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Statement on ACF's 2012 Changes to the *Child Welfare Policy Manual's* Public Disclosure Provisions and the Impact on Future Issues of *State Secrecy and Child Deaths in the U.S.*

For the past several years, the Children's Advocacy Institute (CAI) and First Star have engaged in national and state-based advocacy and public education regarding, among other things, the mandate contained in the federal Child Abuse Prevention and Treatment Act (CAPTA) requiring states to have laws or programs that allow for "public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality." As organizations dedicated to making thoughtful and meaningful reform that helps to save and improve the lives of our most vulnerable citizens, we became dedicated to ensuring that reform in this most extreme subset of cases can be driven by reliable and comprehensive data. CAI and First Star regularly survey the laws of all fifty states and the District of Columbia to determine whether each jurisdiction is in compliance with this requirement, and to evaluate the extent to which each state's laws or programs further the purpose and intent of the public disclosure provision. In 2008 and again in 2012, we published our findings in national reports entitled *State Secrecy and Child Deaths: An Evaluation of CAPTA-Mandated Public Disclosure Policies about Child Abuse or Neglect Fatalities or Near Fatalities, with State Rankings* (available at www.caichildlaw.org).

CAPTA's public disclosure provision reflects Congress' determination that the value of maintaining confidentiality of child abuse and neglect reports and records is greatly diminished in cases of fatalities and near fatalities, and that in such cases it is of overwhelming importance to examine the performance of the system as a whole and to identify and remedy any mistakes, weaknesses or failings. Indeed, the U.S. Senate has reported that the CAPTA provision mandating public disclosure in these cases "ensures improved accountability of protective services and can drive appropriate and effective systemic reform."¹ The U.S. House of Representatives likewise stated it

is the intent of the conferees that in the case of a fatality or near-fatality resulting from child abuse or neglect, that the factual information regarding how the case was handled may be disclosed to the public in an effort to provide public accountability for the actions or inaction of public officials.²

Thus, Congress has determined that in order to identify and fix flaws in our child welfare system, the need for public disclosure of what happened in these specific cases must trump the rule of confidentiality that typically applies to child abuse and neglect records and reports. To ensure that this disclosure takes place, Congress amended CAPTA in 1996 to explicitly require that states have policies allowing for the disclosure of this information to the public.

¹ U.S. Senate, *Sen. Rep. No. 378* (2010).

² U.S. House of Representatives, *H.R. Rep. No. 104-430* (1995).

With the first *State Secrecy* report, released in 2008, CAI and First Star put Congress, as well as the U.S. Department of Health and Human Services (DHHS) and its Administration on Children and Families (ACF), on notice that many states were not in compliance with CAPTA's public disclosure requirement. Some states had no identifiable public disclosure policy at all, other states had policies that covered only fatalities and not near-fatalities, and many states had restrictions and exceptions that basically rendered their public disclosure policies illusory.

Responding to this notice, in 2010 the Senate Health, Education, Labor and Pension (HELP) Committee called upon HHS to take action to address this situation by adopting the following Report language (emphasis added):

The committee believes that the duty of child protective services, required in CAPTA Sec. 106(b)(2)(x), to provide for the mandatory public disclosure of information about a case of child abuse or neglect which has resulted in a child fatality or near fatality ensures improved accountability of protective services and can drive appropriate and effective systemic reform. However, the committee is aware that not all States are in compliance with these CAPTA requirements. **The committee calls upon the Secretary of Health and Human Services to develop clear guidelines in the form of regulations instructing the States of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities, and to provide technical assistance to States in developing the appropriate procedures for full disclosure of information and findings in these cases.**

Thus, as stated by the HELP Committee, the expectations of Congress are that

- (1) HHS adopt regulations that fully inform states of their responsibilities under the public disclosure provision, and
- (2) States provide “full disclosure” of information in cases of child abuse or neglect fatalities or near fatalities.

Where do we stand five years later?

- (1) HHS has refused to adopt regulations that instruct states about their responsibilities *vis-à-vis* CAPTA's public disclosure requirement, and
- (2) HHS made un-noticed, unilateral revisions to its *Child Welfare Policy Manual (CWPM)* in 2012 that purports to allow states to provide less transparency and limited information and — most disturbingly — purports to give states discretion to provide no disclosure whatsoever.

CAI has numerous concerns about the actions taken by DHHS/ACF over the last few years, as they contradict both the congressional intent of CAPTA and the clear direction of the Senate HELP Committee. These concerns include the following:

1. ACF's Adoption of Policy Interpretations Instead of Regulations

As an overarching matter, we find it unacceptable that ACF has chosen to publish “policy interpretations” in its CWPM regarding the CAPTA public disclosure mandate, as opposed to engaging in the more transparent, binding, and enforceable process of rulemaking.³ We respectfully note that the HELP Committee explicitly called upon HHS to adopt “regulations instructing the States of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities” (emphasis added).

³ With the ACF's recent repeal of the few CAPTA regulations that had ever been formally adopted in the 41 years since CAPTA was first enacted, we are left without a single duly-adopted regulation implementing *any part* of CAPTA — not just its public disclosure mandate.

Our research informs us that states are struggling to understand exactly what their responsibilities are with regard to the public disclosure mandate. On the one hand, they must maintain the strict cloak of confidentiality that generally governs the child welfare system. On the other hand, they are required to release information about certain cases. Faced with these two very different mandates, and without any formal, binding regulatory instructions provided by ACF, many states err on the side of confidentiality and have adopted disclosure policies and/or practices that thwart the congressional intent behind the public disclosure mandate.

In order to ensure that states provide “full disclosure” that furthers congressional intent, ACF must adopt regulations that expressly specify what states must do in order to comply with the public disclosure mandate. The cause of ensuring faithful compliance with CAPTA requires rules that have the dignity and binding impact of regulations — regulations that represent the best effort to ensure a national floor of CAPTA compliance among states.

2. ACF’s Unauthorized Creation of Extremely Broad Exceptions to Disclosure

The one positive element of ACF’s 2012 changes was its definitive answer “**Yes**” to the question “[i]s there information that a state **must disclose** to the public?” (emphasis added); in fact, ACF lists specific categories of information that a state’s public disclosure policy **must** encompass (see CWPM section 2.1A.4, Q/A #8).

However, ACF then creates, with no authority to do so, an exception that swallows the rule: “States may allow exceptions to the release of information in order to ensure the safety and well-being of the child, parents and family or when releasing the information would jeopardize a criminal investigation, interfere with the protection of those who report child abuse or neglect or harm the child or the child’s family.”

We do not object to allowing states to temporarily withhold specific information if release of that specific information would jeopardize a criminal investigation. Nor do we object to allowing states to withhold identifying information concerning the individual who reported child abuse or neglect.

However, we have grave concerns with the new CWPM language that purports to give states an unfettered blanket allowance to make exceptions to the release of information in order to ensure the safety and well-being of the child, parents and family, or when releasing the information would harm the child or the child’s family. This new language completely contradicts language that was previously contained in CWPM Section 2.1A.4, Question 4. The prior language, which was repealed by ACF as part of its 2012 revisions, explained that states have no option or discretion in releasing this information even if “full disclosure may be contrary to the best interests of the child, the child’s siblings, or other children in the household.” ACF’s previous policy interpretation of the CAPTA public disclosure mandate fairly reflected Congressional intent that — in just the most tragic cases of child abuse or neglect fatalities and near fatalities — the interest in preventing further tragedies through the flow of information trumps the privacy interests involved. In fact, in enacting the CAPTA public disclosure provision, Congress already conducted the balancing test and determined that the benefits of disclosure outweigh any potential impact that disclosure might have on those involved. By allowing states to engage in their own balancing test, and to withhold information about child abuse and neglect deaths and near deaths, ACF has now disregarded Congress’ decision in this regard and replaced it with its own.

No intervening statutory or judicial action took place compelling, necessitating, permitting, or even explaining this complete change in ACF’s “policy interpretations,” which now thwart congressional intent. In fact, the one piece of congressional directive that was handed to ACF prior to its 2012 revisions (the 2010 HELP Committee report language) instructed the agency to ensure that states were engaging in “full disclosure of information and findings in these cases” — not to give states the discretion to withhold information as they see fit.

ACF would later describe the reason for its 2012 revisions as follows: “The Administration recognized that some States want to provide the public with a full picture of the agency’s involvement when child abuse or neglect is the cause of a child fatality or near fatality.”⁴ The ACF explanation goes on to say that: “Prior Federal policy did not precisely describe what information may be disclosed and allowed for State discretion in releasing the facts, findings, and information.” We presume the latter part of this statement refers to discretion in what to release, not in whether to release findings or information since, as noted above, the pre-2012 “policy interpretations” clearly provided that states had **no option or discretion** with regard to releasing this information if requested to do so. So while commendably giving states a specific set of minimum information that must be released, ACF chose to also purportedly give them *cart blanche* discretion to withhold any and all information by adding the broad new exceptions noted above.

This change allows states to withhold information to purportedly ensure the safety and well-being of not only the child victim and other children in the household — *but also the parents and family*. In so doing, ACF has decided that protecting the interests of adults (even those perhaps responsible for the child’s fatality or near fatality) is more important than the public’s right to information that could help save other children’s lives. Such an interpretation is *clearly* not consistent with Congressional intent.

3. ACF’s Failure to Define the New Term “Pertinent to”

As noted above, ACF’s 2012 changes to CWPM section 2.1A.4, Q/A #8 added language indicating specific categories of information that must be included in a state’s public disclosure policy. That information includes, but is not limited to, “the cause of and circumstances regarding the fatality or near fatality; the age and gender of the child; information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality; the result of any such investigations; and the services provided by and actions of the State on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality.”

While the specificity provided by this listing was at first welcomed by child advocates, we quickly feared ACF’s failure to define what information is to be deemed “pertinent to” the abuse or neglect that led to the fatality or near fatality would lead to under-disclosure or non-disclosure by states that adopt a very limited interpretation of the term. Since a primary purpose of the public disclosure mandate is to review what led up to a tragic incident of child abuse or neglect fatality and near fatality, and whether anything could have been done to potentially prevent such an incident, clearly some of the most vital and useful information is what happened before in that family’s life. Did we have prior signs or indications that this child might be in harm? Did we respond appropriately to those signs? As child advocates, we believe that everything contained in a case file about prior events is potentially “pertinent to” an eventual death or near-death, and all such information must be disclosed so that the public can make that determination.

When a child dies due to abuse or neglect in a home that had previous contacts with the child welfare agency, the agency might have deemed previous reports of abuse or neglect insufficient to act upon, or perhaps **not pertinent to** previous reports of abuse or neglect. We question the wisdom of allowing the child welfare agency to have unilateral and unfettered discretion to determine what prior information was pertinent to a case that eventually resulted in a child’s fatality or near fatality. This is particularly true when another purpose of providing public disclosure is to determine if the agency inappropriately

⁴ See Children’s Bureau Policy Division, *Children’s Bureau Policy Division Update* (April 23, 2013). ACF does not indicate what the Administration thought the purpose of the mandated public disclosure policy was prior to 2012 — if not to ensure that states “provide the public with a full picture of the agency’s involvement when child abuse or neglect is the cause of a child fatality or near fatality.”

handled or responded to prior reports or information indicating that a child was in a potentially harmful situation.

We have called upon ACF to adopt into regulation language that expressly states that any and all findings or information about previous reports, referrals, investigations, services provided, and/or actions taken with regard to the child, the child's family, and/or members of the child's household are deemed "pertinent to" the child abuse or neglect that led to the fatality or near fatality.

CONCLUSION

While giving states some much needed specificity regarding what they are required to release pursuant to CAPTA's public disclosure mandate, ACF's 2012 CWPM revisions are contrary to Congressional intent and, therefore, illegal by

- giving states *carte blanche* discretion to refuse to provide public disclosure of findings and information about child abuse and neglect fatalities and near fatalities through the use of broad, amorphous exceptions (directly negating congressional intent that states provide "full disclosure" by allowing states to provide no disclosure whatsoever);
- favoring parental, familial, and other privacy interests over the need to ensure public review and accountability of our child welfare system;
- failing to provide states with clear and complete guidance as to what their responsibilities under CAPTA's public disclosure mandate are, and how they can provide full disclosure in a manner that comports with any other applicable federal laws; and
- taking the form of "policy interpretations" instead of the Congressionally-mandated form of binding and enforceable regulations.

What impact will ACF's 2012 *Child Welfare Policy Manual* revisions have on future issues of the *State Secrecy* report?

When CAI and First Star reviewed and graded states' public disclosure policies for the first two editions of our *State Secrecy* report, we did so based on, among other things, how those policies would be interpreted in light of the guidance then provided by ACF in its *Child Welfare Policy Manual*.

ACF's blunt reversal with regard to the issues discussed above will necessitate a complete re-examination of each state's public disclosure policies for child abuse or neglect fatalities and near fatalities to ensure that the policies, among other things,

- explicitly do not take advantage of the broad discretion to withhold that has purportedly been granted to states by ACF;
- explicitly mandate the release of the specific categories of information that a state must disclose with regard to child abuse or neglect fatalities and near fatalities as provided in CWPM section 2.1A.4 Q/A #8; and
- provide clear and broad definitions of terms such as "pertinent to" in a manner that fully furthers the intent and purpose of the CAPTA public disclosure policy.