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Overwhelmed System Must Not Silence Voices of Foster Youth

Forum Column

By Miriam Aroni Krinsky

We tout our constitutional principles of democracy and due process as a guiding beacon for the world. The U.S. Constitution proclaims our allegiance to fairness and to the need to ensure that no citizen suffers deprivation without due process of law. And President Bush recently anchored a successful re-election campaign on the notion that we should extend our country's commitment to a free, fair and democratic process to nations throughout the world.

Yet when it comes to youth in foster care, we may be disregarding the essence of due process that our judicial system seeks to ensure.

The dictionary defines democracy as a doctrine of equality of rights, opportunity and treatment. Inherent within those principles is the critical importance of an independent judicial system - a system in which parties are guaranteed that their voices will be heard, that due process will protect the integrity and legitimacy of the result, and that decision-making will be guided by the merits of the case - not by outside influence, monetary clout or political power.

A fair and just legal system, however, cannot exist in a vacuum; all parties must be assured that their voices, perspectives and interests are considered and zealously advanced within the court process. But the right to be heard means little without access to a legal advocate who can navigate the court system. As the Supreme Court has recognized, "[t]he right to legal representation is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice." *Kent v. United States*, 383 U.S. 541 (1966).

In our dependency proceedings, however, we ignore those who have the greatest need for legal counsel and an empowered voice in court. Abused and neglected youth too often are relegated to second-class status when it comes to legal representation. The child's abusers, child welfare agencies and non-offending parents all have a voice and legal representation in court, while youth in some jurisdictions have no voice at all and in others have only limited access to the legal process and protections.

It can be argued that the child's interest in a dependency proceeding is even greater than the interest of the parent, because his or her entire future, maintenance of family relationships, physical safety, health and very home are at stake.

From the perspective of the bench, it is impossible to consider how a fair and just decision can be rendered without knowledge of the child's perspective and what the child wants.

We send a message to children when we exclude them from their own court cases. That message is that we don't value them, that they are not a meaningful part of the process. We extinguish any concept of due process, fairness or legitimacy of decision-making when we exclude the very participants our system is designed to protect - the children we agree to raise under the jurisdiction of our dependency courts.

The national bipartisan Pew Commission on Foster Care recognized the significance of these concerns. The commission opined, "[n]o child ... should face the partial or permanent severance of familial ties without a fully informed voice in the legal process." The commission also noted the "dissonance" and "wildly inconsistent approaches" around the country in regard to the issue of legal representation for children.

Nearly 40 years ago, the Supreme Court established that children have a constitutional right to counsel in juvenile delinquency proceedings. *In re Gault*, 387 U.S. 1 (1967). The *Gault* decision marked the start of a new way of thinking about legal representation for children and extended to children due process protections when liberty deprivations are at stake.

Unfortunately, the extension of these principles beyond the delinquency arena in the intervening years has been a slow process. Tellingly, however, the rationale underlying the *Gault* court's commitment to a voice for children was not limited to delinquency cases.

Instead, the court looked to a presidential commission report that found: "[J]uveniles often need the same safeguards that are granted to adults. And in all cases children need advocates to speak for them and guard their interests, particularly when important decisions are made." *Gault*.

Over time, federal law has sought to propel the notion of representation for children in dependency proceedings. The Child Abuse Prevention and Treatment Act requires that each foster child be represented by

either an attorney or a guardian ad litem. While these provisions are an important first step toward giving children a voice in court, federal law fails to ensure that all children have effective and independent legal representation.

A lay guardian ad litem, no matter how zealous and committed, lacks the expertise gained from a legal education and practical experience in issues related to abuse and neglect. As a nonlawyer, the guardian ad litem has little ability to use the process of the court to the child's advantage. Without adequate legal representation, the child cannot be on an equal footing with the other parties in the case.

A guardian ad litem may be a valuable resource in a dependency proceeding, but the roles of attorney and guardian ad litem are fundamentally different. The guardian's role is to express his or her view of the child's best interest, but the guardian is under no obligation to express the view or wishes of the child. An attorney has an ethical responsibility to express and represent the wishes of his or her client before the court.

In addition, an attorney, unlike a guardian ad litem, is bound by the traditional rules of attorney-client privilege. This allows the child, who is already undergoing emotionally chaotic and traumatic events, to be more comfortable and open with his or her representative and to feel that the process has a true sense of legitimacy.

Moreover, providing children with legal counsel may increase the likelihood that the court will have greater access to facts in the case, be better positioned to make more accurate and informed decisions to promote the best interests of the child, and reduce the risk of making erroneous decisions.

Last month, a landmark ruling from a federal district court in Georgia moved the issue of legal representation of children to the forefront. The court embraced the notion that abused and neglected children have a constitutional due process right to legal representation. The court observed in *Kenny A. v Perdue*, 218 F.R.D. 277 (N.D. Ga. 2005): "it is well settled that children are afforded protection under the Due Process Clauses of both the United States and Georgia Constitutions and are entitled to constitutionally adequate procedural due process when their liberty or property rights are at stake."

The Georgia court not only endorsed the right to legal representation for children in dependency proceedings, but it also underscored that these rights are meaningless unless we ensure that counsel is effective. As the court recognized, however, the goal of assuring effective legal counsel for children cannot be achieved without minimum training, competency standards and reasonable caseloads.

Common sense dictates that counsel who are forced to take on hundreds of cases simply cannot perform effectively. Marvin Ventrell, executive director of the National Association of Counsel for Children, testified in the Georgia case that a child cannot receive effective representation if his or her attorney carries a caseload of significantly more than 100, and certainly not if the attorney has a caseload of 200.

Yet children's attorneys far too often have clients substantially in excess of these numbers, in some instances reaching case loads of as many as 600 clients apiece. No system of justice can or should sanction these practices as consistent with the concept of due process our country purports to promote.

As this nation seeks to spread our constitutional principles to other shores, we must ensure that our own house is in order, that principles of democracy and due process are firmly ingrained in our own legal system. The California Youth Connection, a passionate association of current and former foster youth, has adopted a rallying cry that encapsulates the essence of these democratic values. They demand simply: "Nothing about us without us!"

Our dependency courtrooms and our national policymakers would be well served to heed this sound advice.

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