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## Viewpoint: 'E.T.' Hurts Foster Kids, Should Be Reheard

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In May 2009, the AOC published the "Final Report and Action Plan" of the Blue Ribbon Commission on Children in Foster Care, created by former Chief Justice Ronald George and chaired by former Justice Carlos Moreno. That report contained recommendations to the Judicial Council for improving the outcomes for foster children under the jurisdiction of the state's juvenile courts.

The commission's second recommendation called on the "the Judicial Council and the trial and appellate courts [to] make children in foster care and their families a priority when making decisions about the allocation of resources and administrative support." Its fourth recommendation was that "the Judicial Council, Congress, the Legislature, the courts and partnering agencies should give priority to children and their families in the child welfare system in the allocation and administration of resources." Recommendation 2D, after noting that "the court's ability to make fair, timely and informed decisions requires attorneys, social workers and Court Appointed Special Advocates who are well-qualified and have the time and resources to present accurate and timely information to the courts," specifically recommended that "the Judicial Council advocate for the resources, including a stable funding source, necessary to implement the council's recently adopted attorney caseload standards."

In July 2009, two months after the commission's report was issued, five Sacramento County foster children filed a class action in the Eastern District against the Judicial Council and the AOC. The children were represented pro bono by Winston & Strawn and the Children's Advocacy Institute at University of San Diego School of Law. The suit alleged that the caseloads of court-appointed counsel for children in Sacramento County were as high as 395 cases per attorney — more than twice the maximum caseload standard set by the Judicial Council itself. The complaint claimed that the funding provided by the AOC for court-appointed counsel was inadequate to ensure that children's attorneys had caseloads that would allow them to provide competent representation.

The first-named plaintiff, E.T., alleged that, although she had been in the foster care system for less than a year, she had already had two different attorneys, neither of whom had much contact with her. Although there had been 14 hearings in her case, her attorneys had only met with her briefly three times. In addition, although she was a special education student who had mental health issues, her attorneys had not been able to investigate or bring her mental health needs to the attention of the court nor did they investigate her need for special education.

The second-named plaintiff, K.R., had been in the foster care system for four years at the time the complaint was filed. She was in her fifth foster care placement and had had six different attorneys in those four years. Although there had been 17 hearings in her case, none of her attorneys had ever contacted her. The attorneys filed no pleadings, motions or objections to protect her interests and failed to take any action to stabilize her foster care placements.

C.B., the third-named plaintiff, alleged that she was a developmentally delayed child who had had 10 attorneys and 10 placements

over the 10 years she had been in the foster care system. Those 10 attorneys did not contact her before most of the hearings in her case and failed to take any action to ensure that her educational needs were being met. Even though there was a court order for contact between this child and a sibling, the attorneys did nothing to secure compliance with the order. The allegations concerning the other named plaintiffs alleged similar failures by court-appointed attorneys to meet with their clients and to advocate for their clients' interests in the juvenile court.

Because every decision about the lives of abused and neglected children (what drugs they will take, with whom they will live, where they will be schooled, whether they are allowed to see brothers or sisters) is made by a juvenile court judge, the complaint alleged that abused and neglected children have a due process right to adequate representation. This was neither a novel concept nor a novel cause of action. In 2003, a Georgia federal district court ruled that foster children had a due process right to adequate counsel (*Kenny A. v. Perdue*, 218 F.R.D. 277). The child plaintiffs also made an equal protection claim and alleged other violations of state and federal laws requiring that abused and neglected children have competent representation. The complaint also challenged the Sacramento dependency judges' caseloads, alleging that they were so big that juvenile court bench officers spent an average of two minutes of courtroom time per case.

Represented by Jones Day, the Judicial Council and the AOC played hardball from the start. Ignoring their own Blue Ribbon Commission's recommendations, the defendants filed a motion to dismiss arguing that abused and neglected children had no guaranteed right to a lawyer, much less a competent lawyer. They urged the federal court to abstain from hearing such cases, claiming that any decision on the merits would inject the federal judiciary into the cases of individual foster children and thus interfere with the jurisdiction of state courts. This argument persuaded the federal district court to issue a decision that effectively bars any foster child from ever being able to file lawsuits in federal court for anything, even civil rights violations, if the defendants are state judicial branch administrators instead of state executive branch administrators.

With such a disastrous result and with the district court decision being cited by other district courts, the plaintiffs did three things: They appealed; they dramatically narrowed their case (abandoning all claims for injunctive relief and the claims challenging judicial caseloads); and, in their opening brief all but implored the judicial defendants to articulate some — any — limiting principle to their theory. In their appellate brief, the Judicial Council and the AOC held the line and sought to win at all costs, no matter how the case law might fall.

The result — [E.T. v. Cantil-Sakauye](#), 11 C.D.O.S. 11707 — is a decision that, in the words of eminent legal scholars, could bar a "wide array of constitutional cases ... from federal court." (UC-Irvine School of Law Dean Erwin Chemerinsky who, with two other constitutional law professors, the ACLU and the Western Center on Law and Poverty, filed a request to have the decision reheard or reheard *en banc*.) The Ninth Circuit U.S. Court of Appeals decision not only bars suits by foster children in federal court over anything related to their status as a foster child, it may bar the doors of the federal courthouse to others as well when the defendants are state court administrators charged with violating the plaintiffs' constitutional or federal rights.

This is not to suggest that the Judicial Council or the AOC should have just capitulated in response to being sued. They have every right to a vigorous defense just as they have every right to prioritize case management technology over keeping courthouse doors open. But, just because they had the right to do these things does not mean that it was right to do them. The public has the right to hold the judicial branch to a higher standard, a standard commensurate with the elevated position the judiciary holds among all our public officials. When sued, they should not act like common litigants in a common business dispute.

We have a right to expect the judicial branch to be consistent and to not take positions in litigation that are inconsistent with positions they take in other public arenas. *E.T.* sought to secure for foster children the very rights the AOC-sponsored Blue Ribbon Commission recommended that the dependency system provide for every foster child. The AOC and Judicial Council's position in *E.T.* actively sought to deny those rights to these children.

We also have a right to expect that the judicial branch — especially when sued — will defend the case with an eye to the bad law that might be made from their defense, knowing that their colleagues hearing the case will listen to them with a unique deference. They should, in other words, defend the suit in a manner proportional to the harms that will come to them if they lose, because sometimes winning at all costs simply costs too much. Whether or not the Judicial Council and the AOC intended to bar the doors of federal courthouses to all foster children, that is ultimately the result of their defense.

It may not be too late. The Judicial Council and the AOC should act like judges who understand the dangers of bad precedent and the regrettable consequences of their take-no-prisoners litigation strategy against foster children. They should ask that *E.T.* be reheard.

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