

Supreme Court of Texas
Children's Commission



Task Force
on Court-Appointed
Legal Representation

Final Report

May 2021



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ACKNOWLEDGEMENTS

The Supreme Court of Texas Children’s Commission would like to thank all the members of the Task Force on Court Appointed Legal Representation for all of their time, hard work, and dedication to thoroughly examining the issues covered in this report. The Commission would like to thank the Hon. Thomas Stuckey particularly for his leadership as Task Force Chair, as well as Angela Ellis, Kim Murphy, Gabriela McDonald, Andrew Brown, Cynthia Dyar, and Geoff Burkhart for their service as co-Chairs.

EXECUTIVE SUMMARY

The decision by the state whether to remove children from their homes in response to allegations of abuse and neglect is of the utmost importance. Child welfare law invokes fundamental constitutional rights of both parents and children and the quality of legal representation provided to parents and children should match the gravity of the stakes at issue. However, studies have identified areas in need of significant improvement for court-appointed legal representation in Texas. The Task Force on Court-Appointed Legal Representation was assembled by the Supreme Court of Texas Children’s Commission to examine the problem, study potential solutions, and make recommendations for improvement.

Court-appointed legal representation is mandated by law in Texas for all children in the temporary managing conservatorship (TMC) of the Department of Family and Protective Services (DFPS) and for their parents, if indigent. The system of providing court-appointed legal representation is county-based, county-funded, and typically consists of attorneys appointed from a list of approved private attorneys overseen and approved by a judge. Qualifications, compensation, and available resources for these court-appointed attorneys vary from county to county. Texas does not have standards of representation for court-appointed attorneys and oversight of their performance varies.

The Task Force identified elements of quality representation that should be addressed by Texas-specific standards, defining both the breadth and depth of knowledge attorneys must have and the best practices they should employ. Standards of representation are necessary to create a shared expectation between attorneys, judges, parties, and other stakeholders of what quality representation entails. The Task Force also examined structure of appointment system to determine which methods of appointing, retaining, and compensating attorneys enable and incentivize quality representation. The structure must also include oversight of attorney performance to ensure quality representation is being delivered to Texas families experiencing the child welfare system.

The Task Force evaluated different models of delivering quality representation currently in use across the United States. First examined was the Contract Firm Model, where a firm or non-profit based contracting model where the contracts cover a geographic area

or established number of cases but the manner in which representation is provided is left up to the contactor. Next, the Task Force examined an Institutional Office Model where representation is provided through a public defender style organization where staff lawyers and support personnel provide representation directly. The third model reviewed by the Task Force was an Oversight Agency Model where individual private attorneys receive appointments, but the selection, compensation, and oversight of attorneys is performed by a stand-alone agency rather than by the court. Hybrid Models combining an Oversight Agency with an Institutional Office were also examined. Each model has strengths and weakness when applied to the Texas child welfare system and ultimately, the Task Force concluded there was no one model of representation that was the right fit for all of Texas.

The Task Force also examined available data on the effects of quality representation and how quality representation may impact Texas. Studies of quality representation indicate that raising the quality of representation can significantly reduce the time children spend in foster care and can increase the number of families who are reunified.

Establishing a system to ensure quality representation to all Texas Families is a long-term goal that may take many years to achieve. The Task Force recommends that Texas begin developing and implementing pilot programs that can be used to evaluate the effectiveness of different models of representation as a critical step toward that goal. While those pilots are being developed, the Task Force recommends Texas adopt policy and statutory modifications that can have a more immediate impact, such as utilizing Title IV-E funds to spur innovation, revising the statutory reporting requirements for attorneys, and appointing attorneys for parents when the petition is filed.

INTRODUCTION

LEGAL REPRESENTATION IN CPS CASES IN TEXAS

For almost four decades, the Supreme Court of the United States and the Supreme Court of Texas have recognized the constitutional implications in cases of involuntary termination of the parent-child relationship by governmental entities. Court-appointed legal representation is mandated by law in Texas for all children in TMC of DFPS and for their parents, if indigent. However, resources are limited, and providing high-quality legal representation is a challenge for both courts and attorneys.

The Texas Family Code requires that each court-appointed attorney fulfill various duties and responsibilities, including becoming familiar with the standards of representation adopted by the National Association of Counsel for Children (NACC) and the standards

issued by the American Bar Association (ABA).¹ However, Texas has not adopted either set of standards, nor has it established its own standards of representation for parents and children in cases involving termination of parental rights. Attorneys representing parents and children are only required to complete six hours of training specific to child welfare law before becoming eligible to take court-appointed cases. The system of appointment for attorneys, the fee schedule for attorney compensation, and oversight of attorney performance varies from county to county and there are no uniform standards for how legal representation should function at a local or statewide level.

Financial and Procedural Responsibility for Providing Legal Representation to Parents and Children

The Texas Legislature has placed the financial and procedural responsibility for providing legal representation to children and parents on Texas counties and the judges who preside over cases filed in the counties.² In 2015, the Texas Legislature enacted Chapter 37 of the Texas Government Code which outlined certain requirements for appointing attorney ad-litem. Each court is required to establish and maintain a list of attorneys who are qualified to serve as attorneys and as guardians ad-litem for children and parents involved in child welfare cases. Court-appointed attorneys for children and indigent parents are entitled to reasonable attorney fees and expenses and the Texas Family Code requires those fees and expenses to be paid from the general funds of the county where the suit is filed.³ In contrast, the cost of providing substitute care to children who are removed from their parents and placed in DFPS conservatorship by courts is shared by the State of Texas and the federal government. In some instances, child placing agencies and other residential care providers also contribute funds to support children in substitute care.

Changes to Federal Funding Available for Representation of Children and Parents in Child welfare cases.

On January 7, 2019, the Administration for Children and Families issued a child welfare policy change that expanded the resources available for the legal representation of parents and children.⁴ For the first time, states can now claim federal funds through Title

¹ Tex. Fam. Code § 107.004; *ABA Standards of Practice for Lawyers who Represent Children in Abuse and Neglect Cases*. Available at https://www.americanbar.org/content/dam/aba/administrative/child_law/repstandwhole.pdf; *ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*. Available at https://www.americanbar.org/content/dam/aba/administrative/child_law/aba-parent-rep-stds.pdf; *NACC Revised ABA Standards for Lawyers who Represent Children in Abuse and Neglect Cases*. Available at https://cdn.ymaws.com/www.naccchildlaw.org/resource/resmgr/Standards/ABA_Standards_NACC_Revised.pdf.

² Tex. Fam. Code § 107.015(c).

³ Tex. Fam. Code §107.031.

⁴ Children's Bureau Technical Bulletin *Frequently Asked Questions: Independent Legal Representation* (2020). Available at <https://15uclg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/07/Technical-Bulletin-FAQs-on-Independent-Legal-Representation.pdf>.

IV-E of the Social Security Act to help pay the costs of attorneys representing certain children and their parents in child welfare legal proceedings. The amount available for reimbursement is 50% of the original amount of allowable expenses spent on representation for the proportion of children who are Title IV-E eligible. Before this change, federal funds were only available through reimbursement to help pay for allowable administrative costs for attorneys who represented child welfare agencies.

BACKGROUND

CHARGE OF THE TASK FORCE

In 2017, the Children’s Commission conducted an extensive survey and research project to update its 2010 study on legal representation. The Children’s Commission surveyed parents, youth currently in care, relatives, foster parents, caseworkers, attorneys, mediators, judges, and other professionals involved in the child welfare system about how the current system for providing legal representation for parents and children in Child Protective Services (CPS) cases is functioning, how the current system impacts the quality of legal representation provided to parties, and potential reforms that could impact the quality of representation. An analysis of the survey results culminated in a report to the Texas Legislature in September 2018 entitled *Supreme Court of Texas Children’s Commission 2018 Study of Legal Representation in Child Protection Cases (2018 Legal Representation Study)*.⁵

The study revealed some significant differences between how various stakeholders viewed attorneys’ compliance with their statutory obligations. The study also found a lack of clarity regarding the mechanisms for ensuring that attorneys perform their duties. The 2018 Legal Representation Study also surveyed stakeholders about what changes to the system would have a positive impact on the quality of representation. Improved oversight of attorney performance, the creation of standards of legal representation, early appointment of parents’ counsel, access to multidisciplinary support, increased pay for attorneys, and higher training requirement were cited as the most impactful reforms across all stakeholder groups.⁶

The challenges and potential solutions identified by the 2018 Legal Representation Study and the newly available Title IV-E funding present a unique opportunity to transform the way legal representation is provided to Texas parents and children and take significant steps toward a system that ensures every parent and child experiencing the CPS system

⁵ Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families. (2018). *2018 Study of Legal Representation in Child Protection Cases*. Available at: <http://texaschildrenscommission.gov/media/83923/2018-legal-representation-report-final-online.pdf>.

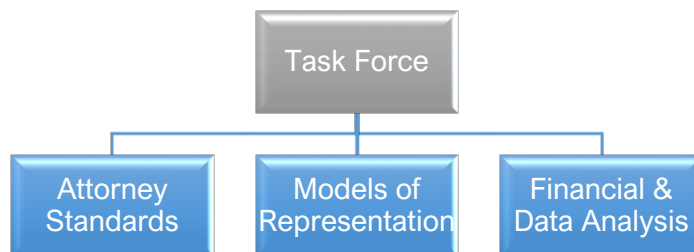
⁶ *Id.*

receives high-quality legal representation. Taking advantage of this opportunity requires developing a consensus of what high-quality legal representation means, a candid evaluation of the state’s method of delivering legal representation, and a shift to a cost-effective approach centered on quality representation.

The Task Force on Court-Appointed Legal Representation (“Task Force”) was assembled to include experts in judicial, legal, legislative, and administrative fields. The Children’s Commission charged the Task Force with investigating systems of delivering high-quality legal representation and making recommendations on the statutory and systemic reforms required to help ensure high-quality legal representation for parties involved in child welfare cases.

THE WORK OF THE TASK FORCE

The Task Force held its first meeting in December 2019, to review the 2018 Legal Representation Study, the change in Title IV-E policy, and examples of different systems of representation. The members agreed to the creation of three subcommittees to examine standards for attorneys, different models of representation, and to perform a financial and data analysis of what would be involved in transitioning Texas to a different system of representation. The subcommittees each held their initial meeting in January 2020.



In 2020, the Task Force on Court-Appointed Legal Representation held seven meetings of the full Task Force, two meetings of the Models of Representation Subcommittee, two meetings of the Quality, Standards, and Accountability (Attorney Standards) Subcommittee, and two meetings of the Financial and Data Analysis Subcommittee. Due to COVID-19, the 2020 meetings were conducted virtually which allowed the Task Force more direct, virtual access to national experts who presented their work on delivering quality representation. The Models of Representation Subcommittee was able to bring in representatives of organizations providing different models of legal representation from California, Massachusetts, New York, North Dakota, Pennsylvania, and Washington over the course of three virtual question and answer sessions with members. Task Force members were easily able to obtain direct feedback about how each of the models worked and how they might be applied to Texas.

STANDARDS, SYSTEM STRUCTURE, AND ACCOUNTABILITY

Standards of representation are necessary to define quality representation so that it can be understood by attorneys and measured by evaluators. The structure of an appointment system must be designed so it enhances rather than inhibits attorneys' abilities to practice in accordance with the standards. Accountability is required to ensure that attorneys are meeting the standards of representation so that clients receive the representation they need and that taxpayers can be confident public funds are being properly spent.

After studying the relevant issues, the Attorney Standards Subcommittee determined it was most impactful to emphasize the connection between standards of quality representation practice, the structural support necessary to enable attorneys to meet those standards, and the accountability to ensure that the standards are being met. Understanding the interconnectedness between these three elements was determined to be key to implementing a system that would raise the consistency and quality of legal representation of parents and children experiencing the child welfare system across Texas.

For example, court-appointed attorneys have a statutory duty to meet with their clients prior to each hearing. Compliance with the statutory duty would be required by standards of representation. Reimbursement for the travel and out of court time necessary to meet with clients would be part of the structure of the appointment system, and accountability would require a process of verification that attorneys are in fact meeting with their clients.

STANDARDS FOR COURT-APPOINTED ATTORNEYS FOR PARENTS AND CHILDREN

Standards of representation are necessary for attorneys, courts, and clients to define quality representation and evaluate whether it is being provided. The standards should outline specific tasks the attorney is to perform and provide commentary to explain the purpose and necessity of the action. Though many of the duties overlap, there should be separate and specific standards for attorneys representing parents and for attorneys representing children. The Task Force identified the following specific aspects of legal representation in CPS cases that standards of representation should address.

Zealous Advocacy

The stakes in a child welfare case are extremely high. For children, each child's relationships with parents and family, safety, and well-being hang in the balance. For parents, whether or not they will have legal rights to have a relationship with their child and make decisions in their child's best interest is on the line. Attorneys practicing child

welfare law are often motivated by passion, caring, and a sense of duty to serve children and families at the highest level. Zealous advocates understand that the court's decisions in a child welfare case have permanent and life-altering consequences for the child and their families and conduct themselves in accordance with the gravity of what is at stake.

Proactive Representation

Proactive representation means that a zealous advocate takes action rather than operating with a “wait and see” attitude regarding the decisions of DFPS. Time is of the essence in a child welfare case given the statutory deadlines and the separation of parents and children takes a powerful emotional toll and creates ongoing emotional trauma on all parties. A proactive attorney understands the urgency of the stakes involved and is proficient in navigating procedures and timelines. Proactive representation means that court-appointed attorneys conduct investigations and discovery, file motions, and set hearings based on their client's direction and legal interests, rather than merely reacting to information provided by DFPS and the statutory hearing schedule.

Compliance with Statutory Duties

Standards of Representation should require that court-appointed attorneys comply with their duties specified in Chapter 107 of the Texas Family Code.⁷

Training Components

Training is essential for court-appointed attorneys to adequately understand both the legal framework of the child welfare case and the associated issues necessary to effectively advocate for their clients. Standards of representation for court-appointed attorneys should include a required number of training hours prior to appointment that are sufficient to provide adequate training in the subject areas outlined below.

Legal Basics of a CPS Case

Attorneys for parents and children must receive training on the provisions of the Texas Family Code that govern petitions filed by DFPS including but not limited to the law governing DFPS investigations, the elements required for removing a child from the home, the findings required at Adversary, Status, and Permanency Hearings, dismissal dates, statutory grounds for termination of parental rights as well as the relevant case law, and requirements for naming DFPS permanent conservator of a child without terminating a parent's rights.

⁷ Children's attorneys' duties include Tex. Fam. Code §§ 107.003, 107.004, 107.008, 107.002, 107.0125 and 107.016. Parents' attorneys' duties include Tex. Fam. Code §§ 107.0131, 107.0132, 107.014, 107.0141, and 107.016.

Applicable Federal Law

Attorneys for parents and children must receive training regarding federal legislation that impacts Texas child welfare proceedings including the Indian Child Welfare Act (ICWA), the Interstate Compact on the Placement of Children (ICPC), Special Immigrant Juvenile Status (SIJS), Every Student Succeeds Act (ESSA), and the Family First Prevention Services Act (FFPSA).

Understanding Trauma

Every child in a child welfare case has lived through at least one traumatic experience: the removal from their home. Many parents of children in child welfare cases have also experienced trauma as a child or as an adult. Standards of representation for court-appointed attorneys for parents and children must include training on trauma that informs attorneys on how to communicate with clients in a trauma-responsive manner and advocate for their clients to have access to trauma-informed care, treatment, and services. This training should be comprehensive, research-based, and culturally responsive.

Domestic Violence

Families involved with DFPS may also report a history of domestic violence in the home. Intimate partner violence may exacerbate the danger to both the adult victim of violence and to the children in the home. Court-appointed attorneys should have competent knowledge and understanding of the dynamics of intimate partner violence, and an understanding of the laws that protect victims against these types of violence. Attorneys should also be prepared, if needed, to file protective orders on behalf of their clients. Court-appointed attorneys should understand the potential risk of escalated violence when a victim intends to separate from an abuser, should be able to develop a safety plan with the clients they are representing, and should be familiar with the community resources available for victims and batterers like domestic violence shelters, batterer's intervention and prevention programs, and other related community programs. Training should include information on intimate partner violence, and how to identify a pattern of power and control between the adults in the home, which may include non-physical manifestations of partner abuse such as control of the family's finances, isolation, coercive control, and emotional abuse.

Substance Use

Training must address the subtleties and complexities of substance use disorders and treatment. Although substance use disorders are common in CPS cases, each parent's recovery process is unique. The impact of substance use on the client's ability to parent can vary depending on the circumstances. It is imperative that any attorney who represents a client with a substance use disorder understands substance use and its effect on the client's decision-making. Attorneys for parents and children must have a

realistic understanding of the recovery process, including the possibility of relapse, and the inherent uncertainty of predicting long-term sobriety. Training on this subject is necessary to be able to successfully work with the client and to advocate for treatment that is appropriate for the individual, and for reunification plans that are tailored to the family.

Mental Health

Both parents and children in CPS cases can have mental health issues that impact services they receive to address their needs, their ability to complete a service plan, and their ability to communicate with their attorney and to understand the attorney-client relationship. To be effective advocates, attorneys for parents and children need training on how to understand a client's mental health diagnosis and adjust their advocacy accordingly. Mental health issues often intersect with substance abuse, domestic violence, and trauma so attorneys need training to understand how they interact and how they can be differentiated. Mental health training is especially critical for attorneys representing parents as the Texas Family Code allows for termination of a parent's rights based on the parent's mental illness or mental deficiency.⁸

Child Development and Well-being

To effectively represent children, attorneys must receive some training on basic child development to be able to identify and understand the different needs children have at different ages. Attorneys for children also have a statutory duty to review the child's safety and well-being including the effects of trauma on the child and to bring issues that need to be addressed to the court's attention. In order to provide quality representation to children, attorneys must be able to "recognize the impact that exposure to violence and trauma has on development and well-being, responding to child traumatic stress through legal representation that reflects such recognition, and collaborating with other professionals to support the recovery and resiliency of the child and family."⁹ Well-being training must also address issues of normalcy so that attorneys can effectively advocate for children to have access to age-appropriate activities readily available to children outside the CPS system.

Relationship with the Client

Standards of representation must take into account the unique aspects of developing and maintaining an attorney client relationship in CPS cases. A client's trust in the attorney-client relationship is often key to establishing or reestablishing trust and confidence in the

⁸ Tex. Fam. Code § 161.003.

⁹ Klain, E.J., et al. (2013). *Implementing Trauma-Informed Practices in Child Welfare* at 7. Available at <http://www.centerforchildwelfare.org/kb/TraumaInformedCare/ImplementingTraumaInformedPracticesNov13.pdf>.

child welfare process. An attorney's relationship with a client in a child welfare case, whether representing a parent or child, has two layers. The first layer is the traditional attorney-client relationship, where the attorney is expected to be competent, informed, and compliant with their statutory and ethical duties. The second layer is a relationship with the client that works to establish trust, respect, and a mutual understanding in the context of a client population that has often experienced historical, generational, and personal trauma.

Because clients in CPS cases often have a history of trauma and difficult lived experiences, their ability to engage and respond may be hindered and can be misinterpreted as disinterested, hostile, and uncooperative. A court-appointed attorney must "meet the client wherever they are" to establish an effective relationship because there is no "one size fits all" form of representation for children or parents. Standards of representation can lay out how to create a strong attorney-client relationship and can recognize and support the unique position court-appointed attorneys are in to serve their clients' needs by providing guidance as outlined below.

Meeting and Communicating with a Client

The Texas Family Code requires that court-appointed attorneys meet with their clients within a reasonable time after being appointed and before each hearing.¹⁰ For children, each of these meetings is required to be conducted in a manner that is "developmentally appropriate" for the "child's age, level of education, cultural background, and degree of language acquisition."¹¹ The meeting must occur with sufficient time before the hearing to allow the attorney to prepare in accordance with the child's expressed objectives.¹² The Texas Disciplinary Rules of Professional Conduct requires that an attorney keep their client informed, respond promptly to reasonable requests for information, and "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."¹³ Further, an attorney shall not "neglect" or "frequently fail to carry out completely the obligations that the attorney owes to a client or clients."¹⁴

Standards of representation should not only reflect the statutory and ethical requirements but should provide guidance and examples of appropriate ways attorneys can meet these requirements to instill trust, demonstrate respect, and display an understanding of the clients they are representing. Standards of representation should require that during meetings attorneys advise the client, ascertain facts, and develop a case strategy. Standards for meeting and communicating with children should include guidance and awareness about developmentally appropriate language, both written and verbal,

¹⁰ Tex. Fam. Code §§ 107.003, 107.004, and 107.0131.

¹¹ Tex. Fam. Code § 107.001(3).

¹² Tex. Fam. Code § 107.004(d-1).

¹³ Tex. R. Prof. Conduct 1.03.

¹⁴ Tex. R. Prof. Conduct 1.01(b).

encourage an understanding of adolescent brain science, and recognize that the location of meetings can be important for children to effectively take in or share information.

To ensure effective communication for all, the standards of representation must include guidance for attorneys when their client has limited English proficiency, or has a disability that does not affect competency, but impacts their means of communication in some other manner (such as a hearing impairment). Standards of representation should also account for the need to meet with and counsel incarcerated parents, emphasizing that even if in-person meetings are not possible, telephonic or video conferences should be sought through a facility's proper channels. Standards should also cover virtual contacts, and best practices when it is unsafe or impractical to meet with a child if the child is placed in another area of the state. Attorneys should utilize the input of social workers and other mental health professionals on integrated teams when possible and utilize professional perspectives and guidance from those experts in case planning.

Standards should articulate that regular and effective communication is required to build a strong foundation of trust, respect, and understanding with their parent or child client that is necessary for an effective attorney-client relationship. An effective attorney-client relationship allows attorneys to carry out all of their statutory duties in a timely manner and allows for children's and parents' needs and desires to be heard and understood.

Unknown or Unlocated Clients

Identifying missing parents is not only important to comply with legal notice requirements, but it can also open opportunities for familial placement or permanent connections for the child. Standards of representation should address issues of attorney conduct if a client is unknown or unlocatable. If a parent-client is absent or missing, the standards of representation should provide guidance for due diligence in a search for that parent, taking into account Texas Family Code § 107.014. If a child-client is absent or missing, the standards of representation should provide for notification to the appropriate authorities, in addition to what encompasses a diligent search, with all appropriate follow-ups.

Effective Counseling

“Effective counseling . . . is a practice that every court-appointed attorney can provide, regardless of the circumstance of the case, whereas securing a particular outcome is often beyond an attorney's control.”¹⁵ Effective counseling includes meeting with clients before and after every hearing and leaving enough time to prepare for each hearing and debrief afterwards by explaining the legal process and reviewing legal documents in a developmentally appropriate manner. Effective counseling requires actively listening to a client's expressed objectives and understanding the reasoning behind them and

¹⁵ Children's Commission Legal Representation Study, *supra* note 5, at 58.

proactively inquiring about the client’s educational, physical, and behavioral health needs. It requires regularly communicating with other professionals on the case and other key figures in the client’s life, because an informed attorney can promptly respond to client questions and concerns about the case. When attorneys routinely engage in the above actions, the client is more likely to feel valued and respected as the expert in their own lives even if the outcome that the client desired does not ultimately occur.

Client-directed Representation & Advocacy

The Texas Rules of Professional Conduct require that all attorneys shall abide by their client’s decisions concerning the objectives of representation.¹⁶ The Texas Family Code also requires that a court-appointed attorney for a parent “abide by the parent’s objectives for representation.”¹⁷

For court-appointed attorneys for children, the rules are more complex. The Texas Rules of professional conduct still apply, but the Texas Family Code requires that an attorney ad litem “seek to elicit in a developmentally appropriate manner the child’s expressed objectives of representation” and “consider the impact on the child in formulating the attorney’s presentation of the child’s expressed objectives of representation to the court.”¹⁸ Unless specific statutory outlined exceptions apply, a court-appointed attorney for a child must advocate based on the child-client’s directives, not on what the attorney determines is in the best interest of the child.¹⁹

Standards of representation will need to articulate the difference between the client-directed model of advocacy and the best interest model for children’s attorneys. The standards should reinforce the directive that attorneys should not substitute their judgment for their clients, even when they think their clients’ expressed objectives might be detrimental to their clients’ cause, unless one of the specific statutory exemptions apply.²⁰ Instead, attorneys should use their advisory and counseling role to the best of their ability.

Confidentiality, Loyalty, and Conflicts of Interest

Confidentiality and loyalty are required elements of all good and effective representation.²¹ This is particularly true in child welfare cases where children, youth, and families have a right to privacy of their records²² and personal information and trust is vital to create a channel for shared information between attorney and client. The Texas Family Code specifically defines attorney ad litem as “an attorney who provides legal services to

¹⁶ Tex. R. Prof Conduct 1.02.

¹⁷ Tex. Fam. Code § 107.0131(H).

¹⁸ Tex. Fam. Code § 107.003(a)(1)(B-C).

¹⁹ Tex. Fam. Code §§ 107.004(2) and 107.008.

²⁰ Tex. Fam. Code. § 107.008.

²¹ Tex. R. Prof Conduct 1.05 and 1.06.

²² Tex. Fam. Code § 262.201.

a person, including a child, and who owes to the person the duties of undivided loyalty, confidentiality, and competent representation.”²³

Standards of representation must provide guidance regarding the duty of confidentiality between an attorney and their client in CPS cases. The standards must account for the fact that attorneys are mandatory reporters with regard to child abuse and neglect, and reconcile that duty with their obligations to their clients and the importance of disclosing that duty to their client.²⁴ Standards should include clear exceptions when information shared with an attorney absolutely cannot be kept confidential and should provide guidance on how to frame what is and is not considered confidential between an attorney and their child-client, as well as between an attorney and their parent-client.

The standards of representation should provide guidance regarding actions that violate the duty of loyalty and what potential conflicts of interest could occur if an attorney represents multiple children or multiple parents on the same case.

Cultural Competence

The Child Welfare League of America defines cultural competence as “the ability of individuals and systems to respond respectfully and effectively to people of all cultures, classes, races, ethnic backgrounds, sexual orientations, and faiths or religions in a manner that recognizes, affirms, and values the worth of individuals, families, tribes, and communities, and protects and preserves the dignity of each.”²⁵ Practicing cultural competency is also a method attorneys can use to address the inequities that exist in the child welfare system and the other systems that parents and youth engage with, by learning and understanding when issues arise that are due to differences in cultural values, as opposed to those that cause a child to experience abuse and neglect.

A court-appointed attorney should be aware and have a good understanding of the culture of their client and their client’s family. Being a culturally competent attorney goes beyond understanding the race, ethnicity, and/or the language of the person they represent. Cultural competency also extends into understanding the interplay of the client’s religion, education, socio- economic status, marital status, gender, sexual orientation, and age. Being a culturally competent attorney means that the attorney understands, accepts, and has learned the multiple facets of a client’s culture. This understanding will help the attorney build rapport with the client, gather more information, and represent the client more effectively. This knowledge and understanding will also help the attorney inform the court and other parties within the child welfare system about how to best serve the family.

²³ Tex. Fam. Code § 107.001.

²⁴ Tex. Fam. Code § 262.101(b).

²⁵ Bridging Refugee Youth & Children’s Services *Cultural Competency in Child Welfare Practice: A Bridge Worth Building*. Available at <https://brycs.org/child-welfare/cultural-competency-in-child-welfare-practice-a-bridge-worth-building/>.

An attorney representing parents and children should be culturally competent in their representation. Standards of representation must require training in and encourage discussions around cultural competency. Parents and children in CPS cases have a wide variety of cultural backgrounds that may differ from those of their court-appointed attorneys.

Implicit Bias

Implicit bias refers to subconscious feelings, attitudes, and stereotypes that affect our understanding, actions, and decision-making processes in an unconscious manner.²⁶ In the child welfare context, implicit bias can influence decision makers at every stage of the case in a way that can harm children and families. Standards of representation should require attorney training on the issue not only to gain an understanding of how implicit bias impacts the child welfare system, but to gain an awareness of their own implicit biases. Standards should also require that attorneys periodically review the data around disproportionality and disparities in their jurisdiction.

Independent Investigation

In addition to the statutory duty to conduct an investigation, standards of representation for court-appointed attorneys should provide specific actions necessary for an adequate investigation. Standards should make clear that out-of-court activity is just as important to achieving a successful outcome as in-court activity and should identify essential persons to be interviewed, including parties, opposing counsel, and witnesses. Standards should outline when certain tasks should be completed, and which tasks should be considered ongoing. Standards should also provide guidance as to when in-person tasks may be necessary, such as visiting a client's home. An investigation includes identifying family or friends who can care for the child while the case is ongoing to support maintaining the child's connection with family, friends, community, language, and culture.

Formal and Informal Discovery

Standards of representation for court-appointed attorneys should require attorneys who represent parents and children to conduct discovery and should provide guidance for discovery issues specific to CPS cases including all relevant records, reports, and documents (such as the child's medical and school records) as well as any expert testimony that may be needed. Standards should address how and when court-appointed attorneys should request disclosure of certain evidence per Texas Family Code § 262.014 which requires counsel for DFPS to turn over the name of any witness to be called at the Adversary Hearing, along with a copy of other evidence to be admitted, including offense

²⁶ National Council of Juvenile and Family Court Judges. (2019). Addressing Bias in Delinquency and Child Welfare Systems. Available at <https://www.ncjfcj.org/wp-content/uploads/2019/07/Addressing-Bias-Bench-Card-1-1.pdf>.

reports, photographs, videos, or recordings prior to the hearing that allows a parent to contest the removal of the children.

Some Texas counties have standard discovery control plans for CPS cases, and standards of representation should address how court-appointed attorneys should serve requests for permissible discovery under that plan at the inception of the case on every party, regardless of initial alignments. If a county does not have a standard discovery control plan for CPS cases, standards of representation should articulate that court-appointed attorneys should evaluate all discovery requests permissible under the Texas Rules of Civil Procedure. Standards should also determine whether the requests should be at the beginning or later stage in the case, in order to receive responses under the general discovery response timelines. Even if a case does not proceed to trial, information contained in discovery responses can help settle a case at mediation or provide new evidence for pre-trial motions requesting affirmative relief.

Standards should articulate when court-appointed attorneys should request and review the de-identified case file maintained by DFPS. This case file should be updated by DFPS throughout the case, with the attorney requesting regular updates prior to proceeding to trial. The case file should include all non-confidential emails sent and received by Department employees, along with all the documents about the parents and children in DFPS' possession. While some parties may not be entitled to all documents without a court order, reviewing the de-identified file is a critical step in understand the case and preparing for negotiation and trial.

Standards should also address when court-appointed attorneys for parents should maintain releases of information signed by their clients to obtain records directly from service providers. Releases are another element of proactive representation as they allow attorneys to contact service providers without coordinating through DFPS and enable attorneys to take initiative in requesting affirmative relief for their client such as a change in placement, unsupervised visitation, or a monitored return.

Pleadings

Standards of representation should address when court-appointed attorneys should file an answer and counter-petition as outlined in the Texas Rules of Civil Procedure. Standards should provide guidance regarding pleading counterclaims against other parents and DFPS, including affirmative defenses to the grounds plead for termination, claims under the Americans with Disabilities Act, requests for child support, and specific requests for conservatorship. Even if the case ends in a return to one parent, the counterclaims should preserve the right to seek child support and visitation restrictions against opposing parents. Maintaining active counterclaims protects the client's interests as it allows the suit to survive, even if DFPS nonsuits its case, because there are other live claims on file seeking alternative relief.

Court Preparation

Standards should establish that all court-appointed attorneys must engage in detailed preparation, resulting in a depth of knowledge of all facts surrounding the case for all court hearings, trials, and mediations. The attorney should interact with opposing counsel, their client, witnesses, and other parties as part of their preparation for court, not waiting until the day of court to meet and learn new case developments. Attorneys must establish a working relationship with DFPS and understand the importance of collaborating without relying upon DFPS counsel and caseworkers to gather information and the witnesses necessary to represent their clients. Each attorney should be required to create a case plan or strategy for each case that includes the securing of expert witnesses and medical records when appropriate. Preparation includes establishing pre-existing relationships with social workers, parent advocates, investigators, interpreters, and other professionals who can be called upon to assist with the case and ensures that the parent's needs and interests are represented in the development of the service plan.

Preparation also includes knowledge of case law, statutes, and DFPS policy necessary to advocate the basis for their client's position and defend their client's position against counter arguments. Preparation also includes becoming familiar with resources and services available in the client's community that can help achieve a positive outcome and the development of a workable visitation schedule that maximizes in-person contact between parent and child in an environment that is child-friendly and promotes bonding.

Additionally, court-appointed attorneys should attend all case planning meetings with their client and meet with their clients via telephone, in person, and/or virtually prior to and after every hearing.

Hearings and Trial

Standards of representation should articulate that court-appointed attorneys must possess competent courtroom trial skills, including listening, observing, and responding appropriately during proceedings. Each attorney should make appropriate arguments and objections without becoming either obstructive or overly passive to the detriment of their client. Each attorney should be familiar with the mechanics of offering exhibits, cross examination, voir dire, and opening and closing argument for jury and bench trials. Each attorney should be able to articulate their argument on behalf of their client at the beginning and end of each hearing, drawing a clear picture for the factfinder who must render the decision. Standards should articulate that attorneys must also be technologically capable, possessing the ability to effectively communicate and argue their client's positions via virtual technology for hearings and trial. Each attorney should be effective at filing, sharing, and displaying exhibits and pleadings electronically and according to the individual court procedure (known to the attorney ahead of time based on the attorney's preparation).

Post-Hearings/Appeals

The Texas Family Code states that a court-appointed attorney for a parent continues to serve in that capacity until the suit is dismissed, the date all appeals in relation to any final order terminating parental rights are exhausted, or the court relieves the attorney and replaces them with another attorney.²⁷ Appeals in child welfare cases are governed by the rules of appellate procedure for accelerated appeals²⁸ and notice of appeal must be filed 20 days after the final order is signed.²⁹

Standards of representation must address an attorney's responsibilities during this critical period. Standards should address an attorney's responsibility to notify a client of their right to appeal, to review the final orders with their client, to discuss possible grounds for appeal, and to determine whether the client wishes to seek appellate relief. If a client does wish to appeal, standards should clarify the attorney's responsibility to file a notice of appeal, file a motion for new trial if required, and request appointment of appellate counsel.

STRUCTURE OF THE APPOINTMENT SYSTEM

The structure of the appointment system for court-appointed attorneys must be designed to ensure attorneys have the ability and resources to provide quality representation in accordance with the standards of representation. In order for court-appointed attorneys to comply with standards of representation, the Task Force recommends that any system for appointing attorneys for Texas parents and children include the following structural elements.

Early Appointment of Counsel

Under the Texas Family Code, a parent who is indigent is entitled to a court-appointed attorney, but not until they appear at the Adversary Hearing in opposition to DFPS, claim indigency, and request appointment of counsel.³⁰ In contrast, the attorney representing DFPS is working the case before or by the time the petition is filed, and the child's attorney is required to be appointed immediately after the petition is filed.³¹ Prior to the Adversary Hearing, parents are often reeling from the shock of having their child taken away and afraid of the prospect of losing them forever. Parents are often experiencing a complex array of powerful emotions such as anger, frustration, shame, confusion, and helplessness. There are many opportunities during this time for the state to interact with an unrepresented parent. A parent may make crucial decisions based on fear, lack of

²⁷ Tex. Fam. Code § 107.016.

²⁸ Tex. R. App. P. 28.4.

²⁹ Tex. R. App. P. 26.1(b).

³⁰ Tex. Fam. Code §§ 107.013(a) and 262.201(d).

³¹ Tex. Fam. Code §107.012.

understanding, or even misinformation from social media or other sources without the benefit of counsel who can help them understand the impact of their actions.

The Adversary Hearing is one of the most important hearings in a child welfare case because it is likely the first opportunity the parent will have to contest the removal of their child. At this hearing, the court determines whether the child will remain in CPS custody and what steps the parents must take for the child to be returned. It is critical that court-appointed attorneys gain the trust of their clients and help them manage their emotions during this incredibly difficult period. However, a parent's attorney who is appointed the day of the hearing cannot effectively advise or strategize with their client, because they have had no time to gather information, subpoena witnesses, or communicate with opposing counsel. The court may grant a continuance to allow the attorney more time to prepare, but continuances cost additional court and attorney time, and the attorney may not be able to "un-ring the bell" of earlier decisions made without the advice of counsel. The continuance may also result in a delay of the return of the child to the parent, or a missed opportunity for placement of the child with appropriate family members from the beginning of the case.

Early appointment of parents' counsel may result in more contested Adversary Hearings, but may also result in more negotiated agreements, earlier returns, or even avoiding the need for removal altogether. Most stakeholders surveyed in the Children's Commission's 2018 Legal Representation Study, including attorneys representing DFPS, reported that early appointment of parents' counsel would have a positive impact on the quality of representation.³² For DFPS attorneys in jurisdictions that appoint parents' counsel early, a majority reported that this had a positive effect on the direction of the case and only ten percent reported a negative effect.³³

The delay in the appointment of counsel creates a power imbalance against parents at the very outset of the case. Attending court without an attorney, and not understanding legal rights and options, means parents begin the case with a deficit of knowledge, power, and trust in the system charged with attempting to reunify them with their children. Accordingly, the structure of an appointment system should include appointment of an attorney for a parent when the petition is filed.

Multidisciplinary Support

Child welfare cases are unique in the legal field for including two distinct and equally important components – legal and social services. Both are critical for the success of a case, but each requires a different set of skills. Parents and children's attorneys benefit from having access to multidisciplinary support to successfully manage both tracks.

³² Children's Commission Legal Representation Study, *supra* note 5, at 23.

³³ *Id.* at 24.

Making multidisciplinary resources available to court-appointed attorneys can provide for a more equitable defense, while also freeing up an attorney's time to focus on legal issues.

[Social Workers and Parent Advocates/Peer Mentors](#)

Licensed social workers provide the skills, knowledge, and problem-solving abilities to facilitate better communication between parents and child protective services (often the most challenging and critical aspects of a case), find services targeted toward a parents' or child's specific needs, and help provide support and resources to successfully reunify the family and prevent them from returning to the system. Parent advocates/peer mentors are often parents with prior experience in the child welfare system, or youth who have aged out of care and can provide the insight and support of a person who has lived experience with the system.

Unique to CPS cases, critical decisions and important information is disseminated during non-courtroom meetings and conferences. These meetings are geared toward the social work aspect of the case, such as the parent's progress in services or treatment. If social workers and/or parent advocates attend these meetings instead of attorneys, it achieves multiple benefits. Not only are they able to provide their own expertise and skills at these meetings, but it also frees up the attorney's time. With the additional time, attorneys can focus on the legal aspect of their cases.

[Investigators](#)

From the inception of a case, DFPS has personnel to devote to investigation matters. The investigative case worker is responsible for thoroughly investigating the family's situation prior to filing the petition, the conservatorship caseworker continues to gather information after the petition is filed, and both the investigative and conservatorship caseworkers are able to testify in court. The attorney representing DFPS analyzes the information to make legal determinations but is not responsible for conducting an investigation before or after the petition is filed. Without investigators or support staff, court-appointed attorneys must conduct investigations on their own, which takes time away from legal work, risks missing important facts, and decreases the number of cases they can handle. Conducting their own investigations also risks making the court-appointed attorney a fact witness on the case. However, with access to a dedicated investigator, court-appointed attorneys are better able to assess the strengths and weaknesses of their case, uncover facts not found by DFPS, and better advise their clients on the best course of action. An equally balanced investigation can help provide the court and the parties with a more complete view of the facts, help the parties negotiate on more equal footing, and help the judge make a better-informed decision.

[Experts](#)

Court-appointed attorneys must have access to expert witnesses in parity with DFPS and be able to do so without having to request a judge's permission. DFPS does not have

unlimited resources for experts, but it may have the ability to contract and pay experts without court approval or county funds. CPS cases can involve volumes of detailed medical records and imaging and attorneys are not trained to understand this information. In order to put on a fair and proper defense in these cases, an attorney must have access to medical experts who are up to date with the ever-changing science around child abuse and neglect. Without a thorough review of records in these cases, an attorney is vulnerable to a possible malpractice lawsuit, and without robust challenges to proffered evidence, courts may not receive all the information needed to make a sound decision.

Access to Resources

A lack of access to equitable resources can lead to conflict between the attorney's interest and the client's interest. The Children's Commission 2018 Study of Court-Appointed Legal Representation in CPS Cases found that 70% of attorneys reported feeling inadequately compensated for their work, and 57% of surveyed attorneys reported deliberately underbilling for the number of hours spent on their cases.³⁴ Some attorneys expressed concern that billing for the amount of work necessary to provide adequate representation may result in them receiving fewer court appointments if the court deemed them to be too expensive.³⁵

Fear of the consequences of requesting resources may lead attorneys to neglect the crucial multidisciplinary needs of clients in DFPS cases. Although resources for attorneys representing DFPS are limited, ensuring more equitable resources between DFPS and court-appointed attorneys allows for clients to receive well-rounded legal services and for judges to receive thorough and balanced information so they can make well-informed decisions that are specific to each family.

Caseload Tracking and Limits

The appointment system structure must have some measure of tracking attorneys' caseloads and limiting those caseloads so that attorneys can provide quality representation. A reasonable attorney caseload ensures that attorneys have adequate time per case to engage in quality representation practices such as conducting an investigation, out-of-court advocacy, meeting with clients, and preparing for court hearings.

Incentives for Compliance

Attorney compensation should be viewed through the lens of incentivizing compliance with standards of representation. Paying court-appointed attorneys' hourly rates, rather than flat fees per-case or per-hearing aligns with the standard of rigorous investigation, discovery, and preparation prior to each proceeding as the amount of compensation

³⁴ Children's Commission Legal Representation Study, *supra* note 5, at 45-46.

³⁵ *Id.* at 47.

aligns with the amount of work performed. The hourly rate must be reasonable for the community so that the appointment system can attract and maintain a pool of qualified attorneys who meet the required standards. Equal pay between in-court time and out-of-court time also aligns with rigorous investigation, discovery, and preparation by the attorney.

Compensation for Travel Time

Attorneys for both parents and children have a duty under the Texas Family Code to meet with their client prior to each court hearing. While a parent can be reasonably expected to travel to their attorney for the required meeting, an attorney for a child must travel to the child unless good cause exists why the meeting is not feasible or is not in the child's best interest.³⁶ Despite the statutory obligation, the Children's Commission 2018 Study on Court-Appointed Legal Representation found that only 20% of youth surveyed reported that their attorney always visited them before each hearing and 29% reported that they had not seen their attorney in over a year.³⁷ The same study found 48% of attorneys surveyed reported that they are not compensated for travel time.³⁸

Compensation for travel time aligns with the standard that an attorney must meet their statutory duty to meet with their client prior to each hearing. This is especially critical for court-appointed attorneys for children who must often travel to the client's home or school to comply with their duty.

For an appointment system to be successful in implementing quality representation, the compensation structure for attorneys should include payment for their compliance with their duty to meet with the client. While virtual meetings with child clients via video conference may become more common in the future, a good cause finding by the court is still necessary for an attorney to substitute a video conference meeting for an in-person meeting with a client.³⁹ The structure should provide clear guidance of when good cause should be requested.

Training

A system of appointing attorneys for parents and children should require that attorneys receive training in compliance with the standards of representation. The system should equally ensure attorneys have access to necessary and appropriate training. The core trainings that meet requirements set by the standards of representation should be identified and be both affordable and accessible to attorneys across Texas. In addition to core trainings required by the standards, attorneys should have access to ongoing training to ensure they are aware of relevant case law and legislative updates as well as

³⁶ Tex. Fam. Code §§ 107.0131(a)(1)(G), 107.004(d).

³⁷ Children's Commission Legal Representation Study, *supra* note 5, at 61.

³⁸ *Id.* at 43.

³⁹ Tex. Fam. Code § 107.004(e).

current best practices. Specialized trainings that address issues specific to parent representation and those that are specific to child representation should be accessible so that attorneys can tailor their skills to the needs of their clients. Local trainings with local presenters should be utilized to both keep cost low and ensure that such trainings cover local court practices and procedures.

Recruitment and Retention

Given the gravity of decisions made in child welfare cases, it is essential that Texas attract and maintain attorneys with expertise in representing children and parents. Therefore, an appointment system for court-appointed attorneys in CPS cases must include a process by which attorneys qualify for appointment and provide incentives for attorneys to develop the expertise necessary to handle these complex cases.

Such a process can and should have several “on ramps” to qualification. The Texas Board of Legal Specialization created a certification in Child Welfare Law in 2018. Attorneys who have attained this specialization or who have obtained a similar certification, such as the Child Welfare Law Specialist (CWLS) certification through the National Association of Counsel for Children, should be considered to automatically qualify for appointment. Another example of an “on ramp” is a mentorship program whereby a new attorney is matched with a certified attorney to complete a set number of hours assisting with child welfare cases before being qualified to handle cases on their own. Jurisdictions may also wish to develop an intensive Continuing Legal Education “boot camp” in child welfare law to allow attorneys to qualify for appointment while obtaining required CLEs. Finally, as a way to incentivize the participation of high-quality attorneys, jurisdictions should consider offering additional incentives like CLE credit for mentorship or pro-bono representation.

Virtual Representation

While direct, in-person representation is the preferred method to serve clients in the child welfare system, the COVID-19 pandemic has forced the legal field to re-examine the benefits and drawbacks of virtual participation in the legal system. Even prior to the pandemic, Chad Burton, chair of the American Bar Association, articulated some of the benefits of virtual representation, saying “The focus of a virtual practice is about introducing and enhancing the concept of ‘mobility’ into the attorney client relationship—both for the attorney and the client.”⁴⁰ Virtual representation for children and parents can be a benefit not only to the attorney-client relationship, but to the overall goal of achieving safety, well-being, and permanency for children.

⁴⁰ Law Practices Division Futures Initiative, March 22, 2017. Available at <https://aemdev.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/the-virtual-practice-of-law/>.

Virtual representation enables many child-clients to engage with their attorneys within the child's own environment, which can result in more meaningful and open conversations. Video conferencing platforms allow clients to show their attorneys a virtual tour of their environment, allowing attorneys to see what really matters to youth in their physical space and see whether youth are truly comfortable and at ease while in their placement.

Virtual representation also allows parent-clients to meet with their attorneys without having to miss work, allowing them to maintain their employment. Indigent parents are often reliant on public transportation and video conferencing technology can reduce the burden of arranging a face-to-face meeting. Parents are also able to meet attorneys in locations that are comfortable to them and that do not require them to enter spaces like a courthouse where they may feel distrustful or uncomfortable, or be at risk of arrest for legal issues extraneous to the child welfare case. Though extraneous legal issues may still affect the parent's child welfare case, their presence in the hearing can help the court evaluate the parent's progress in their service plan, help the parent understand the legal process, and allow the parent to provide family history and placement options for the child.

Virtual representation may also increase access to quality and efficient representation for clients in rural jurisdictions who may face challenges in providing legal services. Children and parents in jurisdictions with fewer attorneys will have access to attorneys located in other places via virtual representation. Clients in remote locations, or facilities that do not allow clients to leave or visitors to enter (such as rehabilitation centers or jails), can have more frequent and meaningful contact with their attorney through virtual visits and consultations, helping to ensure the representation is client-driven. Less travel time means more time and opportunity for attorneys to prepare for meetings, consultations, mediations, and hearings. Additionally, attorneys can use virtual resources to ensure that parents, children, and siblings are able to have meaningful visitation time where it would otherwise be difficult, such as when a family member resides out-of-state. Virtual representation also presents an opportunity for systemic cost savings by cutting attorney travel time, particularly for attorneys who practice in multiple rural jurisdictions.

Virtual representation is not without significant challenges. Tablets, laptops, and other technology are not always affordable or accessible to all clients, all attorneys, and all witnesses; and inevitably, there will be issues with inoperability and compatibility of various systems and certain forms of virtual connectivity may not be appropriate for individuals with specific disabilities. Texas also has many geographic areas that do not have internet access or other forms of stable connectivity. Access to technology is not the only concern about virtual representation that must be addressed. Maintaining confidentiality when meeting a client is paramount and it can be difficult for attorneys to know if a client is alone (for example, during a meeting with a child-client, whether a foster

parent is sitting outside of a camera's view listening to the entire conversation). These challenges must be addressed to fully realize the benefits of virtual representation.

Accountability

Quality representation will be defined by standards of representation and enabled by appointment system structures, but accountability measures are required to ensure that quality representation is being delivered to Texas parents and children. Accountability allows attorneys who comply with standards and provide quality representation to be identified and maintained in the system and allows attorneys who do not comply with the standards or provide inadequate representation to be identified and removed from the system. Accountability can be ensured in many ways, but all methods must have the information necessary to evaluate attorney performance, the time and resources to evaluate attorneys effectively and regularly, and a process for the evaluation to be fair and objective.

Data Measurement

Data that allow attorney performance to be measured is a key aspect of accountability. If tasks that are required by the standards are identified and tracked through a billing or time keeping system, that data can then be reviewed to evaluate the attorney's practices against the standards of representation. An attorney's compliance with their duty to investigate can be evaluated when accessible data show the frequency and timeliness of witness interviews, record requests, or requests for expert evaluation or testimony.

Client Feedback

To ensure quality representation, a system of appointment must have some ability for clients to provide confidential feedback about their experience with the legal representation provided by the system. Opportunities may take the form of a dedicated ombudsman to field complaints, post-representation surveys, focus groups, or randomized audits. Whatever the methods used, both the clients and attorneys should be made aware of the process and how it works.

Regular Evaluation

To be effective, accountability must include meaningful and regular evaluation of attorney performance. A system of delivering representation must be structured so that it is clear who is responsible for evaluating attorney performance and what the process or routine is for attorney evaluation. Also, it is critical that those assigned to do the evaluation have the time and resources necessary to carry out their responsibility.

Fair and Objective

Evaluation of attorney performance must be fair to the attorney, the client, and the taxpayers who fund the court-appointment system. Clients must be aware of the accountability measures that are in place and the available methods of providing feedback. Attorneys must understand the process by which they will be evaluated, and the process must be as objective as possible. If there is an issue with attorney performance, there should be due process for attorneys to correct or address the issue. The public should have access to performance measures to ensure that they are getting value for the funds spent on court-appointed representation.

MODELS EXAMINED BY THE TASK FORCE

To achieve the long-term goal of providing quality representation to every Texas parent and child who receives a court-appointed attorney, the Task Force examined models of representation implemented in jurisdictions across the country which are designed to deliver high-quality representation in order to see how those models aligned with the necessary standards, structure, and accountability identified by the Task Force.

CONTRACT FIRM MODEL

This model of representation utilizes private law firms or non-profit organizations that contract to provide services in a given county. The amount of the contract is allocated based on the caseload of the county being served and each county then establishes its own system of assigning counsel. Contracts are awarded by a cyclical competitive bidding process. As part of the contract, attorneys must comply with practice standards and participate in yearly trainings. Peer surveys are given to clients, agency counsel, judges, children's attorneys, parents' attorneys, and opposing counsel.

Examples

California

The California Dependency Representation, Administration, Funding and Training Program (DRAFT) was established in 2004. The DRAFT Program includes the following components: attorney caseload standards of 188-200 clients per attorney (this caseload level assumes a half-time social worker/investigator per full-time attorney); regional compensation standards; attorney performance standards; attorney reporting requirements regarding time spent on in-court and out-of-court activities; training and technical assistance for attorneys; and outcome evaluations, including attorney evaluations completed by judges, peers, and clients and permanency evaluations using reunification, guardianship, and placement data.

Representation models vary in each county, and include private firms, government agencies, solo practitioners, and non-profit organizations. Representation providers also vary in geographic coverage with some organizations providing representation in multiple counties, and some counties contracting with multiple provider organizations.

Meeting with Providers

The Task Force hosted a question-and-answer session with David Meyers, Chief Operating Officer of Dependency Legal Services, a non-profit that holds contracts to represent parents and children in eight northern California counties.

Dependency Legal Services website: <http://dependencyls.com/>.

Advantages of the Model

Flexibility

Firms can contract to provide representation in a manner that caters to the needs of the county. States can use the various contracts to try to evaluate the efficiencies of different methods.

Cost Efficiency

A competitive bidding process may create pressures to ensure that representation is delivered in the most cost-effective manner possible.

Disadvantages of the Model

Inconsistency

Different methods of representation rely on different structures and incentives that can result in inconsistent levels of quality across the state, and even within a county.

High Caseloads

Bidding processes for contracts can incentivize high caseloads to reduce costs and make bids more competitive, but negatively impact quality. The Judicial Council of California established a recommended a caseload standard of 188-200 cases that is significantly higher than caseload standards in other models, and many California counties carry average caseloads substantially in excess of the recommended number and with some as high as 500-800 cases per attorney.⁴¹

⁴¹ ABA Center on Children and the Law. (2020). *Effects of Funding Changes on Legal Representation Quality in California Dependency Cases* at 3. Available at https://www.americanbar.org/content/dam/aba/administrative/child_law/calrep-assessment.pdf.

INSTITUTIONAL OFFICE MODEL

The institutional office model of representation can take the form of a government office or a non-profit corporation that employs salaried staff attorneys who provide legal representation in conjunction with on-staff, multidisciplinary professionals to provide clients with comprehensive services.

Examples

New York, NY

Center for Family Representation, Inc., (CFR) in New York, New York provides comprehensive representation to parents involved in the child welfare system. CFR employs an institutional model of representation and has a salaried staff of experienced attorneys, social workers, and parent advocates. CFR's operating revenue is derived from government contracts for parent representation and support from private foundations, corporations, and individuals.

CFR website: <https://www.cfrny.org/our-work/>.

The Bronx Defenders employs an institutional model of representation and has a salaried staff of lawyers, investigators, social workers, and parent advocates. Every parent is paired with an interdisciplinary team of lawyers, social workers, and parent advocates. The Bronx Defender's representation model includes advocacy in court and out-of-court. The interdisciplinary team works to develop comprehensive service plans ensuring that meaningful services are in place to provide the parents with critical supports. Additionally, the Bronx Defenders includes different legal units each proficient in a different area of law, so clients often benefit from legal assistance from the other units (such housing or criminal defense) in resolving important collateral issues that arise in their cases.

Bronx Defenders website: <https://www.bronxdefenders.org/our-work/family-defense-practice/>.

Philadelphia, PA

Community Legal Services, Inc., (CLS) in Philadelphia provides court-appointed representation to many parents in Philadelphia. CLS's Family Advocacy Unit is an institutional model of representation, employing a staff of attorneys, social workers, and paralegals who receive significant training and supervision. Most CLS clients are assisted by a lawyer and a paralegal or social worker, so that the client has the benefit of intensive legal and social work assistance. Where possible, CLS represents families both in the investigation stage of the case (before a petition has been filed) and throughout the case (after a petition has been filed and/or a parent's child has been removed from the home). Like the Bronx Defenders, CLS also includes different legal units such housing or criminal

defense which can assist clients in resolving important collateral issues that arise in their cases.

CLS website: <https://clsphila.org/services/dhs-cases-parents-only/>.

Meeting with Providers

The Task Force hosted a question-and-answer session with Scott Constantine of the Travis County Juvenile Public Defender's Office (and formerly with the Bronx Defenders); Christine Bruno from the Center for Family Representation in New York City; Kathleen Creamer, Managing Attorney with the Family Advocacy Unit of the Community Legal Services of Philadelphia; and Martin Guggenheim, Fiorello LaGuardia Professor of Clinical Law at NYU School of Law.

Advantages of the Model

Comprehensive and Specialized Legal Services

Attorneys working in the institutional offices specialize in child welfare cases and represent only clients in those matters, allowing the office to develop institutional knowledge and expertise. The attorneys are supported by multi-disciplinary staff who are also salaried employees, allowing clients to receive legal services from a unified team. Supervising attorneys and colleagues allow the staff to collaborate on complex cases and to appear in court for one another when a principal lawyer is unavailable. Offices that encompass multiple legal units such as housing or criminal defense can offer unified concurrent representation if clients are involved in multiple systems.

Structural Oversight

Oversight of attorney performance comes from within the organizational structure. The competitive hiring process allows selection of highly motivated applicants and performance incentives, reviews, and requirements are set by the office.

Independence from Court

Office attorneys are assigned to a case by the office rather than the court, limiting the discretion of judges to appoint specific, individual attorneys. This reduces favoritism and conflict of interest for attorneys and judges.

Disadvantages of the Model

Infrastructure and Overhead

The physical space needed for an office along with the salary and benefits of staff can be significant ongoing expenses that might be cost-efficient in larger metropolitan areas with high caseloads and more resources but would be very challenging to implement in smaller and mid-sized jurisdictions. As with the contract firm model, cost-efficiency pressures may result in high caseloads which creates a time pressure that conflicts with best practices.

Conflicts of Interest

The American Bar Association Model Rules of Professional Conduct forbid an attorney from representing opposing parties on a case or representing multiple parties in the same case if the parties' interests are adverse.⁴² While the Texas Family Code does allow for one attorney to represent both parents in some instances, CPS legal cases usually require an attorney for each parent, including an attorney for each father if the children have different fathers. Cases involving more than one child may also require different attorneys for different children if the children's interests are adverse. These rules can result in three or more court-appointed attorneys on a case.⁴³

The Rules of Professional conduct apply the same conflict of interest rules to an office as to an individual attorney, meaning that the institutional office model is limited to only representing one party in a CPS case.⁴⁴ The other attorneys on the case must be either from a different institutional office or from the wheel of court-appointed attorneys. The model has limitations as a vehicle to universally raise the quality of representation across the state, as even the largest Texas cities would find it challenging to create enough different offices to address all of the conflicts.

OVERSIGHT AGENCY MODEL

In an oversight agency model, the power and responsibility for selecting attorneys available for court appointments lies with a central agency rather than individual courts. The agency sets the qualifications which attorneys must have to receive appointments, determines the fee schedule for paying attorneys, approves attorney applications to receive appointments, and reviews attorney performance. The appointed attorneys are not agency employees, but contract with the agency to provide services. The courts retain the authority to appoint attorneys, but the attorneys appointed must be from the agency's list of approved contractors.

Examples

Colorado

Office of Child's Representative (OCR) was established in 2001 as a state agency that administers court-appointed representation of children in Colorado. The OCR is responsible for the legal representation of children, establishing rates of compensation for attorney services, setting minimum practice and training standards, and working with the state CASA.

⁴² ABA Model Rules of Prof'l Conduct R. 1.7 (2020).

⁴³ Tex. Fam. Code § 107.013(b).

⁴⁴ Tex. R. Civ. P. 106.

The OCR conducts an annual review of the competency and quality of attorney services as well as the validity of any concerns. Attorneys annually apply to OCR and each application is individually reviewed. The annual review includes distributing surveys to all CASA agencies, court facilitators, administrators, and judicial officers, as well as conducting visits to each judicial district. During visits, the OCR staff meet with attorneys under contract, interview new applicants, and interview court personnel, judicial officers, and CASA directors. Annually, a list of attorneys eligible for appointment is compiled and distributed to each judicial district.

OCR website: <http://www.coloradochildrep.org/>.

The Office of Respondent Parents Counsel, modeled on the Office of the Child's Representative, was established in 2016 and provides legal representation for indigent parents in dependency and neglect proceedings.

ORPC website: <https://coloradoorpc.org/>

Washington

Founded in 2000, the Washington State Office of Public Defense (OPD) Parent Representation Program provides state-funded attorney representation and case support services to indigent parents, custodians and legal guardians involved in the child protection system. Key elements of the OPD parent representation program include reasonable compensation for attorneys, reduced caseloads, access to independent social worker staff, access to expert and investigative resources, periodic attorney trainings, and oversight of attorneys' performance. Originally a four-county pilot program, OPD now operates in all of Washington's 39 counties.

OPD website: <https://www.opd.wa.gov/program/parents-representation>.

Meeting with Providers

The Task Force hosted a question-and-answer session with Joanne Moore, Director of the Washington State Office of Public Defense to discuss how the model might work in Texas.

Advantages of the Model

Continuity with a Private Practice Based System

Replacing a county-based system with an oversight agency as the contracting entity is less disruptive to attorneys and courts than an institutional office or contracting firm model. Additionally, this model eliminates any potential conflicts of interest between the court-appointed attorney and the judges making the appointments. Since attorneys remain contractors rather than employees, there is no conflict of interest in appointing multiple agency-contracted attorneys to the same case.

Quality Metrics Would Be Achieved Statewide Through Efficiency of Scale

If the agency model is implemented statewide, the effects would accrue statewide, reducing the disparities in the quality of representation between jurisdictions. Consolidating appointment and oversight responsibility into one dedicated agency relieves individual jurisdictions from maintaining their own appointment, oversight, and payment systems. Fee schedule rates would be standardized by the agency but could still be adjusted by cost of living in the region. Contracts could also be adjusted by region to incentivize board certification, language skills, or practicing in underserved jurisdictions.

Disadvantages of the Model

Reduced Community Control and Flexibility

A statewide oversight agency would require the creation of a significant new government bureaucracy. The advantages of the model's efficiency of scale come at the cost of local control and flexibility. Establishment of a statewide oversight office could be inconsistent with Texas's current Community Based Care model of increasing regional control over CPS cases to bring decision-making closer to communities.

Contractor rather than team-based representation.

Although the model can provide access to multidisciplinary support for attorneys, the support must come through contracted social workers, investigators, or other advocates and may lack the cohesive team-based approach of the institutional office model.

HYBRID MODEL

A hybrid model of representation combines elements of the institutional office model and the oversight agency model. An office or agency provides representation directly through salaried employees in larger metropolitan areas, but the same agency also approves contract attorneys for appointments in other jurisdictions.

Examples

Massachusetts

The Committee for Public Counsel Services (CPCS), a state agency, is responsible for providing legal services to the indigent in civil and criminal matters. The Children and Family Law (CAFL) Division of CPCS oversees all court-appointed child welfare attorneys. Approximately 90% of dependency cases are handled by a panel of specially qualified private attorneys overseen by CAFL. Staff attorneys in seven offices handle the remaining 10% of the cases. To be eligible for the private attorney panel, attorneys must apply to CAFL. Attorneys who satisfactorily complete the trainings and are eligible to be on the panel must also work with a mentor attorney for at least 18 months. Attorneys are compensated at the same rate for both in-court and out-of-court work and cannot have

more than 100 open cases. Attorneys can hire social workers and investigators to assist with their cases. CAFL oversees attorneys for both children and indigent parents, and all private panel and staff attorneys have a mixed caseload. Attorneys are compensated at the same rate for representing parents and children.

CAFL website: <https://www.publiccounsel.net/cafl/>.

North Dakota

The Commission on Legal Counsel for Indigents (LCI) oversees all indigent defense in North Dakota, including parent representation in child welfare cases. There are six public defender offices in the state and the remaining defense services are provided by attorneys who have contracted with LCI to provide representation to indigent clients, including parents. LCI was established by the legislature to be an executive branch state agency overseeing legal services to indigent clients. LCI was established as an independent body to separate the judiciary from the delivery of indigent services and avoid the appearance of conflict. LCI sets statewide eligibility, compensation, training, and practice standards for attorneys representing parents in child welfare.

LCI website: <https://www.indigents.nd.gov/>.

Meeting with Providers

The Task Force hosted Mike Dsida, Deputy Chief Counsel of the Massachusetts Committee for Public Counsel Services Children and Family Law Division, and Travis Finck, Executive Director of the North Dakota Commission on Legal Counsel for Indigents, for a question-and-answer session discussing how the model might apply in Texas.

Advantages of the Model

The model has the advantages of both the institutional office and oversight agency models.

Disadvantages of the Model

The model may have significant financial costs in establishing an entity large enough to provide both sets of services.

QUALITY REPRESENTATION DATA

The Task Force examined both the existing data and research on quality representation of parents and children and considered how implementation of quality representation would impact the child welfare system in Texas.

DATA & RESEARCH ON QUALITY REPRESENTATION

The complexities of child welfare cases often make it challenging to correlate practices by attorneys and courts to case outcomes because of the difficulty of isolating those factors from other possible contributing factors. However, a growing body of research has identified that specific types of quality representation can be shown to have positive effects on case outcomes, such as reducing the time children spend in the foster care system and increasing the number of children reunified with their families.

New York

[Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare](#)

This study assessed the causal impact on child welfare outcomes when parents facing an abuse or neglect case in the New York City Family Court were provided interdisciplinary law office representation as opposed to representation by a solo practitioner appointed from a panel of approved attorneys.⁴⁵ The offices in the study included the Center for Family Representation, the Family Defense Practice of Brooklyn Defender Services, and the Bronx Defenders. Using administrative child welfare data, the study assessed the foster care and safety outcomes of 9,582 families and 18,288 children from 2007 to 2014.

The study was able to isolate the impact of the interdisciplinary law office approach because the New York City court-appointment system addresses issues like timely appointment of attorneys, selection criteria for attorneys, caseload and practice standards, attorney compensation, ongoing training, and oversight for both panel and office attorneys. Children whose parents were served by the interdisciplinary representation model spent on average 118 fewer days in foster care than those who were served by a panel attorney. The study found no evidence that interdisciplinary parental representation impacts the likelihood of children experiencing a subsequent substantiated report of child maltreatment. The study estimated an annual projected savings of 40 million dollars for the cost of approximately 4,000 children who enter foster care each year in New York City.

Washington

Washington State Office of Public Defense Parent Representation Program (PRP) that was evaluated by the Models of Representation Subcommittee has been the source of several studies. Washington implemented the PRP as a pilot in 2000 in four counties and incrementally expanded the PRP until it covered the entire state in 2019. The gradual phase-in of the PRP program across Washington allowed for two large, third-party evaluations of the outcomes for children in counties before and after PRP was

⁴⁵ Gerbera, L., Panga, Y., Rossa, T., Guggenheim, M., Pecorac, P., and Millerd, J. (2019). Child and Youth Services Review. *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*.

implemented, and the outcome differentials between PRP and non-PRP counties. In 2009, a study by PRP in consultation with the Washington State Center for Court Research found that after the implementation of PRP, 15 counties experienced a 10% increase in family reunification and a 11% increase in cases which resolved within 28-31 months in care compared to their pre-PRP outcomes.⁴⁶ In the 14 non-PRP counties, there was a 1% decrease in reunifications and a 1% increase in timely case resolutions in the same time period.⁴⁷

Reunifications in post-PRP counties also proved more enduring than those made previously. After counties adopted PRP, the rate of refiled abuse or neglect cases within one year for reunified families dropped from 5% pre-PRP to 3% post-PRP and dropped from 8% to 5% for refiled within two years.⁴⁸ A second study by the University of Washington which followed 12,104 children between 2004 and 2008 revealed a reunification rate that was 11% higher for children living in PRP counties. Additionally, the study estimated that the children in PRP counties achieved reunification one month sooner than non-PRP counties and children who were adopted or placed in guardianship achieved those outcomes one year sooner than children in non-PRP counties.⁴⁹

Texas

[Legal Representation in the Juvenile Dependency System: Texas's Parent Representation Pilot Project](#)

Beginning in 2009, the 126th District Court in Travis County began a parent representation pilot project, appointing attorneys at the time of the filing of a petition, with the goals of improving informed decision making, improving parent understanding and involvement in cases, identifying family members early in cases, and reducing costs for legal fees paid for indigent representation. In 2013, staff from the National Council of Juvenile and Family Court Judges (NCJFCJ) designed a data collection instrument and conducted case file review to determine the pilot project's impact on outcomes, attorney and parent presence at court hearings, and timing of key court events.

The study found that attorneys appointed earlier in cases were more likely to be present at key hearings throughout the case. Also, parents who received counsel early in their cases were more likely to have their cases dismissed or their children returned. Children

⁴⁶ Wash. State Office of Pub. Def. (2010). *Reunification and Case Resolution Improvements in Office of Public Defense Parents Representation Program Counties* at 2-3. Available at: http://www.opd.wa.gov/documents/0049-2010_PRP_Evaluation.pdf.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 7.

⁴⁹ Courtney, M.E. and Hook, J.L. (2011). *Evaluation of the Impact of Enhanced Parental Legal Representation on the timing of Permanency Outcomes for Children in Foster Care*. Seattle: Partners for Our Children at the University of Washington. Available at: https://partnersforourchildren.org/sites/default/files/2011._evaluation..._impact_of_enhanced_parental_legal_representation....discussion_paper.pdf.

involved in the pilot cases were placed with relatives more frequently and their cases reached final orders without permanent managing conservatorship being transferred to DFPS.⁵⁰

Cost of Legal Representation

Until 2019, there was no requirement for counties to report their expenditures for court-appointed legal representation for parents and children. To estimate the total statewide spending on court-appointed attorneys for parents and children in CPS cases, in 2011 the Children's Commission conducted a survey of 28 sample counties, covering both rural and urban regions across Texas. The sample counties comprised 54% of Texas' population and 51% of the children in DFPS' conservatorship. The sample data were extrapolated using both the ratios for population and children in DFPS' conservatorship and it was estimated that counties spent between \$34.6 and \$36.6 million in CPS cases in 2009.⁵¹

For the 2018 Children's Commission Study, the Office of Court Administration (OCA) provided data reported by counties pursuant to Texas Government Code Section 36.004, enacted by the 84th Texas Legislature. Chapter 36 requires the clerk of each court to submit a report to OCA each month on court appointments for attorneys ad-litem, guardians ad-litem, mediators, and competency evaluators.⁵² There is no requirement to identify whether the case is a CPS case, whether the attorney represents a parent or a child, or whether the attorney represents more than one child in any given case. Despite the reporting requirement, the exact amount of money spent on court-appointed attorneys per child in CPS cases is still difficult to estimate. However, using the data provided under Chapter 36, OCA and the Children's Commission estimate that at least \$56 million was paid to attorneys appointed to parents and children in CPS cases across the state in Fiscal Year 2017.⁵³ In Fiscal Year 2017, there were 50,293 children in DFPS conservatorship.⁵⁴

In 2019, the 86th Texas Legislature passed Senate Bill 560 that requires counties to report on the amount of money spent on court-ordered representation for parents and children, as well as the fee schedule by which they are paid, and the appointment system used by

⁵⁰ National Council of Juvenile and Family Court Judges Juvenile Law Programs. (2013). *Assessing a Parent Representation Program in Texas*, at 10. Available at https://www.ncjfcj.org/wp-content/uploads/2013/07/FINAL_TX-Attorney-Representation-Pilot-Program-Report.pdf.

⁵¹ Supreme Court of Texas Permanent Judicial Commission for Children, Youth and Families. (2011). *Legal Representation Study: Assessment of Appointed Representation in Texas Child Protection Proceedings*, at 80. Available at: <http://texaschildrenscommission.gov/media/1143/lrs.pdf>.

⁵² Tex. Gov't Code § 36.004(a).

⁵³ Children's Commission Legal Representation Study, *supra* note 5, at 110.

⁵⁴ DFPS Data Book CPS Conservatorship: Children in DFPS Legal Responsibility. Available at: https://www.dfps.state.tx.us/About_DFPS/Data_Book/Child_Protective_Services/Conservatorship/Children_in_Conservatorship.asp.

the county.⁵⁵ Data collection will begin in Fiscal Year 2020, and preliminary data will become available the fall of 2021.

Cost of Foster Care and Non-Reunified Legal Permanency

It is difficult to measure the exact financial cost of removing a child from their parent and placing them in substitute care. However, some associated costs are quantifiable. In Fiscal Year 2019, the total DFPS budget was \$1,800,990,230 for protecting children through an integrated service delivery system. In Fiscal Year 2019, there were 51,417 children in DFPS conservatorship and DFPS spent \$528,600,493 on licensed foster placement and residential operations and \$29,552,074 on relative care placements.⁵⁶

Additionally, Texas incurs certain ongoing financial obligations when children are not reunified with their parents. Children adopted from DFPS conservatorship may qualify for adoption assistance payments, and children placed in the legal custody of relatives may qualify for permanency care assistance (PCA) payments.⁵⁷ Texas spent \$291,938,070 on all such payments for 56,334 children in Fiscal Year 2019. The payments begin after the adoption is finalized or the relative conservatorship agreement is signed and continue as a financial obligation until the child is 18. The charts below illustrate how the financial costs of foster care and adoption/PCA subsidies have changed over the past decade.

⁵⁵ Tex. Gov't Code § 71.03555.

⁵⁶ DFPS Budget and Finance Monthly Financial Reports. Available at: https://www.dfps.state.tx.us/About_DFPS/Budget_and_Finance/default.asp.

⁵⁷ Tex. Fam. Code §§ 162.304 and 264.852.

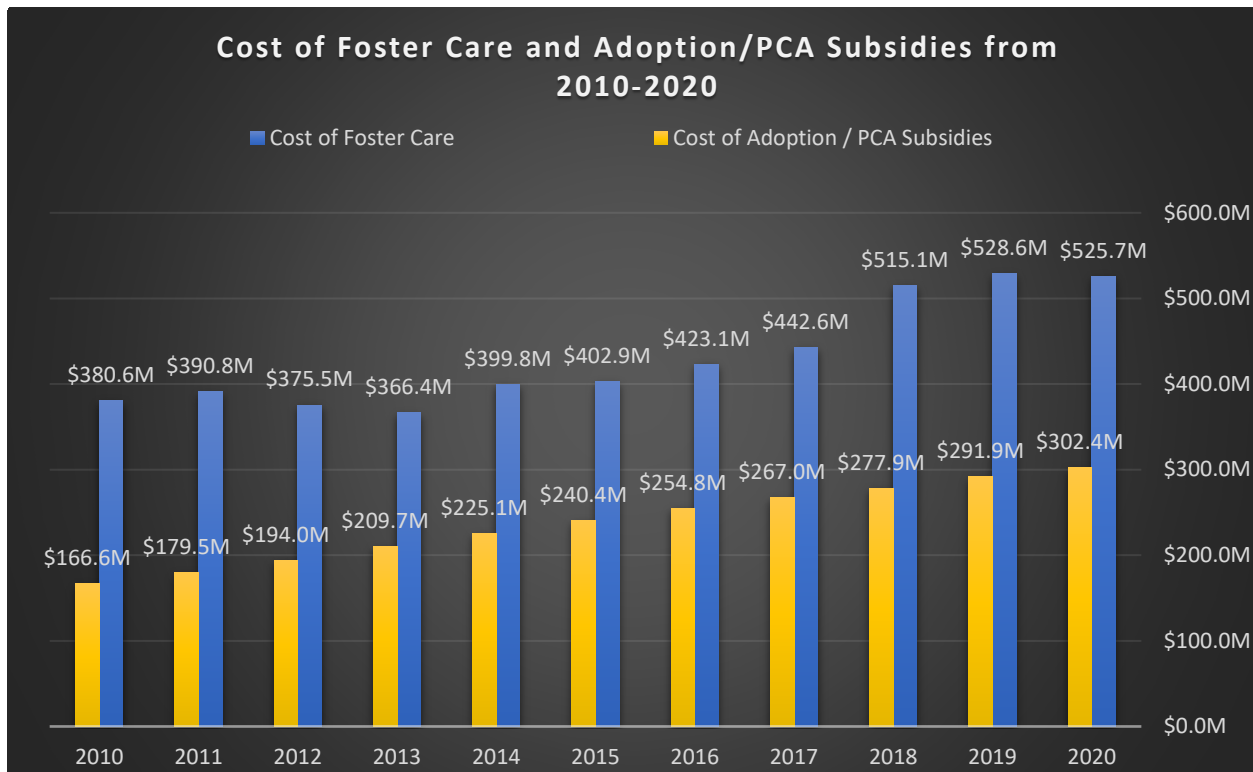


Figure 1 https://www.dfps.state.tx.us/About_DFPS/Budget_and_Finance/default.asp

HOW QUALITY REPRESENTATION COULD IMPACT TEXAS

It is difficult to estimate precisely how raising the quality of representation will fully impact the Texas child welfare system. The impact will depend on which measures are used to raise the quality, the model selected to deliver representation, and the circumstances of the jurisdictions where the model is implemented. Regardless, if quality representation is successfully provided across the state, the impact of reducing the costs to the state of providing substitute care and reducing the trauma of separation to Texas children and families could be significant.

Impact of Decreased Time to Permanency

The different studies cited in this report regarding the implementation of quality representation measures found reduction in the time a child spends in foster care to range from a few days to as long as four months. Those studies also examined different models of improving the quality of representation, so any reduction of foster care days in Texas may depend on the type of model implemented and the scope of its implementation. However, since Texas currently implements none of the quality representation models examined, it may see benefits in reduced foster care days regardless of which model is implemented.

Calculating the per-day cost of providing foster care to a child in DFPS conservatorship is also a challenge. Doing so requires not just knowing the number of children in foster care and the amount paid in foster care but other factors such as CPS staff salary and overhead as well as services provided to the child and family. There is no precise figure of cost per day in the foster care system in Texas. It is also important to note that one factor alone may not explain reduced time in foster care. However, Oklahoma DHS has estimated that it spends \$92.35 per child, per day and the Oklahoma Task Force on Uniform Representation of Children & Parents in Cases Involving Abuse & Neglect calculated that the state would recognize \$86,450,682 in savings if high-quality legal representation reduced the time spent by the 7,801 children in Oklahoma’s child welfare system by the 118 days cited in the New York City study.⁵⁸

Impact of Increased Reunification

The percent of children exiting DFPS care who exit to reunification has remained consistent, but Texas ranks amongst the lowest of all U.S. States and Territories in the percent of children in state custody who exit to reunification. Texas’ reunification rate may be impacted by the low reporting rate of abuse and neglect as well as a low rate of removal as compared to other states.

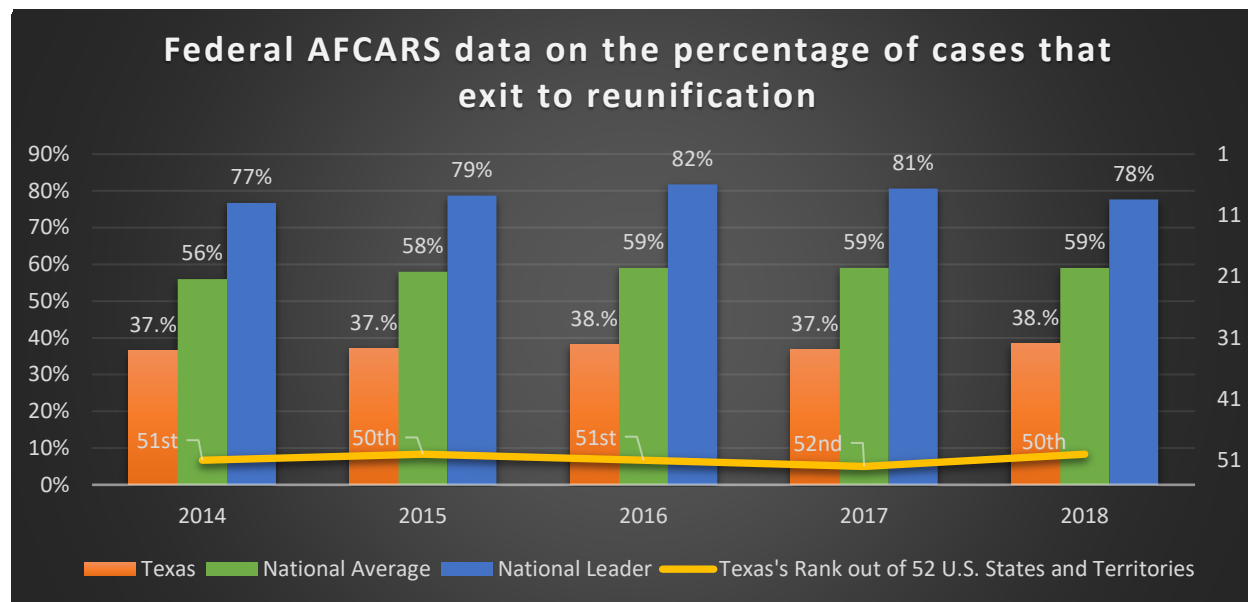


Figure 2 <https://cwoutcomes.acf.hhs.gov/cwodatasite/fourOne/index>

AFCARS data also measure the timeliness of reunification rates by measuring what percent of children who enter care in a twelve-month period are reunified within twelve

⁵⁸ Oklahoma Task Force on The Uniform Representation of Children & Parents in Cases Involving Abuse & Neglect, (2020). *Interim Report*, at 14. Available at <https://www.ok.gov/occy/documents/March%202027,%202020%20Commission%20Meeting.pdf>.

months of entering care.⁵⁹ To help ensure children do not linger in foster care, Texas requires that a child welfare case proceed to trial or be dismissed twelve months after removal unless extraordinary circumstances exist to extend the deadline.⁶⁰ Despite the twelve-month statutory dismissal date, Texas also ranks low amongst U.S. states and territories in the twelve-month reunification measure.

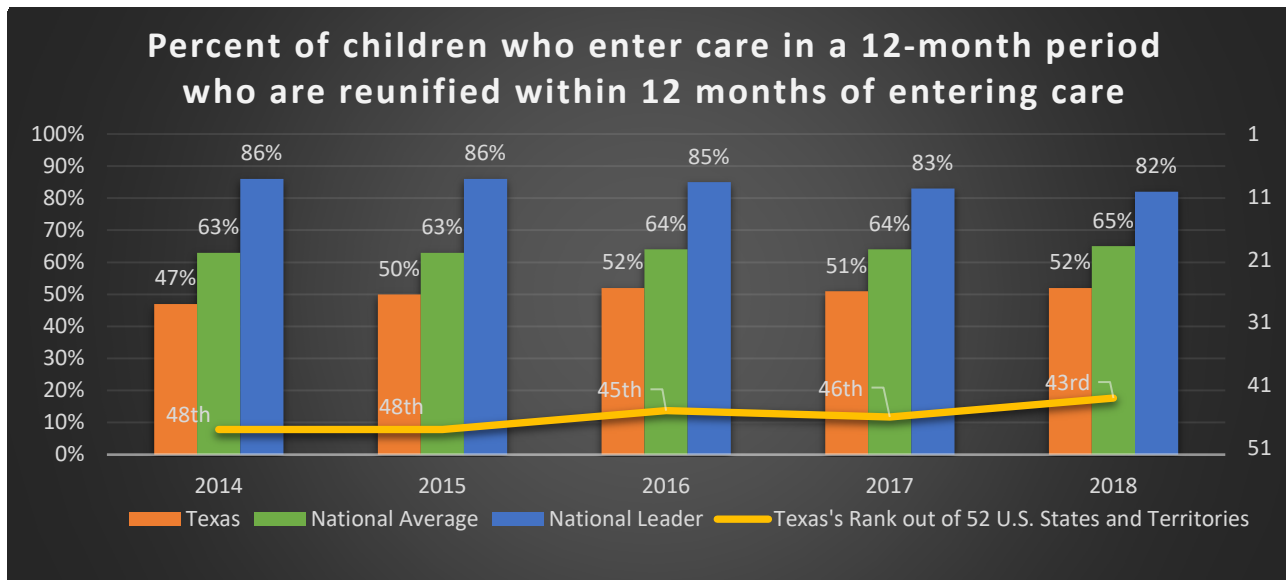


Figure 3 <https://cwoutcomes.acf.hhs.gov/cwodatasite/fourOne/index>

Cost-Benefit Estimate of Impact of Quality Representation

The estimated cost of providing high-quality representation is that doing so will require increasing county or state funds for court-appointed legal representation in addition to increasing the federal Title IV-E reimbursement. The estimated benefit of providing high-quality representation is that studies show that doing so shortens time to permanency and increases rates of reunification, and it is estimated that the resulting impact will reduce federal and state funds spent on providing foster care and adoption and PCA subsidies.

It is not possible to precisely estimate how much it will cost to raise the quality of representation or exactly how much high-quality representation will reduce other funding obligations. However, a useful starting point is to compare the current scale of funding as the graph below sets out in a pie chart.

⁵⁹ Adoption and Safe Families Act of 1997, 1997 Enacted H.R. 867, 105 Enacted H.R. 867, 111 Stat. 2115, 2118.

⁶⁰ Tex. Fam. Code § 263.401.

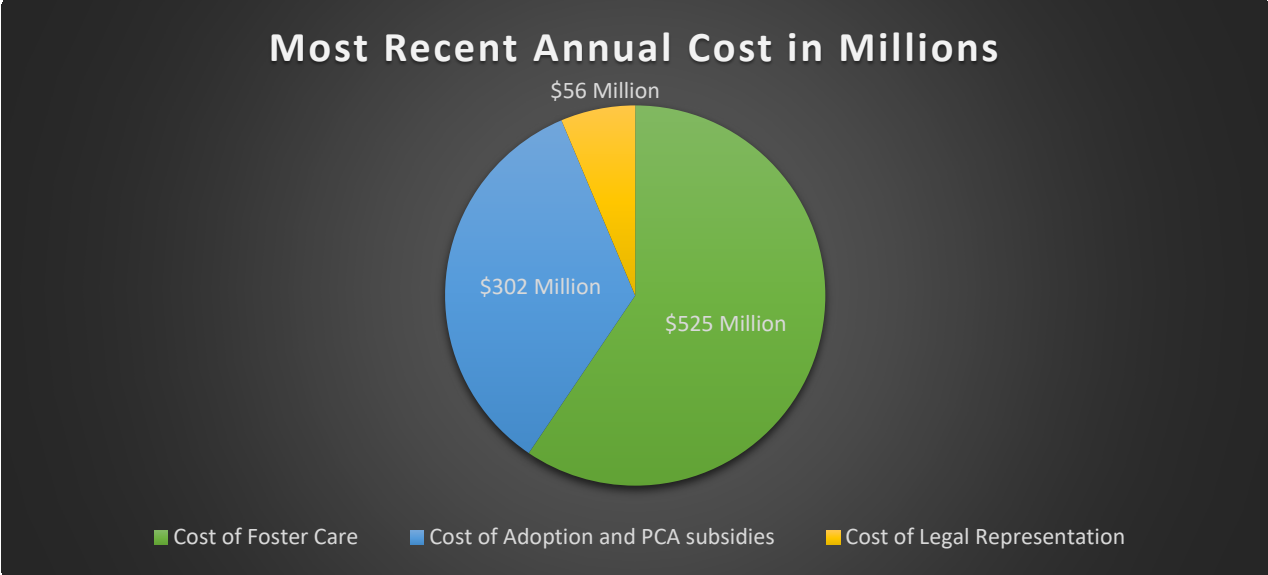


Figure 4

Increasing the funds spent on legal representation will make that section of the pie larger, but it is significantly smaller than the cost of foster care and the cost of Adoption and PCA subsidies to begin with. Achieving high-quality representation should reduce the size of these other two sections of the pie. How much of a reduction is impossible to know, but the comparative size of those sections means that even small-scale reductions could have a significant positive impact on cost savings regarding overall expenses of providing foster care and adoption and PCA subsidies.

A hypothetical example can help illustrate this relationship. Using Oklahoma’s \$92.35 per child, per day estimate of the cost of foster care, if high-quality representation reduced the average time to permanency for 100 percent of Texas’s 33,329 children in foster care in Fiscal Year 2019 by 19 days, then Texas would save enough funds to cover the entire yearly amount of \$56 million it is estimated to have spent on legal representation in Fiscal Year 2018. In other words, doubling the amount of funding on court-appointed systems to achieve statewide high-quality representation could be revenue neutral if foster care stays are reduced by an average of 19 days.

Such a dollar figure should not be considered a precise estimation of the impact of quality representation. A variety of factors, such as differences in cost between foster care stays in Oklahoma and Texas, as well as the differences in average time to permanency and the different legal frameworks for achieving timely permanency, limit the effectiveness of comparing costs and outcomes between regions. However, it does serve as a useful barometer for comparing the scale of the current funds spent on court-appointed legal representation versus the potential impact of implementing a high-quality representation system.

It is likewise difficult to estimate how much high-quality representation would affect rates of reunification, but the federal data show that Texas can improve in both the percent of families who are reunified and the time to reunification. DFPS does provide post-reunification services to some families, but the data also show that Texas’s ongoing financial obligations for non-reunified children are substantial and have increased by a higher percent than the cost of foster care over the last 10 years.

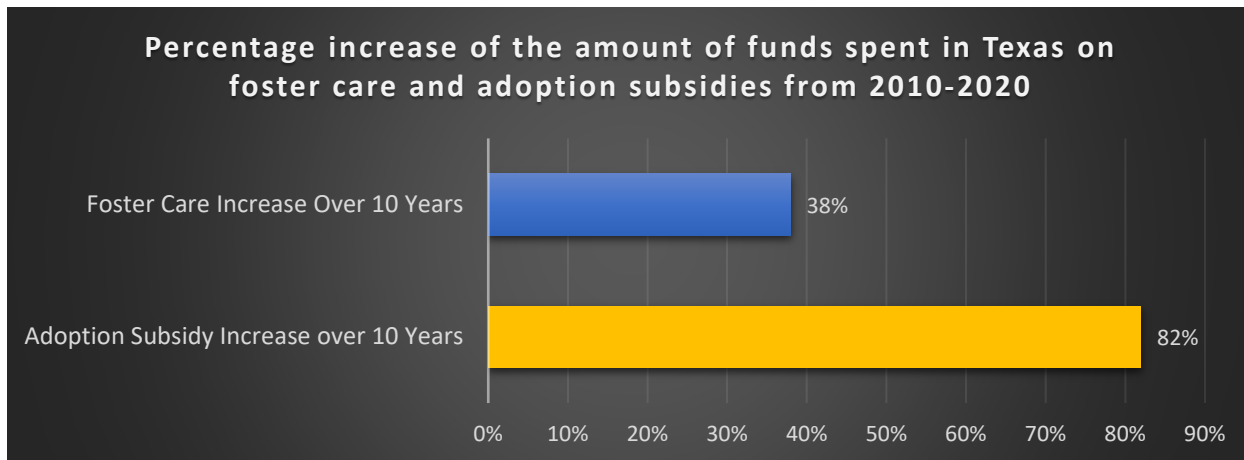


Figure 4 https://www.dfps.state.tx.us/About_DFPS/Budget_and_Finance/default.asp

Regardless of any financial cost-benefit analysis, it is also important to recognize that increasing the number of safely reunified families benefits society in ways that are not reducible to a dollar figure.

Minimizing Trauma

Clinical research has shown that children who are removed from their parents are overwhelmed with feelings of abandonment, rejection, worthlessness, guilt and helplessness.⁶¹ The trauma of removal also has long-term impacts on a child’s health, including the effect of stress hormones on the child’s body which can lead to difficulty sleeping, developmental regression, heart disease, hypertension, obesity, diabetes, and decreased longevity.⁶² The stress response can also lead to architectural changes in the brain that may lead to serious learning, developmental, and health problems.⁶³

Studies have shown that compared to similarly situated children, children who are removed from their homes are at an increased risk of a wide range of negative life outcomes. Children who are removed are at increased risk of higher teen birth rates,⁶⁴ of

⁶¹ Folman, R. (1998). *“I Was Taken”*: How Children Experience Removal from Their Parents Preliminary to Placement in Foster Care, 2 Adoption Quarterly 2.

⁶² Sara Goydarzi. (June 2018). *Separating Families May Cause Lifelong Health Damage*, Scientific American. Available at <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/>.

⁶³ *Id.*

⁶⁴ Joseph J. Doyle, Jr. (2007). *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*. 97 Am. Econ. Rev. 1583.

lower earnings as adults,⁶⁵ are twice as likely to have learning disabilities and developmental delays,⁶⁶ are six times more likely to have behavioral problems as adults,⁶⁷ and are more likely to have substance-related disorders, psychotic or bipolar disorders, and depression and anxiety disorders as adults.⁶⁸ Studies have also shown children removed from their homes are at increased risk of involvement in the criminal justice system, including two to three times higher juvenile delinquency rates,⁶⁹ two to three times higher rates of arrest and two to three times more likely to enter the criminal justice system as adults,⁷⁰ and are more likely to have criminal convictions for violent offenses.⁷¹ The risk of involvement in the child welfare system and the related consequences = also disproportionately affect certain populations. In Texas, African American children are nearly twice as likely to be removed as Anglo and Hispanic children, are less likely to be reunified with their families and more likely to wait longer to become adopted.⁷²

The exact financial cost of these outcomes is difficult to quantify, but the human cost to the children and families effected is incalculable. It is clear that individual families, communities, and society as a whole benefit when Texas children enter DFPS conservatorship only when absolutely necessary, spend as little time in DFPS conservatorship as necessary, and when as many Texas families remain safely intact as possible.

Regardless of the permanency outcome of a case, high-quality representation is also necessary to ensure parents and children have access to a fair procedure and a just and equitable outcome when their constitutional rights are at stake.

ESSENTIAL ELEMENTS OF A MODEL REPRESENTATION PILOT

After analyzing the various models of representation, the Task Force did not reach consensus to recommend a specific model of representation that could meet the needs of all jurisdictions in Texas. Instead, the Task Force concluded that its report should

⁶⁵ *Id.*

⁶⁶ Lowenstein, K. (2018). *Shutting Down the Trauma to Prison Pipeline Early, Appropriate Care for Child-Welfare Involved Youth*. Citizens for Juvenile Justice.

⁶⁷ *Id.*

⁶⁸ Côté, SM, Orri, M., Marttila, M., and Ristikari, T. (2018). *Out-of-home placement in early childhood and psychiatric diagnoses and criminal convictions in young adulthood: a population-based propensity score-matched study*. *Lancet Child Adolesc. Health*; published online July 25, 2018.

⁶⁹ Doyle, Jr, J. (2008). *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 *J. of Political Econ.* 4.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Department of Family and Protective Services, (2018). Available at https://www.dfps.state.tx.us/Child_Protection/Disproportionality/how_big.asp.

recommend the development of a Model Representation Pilot that includes attributes that the Task Force determined were essential elements of a quality representation model.

Through analysis of various models of court-appointed legal representation across the country, as well the Task Force's conclusions regarding the standards, structure, and accountability necessary for a quality appointment system, the Task Force determined that certain key elements were necessary in order for a Model Representation Pilot to serve as an efficient, equitable, and representative example of how quality representation can be provided to parents and children involved in child welfare cases in Texas.

STANDARDS

Commitment to Standards

There should be consistent and quality representation of parents and children throughout all 254 counties in the state of Texas. Although the Task Force did not draft specific standards, the essential elements to create standards are laid out above. Once Texas-specific standards have been created, a Model Representation Pilot should adopt and abide by the statewide standards in order to model this consistency and quality. A Model Representation Pilot that successfully implements standards of representation and adopts uniform training will increase the understanding of the expectations of representation and accountability and will serve as a vehicle to increase the quality of representation to a much higher level statewide.

FUNDING

Braided Funding

Certain counties within Texas have limited budgets for indigent representation which results in delayed appointment for parents' attorneys and in per-hearing or per-case fee schedules that do not align with quality representation.⁷³ State funding for equal representation across all counties would help ensure every county in Texas is able to provide timely appointment of parents' counsel and implement a fee schedule that incentivizes compliance with standards of representation outlined above.

As outlined in the Quality Representation Data section of this report, if quality representation shortens the average time to permanency and increases reunification rates as suggested by the research, the financial savings associated will accrue largely to the state of Texas rather than county budgets. If the burden of providing the quality of

⁷³ Children's Commission Legal Representation Study, *supra* note 5, at 41.

representation is left only to the counties, the benefits of quality representation are unlikely to be realized by the state.

If Texas hopes to ensure equal access to justice for parents and children, the Task Force recommends that state standards for quality representation—many of which are already mandated by the state in the Texas Family Code—should be matched by state funding to ensure those standards can be achieved on every case. Additional state funds would also be eligible for Title IV-E reimbursement, increasing the amount of federal dollars available for quality representation. A Model Representation Pilot will require state funds to illustrate and evaluate how state funds can be effectively and efficiently utilized to raise the quality of representation.

Leveraging Title IV-E Funds

Title IV-E funding has long been available to reimburse counties for the cost of representing DFPS.⁷⁴ Utilizing the same funding for court-appointed representation furthers the goal of providing equity in representation to Texas children and parents. The Children’s Commission’s 2018 study estimated that Texas spent at least \$56 million on legal representation in Fiscal Year 2018.⁷⁵ Based on that estimate, maximizing Title IV-E reimbursement funding could result in an additional eight to ten million dollars for court-appointed legal representation, per fiscal year. DFPS is currently allowing interested jurisdictions to draw down Title IV-E funds for allowable expenses such as travel, meeting with clients, and interviewing witness.⁷⁶ Utilizing Title IV-E funds to implement quality representation brings Texas into alignment with the Children’s Bureau’s goals of ensuring that all families experiencing the child welfare system have access to quality representation.⁷⁷ A Model Representation Pilot should be responsible for drawing down federal funds in the most efficient way possible to minimize any administrative or bureaucratic barriers.

STRUCTURE

In addition to the factors identified in the Structure of the Appointment System section in this report, a Model Representation Pilot should include the following elements set forth below.

⁷⁴ DFPS *Title IV-E Finance Handbook for County Contracts* (2019).

⁷⁵ Children’s Commission Legal Representation Study, *supra* note 5, at 53.

⁷⁶ DFPS *supra* note 71.

Available at http://www.dfps.state.tx.us/handbooks/Title_IV_E_County/Files/IVEC_pg_5000.asp#IVEC_5100

⁷⁷ ACYF-CB-IM-21-06 Available at <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>.

Caseloads

A reasonable caseload per attorney may vary based on the model of representation implemented, and cases may be weighted by the complexity of the issues involved or the time requirements of specific client(s). The American Bar Association's Family Justice initiative recommends a caseload of 60 cases per attorney.⁷⁸ The Task Force recommends that the Model Representation Pilot include a workload study, so that a Texas-specific caseload recommendation can be established, which would include appropriate weighting of cases based on complexity and resources required. If the model allows court-appointed attorneys to take non-child welfare cases, the study must factor in attorneys' total caseloads.

Access to Multidisciplinary Support

DFPS staff are trained in social work and investigations and have access to contract providers for a range of services needed to assess and prosecute a case. Attorneys for DFPS also face challenges of high caseloads and limited resources but have the institutional support of DFPS and/or the District or County Attorney's office. Their attorneys can benefit from the information gathered during the investigative stage and may have access to DFPS liaisons and/or para-professional support to free up the attorney's time so that they can focus on the legal aspects of the case. Court-appointed attorneys must do their own investigations, attempt to provide social support without proper training or expertise, and must seek court approval for expert witnesses. If court-appointed attorneys choose to hire experts or other support personnel, they must pay out of the court-ordered fees they receive or file a motion in advance for authority to hire a needed expert. Paying out of pocket becomes cost-prohibitive, and regular requests to the court for additional support cause delay and may create a conflict of interest, as the court who approves or disapproves of the request may be the same court deciding the merits of the case.

A Model Representation Pilot must provide attorneys access to multidisciplinary support including social workers, parent advocates/peer mentors, investigators, and expert witnesses if it is to achieve the benefits of multidisciplinary representation cited in the Quality Representation Data section.

Prioritizing Parent Representation

Ideally, a Model Representation Pilot for court-appointed legal representation in child protective services cases would include both parent and child representation. However, since no such statutory requirement currently exists for the appointment of an attorney

⁷⁸ ABA Family Justice Initiative, (2021). *System Attribute 1: Caseload and Compensation*. Available at <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/03/fji-implementation-guide-attribute1-1.pdf>.

for the parent, the pilot program should, at minimum, focus on appointing parents' attorneys prior to the full Adversary Hearing. Unlike a child's attorney, the parent's attorney represents a legal party to the case and is responsible for putting on a case in chief at a contested Adversary Hearing and at trial. High-quality parent representation is the most direct check on the power exercised by DFPS and the most direct vehicle to balance information relied upon by the court. Therefore, the Task Force recommends that the Legislature should prioritize programs that deliver quality representation for parents when implementing Model Representation Pilot programs.

Provide Representation to Rural and Urban Areas

Clients in rural and urban areas deserve equitable representation and resources when interacting with the child welfare system. Historically, urban counties have experienced high numbers of cases and families that stretch available attorney numbers and resources thin. Due to a lack of available resources, rural communities have faced challenges in providing quality representation to families in the child welfare system that suburban and urban areas have not experienced. The geographic isolation of some Texas counties creates even further obstacles that will need to be overcome in order to provide equitable resources for family preservation.

When evaluating various Models of Representation, access to and allocation of resources including, but not limited to, trained attorneys, technology, supporting personnel, and transportation, will help steer the decision for a Model to implement. The optimal Model of Representation will be able to provide and allocate resources in an equitable manner across both rural and urban areas. A Model Representation Pilot should be implemented in an area that includes both rural and urban communities in order to be effectively evaluated.

Attorneys

Typically, child welfare specialist attorneys are concentrated in the urban areas. Providing well-trained and knowledgeable attorneys to clients in rural areas can be particularly challenging because of distance. A Model Representation Pilot will need to utilize available local attorneys in the rural areas and support them with additional training and expertise found in the urban areas. Alternatively, a Model Representation Pilot could allocate resources for urban specialists to extend their reach into rural communities.

If available, technology can be utilized to assist non-local attorneys to meet with rural clients and make court appearances. In the past, law school clinics have offered training to the next generation of attorneys by providing an opportunity to represent participants in the child welfare system. Law school clinics could be included in a model for both training and to help free up resources for use in rural areas. A Model Representation Pilot must include a plan for equitable allocation of attorneys between urban and rural communities.

Technology

A preferred Model Representation Pilot will leverage technology to expand its reach. The pilot should address the lack of existing technology in some isolated parts of Texas as an important consideration. High-speed internet access could help bridge many of the resource gaps between urban and rural areas and help to build out a more equitable allocation of resources. In 2019, the Pew Research Center found “roughly two-thirds of rural Americans (63%) say they have a broadband internet connection at home.”⁷⁹ Additionally, the Pew Research Center noted that “rural adults are less likely than suburban adults to have multiple devices or services that enable them to go online.”⁸⁰ A pilot’s utilization of available technology will be fundamental to creating an equitable system between urban and rural areas.

Multidisciplinary support

Personnel who support child welfare attorneys, such as social workers, investigators, and expert witnesses, are concentrated in urban areas and generally, the “supporting network” of persons involved in child welfare cases is not available in rural communities. A Model Representation Pilot will need to provide a plan for how to allocate and provide support personnel in both rural and urban areas.

Transportation

A Model Representation Pilot will need to address the lack of travel resources for the clients involved in rural counties. Due to distance, clients in rural areas may not be able to travel to meet with attorneys and other support personnel. An important component of a proposed pilot will be a plan to provide in-person services and meet with their clients.

ACCOUNTABILITY

Provide Oversight and Accountability for Attorney Performance

In the Children’s Commission 2018 Study of Legal Representation in Child Protective Services Cases, improved oversight was cited as the reform most likely to have a strong positive effect on the quality of legal representation provided by court-appointed attorneys.⁸¹ The study also identified that the current judicial oversight system for attorney performance does not have the resources to be effective.⁸²

The Task Force recommends that the Model Representation Pilot implement accountability measures which provide an opportunity to identify and reward quality

⁷⁹ Perrin, A. (2019). *Digital Gap Between Rural and Nonrural America Persists*. Pew Research Center. Available at <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/>.

⁸⁰ *Id.*

⁸¹ *Id.* at 96.

⁸² *Id.* at 87.

performers, encouraging quality representation. The specific accountability measures will depend on the model of representation selected, but regardless of the model selected, accountability measures consistent with those outlined in the Structure of Appointment System section of this report should be adopted by the pilot. By utilizing oversight and accountability in measuring performance, the pilot can also demonstrate to the public that the expenditure of public funds has been effective and appropriate.

Effective Use of Data

A Model Representation Pilot must track sufficient and appropriate data so the model can be evaluated in two separate areas: its success in achieving quality representation measures and its correlation with other child welfare benchmarks. Quality representation measures include the number of cases per attorney, the number of hours of out-of-court advocacy, the frequency of meeting with clients, the diligence in filing pleadings and motions on behalf of clients, the hours of multidisciplinary support provided, the number of appearances by a substitute attorney rather than the attorney of record, and the number of continuances or delays requested by attorneys. Child welfare benchmarks such as time to permanency, permanency outcomes, successful reunifications, the number of placements per child, and the number of children placed with relatives or fictive kin will also be necessary to effectively evaluate the model.

Sources of data must also be identified and implemented. Some measures such as child welfare benchmarks are already tracked by DFPS and would need to be linked with Model Representation Pilot cases. Appointment, pleading, and continuance data may need to be gathered from court administrators, and other quality indicators will need to be tracked by the model's case management system. It follows that the model will need access to a case management system that can track and export the data necessary for an effective evaluation. To the extent possible, the measures should also track those currently available in the existing system. Tracking all such measures will assist in evaluating the Model Representation Pilot by either using a before and after comparison of a jurisdiction after implementation of the model, or a data comparison from a similar jurisdiction outside of the pilot.

REPLICABILITY

For a state as diverse as Texas, there may not be one model of representation that can be successfully implemented across the entire state. However, a Model Representation Pilot should be designed so that it can be replicated and expanded if it is successful. The Task Force examined the Washington State Office of Public Defense Parent Representation model which originated as a state-funded pilot program in two counties in 2000. The Washington State Legislature slowly expanded the program county by county

after its successful evaluation, until it reached statewide implementation in all 39 counties in 2018.⁸³ A Model of Representation Pilot should be designed with a similar goal in mind.

EXPANDABILITY

Pre-Petition Representation

The Legislature should also consider using the pilot to develop strategies to encourage the appointment of counsel for both parents and children prior to the filing of a removal petition. Texas has an opportunity to be on the leading edge of the national shift in child welfare toward a focus on prevention. The Model Representation Pilot could provide a valuable tool for allowing local communities to experiment with innovative ways to provide pre-petition legal and supportive services to high-risk families, then scaling the most successful models statewide.

SHORT TERM RECOMMENDATIONS

The Task Force determined that changing the system of court-appointed representation for parents and children to ensure that every family involved with CPS has access to quality representation is a long-term effort that will require implementation of new models of delivering representation. While the Task Force examined various models for delivering quality representation, the Task Force also recognized the urgency for each child and parent currently involved in a CPS case necessitates that immediate steps be taken that can raise the quality of representation within the current court-appointment system. The Task Force identified the following steps that can immediately improve the quality of representation for parents and children.

STATUTORY CHANGES

Judicial Admonishments

Child's Attorney's Compliance with Statutory Duties

After publication of the Children's Commission 2011 study on Legal Representation, the 82nd Texas Legislature passed House Bill 3314 which amended Texas Family Code Section 107.004 to add a requirement that an attorney appointed to represent a child must file a written statement with the court regarding their compliance with their statutory duty to meet with their client in advance of hearing.⁸⁴ While the intent may have been to

⁸³ Washington State Office of Public Defense, (2021). *Parents Representation Program History*. Available at <https://www.opd.wa.gov/program/parents-representation/9-pr/55-history>.

⁸⁴ 2011 Tex. ALS 573; 2011 Tex. Gen. Laws 573; 2011 Tex. Ch 573; 2011 Tex. HB 3314.

increase attorney compliance with the statutory duty, the structure of the compliance statement requirement does not provide clear and timely information to the court.

The trigger for the child's attorney to file the statement is not whether the attorney met with the child prior to the hearing, it is whether the child--or child's caregiver, if the child is less than four years old--is "not present at court." Therefore, a child's attorney who did meet with their client prior to the hearing would still have to file a statement if the child or caregiver did not attend the hearing, while a child's attorney who did not meet with their client prior to the hearing would not have to file a statement of compliance, as long as the child or the caregiver was present at the hearing.

No specific time requirement to file the statement is mentioned in the statute, and because the triggering event occurs at the hearing, the filed statement does not provide information to the court prior to or during the hearing. The low levels of compliance reported by children, CPS caseworkers, CASA volunteers and DFPS attorneys in the Children's Commission 2018 study indicate that filing the written statement has not solved the issue of attorneys meeting with their clients.⁸⁵ The judiciary's anomalist perspective regarding attorney compliance raises the question of whether the compliance statement is assisting in providing accurate information to the judiciary.⁸⁶

The Task Force Recommends that the written compliance statement required by Texas Family Code Section 107.004(d)(2) be struck and replaced with a statutory requirement that the court shall inquire as to whether the attorney ad litem for the child has complied with their duties under 107.004(d)(1) at each hearing under chapters 262, 263, and 264. If the attorney has not complied, the court shall determine whether there was good cause why the attorney ad litem's compliance with the subsection was not feasible or was not in the child's best interest, as provided by 107.004(e).

[Parent's Attorney Compliance with Statutory Duties](#)

While a parent's attorney also has a statutory duty to meet with their client prior to each hearing, the Task Force determined that crafting a judicial admonishment regarding the parent's attorney's lack of compliance with this duty is more complicated than for the child's attorney. Unlike a child's attorney, a parent's attorney's ability to meet with their client depends on the client, as well as the attorney. A parent's attorney who scheduled a meeting with their client, only for the client not to attend, will be at risk of divulging attorney-client communication and undermining their client's legal case if required to provide information regarding the meeting to the court. A judicial inquiry into whether a parent is generally satisfied with their representation and/or an admonishment that

⁸⁵ Children's Commission Legal Representation Study, *supra* note 5, at 61-63.

⁸⁶ *Id.* at 63.

informs the parents of existing methods of reporting issues with their representation may be more appropriate.

Appointment of Parents' Attorneys When the Petition is Filed

Legal representation prior to the full Adversary Hearing is a critical goal for Texas. The variation in the timing of appointments of counsel for parents across the state reflects uncertainty in the statutory framework requiring the appointment of parents' counsel. Texas Family Code Section 107.013 requires appointment of an attorney for a parent who responds in opposition to the suit, but provides no timetable by when the appointment must occur and does not define what it means to respond in opposition to the suit.⁸⁷ The court may not proceed with the Adversary Hearing without admonishing the parent of their right an attorney, but only requires appointment of an attorney if the parent appears at the hearing, responds in opposition, claims indigence, and requests appointment.

Texas Family Code Section 107.0141 already contains a statutory framework for permissive appointment of an attorney for a parent prior to the Adversary Hearing that addresses the attorney's duty to locate the client, assist in preparation for the Adversary Hearing, address indigency, and request continued appointment if indigency is found.⁸⁸ Therefore, the Task Force recommends that the Legislature change the permissive appointment of a parents' attorneys prior to Adversary Hearing to be a mandatory appointment.

UTILIZING TITLE IV-E FUNDS TO RAISE THE QUALITY OF REPRESENTATION

The Children's Bureau's guidance that has accompanied the policy change allowing for federal reimbursement for the costs of court-appointed attorneys for parents and children has emphasized that funds are intended to raise the quality of representation provided rather than simply reduce the cost of the current level of representation.⁸⁹ However, the Children's Bureau has allowed states flexibility in determining how to best utilize the funds to raise the quality of representation.

Jurisdictions with statewide representation systems like Washington OPD have a Memorandum of Understanding (MOU) between the agency and the OPD that requires OPD to provide representation in accordance with the quality metrics of their model.⁹⁰ New Mexico has a contractor-attorney system where the contractors are approved by the

⁸⁷ Tex. Fam. Code § 107.013.

⁸⁸ Tex. Fam. Cod § 107.0141.

⁸⁹ ACYF-CB-IM-17-02 available at <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

⁹⁰ ABA Family Justice Initiative *Federal Funding* (2021). Available at <https://15ucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/02/OPD-IV-E-EXECUTED-Parents.pdf>.

Administrative Office of the Courts (AOC). The MOU between child welfare agency and the AOC requires the AOC to evaluate contracted attorneys, as well as provide training, oversight, auditing, and notice of a grievance procedure as conditions for receiving Title IV-E funds.⁹¹

Because Texas has no statewide representation legal services provider or entity to oversee attorney contracts, the Task Force recommends that Texas explore an approach to utilizing Title-IV funds pioneered by the state of Michigan. The approach utilizes a bottom-up rather than a top-down method of establishing quality metrics, encouraging creativity and allowing jurisdictions to implement changes that best fit the needs of their community. This approach allows each jurisdiction to develop a tailored plan that meet the needs of the community rather than requiring exact uniformity across jurisdictions.

Drawing down the Title IV-E funds would require an MOU or contract between DFPS and the jurisdiction providing representation. Under the Michigan approach, a jurisdiction seeking to draw down Title-IV funds would submit an application to DFPS that contains two provisions: 1) an agreement not to reduce county funding from a baseline established by the prior fiscal year; and 2) a statement outlining a plan for how the additional federal funds would be used to improve the quality of representation.⁹²

This will likely require a change to DFPS policy and may increase the administrative burden on DFPS to administer Title IV-E funds. Currently, DFPS has existing contracts with some jurisdictions to draw down funds if the claimed expenses of representation meet the Title IV-E requirements of expenses eligible for reimbursement. Allowable expenses for reimbursement include travel, meeting with clients, and interviewing witness.⁹³ Counties that do not currently compensate court-appointed attorneys for those expenses may be more likely to begin doing so under the existing contracts. Switching to an approach similar to the one used by Michigan represents a departure from the current contracts DFPS has with those jurisdictions and may not be feasible during the contract period.

However, the Task Force recognizes that implementing new models of quality representation is a long-term goal that could take decades to complete, while Title IV-E funds are available now. If the distribution of Title IV-E funds is not conditioned on any improvements in the quality of representation, there is a substantial risk the funds will only be used to lower the cost of the existing system that does not provide quality representation. It would be a lost opportunity to make an immediate difference in the lives

⁹¹ *Id.* Available at <https://15sucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/01/AOC-CYFD-IV-E-JPA-2019.pdf>.

⁹² *Id.* Available at <https://15sucklg5c821brpl4dycpk15-wpengine.netdna-ssl.com/wp-content/uploads/sites/48/2020/09/Michigan.pdf>.

⁹³ DFPS. (2019). *Title IV-E Finance Handbook for County Contracts*.

Available at http://www.dfps.state.tx.us/handbooks/Title_IV_E_County/Files/IVEC_pg_5000.asp#IVEC_5100.

of parents and children if Title IV-E funds entrench the current approach, rather than inspiring and encouraging innovation and quality.

As a possible way to reduce the administrative burden on DFPS and to address any possible conflict of interest, the Task Force recommends that DFPS consider designating the Office of Court Administration (OCA) as the authority to approve the representation plan if Texas moves forward with the Michigan approach, although this may result in adding another type of administrative burden. Upon approval by OCA, the memorandum can be executed, and the funds accessed. This approach will require collaboration between OCA and DFPS on how the process will work and can include partnership with the Children's Commission to develop examples of quality improvements based on the recommendations in this report and to offer support and guidance for implementation.

CONCLUSION

Despite the concerns outlined in this report, legal representation of parents and children in CPS cases has made important strides in Texas. The creation of the Child Protection Law Section of the State Bar and the establishment of child welfare law as a Texas Board of Legal Specialization certified area of expertise in 2017 show the increasing recognition of the importance of this area of law, and a desire and willingness by the legal community to raise the quality of legal representation. The goal of providing high-quality representation for every Texas family involved in a CPS case may still appear distant, but the path forward is clear. The Task Force recommends that the statutory changes proposed in this report be adopted by the Texas Legislature, that DFPS adopt a model for utilizing Title IV-E reimbursement that incentivizes quality and innovation, and that the Texas Legislature establish a pilot program for implementing high-quality representation, with the goal of expanding successful pilots until every Texas family involved with CPS has access to high-quality legal representation.

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