Children's Advocacy Institute

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Reply to: □ San Diego □ Sacramento

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April 15, 2011

The Honorable Jim Beall, Chair
Assembly Human Services Committee
1020 N Street
Room 124
Sacramento, CA 95814

Re: Support for AB 73

Dear Assemblymember Beall:

The Children's Advocacy Institute at the University of San Diego School of Law (CAI), which for over twenty years has worked to improve the well being of children in California through regulatory, legislative, and judicial advocacy, is pleased to support AB 73, a bill that poses the question:

> **given California's stubbornly enduring failure to provide the kind of life minimally required to fulfill our moral obligations to abused and neglected children, *how many more states than approximately 19 must decide presumptively to open their dependency courts before California allows counties that want to try it to do so, even while requiring protection for children unprecedented in other states, including***
>
> ***(i) protecting the child's identity in the courtroom;***
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> ***(ii) giving the child and her lawyer the power to request the hearing be closed;***
>
> ***(iii) imposing a "best interests of the child" test to closing the hearings that permits consideration of no other interest; and***
>
> ***(iv) measuring the consequences, to see if such openness might improve the lives of California's foster children, as some researchers forecast?***

THE BILL DOES NOT MANDATE THAT EVERY DEPENDENCY CASE BE OPEN TO THE PUBLIC. THE BILL PROTECTS THE CHILD WHILE SHEDDING LIGHT ON THE EFFICACY OF THE SYSTEM THE CHILD LIVES IN

The bill as it will be amended does not require a dependency court to remain open even when, for example, a child or child's counsel presses persuasive arguments against it.

Rather, the bill would—on a pilot basis only, only for four years, for a few counties that want to try it, and in the wake of nearly 20 states that have already done so—***simply change the presumptive starting point of the dependency hearing***.

Instead of the proceedings starting off closed to the public, they would start off open, and counsel for the child party would have to ask for them to be closed, instead of the other way around.

Moreover, the bill:

(i) requires that any identifying information of the child remain confidential;

(ii) provides that a motion to close the proceedings can be made at any time and even by the judge;

(iii) requires the question of open vs. closed to turn ***solely on the best interests of the child only – no balancing of any other potentially competing interest is permitted***; and

(iv) requires the consequences to be studied and measured, to test whether the lives of foster children living in the system were improved by allowing the public a more reliable window into how it works (or doesn't).

EVERY FACET OF OUR DEPENDENCY COURT SYSTEM IS COLLAPSING UNDER CRUSHING CASELOADS

Every major decision about the life of a foster child – with whom she will live, whether she will be drugged, whether she will be able to see her brothers or sisters -- is made in a dependency court where everyone working in it has far greater caseloads than any imaginable or identified maximum.

The lawyers for these children who are by state law supposed to investigate the safety of their placements, advocate for the child's best interests, and serve as the child's voice in a bewildering bureaucracy, have caseloads that are up to twice the ceiling identified by the California Judicial Council (188 children per lawyer) and that ceiling is itself almost twice what national experts suggest (100). As a result, lawyers frequently are only able to meet their child clients briefly before key hearings on such matters as whether the child will be removed from their parents' care, whether the child will be administered psychotropic drugs, and whether they will ever see their brothers or sisters again. Caseloads prevent these lawyers from almost ever appealing or even enforcing existing orders that benefit the child.[1]

[1] http://www.caichildlaw.org/Misc/Caseload_Complaint.pdf

Social workers, too, arguably performing the toughest job of any public employee, shoulder caseloads far above nationally-recognized ceilings.[2]

Dependency judges have caseloads so extraordinary (hundreds, sometimes thousands of children) that in the recent informational hearing in Assembly Judiciary Committee a representative from the Administrative Office of the Courts candidly testified that judges do not obtain all the information they need to make the routinely life-changing decisions they make every day. Think about that. These are children we have removed by force of law from their parents, yet the judges who function as their parents do not have the ability to make informed decisions.

One report timed the average hearing length at two minutes – less than small claims hearings, less than Judge Judy hearings.

This is a travesty; a terrific injustice to these abused and neglected children of the State. It has endured for years, maybe decades.

Why?

One contributing reason is likely this: how this plays out every day, and the human stories that make it resonate with non-policy wonks, is currently presumptively invisible to the public that must demand it be changed if it is to change.

THE REPEATED AND LONG-STANDING FAILURE OF "THE SYSTEM" TO DO RIGHT BY ABUSED AND NEGLECTED FOSTER CHILDREN

The bill's effort to permit specified counties to pilot simply a different starting point where openness is concerned must be viewed against the backdrop of our widespread and long-standing failure to enact and implement systems for abused and neglected children that do anything other than fail them; fail them beyond all moral measure; fail them grotesquely. As the Little Hover Commission plaintively wrote in 2003:

> Children in foster care are routinely denied adequate education, and mental and physical health care. For approximately one out of four children who enter the system each year, foster care is not temporary at all, but a heartless limbo—childhoods squandered by an unaccountable bureaucracy. For a significant number of children, foster care is not healing at all, but inflicts additional trauma on young hearts and minds. In the most severe cases, children are hurt, threatened and even killed while in the State's care.[3]

This is well known to you, Mr. Chair, as a tireless and devoted advocate for these children. No one disputes that when we by force of law remove a child from the care of their parents the State – and, by extension, every Californian—incurs a uniquely personal and heavy moral,

[2] *Ibid*.
[3] Little Hoover Commission, *Still in Our Hands*, (2003), http://www.lhc.ca.gov/lhcdir/report168.html

legal, and spiritual responsibility to these children because we have made them our own children.

Everyone agrees on these principles.

Yet, to our enduring shame, the policies and these outcomes endure.

Again, why?

THE NEED FOR THE PUBLIC TO HAVE A BETTER UNDERSTANDING OF WHAT IS DAILY HAPPENING IN OUR DEPENDENCY COURTS, GROUND ZERO FOR OUR FOSTER CARE SYSTEM

Foster children are faring badly in the latest rounds of budget slashing***. But, foster children did not enjoy a system-perfecting windfall when the budget was flush with cash.***

The saga is always the same. There is plenty of money for other groups but when the foster children come knocking, the public pockets are empty, whether it is because we are in a deficit or because the surplus money we had went to people who can with more political clout successfully divide up the largesse.

Abused and neglected children are few in number, do not vote, do not have a union or chamber, do not go to fundraisers or convene them, are of color, and their tragedies are lived out in secret.

Foster children simply do not have the "juice" to compete in this Legislature (or any other) with interests far less worthy but far more powerful when it comes to dividing up public money.

It has only ever been the case that sustained public outrage changes this kind of political status quo. To our memory, there has never been an instance in recent history where significant reform that does not benefit those with so-called "juice" has occurred without a sustained popular demand for it, where that demand has been predicated solely by a public becoming educated and angry about some failure of their government to do something corrective to fix it.

And, to our knowledge, such reform has never occurred when the most telling examples of why reform is needed are kept secret from the public.

Maybe – just maybe – keeping the daily consequences of our funding priorities as they play out on a human scale in dependency courts presumptively secret from the public that has yet to demand reform *might have something to do with why the public has yet to demand reform.*

THE CLAIMS OF POSSIBLE HARM TO FOSTER CHILDREN WEIGH HEAVILY ON US BUT THEY HAVE SIMPLY HAVE NOT HAPPENED, LET ALONE BEEN SUFFICIENTLY CERTAIN TO WARRANT NOT TRYING SOMETHING DIFFERENT WHEN OUR CURRENT EFFORTS ARE SPECTACULARLY FAILING

For decades, the Institute has devoted itself to the cause of improving the lives of foster children. We are currently involved in litigation with no less than the Chief Justice and the

Administrative Office of the Courts to improve the caseloads of dependency attorneys so as to get the current system to be more responsive to the child's needs. We have successfully sued the Department of Social Services challenging foster parent reimbursement rates. Every year we sponsor and support many bills that try to tweak current systems to be more responsive to the needs of foster children.

Their needs are paramount for us but we are mindful of this: despite our efforts, none of us who work to improve the lives of foster children are succeeding in transforming their lives so that they grow up at least on average as happy, healthy, educated, balanced, and prosperous as children that remain in their families.

All of us are millions of miles from that morally required goal.

If there was any credible evidence from any source or any state that was able to trace harm to foster children simply to a different starting place for determining the openness of dependency proceedings (this bill), we would oppose such efforts.

But, no such evidence attributable to presumptively opening hearings has been presented to us. Respectfully, the worries of least some of those concerned about the bill do not remain intact or persuasive after scrutiny.

For example:

- Opponents claim that photographs and records were released in Minnesota **without also mentioning** that in that state, the case files of children were also made more open – something not contemplated here.

- Opponents highlight that few petitions to close hearings on behalf of children were ever granted – **without also mentioning** that in Minnesota children are not guaranteed a lawyer to represent them, in contrast to California, where every foster child is assigned a lawyer.

- Opponents highlight the concern that children may be anxious about strangers in the court room – **without also mentioning** that these children must already appear before multiple strangers all the time in the most painful contexts. Indeed, most everyone in the dependency court room with power over their lives – judges, social workers, even their own lawyers -- is a stranger. Moreover, the stories, appearances, and testimonies of the most tragically harmed children frequently play out in criminal court rooms that are now and have always been open to the public (and are populated by still more strangers).

In any event, the bill **does not *require* that the proceeding be open even over the objections of the child.** It only makes the proceeding open as a presumptive starting place and if the child requests the hearing be closed, the only issue to be considered is the child's best interests:

> **… the court shall consider whether opening the proceedings to the public is contrary to the child's best interests.**

(Proposed WIC sec. 346.5(d))

That's it. To understand how this—in addition to all of the literally unprecedented protections in this bill, inserted into a policy that has already been piloted in nearly 20 states—works to protect kids who need or want such protection, observe that ***no other factor is admitted for judicial review*** of a child's request to close the hearing.

THE PROBLEM WITH THE OPPONENTS' PROPOSED AMENDMENT

The only thing this standard does not permit is the amendment requested by some opponents: granting the minor child the unilateral, judge-like power to determine the conduct of the courtroom.

CAI includes litigators with 60-plus years of combined experience appearing before judges in a variety of high-profile matters in the state and federal courts, including at the appellate level. CAI is headed by Robert C. Fellmeth, Price Professor of Public Interest Law at the University of San Diego School of Law.

We are not aware of a precedent for granting one party in litigation the entire power to determine the conduct of a judge's courtroom.

Moreover, from the perspective of openness, such an amendment is a poison-pill; a step-backward, since, at least now, when a party requests a hearing be open, it is not the minor who in effect rules on the motion.

Finally, the fact that the author has modestly sought to implement the bill as a pilot (as yet another a gesture to the opponents) should not be used as a pejorative by the opponents to imply that the bill is some kind of unusual social engineering experiment. Surely the opponents would still be opposing if the bill were a statewide decree rather than a "pilot."

More pointedly, every year this Legislature enacts dozens of new bills that have never been enacted anywhere before and that are not accompanied by sunset dates and efforts to measure their consequences (this bill). Where child welfare is concerned, our largest county – Los Angeles County, the one with the most foster kids – operates under an "experiment": the federal waiver. Few of the bills enacted by the Legislature have already been enacted in nearly twenty other states as has this one.

THE POSSIBLE BENEFITS OF GREATER OPENESS

In contrast to the arguments of the opposition,(i) there is evidence from another state that indicates that opening up dependency proceedings helps improve job the performance of those in the court rooms; (ii) there is ample evidence from other open-government contexts that government performance improves when the business of the government is done in public; (iii) there is a desperate need to educate the possibly game-changing public on a routine, more than just a fleeting expose basis, of how the daily operations of these caseload besieged courts fail these children and are, in fact, partly responsible for the hideous outcomes described above; and (iv) there is recent evidence that wider publicity about foster care problems leads to noteworthy reform—legislative and operational reforms have been enacted driven entirely by coverage in the last few years by the *San Jose Mercury News*, the *Sacramento Bee*, and the *Los Angeles Times*.

The most thorough study of the openness to be permitted by the bill concluded:

> **[R]eal and potential benefits result from open hearings/records, including enhanced professional accountability, increased public and media attention to child protection issues, and openness of judicial proceedings in a free society. A critical factor that will influence the balance between the costs and benefits of open hearings/records in child protection proceedings will be the amount and type of attention that the public and the media pay to open hearings/records . . . , given the enhanced public access that results from this policy.[4]**

"Enhanced professional accountability." "Increased public and media attention to child protection issues."

These are welcome things where child welfare is concerned.

SUGGESTED AMENDMENTS

We respectfully suggest two refinements:

Suggested amendment number 1:

> (d) If an objection is made pursuant to this section by the child's attorney, or any other party to the proceeding, or if the court on its own motion wants the proceeding to be closed to the public, the court shall consider whether opening the proceedings to the public is contrary to the child's best interests. The court shall issue a specific finding explaining the reasoning and bases for its decision. The Judicial Council may adopt guidelines of factors that courts should consider when determining the best interest of the child under this section.
>
> (g) At any point in the proceedings, the court may, in its discretion, on its own motion or upon motion of persons specified in subdivision (d), close the proceedings to the public. The court shall issue a specific finding explaining the reasoning and bases for its decision.

Rationale: This is to ensure that judges do not simply, one way or another, accept or reject arguments as to what is or is not in the child's best interests in a conclusory fashion. Aside from being important to ensure a substantive discussion of the issues, such findings may well be important in assessing the pilot.

Suggested amendment number 2:

> (d) If an objection is made pursuant to this section by the child's attorney, or any other party to the proceeding, or if the court on its own motion wants the proceeding to be closed to the public, the court shall consider whether [DELETE opening the proceedings to the public is contrary to the child's best interests.]

[4] Fred Cheesman II, *Key Findings from the Evaluation of Open Hearings and Court Records in Juvenile Protection Matters,* p. 32 (National Center for State Courts 2001).

closing the proceedings is required to protect the best interests of the child. The Judicial Council may adopt guidelines of factors that courts should consider when determining the best interest of the child under this section.

Rationale: The current language is somewhat inconsistent with the proceedings being presumptively open.

CONCLUSION

As the California Blue Ribbon Commission on Foster Care observed:

> California's dependency courts are overstressed and underresourced, burdened by crowded dockets and inadequate information.[5]

The status quo has not worked and is not working for these children. The intent is not to mandate a different starting place for all of the State. The intent is simply to get out of the way of those counties that wish to try something already being implemented in nearly 20 states; measuring and testing the time-limited pilot all the while.

It is time on a pilot basis in this State to make it slightly easier for the taxpaying and voting public to see what an "overstressed and underresourced" court lacking the basic information to make wise decisions looks and sounds like, and measure whether doing so helps.

Sincerely,

Ed Howard,
Senior Counsel

cc: Members of the Assembly Human Services Committee

[5] California Blue Ribbon Commission on Children in Foster Care, *Fostering a New Future for California's Children: Ensuring Every Child a Safe, Secure, and Permanent Home: Final Report and Action* 3 (May, 2009).