November 06, 2018

Reasonable Efforts as Prevention

Jerry Milner, David Kelly

The U.S. Children's Bureau has shared a new vision for the child welfare system that emphasizes preventing child maltreatment and the unnecessary removals of children from their homes. Attorneys and judges can leverage reasonable efforts findings as part of child welfare prevention efforts. This article shares how a commitment to making meaningful reasonable efforts findings can fulfill legal mandates and support prevention efforts.

Far too often the wrong examples drive child welfare policy and practice in the United States.

We see it time and time again in jurisdictions where there is a child fatality; a formulaic response. Negative stories run, resignations are sought, blue ribbon commissions or task forces assembled, recommendations made. Perhaps a new policy is created or law passed to hold folks more accountable—often based on the facts of the most recently publicized tragedy as opposed to data and what we know children and families need. Commonly, there are corresponding spikes in the number of kids removed from their homes, everyone becomes scared and that fear is reflected in social work and legal decision making.

Attention then turns to recruiting more foster homes to place the increasing numbers of kids coming into foster care and we create a demand for which supply will never be adequate. Dockets and caseloads swell, workforce stress and turnover become endemic, and children and parents often do not receive services or supports to meet their needs. Such reactions bring tragic consequences and affect tens of thousands of lives annually-- the unnecessary separation of children from their parents and ensuing trauma. The child welfare system often becomes stuck in this cycle, and it comes at enormous human and financial cost. Yet, we continue to respond in the same damaging and costly way, over and over again.

As a field we know the trauma children experience when separated from their parents is considered a powerful adverse childhood experience that can lead to long-term health, relational, and self-sufficiency challenges. It is also highly traumatic for parents and can trigger relapse or

decompensation for those that may be in recovery or struggling with substance abuse or mental health issues. In other words, fear of making a wrong decision can lead to over removal. Over removal is a near guarantee of harm to a much larger population and perpetuates intergenerational cycles of disruption and maltreatment. This is a quieter, more far-reaching tragedy.

Attorneys' Roles in Promoting Reasonable Efforts

High-quality legal representation for parents, children, and child welfare agencies at all stages of child welfare proceedings is one of the most important systemic safeguards to ensure we keep our eyes on the ball as a child welfare system and avoid unnecessary removal, overly long stays in foster care, and trauma to parents and children.

Attorneys for parents, children, and the child welfare agency are charged with providing information to the judge to guide two critical judicial determinations: the determination that reasonable efforts have been made to prevent removal, and later, if out-of-home placement is deemed necessary, reasonable efforts to finalize the permanency plan. Exercised as statutorily intended, these two findings alone have the potential to dramatically reduce unnecessary family separation, decrease child and parent trauma, promote child and parent well-being, and expedite permanency.

Well-trained child welfare attorneys bring extra sets of problem-solving eyes to assist families and children and the skills to advocate for safety plans, identify strengths, needs, resources, and supports to help keep parents and children safe and together. Attorneys for all parties have the ability to ask what the needs or threats are that have been identified, zealously inquire about efforts to address those needs or threats, provide legal advocacy to ensure those needs are met and threats are addressed to support family resiliency. This is the very substance of reasonable efforts.

However, evidence remains scarce based on round 3 of the Child and Family Services Review, court observation work conducted across the country by Court Improvement Programs, and current trends in child welfare outcome data that either reasonable efforts determination is treated with the rigor or seriousness required under the law. Legislative intent provides adequate context to understand that these legal findings were intended to avoid unnecessary placement and minimize the length of time children and youth spend in foster care. Tying these findings to federal funding in the form of eligibility for title IV-E reimbursement was intended to underscore the significance of keeping families together and preventing unnecessarily long stays in foster care. Unfortunately, tying the findings to funding often leads to the common practice of invoking standard language,

checking boxes, and findings in words only, for fear of a determination leading to financial ineligibility for federal reimbursement for part or all of a child welfare episode.

Using Reasonable Efforts as a Prevention Tool

For the child welfare system to become one that respects the integrity of the parent-child relationship and seeks to minimize trauma, attorneys must use the tools the law provides and judges must make meaningful judicial determinations.

Attorneys for parents, children, and the child welfare agency can help change the trajectory of child welfare in the United States by:

1. Being active voices for preventing the trauma of unnecessary family separation in and out of the courtroom,

2. Advocating vigorously for reasonable efforts to be made to prevent removal or for a finding that reasonable efforts have not been made to prevent removal when that is the situation, and

3. Where removal is necessary, advocating that reasonable efforts be made to finalize permanency plans and, when not made, advocating for a no reasonable efforts finding.

There must be a unified commitment across the child welfare system to strengthening families through prevention, reasonable efforts to prevent removal and finalize the permanency plan, and providing the services that will become available through the Family First Prevention and Services Act and other sources. These efforts harbor great potential to keep families safely together and help avoid the outlier tragedies that have for too long driven how we serve children and families.

To be clear, the change we need in child welfare will not come from legislation alone. There must be a change of mindset, and support among the legal and judicial community to work further upstream to help prevent the need for children and families ever to enter a courtroom. Reasonable efforts must be treated with the seriousness such findings deserve when legal system contact is made. As we've seen with previous legislation, laws that do not translate into robust practice at best preserve the status quo.

Jerry Milner, DSW, is Associate Commissioner of the Children's Bureau at the U.S. Department of Health and Human Services.

David Kelly, JD, MA, is Special Assistant to the Associate Commissioner/Child Welfare Program Specialist for Court Improvement at the U.S. Department of Health and Human Services.

An Invitation to Remake Child Welfare

chronicleofsocialchange.org/child-welfare-2/federal-government-invitation-to-remake-child-welfare/33319

January 3, 2019 Guest Writer Child Welfare , Opinion , Top Stories Comments Off on An Invitation to Remake Child Welfare
January 3, 2019

A few days before Christmas, the federal government extended an invitation to state child welfare agencies that has the potential to completely transform the system.

Vivek Sankaran, University of Michigan Law School

The invitation did not arrive with great publicity. Nor was it lengthy. Instead, it was announced in a few ordinary-looking sentences, in a very ordinary-looking email.

But looks can be deceiving. The change announced by the federal government could lead to far fewer children being placed in foster care. It could expedite the reunification of those children in care. It could increase visitation between children in care and their parents. And it could get children into permanent homes more quickly, even when they can't return home.

So what is this change that could bring about these dramatic results? The federal government announced that it would permit uncapped, matching federal child welfare funds under Title IV-E of the Social Security Act to support the representation of parents and children in the child welfare system.

The significance of this change cannot be overstated. For decades, the federal government has overlooked the fact that a functioning child welfare system needs effective advocates for parents and children. The United States Supreme Court, in *Lassiter v Department of Social Services*, held that the United States Constitution does not guarantee parents an absolute right to counsel before their rights are terminated.

No federal statute requires states to provide attorneys to parents and children involved in the proceedings. And the federal government has never required states to provide legal advocacy for families in order to receive federal child welfare funding. To the contrary, for decades the federal government explicitly prohibited child welfare funds under Title IV-E from being used to support legal advocacy for families.

Without federal support, states have struggled to provide families – the overwhelming majority of whom cannot afford a lawyer – with the advocacy they need to navigate the foster care system. In some states, a parent can have their child removed without ever having received the help of a lawyer.

Others are worse, even allowing courts to terminate parental rights without giving parents an attorney. And in pretty much every state, lawyers for indigent parents are underpaid, overworked and lack important supports – like a social worker or investigator – to effectively represent clients. The reality in most jurisdictions is that families will not receive the type of legal advocacy that they deserve. But without an infusion of funding, little hope existed that the situation would change.

Until now.

The new availability of federal funding to support legal representation for parents and children allows states to remake their child welfare systems to produce the outcome that all stakeholders want – more children residing safely with families, increased contact between children and parents, and expedited legal proceedings. Study after study supports the conclusion that strong legal advocacy improves the outcomes of the child welfare system.

But while this opportunity is within our grasp, it will require significant action by the child welfare community to take advantage of it. Since federal funding under Title IV-E only flows to child welfare agencies and only matches state expenditures by that agency, states must now rework their payment structures for legal representation so that the current state funds supporting representation are being spent by the agency. Unless the state agency is the entity spending the money, the state cannot receive matching federal funds.

In a second part to this column on Monday, I'll share my thoughts on how states should think through and plan to seize this momentous opportunity.

Vivek Sankaran *is the director of the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University Michigan Law School. Follow him on Twitter at @vivekssankaran.*

Grasping the Opportunity to Remake Child Welfare

chronicleofsocialchange.org/top-stories/how-states-can-seize-new-legal-funding-federal-government/33321

October 22, 2012 John Kelly Publication , Research and Resources Comments Off on How Does Foster Care Work?: International Evidence on Outcomes

January 7, 2019

Vivek Sankaran, University of Michigan Law School

As I wrote last week, the federal government quietly introduced a momentous new funding source for child welfare systems before the holidays. The Department of Health and Human Services will now reimburse states for legal support given to parents involved in child welfare proceedings, and to their children.

This requirement will necessitate that states be creative. For example, in most parts of the country, counties pay for the costs of legal representation. So to access federal matching funds, counties might need to enter a cost sharing agreement in which it agrees to send funds to the state agency so that the agency can pay for the expenses of advocates for parents and children.

But this, in turn, will require state agencies to draft conflict of interest agreements to prevent the possibility that advocates will engage in relaxed advocacy because they are being compensated by an adverse party, the state child welfare agency. In other words, we don't want to create a system in which attorneys are worried that their zealous advocacy might result in them not getting paid. Or one in which the state agency changes its mind and drops its support for legal representation based on a disagreement in a single case.

So how do we move forward now? I see four logical steps to start the ship moving.

First, the federal government, national foundations and other stakeholders need to persuade directors of child welfare agencies that strong legal representation for families will improve child welfare outcomes. While this evidence exists, it needs to be communicated to those in charge of agencies. To do so, a national convening for agency directors centered on legal representation would be a logical first step.

Second, state child welfare stakeholders should determine how much their state currently spends on legal representation for parents and children, and where those payments come from. Is the system funded by the state, or by counties? This type of project would be perfect for a multidisciplinary entity, like a state Court Improvement Program team.

Once that information is ascertained, child welfare stakeholders should dream big. Assess the current quality of representation. Imagine what their system could look like if they had twice the funds to spend on legal representation. Would they create an office-based system, similar to the Center to Family Representation in New York City, which has achieved incredible results for families? Do they wish to create a state-based system, which establishes meaningful standards and training requirements for attorneys, like the systems in Colorado or Arkansas?

Or perhaps they want a hybrid approach, with a few model offices existing within a statewide system? The potential infusion of federal funds gives stakeholders a chance to design the system they think will best serve families within their jurisdictions.

And while dreaming big, states might wish to start small, with a pilot project in a particular county. For example, one county could agree to send its legal representation funds to the state agency, so that it can receive twice as much money in return to support advocacy for families within its child welfare system. Once this type of agreement works in one county, others will be more likely to sign on.

None of this will be easy. It will take time. It will be frustrating. It might seem impossible.

But until families are provided with effective legal representation, the child welfare system will continue to struggle. Judges need lawyers to produce the information that will help them reach the right decision in a given case. Legislatures want strong attorneys to ensure that the correct laws and procedures are being adhered to.

And most importantly, parents and children need the advice of trusted advocates to guide them through the most difficult and painful time of their lives.

Vivek Sankaran *is the director of the Child Advocacy Law Clinic and the Child Welfare Appellate Clinic at the University Michigan Law School. Follow him on Twitter at @vivekssankaran.*

https://thehill.com/opinion/civil-rights/427640-children-win-with-feds-policy-reversal-supporting-legal-representation

Children win with feds' policy reversal supporting legal representation

By Amy Harfeld, opinion contributor — 02/02/19 08:00 AM EST 48

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Children do not know their rights and cannot represent themselves in court. Not in criminal court. Not in immigration court. And certainly not in dependency court. Children are the most vulnerable parties in child abuse and neglect cases, with every element of their lives and their very freedom at stake as they face being placed in state custody, otherwise known as foster care. They need lawyers, and good ones at that. Approximately 40 states provide these children with attorneys, in some or all circumstances, to counsel them, protect their legal interests and ensure their voices are heard.

Yet a decisive right to counsel for abused and neglected children remains elusive. Federal law does not currently require states to provide legal representation for children. In a dozen or so states, the entire judicial process of determining what will happen to a child occurs without the child ever speaking with an attorney. Federal law only requires representation by a non-attorney guardian, or court-

appointed special advocate (CASA), appointed to recommend what he or she thinks is best for the child. Sometimes even this doesn't happen, and children play no role in their own case, learning their fate after it is decided.

A non-attorney guardian, though invaluable to the court and to attorneys in a case, is no substitute for an attorney to protect a child's legal interests, counsel them, or zealously advocate for their wishes. In fact, some who are invested in the status quo have vociferously opposed legislative reform efforts to protect the legal rights of these children, arguing that providing them with attorneys would amount to an unfunded mandate and interfere with states' rights. Yet the drumbeat to ensure all maltreated children get appropriate legal representation continues and progress is being made.

The Children's Bureau (CB) at the Department of Health and Human Services (HHS) recently issued an important policy reversal, allowing federal dollars to flow to states to help pay for legal representation of children in child welfare cases. Federal law has always allowed for this, but previous policy explicitly prohibited drawing down money for it. The policy change aligns with the vision of CB leadership and is consistent with recent legislation supporting family preservation, explicitly extending this funding for legal representation even to "candidates" for foster care.

The policy change is a civil rights victory for children, but it is not a cure-all. It will give states, which already provide lawyers for maltreated children, a mechanism to request reimbursement of a portion of those costs, but it does not secure a right to counsel for children. It does support the notion that the federal government recognizes the stakes for children in these cases and the importance of independent legal counsel to protect their rights, but it does not require states to provide this legal representation. It will provide incentive for states that do not provide this legal representation to get on board and begin doing so, but it will not resolve longstanding inconsistencies around what model of legal representation states adopt.

The policy change provides access to the same funding to help pay for legal representation for parents in these cases as well. Children are best served when all parties in the case have well-trained, high-quality attorneys, and this element of the policy announcement will further advance good outcomes for children.

This new policy initially may be seen as a boon for cash-strapped states that are uneasily contemplating the imminent expiration of child welfare waivers that have allowed them tremendous flexibility in funding their systems for years. But

it should not be used as a cost-saving measure by states to recoup spending on legal representation. Rather, these newly available federal dollars are intended to supplement existing funding to encourage states to improve upon their models and delivery of legal representation to better align with best practices enumerated in the American Bar Association (ABA) Model Act on Child Representation.

The ABA model act conveys, among other things, that children should have well-trained, client-directed attorneys and that attorneys should have reasonable caseload limits to ensure quality representation.

Against all odds, HHS has activated a powerful administrative tool to advance the rights of abused and neglected children. Now it is up to the courts to fulfill the promise of Gideon v. Wainwright, which ensured a right to counsel to all those facing placement in state custody because of criminal charges, and establish once and for all a federal right to counsel for maltreated children who similarly face loss of their physical liberty through foster care placement.

It is up to Congress to ensure that the protection of these rights is not left to the vagaries of state law, but instead is enshrined decisively in federal law. No longer can attempts to advance a child's right to counsel be dismissed as an unfunded mandate; it now is funded. All that's left is to make it a mandate.

Amy Harfeld is the national policy director for the Children's Advocacy Institute at the University of San Diego School of Law. Follow her on Twitter @AmyHarfeld.

Better Counsel for Children and Parents: What the Research Says

chronicleofsocialchange.org/child-welfare-2/better-counsel-for-children-and-parents-what-research-says/33678

February 6, 2019 John Kelly Child Welfare , Research News , Top Stories 0 February 6, 2019

The argument for a greater guarantee of lawyers in dependency court has strong grounding in legal circles. It is virtually inarguable that the interests of justice are better served with counsel than without it.

But when it comes to child welfare outcomes, does it make kids safer, more stable? The body of research is limited. Both factions – those championing child counsel, and those for parental representation – each have one study they can point to as firm evidence.

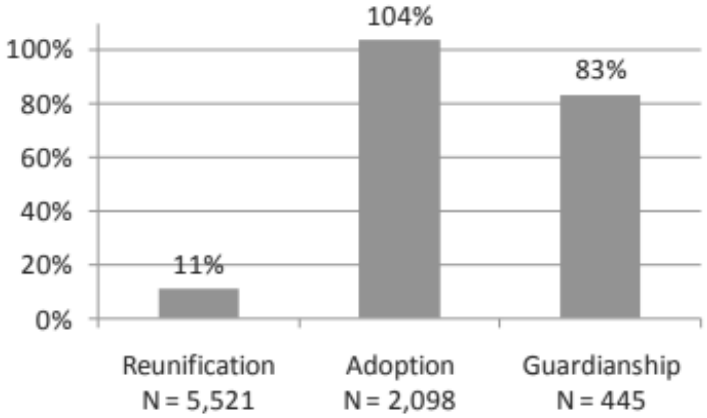
When it comes to children, the Chicago-based research and evaluation organization Chapin Hall published a report out of West Palm Beach County, Florida, that attempted to isolate the impact of the Legal Aid Foster Children's Project (FCP), which was providing continuous representation to about 350 children.

The report found that when compared to youth who were not provided legal counsel, FCP clients found a permanent home at much higher rates. This was largely attributable to increases in the number of youth for whom adoptions and guardianships were finalized. Importantly, those gains did not coincide with a decrease in the number of children who were reunified with their parents.

Not incidentally, the study also found that the legal support actually saved the county money.

In 2011, Partners for Our Children, a research and policy organization, released a study of Washington state's Parent Representation Program (PRP). The research team, led by Mark Courtney, compared regions of the state covered by PRP with regions that had not implemented the program.

The study found that, all else being equal, the exit rate to reunification was 11 percent



2011 findings that Partners for Our Children was associated with greater rates of reunification, adoption and guardianship. Washington has since scaled the program statewide.

higher in PRP-covered counties. Interestingly, the rate of adoptions and guardianships were significantly higher in PRP areas: 83 percent higher for adoption, 102 percent higher for guardianships.

The difference in reunification may appear small next to the other metrics, but the authors point out that "the decrease in time to reunification affects more children because reunification is the most common outcome for children."

As of July 2018, PRP was being used in every county in Washington.

That study has served as the strongest proof-of-concept for parent advocates. But several people that *The Chronicle of Social Change* spoke with for this article believe that a soon-to-be-released report on New York City's network of legal assistance providers, funded by Casey Family Programs, will show demonstrable impact. That report is expected to be released in the next few months.

"I'm really hopeful about that study," said Mimi Laver, director of legal representation at the ABA Center on Children and the Law.