

National Association  
of Counsel for Children



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**Let's Take a Poll!**

## 1899-America's First Juvenile Court Cook County, Illinois

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- Focus on juvenile legal matters
- But adjudicated abuse and neglect/dependency matters too!
- *Parens Patriae*- broad discretion
- No due process

<https://www.illinoiscourts.gov/News/388/Illinois-Supreme-Court-History-Juvenile-Courts/news-detail>

<https://ojjdp.ojp.gov/model-programs-guide/literature-reviews/Intersection-Juvenile-Justice-Child-Welfare-Systems#0-0>



# Two Similar Systems with Distinct Purposes

## Dependency

services and support to promote child well-being, safety, permanency, and to strengthen families to care for children

## Juvenile legal

(“Youth Justice”)

youth accountability, rehabilitation, treatment, prosocial development

# What are dependency court proceedings?

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Legal matters initiated due to allegations of child abuse or neglect

May involve state removing child from parents/guardians and foster care placement

Other parties to the case include the child protection agency and the parents/guardians of the child

# Difference in Access to Counsel in Youth Justice and Child Protection

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## Juvenile Justice System

- US Supreme Court Decision *In re Gault* mandates legal representation
- A “*child requires the guiding hand of counsel at every step in the proceedings against him.*”  
387 U.S. at 13
- Every state requires youth defense counsel

## Child Protection System

- US Supreme Court has not reviewed counsel for youth in foster care
- 1 federal court decision in Georgia, other state court decisions
- Federal Law (CAPTA)
- 37 states require counsel for youth in foster care

# Liberty Interest Also at Stake in Dependency Matters

*[C]hildren have **fundamental liberty interests at stake in deprivation and TPR proceedings**. These include a child's interest in his or her own safety, health, and well-being, as well as an interest in maintaining the **integrity of the family unit** and in having a relationship with his or her biological parents. Kenny A. v. Perdue et. al., 356 F.Supp.2d 1353 (N.D. Ga. 2005)*



# Children's Right to Family Integrity Requires Procedural Protections

- **Family Integrity** is the right of the family as a unit to be free from arbitrary state interference.
- Children's right to family integrity is at issue when the state acts through CPS to remove them from their families
- Children cannot be separated from their families without due process of law

Kenny A. v. Perdue et. al., 356 F.Supp.2d 1353  
(N.D. Ga. 2005)

Rachel Kennedy, *A Child's Constitutional Right to Family Integrity and Counsel in Dependency Proceedings*, 72 Emory L. J. 911 (2023).

Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARVARD CIVIL RIGHTS - CIVIL LIBERTIES LAW REVIEW (2021).

Available at: [https://scholarworks.law.ubalt.edu/all\\_fac/1129](https://scholarworks.law.ubalt.edu/all_fac/1129)



# Children's Right to be Safe in Foster Care Requires Procedural Protections

## **This right includes →**

1. The right to be protected from physical, sexual, and emotional abuse.
2. The right to adequate shelter.
3. The right to minimally nourishing food.
4. The right to basic medical and emotional care.

See *M.D. ex rel. Stukenberg v. Abbott*, 907 F.3d 237, 249-50 (5th Cir. 2018)

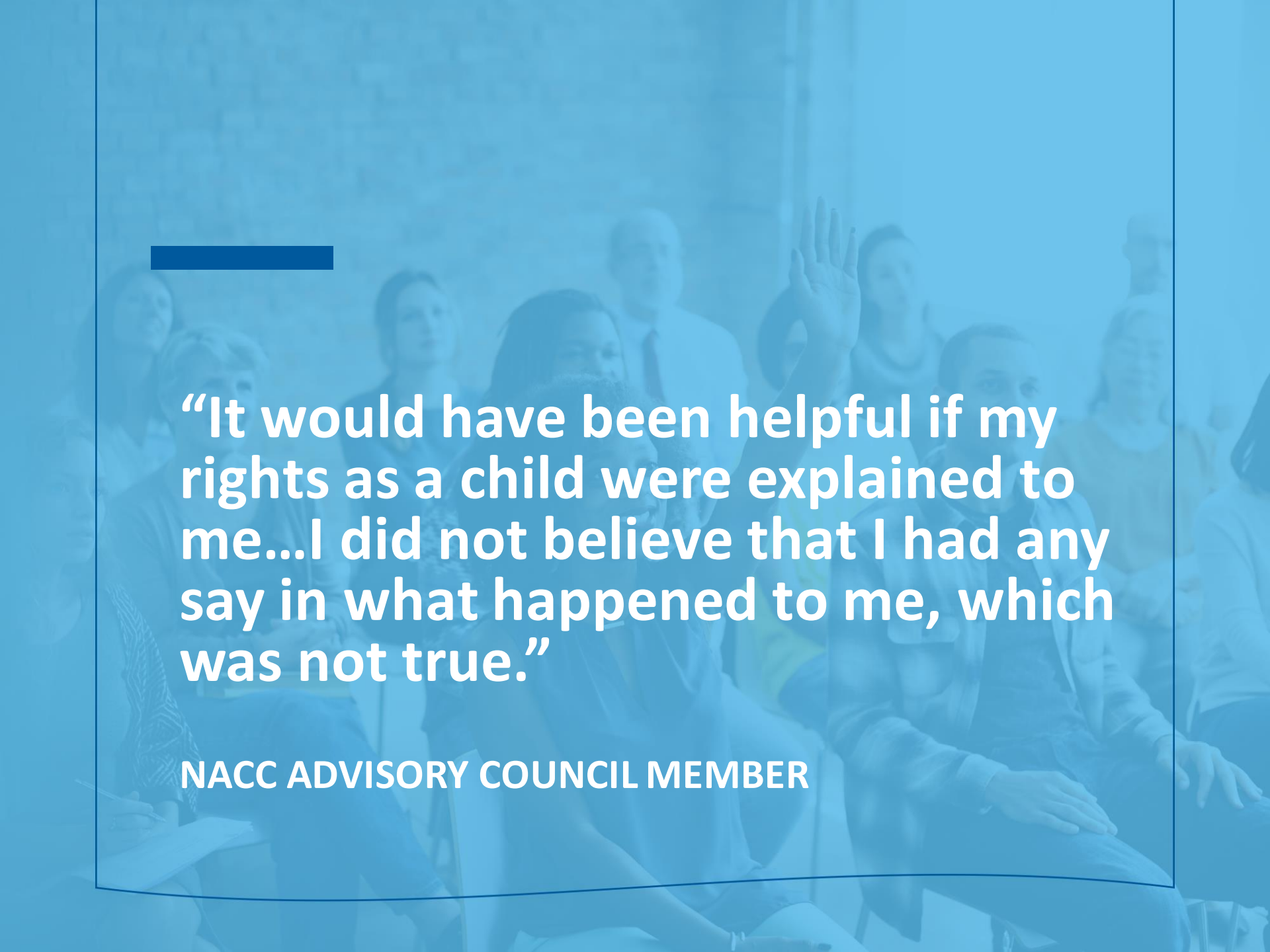
Tim Keller, *Asserting, Arguing, and Appealing the Constitutional Rights of Children in Foster Care: A Practice Manual for Lawyers Representing Abused and Neglected Children* (2024)

[https://www.thecenterforchildren.org/wpcontent/uploads/2024/01/2024\\_Center\\_Practice\\_Manual\\_Digital\\_Final\\_012324.pdf](https://www.thecenterforchildren.org/wpcontent/uploads/2024/01/2024_Center_Practice_Manual_Digital_Final_012324.pdf)

# Children's Attorneys

- Spend time getting to know their clients and building rapport
- Ensure that judges have all information necessary to make life changing decisions about children and families.
- Explain complex legal processes, help clients understand their options, provide legal advice, develop legal strategy, ensure client notice and participation, prepare clients for court– directly influence youth perception of fairness.
- Engage in as much out-of-court advocacy as in-court
- Communicate with agency workers, service providers, foster parents, kin connections, and opposing counsel





**“It would have been helpful if my rights as a child were explained to me...I did not believe that I had any say in what happened to me, which was not true.”**

**NACC ADVISORY COUNCIL MEMBER**

# Youth Experience

**Child Protection System**

**Juvenile Legal System**

*No federally recognized right to counsel*

*Constitutional right to the effective assistance of counsel*

Separated from their siblings, family, and community

•••  
Trauma

•••  
Decisions made by judges deeply impact their lives

•••  
Locked in restrictive institutional settings

•••  
Subjected to dangerous physical and chemical restraints

•••  
Prescribed Psychotropic Medications

•••  
Placed in psychiatric facilities without clinical need

# Systemic Racial and Ethnic Disparities

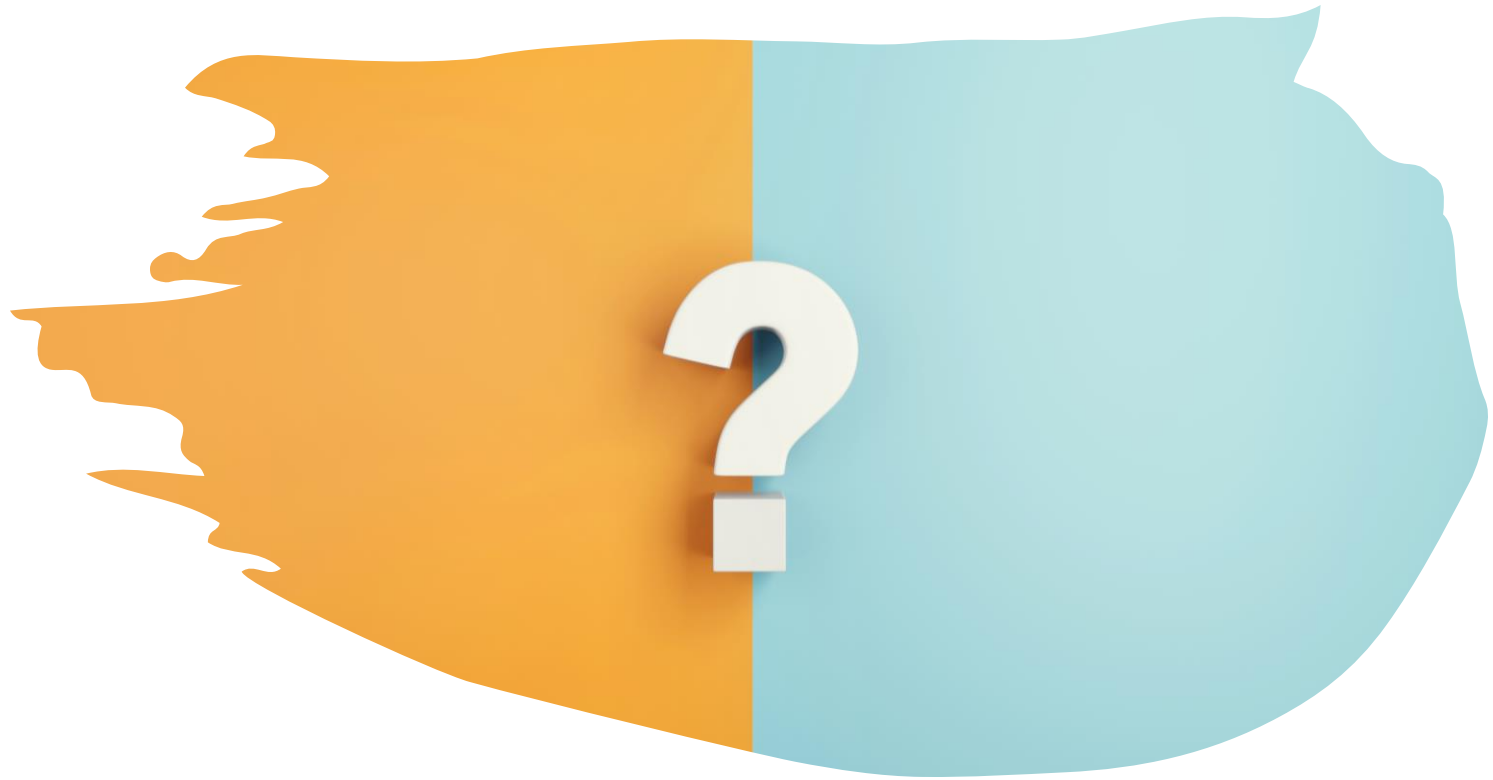
- Black and Indigenous children overrepresented in child protection system relative to their representation in general population.
- More than half of black children (53%) are subjected to a CPS investigation at some point during their childhoods—almost twice the lifetime prevalence for white children (28.2%).
- Black children are removed from their homes at higher rates in every state.

Dorothy Roberts, *Torn Apart: How the Child Welfare System Destroys Black Families and How Abolition Can Build a Safer World* (2022).

Child Welfare Information Gateway. (2021). [Child Welfare Practices to Address Racial Disproportionality and Disparity](#). U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau.

# Attorneys Promote Race Equity

- Treating children and families with respect and dignity—exercising cultural humility
- Challenging disparate treatment due to racial bias
- Amplifying youth voice –ensuring access to court and system processes



Don't youth in foster care get appointed guardians *ad litem*?



## **Distinguishing Best-Interest/ Guardian *ad litem* Advocacy**

- Risk of bias present when an attorney establishes case objectives according to their own values and experiences, which may be starkly different than the child's and family's
- Does not provide the child or youth with professional duty of confidentiality.
- Allows counsel to advance objectives that may be in direct conflict with youth's stated interests
- Limits the comprehensive flow of information to the court



# Attorneys and CASA/GAL Volunteers: Distinct & Complementary Roles

<u>Attorneys</u>	<u>CASAs</u>
Attorney-client relationship bound by legal and ethical guidelines	Supportive mentor relationship
Investigate and act on case facts on behalf of the client	Investigate case and report on facts on behalf of the court
Typically carry a caseload of clients, offering a wide breadth of experience, familiarity with the child welfare system and a deep understanding of the pertinent laws	Typically work with 1 child or sibling set at a time, allowing more time for intensive attention and support
Provide legal advice to the child about their rights and legal options in their case	Cannot provide legal advice to the child
File motions, call witnesses, make legal arguments, and use other legal tools to advocate for the client's position	Provide written and oral reports to court with best interest recommendation
Law school graduate, state bar licensure, continuing education requirements, knowledge of pertinent federal and state law	30-hour training program
Paid professional role	Unpaid volunteer role

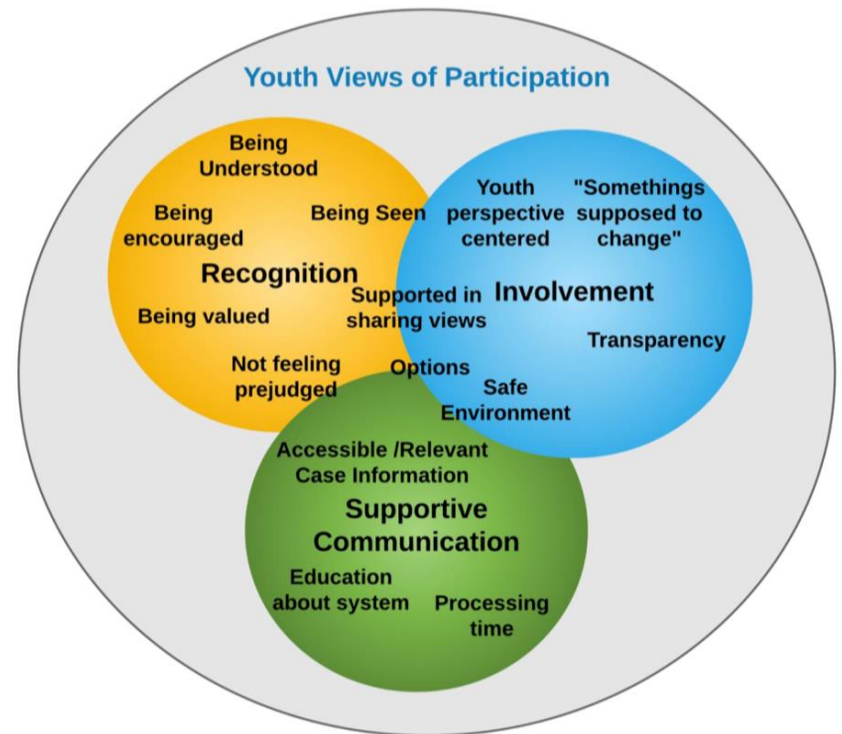
# RESEARCH



# Youth Should Be Seen & Heard

Persons with lived experience in the child welfare system overwhelmingly indicate a desire to:

- Be heard;
- Be engaged in their legal proceedings;
- Be told what is happening in their case.



Cody, Anna. "Children's Participation Rights in Child Welfare Systems: Identifying Opportunities for Implementation." <https://scholarscompass.vcu.edu/cgi/viewcontent.cgi?article=7617&context=etd>

# The Impact of Quality Children's Legal Representation

Prevents the need for removal;

Expedites timelines to permanency;

Decreases placement changes and school moves

Promotes engagement in case planning, services, and court hearings;





Increases rates of kinship placements; and

Yields cost savings for government agencies.





# Improved Outcomes

- ✓ 40% more likely to leave foster care in 6 months 
- ✓ 45% higher reunification rate w/biological parents 
- ✓ 30% reduction in the rate of placement moves 
- ✓ 65% reduction in the rate of unnecessary school moves 

Evaluation of the Washington State Dependent Child Legal Representation Program (2021). Washington State Center for Court Research. See also: [www.improvechildrep.org](http://www.improvechildrep.org) – as included in Center for the Rights of Abused Children

# Link between Child Maltreatment and Crossover

“[T]hroughout the nation today, half or more of youth entering the juvenile justice system might well be dual system youth with histories of child welfare intervention.” Herz and Dierkhising, “[OJJDP Dual System Youth Design Study](#).”

<https://nij.ojp.gov/topics/articles/dual-system-youth-intersection-child-maltreatment-and-delinquency>

# Children's Attorneys Can Disrupt Crossover Pathways

Ensure clients know their Miranda rights

Fight criminalization of normal adolescent behavior

Advocate for family placement over institutions or group homes

Work with caregiver to implement safety plan that avoids juvenile legal system contact



# Children's Attorneys Can Support Defense Counsel

Ensures defense counsel is aware of the youth's criminalized trauma behaviors.

Push for immediate evaluation of youth with suspected disability when referral made based on school behaviors

Educate court about services that could make justice system involvement unneeded

Attend juvenile legal hearings, to humanize youth before the court, contextualize their life experience, and update court on dependency matter

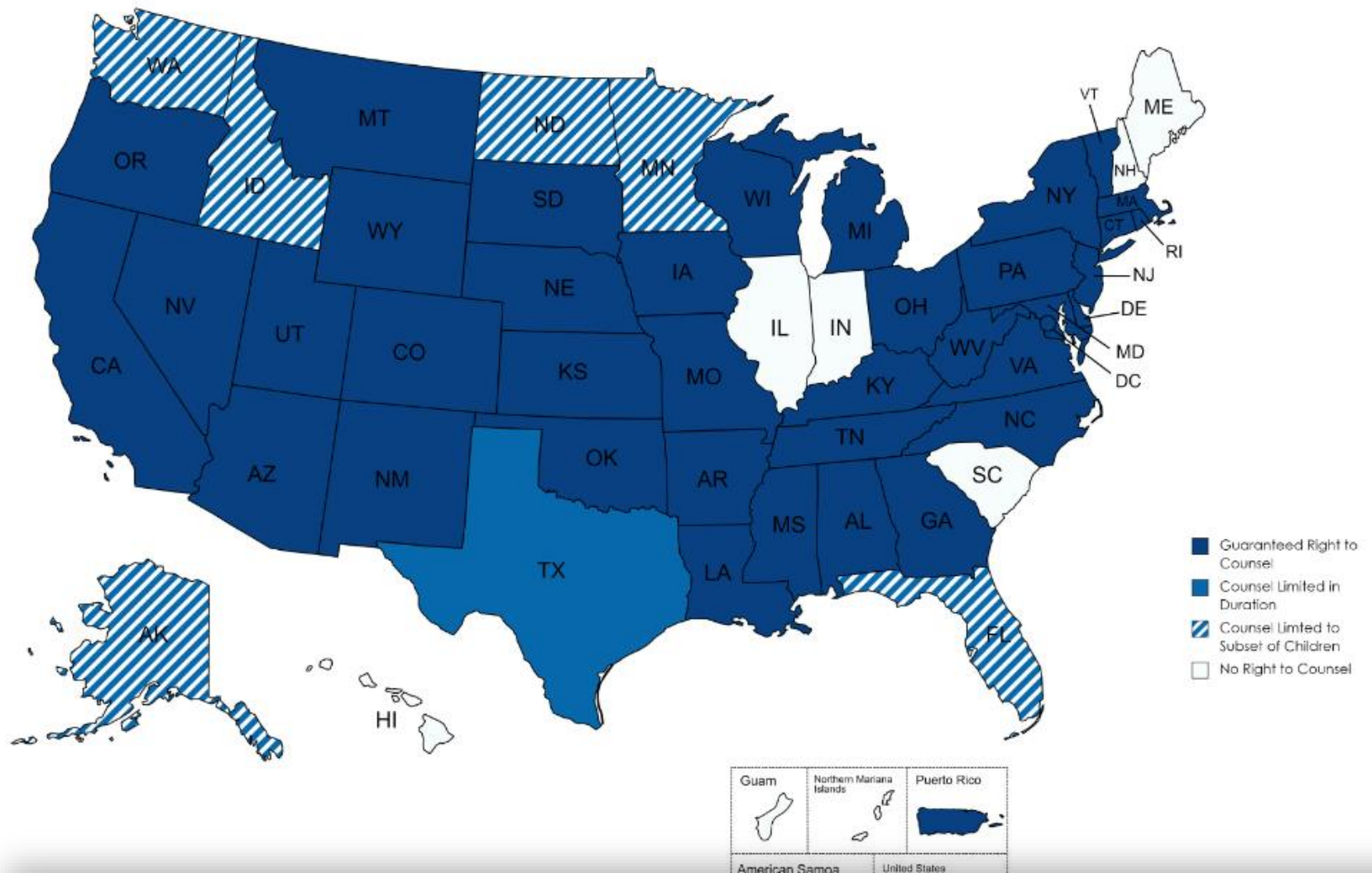


# Cross-System Agreement: Fundamental Criteria for Effective Delivery Systems



- **Effective:** Client-centered, zealous advocacy throughout all stages of legal proceeding
- **Specialized:** Specific practice standards and specialized training requirements
- **Accountable:** Supervision and oversight
- **Reasonable:** Monitored and controlled caseloads
- **Fairly-compensated:** Pay appropriate and comparable to other publicly funded lawyers
- **Supported:** Access to interdisciplinary services





# Dependent Youth Right to Counsel

# Recent Legislative Activity Indicating Trend Toward Guaranteeing Right to Counsel

- 2021 Arizona\*, Florida, North Dakota\*, Texas, and Washington\*
- 2022 Alaska\*, Colorado\*, Florida, Indiana
- 2023 Florida, Illinois, Indiana, Kansas, Missouri, Mississippi, Montana, New Hampshire
- 2024 Kansas, Indiana, Iowa, Missouri, New Hampshire

\* Indicates successful policy change

## State Public Defense Systems

### Established to fulfill constitutional mandates

- *Gideon v. Wainwright*, 372 U.S. 335 (1963)
- *Gault*

### Various public defense providers

- Staffed offices
- Independent contractors
- Combo of both

The Gault Ctr., National Youth Defense System Standards (2024).

American Bar Assn., Ten Principles of A Public Defense Delivery System (2023).

# Public Defense Systems and Dependency Court Proceedings

- Some state public defense systems provide child representation in dependency (i.e., Connecticut, Massachusetts, Minnesota, Montana, New Jersey)
- Other delivery system types:
  - **Independent government agencies** (Arkansas Attorney Ad Litem Program, Colorado Office of the Child Representative, New Mexico Office of Family Representation and Advocacy)
  - **Legal non-profits** (Children's Law Unit of Kansas Legal Services, Legal Aid Center of Southern Nevada Children's Attorney Project, Children's Law Center of the District of Columbia)
  - **Independent contractors**

# Place your ideas in the chat

**Why do you think public defense systems are selected to provide legal representation for dependency cases in some states?**





“Fair treatment of children in delinquency courts is virtually impossible without the availability of specialized and highly skilled lawyers advocating for the expressed legal interests of the children they represent.” Nat’l Juvenile Defender Ctr., *Defend Children: A Blueprint for Effective Juvenile Defender Services* (2016).

# States Implementing a Client-Directed Model of Representation

## For all children:

- Arizona
- Connecticut
- Louisiana
- Massachusetts
- Montana
- Nevada
- New Jersey
- New York
- Oregon
- Vermont

## For Children of a Certain Age, Competency, or Special Need:

- Alaska
- Colorado
- Florida
- Idaho
- Maryland
- Minnesota
- New Mexico
- North Dakota
- Oklahoma
- Washington
- Wisconsin



# Need Practice Guidance?

**State Standards of Practice and Court Rules**

**NACC's Recommendations for Legal Representation of Children and Youth in Neglect and Abuse Proceedings**

**ABA Model Act Governing the Representation of Children in Abuse and Neglect Proceedings**

**ABA Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases**

[www.NACCchildlaw.org](http://www.NACCchildlaw.org)



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Promoting  
Excellence



Building  
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Advancing  
Justice