

12-11-2017

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Vivek S. Sankaran

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### Recommended Citation

Vivek S. Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, 44 J. Legis. 1 (2017).

Available at: <http://scholarship.law.nd.edu/jleg/vol44/iss1/1>

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# MOVING BEYOND *LASSITER*: THE NEED FOR A FEDERAL STATUTORY RIGHT TO COUNSEL FOR PARENTS IN CHILD WELFARE CASES

Vivek S. Sankaran<sup>†</sup>

## INTRODUCTION

In New York City, an indigent parent can receive the assistance of a multidisciplinary legal team—an attorney, a social worker, and a parent advocate<sup>1</sup>—to defend against the City’s request to temporarily remove a child from her care.<sup>2</sup> But in Mississippi, that same parent can have her rights to her child permanently terminated without ever receiving the assistance of a single lawyer.<sup>3</sup> In Washington State, the Legislature has ensured that parents ensnared in child abuse and neglect proceedings will receive the help of a well-trained and well-compensated attorney with a reasonable caseload.<sup>4</sup> Yet in Tennessee, its Supreme Court has held that although a parent may technically have a right to a lawyer, that lawyer need not be effective.<sup>5</sup>

The United States Supreme Court has repeatedly recognized that a parent’s right to direct the care of her child is one of the oldest and most fundamental rights protected by the Constitution.<sup>6</sup> How that right is safeguarded, however, when the State seeks to strip a parent of that right—either temporarily or permanently—can vary significantly. Over twenty-five years ago, in *Lassiter v. Department of Social*

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<sup>†</sup> Vivek S. Sankaran is a clinical professor of law at the University of Michigan Law School, where he directs the Child Advocacy Law Clinic and Child Welfare Appellate Clinic.

<sup>1</sup> A parent advocate, also known as a parent partner or peer mentor, is a parent who was previously involved with the child welfare system but who successfully reunified with his or her child. That parent now serves as a mentor for other parents currently experiencing the child welfare system. For more information about parent advocates, see Diane Boyd Rauber, *From the Courthouse to the Statehouse: Parents as Partners in Child Welfare*, 28 ABA CHILD L. PRACTICE 145, 150–56 (2009).

<sup>2</sup> Several New York City legal organizations provide parents with a multidisciplinary legal team. Examples include the CTR. FOR FAM. REPRESENTATION, [www.cfrny.org](http://www.cfrny.org) (last visited Oct. 17, 2017); BROOK. DEFENDER SERVICES, [www.bfdp.org](http://www.bfdp.org) (last visited Oct. 17, 2017); and BRONX DEFENDERS, <https://www.bronxdefenders.org/our-work/family-defense-practice/> (last visited Oct. 17, 2017).

<sup>3</sup> MISS. CODE ANN. § 43-21-201(2) (2017) (“[T]he youth court judge may appoint counsel to represent the indigent parent or guardian in the proceeding.”) (emphasis added).

<sup>4</sup> Information about the Washington State Office of Public Defense, Parent Representation Project is available at WASH. ST. OFF. OF PUB. DEF., <http://www.opd.wa.gov/index.php/program/parents-representation> (last visited Oct. 17, 2017).

<sup>5</sup> *In re Carrington H.*, 483 S.W.3d 507 (Tenn. 2016), *cert. denied*, 137 S.Ct. 44 (2016).

<sup>6</sup> *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”).

*Services*,<sup>7</sup> the United States Supreme Court had the opportunity to create uniformity in how states protect the right to parent. It refused to do so, instead finding that parents do not have an absolute constitutional right to counsel in termination of parental rights (“TPR”) cases.<sup>8</sup> Since then, state legislatures and state courts have defined under what circumstances parents should receive the assistance of counsel. While some states require the appointment of lawyers before the court can remove a child from her parent, others delay the appointment to the TPR stage, which may be years after a child has already been placed in foster care. By then, the outcome of the case may be preordained due to the series of interim decisions leading up to the TPR hearing. Even worse, a few permit courts to terminate parental rights without ever appointing counsel for a parent. And in many, the ability to receive the assistance of an effective lawyer depends on the funding whims of the legislature, which can quickly change during a budgetary crisis. While some legislatures have shown an interest in strengthening parent representation,<sup>9</sup> many have not. So long as *Lassiter* remains binding precedent—which there is no reason to believe will change anytime soon—appellate courts will be ill-equipped to address the significant disparity between how states provide the right to counsel for parents.

But another previously unexplored avenue for redress exists. Since the mid-1970s, the Federal Government has sought to create uniformity in how states administer child welfare systems to achieve basic goals for children, including preventing unnecessary removals, reunifying families quickly, and if they cannot go home, expediting their placement into another permanent home.<sup>10</sup> Various pieces of federal legislation, including the Child Abuse Prevention and Treatment Act,<sup>11</sup> the Adoption Assistance and Child Welfare Act,<sup>12</sup> and the Adoption and Safe Families Act,<sup>13</sup> have required states to implement uniform procedures within their child welfare systems in exchange for receiving federal funds. Using this authority, among other things, Congress has required child welfare agencies to provide services to families prior to removing children from their homes,<sup>14</sup> mandated that agencies develop case plans to reunify children with parents,<sup>15</sup> and directed states to provide children the assistance of guardians *ad litem* in every case.<sup>16</sup> To ensure compliance

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7 452 U.S. 18 (1981).

8 *Id.* at 31–32.

9 For example, in Utah, the legislature has included parent representation within the scope of its Indigent Defense Commission, which is primarily focused on strengthening legal representation for defendants in criminal cases. More information about the Commission can be found at UTAH INDIGENT DEF. COMM’N, <https://justice.utah.gov/indigent-defense.html> (last visited Oct. 17, 2017).

10 EMILIE STOLTZFUS, CONG. RESEARCH SERV., R42794, CHILD WELFARE: STATE PLAN REQUIREMENTS UNDER THE TITLE IV-E FOSTER CARE, ADOPTION ASSISTANCE, AND KINSHIP GUARDIANSHIP PROGRAM 5–6, 11 (2012).

11 42 U.S.C. § 5101 (2012).

12 Pub. L. No. 96-272, 94 Stat. 500 (1980).

13 Pub. L. No. 105-89, 111 Stat. 2115 (1997).

14 42 U.S.C. § 671(a)(15)(B) (2012).

15 § 671(a)(16).

16 42 U.S.C. § 5106a(b)(2)(B)(xiii) (2012) (requiring the governor of each state to assure that the state has procedures that “in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate

with these federal mandates, the Administration of Children and Families (“ACF”) regularly conducts audits of child welfare systems in which it identifies areas where states are failing to follow federal standards, and seeks corrective actions, including the potential loss of federal funds. These federal requirements drive how states’ child welfare systems operate.

In exchange for complying with these federal mandates, the Federal Government provides states with billions of dollars to administer their child welfare systems.<sup>17</sup> Generally speaking, federal monies can be used to pay for limited prevention programs, fund the salaries of agency caseworkers, and pay subsidies for foster parents, adoptive parents, and relative guardians.<sup>18</sup> Additionally, states can use federal funds to pay for attorneys who represent child welfare agencies,<sup>19</sup> adoptive parents, and relatives seeking a guardianship.<sup>20</sup> But the ACF has interpreted federal law to prohibit federal funds from being used to pay for attorneys who represent birth parents,<sup>21</sup> implicitly stating that parents’ lawyers are not necessary for the proper and efficient administration of the foster care system, the required finding for states to receive administrative funds related to foster care under Title IV-E of the Social Security Act.<sup>22</sup>

Recently, however, the ACF issued a powerful and detailed policy memorandum contradicting its own position, calling for states to provide parents with “high quality” counsel “at or before the initial court appearance in all cases.”<sup>23</sup> In fact, in the memorandum, the ACF concluded that the lack of competent legal counsel was a “significant impediment to a well-functioning child welfare system.”<sup>24</sup> This is unsurprising given the research demonstrating that strong parent representation furthers the policy goals of both child welfare agencies and the Federal Government.<sup>25</sup> Yet despite its strong language, the memorandum lacked a critical piece—specific actions the Federal Government would actually take to ensure that parents in every state receive the effective assistance of counsel. Most importantly,

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who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings – (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and (II) to make recommendations to the court concerning the best interests of the child.”)

17 See CAL. ADVOCATES FOR CHANGE, CHILD WELFARE FINANCING REFORM: THE LIMITS OF FLEXIBILITY AND THE NEED FOR NEW RESOURCES 2–5 (2016) (providing an overview of federal child welfare financing).

18 *Id.* at 4.

19 See ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD WELFARE POLICY MANUAL 8.1B Question 18, available at [https://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=36](https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36).

20 42 U.S.C. § 673(a)(6) (2012); See also § 673(d)(1)(B)(iv).

21 See ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 19.

22 Under 45 C.F.R. § 1356.60(c) (2016), states may claim reimbursement for “administrative expenditures necessary for the proper and efficient administration” of the foster care system.

23 See ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., INFORMATION MEMORANDUM 17-02, at 1, 13 (2017).

24 *Id.* at 2.

25 See Vivek S. Sankaran, Patricia L. Rideout & Martha L. Raimon, *Strange Bedfellows: How Child Welfare Agencies Can Benefit From Investing in Multidisciplinary Parent Representation*, (Ctr. for the Study of Soc. Polic’y 2015), <https://www.cssp.org/reform/child-welfare/strange-bedfellows-how-child-welfare-agencies-benefit-from-multidisciplinary-parent-representation.pdf> (documenting ways in which good parent representation helps child welfare agencies).

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the memorandum failed to specify any federal funding which would allow states to strengthen the representation of birth parents.

This Article seeks to fill that void and proposes specific steps that the Federal Government must take. It argues that Congress should include—among its existing conditions for states to receive federal child welfare funds under Title IV-E of the Social Security Act—an explicit requirement that states provide parents with the assistance of counsel at the first court proceeding in every child welfare case. To support the implementation of this requirement, both Congress and the ACF should make clear that states can use federal child welfare funds under Title IV-E to pay for parents’ counsel, a directive perfectly consistent with the plain language of the current law. Additionally, in addition to clarifying that Title IV-E funds can be used to support parent representation, the ACF should invite states to submit proposals for the Title IV-E demonstration project waiver program—if Congress reauthorizes the program—that focus on parent representation.<sup>26</sup> Taking these steps would dramatically improve the legal representation that parents receive when their fundamental rights are jeopardized and would create much needed uniformity across the country. An indigent parent’s ability to protect a fundamental constitutional right will no longer vary depending on her misfortune of living in a particular state.

Part One of this Article provides a brief overview of the Supreme Court’s recognition of a parent’s fundamental right to raise her child, the ways in which civil child welfare proceedings impact that right, and how *Lassiter* has created an insurmountable roadblock to achieve uniformity in the appointment of counsel for parents through litigation. Part Two highlights the moral, social, and economic costs created by the disuniformity and argues that it serves the policy interests of both the Federal Government and child welfare agencies to address it. Part Three explains how Congress has used federal laws to create standard practice in the administration of state child welfare proceedings and argues that both Congress and the ACF must take steps to strengthen parent representation across the country because such representation is an essential component of a functioning foster care system.

## I. THE CURRENT STATE OF PARENT REPRESENTATION FAILS TO PROTECT A PARENT’S CONSTITUTIONAL RIGHT TO DIRECT THE UPBRINGING OF HER CHILD

For nearly a century, the United States Supreme Court has recognized that the Fourteenth Amendment of the United States Constitution protects a parent’s right to direct the care, custody, and control of her child from unnecessary interference by

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<sup>26</sup> The Title IV-E Waiver Demonstration Program allowed states to request permission from the Federal Government to spend child welfare funds received under Title IV-E of the Social Security Acts for a broad range of purposes. Typically, these funds are spent to pay for expenses related to a child’s stay in foster care. More information about the program can be found at CHILDREN’S BUREAU, OFFICE FOR THE ADMIN. FOR CHILDREN & FAMILIES, CHILD WELFARE WAIVERS (last visited Oct. 17, 2017), <https://www.acf.hhs.gov/cb/programs/child-welfare-waivers>.

the State.<sup>27</sup> Accordingly, the Supreme Court has struck down state statutes infringing upon a parent's right to choose a school for her child,<sup>28</sup> to determine what language a child can learn in school,<sup>29</sup> and to decide whether a child can visit with grandparents.<sup>30</sup> In each of these cases and others, the Court has safeguarded the fundamental right of parents to raise their children absent compelling circumstances.<sup>31</sup>

The most severe way for the State to infringe upon a parent's right to direct the care of her child is for the State to strip a parent of that right through a civil child welfare proceeding. In these proceedings, after conducting an investigation, the State can file a petition alleging that the parent has abused or neglected her child and requesting an order that the court take control over the child to make decisions about where the child should live. The court can determine what services should be provided to the family to remedy the maltreatment, and if removed, when the child should return home.<sup>32</sup> If the allegations are proven, the court can monitor the family, order the child welfare agency to provide services to remedy the maltreatment, and ultimately determine where the child's permanent home should be. In extreme circumstances, the court can terminate the rights of the parent, a drastic remedy characterized by appellate courts as the "civil death penalty."<sup>33</sup> After a parent's rights are terminated, all legal ties between the child and his parent are extinguished.

Due to the severe sanctions courts can impose on parents in child welfare proceedings, the Supreme Court has sought to ensure that these proceedings adequately protect the procedural due process rights of parents. For example, in *Stanley v. Illinois*,<sup>34</sup> the Court interpreted the Fourteenth Amendment to require that the State demonstrate that a parent is unfit prior to placing his or her child in foster care.<sup>35</sup> And in *Santosky v. Kramer*,<sup>36</sup> the Court held that the Constitution required the State to demonstrate that a parent was unfit by clear and convincing evidence before permanently terminating a parent's rights.<sup>37</sup> In both decisions, the Court recognized the sanctity of the parent-child relationship and the unique ways in which

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27 See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

28 *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925).

29 *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923).

30 *Troxel*, 530 U.S. at 68–69.

31 *But see* *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (affirming state law prohibiting parents from forcing children to work under certain conditions).

32 For a detailed overview of the steps in a civil child welfare proceeding, see Ann M. Haralambie & Donald N. Duquette, *A Child's Journey Through The Child Welfare System*, in *CHILD WELFARE LAW AND PRACTICE* 419 (3d ed. 2016).

33 *In re K.A.W.*, 133 S.W.3d 1, 12 (Mo. 2004); *In re N.R.C.*, 94 S.W.3d 799, 811 (Tex. App. 2002); *In re K.D.L.*, 58 P.3d 181, 186 (Nev. 2002).

34 405 U.S. 645 (1972).

35 *Id.* at 649.

36 455 U.S. 745 (1982).

37 *Id.* at 769 (holding that, in cases involving Indian children, the Indian Child Welfare Act requires the State to prove grounds for termination of parental rights beyond a reasonable doubt). See 25 U.S.C. § 1912(f) (1978).

civil child welfare cases threatened that right. Thus, the Court prescribed procedures to ensure that the State was not erroneously infringing upon the right.

Despite the Court's strong recognition of the procedural due process rights of parents in child welfare cases, in *Lassiter v. Department of Social Services*,<sup>38</sup> the Court retreated. In *Lassiter*, the Court had the opportunity to create a straightforward rule to ensure that all parents receive a basic protection—the right to a lawyer—before a court could terminate their parental rights. The Court declined to do so. Instead, while recognizing the crucial role that parent's counsel play in termination of parental rights cases, the Court ultimately gave trial courts the discretion to determine—on a case-by-case basis—whether the Constitution required the appointment of counsel.<sup>39</sup> The Court concluded, “[We] leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court.”<sup>40</sup> But the Court still recognized that “wise public policy, however, may require that higher standards be adopted than those minimally tolerable under the Constitution” and that “[i]nformed opinion has clearly come to hold that an indigent parent is entitled to the assistance of appointed counsel not only in parental termination proceedings, but also in dependency and neglect proceedings as well.”<sup>41</sup> Nevertheless, it refused to interpret the Constitution to require the absolute appointment of counsel for parents in every case.

Commentators quickly criticized the Court's holding in *Lassiter*. Anthony Trombley noted, “[i]t is curious that the Court considers a one-day jail sentence to be more intrusive on liberty than a lifelong revocation of the parental right to the care, custody, and companionship of a child.”<sup>42</sup> Trombley also observed that *Lassiter* failed to provide guidance for state courts or any articulated standards and that “[a]d hoc determinations . . . will likely lead to inconsistent protection of procedural due process rights.”<sup>43</sup> Similarly, Douglas Besharov warned that *Lassiter* “may lead state legislatures and state courts to conclude that indigent parents do not need—or do not deserve—legal representation.”<sup>44</sup> In his words, “*Lassiter*, for all practical purposes, stands for the proposition that a drunken driver's night in the cooler is a greater deprivation of liberty than a parent's permanent loss of rights in a child.”<sup>45</sup>

In many ways, in the three decades after *Lassiter*, the inconsistency and disuniformity predicted by Trombley has borne out. In at least six states, statutes and court rules give courts wide discretion whether to appoint counsel for parents, even at the TPR stage. For example, in Delaware, courts have discretion to determine whether the request for counsel is “appropriate,” considering the degree to which the

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38 452 U.S. 18 (1981).

39 *Id.* at 31–32.

40 *Id.* at 32.

41 *Id.* at 33–34.

42 Anthony Trombley, *Alone Against the State: Lassiter v. Department of Social Services*, 15 U.C. DAVIS L. REV. 1123, 1136–37 (1982).

43 *Id.* at 1140–41.

44 Douglas Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel after Lassiter v. North Carolina*, 15 FAM. L. Q. 205, 219 (1982).

45 *Id.* at 221.

loss of parental rights are at stake, the risk of an erroneous deprivation of those rights, and the interest of the State.<sup>46</sup> Similarly, in Mississippi, the statute simply asks courts to determine “whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution . . . or statutory law.”<sup>47</sup> Likewise, in Nevada, the statute does not require the appointment of counsel but instructs courts that they “may” appoint one.<sup>48</sup> Three other states have similar frameworks.<sup>49</sup> In these jurisdictions, it is entirely possible for a parent to have their rights terminated without ever having received the assistance of a lawyer.

Not only do several states deny parents the right to counsel at the TPR stage, many more—at least eleven—fail to guarantee parents the right to counsel at earlier stages of the child protective proceeding, where critical decisions are made as to whether the State can remove a child from her home.<sup>50</sup> In most of these jurisdictions, statutes and court rules leave the appointment of counsel within the complete discretion of the trial court. For example, in Minnesota, the court must only appoint counsel when “it feels that such an appointment is appropriate.”<sup>51</sup> In Missouri, the court may give the parent an attorney only if it determines that “a full and fair hearing

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46 DEL. FAM. CT. R. CIV. P. 206(a)(b).

47 MISS. CODE ANN. § 93-15-113(2)(b) (2017). *See also* J.C.N.F. v. Stone Cty. Dep’t of Human Servs., 996 So. 2d 762, 772 (Miss. 2008) (finding that the trial court did not err in denying counsel to an indigent parent); K.D.G.L.B.P. v. Hinds Cty. Dep’t of Human Servs., 771 So. 2d 907, 910 (2000) (noting that “appointment of counsel in termination proceedings, while wise, is not mandatory”).

48 NEV. REV. STAT. § 128.100(3) (2016). *See also In re* N.D.O., 115 P.3d 223, 225 (Nev. 2005) (finding that “no absolute right to counsel in termination proceedings exists in Nevada.”).

49 *See* MINN. STAT. § 260C.163(3)(c) (2017) (court may appoint counsel “in any case in which it feels that such an appointment is appropriate”); VT. STAT. ANN. tit. 13 § 5232(3) (2017) (court may appoint counsel “when the court deems the interests of justice require representation”); WYO. STAT. ANN. § 14-2-318(a) (2017) (“The court may appoint counsel for any party who is indigent”).

50 DEL. FAM. CT. R. CIV. P. 206(a) (court “may” appoint counsel during the parent’s initial appearance); MINN. STAT. § 260C.163(3)(c) (2017) (court may appoint counsel “in any case in which it feels that such an appointment is appropriate.”); MISS. CODE ANN. § 43-21-201(2) (2017) (“[T]he youth court judge may appoint counsel to represent the indigent parent or guardian in the proceeding.”) (emphasis added); MO. REV. STAT. § 211.211(4) (2016) (court shall appoint counsel only if it finds: “(1) [t]hat the custodian is indigent; and (2) [t]hat the custodian desires the appointment of counsel; and (3) [t]hat a full and fair hearing requires appointment of counsel for the custodian”); NEV. REV. STAT. § 432B.420(1) (2016) (“[T]he court may appoint an attorney to represent the person.”); OKLA. STAT. tit. 10A, § 1-4-306(A)(1)(a) (2016) (“[C]ounsel may be appointed by the court at the emergency custody hearing.”); OR. REV. STAT. § 419B.205(1) (2015) (“Counsel shall be appointed for the parent or legal guardian whenever the nature of the proceedings and due process so require.”); TEX. FAM. CODE tit. 5 § 107.013(a) (West 2017) (counsel only required when “termination of the parent-child relationship or the appointment of a conservator for a child is requested”); VT. STAT. ANN. tit. 33 § 5306(d)(5) (2017) (“The attorney may be Court-appointed in the event the parent is eligible . . .”). Wisconsin has no statute allowing trial courts to appoint counsel for parents prior to the termination of parental rights hearing, but its Supreme Court has ruled that courts must have the discretion to appoint counsel when necessary. *See* *Joni B. v. State*, 549 N.W.2d 411, 417–18 (Wis. 1996) (“We emphasize that the key to an individualized determination is that the need to appoint counsel will differ from case to case. In other words, a circuit court should only appoint counsel after concluding that either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment.”). And Virginia appoints counsel at the initial removal hearing but does not require that counsel remain on the case during the post-dispositional stage when the parent is trying to reunify with his or her child in foster care. *See* VA. CODE ANN. § 16.1-266(D) (2017) (“Prior to a hearing at which a child is the subject of an initial foster care plan filed pursuant to § 16.1-281, a foster care review hearing pursuant to § 16.1-282 and a permanency planning hearing pursuant to § 16.1-282.1, the court shall consider appointing counsel to represent the child’s parent or guardian.”).

51 MINN. STAT. § 260C.163(3)(c) (2017).



requires appointment of counsel.”<sup>52</sup> Oregon law asks that the court consider various factors to ascertain whether counsel is actually needed including the following:

- (a) [t]he duration and degree of invasiveness of the interference with the parent-child relationship that possibly could result from the proceeding;
- (b) [t]he complexity of the issues and evidence; (c) [t]he nature of allegations and evidence contested by the parent or legal guardian; and (d) [t]he effect the facts found or the disposition in the proceeding may have on later proceedings or events, including but not limited to termination of parental rights or criminal proceedings.<sup>53</sup>

The common thread in these statutory schemes is that the appointment of counsel is permissive. That is, parents in these jurisdictions may have their children taken from them and placed in foster care without ever having received the assistance of a lawyer.

Not only does variance exist among states as to when, or if, counsel must be appointed to represent parents; it also exists as to the adequacy of that lawyer. Certainly, in some jurisdictions across the country, courts appoint high quality, well-funded and properly trained attorneys to represent parents.<sup>54</sup> Some even afford parents the assistance of a social worker and a parent advocate, who are members of the multidisciplinary legal team.<sup>55</sup> The past decade has seen significant progress in the increase of highly specialized parent representation.

But this is the exception, not the norm. In many jurisdictions, parents’ lawyers still get paid very little,<sup>56</sup> receive inadequate training,<sup>57</sup> and carry high caseloads.<sup>58</sup> Numerous states place the burden on funding parent representation on counties, and as such, the amount attorneys get paid—and how they get paid—can even vary within

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52 MO. REV. STAT. § 211.211(4) (2016).

53 OR. REV. STAT. § 419B.205(1) (2015).

54 See Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L. Q. 139, 140 (2012) (describing work of high quality parent representation offices across the country).

55 *Id.* at 141 (describing multidisciplinary practice).

56 Rosalie R. Young, *The Right to Appointed Counsel in Termination of Parental Rights Proceedings: The States’ Response to Lassiter*, 14 TOURO L. REV. 247, 265 (1997) (“Even where the appointment of counsel is mandated, there may be nonexistent or limited provisions for paying those lawyers . . .”). Young correctly observed that a “[l]ack of remuneration may limit the number of attorneys willing to accept parental rights case [sic], or their enthusiasm for those cases they do undertake”). Astra Outley, *Representation for Children and Parents in Dependency Proceedings*, 8 (Pew Charitable Trs., 2004), <http://www.pewtrusts.org/en/research-and-analysis/reports/2004/06/01/representation-for-children-and-parents-in-dependency-proceedings>. (“The perception within the legal community is that the pay for parent’s attorney is at a level too low to allow for effective representation. Of the court improvement specialists interviewed for the NCJFCJ Project, 75% believed that attorneys for parents were not adequately compensated.”).

57 See ABA CTR. ON CHILDREN AND THE LAW, COURT IMPROVEMENT PROGRAM PARENT ATTORNEY SURVEY RESULTS 2 (2011) [hereinafter “COURT IMPROVEMENT SURVEY”] (noting that in at least nineteen states, there are no training requirements for parents’ attorneys prior to receiving a case, and that in at least twenty-eight, there are no standards of practice).

58 See *id.* at 5 (noting that at least thirty states do not limit the caseloads of parents’ lawyers).

a state.<sup>59</sup> And during times of budget crises, legislatures have sought to cut funding for parent representation.<sup>60</sup> Additionally, many attorneys who practice in this field are solo practitioners, and thus receive no institutional support for their work.<sup>61</sup>

Unsurprisingly, many parents, judges and other stakeholders have publicly criticized the lack of quality of parents' counsel.<sup>62</sup> The Vera Institute for Justice found that over twenty-seven percent of parents said their attorney was unhelpful.<sup>63</sup> Nearly eleven percent reported never meeting the attorney.<sup>64</sup> More than a third of those with attorneys did not know for whom their attorney worked.<sup>65</sup> Even attorneys conceded the significant disincentives to engage in zealous advocacy. A 2004 report by the Spangenberg Group observed that "[a] number of attorneys candidly admitted that there is disincentive to do all that could be done when representing a parent in abuse and neglect cases because of the fee ceiling."<sup>66</sup> Consistent with this, a 2005 report by the Muskie Institute and the American Bar Association noted that parents' lawyers in Detroit "meet in the cafeteria and deal the morning's cases like cards, trading cases back and forth based on who is going to be in which courtroom that

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59 See *id.* at 6 (noting that at least seventeen states have a county-based funding system). The survey also noted that in the forty-eight states whose stakeholders responded to the survey, there were eighty-one different types of funding schemes to pay parents' lawyers.

60 See, e.g., Dan Gorenstein, *N.H. Parents on Their Own In Abuse, Neglect Cases*, N.H.P.R. (April 2, 2012), <http://www.npr.org/2012/04/02/149846261/n-h-parents-on-their-own-in-abuse-neglect-cases> (describing budget cuts to parent representation in New Hampshire); Elizabeth Stawicki, *Public Defenders to Stop Representing Poor Parents in Child Protection Cases*, MPR NEWS, July 3, 2008, available at [https://www.mprnews.org/story/2008/07/03/who\\_will\\_pay](https://www.mprnews.org/story/2008/07/03/who_will_pay) (reporting that due to budget cuts, the public defender agency decided to stop representing parents in child protection cases).

61 See COURT IMPROVEMENT SURVEY, *supra* note 57, at 10 (noting that at least twenty-four states did not give parents' attorneys access to social workers to assist them in their cases).

62 See, e.g., MUSKIE SCH. OF PUB. SERV., CUTLER INST. FOR CHILD AND FAMILY 'POLICY & ABA, MICHIGAN COURT IMPROVEMENT PROJECT REASSESSMENT 155 (2005) [hereinafter "MICHIGAN COURT IMPROVEMENT PROJECT"], available at <http://courts.mi.gov/administration/sc-ao/resources/documents/publications/reports/cipaba-reassess.pdf>; Outley, *supra* note 56, at 7 ("Regardless of whether and at what point counsel is appointed, much of the time the representation is inadequate for varied reasons."); Editorial, *Giving Overmatched Parents a Chance*, N.Y. TIMES, June 17, 1996, at A14 ("Parents who are about to lose their children because of abuse or neglect are often at a legal disadvantage. Welfare authorities have the legal muscle of the city behind them. The children are generally represented by an experienced Legal Aid lawyer with a support network of social workers. But the parents are generally stuck with harried court-appointed lawyers who are juggling many cases, and who often show up unprepared and late for hearings. . . . [T]hese lawyers are often not up to the task. Many meet their clients for the first time just before rushing into court. They know nothing of the family's background and often cannot speak the parents' language.").

63 Julia Vitullo-Martin & Brian Maxey, *New York Family Court: Court User Perspectives* 15 (Vera Inst. of Justice 2000), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-family-court-court-user-perspectives/legacy\\_downloads/nyfamilycourt.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/new-york-family-court-court-user-perspectives/legacy_downloads/nyfamilycourt.pdf). See also Ann Moynihan, Mary Ann Forget & Debra Harris, *Symposium: Fordham Interdisciplinary Conference: Achieving Justice: Parents and the Child Welfare System, Foreword*, 70 *FORDHAM L. REV.* 287, 330 (2001) (recounting the following story from a parent: "When I arrived at court that morning, I was told this is my lawyer. My lawyer sat down with me five minutes, asked me a couple of things, and told me to admit to my drug addiction. I didn't know anything about a fact-finding hearing. I wasn't told what my rights were. I wasn't told the procedure of court. I didn't have any idea what was happening, and I was very much afraid, because the most important thing in my life had just been lost.").

64 Vitullo-Martin & Maxey, *supra* note 63.

65 *Id.*

66 SPANGENBERG GRP., *A COMPREHENSIVE REVIEW OF CRIMINAL DEFENSE IN VIRGINIA* 54–55 (2004).

day.”<sup>67</sup> The report concluded that “[w]hat was reported to evaluators . . . and what was observed at court hearings falls disturbingly short of standards of practice.”<sup>68</sup> These observations typify what is well known to anyone in the field—that the lack of quality parent representation remains a blight on our child protection system.<sup>69</sup>

Three decades ago, Professor Martin Guggenheim correctly noted that child protection “is the only area of law in which the party most in need of effective assistance of counsel is least likely to obtain it.”<sup>70</sup> His words still ring true today. It is beyond dispute that the state of parent representation remains in disarray over thirty-five years after the Supreme Court’s decision in *Lassiter*. This leads to two related questions: 1) why should we care and 2) what can we do about it? The next section explores these issues.

## II. INADEQUATE PARENT REPRESENTATION UNDERMINES JUSTICE, HARMS CHILDREN, AND WASTES MONEY, BUT *LASSITER* PREVENTS A REMEDY THROUGH THE COURTS

The failure of child welfare systems to provide parents with adequate legal representation undermines our sense of justice, thereby reducing the likelihood that parents will cooperate with the very systems looking to reunify their children with them. It also harms children and wastes public funds. For these reasons, investing in parent representation serves the policy interests of both the Federal Government and child welfare agencies.

As noted at the outset of this Article, child protective proceedings involve the use of the State’s *parens patriae* power to involuntarily remove a child from his or her home. More often than not, parents involved in these proceedings are poor, lack education, and may suffer from mental health conditions. Additionally, the ability of parents to think cogently may also be affected by the trauma the parents themselves

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67 MICHIGAN COURT IMPROVEMENT PROJECT, *supra* note 62, at 153 (internal quotations omitted).

68 *Id.* at 155.

69 Numerous statewide reports have confirmed these findings. Within the last decade, reports from Michigan, Oregon, Colorado, North Carolina and Wyoming have all documented the challenges faced by parents’ attorneys, including high caseloads, inadequate compensation and a lack of training, among other things. See ABA CTR. ON CHILDREN AND THE LAW, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF MICHIGAN PRACTICE (2009), available at [https://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/michigan\\_parent\\_representation\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/michigan_parent_representation_report.authcheckdam.pdf); OR. TASK FORCE ON DEPENDENCY REPRESENTATION, FINAL REPORT (2016) available at [http://www.oregon.gov/gov/policy/Documents/LRCD/Oregon\\_Dependency\\_Representation\\_-\\_TaskForce\\_Final\\_Report\\_072516.pdf](http://www.oregon.gov/gov/policy/Documents/LRCD/Oregon_Dependency_Representation_-_TaskForce_Final_Report_072516.pdf); NAT’L. CTR. FOR STATE COURTS, COLORADO COURT IMPROVEMENT PROGRAM RESPONDENT PARENTS’ COUNSEL TASK FORCE STATEWIDE NEEDS ASSESSMENT: FINAL REPORT (2007), available at [https://www.courts.state.co.us/userfiles/File/Court\\_Probation/Supreme\\_Court/Committees/Court\\_Improvement/CORPCFinalNeedAsstReptApp.pdf](https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Court_Improvement/CORPCFinalNeedAsstReptApp.pdf); ABA CTR. ON CHILDREN AND THE LAW, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: A PERFORMANCE-BASED ANALYSIS OF NORTH CAROLINA PRACTICE (2013) available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/NorthCarolinaReport\\_full.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/NorthCarolinaReport_full.authcheckdam.pdf); ABA CTR. ON CHILDREN AND THE LAW, LEGAL REPRESENTATION FOR PARENTS IN CHILD WELFARE PROCEEDINGS: AN ANALYSIS OF WYOMING PRACTICE (2011), available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/wyolegalrep.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/wyolegalrep.authcheckdam.pdf).

70 Kathleen A. Bailie, Note, *The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role Of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2310 (1998).

have experienced, either as children or as adults.<sup>71</sup> Consequently, these parents are among the least likely of individuals to be able to defend themselves on their own and to articulate to a court why their children should be returned to their care.<sup>72</sup> These are also the very parents that the system must work with to achieve its primary goal of reunification.

In contrast, the State has a vast array of resources to prosecute a child welfare case, including trained lawyers and caseworkers, access to records about the family, and the availability of investigatory tools. The Supreme Court described this vast resource disparity in its decision in *Santosky v. Kramer*. The Court stated:

The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the state has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.<sup>73</sup>

The effects of this resource disparity are exacerbated by the increasing complexity of the laws governing the child welfare system along with the collateral consequences of decisions made in these cases.<sup>74</sup> Federal and state laws, court rules, administrative regulations, agency policies, and informal practices govern child welfare cases. While federal statutes define the broad, uniform contours of how child welfare systems must operate, state statutes vary significantly in the legal standards, burdens of proof, and the legal obligations of child welfare agencies and the courts.<sup>75</sup> Additionally, federal and state court decisions interpret the complicated statutory scheme. Given the complexity of these laws, the National Association of Counsel for Children offers a certification for lawyers who specialize in the field, which has been recognized by the American Bar Association.<sup>76</sup> Any belief that an

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71 See ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 23, at 5 ("State intervention in the lives of families . . . is a traumatic experience for children and parents alike.").

72 *Id.* at 5 ("A parent . . . may not fully understand how the child welfare system works, the relevant laws and his or her legal rights.").

73 455 U.S. 745, 763 (1982).

74 See ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 23, at 3 (noting the complexity of legal proceedings in child welfare cases as a reason why parents need competent legal counsel).

75 See Haralambie & Duquette, *supra* note 32, at 421 (noting that "[a] child in foster care is affected by a myriad of decisions established by federal and state laws designed to help the child" and that "[l]aws vary across states.").

76 More information about the certification program can be found at NACC CERTIFICATION, <http://www.naccchildlaw.org/?page=certification> (last visited Oct. 18, 2017).

unrepresented—or poorly represented—litigant can effectively navigate this system is misplaced.

Not only is the child welfare system complex, the costs of failing to effectively navigate the system are high. Parents can temporarily lose custody of their children in child protective cases and can also have their rights permanently terminated. Additionally, findings in one case may be used to justify both the temporary and permanent removal of another child from the family.<sup>77</sup> And as a result of the case, names of parents may be placed permanently on administrative registries, which can bar parents from getting certain jobs or participating in events with children, and parents may face related criminal or civil cases.<sup>78</sup> A finding of maltreatment in a child protective case may also affect the parent's ability to retain their housing or public benefits, which hinge on children remaining in the parent's care.

Thus, at a minimum, adequate parent representation is needed to protect our sense of justice and fairness in the child protective system.<sup>79</sup> Can we possibly describe our system as being fair when the State, with its sizeable resources at its disposal, brings a case against a parent, who may not have the acumen to navigate a complicated system on his or her own? And can we do so when decisions made in the system carry significant collateral consequences? To preserve our sense of fairness, public systems must invest in attorneys to represent parents.<sup>80</sup>

The lack of fairness created by the inadequate representation of parents impedes the system's goals of reunifying children with their families, which hinges on its ability to engage and work with parents. Repeated studies by social psychologists in the field of procedural justice provide compelling evidence that a key determinant in whether litigants are willing to engage with court systems is using fair procedures to make decisions.<sup>81</sup> Surprisingly, although an individual's willingness to accept

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<sup>77</sup> The doctrine of anticipatory or predictive neglect is well-established in child welfare cases. *See, e.g., In re Arthur H.*, 819 N.E.2d 734, 749 (Ill. 2004) (“Under the anticipatory neglect theory, the State seeks to protect not only children who are the direct victims of neglect or abuse, but also those who have a probability to be subject to neglect or abuse because they reside, or in the future may reside, with an individual who has been found to have neglected or abused another child.”); *In re Powers*, 528 N.W.2d 799 (Mich. Ct. App. 1994) (“[A]nticipatory neglect guarantees the protection of a child who is not yet born, i.e., because of the past conduct of another person, there is good reason to fear that the second child, when born, will also be neglected or abused.”).

<sup>78</sup> *See* Ann Haralambie et al., *Collateral Proceedings in CHILD WELFARE LAW AND PRACTICE* 550–51 (3d ed. 2016) (describing registries created by states listing those substantiated of child abuse or neglect).

<sup>79</sup> *See* ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 23, at 2, 14 (“The 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 . . . . Providing high quality legal representation . . . at all stages of dependency proceedings is crucial to realizing these basic tenets of fairness and due process under the law.”).

<sup>80</sup> A small study in Mississippi found that parents who had an attorney felt like the system was fairer because they had a greater voice in determining outcomes, and that they understood the court process better compared to those without attorneys. *See* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *EXPLORING OUTCOMES RELATED TO LEGAL REPRESENTATION FOR PARENTS INVOLVED IN MISSISSIPPI'S JUVENILE DEPENDENCY SYSTEM, PRELIMINARY FINDINGS*, (2013) *available at* <https://www.ncjrs.gov/pdffiles1/ojjdp/grants/244704.pdf>.

<sup>81</sup> *See* TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH POLICE AND COURTS* 51, 93 (2002) [hereinafter *TRUST IN THE LAW*]; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 115, 129, 137 (1990) [hereinafter *WHY PEOPLE OBEY THE LAW*]; E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 71 (1988) [hereinafter *SOCIAL PSYCHOLOGY OF PROCEDURAL*

authorities' decisions is shaped by the favorability of outcomes, research shows that outcome favorability is not the only, or even a major, factor shaping acceptance and satisfaction.<sup>82</sup> Both trust in the motives of authorities and judgments about the fairness of procedures they use are stronger influences on acceptance and satisfaction than achieving a particular outcome in a case.<sup>83</sup>

In assessing what is fair, litigants look to a number of factors. Most importantly, procedures that permit individuals to present arguments and exert control over the process are deemed just, whereas those that silence litigants only exacerbate feelings of mistrust.<sup>84</sup> Central to these findings is a person's need to have his story told, regardless of whether the telling will ultimately impact the outcome of the case.<sup>85</sup> Fairness is also enhanced by adequate legal representation and confidence that the decision-maker is neutral and unbiased.<sup>86</sup> Courts that reaffirm one's self-respect and treat people politely while respecting their rights earn the trust of those before it, regardless of the substance of the orders it issues.<sup>87</sup>

Why is the satisfaction of litigants important? Research demonstrates that greater satisfaction in the process significantly increases the likelihood that litigants will comply with the mandates of authorities, even when those authorities are taking actions that may be detrimental to the interests of those individuals.<sup>88</sup> This result is particularly salient in child protective cases in which a finding of neglect only represents the beginning of the case, and the ultimate outcome depends largely on the willingness of the parent to work with the court and child welfare agency.<sup>89</sup> Parents must comply with case service plans and court orders to effectuate the child's return home. A parent's satisfaction with the court process only helps child welfare authorities work with that parent. Thus, the justice concerns raised by the absence of adequate counsel directly hinders the system's ability to work with parents.

Inadequate parent representation also harms children and wastes scarce public funds. Research studies have shown that poor legal representation causes children to needlessly enter and remain in foster care. Data from the Center for Family

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JUSTICE]; Tom. R. Tyler, *What is Procedural Justice? Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 L. & SOC'Y. REV. 103, 104 (1988) [hereinafter *What is Procedural Justice?*].

82 See TRUST IN THE LAW, *supra* note 81, at 26; WHY PEOPLE OBEY THE LAW, *supra* note 81, at 116, 163.

83 See TRUST IN THE LAW, *supra* note 81, at 26; WHY PEOPLE OBEY THE LAW, *supra* note 81, at 116, 163.

84 See Kees van den Bos et al., *When Do We Need Procedural Fairness? The Role of Trust in Authority*, 75 J. PERSON. & SOC. PSYCHOL. 1449 (1998); Gary B. Melton & E. Allan Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?* in LEGAL REFORMS AFFECTING CHILD & YOUTH SERVICES 65 (Gary B. Melton ed., 1982).

85 See WHY PEOPLE OBEY THE LAW, *supra* note 81, at 116, 127.

86 *Id.* at 137; *What is Procedural Justice?*, *supra* note 81, at 105, 107; van den Bos et al., *supra* note 84, at 1452.

87 See *What is Procedural Justice?*, *supra* note 81, at 129; WHY PEOPLE OBEY THE LAW, *supra* note 81, at 138.

88 See TRUST IN THE LAW, *supra* note 81, at 51; WHY PEOPLE OBEY THE LAW, *supra* note 81, at 163; SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE, *supra* note 81, at 64; José B. Ashford, *Comparing the Effects of Judicial Versus Child Protective Service Relationships on Parental Attitudes in the Juvenile Dependency Process*, 16 RES. SOC. WORK PRAC. 582, 584 (2006), available at <http://rsw.sagepub.com/cgi/reprint/16/6/582.pdf>; van den Bos et al., *supra* note 84, at 1449.

89 See Ashford, *supra* note 88, at 583–84.

Representation in New York City revealed that effective parent representation reduced the need for children to enter foster care by fifty percent.<sup>90</sup> When children whose parents were served by the Center entered foster care, their stay in foster care was a little over five months, compared to a citywide average of nearly a year.<sup>91</sup>

Similarly, a 2011 study of the Parent Representation Project of the Washington Office of Public Defense, which reviewed data for over 12,000 children in Washington's child welfare system, found that children served by the Project—as opposed to a typical court-appointed counsel—had a higher rate of reunification, adoption, and guardianship, and that children achieved those outcomes much more quickly.<sup>92</sup> This data accords with similar findings in Oregon,<sup>93</sup> and California.<sup>94</sup> Parents' counsel achieve these goals by providing information and options to parents, counseling them, investigating facts, and presenting arguments to courts.<sup>95</sup>

These studies—though limited—suggest that inadequate parent representation leads to children unnecessarily spending time in foster care, which in turn wastes scarce public funds. The Center for Family Representation estimated that over a ten-year period, its work generated over \$130 million in public savings.<sup>96</sup> Similarly, the Washington State Parent Representation Project estimates that it saves the state and federal governments over \$10 million a year in out-of-home care and guardianship/adoption subsidy costs. These savings are unsurprising given the high costs of foster care. In New York City, it costs at least \$30,000 a year to keep a child in foster care.<sup>97</sup> In contrast, it costs the Center for Family Representation approximately \$6,500 per family over the entire life of the case.<sup>98</sup> An investment in parent representation not only promotes good outcomes for children, it also makes the best use of limited government funds.

The dissonance that exists in child welfare systems across the country is readily apparent. While systems need adequate parent representation to instill a sense of fairness in our systems (thereby getting parents to engage with them), prevent poor outcomes for children, and avoid wasting public funds, systems have nevertheless failed to ensure that every parent receives the assistance of an effective lawyer. In fact, as detailed in Section I, most systems guarantee the exact opposite—that parents

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90 See Thornton & Gwin, *supra* note 54, at 143.

91 CTR. FOR FAMILY REPRESENTATION, (2016), available at <http://www.cfrny.org/wp-content/uploads/2013/11/CFR-at-a-Glance-June-2016.pdf>

92 Mark E. Courtney, Jennifer L. Hook, & Matt Orne, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 34 CHILD. YOUTH SERV. REV. 1337 (2011), available at <http://partnersforourchildren.org/resources/publications/evaluation-impact-enhanced-parental-legal-representation-timing-permanency>.

93 OR. PUB. DEF. SERVS. COMM'N, PARENT CHILD REPRESENTATION PROGRAM ANNUAL REPORT 2014–2015 (2015), available at [https://www.oregon.gov/OPDS/docs/Reports/PCRP\\_report\\_PDSC\\_Jan\\_2016.pdf](https://www.oregon.gov/OPDS/docs/Reports/PCRP_report_PDSC_Jan_2016.pdf).

94 DIANE NUNN ET AL., DRAFT PILOT PROGRAM AND COURT-APPOINTED COUNSEL (2007), available at <http://www.courts.ca.gov/documents/102607itemF.pdf>.

95 See Sankaran et al., *supra* note 25 (discussing ways in which strong parent representation helps parents and child welfare agencies).

96 Martin Guggenheim & Sue Jacobs, *A New National Movement in Parent Representation*, 47 CLEARINGHOUSE REV. J. POVERTY L. AND POL'Y 35, 44–46 (2013).

97 CTR. FOR FAMILY REPRESENTATION, 2014 REPORT TO THE COMMUNITY (2014), <https://www.cfrny.org/wp-content/uploads/2012/12/Annual-Report-2014-FINAL.pdf>.

98 *Id.*

will not receive the assistance of a competent lawyer, thereby undermining confidence in the process, harming children and spending money to unnecessarily house kids in foster care.

In some jurisdictions in which the absolute right to counsel is not guaranteed by statute, advocates have made some attempts to litigate the issue, asking courts to recognize a due process right to counsel, both in TPR cases and at earlier stages.<sup>99</sup> But those efforts have been largely unsuccessful due to *Lassiter* and its refusal to recognize that the Constitution categorically affords indigent parents the right to counsel. In at least five states—Nevada, Mississippi, Delaware, Montana and Wyoming—appellate courts have relied on *Lassiter* to deny attempts to guarantee an absolute right to counsel.<sup>100</sup> For example, in *In re N.D.O.*,<sup>101</sup> the Nevada Supreme Court stated, “after *Lassiter*, no absolute right to counsel exists under the United States Constitution’s Fourteenth Amendment in parental rights termination proceedings.”<sup>102</sup> Similarly, the Mississippi Supreme Court, in *K.D.G.L.B.P. v. Hinds County Department of Human Services*,<sup>103</sup> citing *Lassiter*, found that the “appointment of counsel in termination proceedings, while wise, is not mandatory and therefore should be determined by state courts on a case-by-case basis.”<sup>104</sup> And in *In re CC v. Natrona City Department of Family Services*, the Wyoming Supreme Court, also referencing *Lassiter*, noted that because a “parent’s physical personal liberty is not in jeopardy in a parental termination proceeding, appointment of counsel is not required in all instances.”<sup>105</sup>

Unsurprisingly, efforts to persuade courts to recognize an absolute right to counsel in earlier stages of the proceedings—without a statute authorizing that right—have also been largely unsuccessful. Courts in at least five states—New Hampshire, Texas, Minnesota, Montana, and Nebraska—have refused to find that the Constitution requires the appointment of counsel immediately upon the child’s removal from the home.<sup>106</sup> In *In re C.M.*, the New Hampshire Supreme Court considered the question after the state legislature abolished the statutory right to counsel for parents prior to the TPR hearing.<sup>107</sup> The Court found that, despite the absence of counsel, the statutory procedures were “facially sufficient to prevent the

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99 While most state courts have rejected constitutional or statutory claims to expand the right to counsel in child protective cases, a few have, relying on interpretations of their state constitutions. See, e.g., *In re TM*, 319 P.3d 338, 355 (Haw. 2014) (requiring appointment of counsel in TPR proceedings); *In re G.P.*, 4 N.E.3d 1158 (Ind. 2014) (mandating counsel in earlier child protective proceedings).

100 *In re N.D.O.*, 115 P.3d 223 (Nev. 2005); *J.C.N.F. v. Stone Cty. Dep’t of Human Servs.*, 996 So. 2d 762 (Miss. 2008); *Watson v. Div. of Family Servs.*, 813 A.2d 1101 (Del. 2002); *BSC v. Natrona Cty. Dep’t of Family Servs.*, 102 P.3d 890 (Wyo. 2004); *In re A.B.*, 780 P.2d 622 (Mont. 1989)

101 *In re N.D.O.*, 115 P.3d 223, 226 (Nev. 2005).

102 *Id.* at 226 (internal emphasis omitted).

103 *K.D.G.L.B.P. v. Hinds Cty. Dep’t of Human Servs.*, 771 So. 2d 907 (Miss. 2000).

104 *Id.* at 911.

105 *In re CC v. Natrona Cty. Dep’t of Family Servs.*, 102 P.3d 890, 895 (Wyo. 2004).

106 See *In re Welfare of Children of S.-L.C.*, No. A07-586, 2007 Minn. App. Unpub. LEXIS 1083 (Minn. Ct. App. Nov. 6, 2007); *In re A.F.-C.*, 37 P.3d 724 (Mont. 2001); *In re R.R.*, 475 N.W.2d 518 (Neb. 1991); *In re C.M.*, 48 A.3d 942 (N.H. 2012); *Anderson v. Texas Dep’t of Protective & Regulatory Servs.*, No. 14-97-00985-CV, 1999 Tex. App. LEXIS 4664 (Tex. Ct. App. June 24, 1999).

107 *In re C.M.*, 48 A.3d at 945.



risk of an erroneous deprivation of a parent's fundamental liberty interest in the care and custody of his or her children."<sup>108</sup>

Similarly, the Texas Court of Appeals, in *Anderson v. Texas Department of Protective & Regulatory Services*, noted that "[b]ecause appointment of counsel lies within the discretion of the trial court under federal constitutional analysis and the Texas Legislature has not prescribed a time frame in which a trial court must appoint . . . counsel, we decline to impose a rigid time frame by which courts must appoint trial counsel."<sup>109</sup> Consistent with these holdings, the Montana Supreme Court, in *In re A.F.-C.* found that the appointment of counsel was not required but instead was contingent "in view of all of the circumstances."<sup>110</sup>

These cases exemplify how *Lassiter* has created an insurmountable roadblock to use the courts to ensure that every parent has the assistance of adequate counsel immediately upon the removal of his or her child. Even in states that guarantee parents the statutory right to counsel at all stages, *Lassiter's* effects can be felt. For example, recently, the Supreme Court of Tennessee, citing *Lassiter*, found that in the absence of a constitutional right to appointed counsel, parents did not have a right to the effective assistance of counsel.<sup>111</sup> In other words, while the Tennessee Legislature had mandated that all parents have counsel, there was no legal requirement that the lawyer actually had to be effective. The pernicious effects of *Lassiter* are omnipresent.

Given that there is no reason to think the Supreme Court will revisit or overturn *Lassiter* anytime soon,<sup>112</sup> this roadblock will impede efforts to persuade appellate courts to recognize a federal constitutional right to adequate parent representation from the very outset of the child welfare case. Certainly, lawyers can rely on provisions in state constitutions to try to strengthen parent representation, or can pursue local legislative strategies, which in some jurisdictions have been somewhat successful.<sup>113</sup> But these efforts will be piecemeal and may exacerbate the disuniformity that currently exists across the country. Whether a parent receives the effective assistance of counsel to protect a fundamental constitutional right should not depend on where he or she resides.

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108 *Id.* at 948–49.

109 *Anderson v. Texas Dep't of Protective & Regulatory Servs.*, No. 14-97-00985-CV, 1999 Tex. App. LEXIS 4664 at \*13 (Tex. Ct. App. June 24, 1999).

110 *In re A.F.-C.*, 37 P.3d at 731.

111 *In re Carrington H.*, 483 S.W.3d 507 (Tenn. 2016).

112 *See, e.g., Turner v. Rogers*, 564 U.S. 431, 442, 448 (2011) (reaffirming *Lassiter's* presumption that an absolute right to counsel only exists where a litigant may lose his physical liberty and finding that the Due Process Clause does not automatically require the appointment of counsel in civil contempt proceedings, even if a litigant faces the possibility of being incarcerated).

113 Several states have taken notable steps to strengthen parent representation. For example, in Utah, its Indigent Defense Commission included parent representation within the scope of its work. *See UTAH INDIGENT DEF. COMM'N*, *supra* note 9. In Washington State, its legislature expanded its strong parent presentation program to more counties. *See WASH. STATE OFF. OF PUB. DEF.*, *supra* note 4. Additionally, the New Hampshire legislature restored cuts to parent representation to ensure counsel at every child welfare proceeding. *See Todd Bookman, House Votes to Restore Lawyers in Child Abuse Cases*, N.H.P.R. (March 6, 2013), <http://nhpr.org/post/house-votes-restore-lawyers-child-abuse-cases#stream/0>.

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To create uniformity in the protection of the fundamental right to parent, advocates will need to pursue creative, non-litigation strategies. One previously unexplored avenue to do so is to use federal child welfare statutes to both require and fund adequate parent representation. The final section explores this possibility.

### III. FEDERAL CHILD WELFARE LAWS PROVIDE THE BEST OPPORTUNITY TO REMEDY THE CRISIS IN PARENT REPRESENTATION

The federal government is uniquely situated to create a basic level of adequacy in the representation of parents. Since the early 1970s, the federal government has sought to ensure uniformity in the basic practices and procedures of child welfare systems across the states. The government took these steps due to concerns that children were needlessly entering and remaining in foster care, thereby harming their overall wellbeing.<sup>114</sup> Though the government's authority to directly require states to follow federal mandates in child welfare cases is limited due to federalism concerns, the government circumvented this by tying federal foster care funding to the adoption of specific procedures it deemed essential to a well-functioning child welfare system. Take Title IV-E of the Social Security Act, for example, which constitutes the largest federal child welfare program. To receive federal foster care funding under Title IV-E, states must submit a plan for their child welfare system that contains numerous elements, such as ensuring that reasonable efforts are made to prevent the removal of a child,<sup>115</sup> developing a case plan that outlines what a parent must do to reunify with her child,<sup>116</sup> and identifying a child's relatives within thirty days of removal.<sup>117</sup> Other federal child welfare laws, such as the Child Abuse and Prevention Treatment Act, require states to ensure that children in foster care receive the assistance of a guardian *ad litem*,<sup>118</sup> the creation of a system for reporting child abuse and neglect, and that a registry be established to identify perpetrators of abuse and neglect.<sup>119</sup> These are but a few of the many requirements imposed by the federal government through its child welfare statutes.

In exchange, states receive federal funding to support specific expenses of their foster care system. Funding through Title IV-E of the Social Security Act constitutes the bulk of this funding, and those funds—which are an uncapped entitlement—can be used to support expenses including subsidies and lawyers<sup>120</sup> for foster parents, adoptive parents and guardians, training caseworkers and foster parents, and administrative costs necessary for the proper administration of the child welfare

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114 See STOLTZFUS, *supra* note 10, at 1 (describing federal goals of safety, permanence, and well-being for children in foster care).

115 42 U.S.C. § 671(a)(15)(B) (2012).

116 § 671(a)(16).

117 § 671(a)(29).

118 § 5106a(b)(2)(B)(xiii).

119 § 5106a(b)(2)(B)(xvi)(VI).

120 § 673(a)(6)(A); *id.* § 673(d)(1)(B)(iv).

system.<sup>121</sup> But funds under Title IV-E cannot be used to provide social services to the child, the child's family or foster family.<sup>122</sup>

To ensure that states are following federal child welfare laws, the government has set up several enforcement mechanisms, most prominently in Title IV-E. For a child to be eligible for federal funding, judges in individual cases must make certain findings, such as finding that reasonable efforts were made to prevent the removal of a child from her home.<sup>123</sup> Additionally, the federal government conducts periodic audits of child welfare agencies to ensure compliance with federal law. And every few years, the government conducts more formal Child and Family Service Reviews, which assess outcomes for children through detailed onsite review of a specified number of case records in a given state and by measuring statewide performance against certain national data indicators.<sup>124</sup> States not in substantial conformity with federal policy must develop and successfully implement a Program Improvement Plan to avoid financial penalties.<sup>125</sup>

Many resources exist that detail how the federal government has sought to create uniformity among state child welfare systems. This brief overview is intended to make a basic point: within this framework, the federal government could immediately ensure that all parents receive the assistance of adequate counsel at the very outset of a child welfare case. It could do so by specifically including a provision within Title IV-E of the Social Security Act that in order to receive funding under the Act, states must provide indigent parents with the assistance of a lawyer at the first court hearing in a child protective case. In exchange for doing so, it could make clear that funding under Title IV-E was available to support the representation of parents.

Parent representations should be situated within Title IV-E—as opposed to other federal child welfare legislation—for several reasons. First, Title IV-E represents the bulk of the federal government's child welfare spending and is an uncapped entitlement, unlike other legislation like CAPTA which has very limited funding.<sup>126</sup> Second, funds distributed under Title IV-E already reimburse states for providing attorneys to child welfare agencies and individuals seeking to adopt or obtain a guardianship over a child.<sup>127</sup> Third, the law allows states to be reimbursed for training parents' lawyers. Situating parent representation within the other Title IV-E requirements is not only consistent with its existing directives, it will also have the biggest impact on child welfare systems given the significant funding it provides states.

The question remains, however, whether doing so would serve the federal government's child welfare policy interests. In January 2017, the Administration for

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121 See CAL. ADVOCATES FOR CHANGE, *supra* note 17, at 2–4 (listing federal funding streams supporting child welfare); STOLTZFUS, *supra* note 10.

122 45 C.F.R. § 1356.60(c)(3) (2016).

123 42 U.S.C. § 672(a)(2)(A)(ii) (2012).

124 See 45 C.F.R. §§ 1355.31–1355.37 (2016) (for more information about the child and family services review process).

125 §§ 1355.35–1355.36.

126 See CAL. ADVOCATES FOR CHANGE, *supra* note 17, at 2–4.

127 ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 19; 42 U.S.C. § 673(a)(6)(A) (2012); 42 U.S.C. § 673(d)(1)(B)(iv) (2012).

Children and Families answered this question in a widely-distributed Information Memorandum in which it implored state child welfare agencies and courts to strengthen the representation of parents.<sup>128</sup> In the memorandum, the Administration “strongly encourage[d] all jurisdictions to provide legal representation to all parents in all stages of child welfare proceedings.”<sup>129</sup> The memorandum documented ways in which strong legal representation furthered the system’s goals of increased party engagement, improved case planning, expedited permanency, and cost savings to state government.<sup>130</sup> It concluded that “[t]he absence of legal representation . . . at any stage of child welfare proceedings is a significant impediment to a well-functioning child welfare system.”<sup>131</sup>

The Administration’s position is unsurprising given the close link between parent representation and the explicit goals of the Title IV-E program. To receive funding under the program, a state’s plan must accomplish, among other things, the following goals: 1) ensuring that children do not needlessly enter foster care; 2) expediting the reunification of children with their families; 3) facilitating the placement of children with relatives; and 4) hastening the permanency for children.<sup>132</sup> As detailed in Section II, research demonstrates that strong parent representation furthers each of these policy goals. The Administration’s recognition that a child welfare system cannot function without adequate parent representation was long overdue.

Persuading Congress to amend Title IV-E to both require and fund adequate parent representation is a long-term goal, given the length of time any legislative campaign takes. In the meantime, ACF can take two immediate steps to solidify the federal government’s recognition of the importance of parent representation.

First, the Administration should revise its Child Welfare Policy Guide to make clear that Title IV-E funds, under the current version of the statute and regulations, can be used by state child welfare agencies to support parent representation. Both the statute and the regulations allow the federal government to provide states with funds to cover administrative costs “necessary for the proper and efficient administration of the title IV-E plan.”<sup>133</sup> Neither the statute nor the regulations specifically define exactly what administrative costs states can recoup. But the regulations specifically identify costs related to the “[p]reparation for and participation in judicial determinations” as ones “necessary for the administration of the foster care program” and thus recoverable from the federal government.<sup>134</sup>

ACF, however, has prevented states from seeking funds for parent representation as administrative costs. In a policy created in 2004, the Administration summarily stated that states could not recoup the costs of parent representation from the federal government.<sup>135</sup> In reaching its conclusion, however, it provided no analysis of the

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128 See ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 23.

129 *Id.* at 11.

130 *Id.* at 2.

131 *Id.*

132 STOLTZFUS, *supra* note 10, at 3.

133 45 C.F.R. § 1356.60(c) (2016); 42 U.S.C. § 674(a)(3) (2012).

134 45 C.F.R. § 1356.60(c)(2)(ii) (2016); 45 C.F.R. § 1356.60(c) (2016).

135 See ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 19.

regulations or statutes governing Title IV-E. It simply stated that agencies could only seek reimbursement of costs related to the representation of child welfare agencies. Although this policy was not a formal regulation promulgated in accordance with the Administrative Procedures Act, states have still followed it, refusing to seek Title IV-E funding to support the representation of parents.

The Administration should change this, and could do so easily given that the policy is not a formal regulation. As noted above, its own memorandum issued in January 2017 identifies the myriad ways in which parent representation is essential for the administration of a functioning foster care system. Without adequate parent representation, the goals of federal child welfare policy are directly undermined: children needlessly enter foster care, remain in foster care, and do not achieve permanency in a timely manner. Unsurprisingly, in a 2012 federal review, every state in the country failed to achieve substantial conformity on six of seven outcomes related to their Title IV-E Plan.<sup>136</sup> Many of these outcome measures, including maintaining children in their homes, continuing familial relationships and expediting permanency, are directly strengthened by parent representation.

Not only are new approaches necessary, they are possible under the law. Given that the regulations governing Title IV-E recognize that costs related to preparing for and participating in court hearings are permissible administrative costs, and given that neither the statute nor the regulations prohibit agencies from using administrative costs to support the representation of parents, ACF should encourage states to seek funding for this purpose. Opening up Title IV-E funding to support parent representation would infuse much needed funding to bolster the struggling parent representation systems across the country.

Second, if Congress reauthorizes the child welfare waiver demonstration program, ACF should explicitly encourage states to submit proposals focusing on parent representation. In 1994, Congress authorized the Department of Health and Human Services to approve a specific number of demonstration projects that gave states a wide degree of flexibility in how they used their Title IV-E funds, so long as the programs were cost-neutral, promoted the overall goals of the Title IV-E program, and met other specific requirements.<sup>137</sup> Since that time, over twenty states have implemented waiver demonstration projects in a variety of areas, including intensive services for parents with substance abuse disorders, providing expedited reunification services, and giving families in-home services before a child is removed to keep families intact.<sup>138</sup>

Materials describing the goals of the program identify the importance of innovative programs to support parents. For example, a 2012 Information Memorandum explains that “to achieve better outcomes for children who have

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<sup>136</sup> See ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., FEDERAL CHILD AND FAMILY SERVICES REVIEWS AGGREGATE REPORTS ROUND 2 (FISCAL YEARS 2007–2010) (2011), available at [https://www.acf.hhs.gov/sites/default/files/cb/fcfsr\\_report.pdf](https://www.acf.hhs.gov/sites/default/files/cb/fcfsr_report.pdf).

<sup>137</sup> See ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., LOG NO. ACYF-CB-IM-12-05 at 2–3 (2012) for a comprehensive discussion of the Title IV-E Waiver Demonstration Project.

<sup>138</sup> See JAMES BELL ASSOCS., SUMMARY OF THE TITLE IV-E CHILD WELFARE WAIVER DEMONSTRATIONS 2–3 (2013), [https://www.acf.hhs.gov/sites/default/files/cb/waiver\\_summary\\_final\\_april2013.pdf](https://www.acf.hhs.gov/sites/default/files/cb/waiver_summary_final_april2013.pdf).

experienced maltreatment, it is essential to engage families. . . . As parents and caregivers become better equipped to provide a safe, nurturing and healing environment, permanency becomes far more likely and more sustainable.”<sup>139</sup> But in the twenty-five years the program has existed, a state has never submitted a demonstration project centered on the representation of parents. Nor has ACF ever identified parent representation as an area for states to focus on when submitting an application for the program. Short of adopting a policy position that Title IV-E funds can be used to support parent representation, at the very least, ACF should explicitly encourage states to focus on parent representation when applying for demonstration project waivers.

ACF’s 2017 information memorandum was an important first step in recognizing the close link between strong parent representation and the federal government’s child welfare policy goals. But it is essential that it follow the memorandum with actionable steps. As described above, if ACF 1) works with Congress to amend Title IV-E to require states to provide parents with counsel at the first court hearing and to explicitly permit funds to be used to support parent representation; 2) makes clear that under the current law, Title IV-E funding can be used to support parent representation; and 3) encourages states to submit demonstration projects focusing on parent representation, dramatic improvements will occur to strengthen parent representation across the country and to close the gap in the disuniformity that currently exists today.

#### CONCLUSION

Every day, parents lose temporary and permanent rights to direct the care of their children without the assistance of an adequate attorney. This reality undermines our sense of justice, harms children, and wastes scarce public funds. But, because of the Supreme Court’s decision in *Lassiter*, federal and state appellate courts are largely powerless to remedy this crisis.

The Federal Government could—and should—take immediate steps to fix this. Congress should amend Title IV-E of the Social Security Act to require states to provide parents with the assistance of counsel at the first court hearing and should make clear that funds under the Act can be used by states to support parent representation. Until that happens, the Administration for Children and Families should clarify that states can recoup costs related to parent representation as administrative costs under Title IV-E and should encourage states to submit child welfare demonstration projects if Congress reauthorizes the program. These steps are a crucial next step to implementing the strong language in ACF’s 2017 information memorandum in which it highlighted why a functioning child welfare system must provide strong parent representation.

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139 See ADMIN. FOR CHILDREN AND FAMILIES, *supra* note 137, at 7 (2012).