



SYSTEM ON THE BRINK



How Crushing Caseloads in the California Dependency Courts Undermine the Right to Counsel, Violate the Law, and Put Children and Families at Risk

The dependency courts are entrusted with the most sensitive and critical of responsibilities: ensuring the health and safety of children who have been victims of abuse and neglect, and protecting children and parents' rights to familial integrity. Federal and state law requires robust procedural protections in dependency court proceedings to protect these fundamental interests, including the right to appointed counsel for children and parents.

However, in 2002, the Judicial Council of California recognized that the state's underfunding of dependency counsel had led to unmanageable caseloads that left attorneys unable to provide adequate representation. The Judicial Council identified improvements to the dependency system including a recommended "optimal" caseload of 77 clients per attorney and, in 2007, ultimately adopted standards setting the maximum caseload at 188 clients per attorney.

Yet more than a decade after Judicial Council recognized the crisis of caseloads for dependency counsel, the situation has only grown more dire. Since 2009, the state has not increased the budget for the dependency

courts while the number of open cases has continued to escalate. Caseloads in many counties are now double the maximum standard of 188, and some counties are experiencing caseloads in excess of 400-500 clients per attorney. The result is that an already over-stressed system has reached a breaking point.

This report examines the tragic consequences and legal implications of California's failure to provide sufficient funding for dependency counsel. The crushing caseloads have put dependency counsel in an impossible situation, forcing them to cut services, forgo necessary investigation and tasks, and choose between competing clients' needs. As a result, California is violating federal and state constitutional provisions, as well as federal and state laws, that require the state to provide sufficient funding to enable dependency counsel to provide "competent" and "effective" assistance to children and parents.

This report concludes that California must provide sufficient funding to reduce caseloads for dependency counsel to comply with federal and state legal requirements and fulfill its obligations to provide adequate representation to children and parents in dependency proceedings.

A. WHAT IS DEPENDENCY COURT?

Dependency courts adjudicate cases where children are alleged to have been the subject of abuse or neglect. The purpose of dependency proceedings is to ensure the safety and well-being of children and to protect the rights of children and their families. Dependency courts have broad authority over children and their families and can make decisions that have enormous implications for the lives and futures of both children and parents. For instance, dependency courts have the power to order the removal of children from their homes; send children to live with relatives or in foster care; terminate parents' rights; create new parental rights; or otherwise order services to advance children's needs.

Dependency cases are conducted in California superior court and are adversarial proceedings that involve three sets of parties: the County, which investigates and files the case alleging abuse or neglect; the parent(s) alleged to have engaged in abuse or neglect; and the child(ren) alleged to be a victim of abuse or neglect. The parties—the County, the parents and the children—are generally represented by a licensed attorney throughout the proceedings.

By law, indigent children and parents must be appointed counsel if they cannot afford to retain one in proceedings where the child is removed, or potentially may be removed, from his or her parents' custody.

A dependency case begins when the County either takes protective custody of a child believed to be subject to abuse or neglect or when it files a petition in the dependency courts alleging abuse or neglect. At the outset of a dependency proceeding, if the dependency court determines that a child should be removed from the custody of his or her parents pending the litigation, the court will do so and place the child with a relative, with a non-relative extended family member, in a foster home, in a group home, or in a non-secure facility.

A case then proceeds through a complex series of hearings in dependency court and, if the case does not end in a settlement, culminates in a trial at which the parties present witnesses and evidence regarding the alleged abuse or neglect, rehabilitative efforts, and the feasibility of various forms of reunification services.

At the close of the trial, the judge issues a “disposition” setting temporary or permanent terms of the child's placement and parental rights. If a child is removed from his or her parents' care, the court conducts subsequent proceedings and reviews to determine whether to reunite the child with his or her parents or find a permanent and stable alternative placement for the child.

Depending on the nature of the “disposition,” the court may retain jurisdiction and conduct periodic review hearings every six months for up to 24 months to review the case and assess the efficacy of any reunification services, and determine whether to alter the terms of the “disposition.” If the court decides to terminate reunification services, the court then must make findings regarding a permanent placement plan. That plan may include adoption, guardianship, or continued foster care.

B. DEPENDENCY COUNSEL PLAYS A CRITICAL ROLE IN PROTECTING CHILDREN AND FAMILIES

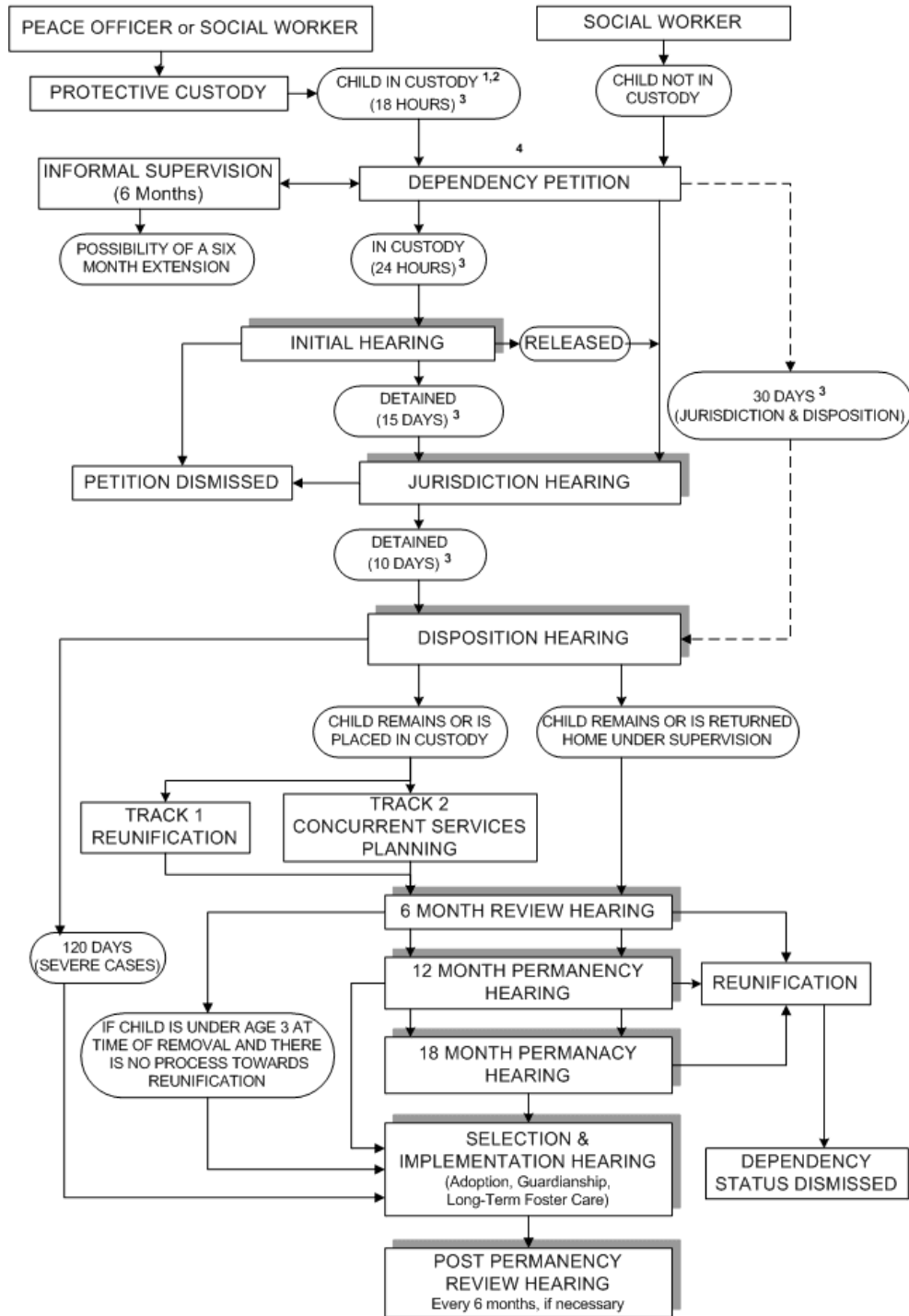
By law, indigent children and parents generally must be appointed counsel if they cannot afford to retain one.¹ Dependency attorneys fall under two general categories—attorneys who represent children and attorneys who represent parents. Attorneys who represent children are responsible for advocating “for the protection, safety, and physical and emotional well-being of the child or nonminor dependent.”² These attorneys serve both as the child's guardian ad litem and attorney.*

Parents are also entitled to counsel and have the option of either retaining their own private counsel or being represented by a court-appointed attorney if they cannot afford counsel. Attorneys who represent parents are responsible for advocating for their client's rights, which most often involves challenging the allegations against them and helping to reunify them with their children.

Due to the complexity of dependency proceedings, the need for the court to monitor parents and children's progress, and the need for the court to enforce its orders and ensure that services are being provided as ordered, attorneys often represent clients for years.

*On very rare occasions, a child or nonminor dependent is not represented by counsel if the court determines that he or she would not benefit from the appointment of counsel.

Juvenile Dependency Proceedings
(Welfare & Institutions Code Section 300 et seq.)



¹ If a child is under the age of three at the time of removal, court ordered services shall not exceed six months. (See W & I Code section 361.5(a)(2) for exceptions.) When calculating the 6-month period, the time shall begin either 60 days after the child was placed in protective custody or from the date of the jurisdiction hearing, whichever is earlier.

² If a child is three years of age or older at the time of removal, court ordered services shall not exceed 12 months. (See W & I Code section 361.5(a)(2) for exceptions.) The twelve month time period is calculated the same as in footnote #1.

³ Judicial Days/Hours

⁴ When a minor is a dependent child of the court and remains in the home and there is a reasonable cause to believe that the minor is a person described in subdivision (a), (d) or (e) of section 300 of the Welfare and Institutions Code, court proceedings shall commence and the minor shall be committed to the care, custody and control of the probation officer.

FIGURE 1³

C. DEPENDENCY COUNSEL IN CALIFORNIA

The Judicial Council has established maximum caseload standards to ensure that counsel appointed to represent children and parents in dependency proceedings can devote sufficient time and resources to provide each of their clients with competent and effective representation. In 2000, the California legislature amended section 317 of the Welfare & Institutions Code to require that the Judicial Council “promulgate rules establishing caseload standards, training requirements, and guidelines for appointment of counsel for children.”⁴

In response to the legislative mandate, in 2002, the Judicial Council conducted a comprehensive study of caseloads of court-appointed dependency counsel and concluded that the optimum caseload for attorneys was 77 clients and that the absolute maximum caseload should be no greater than 141 clients per full-time dependency attorney.⁵ The report found that no attorney could maintain a base-level standard of performance if his or her caseload exceeded that figure.⁶ The report also found that the statewide caseload average in California was 273 clients per attorney, almost doubling the Judicial Council’s recommendation.⁷

GENERAL RESPONSIBILITIES OF A DEPENDENCY ATTORNEY

- Conducting independent investigations in good faith to ascertain the facts
- Interviewing, examining, and cross-examining witnesses in all contested hearings
- Meeting regularly with their clients
- Being available when the clients have questions or seek advice
- Working with other counsel and the court to resolve disputed aspects of a case to obviate the need for a contested hearing
- Adhering to mandated timelines
- Obtaining copies of all pleadings and relevant notices
- Participating in depositions, negotiations, discovery, pre-trial conferences, hearings and mediations
- Developing a theory and strategy of the case to implement at hearings, which incorporates all factual and legal issues⁸

RESPONSIBILITIES SPECIFIC TO THE REPRESENTATION OF CHILD CLIENTS

- Making recommendations to the court concerning the child’s welfare
- Investigating the interests of the child beyond the scope of the juvenile proceedings
- Interviewing witnesses such as parents, relatives, foster parents, teachers, and school administrators
- Reporting to the court other interests of the child that may need to be protected by the institution of other administrative or judicial proceedings
- Contacting social workers and others associated with the child’s case
- Having sufficient contact with the child to establish and maintain an adequate and professional attorney-client relationship
- Counseling the child concerning the subject matter of the litigation, the child’s rights, the court system, the proceedings, the lawyer’s role, and what to expect in the legal process
- Interviewing all children older than four years old in such a way as to be able to determine the child’s wishes
- Advising the court of the child’s wishes
- Assessing the child’s well-being
- Identifying appropriate family and professional resources for the child
- Maintaining the child’s sibling relationships, which includes ensuring that the siblings are placed together or, when that is not possible, that the siblings receive regular visitation
- Enforcing a myriad of auxiliary legal rights the child possesses, including but not limited to rights related to education; mental health services; psychotropic medication; participation in religious, cultural and extracurricular activities; access to reproductive health care; gender identity and expression; and parenting⁹

5 KEY FACTS

Following its publication of the 2002 study, the Judicial Council refrained from formally setting either the 77 or 141 figures as a firm maximum. Instead, the Judicial Council developed the Dependency Representation, Administration, Funding, and Training (“DRAFT”) program, which centralized the administration of court-appointed counsel services in certain counties in an attempt to reduce caseloads and improve services to children and families in dependency proceedings.¹⁰ After monitoring the implementation of the DRAFT program, the Judicial Council subsequently revised its recommended maximum caseload standard to 188 in order to account for assistance from investigators and social workers, as well as the “fiscal realities” of funding for the California courts.¹¹

In October 2007, the Judicial Council formally adopted a maximum caseload standard of 188 clients per attorney.¹²

This caseload figure assumes that each full-time attorney is aided by one-half of the time of a full-time investigator or social worker. The Judicial Council recognized the standard is significantly higher than the caseload standards promulgated by the American Bar Association and the National Association of Counsel for Children, which recommend a maximum caseload of 100 clients per full-time practitioner.¹³

The Judicial Council’s standard also far exceeds the maximum caseload standards set by other states. For example, Massachusetts has set a set a maximum

caseload limit for open Children and Family Law cases that an attorney may carry at 75;¹⁴ Arkansas has set a maximum caseload limit for dependency-neglect cases of 75;¹⁵ in Washington, no public defense attorney can have a caseload of over 80 open juvenile dependency cases;¹⁶ Wyoming has set a caseload limit of 100 for court-appointed attorneys in juvenile court cases;¹⁷ and in New York, no court-appointed attorney may represent more than 150 children at any time.¹⁸ Georgia has a 100-client caseload maximum for dependency attorneys, which was set by a judicial order by a U.S. District Court in *Kenny A. v. Perdue*, 218 F.R.D. 277 (N.D. Ga. 2003).¹⁹ [See Figure 2]

The Judicial Council candidly admitted that, “[w]hile not optimal, the California judicial branch caseload standard reflects a pragmatic fiscal realism regarding the court-appointed counsel program.”²⁰

Around the time the Judicial Council was finalizing its caseload standard, in 2006, Chief Justice Ronald M. George established the California Blue Ribbon Commission on Children in Foster Care, (“Blue Ribbon Commission”). The Blue Ribbon Commission, headed by California Supreme Court Justice Carlos Moreno, was tasked with providing recommendations to the Judicial Council “on ways in which the courts and their partners can improve safety, permanency, well-being, and fairness for children and families in the child welfare system.”²¹ The Blue Ribbon Commission’s efforts culminated in the publication of a final report in May 2009.

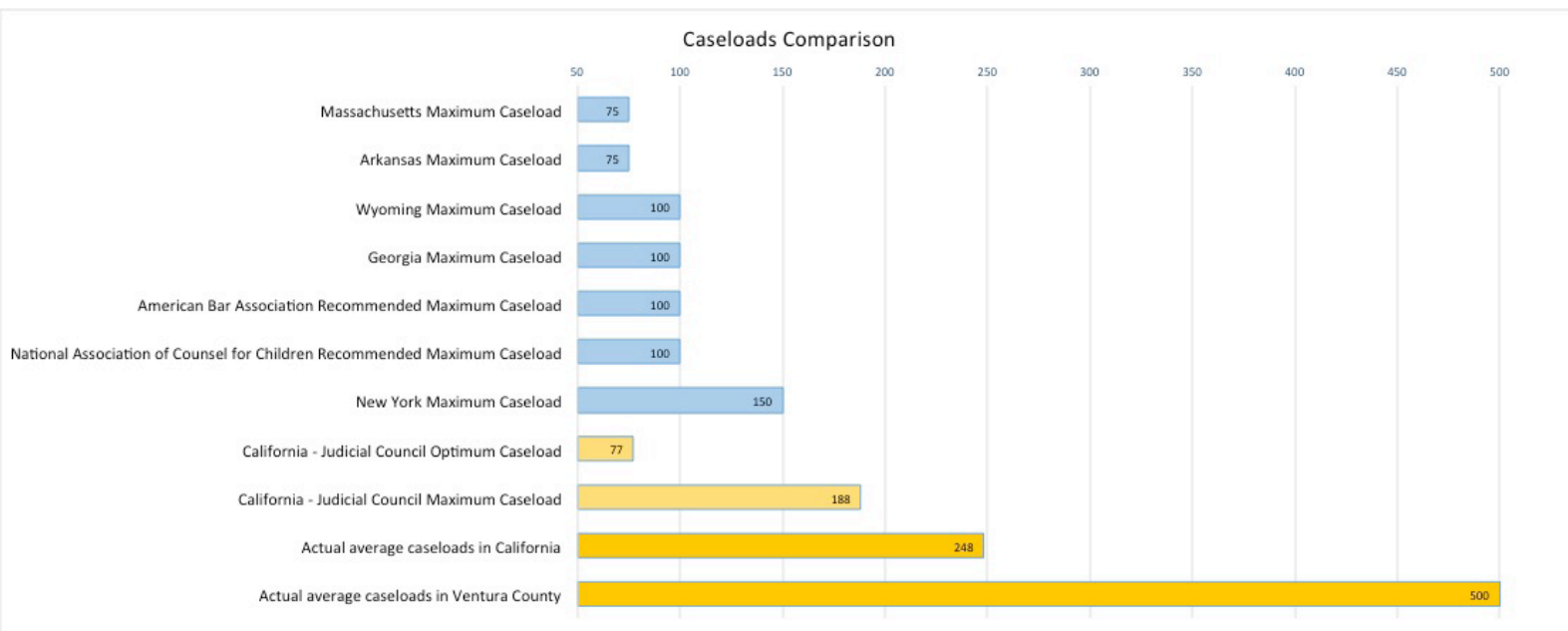


FIGURE 2



The report opened by declaring that:

“California’s Dependency Court system is overstressed and underresourced, burdened by crowded dockets and inadequate information.”²²

The Blue Ribbon Commission further explained:

Juvenile dependency court attorneys, who represent children and parents in court, have an average caseload of 273, which far exceeds the recommended caseload standard of 188 recently adopted by the Judicial Council. In some counties, attorney caseloads rise to 500 or 600. Children and parents sometimes do not meet their attorneys until moments before their hearings, which not only limits their opportunity to speak in court, but means attorneys often have inadequate information about a child’s life.²³

To address these concerns, the Blue Ribbon Commission recommended that “[t]he Judicial Council advocate for the resources, including a stable funding source, necessary to implement the council’s recently

adopted attorney caseload standards, to implement caseload standards for social workers, and to develop and implement caseload standards for social services agency attorneys.”²⁴

D. CURRENT CASELOADS IN THE DEPENDENCY COURTS

Despite the Blue Ribbon Commission’s dire findings and unequivocal recommendations, the situation has only deteriorated in recent years.

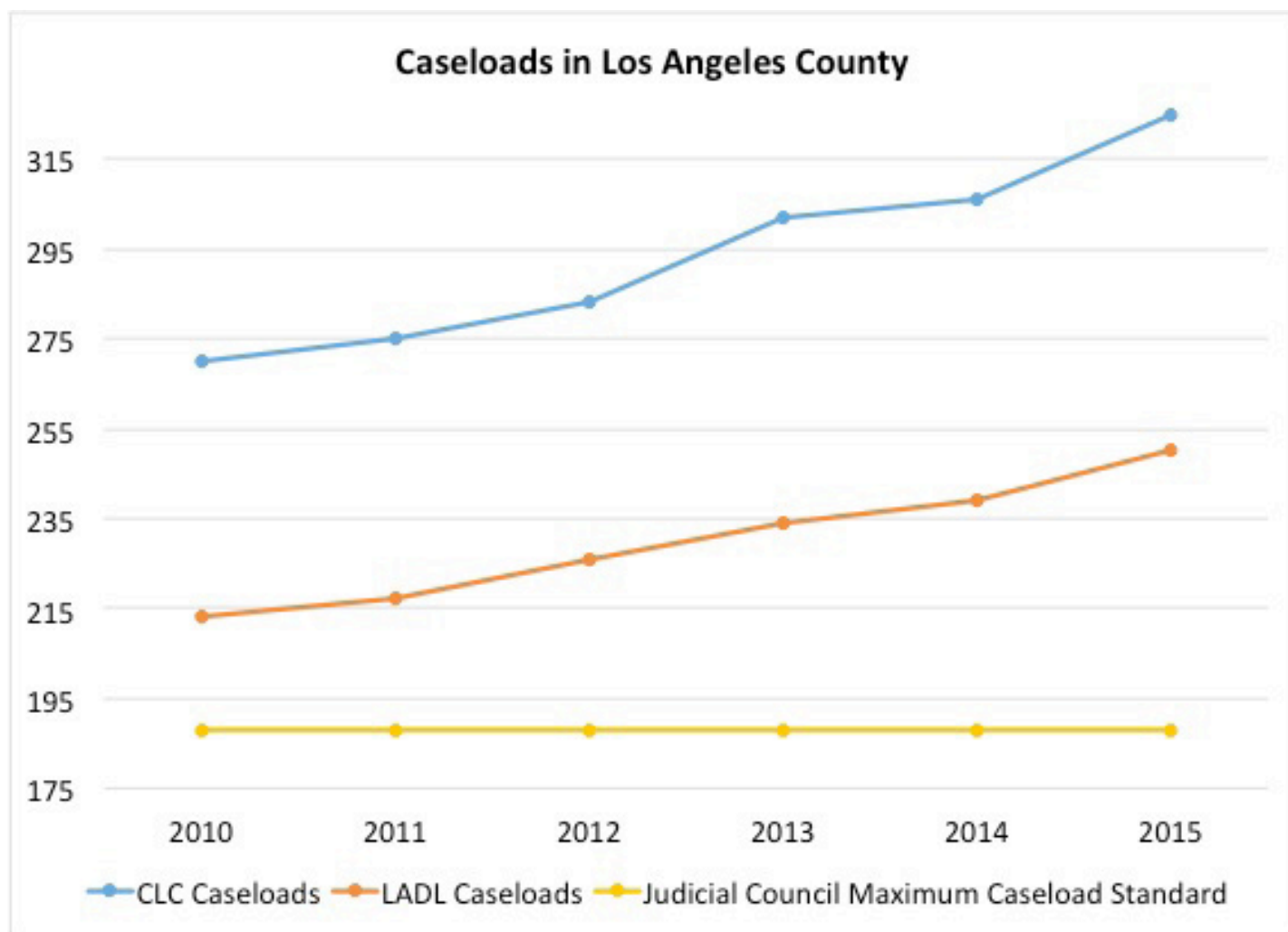
Since the Blue Ribbon Commission’s report was issued in 2009, California not only has failed to increase the budget for the dependency courts to meet Judicial Council’s caseload standards, it has not increased the budget at all. The California state budget for the dependency courts has remained flat at approximately \$103.7 million each year from 2009 to present.²⁵ At the same time, the number of dependency cases filed in the superior courts has continued to climb, as have operations costs. As a result, dependency counsel have been forced to represent even more clients with no additional resources.

These burdens have been felt across the state but particularly acutely in Los Angeles County, which handles the largest number of dependency cases in California (approximately 40% of all cases). In Los Angeles County, the nonprofit organizations that represent children and parents in dependency proceedings have seen enormous increases in their total number of clients and attorney caseloads in recent years. From 2009 to present, the Children’s Law Center of California (“CLC”), the nonprofit that represents children has seen the number of its active clients climb by roughly 5,000 children, and today represents more than 30,000 children in open cases. In 2009, its attorneys represented on average approximately 270

NUMBER OF CLIENTS & CASELOAD AVERAGES FOR LOS ANGELES COUNTY DEPENDENCY LAWYERS

YEAR	CHILDREN’S LAW CENTER		LA DEPENDENCY LAWYERS	
	CLIENTS	AVERAGE CASELOADS	CLIENTS	AVERAGE CASELOADS
2010	25,446	270	17,053	213
2011	26,157	275	17,340	217
2012	26,964	283	18,098	226
2013	29,357	302	18,708	234
2014	29,726	306	20,572	239
2015	30,004	325	21,530	250

FIGURE 3

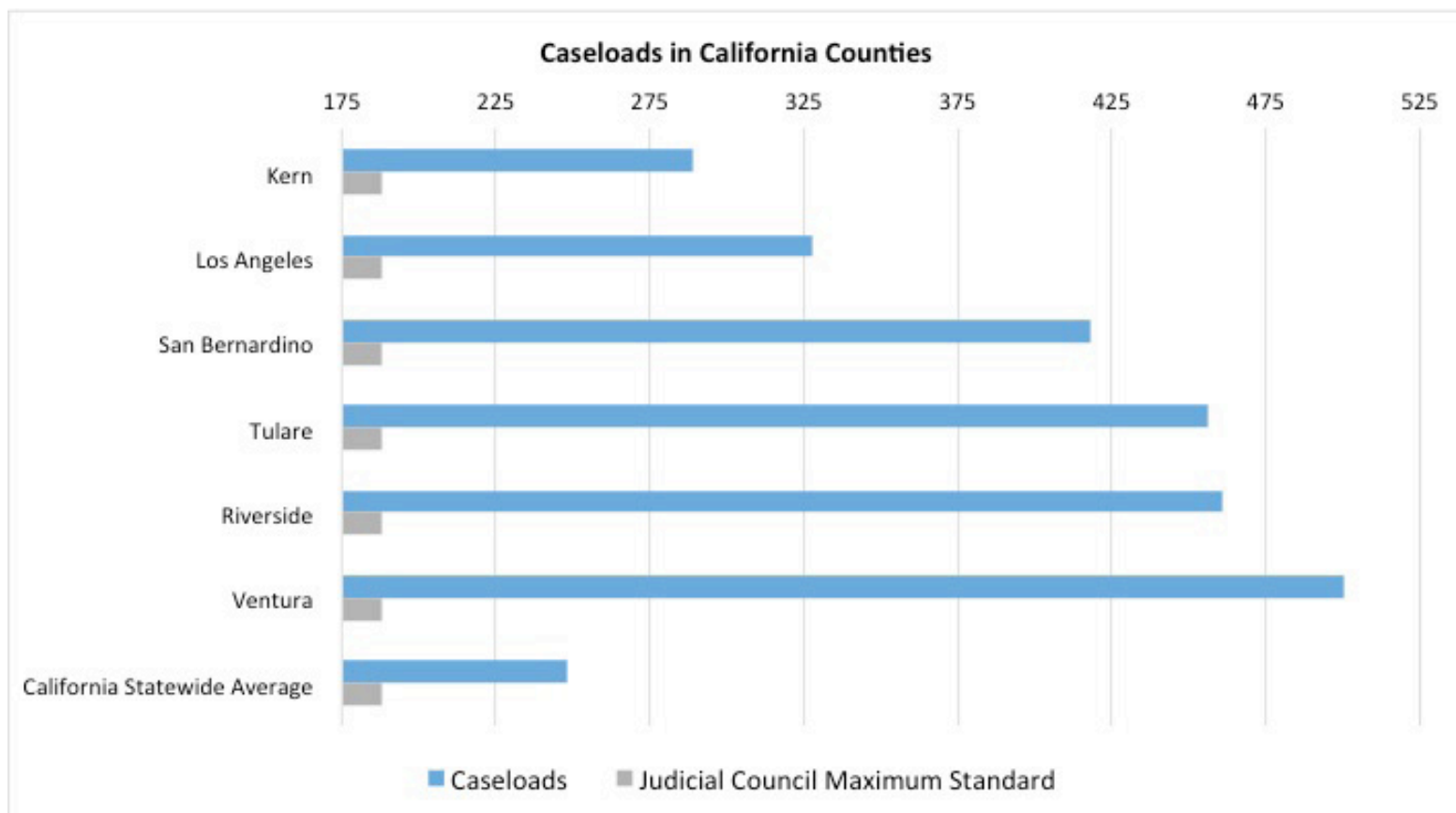


children each in open cases. Today, the same attorneys average roughly 325 children. Further compounding the problem, between 2011 and 2015, per client funding in Los Angeles dependency courts fell from \$646 to \$605 for children in proceedings.²⁶

The Los Angeles Dependency Lawyers (“LADL”), the nonprofit that represents parents, has experienced a similar growth in caseloads.* From 2009 to present, there has been an increase of over 4,000 parents in open cases, leaving its 86 case-carrying attorneys to represent over 21,000 parents who are currently in open cases. During that time period, the average caseload for its attorneys has increased by about 40 clients, from 213 to 250. (See Figure 3)

*Each County has established its own system of assigning dependency counsel. In Los Angeles County, two non-profit organizations have contracted with the State to provide representation to children and parents in dependency court. CLC’s attorneys represent the vast majority of the children in dependency court, and LADL attorneys represent the majority of parents in dependency court.

In December 2013, the Judicial Council provided LADL and CLC with a one-time infusion of funds from money collected from parents who had the ability, at least partially, to pay for counsel. That supplemental funding allowed LADL and CLC to hire additional attorneys, but these positions are temporary and without additional funding cannot be sustained after 2015-16

FIGURE 4²⁷

Other counties across California face similar conditions. **Fifteen counties are so under-resourced that caseloads are more than double the Judicial Council's maximum standard, with many counties having average caseloads well above 400 clients.** For example, in 2014-15, Riverside County dependency counsel carry an average caseload of 461, San Bernardino County dependency counsel carry an average caseload of 418 clients, Tulare County dependency counsel carry an average caseload of 456, and Ventura County dependency counsel carry a caseload of 500.²⁷ (See Figure 4)

The effects of the state's underfunding has been compounded in some counties by the Judicial Council's allocation of state funding. The Judicial Council's allocation formula has historically left certain counties with less than their proportional

share of the dependency case workload. The Judicial Council recently took steps to allocate funding based on each court's workload within four years but—even under a workload-based allocation—the dependency courts across the state will remain far below the funding necessary to reduce caseloads to state standards.

As the Judicial Council acknowledges, at current funding levels, at the conclusion of the four-year implementation plan, dependency courts will only receive 75.7% of funding required to reduce caseloads to the 188 maximum.²⁸

Caseloads also have grown as a result of the passage of AB 12 in 2010, which has led to an increase in the number of children who remain in foster care through age 21.²⁹

CASE STUDIES



JULIE MCCORMICK
Staff attorney at CLC

*"I represent **over 300 clients**. I have practiced family law for over 15 years, yet I feel like I am drowning and am failing my clients. Despite working long hours, I am unable to meet with my clients as much as I need to. I struggle to sufficiently investigate the facts of each of my cases or prepare my young clients for court. In fact, when my young clients come to court, I often only have five to ten minutes to spend with each of them. I do not believe I can provide my clients with the representation they deserve."*



SARAH OLIVER
Attorney at CLC and
child welfare specialist

*"I have been practicing law for 13 years. I currently have over **350 child clients** and am in a constant state of triage. I have so many cases that I am barely able to keep my head above water. I am constantly terrified that I'll miss something important when I'm representing my clients."*



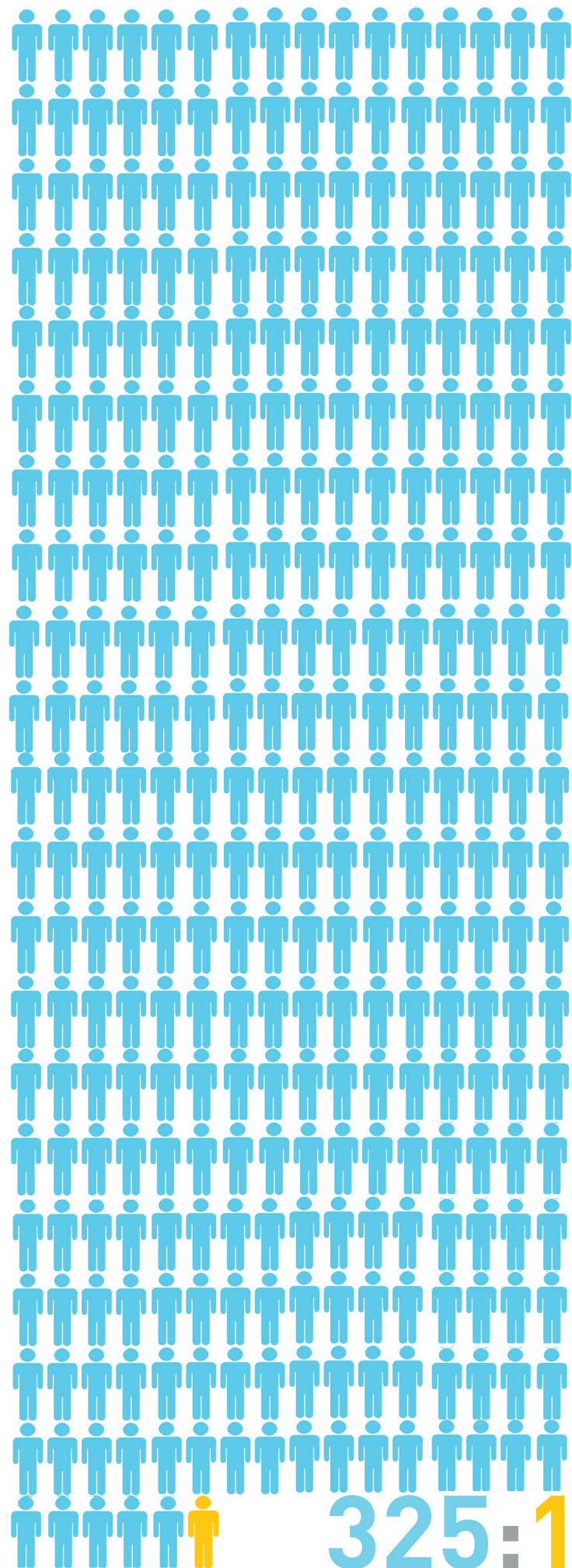
EDWARD TSANG
Staff attorney at CLC

*"I have been a children's attorney for seven years and I currently represent **317 children**. In reflecting on my practice, I would say the most frustrating thing about our large caseloads is that we are often forced to pick only the most urgent issues. I am always jumping from one emergency to the next. I often don't have time to follow up to ensure that my clients' lives are tended to. I don't have time to do my job the way my clients deserve and the way I want to practice."*



BARBARA DUEY
Attorney supervisor at CLC

"I supervise a team of amazing and passionate attorneys, but I believe they are completely overloaded. In my estimation, a good attorney needs to be able to conduct an independent investigation of his or her clients' situation, observe them in their foster homes, attend their Individualized Education Plan meetings, interview their families, and make phone calls to their health care professionals. However, my attorneys' caseloads are so high that they can rarely do all of those things. My attorneys are working nights and weekends, but it's not enough given their extreme caseloads. The system is in crisis."



AVERAGE CASELOADS FOR DEPENDENCY ATTORNEYS
REPRESENTING CHILDREN IN L.A. COUNTY IN 2015

California's failure to sufficiently fund dependency counsel violates the due process guarantees of the federal and state constitutions, and federal and state laws governing dependency proceedings.

California state law, as well as the federal and state constitution, requires that dependency counsel provide "competent" and "effective" representation to children and parents. It is well-established that counsel can only provide such "effective" representation where they maintain caseloads that enable them to devote sufficient time and resources to each client.³⁰ Current caseloads for California dependency counsel are far in excess of what Judicial Council and other experts have determined are the maximum that an attorney can carry and still provide the competent and effective assistance required by law.

The current, excessive caseloads also violate federal laws that require California—as a recipient of federal funding under the Adoption Assistance and Child Welfare Act and Child Abuse Prevention and Treatment Act—to ensure adequate legal representation of children in dependency proceedings that can protect the child's health and safety. California's failure to meet these federal legal requirements not only violate children's rights as beneficiaries of the federal programs, but also risk the loss of significant federal funding under these programs.

A. DEPENDENCY ATTORNEY CASELOADS CURRENTLY EXCEED THE CASELOAD STANDARD ESTABLISHED BY JUDICIAL COUNCIL AND SECTION 317(c) OF CALIFORNIA'S WELFARE AND INSTITUTIONS CODE

Section 317(c) of the Welfare and Institutions Code requires that dependency counsel maintain a caseload that "ensures adequate representation of the[ir] child or nonminor dependent" clients. In 2000, the California legislature amended section 317(c) to require the Judicial Council to promulgate rules establishing caseload standards for dependency counsel. The revised section 317(c) provides, in relevant part:

*The appointed counsel shall have a caseload and training that ensures adequate representation of the child or nonminor dependent. The Judicial Council shall promulgate rules of court that establish caseload standards, training requirements, and guidelines for appointed counsel for children and shall adopt rules as required by Section 326.5 no later than July 1, 2001.*³¹

After performing several comprehensive studies and issuing a number of reports, in October 2007, the Judicial Council formally adopted a maximum caseload standard of 188 per attorney, with a 0.5 FTE investigator/social worker complement for each attorney.³² Despite setting the standard, the Judicial Council acknowledged that "there is widespread recognition that there is not currently sufficient funding available to implement that standard."³³

Now, almost eight years later, despite the legislature's and Judicial Council's clear mandate that attorneys in dependency proceedings must maintain reasonable caseloads that may not exceed 188, caseloads and the burdens on dependency counsel have only increased since that time. **Chronic underfunding has allowed dependency attorney caseloads to surge above 300 in Los Angeles County and above 400 in a number of other counties across California.** As the Judicial Council already determined in 2009, caseloads above 188 prevent counsel for both children and their families from providing effective representation to their clients.³⁴

This pervasive underfunding, and the resultant excessive caseloads, directly contravenes section 317(c) and the caseload standard issued by the Judicial Council.

B. UNDERFUNDING OF THE DEPENDENCY COURTS VIOLATES SECTION 317.5 OF CALIFORNIA'S WELFARE AND INSTITUTIONS CODE

In California, children and parents in dependency court have a right to appointed counsel in all proceedings where there is the potential for a child to be removed from his or her parent's home.³⁵ Courts have traditionally recognized that this right to counsel includes the right to be represented by effective counsel.³⁶ In 1995, the California legislature made clear that children and parents in dependency proceedings have the right to effective representation by enacting section 317.5 of the California Welfare & Institutions Code, which provides:

"All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel."³⁷

Although this right to counsel is statutory rather than constitutional, California courts have "interpreted [it] in substantially the same manner as the constitutional right to the effective assistance of counsel."³⁸ California

Courts have likened the rights conferred to children and parents by section 317.5 to the constitutional right to effective representation criminal defendants possess, and have applied a similar analysis when adjudicating ineffective assistance of counsel cases in the dependency context.³⁹ Accordingly, whether an attorney provides competent counsel involves determining whether an attorney's performance falls below an objective standard of reasonableness as measured against prevailing professional norms.⁴⁰ Further, courts consistently have recognized that this statutory right to counsel also includes the right for both parents and children to seek judicial review of claims of ineffective assistance of counsel.⁴¹

Where underfunding causes court-appointed attorneys to maintain prohibitively high caseloads, the system itself can violate the law because it results in ineffective assistance of counsel in individual cases.⁴² Excessive caseloads are the primary indicator that attorneys cannot serve as competent counsel to their clients because, as the Judicial Council recognized, high caseloads prevent attorneys from performing even the minimum tasks required to represent their clients.

For example, in *Kenny A*, a number of children in dependency proceedings brought a lawsuit against Georgia state agencies and officials for allowing their attorneys to carry excessive caseloads. There, high caseloads prevented attorneys from:

- at times, performing more preparation than merely reading the initial deprivation petition;
- meeting all of their clients;
- determining how many children they, or their organization, represents;
- reviewing their clients' medical, social service, education, or other records;
- meeting with their clients' foster care providers;
- adequately investigating whether their clients are receiving the appropriate medical or social services;
- monitoring whether their clients are in safe foster care placements; and
- monitoring compliance with court orders.⁴³

The high caseloads dependency attorneys across California currently maintain have caused similar issues. For example, dependency attorneys in California report that excessive caseloads have hindered their ability to:

- adequately advise their clients of their legal rights;
- perform legal research;

- access the appropriate investigative and expert resources;
- monitor compliance with court orders;
- meet with their clients in foster care placements;
- communicate with clients beyond brief telephone calls or courtroom exchanges;
- conduct complete case investigations or client-specific legal analysis;
- file extraordinary writs or pursue appeals;
- meaningfully assess each client's placement or conduct an informed review of Child Protective Services' placement decisions; and
- attend to critical pleadings, motions, responses, and objections.

Further, excessive caseloads in California have contributed to high attorney turnover, which has resulted in clients being represented by less experienced attorneys and for cases to be routinely transferred to attorneys who are unfamiliar with the clients and the facts surrounding the cases.

Accordingly, the state's failure to provide adequate funding to the dependency courts has made it impossible for its court-appointed attorneys to provide effective representation to their clients in clear violation of section 317.5.

C. UNDERFUNDING OF THE DEPENDENCY COURTS VIOLATES THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

The State of California's underfunding of the dependency courts also likely violates the United States Constitution because, beyond California's statutory right to counsel, the due process clause of the Fourteenth Amendment also confers parties in dependency proceedings with a right to competent counsel in certain circumstances.⁴⁴

In *Lassiter v. Department of Social Services of Durham County, N.C.*, 452 U.S. 18, 31-33 (1981), the United States Supreme Court confirmed that due process entitles parties in cases involving the termination of parental rights to be represented by competent counsel under certain circumstances.⁴⁵ In order to determine whether a due process is violated, courts must "examine: (1) the private interests at stake; (2) the government's interest; and (3) the risk that the procedures used will lead to an erroneous decision."⁴⁶ After performing the three-part test, the Court held that parents have a due process right to appointed counsel in certain circumstances given the significant interests at stake in dependency court proceedings.⁴⁷

Applying the *Lassiter* analysis to dependency proceedings, California courts have recognized that parents in dependency proceedings generally possess a due process right to counsel when they are facing the termination of parental rights because “the parent’s interest at the termination of parental rights stage is extremely important; the state shares with the parent an interest in a correct decision; and the risk of an erroneous deprivation of the parent’s rights is insupportably high.”⁴⁸

California courts have interpreted this due process right to counsel broadly, determining that it entitles parents to both competent assistance of counsel and to judicial review to determine whether the parent received effective representation.⁴⁹ **Accordingly, the state’s failure to provide sufficient funding to ensure that court-appointed dependency attorneys maintain reasonable caseloads likely also violates the due process clause of the Fourteenth Amendment.**

D. UNDERFUNDING OF THE DEPENDENCY COURTS VIOLATES THE DUE PROCESS CLAUSE OF THE CALIFORNIA CONSTITUTION

Article I, section 7 of the California Constitution also provides parties in parental termination proceedings with a right to competent counsel. Although the Fourteenth Amendment’s guarantee of due process and the California Constitution’s due process clause are not coextensive, courts undertake a similar analysis when determining whether there is a due process violation under either clause. Specifically, to determine whether due process under the California Constitution requires the appointment of counsel, courts “‘must examine the nature and magnitude of the interests involved, the possible consequences appellants face and the features which distinguish [this proceeding] from other civil proceedings. These factors must then be balanced against the state’s interests.’”⁵⁰

Applying this analysis to the right to counsel in dependency proceedings, California courts have recognized that the California Constitution may require the appointment of counsel when parents are faced with the termination of their parental rights because (1) the termination of parental rights implicates “one of the most compelling and fundamental rights”; (2) dependency proceedings are complex and “overwhelm[ing]”; and (3) the state’s interest is merely “financial.”⁵¹ Thus, the due process clause of the California Constitution likewise requires

that parties in proceedings involving the termination of parental rights receive the benefit of competent counsel, and the State of California has an obligation to ensure that court-appointed counsel maintain caseloads that preserve their ability to provide adequate representation to their clients.*

E. UNDERFUNDING OF THE DEPENDENCY COURTS VIOLATES THE FEDERAL ADOPTION ASSISTANCE AND CHILD WELFARE ACT AND CHILD ABUSE PREVENTION AND TREATMENT ACT

California is a recipient of federal funding under two federal programs that require the state to provide children in dependency proceedings with comprehensive services to protect their health and safety, including competent legal assistance.

The federal Child Abuse and Prevention and Treatment Act (“CAPTA”) authorizes the federal government to make grants to states to support child abuse or neglect prevention and treatment programs. Such grants are intended to, among other purposes, “improve[e] legal preparation and representation, including . . . provisions for the appointment of an individual appointed to represent a child in judicial proceedings.”⁵² To obtain a federal CAPTA grant, the state must submit an application that certifies that

*in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings . . . to obtain first-hand, a clear understanding of the situation and needs of the child; and . . . to make recommendations to the court concerning the best interests of the child.*⁵³

*Children may also have a due process right to counsel in dependency proceedings under the corresponding “‘fundamental independent right’ in being part of a family unit.”⁵⁴ Further, the Supreme Court has recognized that children enjoy a fundamental right to family integrity derived from the First Amendment’s broad right of association, the Ninth Amendment’s reservation of rights to the people, and the Fourteenth Amendment’s substantive due process protections.⁵⁵

Likewise, the federal Adoption Assistance and Child Welfare Act (“AACWA”) provides for federal reimbursement for certain expenses incurred by states in administering foster care and adoption services. To participate in the program, a state must submit a plan that includes severally statutorily imposed requirements, including “standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children.”⁵⁶

As a recipient of federal funding under the CAPTA and AACWA, California is obligated to provide children in dependency proceedings with an appointed representative who can provide the court with

information sufficient to ensure “the best interests of the child,” and provide “quality services that protect the safety and health of the child[.]”⁵⁷

The state’s failure to provide sufficient funding to ensure that appointed counsel in dependency proceedings can meet these critical requirements violates children’s rights as beneficiaries of these federal programs.⁵⁸

It also places California at risk of losing significant federal funding because the state has failed to comply with the statutory requirements of the CAPTA and AACWA.

RECOMMENDATIONS

It is long past the time for California to increase the funding for dependency counsel. For at least a decade, dependency counsel have maintained caseloads far in excess of what Judicial Council and other experts have expressly determined is the maximum caseload that an attorney can feasibly carry. To ensure that dependency counsel are able to provide competent and effective representation to children and parents

in compliance with federal and state law, California must increase funding for dependency counsel such that attorneys maintain “optimal” caseloads of no more than 77 clients per attorney. At a minimum, California must take immediate steps to increase funding to ensure that no attorney’s docket exceeds Judicial Council’s maximum standard of 188 clients per attorney.

¹ See Welf. & Inst. Code § 317.

² Welf. & Inst. Code § 317(c).

³ See Superior Court of California, County of Orange, Juvenile Court: Dependency (last visited May 18, 2015), available at <http://www.occourts.org/self-help/juvenile/dependency.html>.

⁴ See Welf. & Inst. Code § 317(c); Judicial Council of California, DEPENDENCY COUNSEL CASELOAD STANDARDS at 5 (2008) (“Judicial Council Report”).

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See Welf. & Inst. Code § 317(e); California Rules of Court 5.660(d); American Bar Association, Standards of Practice for Lawyers Who Represent Children in Abuse and Neglect Cases 3-4 (1999).

⁹ See *id.*

¹⁰ See Welf. & Inst. Code § 317(c).

¹¹ See *id.* at 8 n.2.

¹² See *id.* at 8.

¹³ See *id.* at 12 n.10.

¹⁴ See Committee for Public Counsel Services, Assigned Counsel Manual, Ch. 5, No. 22 (2011).

¹⁵ See Arkansas Judiciary Administrative Order 15.1, § 2(n).

¹⁶ See Supreme Court of Washington, Order no. 25700-A-1004, Standards for Indigent Defense § 3.4.

¹⁷ See Guardians Ad Litem Program Rules and Regulations, Standards, Certification And Training, Ch. 2 §6b.

¹⁸ See Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts §127.5.

¹⁹ See Judicial Council Report at 12 n.10.

²⁰ See *id.* at 8.

²¹ Blue Ribbon Commission, FOSTERING A NEW FUTURE FOR CALIFORNIA’S CHILDREN, FINAL REPORT AND ACTION PLAN at 4 (2009).

²² *Id.*

²³ *Id.* at 4.

²⁴ *Id.* at 17.

²⁵ See Senate Committee on Budget and Fiscal Review, Overview of the 2015-16 Budget Bill at 5-20 (2015) (“2015-16 Budget Overview”).

²⁶ See Garrett Therolf, “Swamped with Dependency Cases, Law Center May Refuse Young Clients,” *Los Angeles Times*, Nov. 14, 2014.

²⁷ See 2015-16 Budget Overview at 5-21.

²⁸ See Judicial Council, Report to the Judicial Council (April 17, 2015).

²⁹ See generally <http://www.childsworld.ca.gov/PG2902.htm>.

³⁰ See *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353 (N.D. Ga. 2005) (plaintiffs prevailed in challenge to dependency court system where, among other things, they established court-appointed attorneys had excessively high caseloads).

³¹ Welf. & Inst. Code § 317(c).

³² See Judicial Council Report at 8.

³³ *Id.*

³⁴ See *id.* at 8 (“current funding levels result in underpaid

and overworked lawyers who often cannot effectively and appropriately advocate for their parent and child clients.”).

³⁵ See Welf. & Inst. Code § 317.

³⁶ See *In re Kristin H.*, 46 Cal. App. 4th 1635, 1660 (1996); *In re Michelle C.*, 130 Cal. App. 4th 664 (2005).

³⁷ *Id.* (emphasis added).

³⁸ *In re Daniel H.*, 99 Cal. App. 4th 804, 806 (2002).

³⁹ See *In re O. S.*, 102 Cal. App. 4th at 1407 (citing *Strickland*, 466 U.S. at 686; *In re Kristin H.*, 46 Cal. App. 4th at 1662, 1671 (drawing an analogy between section 317.5 and the ineffective assistance of counsel standards in criminal proceedings)).

⁴⁰ See, e.g., *United States v. Strickland*, 466 U.S. 668, 694 (1984).

⁴¹ See *In re. Kristin H.*, 46 Cal. App. 4th at 1662 (“There is nothing vague or ambiguous about this directive and we believe it must include the right to seek review of claims of incompetence of counsel.”); *In re Darlice C.*, 105 Cal. App. 4th 459, 463 (2003) (“Where, as here, the juvenile court has ordered parental rights terminated, a parent has the right to seek review of claims of incompetent assistance of counsel.”); cf. *In re Clifton B.*, 81 Cal. App. 4th 415, 428 (2000) (children in dependency are entitled to judicial review of whether they received adequate representation); *L.A. Cnty. Dep’t of Children Etc. Servs. v. Superior Court*, 51 Cal. App. 4th 1257, 1276 (1996) (“The dependency court judges in Los Angeles have a responsibility to their court and to the children who come before them to take all reasonable steps to ensure those children are afforded their right not just to counsel but to ‘competent counsel.’”).

⁴² See, e.g., *Kenny A.*, 356 F. Supp. 2d 1353 (plaintiffs prevailed in challenge to dependency court system where, among other things, they established court-appointed attorneys had very high caseloads); *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *rev’d on abstention grounds*, *Luckey*, 976 F.2d 673 (11th Cir. 1992); *Nicholson v. Williams*, 203 F. Supp. 2d 153, 240 (E.D.N.Y. 2002), *vacated in part by Nicholson v. Scopetta*, 116 F. App’x. 313, 316 (2d Cir. 2004); *New York County Lawyers’ Ass’n v. State*, 188 Misc. 2d 776, 787-88 (Sup. Ct. N.Y. County 2001), *aff’d* 742 N.Y.S.2d 16 (1st Dep’t 2002); *Hurrell-Harring v State of New York*, 2010 NY Slip Op 3798, 7, *17-18 (N.Y. May 6, 2010); *Duncan v. State*, 284 Mich. App. 246, 255 (Mich. Ct. App. 2009), *vacated on unrelated grounds by Duncan v. State*, 780 N.W.2d 843, 844 (Mich. 2010); *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (Mass. 2004); *State v. Smith*, 140 Ariz. 355, 362 (Ariz. 1984); *Rivera v. Rowland*, 1996 Conn. Super. LEXIS 2800 (Conn. Super. Ct. Oct. 22, 1996).

⁴³ *Kenny A.*, 356 F. Supp. 2d at 1363.

⁴⁴ See *In re O.S.*, 102 Cal. App. 4th 1402, 1407 (2002) (“Although a parent’s right to counsel in dependency proceedings derives from statute (§ 317), a parent has a constitutional right to counsel at some stages of those proceedings.”).

⁴⁵ See also *In re Gault*, 387 U.S. 1 (1967) (holding that minors have due process right to counsel in delinquency proceedings).

⁴⁶ *Lassiter*, 452 U.S. at 31.

⁴⁷ *Id.* at 30-31.

⁴⁸ *In re O.S.*, 102 Cal. App. 4th at 1407; *In re Arturo A.*, 8 Cal. App. 4th 229, 238 (1992) (“With respect to those hearings which have the potential of termination of parental rights, however, due process entitlement to competent counsel [under the Fourteenth Amendment] . . . is apparent.”).

⁴⁹ See *In re Arturo A.*, 8 Cal. App. 4th at 238 (“When an indigent is entitled to counsel on due process grounds the entitlement must extend to effective assistance of counsel or it will be a hollow right.”).

⁵⁰ *In re Jay R.*, 150 Cal. App. 3d 251, 262 (1983).

⁵¹ *Id.* at 262-65; see also *In re Sade C.*, 13 Cal. 4th 952, 984 (1996) (“We also recognize that an indigent parent may have a right to the assistance of appointed appellate counsel in his appeal from a state-obtained decision adversely affecting child custody or parental status, on a case by case basis, under the due process clause of the Fourteenth Amendment to the United States Constitution and/or that of article I, section 7, subdivision (a), of the California Constitution.”); *In re Emilye A.*, 9 Cal. App. 4th 1695, 1711 n.10 (1992) (“At this point we feel compelled to comment that a meritorious argument could be made that an indigent parent has a due

process right under the California Constitution to appointed counsel in dependency proceedings and a concomitant right to effective assistance of counsel.”).

⁵² 42 U.S.C. § 5106a(a)(2)(B)(ii).

⁵³ 42 U.S.C. § 5106a(b)(2)(A).

⁵⁴ *In re Kristin H.*, 46 Cal. App. 4th at 1642 (internal citations omitted); see also *Quillon v. Walcott*, 434 U.S. 246, 255 (1977); *Kenny A.*, 356 F. Supp. at 1353 (“The Court finds that children have fundamental liberty interests at stake in deprivation and [termination of parental rights] proceedings.”).

⁵⁵ See *Roberts v. United States Jaycees*, 468 U.S. 609, 617-20 (1984); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

⁵⁶ 42 U.S.C. § 671(a)(22).

⁵⁷ 42 U.S.C. § 5106a(b)(2)(A); 42 U.S.C. § 671(a)(22).

⁵⁸ See *Kenny A.*, 218 F.R.D. at 292 (holding that foster children could enforce 42 U.S.C. § 671(a)(22) as beneficiaries of the AAWCA); see generally *ASW v. Oregon*, 424 F.3d 970, 974 (9th Cir. 2005) (“legislation enacted pursuant to Congress’s spending power can give rise to enforceable rights”).



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RESEARCH/ANALYSIS

Michael Kaufman, staff attorney, ACLU of Southern California

Victor Leung, staff attorney, ACLU of Southern California

LAYOUT/DESIGN

Marcus Benigno, new media strategist, ACLU of Southern California

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