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TO: Barbara McDowell and Gerald S. Hartman Foundation
FROM: Children's Advocacy Institute, USD School of Law
DATE: July 23, 2018
RE: Final Grant Report for 2018 Grant

As you know, the Children's Advocacy Institute is preparing to file suit to establish nationally the constitutional right of foster children to attorney representation. These children are subject to the parental jurisdiction of the courts, which determine where they are to live, what school they will attend, who they may see, etc. — sometimes for the entire 18 years of childhood. The impact that these proceedings have on these children's lives warrants the appointment of competent, trained counsel to represent them. One decision has been favorable to this thesis, the *Kenny A.* case in Atlanta, but it was a district court case that was not appealed and is not considered precedent. And regrettably, many states ignore the basic constitutional right of these children to have legal representation.

Over the last year, CAI conducted research with Gerald Glynn, a longtime member of the Board of Directors of the National Association of Counsel for Children (NACC), who is a Florida child advocate attempting to bring that state into compliance with constitutional obligations. We identified Indiana as the appropriate violative state to create a holding at the circuit or Supreme Court level that will have national impact. Indiana has a balkanized and confusing system where children often lack even a Guardian Ad Litem (GAL), and hence transgresses even the narrower obligation under the federal Child Abuse Prevention and Treatment Act (CAPTA). Children who do receive GALs are assigned volunteer Court Appointed Special Advocates (CASAs). These often beneficial actors cannot lawfully practice law, and the protection of these children requires the ability to function in a court that serves as the legal parent of a child and determines every aspect of these children's lives. The proper role of a GAL in such proceedings is to call witnesses, subpoena documents, ask questions of those under oath, make motions and argue, and appeal or seek writs; assigning a non-attorney GAL both deprives children of needed legal representation to assure basic protections and effectively commands the unauthorized practice of law.

Thus far, we have lined up allies into a formidable litigation group. These include pro bono counsel Steve Keane from Morrison and Foerster, with whom we have worked successfully in prior impact litigation. Also on our team is Kim Dvorchak, Executive Director of the National Association of Counsel for Children (NACC); Kim and NACC are already assisting us, including communications with its membership in Indiana. We also have committed local counsel in Kathleen Delaney of Delaney and Delaney, a respected law firm in Indianapolis. We also brought onto the team recent USD law graduate Nareene Karakashian and Junhee Park, a third-year law student working as an intern clerk on the project.

Over the last year, we made contacts with local officials in Indiana and learned who our supporters and opponents might be. We worked to prevent opposition from the CASA organization that now provides limited services for some foster kids. Concurrently, we developed a strategy for pursuing the action, including the acquisition of class representative children who will qualify as “friends” under federal law able to bring an action on behalf of appropriate class representative children. We are happy to report that we have leads on several children who may appropriately serve in that important role. And we now have local child advocates, including those who represent Indiana disabled children and delinquents, now actively working with us.

We also engaged in pre-filing discovery, by serving letters under the Indiana Public Records Act from five counties and state authority on the current representation of foster children in the state and those selected counties. Among other things, we requested information regarding the number of children who were the subjects of a Child in Need of Services (CHINS) proceeding or termination of parental rights (TPR) proceeding during the last 3 years; the number of such children who were not considered parties to their proceedings; the number of such children who received a court-appointed GAL or CASA; the number of GAL appointees in CHINS or TPR proceedings who were licensed attorneys; and any documents reflecting the criteria used for determining whether to appoint an attorney, lay GAL, or CASA to represent a child in CHINS and/or TPR proceedings. We received initial responses that indicate wide variation between counties. The Indiana statute allows for appointment of counsel but it rarely occurs and appears to be wildly inconsistent. Few children appear to have actual attorney representation under normal standards. The answers also raise the issue of a practice in some counties of assigning some attorney to serve as “counsel” in court but who is simply a symbolic figure who does not talk to any child or review files carefully and is used rather as a shill to cite in a hearing record. Many counties do not even do that. The returns thus far indicate that more detailed discovery will be needed to establish who does what when. That will likely require interrogatories and perhaps 10 to 12 depositions.

Additional efforts that took place during the past year included legal research on the necessity of naming state officials as defendants for facial statutory challenge, the viability of an equal protection claim, standing to assert a CAPTA violation, Seventh Circuit law on the right to counsel; and Indiana state law on right to counsel. Our team has also been busy identifying potential experts to testify with regard to specific facts about Indiana’s kids and how often they are represented in dependency proceedings, and about poor outcomes that befall children and youth when representation is inadequate and/or nonexistent; drafting the complaint; and determining factual evidence that is needed and formulating discovery requests.

We greatly appreciate the support of the Barbara McDowell and Gerald S. Hartman Foundation over the past year. We hope to have the opportunity to continue working with you over the next year as well.

For more information, please contact Robert Fellmeth at cpil@sandiego.edu or (619) 260-4806.