

Feedback on Senate CAPTA Reauthorization Draft, 6/9/21

Group: National Association of Counsel for Children (www.NACCchildlaw.org)

Contact's Email: Allison.Green@NACCchildlaw.org

Section 106 (Legal Representation)

Feedback: Overall, this amendment will help ensure consistent access to counsel for children and youth in child welfare proceedings and solve the problem of “justice by geography” in foster care. Currently, 38 states and the District of Columbia already provide a statutory right to counsel to children and youth in foster care. Amending CAPTA will ensure equity and access to justice for children and youth in the remaining 12 states who are currently without legal representation. It also effectively realigns CAPTA with its legislative history.¹

Feedback: NACC recommends several revisions in Sec. 106(a)2(A)(xii) that would help streamline implementation and more accurately reflect current practice in the field. **First**, NACC recommends utilizing the word “Attorney” instead of “Attorney ad Litem.” “*Ad Litem*” is a Latin term meaning “for the case.” Although more common in the child welfare legal space, this term has no special meaning relevant to foster care specifically. States use the term “*attorney ad litem*” differently. For example, in Florida, the title “Attorney ad Litem” signifies and expressed-interest attorney, whereas in Arkansas an “Attorney ad Litem” signifies a best-interest attorney. Enshrining this term in federal law would unintentionally produce unnecessary confusion. **Second**, NACC recommends reorganizing and revising the language of this provision to reflect an attorney’s role and responsibilities more simply and clearly. This change would mirror language that states are already familiar via the U.S. Children’s Bureau Title IV-E reimbursement policy for legal representation ([See CWPM 8.1\(B\)#30](#)). It would streamline implementation by utilizing the models of legal representation where they currently exist in state law and avoid a potential separation of powers conflict by deferring to states to define and regulate attorney practice. The change is set out in full below:

“(xii) the State’s plan to ensure that, within a timeline determined by the State, all child victims of child abuse or neglect that results in a judicial proceeding:

- (I) are appointed an attorney who shall provide independent legal representation for the child in accordance with the duties proscribed by each state’s statutes, court rules, standards of practice, and ethical provisions governing attorneys; and

¹ During the 1973 Children and Youth subcommittee hearings, Brian Fraser, staff attorney with the National Center for the Prevention and Treatment of Child Abuse and Neglect, specifically recommended that in every case of child abuse, a lawyer be appointed to represent the child’s interest. His testimony pointed to the seminal U.S. Supreme Court case, In re Gault, 387 U.S. 1 (1967), which established due process rights -including the right to counsel -for youth in juvenile delinquency proceedings more than 50 years ago. Additionally, Dr. Henry Kempe, Chairman of the Department of Pediatrics at the University of Colorado Medical Center, similarly advocated for counsel, analogizing the “potential danger to a child’s right to freedom and life is less in situations involving the adjudication of delinquency than in an abusive family situation.”

- (II) may be appointed a guardian *ad litem*, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and domestic violence, and who may be an attorney or a court appointed special advocate—
 - (aa) to obtain first-hand, a clear understanding of the situation and needs of the child; and
 - (bb) to make recommendations to the court concerning the best interests of the child.

Feedback: The language of related to the Comptroller’s study and report [Sec. 109(f)], should be similarly changed to reflect the recommendation above, by replacing the term “*attorney ad litem*” with “attorney” throughout this section.

Feedback: At present, the children’s legal representation provision is under “(A) Descriptions” while the parent legal representation is under “(B) Assurances.” NACC strongly recommends placing the child and parent legal representation provisions together (under “Descriptions”) rather than separately. Children’s and parent’s legal representation must be aligned, analyzed, and implemented in tandem. Organizing these sections under the same header will provide clarity, efficiency, and direction for states seeking to implement.

Feedback: NACC is pleased to see Sec. 106(a)2(B)(xxii), which would guarantee parents access to counsel through the duration of child welfare court proceedings. This provision may benefit from further clarity regarding indigency determinations for parent litigants. Presently, most or all states that offer parental access to counsel do so after the court, or a court official, conducts an indigency inquiry to determine financial eligibility. In some places, the financial parameters hover near the federal poverty level, leaving many parents who have even extremely minimal, inconsistent income unrepresented. If the drafters’ goal is to ensure all parents have access to counsel, this could be addressed by clarifying that CAPTA-states must assure this access regardless of a parent’s financial status.