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2013 Annual Report

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Children's Advocacy Institute

2013 Annual Report





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This annual report covers the activities of the
Children's Advocacy Institute between
January 1, 2013 and December 31, 2013.

The Children's Advocacy Institute is part of the
University of San Diego School of Law.
Contributions to CAI are tax-deductible to the extent the law allows.

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About The Children's Advocacy Institute



In 1989, Professor Robert C. Fellmeth founded the Children's Advocacy Institute as part of the Center for Public Interest Law (CPIL) at the University of San Diego (USD) School of Law. Staffed by experienced attorneys and advocates, and assisted by USD law students, CAI works to improve the status and well-being of children in our society. CAI includes academic and clinic training of law students in child advocacy, research into child related issues, and public education about the status of children and of the performance of parents and the state to advance their interests. CAI also engages in direct advocacy before courts, agencies and legislatures to seek leveraged results for the benefit of children and youth. All of these functions are carried out from its offices in San Diego, Sacramento, and Washington, D.C. CAI is the only child advocacy group operating on a campus, in a state capital and

also in our nation's capital. That presence has grown in importance as organized interests, with a focus on relatively narrow and short-term self-benefit, increasingly dominate public policy.

The Children's Advocacy Institute is advised by the CAI Council for Children, a panel of distinguished community, state and national leaders who share a vision to improve the quality of life for children. CAI functions under the aegis of the University of San Diego, its Board of Trustees and management, and its School of Law.

CAI's academic program is funded by USD and includes the first faculty chair endowment established at the USD School of Law. In 1990, San Diego philanthropists Sol and Helen Price contributed to the fund, which is now approximately \$5 million in value. The first and current holder of the Price Chair is Professor Robert C. Fellmeth, who also serves as CAI's Executive Director. The chair endowment

and USD funds committed pursuant to that agreement finance the course and clinic academic programs of both CPIL and CAI. A separate endowment helps to fund the Energy Policy Initiatives Center (EPIC), also a part of CPIL, which works on environmental issues — with a focus on energy and the future protection of the earth, a mission consistent with CAI's representation of the long-term interests of children.

However, 100% of the funding for CAI's advocacy program must be raised each year from "soft money" sources — contributions, attorneys' fees, foundation grants, *cy pres* awards, etc. CAI is fortunate to have the personal backing of many highly respected individuals. One point of special pride is the contribution for CAI's work by a majority of the faculty at the USD law school from their own pockets. We are honored to receive such a level of support from within our own community.

From the Desk of Executive Director

I. THE SETTING FOR CHILD ADVOCACY IN AMERICA

This report summarizes where CAI is in its advocacy for children — including the major work of 2013 and our plans for 2014. In previous reports, we discussed the cultural and political obstacles we face. We again feel obliged to outline and update this systemic setting. Tenure is supposed to free professors to tell what they believe to be the truth, however unpleasant or unpopular. So the following is bereft of the passive voice, Latin-infused and citation-laden format that my profession uses to feign neutral exposition. On the other hand, it is not intended as simply an emotionally cleansing rant. I well know that writing is most persuasive when it does not make judgments, but when its facts or stories lead the reader to make them. I apologize for lacking the satirical skill of a Stephen Colbert. But the subject matter below deserves to be part of the discussion among child advocates. Currently, it is not. Nor has it been. I respectfully request your consideration of the following — which I believe is relevant to where children stand in America and the barriers to their success and to the actualization of our oft-stated values.

A. The “Greatest Generation” Example for the Current “Baby Boomers”

There is a wise saying among one of our Native American pueblo tribes: *“We did not inherit this earth from our parents, we are borrowing it from our grandchildren.”* The “Baby Boomers” (my generation born — between 1945 and 1964) benefitted much from our parents and grandparents — whose record largely reflects that ancient homily. Accordingly, they were termed by Tom Brokaw in his bestselling book, *The Greatest Generation*. They overcame perhaps the most severe financial depression in American history; they defeated fascism in a bloody war. They followed those years of work and

danger and heartbreak with the Marshall Plan to rebuild much of the world — including the aggressive nations we defeated. This previous American generation helped the children of even our deadly adversaries. And it did so without seeking permanent control over those nations politically, contrary to longstanding imperialistic practice. Few nations in history have followed such a path.

The members of the Greatest Generation then made extraordinary investments in the education of their own children here at home. Indeed, California (under Governor Pat Brown) set the model to allow almost any child a reasonable chance at free higher education through a community college and state university system unrivaled anywhere — keeping tuition low so graduation would not be a debt culmination event, but the advent of a productive life, including the early opportunity to buy a home and build a family.

But that was not the end of it. That generation also created national parks and protected wilderness areas; enacted air and water pollution statutes and worker safety laws; perfected an interstate highway system; created our modern utility grid; and built massive





water projects that made our prodigious agricultural production today possible. It produced a long list of achievements, including investment in each other and help for the destitute, especially families with children (*e.g.*, AFDC, Medicaid, food stamps). And they moved to provide security for their own parents, creating Social Security and Medicare.

At the same time, they had an admirable ethic that also reflected those core values. They were willing to protect those in need because they believed such aid would not be abused nor remove the incentive to work. They spent for the children of others, believing that all children should be intended by two parents who were prepared to sacrifice for each and for every child born — as they had largely exemplified themselves.

B. The Performance of the Boomers on the Left and on the Right

Something happened to the several generations the Greatest Generation labored to protect and advance, particularly those born during “baby boom” right after 1945 — the group presently in power. This group manifests much self-contradiction. **We now hear common braggadocio from the current “talking heads” of radio and television about how “we are the greatest nation in the history of the earth.” A case can be made of superlative performance by our parents and grandparents, but are those claiming such a mantle today as justified?** Our two major political tribes seem to both claim our international ascendancy in the world, while the real data place our children near the middle of developed nations, and heading lower. In terms of income disparity, educational attainment, home ownership, and general opportunity, the evidence suggests we need less bragging, and more performance.

The two parties do share some things superficially in common. They have the same worship words, *e.g.*, “freedom”, “rights” and “democracy.” There is very little real debate on the substance properly attached to those concepts. They largely serve rhetorical purposes. Similarly, both parties now both highlight the “middle class” in their public pronouncements. Why? Because although it is actually in decline, focus groups reveal that the vast majority of Americans (doubtless most of us from the poverty level up to \$500k a year) think of themselves as “middle class.”

Those who call themselves “liberals” or “progressives” ignore the unprecedented debt we have accumulated for the comfort of those same Boomers doing the bragging. Certainly respected economists such as Paul Samuelson have persuasively recommended a modest measure of public budget deficit financing to stimulate the economy. But liberals do not seem to have mastered math. They generally accept the evidence where consistent with their issue alliances (global warming, racism, gender and sexual orientation discrimination, *et al.*). There is undeniable merit to those concerns, but underlying their perspective is a pattern of advocacy for and by each *adult* interest group. In fact, we have come to expect “stakeholders” who argue for their own constituencies. Ironically, we do not respect or listen as much to those who advocate for a group they are not a part of or paid by. It is ironic that this latter kind of advocacy seems to be rather the message of not just Jesus of Nazareth, but of most of the major religions on earth.

Children require such advocacy for obvious reasons. They do generate concern in concept and even much love when directed at the ones we personally know. But that does not translate into public policy — which is instead more driven by campaign contributions, lobbying, and litigation controlled by adults, and adult organized interest groups (*e.g.*,



labor, the elderly, corporations and trade associations, and even adult minority groupings). The first step in achieving balanced public policy is to place the issues that affect children on the proverbial table. So we think about them, address them. So they are one of the limited subjects on our agenda for action.

Those ever-accumulating deficits are a major case in point. They are one of many proverbial “elephants in the room.” The deficits they are accumulating go well beyond Samuelson — and are not even connected to discretionary federal spending. In fact, the discretionary spending deficit is smaller than levels for either Social Security or Medicare, and is in decline. Rather, the deficit in the two elderly entitlement programs and in public employee pensions/medical coverage for the Boomers increasingly dominates future monies owed. The point here is not that public employees do not warrant pensions or medical coverage, or that a strong argument cannot be made for an effective safety net for our elderly. The point is rather that if you decide to do that, and you would likely have our vote for much of it, be straight about how much it costs and pay for it now. Do not bill our children and their children horrendous amounts and pretend it is free forever.

The debts on the books as obligations to be paid for the above three accounts for the care and feeding of the Boomers and perhaps their children will conservatively total over \$50 trillion over the next two generations. That is not an



ideologically driven conclusion, it is arithmetic. The gathering deficit for these purposes is at a level unprecedented in human history. Indeed, it assumes that there will be no additional medical benefits from even more expensive medical procedures for the elderly — a dubious assumption. We have seen hints of what it can mean from southern Europe and their near term financial crisis. But that is a squeak of a warning compared to what is coming for us.

Liberals will not talk about it. Either they simply refuse to look at the numbers, or easily accept some false assurance that it is a minor thing that can easily be adjusted to bring to even. Those assumptions ignore the political reality that nobody dare offend the elderly beneficiaries, where they vote at high rates, dominate campaign financing, and lobbying. The median age of large campaign contributors is well over 65. Just one of their groups (the American Association of Retired Persons) spends about \$25 million a year on Congressional lobbying — that is 20 times more than all child advocates combined. Indeed, most changes over the last decade have been benefit increases, and limitations seem to be met with “grandma death panel” rhetoric.

That is not to say that the elderly lack values individually. Most would do anything for their grandchildren, and would probably be generous with children in general. But horizontal trade

associations do not represent the individual ethical aspirations of their membership. My more than forty years of dealing with association and other groups organized politically warrant this hard and fast generalization: Their lobbying is to advance their territory and benefits. And it has little to do with — and often very much contradicts — the individual ethical values of their membership.

Part of the problem is that the \$50 trillion conservatively projected from existing commitments to the elderly is a sum beyond easy human comprehension. One million dollars is not a small sum, but you could take that amount and deposit it in an account, starting with the birth of Jesus, and continue to add \$1 million to the account daily — without respite — through the Roman Empire, middle ages, renaissance, age of discovery and through the modern era to today, for 365 days a year and for 2014 years. You would not have even \$1 trillion. And it is not simply a misleadingly large number because of the scale of millions of people. Assume we were to simply carry that \$50 trillion sum, with no further increase (itself requiring major expenditure), and assume we saw not a single new prescription or operation or treatment benefit for the elderly. What will be the cost to simply *carry* it for currently provided and promised benefits, at just 4%? It will be, conservatively, more than 35% of all family income before taxes.

We shall be gone, but the children who follow us will be sitting in judgment of us. It is not likely that we shall be the “greatest” — except in a negative direction.

Added to this blind spot (or perhaps blind acreage) are other endemic problems in the liberal approach to child welfare, such as the reliance on public employee unions and “top down” social workers as child protectors. There is the ingrained idea that bureaucratic management, with applications and submissions and reviews, and children as part of the caseload of a dozen or more government workers, is the presumed palliative for child problems. *E.g.*, it “takes a village” to raise kids is an element of the mantra. What village are they talking about? People do not know who their neighbors are 100 feet from their front doors in much of America. Certainly neighbors and the city, county, state and federal government can all help.

But it takes a family to raise a child. It takes that tie — that feeling that people care so much about you that they will not sleep if you are in trouble. We all may rebel in our teen years, but when we become parents ourselves, most of us realize how important that personal tie was for us.

Then combine the above with the adult centrism of liberal America — an overweening preoccupation with adult license and freedom. There is little expectation of adult moral responsibility, *e.g.*, the obligation of two adults to intend a child, to prepare for his/her arrival, and to commit to his/her protection and sustenance. Almost half of children born in America are not intended, and

now about 40% of those giving birth are not married. The Left selectively celebrates adult prerogatives. Some of that is a tolerant response to adult prejudices against sometimes culturally unpopular groupings. But it does not stop there at all. The denigration of marriage is a part of it. While many marriages end in divorce, at least marriage provides a rubric for continued child contact and commitment. And while parents may love each other and their children without the “piece of paper,” its cultural (and even legal) role as a mutual bond — including a commitment to children — has value that today’s liberals implicitly disavow. To not even acknowledge it as a proper aspiration is disappointing. And all of this ties into the now too common father AWOL status, with median child support collection for the many millions of children in single family homes at a median level of under \$60 per month per child. Liberals do not talk much about that either. They decry poverty — particularly child poverty (currently much higher than among the elderly) — but selectively avoid thinking about many of its causes.

You do not read about much of this in the media, do you? Very little of this is “on the table” among the “progressives” — or whatever self-serving labels they may choose for themselves. They support maximum adult license and immediate Boomer welfare — *in extremis*, and without apparent consciousness about the implications for children. Children are not on their table. Not really.

Nor are those currently ascendant on the Right an improvement over the Left. They lack the courage to directly challenge the



Social Security or Medicare deficits because they know the elderly are powerful and the programs sacrosanct politically. The Right is not quite as deferential to adult prerogative as is the Left (with everyone free to “do their own thing” absent consideration of child impact). But they have their own moral deficiencies. There was a time with the Greatest Generation when income tax rates on the wealthy were at 89%. In the late 1960s the federal rate alone was 81% at just the \$70,000 annual income mark — plus state taxes in most cases. Capital gains taxes were 48%. Inheritance taxes for beneficiaries were high. Maybe all three were too high — certainly the high income tax brackets were. But the fact that income tax rates and capital gains taxes are now half what they once were for the wealthy and much of the “middle class” is never mentioned by the Right. Nor is the fact that the first several million in inheritance is entirely untaxed — and the rest lightly taxed or subject to tax evasion, means that the ever spiraling super wealthy can bestow upon their children incomprehensible fortunes. It is unclear how a caste system based on the elevation of “giving” to create a privileged group unrelated to anything they have done — except to be born — comports with traditional American notions of meritocracy or “equality of opportunity.”

The Right, as with the Left, misappropriates language for misleading labels. In this case it is by terming any limitation on creating classes by inherited wealth to be a “death tax.” No, it is a “tax on monies received without one iota of work or contribution by the undeserving recipient.” That is what it is. Certainly the giver has a right to bestow a present on those he/she loves, but without any limit? Millions or billions of dollars? Even where some groups (*e.g.*, African-Americans) receive only a small percentage of the amount of others? Even if it is to bestow an empire on a group of spoiled brats? To a real conservative, it is as unethical as is the state’s shameless promotion of hundreds of millions of dollars based on “lottery” winning happenstance. Something the state should certainly not be promoting. What happened to the concept of reward for work? What should we be rewarding in our economic system?

We celebrate our predecessors who said neither state power nor its wealth should be the product of inheritance. The King is not elected, but simply by the circumstance of birth, and the decision of a royal father or mother to “give it to him or her” — power and the riches accumulated from it are so allocated. That is what the Revolution we so honor was fought to oppose, was it not?

None of this hypocrisy has any impact on the Right. Any suggestion of even a small increase of any tax from this much reduced level invokes “class warfare” rhetoric. We are hurting the “job creators.” And beyond the reduction, actual tax rates on the

wealthy are actually a fraction of even the much reduced published rates. The wealthy actually do not pay much of a progressive rate at all — it is more at a 15% to 20% actual rate. Their actual tax payments are reduced by a regime of tax credits, exemptions, deductions and shelters. And corporate taxation is even more skewed by everything from state property tax cancellation to attract them to a community, to deductions for factors unrelated to any public benefit, to offshore havens and total tax avoidance.

Those tax expenditures for corporations and the individual wealthy taxpayers are not examined annually (as is government spending) and continue forever unless somehow affirmatively ended. And since ending or limiting a tax expenditure is deemed a “tax increase,” many of the large jurisdictions require a “supermajority” legislative vote to do so.

The major class warfare today is against the poor, especially impoverished children. Their safety net has been cut through inflation to a fraction of previous levels.

The Right has no problem at all advocating for the cancellation of even rudimentary medical coverage for children, even impoverished children. Many governors will not even provide such coverage where entirely financed by the federal government. How can this basic immorality denying (and even advocating removal of) preventive care for impoverished children, let alone treatment and operations where needed, survive politically? What is wrong here? Every developed nation on earth covers its kids systematically — except us. Why are a whole lot of these folks not impeached? Why are they not confronted every time they appear in public?

Meanwhile, we have record high tuition, the predatory practices of private for-profit schools with attendant credit ruination of misled students, and out-of-reach housing prices that all combine to make the opportunities for our children much less than the Greatest Generation provided for the currently empowered Boomers. Our youth are graduating even from public universities with scandalous debt levels as tuition increases in a class price-fix motif unrelated to actual cost changes. Many students graduate with six-figure debt and no chance of owning their own homes, even if real property were not also at artificially inflated prices. And the trend continues of increasing income disparity with the diminution of the actual middle class, as we gradually but alarmingly bend toward the third world model of a monied class and increasingly impoverished masses.

Related to the above is a mindset among the Right that utopia is achieved simply through the withdrawal of government — which is “the problem.” It is akin to the medieval and still surviving notion that God is all powerful and all good, and therefore anything that happens is His will and is part of the divine

plan. Voltaire skewered this “optimist” ethic in his famous tract “Candide”, but it survives — except with the “unfettered market without government” as the new God. The market has critical benefits for ourselves and our children. So much so that we agree it warrants presumed status. And we agree that the top down cancellation of the market common in the Soviet tradition and its replicators, or even the more benign northern European socialist model, is fraught with irrational, unjust, wasteful and often cruel consequences. The market model provides the incentive to produce efficiently, and reflects the exercise of consumer will from the bottom — with informed preferences determining outcomes.



However, market flaws recognized by free market theory progenitor Adam Smith, and many others, may undermine these positive attributes and require state intervention, *e.g.*, to prevent collusion and predation from the top that may corrupt the market model. The market is not God, it is a mechanism that is highly preferable to alternatives, but it also has prerequisites to function as intended. And one clear set of market flaws are what Smith and other market supporters concede are “external costs.” These are rules that allow some to pass costs onto others without market assessment — creating a destructive incentive to impose pollution or safety hazard or other costs on others that the market may dangerously exclude. And that exclusion is in no way part of a divine market model — it turns on rules of liability in the background of each society. Who must pay for the damage caused by one person to another present or (heaven forbid) future person. That set of costs can be assessed by a culture or by statutes or rules or customs. If they are not, the market is not functioning according to its intended model. An adjustment is then warranted — however it may be implemented. Hopefully, in a way that preserves the basic attributes of easy entry, consumer choice, and effective competition. **Perhaps the most important external-cost flaw for child advocates involves future impact on our children and their children, and theirs. The market in its present iteration generally excludes economic reward or cost based on long-term consequence.** We, as parents, grandparents, and citizens, know how much those who came before us sacrificed, and what we want to pass down the line. Humans tend to think long-term, especially when ethically informed. That is why a corporation, with an intrinsic structural obligation to maximize relatively short-term profit for the owners (stockholders), is *not* properly a “person” with political rights equivalent to individuals — contrary to the deeply troubling five-justice U.S. Supreme Court holding in *Citizens United*.

That corporate orientation is not described with pejorative intent — it states what they are supposed to be and allows their role to be highly beneficial as they compete for higher profit through improved products and lower costs. **Corporate directors and officers have a clear and explicit fiduciary duty to protect the investment of the owners and to maximize profits and dividends. And the horizon for that performance hardly extends time wise through future generations. It is more oriented toward the next quarter’s profit figures.**

The Right has some strong arguments against socialism, where the state “owns and operates the means of production.” Why do they not even more assiduously decry “industrial socialism,” where the means of production own and operate the state? Both abuses destroy the important check between public and private, with the latter arguably worse in terms of child protection given the intrinsic bias of the corporate structure to pursue state protection from competition and the deferral of costs into the future, to be borne by our children.

The current Right seems to be so steeped in self-empathy and state enmity that they do not consider such things. But ironically, they are willing to spend apparently unlimited amounts on defense (an institution hardly operating democratically, with “freedom” for its participants or according to any market dynamic). This is not to say we do not need a strong military. The world has long been full of insane leaders — for whom conquest and cruelty (especially against their tribal or national enemies) is more of a perceived accolade than a fault. But ideally, our military is focused on actual threats — not on serving the production needs of military contractors. We would not even bring up the subject were the total expended to be, say, double the amount spent by all of our apparent adversaries combined. But it is much, much more than that. With 4% of the earth’s population, we are spending close to the entire amount

expended by the entire rest of the world combined for military purposes. And if we add in our NATO allies in our column, the domination is overwhelming. Surveying the expenditures, military size, weapon sophistication, ability to attack across distance, makes the current investment level confusing. Among the few nations with such capacity, for example Canada or Australia, few seem to be imminent threats. It is unclear how having 11 bases in Germany and many others throughout Europe, for example, is a necessary expense for us to bear. One suspects that Europe can finance its own protection. Some nations do have nuclear weapons and having the ability to obliterate anyone of them who so attack us is regrettably a necessary expense. But it is not clear how an 8th multi-billion dollar carrier, or an advanced plane the Pentagon does not even want, is a prudent investment to be prioritized above what our children need now and will need in the future.

In contrast to the above, the Right will cut Head Start, food stamps and Temporary Aid to Needy Families, and deny basic medical coverage to children. And, in fact, they have succeeded in limiting increases for child-related protection and investment to well below inflation levels, achieving real money constriction. Most child investment public programs have been in actual and substantial net per child spending decline since the Boomers assumed effective control of the government more than 20 years ago. (See our *California Children's Budget* reports through the 1990s to 2005, comparing inflation-adjusted/per child spending from the base year of 1989.) And yet they seem to have “chant words” that, like Pavlov’s dog, yield the allocation of billions for expenditures — especially those channeling funds to their districts.

The Right seems to have little problem with the rising tuition costs that now make it much more difficult for our children to succeed than was the case for we Boomers when young. They have allowed a thriving industry of “private for-profit” schools to mass advertise misleading promises during prime time television, without disclosing that most of their revenue is not spent on education but on profit, marketing and lobbying. The ads omit all sorts of relevant facts: That their tuition is three times public school alternatives, that their graduation rates are low, that their course credits will not transfer elsewhere, that actual employment in the area of study is unlikely, that loan default rates are high and credit ruination all too common. That fact that for-profit schools’ major victim groups are veterans and foster children, and that they are increasingly dominating GI Bill and other public subsidies, do not phase a group with a categorical worship of anything that is superficially “free enterprise.”

Similarly, the opposition of the Right to environmental responsibility is ethically problematical. It is an obligation well

understood by the earliest Americans, that we are part of a living planet, and that its health and sustenance will determine much of what we leave behind. We have more than doubled the human population during just my lifetime — it is now over 7 billion and climbing apace. It has gone up 20 fold in just the last blink of human evolution. And now much of the human population living at the margin expects the same per capita energy consumption and resource extraction enjoyment that has succored those of us in more advanced nations.

The billing of future generations for our care and comfort is replicated on the environmental cost side, where Boomers are plundering the planet without regard to the effect on our legatees. The list here is long, from the oceans and reefs, to flora and fauna, to non-biodegradable refuse, to the exhaustion of precious underground water assets (e.g., the massive Ogallala Aquifer — perhaps our single greatest national asset — watering the American breadbasket), to the depletion of so many substances that took millions of years to accumulate, to the production of increasing quantities of radioactive waste with thousands of years of lethal half-life for an average nuclear plant life of 30 years each, to global warming. And while the last does receive increasing attention, the other depredations do not.

That the problem extends to both major political groupings is illustrated with the most ardently celebrated tax measure for the Right — Proposition 13 in California. It limits property taxes to 1% of the value of a home. That may well be defensible, perhaps it should be lower. But what the Right never and the Left rarely discuss is the fact that the each property’s “value assessment” to which that 1% is applied is frozen at 1977 levels with a very limited 2% annual maximum increase. Unless you buy recently, in which case it is the (much higher) price paid for the home or business property. The bottom line? The Boomers benefit from property taxes at 1/8th to 1/12th the level applied to their children and grandchildren who buy the house next door at exactly the same current actual market value, or the new business property of the same market real estate value, seeking to compete with a Boomer enterprise. For the Boomer assessments have been relatively frozen for 35 years while the next generation buying (even with the recent small retraction in real property market prices) will be paying many, many times the taxes as will their children buying more recently — to fund the same city and state services. Neither political party will talk about it, in the same way that neither party will talk about Medicare and Social Security deficits.

C. What Needs to Happen

Major human activities should be measured in terms of long-



term impact. Those that minimize negative impact (such as solar power) warrant high cross-subsidy, while those that impose costs are properly prohibited or at least assessed fees to stimulate less-costly means and to finance mitigation. These are all conservative market-correcting policies with an eye toward our mutual legacy. They can be addressed through corrections or adjustments that preserve (and enhance) the market's important attributes for all of us. Where at all possible, this should be accomplished without a Mother Hen state directing everything.

Yes, it is best to limit government intrusion and interference. And government programs (including tax expenditures) are best automatically sunsetted at least every ten years (terminated unless each can affirmatively justify their continuation). On the other hand, our predecessors sacrificed much for we who were strangers or not yet born. Those Americans hitting the beaches of Iwo Jima or Normandy were not doing it just for their families alone, but for all of us. **Those who succeed do so not only from their own acumen, but also because they have been blessed with help in countless ways many have conveniently forgotten.** That help comes from elementary through high school teachers and subsidized higher education, to the work of people we rarely acknowledge — those building our roads and airports, water projects and utilities, maintaining our libraries, and protecting us from crime and fire, among many others.

Private charity is not enough to provide a consistent floor so help is equitably applied at sufficient levels (and is not just received or channeled by the friends of the contributors). Government has an obvious role to invest in our children, including those of our neighbors and fellow Americans. Maybe even a measured investment in the children of other nations — as the Greatest Generation exemplified.

Few societies in the history of the Earth have benefitted as much from the assistance provided by their predecessors, and by their fellow countrymen, as has ours. Few have had the relative wealth that we have now as a group, and that makes such investment by us in all of our children relatively painless. It is hardly a cause of calumny if someone cannot afford a fourth television set or must incur some reduction in ostentatious material exhibitionism. We need a sea change in our cultural and political worlds.

I. ACADEMIC STUDY AND FUTURE CHILD ADVOCATES

We are pleased to report an increase in child advocacy interest among those applying to USD, and reflected in the course selections of those attending. Professor Fellmeth sits on the Admissions Committee and has tracked a notable increase in the number and percentage of applications over the last ten years where students list child advocacy as a primary interest, and also a marked increase in the number explicitly citing CAI as their reason for selecting USD.

The academic work of CAI has been enhanced by its selection as one of the seven areas of law recognized as a designated concentration — to be a part of the Juris Doctor diploma at the USD School of Law. **Taking a package of relevant courses, together with CAI's Child Rights and Remedies course, allows USD Law students to receive a "Concentration in Children's Rights" designation as part of their resulting JD law degree.**

CAI is proud of the associated courses available at USD, including *International Justice and Human Rights* at the Joan B. Kroc Center School of Peace Studies (whose students now are admitted into CAI's courses as well), Frank Kemerer's excellent course in education law and policy at the School of Leadership and Education Sciences, and the extensive client-based clinical program of the USD School of Law — including Margaret Dalton's important courses in special education and enforcement of the federal IDEA statute. The public interest law concentration, centered around the Center for Public Interest Law (which is associated with CAI) teaches administrative public interest law. Other courses in juvenile law and family law also supplement the CAI academic program.

A. CAI Classes and Clinics

As noted above, an increasing number of students know about CAI and cite it as a reason for attending the school. However, due to a national reduction in the number of law school admitted classes, the basic CAI initial survey course *Child Rights and Remedies*, is likely to reflect partly that overall population decline. The 300 slots normally allocated for each incoming class at the School of Law have been reduced to 240-270 because the school wishes to maintain its admission standards. Nevertheless, the 2013 enrollment for *Child Rights and Remedies* included 31 students, or about 14% of the first-year class.

The course is taught in a modified Socratic method, with students assigned various roles (child attorneys, parent attorneys, feminist advocates, fathers' rights advocates, fundamental religious, civil liberties advocates, Attorney General, *et al.*) It uses Professor Fellmeth's text, *CHILD RIGHTS AND REMEDIES* (Clarity Press, 3rd Edition, 2011, 840 pages, including an expanded final chapter on International Child Rights). The course is taught for 3 units each Fall semester.

As noted above, some of the Fall 2013 students also took CPIL's *Public Interest Law and Practice*, co-taught by Professors Robert and Julianne Fellmeth. This year-long course assigns two regulatory agencies to each student to monitor, and provides instruction about the general statutes governing the executive branch (Open Meetings Act, Public Records Act, Administrative Procedure Act, *et al.*). CPIL sends students to the site of executive branch agency meetings to attend and participate in the public interest. The course is a recommended subject for the Child Rights concentration because it teaches the law pertaining to regulatory agencies that are important to child advocates (*e.g.*, departments of social services, health services, education, *et al.*).





During the Spring, Summer and Fall semesters of calendar year 2013, over 20 students participated in one or more of CAI's clinical opportunities and/or otherwise participated in CAI's advocacy component. Ten students (John Jaquish, Holly McCord, Sharaya Nix, Jerrica Phillips, Matthew Felder, Georgia Gebhardt, Patrick Guerrero, Collin Ogata, Deva Robbins, and Jessica Underwood) represented children or parents in CAI's Dependency Court Clinic. This clinical opportunity is unusual; the students are certified by the State Bar's Practical Training of Law Students program and, working under the guidance of Professor Fellmeth and other CAI professional staff, as well as the assigned attorneys for the youth involved, they have substantial roles in the legal proceedings. They interview the children and other parties, handle calendars, file motions, examine witnesses, and conduct trials. It is not merely a briefcase carrying or memo writing function.

Ten students (Megan Foley, Ann Kinsey, Robyn Blackfelner, Michelle Pena, Jenna Garza, Johnathan Abrams, Jessica Kiley, Theresa Amen, Alyssa Ruiz de Esparza, and Natalie Rodriguez) participated in CAI's Policy Clinic, where they helped CAI's attorneys with litigation, national and state reports, and legislative and regulatory advocacy programs described below.

Additionally, USD law students Lisa Charukul and Alicia Belock and volunteer Ariel Meeks also provided extensive assistance to CAI during 2013, engaging in a variety of research and policy advocacy-

related projects, and several other students researched and wrote child advocacy-related papers under Prof. Fellmeth's supervision for other USD School of Law courses.

B. Research and Papers

During 2013, Prof. Fellmeth authored chapters on aspects of child forensic pediatrics for publication in two major reference texts used by pediatricians and others. The first consisted of Chapter 31 in *CHILD MALTREATMENT, PHYSICAL ABUSE AND NEGLECT* (ed. D. Chadwick, A. Giardino, R. Alexander, STM Learning) Encyclopedic Volume, 4th ed. (2013). The second publication was the final chapter in *THE HANDBOOK OF PEDIATRIC FORENSIC PATHOLOGY* (ed. by R. Byard and K. Collins), Springer Publishing (2014), Chapter 40. Each chapter covers different aspects of medically-related expert testimony in the different kinds of child-related court proceedings (juvenile, probate, civil and criminal adult court, administrative hearings). The Forensic Pathology reference work's final chapter was co-written with the well-known pediatrician Dr. David Chadwick.

A record number of USD Law students authored articles under Prof. Fellmeth's supervision, many of which were published during 2013 or are currently scheduled or being considered for publication:

- Georgia Gebhardt wrote "*Hello Mommy and Daddy, How in the World Did They Let you Become My Parents.*" The paper examines the Hague Convention on Adoptions — the most



important international agreement in the burgeoning area of cross-nation adoptions. Georgia's article won second place in the national Schwab Memorial Essay Contest, and was published by the FAMILY LAW QUARTERLY at the end of 2012, disseminated in early 2013 (Vol. 46, No. 3 (Fall 2012) at 419–450).

- Rick Waltman's article entitled "*Veiling Cyberbullies: First Amendment Protection for Anonymity – Per Se Strengths and the Voice of Online Predators*," explored the implications of regrettable advocacy by civil liberty and public interest organizations in favor of "anonymous internet" (author concealment) as a purported core First Amendment value. The implications of hidden speakers on the audience's right to choose who to read and to weigh their credibility is important for both the disclosure of political campaign messaging, as well as on the growing, trend of internet cyberbullying of and by teens. His article is being

considered for Fall 2014 publication by the CHILDREN'S LEGAL RIGHTS JOURNAL.

- Shradha Patel finished her article on the fate of children of deported parents: "*Where Did You Send My Mommy? 'Family Values' and U.S. Immigration Policy*." Her important paper has been submitted for publication in 2014 by the INTERNATIONAL LAW JOURNAL at USD.
- Mary Obidinski covered similar ground, with a different analysis and suggested remedy in "*Children Left Behind? Providing a Brighter Future for U.S. Citizen Children by Granting Temporary Resident Status to their Undocumented Parents*."
- An article by Robert Schultz discusses the problem of international drug sales on the internet (a problem that increasingly reaches teen abusers). The article, entitled "*Online Pharmacy Regulation: How the Ryan Haight Online Pharmacy Consumer Protection Act Can Help Solve an International Problem*," has been accepted for publication in the INTERNATIONAL LAW JOURNAL for 2014.
- One particularly important research and paper effort was completed by Annie Kinsey, entitled "*The More the Merrier – Why State Legislatures Should Give Courts the Discretion to Find that a Child Has More than Two Legal Parents*." Her research, fact sheets and final article helped to support CAI's successful effort to enact a statute that rescinded the anomalous provision of California law (which is also a problem in most states) specifying that only two persons may receive parental recognition. Given the prevalence of divorces, step-parenting, grandparents functioning as de facto parents, et al., it may be in the child's best interest to give more than two persons that status in some circumstances. To grant parental status to persons who are not active, responsible, or beneficial parents for a given child — as legal definitions of parenthood may allow — and to thusly allow them arbitrarily to block parental status to persons who have long-functioned as the actual parent, makes little sense. Kinsey's research and paper persuasively presents the case for allowing exceptions to that sometimes arbitrary and unfair "bright line" limitation.
- Chandra Zdenek wrote an article examining the Hague Convention on Child Abduction. Her paper entitled "*The U.S. Versus Japan as a Lesson Commending International*

Mediation to Secure Hague Abduction Convention Compliance” has been submitted to the INTERNATIONAL LAW JOURNAL for possible 2014 publication.

- Natida Sribhibhadh did independent research and wrote an edifying paper entitled, “*Former Foster Youth of Orange County: Identifying and Eliminating Legal Barriers for a Successful Transition to Adulthood*” for possible publication in 2014.
- International student Chai Wei Wei did extensive research on demographic changes and recent studies on the status of children for the 4th edition of Prof. Fellmeth’s CHILD RIGHTS AND REMEDIES text.
- *Child Rights and Remedies* student Carey Eshelman wrote an important article entitled “*Babies Locked Behind Bars*,” exploring the problem of pregnant women sentenced to prison and the fate of their children post-birth. Carey compared the contrasting policies of the U.S. and Australia for publication in the INTERNATIONAL LAW JOURNAL.

C. Academic Awards

In May 2013, CAI honored a record number of ten graduating law students for their exceptional work on behalf of children. CAI presented its **2013 James A. D’Angelo Outstanding Child Advocate Award** to Jon Abrams, Lisa Charukul, Matt Felder, Georgia Gebhardt, John Jaquish, Adam Juel, Patrick Guerrero, Jerrica Phillips, Sylvia Romero, and JC Sheppard. CAI presented the **2013 Joel and Denise Golden Merit Award in Child Advocacy**, awarded annually to a 2nd year law student who is using his/her developing legal skills to benefit foster children, to Holly McCord.

CAI expects to add many of these students’ portraits and resumes to its “Trailblazer Wall” in the CPIL/CAI student room over the next five to ten years — where they will join many former students already featured for their work in the child advocacy and/or public interest law fields.

D. Advocates for Children and Education (ACE)

In addition to participating in CAI’s academic offerings, USD School of Law students have also created a child advocacy-focused student organization, **Advocates for Child and Education (ACE)**. Founded in 2012 by CAI student Lisa Charukul, the organization sponsors symposia and engages in projects to help youth with education needs. CAI student Jazmine Gregory took over its leadership in 2013 and almost 20 students attended its symposium and mixer in early 2014.

E. Meet some of the Child Advocates of the Future

Our prior annual reports have listed some of our students whose clinic work indicated great promise. We had perhaps our largest group to date working in our program in 2013.



As an attorney who now practices in the area of juvenile dependency, I can easily say that I use what I learned from my studies in Prof. Fellmeth’s CHILD RIGHTS AND REMEDIES class and from my time working with CAI on a daily basis. There are many days I am so thankful that Prof. Fellmeth took

the time to teach us how to make arguments that are both constitutional and outside of the box when advocating for the best interests of a child. Without a doubt, my experience and education in these programs prepared me well for my current practice area. By all means, CAI is an outstanding program for any student with an interest in child advocacy to become involved in, and Prof. Fellmeth does an excellent job in leading students who have a desire to make an impact in this area of law.

— Georgia Gebhardt

Recipient, 2013 James A. D’Angelo Outstanding Child Advocate Award



My involvement with CAI was the highlight of my law school career. I highly recommend CAI’s Dependency Clinic to anyone interested in getting practical experience in a courtroom setting.

— Matthew Felder

Recipient, 2013 James A. D’Angelo Outstanding Child Advocate Award



Working with CAI allowed me to connect with members of the community that I otherwise would not have access to. It allowed me to grow and develop the club Advocates for Children and Education. And, most importantly, the clinics through CAI got my foot in the door at the

Public Defender's office, where I now work, and I continue to use the skills I learned from CAI when assisting those underrepresented members of our community.

—Lisa Charukul

Recipient, 2013 James A. D'Angelo Outstanding Child Advocate Award



Every time I walk into the Children's Advocacy Institute, I feel like I've arrived home. Meeting and working with Prof. Fellmeth, Elisa Weichel, and other staff members has been a true pleasure.

I've learned so much about dependency law, education law, and child advocacy through the dependency clinics, as well as my involvement with the student organization ACE. I look forward to applying the knowledge I learned from CAI once I become an attorney and hope I make a difference in children's lives.

—Holly McCord

Recipient, 2013 Joel and Denise Golden Merit Award in Child Advocacy



Working with CAI not only opened up opportunities I could never have found alone but connected me with some incredible, like minded professionals. Their passion for addressing critical public issues served as a constant reminder of why I came to law school in the first place.

—Adam Juel

Recipient, 2013 James A. D'Angelo Outstanding Child Advocate Award



Prof. Fellmeth taught me to look beyond the emotion that accompanies legal action and listen carefully to figure out what forces are at work behind the scenes. Such clarity has been invaluable in my development as a compassionate and effective advocate for children.

CAI played an integral role in my legal education by introducing me to strong attorneys fighting to protect the rights of children by leveraging resources and relationships from the micro to macro levels.

—Julie Claire Sheppard

Recipient, 2013 James A. D'Angelo Outstanding Child Advocate Award



II. NATIONAL AND STATE POLICY ADVOCACY



A. National Advocacy

1. Participation in the Governance of National Organizations and Collaboration with National Colleagues

CAI continues to strengthen its national presence in Washington, D.C. through its office headed by National Policy Director Amy Harfeld. In addition to participating in several national coalitions, such as the National Foster Care Coalition, the National Child Abuse Coalition, the Coalition on Human Needs and the Child Welfare and Mental Health Coalition, Amy has coordinated CAI's work with leading national groups that have networks extending through the 50 states. These include the American Bar Association, the National Association of Counsel for Children (NACC), the former Voices for America's Children, *et al.* During much of 2013, Amy also took on the task of coordinating the Children's Leadership Council (CLC), now the nation's largest coalition of multi-issue national children's advocacy organizations operating at the U.S. Capitol.

Prof. Fellmeth remained on the Board of First Star and NACC through 2013. For the latter, he concluded his term as president of the Board (2010–2012) and spent 2012 and 2013 on the Executive Committee. NACC has now succeeded in establishing its Child Welfare Specialist (CWLS) certification in more than 30 states, including California. Prof. Fellmeth grades some of these certification examinations and works with NACC staff on various projects. Because NACC is located in Denver and has no office or employee in D.C., CAI and Amy have agreed to provide some advocacy assistance to this important association — the nation's largest grouping of attorneys who represent children.

Another group that CAI has historically been very active with, Voices for America's Children, ceased its operations in 2013. Over the past several years, Voices had grown into a potent force, with its professional staff providing about 20% of all child advocacy at the U.S. Capitol. Moreover, it represented over 54 organizations covering 46 states, each operating at or near their state capitals. Previously called the National Association of Child Advocates, Voices was the network of many of the nation's lobbyists for children in the states. Regrettably, during early 2013, Voices unexpectedly lost the support of several major funders; the funding cut-off was quick and severe and required Voices to

dissolve. Prof. Fellmeth served as counsel to the Board, and with the help of *pro bono* bankruptcy counsel, guided the organization through the dissolution.

Prof. Fellmeth then joined the heads of six other organizations that had previously been a part of Voices to reboot a new organization. He drafted proposed bylaws and has been asked to serve as the Secretary/Treasurer of the Board for the new organization, Partnership of Advocates for Children. Under the guidance of Chair Charlie Bruner of Iowa, early 2014 saw 45 organizations in 41 states agreeing to join the new iteration.

2. National Reports / Campaigns

CAI has researched and produced multiple national reports on the performance of the fifty states in specific areas of child protection. These reports have two features. First, they compare states against an aspirational or model set of laws. Two of the reports do so for all 50 states and the District of Columbia. This dynamic stimulates media coverage since they favor coverage of a contest or conflict or rankings. Second, CAI seeks not to follow

the regrettable pattern of academia to publish a report and then place it on a shelf for examination by another scholar or two in future years. The intent here is rather to capture the attention of the media, draw praise for high-performing states and scorn for low-performing ones, and spur federal and state change by this respective attention.

In 2013, CAI continued to work on all three of our basic subject areas noted below, and also on a fourth area of what will become a continuing CAI national study — the performance of the federal government in creating, implementing, and enforcing federal child welfare law “floors.” These floors include required performance in the subject area of the three other reports, and in other areas important to protect abused children. This fourth subject matter study, discussed below, will have its first edition release during 2014.

All four of the reports discussed below are researched, drafted and published by CAI in partnership with another national child advocacy group, First Star.





a. Disclosure of Abuse and Neglect Deaths and Near Deaths

CAI published the 2nd edition of its report on *State Secrecy and Child Deaths in the U.S.* in 2012, and expects to publish a 3rd edition in 2015. This is a regular national report on the failure of states to comply with the federal requirement to disclose basic information about child abuse and neglect deaths or near deaths — as is explicitly required by the federal Child Abuse Prevention and Treatment Act (CAPTA).

When children are removed from their homes for their protection, we have a multitude of checks — from attorneys appointed for all parents, to a burden on the state and judicial review of every step, to an obligation to undertake “reasonable efforts” to reunify children with their parents. But when children who should have been protected are left in situ, we have no real check. No follow-up review takes place, no attorneys are appointed, no judicial process commences.

When a tragic death or near death occurs, the public must — at the very least — be able to know what led up to the incident, in order to determine if there is a systemic flaw in the system that can be remedied. This concern is underlined by the findings of CAI’s Christina Riehl that close to 80% of such deaths involve prior

reports about those endangered children to child welfare services agencies at the local level.

CAI’s first two editions garnered substantial coverage in national and local press and other media. Since CAI’s 1st edition was released, 17 states improved their laws in this area — although many states still fail to comply with the spirit and/or letter of the federal mandate. During 2013, CAI continued to work with advocates and stakeholders in various states who are working to improve the law and performance among the states.

During 2013, CAI continued to engage the U.S. Department of Health and Human Services’ (HHS) Administration for Children and Families (ACF) with regard to ensuring states’ compliance with CAPTA’s public disclosure mandate. Although then-ACF Acting Secretary George Sheldon indicated a willingness to work with CAI to facilitate state compliance, ACF ultimately moved in the wrong direction in late 2012 by amending its Child Welfare Policy Manual (CWPM) to provide various loopholes that states have already started to use to avoid disclosure. For example, the prior version of the CWPM correctly emphasized that states have no option or discretion when it comes to releasing such information — even



if a state claimed that disclosure would be contrary to the best interests of the child, the child's siblings, or other children in the household; this stance reflected the fact that Congress had already weighed the pros and cons of disclosure and determined that with respect to child abuse and neglect fatalities and near fatalities, the benefits of public disclosure outweigh any potential harm that disclosure might cause. With no corresponding change in CAPTA that would justify a reversal in its position, ACF revised the CWPM in 2012 to *explicitly permit* states to withhold information based on privacy-related criteria that gives states a tremendous amount of discretion. ACF's elevation of privacy interests over revelation of the circumstances of a child's death or near death may effectively cancel the statutory intent. Needless to say, parents also end up in criminal court for all sorts of offenses — against their children and otherwise — and their privacy interests do not justify the concealment of their actions one iota in that context. Despite CAI's advocacy through 2013, ACF refused to correct the improper and devastating loopholes it created. Into and through 2014, CAI shall continue to argue for the agency's adoption of competent and faithful regulations that implement Congressional intent.

CAI has taken several steps to obtain California's compliance with the CAPTA mandate. After successfully sponsoring legislation to set out a state policy regarding the disclosure of abuse or neglect death information, CAI encountered similar executive branch undermining through rules; however, CAI then successfully litigated to cancel those rules and compel enforcement of statutory intent to disclose the causes of deaths from abuse (see discussion below). More work remains to be done to obtain California's compliance with CAPTA's mandate regarding near fatalities.

b. A Child's Right to Counsel

The 3rd edition of *A Child's Right to Counsel—A National Report Card on Legal Representation for Abused & Neglected Children* was released by CAI in 2012. The 4th edition is likely to occur during 2015 or 2016. This report examines to what extent each state's laws assure that every abused and neglected child is represented by a trained, competent client-directed attorney throughout the duration of the child's dependency proceeding. CAI compares each state's laws to a model law that CAI drafted several years ago, and which itself contributed to the Model Act Governing the

Representation of Children in Abuse, Neglect, and Dependency Proceedings adopted by the American Bar Association (ABA) in August 2011.

The need for counsel for these children is basic. The Dependency Court becomes their legal parent. As such, it decides whether parental rights will be terminated or not. And well beyond that, its decisions impact where the child is to live and with whom, who the child may see and how often (including siblings), what school the child will attend, *et al.* — in other words, virtually every detail of a child's life. The state control here is perhaps as great as for delinquent youth who are absolutely required to have counsel under the leading U.S. Supreme Court case of *In Re Gault*.

Regrettably, however, many states do not appoint counsel at all for these children. And many states that do appoint counsel force those attorneys to carry such high caseloads (300–500 children per counsel) that their role becomes largely symbolic. And the courts serving as their parents often have caseloads of over 800, some over 1,000. These children need court parents and attorneys who can properly function as such — arguably more than any other person in our society. They often cannot speak for themselves, and their access to their new parent — the court — entirely depends upon others. Their attorney is here the key player. But the federal statute only vaguely requires a appointment of a *guardian ad litem* (GAL) for each child and, as noted, in many states that is not an attorney. One federal case (*Kenny A.*) requires that abused and neglected children have a due process right to counsel and sets a maximum caseload of 100 — purportedly based on federal and state constitutional command. But it is an Atlanta federal district court decision, and is honored in the breach.

CAI's Amy Harfeld and Christina Riehl remained actively involved with the ABA's Section of Litigation Children's Rights Litigation Committee; in addition to participating in monthly strategy planning sessions, Christina edited stories in 2012 and 2013 that showcase the important role that minor's counsel have in dependency proceedings, and the benefits of providing such representation for children; those stories will be used on the Committee's website and in ongoing advocacy efforts to ensure that all abused and neglected children have attorney representation in the proceedings that will determine their fate.

c. The Fleecing of Foster Children

Another area CAI has occupied has to do with federal and state policies that impede youth from attaining self-sufficiency after exiting from the foster care system, such as the state practice of intercepting funds that belong to these

children in order to pay themselves back for the child's support and maintenance. When a child is a beneficiary of Social Security funds or other similar benefits (*e.g.*, if a parent is deceased or disabled or if the child has an SSI-qualifying disability), such benefits are properly used or conserved as appropriate to meet the best interests of the child — *e.g.*, used to address the child's current disability-related needs or conserved to help the youth obtain self-sufficiency after aging out of foster care. That is what a responsible parent would do — not take the child's money to pay for groceries, rent, or any other expenses that the parent (not the child) is legally obligated to cover.

But when it comes to foster children, state foster care agencies routinely get themselves designated as the representative payees for these children — despite a federal regulation that actually lists them as last in order of preference for such appointment. The Social Security Administration (SSA) generally requires that for beneficiaries under age 18, a representative payee be appointed to manage the child's funds. SSA, which is not currently required to notify the court, GAL, or child's attorney when agencies seeks to serve as representative payee for foster children, typically approves such requests — and then sends the agencies the child's funds. The states and counties then almost universally expropriate those funds meant for the specific, individual needs of the child beneficiaries to pay for the basic foster care costs for the child — expenses that the government is otherwise obligated to provide. CAI's national report in this area, "*The Fleecing of Foster Children*," documents this problem and other federal and state practices and policies that inhibit foster youth from achieving self-sufficiency after leaving care. The original *Fleecing* report was released in 2011 and obtained substantial coverage; during 2013 CAI continued to work on the issues identified in the report, and expects to publish a 2nd edition in 2015 or 2016.

d. A New National Report: Federal Abdication of Minimum Protections for Foster Children

During 2012, CAI presented a panel discussion at the National Association of Child Advocates (NACC) annual conference in Chicago, providing an initial insight into its critique of the enforcement and oversight of HHS and its Administration on Children and Families (ACF). Among other things, the panel discussed options HHS has for enforcement activity, such as the use of monetary penalties and sanctions — as many other branches of the federal government have done successfully — to ensure state compliance with mandatory federal floors.

In 2013, CAI worked on a national report in a fourth subject area — the failure of all three branches of the federal

government to ensure the adoption, implementation, enforcement and interpretation of federal child welfare laws in a manner that appropriately protects abused and neglected children from further harm. This includes HHS' failure to enforce existing federal floors for the protection of foster children — including each of the three subject areas of non-compliance discussed above, among others.

While federal agencies are often authorized to condition state receipt of federal money on compliance in a host of areas, children in the foster care system have not been a regular beneficiary of a “law and order” enforcement of such provisions.

As CAI conducted its research in 2012 and through 2013, we became aware that the problem is not confined to HHS. Federal courts are increasingly abdicating from their proper role as interpreters of the law to compel compliance. Regardless of clear substantive merit to court challenges to state noncompliance with the law, they increasingly invent bases to abdicate their responsibilities — based on alleged (a) lack of any statutory remedy, or (b) lack of standing for child victims, and even (c) “abstention” in favor of their state court judicial colleagues. Cases over the past three years have retreated from previous contrary precedents, and have done so in the face of clear violations of federal law by states, including their social service agencies and court systems.

CAI is discouraged to report that the Congress adds to the problem with its paralysis and servitude to K Street lobbyists. Almost 20 years ago, the Congress enacted a baffling provision which today actually forecloses all federal assistance to states to pay for any foster kid unless the kid comes from a home that would have qualified for welfare under eligibility thresholds as they existed in 1996.

That Congress has allowed the continuation of this so-called “look back” provision for the past 18 years (on a basis irrelevant to the needs of these children and without any CPI adjustment) means that fewer children qualify for federal foster care assistance each year, and states — obligated to pay for an ever-increasing share of the foster child caseload — in turn devise their own ways to short shrift these kids.

One example of how states short shrift these kids is discussed above, in relation to CAI's *Fleeing of Foster Youth* report — states intercept federal benefits belonging to eligible foster youth, and automatically use the funds to reimburse themselves for the cost of the children's foster care maintenance expenses. Another example of consequences of this fundamentally immoral statutory provision relates to implications for desirable placements with relatives. Federal and state policies favor care by the relatives of foster children, especially if all other things are even. The blood

tie may matter and those persons may well already know and love the child. When federal money was used for such payments, at least one state adopted the dubious policy that relatives could not qualify for family foster care payments (for the costs of taking care of a child). Regrettably, many relatives in these families are also low-income persons. So an older sibling or grandparent or aunt or uncle — who may well be the optimum placement in the view of everyone — may not be able to take such a child given the considerable expenses each one entails. And the child so placed may be relegated to food and other shortages. The U.S. Supreme Court, in the case of *Miller v. Youakim*, sensibly held that federal law prohibits the discrimination against foster care givers based on their status as relatives alone. And ironically, when relatives cannot afford to take in a foster child without being reimbursed appropriately, older children are often placed in group homes — with costs now eight to ten times the monthly amount of family foster care (the rates the relatives would receive).

But here is the rub. The states that do not get federal money for an individual child are not covering him or her under the federal statute, and so can violate the *Miller v. Youakim* holding. And many of them do exactly that, including California. So although the states also pay lip service to preference for relatives, they do the opposite —and for any child who is deprived of a federal match (usually due to the look back provision), some states now refuse regular family foster care cost payments to them categorically. They are now a separate class of children — grievously discriminated against. Either they do not get to live with the Grandma they have long known and loved, or if they do, they will get at most about one-third or less of the regular family foster care payment in the form of that state's “child only” welfare grant (not nearly enough to pay the out-of-pocket costs of that child today). Either way, the child suffers gratuitous harm due to the look back provision — and for 18 years now, the Congress has failed to repeal or amend it.

While the Congress has enacted a few helpful child welfare laws over the last few decades, the problem lies in its stark and incomprehensible nonfeasance — such as its failure to address the malodorous look back provision, or to provide clearer mandates and remedies to assure state compliance with much of anything that matters for these children, or to clarify that standing does in fact exist for advocates to seek private enforcement of federal child welfare laws on behalf of children, *et al.* These are not political quagmire issues — these children are the kids of the state, and any consistent notion of family values compels concern over what we do, having seized them.

During 2014, CAI will release what should be a devastating study of federal failures: by the courts in depriving these children of



their offices to enforce and interpret existing federal requirements, by the Congress for failing to correct the abdication of the courts and continuing the look back, permitted takings from foster children and other offenses they are capable of correcting, and by HHS, whose responsibility to enforce federal law forms the basis of its executive branch obligation.

3. Federal Legislation and Rulemaking

The most important child-related federal legislation over the past decade was the Fostering Connections to Success Act of 2008, which in part was designed to help foster youth achieve self-sufficiency by allowing them to remain in care (to have board and housing paid through foster care providers) with federal subsidy up to age 21 instead of to age 18. Since the median age of self-sufficiency for American youth is just past the age of 25, this extension was welcome — although insufficient. Responsible parents hardly abandon their children at age 21, or even 25, but the state as parent has been doing so at 18, with tragic outcome of the hundreds of thousands of youth parented by our democratic institutions. CAI strongly supported the federal measure, which represents a step in the right direction. California implemented the federal law through the 2010 enactment of AB 12 (Beall), which regrettably did not include the Transition Life Coach (TLC)

model long championed by CAI (involving the appointment of a personal transition coach for each foster youth, the development of a transition plan that leads the youth toward his/her specific goals, and the establishment of a trust fund from which the coach would provide financial assistance to the youth as long as the youth stays on track toward meeting his/her goals, with oversight by the court that previously served as the youth's parent). As discussed below, the TLC model, which most closely replicates how private parents support and guide their young adult children toward self-sufficiency, is not currently an option in California or elsewhere. But CAI is monitoring the approaches that have been implemented to gauge their success, including California's somewhat varied execution through AB 12 (see "State Reports" section below for information on the state's implementation to date).

More recently, the Uninterrupted Scholars Act (S. 3472, M. Landrieu), and the Protect Our Kids Act (H.R. 6655, L. Doggett) were enacted; both measures were signed by the President in January 2013. The Uninterrupted Scholars Act is intended to prevent the many privacy provisions of law from impeding the transfer of school records of foster children. The law amends the privacy statute of 1976 to allow this transfer at the request of social workers or other representatives of foster children. These children are commonly moved to new locations and school districts, and the

timely receipt of their previous records, including credit for prior courses, has long been a problem. Although seemingly pedestrian, it has been a real impediment for the continued education of many youth. California had previously address this problem, and the law follows a pattern of national replication of some of the advances that have occurred in this state, here clarifying that such disclosure does not violate the generic federal educational privacy law.

The Protect Our Kids Act created the Commission to Eliminate Child Abuse and Neglect Fatalities. Its primary author, Congressman Lloyd Doggett, is a long-time consumer advocate who had early connection to Prof. Fellmeth's work with Nader in the 1960s and 70s. CAI's Amy Harfeld has been attending meetings and otherwise monitoring this group, which includes some knowledgeable national child advocates, as it begins its work. Certainly the mere creation of a Commission will not in and of itself remedy the factors contributing to child abuse or neglect fatalities, but it does provide a mechanism to perhaps encourage non-partisan adoption of substantive changes in statutes and rules — since it emanates from a body created by the Congress for that purpose. The Commission was much delayed in its beginning by a lapse of six months before even half of the twelve commissioners were appointed and in office (notwithstanding the enabling statute's express three-month deadline for those appointments).

Still in line are many foster child-related bills at this writing, including the following:

- **Foster Children Opportunity Act** — which would address immigration issues, particularly for foster children who were brought to the U.S. as young children and are now in foster care;
- **Foster Children Self-Support Act** — which would prevent the expropriation of foster child Social Security survivor and disability payments due them by states and counties (see discussion of CAI's *Fleeing of Foster Children* report above);
- **Foster Youth Financial Security Act** — which would address credit abuse prevention for emancipating youth;
- **Enhancing Quality of Parental Legal Representation Act of 2013** — which would direct the Secretary of Health and Human Services to make grants to the highest state courts to enable them to provide legal representation for parents and legal guardians with respect to child welfare cases; and
- **Adoption Tax Credit Refundability Act of 2013** — which would make the tax credit for adoption expenses refundable.

With regard to its federal legislative advocacy in 2014, CAI will be concentrating on the above, as well as immigration reform legislation generally — to ensure beneficial provisions for children and foster youth alike. In addition, CAI hopes to see the passage of the End Sex Trafficking Act of 2013, which would hold the consumers of commercial sex accountable — rather than the “workers” (the exploited youth themselves who ironically are in practice the major focus of sanctions).

In 2013, CAI was involved in various rulemaking efforts at the federal level. One was the continuing attempt to persuade ACF to adopt rules that, contrary to their current manual, comport with federal law in requiring disclosure of child deaths from abuse and neglect, and do not excuse noncompliance based on a vague consideration of parental or family privacy that undermines Congressional intent. This effort did not succeed in 2013 and will continue into 2014 (see discussion above).

On February 20, 2013, CAI submitted comments on proposed HHS regulations to medically cover foster children to age 26. **Although the Affordable Care Act requires employee plans to cover employees' children up to age 26, such extended coverage did not apply immediately to foster children. How ironic that we ensure coverage for all youth except the children of the state, for whom we are all responsible.** CAI's comments obviously urged expeditious inclusion and effective notice to those foster children already over 18.

4. Private For-Profit Education Abuses — National Advocacy

CAI continues to work with CPIL and other organizations engaged in national and state advocacy to prevent and police the marketing abuses of private for-profit schools of higher education. This subject area is important to major charitable foundations and such interest has been matched by CPIL and CAI — who together devote more than any funds received in their own staff (uncompensated) contribution. The for-profit schools have proliferated apace, helped by public subsidies. Because of their profit maximization charter, they spend a small percentage of revenue on education, instead directing most revenue toward often misleading marketing, lobbying, and profits.

Foster children are particular victims, directly confronting the priority of CAI to help those children turning 18 to achieve self-sufficiency as adults. In addition, a disproportionate number of foster kids enlist in the military, and young veterans are also a group targeted particularly by the schools because of the GI Bill and other subsidy programs they can draw upon to enhance profits.

Associate degree programs at private for-profit schools average four times the cost of degree programs at comparable community

colleges. In addition to the higher expense, **for-profit schools often lack appropriate support services that help students succeed, and many students drop out prior to graduating. Those who do graduate from for-profit schools rarely find the lucrative careers commonly touted in the schools' ubiquitous advertising. Regardless of whether they drop out or are able to graduate, too many of these young people are saddled with debt that they are unable to climb out from under.**

Culminating a series of revealing and alarming reports, a Senate Health, Education, Labor and Pensions (HELP) Committee revealed that although federal taxpayers are investing billions of dollars a year in for-profit colleges, “more than half of the students who enrolled in in those colleges in 2008–09 left without a degree or diploma within a median of four months.” Consider some of the other findings from this report:

- For-profit colleges are owned and operated by businesses. Like any business, they are ultimately accountable by law for the returns they produce for shareholders. While small independent for-profit colleges have a long history, by 2009, at least 76% of students attending for-profit colleges were enrolled in a college owned by either a company traded on a major stock exchange or a college owned by a private equity firm. The financial performance of these companies is closely tracked by analysts and by investors.
- Congress has failed to counterbalance investor demands for increased financial returns with requirements that hold companies accountable to taxpayers and students for providing quality education, support, and outcomes.
- Federal law and regulations currently do not align the incentives of for-profit colleges so that the colleges succeed financially when students succeed.
- Many for-profit colleges fail to make the necessary investments in student support services that have been shown to help students succeed in school and afterwards, a deficiency that undoubtedly contributes to high withdrawal rates.
- More than half a million students who enrolled in 2008–09 left without a degree or certificate by mid-2010. Among two-year Associate degree-seekers, 63% of students departed without a degree.



- The vast majority of the students left with student loan debt that may follow them throughout their lives, and can create a financial burden that is extremely difficult, and sometimes impossible, to escape.
- In the absence of significant reforms that align the incentives of for-profit colleges to ensure colleges succeed financially only when students also succeed, and ensure that taxpayer dollars are used to further the educational mission of the colleges, the sector will continue to turn out hundreds of thousands of students with debt but no degree, and taxpayers will see little return on their investment.

CAI and CPIL have joined with a USD-wide campaign to address these abuses. The USD Initiative to Protect Student Veterans joins the efforts of military leaders and elected officials to educate and protect military veterans from the misleading practices of some for-profit educational institutions and lenders. Under the direction of Col. Patrick Uetz, USMC (ret.), the Initiative's

multi-pronged approach includes a research component; the Veterans Legal Clinic, which assists veterans who have disputes with for-profit schools or lenders over the use of GI Bill funds and education related loans, and which is directed by Robert F. Muth, who previously served as a Captain and Judge Advocate in the U.S. Marine Corps; and state and federal advocacy led by CAI and CPIL, along with powerful allies such as Public Advocates assisting us on our state work and noted youth education advocate David Halperin contributing greatly to our work, along with our own Amy Harfeld, at the federal level. CAI and CPIL's advocacy efforts at the national level in 2013 included the following major activities:

- **The federal Department of Education.** The Department of Education had adopted a rule that requires the private for-profit schools to meet two tests — state authorization and a student complaint handling process that involves mandatory consideration of such complaints and immediate regulatory remedies to assure compliance with the law and applicable rules. Unfortunately, the Department published a “Dear Colleague” letter in early 2013 that many schools interpreted as requiring only some sort of certification. CAI worked through 2013 to obtain Department clarification that the second prong of the applicable rule is not satisfied unless there is a mandatory complaint handling process with meaningful regulatory enforcement, *e.g.*, of the type that would only be satisfied with submission to the jurisdiction of state regulatory bodies, such as California’s Bureau for Private Postsecondary Education (BPPE) (see state advocacy discussion below). We hope for and expect the Department to issue a clarification of the first such letter to make clear the clear retention of the mandatory student complaint handling process — thus allowing state agencies to assume effective jurisdiction of these schools at the state level.

We also expect 2014 to see consideration of gainful employment standards interposed nationally for receipt of federal education and related subsidies. CAI, CPIL and our colleagues are preparing comments in response to the U.S. Department of Education’s Notice of Proposed Rulemaking “to establish measures for determining whether certain postsecondary educational programs prepare students for gainful employment in a recognized occupation, and the conditions under which these educational programs remain eligible for the student financial assistance programs authorized under title IV of the Higher Education Act of 1965, as amended.”

CAI, with David Halperin and our DC lead attorney Amy Harfeld, will be working to accomplish clarification of the regrettably confusing 2013 “Dear Colleague” letter from the Department, and to encourage the adoption of meaningful rules that are based on at least some baseline performance. Both David and Amy are working with Carrie Wofford, formerly with the Harkin Committee, and a consortium of veterans’ groups at the nation’s Capital. The same groupings are leading or helping in the work applicable to the FTC, Bureau of Consumer Financial Protection, SEC, VA and DOD (see below).

- **Work to stimulate FTC enforcement.** During 2013 CAI compiled and provided the Federal Trade Commission (FTC) with a notebook compendium of data to encourage agency enforcement. The cover legal memorandum reviews the powers of the agency and recommends use of the Section 13 authority to proceed directly to court litigation — particularly given the weak administrative powers of the FTC. Appendices to the notebook included a compilation of all major private and public unfair competition and other suits brought against the growing numbers of schools, and other data relevant to FTC concerns.
- **Organizing evidence for public prosecutions.** During 2013 CAI worked on two major documents: (1) the first national comprehensive list of the Attorneys General (AG), State Attorneys, District Attorneys (DA) and U.S. Attorneys in every major jurisdiction with unfair competition jurisdiction, including name and contact information of the field official filing or deciding to file cases; and (2) a lengthy analysis of current deceptive practices — from prime time television to internet marketing. CAI will present the latter to the law enforcement officials, along with the major ads themselves, reproduced with a click, followed by germane questions for public prosecutors and others to pose; publication and distribution is scheduled for 2014.

Currently, 32 AGs are cooperating in joint investigations and sharing information amongst themselves. Several are filing cases beyond California, as with the recent EDMC prosecution by the consortium of AGs led by Kentucky, and the more recent filings in New York — and they are collaborating with the feds. This has become one of the leading examples of coordinated public enforcement in the modern era.



- **Assisting the CFPB and the SEC.** In late 2013, the Consumer Financial Protection Bureau (CFPB) and the Securities and Exchange Commission (SEC) each announced investigations into the loan and securities practices, respectively, of major schools. CAI will provide any assistance necessary to aid these federal regulators in their investigations.
- **Help with VA/DOD standards and disclosures.** The policies of the U.S. Department of Veterans Affairs (VA) and Department of Defense (DOD) concerning recruitment of students on bases, as well as promotion to current military, are increasingly under review. In addition, a website is being created to provide accurate information to those leaving the military for possible school attendance on the GI Bill or otherwise.
- **Enforcing the President's Executive Order.** In April 2012, President Obama issued an Executive Order to help ensure all of America's service members, veterans, spouses, and other family members have the information they need to make informed educational decisions and are protected from aggressive and deceptive targeting by educational institutions. CAI is tracking the Order for compliance, particularly by the cabinet level agencies that operate under executive leadership, e.g., the Departments of Education and Defense. We hope that the Order will be amplified further in 2014.
- **National private suits and remedies.** *En masse* deceptive advertising and misleading marketing form the ideal core of violations addressable through the class action remedy. Each private for-profit school victim may suffer, for him or her, a substantial loss of from \$10,000 to \$50,000. But that is not a sufficient sum to realistically enable an attorney-filed individual suit. Only public actions or class actions can accumulate a critical amount in dispute to allow for private court enforcement. However, the U.S. Supreme Court, in a series of cases beginning with the now infamous *Concepcion* holding, has elevated the power of the unilateral "terms and conditions" entry to allow effective immunity from private remedy for unfair marketing practices that damage tens of thousands, or even millions. An adhesive stock disclaimer may now eliminate the consumer's right to object to abuses, or may confine any remedy to individual arbitration proceedings. Their statement that class actions are waived is now to be honored, thus precluding effective remedy.

The elevation of arbitration under a federal statute to preempt all state unfair competition law and procedure was imposed by Justices who hypocritically stand for states' rights. And a typical arbitration individual action is too expensive in relation to the amount at stake. It must often be privately funded by the parties, and lacks the scale that makes any attorney-assisted remedy realistic. In an era of marketing abuses that reach millions and cause billions in damages, the Supreme Court has abdicated for itself — and imposed that abdication on all state court systems. It has irresponsibly removed the major remedy necessary in the modern era to allow the law to be enforced and damages collected. It prevents both recovery and deterrent impact, since defrauding a huge number of persons on a large scale is now practical.

Aside from a change in the Court's make-up or Congressional amendment of the federal Arbitration Act (*et al.*), there are three mechanisms possibly remaining for effective enforcement of the law for the private for-profit schools: (1) the development of arbitration class actions; (2) the use of the *qui tam* (taxpayer waste) statutes that do not rely on the class action format; and (3) public prosecutions, as noted above.

- **Congress.** Notwithstanding the current paralysis of the Congress, and the substantial political power of the private for-profit schools, some efforts are underway to bring federal legislation to accomplish “90/10” GI bill reform that will lessen the degree of expropriation now accomplished by abusive schools. In 2014, there is the possibility of federal legislation to mandate reasonable outcomes or to otherwise limit at least the most extreme abuses of veterans and foster children.
- **Media.** Part of the advocacy work on this issue involves drawing media attention to on-going abuses, particularly given the extraordinary monies devoted to lobbying by the schools. Their major lobbyists include 20 high profile former officials, ranging from Colin Powell to Dick Gephardt. During 2013, CAI's colleague David Halperin in D.C. posted numerous articles exposing the private for-profit school abuses and their influence at the capitol. We expect even more widely publicized disclosures in 2014, including oft-placed pieces in highly visible placements at the Huffington Post. A typical example posted at the beginning of 2014 and discussing the growing movement

of public attorney general suits is available at http://www.huffingtonpost.com/davidhalperin/state-attorneys-general-o_b_4677145.html.

B. California Advocacy

1. Private For-Profit Education Abuses — State Advocacy

CAI has also been working to police the private for-profit predations within California. This state not only has the largest population, but the largest number of private for-profit students and schools. As such, it is a major forum and precedent setting venue. Related to that intra-state work, CAI worked in 2013, with anticipated continuation through 2015, to develop a model state statute, grade all states on their private for-profit regulatory oversight, and issue a national report on the subject. Some federal agencies have expressed interest in the compendium and analysis of state by state systems of unfair competition and student redress. CAI and CPIL's advocacy efforts at the state level in 2013 included the following major activities:

- **California legislation.** CAI-sponsored AB 2296 (Block) (Chapter 585, Statutes of 2012) which became effective on January 1, 2013, sets a national lodestar for the measurement of school performance. Each institution that offers an educational program designed to lead to a particular career, occupation, vocation, trade, job, or job title shall now disclose the wage and salary data for the particular career, occupation, trade, job, or job title, as provided by the Employment Development Department's Occupational Employment Statistics, if that data is available. And salary or wage information, as calculated pursuant to the new law, must be consistent with any express or implied claim about salaries. Note that ads often highlight smiling, prosperous looking people who speak in persuasive generalities about their improved finances, job prospects, or life-long careers without making any claims about actual salaries.

Apart from earnings, another loophole the law addresses is misleading job placement claims. Imagine you are a prospective vocational student without a high school diploma looking to enroll in a medical assistant program. The student loans you take out to complete this program will be with you for years. Before deciding, you want to know how many graduates from the program are able to get a job (in the relevant field), so you review the official state-mandated performance disclosures provided by the school. What you wouldn't know is that the fact sheet you've received, that is endorsed by California state law,

lawfully and secretly includes in its aggregate calculation *any and all* job placements obtained by the program's graduates — including fast-food restaurants and other jobs far outside the field.

Under previous California law, a job placement in a fast food restaurant, for example, would count as a “graduate employed in the field” so long as the education received “provided a significant advantage to the graduate obtaining” the fast-food job. Adding to the problem, the previous requirement allowed schools to count job placements for students who work as little as one day — or one hour — per week.

To fix the misleading salary disclosures, AB 2296 removes the misleading requirement that schools disclose general salaries in a field, which included the salaries earned by the graduates of other schools, and instead requires schools to disclose the salaries of their actual graduates. To fix the job placement loopholes, AB 2296 removes the misleading requirement that allows schools to count as “graduates in the field” those who do not in fact work in the field, and delegates to the Bureau of Private Postsecondary Education (BPPE) the authority to define through regulation accurate and appropriate job placement disclosure standards to replace the currently misleading one, offering BPPE, schools, and student advocates an opportunity to achieve consensus on methodology.

To make sure students have the information they need to choose a school where they can succeed, AB 2296 additionally requires schools to disclose the rate at which its graduates default on their loans. This indicator of quality, formally called the Cohort Default Rate, is used by the state and federal governments to assess whether investment in a school will provide a good return on tax dollars and should be available to students as well. The measure also requires disclosure of whether a school is accredited and the limitations of going to an unaccredited school, such as that some employment positions (with the state, for example) will not accept degrees from unaccredited institutions.

■ **2013 Cal Grant graduation and loan default rates.**

CAI was pleased to have the support of Governor Jerry Brown over the private for-profit abuses, and that led to new administration rules on amounts and qualification for the major state tuition subsidy program: Cal Grants.



The maximum amount for the private for-profits will be reduced from \$9,708 to \$4,000, to reflect tuition levels at community colleges. In addition, to be eligible to receive Cal Grants, the budget plan starting in 2013 requires colleges to have a six-year graduation rate of at least 30% and a maximum three-year cohort default rate on students loans of 15.5%. Community colleges were exempt from the new standards, which apply only to institutions where more than 40% of students take out federal loans. (California's community colleges don't charge enough in tuition for federal loans to be an issue.)

Most for-profit colleges that operate in the state will run afoul of the new rules, including the University of Phoenix, ITT Technical Institute, and others. For-profits that will be knocked out of the Cal Grants account for more than 80% of the sector's total enrollment, according to Legislative Analyst Judy Heiman.

- **BPPE Extension.** CAI and CPIL support SB 1247 (Lieu), pending legislation to extend the sunset date of the Bureau for Private Postsecondary Education. The BPPE

was sunsetted some seven years ago, with disastrous results. The private for-profit schools used the lack of any accountability to engage in extreme advertising deception without controls or limit. The agency was restarted several years ago, but with limited authority, and it has been largely impotent since its reboot. It now faces another quick sunset date. However, advocates for youth and veterans will be working hard both to restart it, with enough time to prove its efficacy, and to give it the powers it needs. Tied to that authority is the need to bring all of the private for-profit schools — including those unconscionably exploiting students, creating personal bankruptcies and credit ruination and wasting public funds — under the Bureau’s jurisdiction. The Department of Education rule noted above, and the Dear Colleague letter correction is part of that effort, because it underlines the requirement of a regulatory type of student complaint handling process in order to be eligible for federal funds, and that means submitting to BPPE jurisdiction is necessary for compliance with that rule in California.

The case for a more viable state agency was reinforced by a 2013 Bureau of State Audits study of the failures of BPPE, including its dearth of resources to properly enforce the law. CAI is taking a leading role in organizing support for the extension and added power and inclusion mandate. We are organizing a combine of advocates, under the guidance of Ed Howard in Sacramento and the important leadership and support of some of the state’s leading experts on the subject. If the 2014 statute is enacted, CAI’s work in 2015 will be to create model rules to guide the agency and support for resources to accomplish its purpose.

■ **A second state bill to extend Cal Grant standards.**

CAI and CPIL will be sponsoring AB 2099 (Frazier) in 2014 to follow-up our 2103 advocacy. This bill would deem an institution ineligible for initial and renewal Title 38 awards if it has a three-year cohort default rate equal to or greater than 15.5% or a graduation rate of 30% or less for students taking 150% or less of the expected time to complete degree requirements, or which does not satisfy the other criteria for qualification for Title 38 awards in the bill. This measure takes the Governor’s new rules for Cal Grants, discussed above, and applies them to the receipt of all federal subsidies.

■ **California public prosecutors: Corinthian.** As noted above, CAI is encouraging public prosecutors to use their considerable power under the Little FTC Acts to prosecute abusive marketing practices. California is no exception, with one of the nation’s strongest unfair competition statutes. Already, deputy AG Nick Akers has filed an important case in late 2013 against the major Corinthian private for-profit school. California also has an active group of district attorneys who similarly enforce the same statute. Professor Fellmeth worked this beat for nine years and helped to craft the current statute in the 1970s. He remains a consultant to DA offices in five major counties and believes that many office of DA may be interested in enforcing violations. Our work in 2014 and 2015 will include assisting any such office that brings meritorious actions.

■ **Assistance with private suits.** Although private class actions are problematic given *Concepcion* (see discussion above), both CAI and CPIL will contribute amicus briefs in order to provide some limitation to the regrettable line of cases that allow corporations to essentially escape accountability for unfair competition committed across an entire spectrum of consumers (or students). Some former CPIL students are major litigants now before appellate courts and attempting to do just that.

In addition, CAI and CPIL are watching for cases of class arbitration, which is one possible way to avoid the preclusion of mass relief necessary for these grievances to be practically adjudicated. Ad, we shall be looking for the Qui Tam alternative, as discussed above. We shall be coordinating with the Veteran’s Clinic in seeking such cases and in facilitating their filing and assistance through 2014 and 2015.

■ **Exporting California’s model to other states.** During 2013, CAI’s Melanie Delgado directed a study of the regulatory and statutory student protections in place in each of the 50 states. During early 2014, we intend to fashion an ideal, aspirational statute (similar perhaps to what we shall be introducing in California, and perhaps drawing on successful approaches in other states). That will be the “model.” Then we shall detail the failings against this model of the statutes/agencies/rules in each of the 50 states, *seriatim*. Do they comply with

the “complaint handling” second prong of the federal Department of Education rule discussed above? Are they potentially effective with regard to information collection, standards and possible sanctions. Then we grade each state from A to F on their respective systems of student protection. This study will be disclosed to the FTC and other interested parties during mid-2014 and will be publicly released in late 2014. As with our other reports, a national study that grades states in competition with each other triggers the media’s often ardent interest. A contest or a judgment or a comparison with a nearby state, provide surprising motivation for media attention, and for palliative new statutes and policies, as the prior reports discussed above suggest.

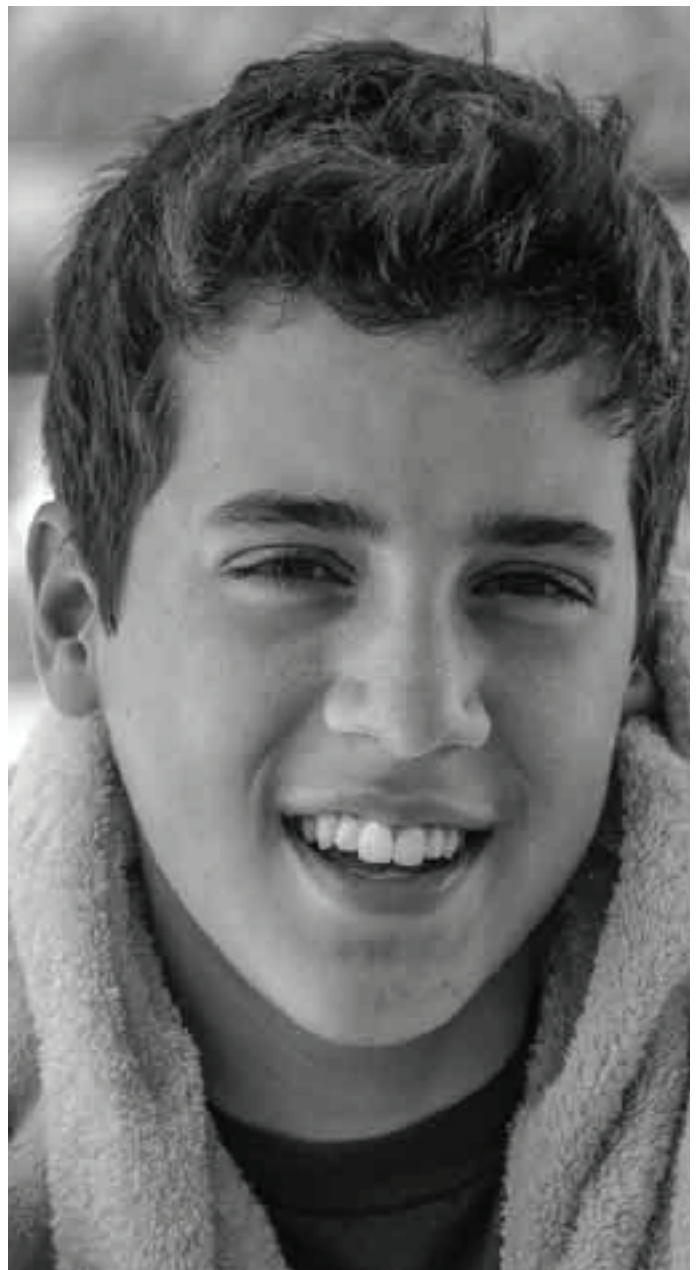
- **Allies.** We are spreading the word about this issue within our own community of child advocates, since in addition to young veterans, one of the prime victim groups is comprised of former foster youth. Some affected youth are sharing with us their stories, some of which are even more heart rending than those of veterans. These are kids who have been neglected, beaten, sexually assaulted, and/or otherwise abused. They have no family they can turn to for support, and after being victimized by a private for-profit business, they typically end up homeless in large numbers, and/or relegated to sex trafficking.

We are taking our message to the major child advocacy national organizations — the National Association of Counsel for Children (NACC), the National Child Abuse Coalition, the National Foster Care Association, the ABA and the Children’s Leadership Council. We have been part of the governance or worked with most of these organizations. In late 2013, the NACC selected CAI to make a major panel presentation to its membership at its annual national conference in Denver in August 2014. The subject will be the exploitation of foster youth by the private for-profits and the countermeasures available to counsel for children.

2. Transition Age Foster Youth

a. Report on Proposition 63

In December 2013, CAI released its second report on the performance of California in allocating substantial new funding approved by the California electorate. By way of background, California voters approved Proposition 63, the Mental Health



Services Act (MHSA), in 2004. The law gave California unprecedented opportunity to lead the country in providing innovative and effective mental health services to its most vulnerable citizens. By assessing a 1% income tax on personal income in excess of \$1 million, the measure was intended to provide funding, personnel, and other resources to support new and innovative county-based mental health programs for children, transition age youth, adults, older adults and families.

Of particular concern for CAI, as discussed below, is the MHSA’s performance in helping transition age foster youth (TAFY). Here are the children the state has seized, with a problematical mental health history. Their parents have been adjudged unfit. The courts have become the legal parents. The children are commonly moved between placements. They have two central attributes: (a) they are

part of a high-risk population for mental health needs (perhaps the most high-risk group extant); and (b) they are literally the children of the state — we as a democracy have taken over the parental role. There is no population more warranting the significant funds this initiative provides.

In 2010, CAI released a report analyzing each of California’s 58 county plans created pursuant to initial MHSA funding from its passage in 2004 through mid-2009 (*Proposition 63: Is the Mental Health Services Act Reaching California’s Transition Age Foster Youth?*, available at www.caichildlaw.org). That Report measured how counties were using initial MHSA funding to address the needs of TAFY. CAI chose to evaluate this aspect of the MHSA because transition age youth (TAY) are specifically carved out in the Act to receive funding for new and expanded mental health services — and TAFY arguably comprise the subset of that population most in need of such services and resources. In fact, TAFY experience serious mental illness and severe emotional disorders at rates that far exceed their peers who have not spent time in the foster care system. Given this reality, the fact that foster youth are the state’s own children, and the amount of money the MHSA took in over the first several years of its existence, CAI believed that TAFY should have been receiving vastly improved services funded by the MHSA — services tailored specifically to their unique needs. And the extraordinary sums collected from the initiative — well over \$1 billion annually — make it a prime source for the legal “children of the state” that are our foster children, especially those commonly falling off the cliff at age 18 (see discussion of CAI’s second 2013 report below).

Unfortunately, CAI found that the counties were falling far short of developing adequate programs to address the mental health needs of TAFY with their MHSA funding. Many counties created programs that included TAFY as a “priority population” for funding; however, such programs were generally extremely broad in their scope, TAFY was only one of several priority populations, and the number of TAFY served by such MHSA-funded programs was very small when compared to realistic estimates of the actual need. Finally, none of the programs examined included any means by which to determine the success of the MHSA intervention over the long term. CAI found there to be a disappointing lack of substantial outcome statistics, with no plan to study outcomes longitudinally.

As a follow up to its 2010 Report, CAI sponsored legislation to amend the statutory language of the MHSA to explicitly identify “transition age foster youth” as a population intended for priority (see AB 989 (Mitchell), enacted in 2011). The statute explicitly requires county mental health programs to consider the needs of transition age foster youth when developing and implementing

MHSA-funded programs to address the needs of transition age youth.

CAI researched and released its 2013 report, entitled *Are They Being Served—Yet?*, because of concerns that counties still were not using MHSA funds to meet the needs of TAFY, despite the new explicit statutory mandate. Underlying CAI’s concern

were two common dynamics that occur whenever new money is to be channeled for a laudable purpose. First, new funds are commonly used to pay for services that were previously funded from the state’s general fund or other sources; this “supplantation” achieves the effective diversion of the funds as intended. The MHSA sought to counter that dynamic by explicitly requiring “maintenance of effort” in accounts serving the same populations for the same purposes relevant to the Act’s mandate. However, that statutory element is difficult to enforce, is often circumvented, and becomes increasingly difficult to track over time — as related accounts necessarily change. But the initial pattern documented in the 2010 Report indicated early — and blatant — supplantation as an increasing factor in the diversion of funds intended for supplemental use. Second, there is a predictable and well documented “top down” pattern where special funds are routed as with this initiative. The state distributes a portion of it through a state board proceeding, but most of the funds are distributed as determined by commissions functioning at the county level. The record for such funds is distribution to what critics call “the usual suspects” — agencies, foundations and private entities that were already receiving public funds, who have local contacts, who know county officials tend to influence RFP solicitations and receive the brunt of such funding. A new line of funding for a preventive or any new venture faces formidable obstacles.

One example, albeit admittedly self-serving, was CAI’s proposal to implement the Transition Life Coach (TLC) solution for emancipating foster children eligible for MHSA funds. That proposal was not top down, nor was it business as usual. It is a truly innovative approach that involves taking all of those with an interest in the child (counsel, the court parent, the CASA volunteer, etc.), and instead of creating a “drop-in center” of some kind or funding services with applications and an administrative regime, the TLC plan takes an approach that closely replicates the support and guidance that parents typically provide to their transition age children:

- The court-parent creates a trust for each youth, funded with monies to be used over the course of a few years to help the youth work toward his/her personal self-sufficiency goals.
- The youth and court find someone preferably known and trusted by the youth to serve as the youth’s coach (mentor) and trustee.

- The youth, guided by his/her coach and others, creates his/her own transition plan, one that can change as appropriate, but which has a reasonable chance for success.
- The trustee is trained and is provided with access to the trust funds — and act as a parent would act in fulfilling the youth's plan for self-sufficiency (providing funds that further the youth's progress toward his/her goals, and withholding funds if the youth is not progressing appropriately toward his/her goals).
- The trust funds are in addition to other help that may be available and fills in holes to allow the youth to fashion something from the bottom up, customized and responsive.
- The plan is not arbitrarily limited to age 21, but recognizes that the median age of self-sufficiency for American youth is 25 or 26 years of age. It can be extended beyond the short time limit now extant.
- The plan is overseen by the coach and reviewed by the court so financial abuse is unlikely.

The end result is the closest thing to what a parent does. The youth is not abandoned by his court-parent, nor by his attorney. And he (or she) has someone specifically working with him/her. It is personal, and it is individualized and it is monitored to the extent necessary. It is essentially an informed bottom-up system. And, it would work. CAI knows this based on 23 years representing foster youth.

CAI successfully sponsored landmark legislation that gives every juvenile dependency court the right to create such trusts. However, not a single jurisdiction in California, or the entire nation, has implemented the TLC plan. The reason has nothing to do with the merits, but instead with who gets this money now and how they think. It is routed through agencies and social workers. These kids are part of a system's caseload — and the powerful unions and administrators of this system oppose any territorial surrender to those who would be in control under the TLC alternative. CAI proposed a TLC-like program as a pilot for the San Diego Proposition 63 Commission. It was rejected in favor of a more traditional option operated by those already engaged in such endeavors, well intentioned to be sure, but in a model with what we believe to be a relatively limited consequence. Our proposal asks that these trusts be funded at the same level of support (about \$40,000 per child) that is the median amount NON-foster children receive from their parents post-18. The new federal and state laws allowing extension of services past 18 could be combined with the TLC option to integrate those benefits with a sum less than that \$40,000, and would allow for funding for all sorts of things

important to a given youth's chances, but not a part of the "top down" categories of current law, and could extend beyond 21 to smooth the way for another several years where needed. That individualization and extension is underlined by the empirical data we do have of youth who remain under support until age 21, *e.g.*, as Illinois has long provided. What the Chapin Hall study concluded is that the extended care helps the youth until 21, but they then fall off the cliff at that age instead of at 18. The optimum solution is not delayed relegation to homelessness, prostitution, poverty, and imprisonment, but another lifetime course. The systems that operate for foster children are not so oriented.

During 2013, CAI reviewed ten diverse California counties to determine to what extent these counties are considering the needs of TAFY in planning and implementing programs funded by the MHSA and creating programs to serve TAFY. The counties that CAI reviewed were Alameda, Humboldt, Kern, Los Angeles, Merced, Orange, Riverside, Sacramento, San Diego, and San Joaquin. Most of the counties reviewed were continuing to provide the programs and services to the populations described in CAI's 2010 Report. Given the changes noted above, particularly the enactments of AB 12 and AB 989, the *Katie A.* settlement, and the increased responsibility entrusted to counties with regard to mental health and foster care services, CAI examined to what extent the counties are considering and addressing the needs of TAFY with their MHSA-funded programs and services.

CAI developed the following five criteria to utilize in its examination of the ten counties' MHSA-funded programs and the planning processes associated therewith. These criteria are drawn from the stated purpose and intent of the MHSA and subsequent legislation (AB 989) which requires counties to consider the needs of foster youth in their MHSA program planning process:

- Does the county offer MHSA-funded programs designed exclusively for TAFY?
- What type of TAFY involvement was included in MHSA planning?
- Does the county track TAFY use of MHSA-funded programs?
- What type of collaboration is there with county child welfare service departments?
- Does the county engage in any meaningful long-term outcome analysis?

CAI's report may be crystallized into 10 findings and conclusions, as follows:

- 1) None of the counties CAI reviewed had designed an MHSA-funded program exclusively for TAFY.



- 2) Some of the ten counties do seek out TAFY for advice, although generally not in the evaluation of where they decide to spend. Indeed, few track the participation of TAFY in their respective programs at all. It is unclear how any advice received or lessons taught would be reflected in what they are doing with their substantial MHSA funds for a group they are not monitoring.
- 3) None of the ten counties reviewed by CAI track TAFY utilization of all available MHSA-funded programs in the county. Two are now discussing it.
- 4) The MHSA now requires counties to consider the needs of TAFY when it is designing MHSA-funded programs for TAY. It is not possible for a county to understand the needs of a population if there is not complete data on to what extent available services are being utilized. It is essential that a county understand to what extent

TAFY are utilizing its MHSA-funded services, before it can meaningfully and fully consider the needs of this population.

- 5) The counties CAI examined engaged in varying degrees of collaboration and consultation with the county child welfare departments in planning and implementing MHSA-funded programs. While most counties at least consulted county child welfare departments in the planning phase, coordination with county child welfare varies with the actual implementation and evaluation of programs. Currently, progress is being made in this area. The *Katie A.* settlement has led to increased collaboration between county mental health departments and county child welfare departments. Most counties include county child welfare departments in the planning stages of their MHSA-funded plans. Alameda County is making strides with its TAY System of Care, which requires extensive

collaboration between county mental health and county child welfare departments. Los Angeles County is also moving in the right direction here, largely due to its efforts around *Katie A.*

- 6) None of the counties that CAI reviewed had any longitudinal outcome data related to TAFY who had participated in any of their MHSA-funded programs. This is a glaring oversight for two reasons. First, there is no way to know if MHSA-funded programs are serving the Act's stated purpose of "reducing the long-term adverse impact on individuals, families and state and local budgets resulting from untreated serious mental illness" if there is no data available with regard to the long-term impact of those programs. Second, a county cannot reliably claim that it is considering the needs of TAFY if it does not know whether the programs created to address those needs are successful over the long term.
- 7) Several encouraging developments have occurred over the past three years to increase somewhat mental health services for foster youth. However, none of these recent developments — including AB 12, *Katie A.*, or the ACA — excuse counties from any obligation to design and implement MHSA-funded programs to serve TAFY. In fact, the availability of these programs underscores the importance and the responsibility of county mental health departments to collaborate with county child welfare departments, consult with TAFY, and take meaningful steps to consider the needs of TAFY throughout the process of planning, implementing and evaluating MHSA-funded programs. The above-mentioned programs represent progress and create opportunities for counties to utilize MHSA funding to help bolster services for TAFY.
- 8) The extension of foster care to age 21 in particular highlights the need for appropriate services for transition age (former) foster youth ages 21–25. County mental health departments must look specifically at the needs of TAFY between the ages of 21–25 who face a gap when they age out of foster care; at that point, they are no longer in foster care and no longer have access to many of the resources associated therewith, but many will still be struggling with various issues, including mental health issues, and will not yet be self-sufficient.

- 9) Over the course of the past three years, California's legislature has given enormous responsibilities to California's counties and to their boards of supervisors to properly review MHSA funding. County supervisors should not delegate completely to commissions made up of persons with longstanding relationships with service providers. The county supervisors should pay particularly close attention to the needs of those TAFY who have aged out of the foster care system (ages 21–25) or have opted out of extended foster care. These youth are all too often ignored as larger, well-funded and well-organized groups take up time and space on meeting agendas and supervisors' schedules.
- 10) An extensive independent audit must be conducted of the MHSA, use of MHSA funds, and compliance with recent amendments to the MHSA. The need for that



detailed audit is underlined by the release of a 2013 report touching. The partial audit found several issues with MHSA oversight, guidance and accountability; the enactments of AB 100 and AB 1467 have the potential to lead to even more of these practices. There is a strong need for a comprehensive review of California's administration and oversight of the Mental Health Services Act, and that of California's counties. Every misappropriation of MHSA funding takes money from the vulnerable populations that this fund was intended to assist. The number of questionable practices that have been observed and reported merits a much deeper investigation.

Both the 2010 and 2013 reports were primarily funded by The California Wellness Foundation and are available in full at www.caichildlaw.org.

b. Report on AB 12 — Extending Foster Care to Age 21

In December 2013, CAI released a second California report relevant to transition age foster youth (TAFY). Entitled *California's Fostering Connections: Ensuring that the AB 12 Bridge Leads to Success for Transition Age Foster Youth*, this report examines California's performance in implementing the 2008 Fostering Connections to Success and Increasing Adoptions Act, which authorized states to extend foster care coverage until age 21. The findings of the report, which was primarily funded by The California Wellness Foundation, are summarized below; the full report is available at www.caichildlaw.org.

Transition age youth are typically recognized as individuals between the ages of 16–25. As a general rule, our society allows transition age youth ample time to finish school, begin a career and establish important relationships prior to expecting them to be completely on their own. In this country, not only is it socially acceptable to live at home with one's parents well past the age of 18 or to move back home, it is happening more and more frequently. On average, most young Americans do not achieve true financial independence until age 26. In fact, parents provide an enormous amount of support to their children post-age 18, both financially and in terms of time. However, until recently, most states expected foster youth to be able to live on their own with little or no assistance at age 18. The documented outcomes were devastating, former foster youth had astronomically high rates of homelessness, unemployment, incarceration and poverty when compared with their similarly situated peers with no history of foster care. Those youth who were employed, earned far less than their peers. Though most foster youth express a desire to attend

college, only about 20% enter and only around 3% ever earned a bachelor's degree.

To implement the Fostering Connections to Success Act in this state, the California legislature enacted AB 12 (Chapter 559, Statutes of 2010) and subsequent legislation collectively known as California's Fostering Connections. The law, which took effect on January 1, 2012, contains eligibility requirements that mirror the federal Fostering Connections requirements, and requires that participants meet at least one of five specified participation criteria to maintain eligibility. To remain eligible, the nonminor dependent (the term adopted to describe a foster youth over age 18) must be (1) completing high school or an equivalent program; (2) enrolled in college, community college or a vocational education program at least half time; (3) participating in a program designed to remove barriers to employment; (4) employed at least 80 hours a month; or (5) unable to participate in any of the above due to a medical condition.

California's Fostering Connections has produced many commendable and promising results, among them:

- Two new age-appropriate supervised independent living setting placement options are available for nonminor dependents, to help them prepare to live independently after they leave care at age 21.
- Youth are allowed to re-enter foster care up to age 21 if they opt out at age 18 or later and change their minds.
- The dependency court remains involved to review progress toward self-sufficiency.
- The youth must be actively involved and consulted in planning both prior to and after age 18.
- The nonminor dependent must be involved in a participation activity that will prepare him/her for self-sufficiency upon exiting the system.
- The youth will continue to benefit from the advice and assistance of an attorney who will represent his or her wishes before the dependency court until age 21.
- The youth will continue to benefit from the guidance and support of his/her case worker until age 21.
- The law accounts temporary setbacks that commonly are experienced by this age group. A nonminor will not automatically lose eligibility due to a temporary setback.
- Probation youth are eligible for California Fostering Connections, in some circumstances.
- Many counties have experienced higher than anticipated participation in California Fostering Connections.

However, CAI's research revealed that further action must be taken in order to ensure the successful implementation of



California's Fostering Connections. For example, CAI recommends the following:

1) California must create additional innovative options for nonminor dependents and former foster youth, such as CAI's proposed Transition Life Coach (discussed above).

2) California must address caseload issues for attorneys, judges, and social workers.

3) California must reinstate dual jurisdiction for all counties. This will help to alleviate some of the issues related to probation youth who should be eligible to participate in AB 12, but are falling through the cracks.

4) Counties must ensure the adequacy of the Transition Independent Living Case Plan (TILCP). The TILCP is the centerpiece of a nonminor dependent's participation in extended foster care. It lays out the means by which the nonminor is

maintaining his/her eligibility for extended foster care and as such, it must be individualized, not boilerplate.

5) The state must address issues faced by parenting nonminor dependents.

6) California and its counties must address the SILP readiness issue. Too many nonminor dependents have been placed in Supervised Independent Living Placements (SILPs) before they are ready for the level of independence that the placement provides.

7) California must provide more streamlined, comprehensive education and training for the professionals who work with AB 12 eligible youth. For Fostering Connections to reach its full potential, it is important for all of the professionals who deal with older foster and probation youth to be aware of Fostering

Connections, and to understand this complex law and its implications for their young clients.

8) California must provide more education related to financial self-sufficiency to foster youth before and after AB 12 eligibility becomes an issue. Too many nonminor dependents are woefully unprepared to handle their finances upon entering Extended Foster Care.

9) Counties must cooperate with one another. Each county administers its own child welfare services program, thus, each county child welfare department may differ. Counties need to cooperate so that nonminor dependents are able to successfully maintain their eligibility and receive the intended benefits of extended foster care.

10) The federal government must repeal the Title IV-E lookback provision. California advocates and lawmakers must encourage the federal government to repeal the federal foster care lookback provision, which requires foster youth to meet an outdated income-based test in order to be eligible for reimbursement under Title IV-E. Given California's budget realignment, this provision could ultimately threaten critical programs that provide a necessary safety net for youth who age out of care, whether they leave foster care at age 18 or at age 21.

3. Counsel for Children in California: Dependency and Family Court

CAI has worked for many years on providing competent counsel for children in dependency court, including the management for three years of the state's 20-hour educational program to train all new juvenile court attorneys. More recently, CAI has worked on legislation to help protect the state's children (discussed below) and has litigated to assure reasonable caseloads; that lawsuit, *ET v. Tani Cantil-Sakauye*, resulted in a 9th Circuit decision that is profoundly disappointing.

As way of background, many of California's counties participate in the state's Dependency Representation, Administration, Funding, and Training (DRAFT) program, meaning that the Administrative Office of the Courts (AOC), the administrative arm of the California Supreme Court, arranges for counsel for children (and other parties) in dependency courts. These administrative decisions are often made contrary to the judgments of other parts of the Supreme Court's own system. For example, although more permissive than the 100 children per attorney caseload set by the federal *Kenny A.* case noted above, **the Court's own Blue Ribbon Commission conceded that any caseload over 188 was facially**

excessive and in violation of reasonable standards. But AOC's contracts with DRAFT counties allow for very few attorneys — and caseloads throughout California are commonly above 300 for the attorneys representing foster children.

CAI filed suit for three children in Sacramento County's, where caseloads were over 380. The attorneys appointed to represent these children barely have time to talk briefly with their clients, much less to represent them, know what they need, file motions and seek writs where appropriate. The federal district court judge and the 9th Circuit invoked the equitable doctrine of "abstention" in order to refuse to "interfere" with their state court judge colleagues. When properly invoked by federal courts, that doctrine is applied to avoid interference with ongoing judicial proceedings at the state level. And it lies in equity. But here it was applied notwithstanding the facts that (1) what was challenged was AOC's administrative/budget decision, not a judicial proceeding at all; (2) a decision by the federal court could not interfere with any ongoing state judicial proceeding, since to base a reversal on any flaw requires an objection to that flaw at the trial court level — which were not an issue here; (3) any equitable defense must consider the alternatives of such a denial, and here the only alternative remedy is suit in a state court of a practice of its own Supreme Court — not a tenable alternative and one that left these children no recourse; and (4) this abdication occurred contrary to federal Constitutional issues that have traditionally invoked massive federal court revision of state court practices (*e.g., see In Re Gaul*), and in an area of law with violated federal statutes, and billions in federal monies involved. None of this mattered to federal judges whose empathy lines were here focused on deference to judicial colleagues.

The next step for CAI is to try to shame the often shameless appellate courts into complying with their own stated standards. During 2014, CAI hopes to sponsor legislation that will earmark \$30 million or more for purposes of dependency court counsel, in an account over which the AOC will have no discretion to divert or reduce. CAI has the support of a growing consortium of child and public interest advocates for this direct resolution.

Beyond dependency court, CAI worked throughout 2013 on the matter of "minor's counsel" for children caught in contentious divorce cases in Family Court. Several student interns worked with Christina Riehl and Professor Fellmeth on issues raised by minor's counsel Robert Jacobs. CAI is especially concerned over a wholly irrational and concealed actual policy. Although the public court rule provides for appointment of minor's counsel in Family Court proceedings based entirely on the need — based on the protection of the child's interests — CAI has learned that actually no such counsel will be appointed unless the parents are wealthy enough to

be assessed the costs. This indefensible policy is not published but is effectively utilized in most of the counties of the state, including the larger counties. That criterion is untenable, and in our view violates basic principles. CAI shall be working in 2014 to challenge it, and to provide counsel based on the endangerment to the child and other defensible criteria — not merely the ability of the state to avoid any representation cost.

4. Sacramento Legislative Advocacy

One of two CAI-sponsored bills to be enacted in 2013, SB 522 (Hueso) reversed the regrettable decision in *Brandon S.*, a decision that created a large hole in the fund designed to encourage family foster care (the foster care placement that is most likely to lead to adoption, and which is obviously preferable to group home settings where employees raise children). Because typical homeowners' insurance will not cover the various liabilities that may be posed from foster child inclusion in a home, CAI helped to create and develop the state's Foster Family Home and Small Family Home Insurance Fund. This Fund provides the missing coverage and enables a supply of family foster care providers who understandably do not wish to risk bankruptcy because of something done by or to a foster child — especially by a third party. A bizarre 2009 opinion, *Brandon S.* held that the Fund does not provide coverage where there is a "dishonest, fraudulent, criminal, or intentional act" perpetrated by *anyone* (and not just the insured foster parent) against a foster child. Hence, if a babysitter, or a neighbor, or any other person engages in any intentional act that harms a foster child, *Brandon S.* denied Fund coverage that would provide treatment or care for the foster child.

While intentional torts *by the insured* should properly be excluded, the breadth of this erroneous decision meant that the Fund was unavailable in many circumstances where coverage was warranted — thus raising liability and decreasing willingness of families to take on foster children. CAI's efforts to cure this problem were hampered by the fact that paying more claims may cost the Fund money, and that means it technically costs the state money, and as such, correcting the *Brandon S.* error was subject to major legislative barriers that are erected quite high when the state is under financial pressure, as it has been for most of the past decade. CAI's Ed Howard was able to craft budget trailer legislation that made clear that the exclusion only applies where there are intentional acts of harm committed by the insured foster parent, not by third parties. SB 522 was signed by the Governor on October 2, 2013 (Chapter 494, Statutes of 2013).

The second CAI-sponsored bill that won enactment in 2013 was SB 274 (Leno). A strange section of California law —

replicated in most states — specifies that only two persons may have parental status in a child's life. Certainly that is appropriate in the overwhelming percentage of cases. But any bright line test that precludes a result that is just and reasonable is best moderated. And the basis for parental status in current law is limited to certain persons in certain situations. It does not necessarily comport with the modern world's many variations. Many children are born to a biological father who abandons the family and the child is actually raised by a third person who performs as a father, and who the child knows to be his/her Dad. Over 40% of marriages end in divorce. Almost 40% of children are unintended by one or both of their biological parents. Some gay or other parents may use eggs or sperm from a third person. A child may be practically raised by a Grandma or someone technically not his parent. These and many other variations cause injustice where courts are forced to pick from among more than two individuals who have valid parental claims according to existing state law in order to grant parental rights to just two individuals — a decision that in effect terminates relationships that may have been extremely beneficial and important to a child.

CAI has an interest in seeing to it that adults who function as parents in a child's life and who meet pre-existing definitions of parentage receive the legal rights (and corresponding responsibilities) that go with parental status, including access to children who so regard them. In 2012, CAI won legislative approval of a bill to do so (SB 1476 (Leno)), but it became involved in the "culture wars," criticized by Limbaugh and various talking heads as part of a "Gay agenda." The Governor was then in the middle of an election cycle, and he vetoed SB 1476. CAI returned again in 2013 and won passage and enactment SB 274 (Leno), with the Governor signing it on October 4, 2013 (Chapter 564, Statutes of 2013). Now courts have the flexibility to recognize more than two individuals as parents when appropriate — based on their qualification under traditional, longstanding parentage tests, and guided by the best interests of the child lodestar.

A third CAI-sponsored bill in 2013 was AB 921 (Jones-Sawyer), a bill to insulate social workers who blow the whistle on practices that endanger children from sanction for doing so. The measure won passage by the legislature, but was then regrettably vetoed by Governor Brown.

5. Transparency of Juvenile Dependency Court

During 2012 and 2013, CAI supported an order issued by Los Angeles County Juvenile Court Presiding Judge Michael Nash that facilitated the media's attendance at dependency court proceedings

under relevant state and federal statutory and case law — except when the best interests of the child warrants confidentiality. CAI agrees with Judge Nash that federal and state law authorize public access to dependency court proceedings under certain circumstances, and CAI believes that greater transparency and accountability of the dependency court system is necessary in order to fully protect and promote the interests of the children involved. To that end, during 2013, CAI worked on a new campaign entitled “Foster Kids First: Does Press Coverage Help Foster Kids?” As part of this initiative, CAI consultant Johner Riehl has been monitoring media coverage of Los Angeles dependency court matters and comparing it to coverage in other counties and with Los Angeles County’s historic press coverage. **The 2013 findings indicate no example of any child being harmed (or even named) in a press story covering dependency court matters.**

However, many systemic problems — including caseload issues, delays and lack of resources — did come to light in the coverage.

During 2013, one party in a dependency case challenged Judge Nash’s Order after the juvenile court judge allowed the *Los Angeles Times* to be present during certain hearings (despite the fact that no story naming the involved child or parents appeared was ever published). CAI expects to be involved in this litigation, and its appeal, during 2014.

CAI agrees that protective orders should issue liberally wherever publicity may harm a child, and the categorical prohibition on name or photo disclosure may be justified. But to have a closed door that does not allow any entry at all creates a catch-22, as the press will not even know enough to ask for entry. And an extreme closed door policy undermines democratic checks on a system where the children need a protective element, as systems tend not to reform themselves. Children lack the voting, campaign contribution and lobbying power of almost every adult grouping. They need transparency and the concern of the broader population to bring them policies that work for them.

6. Children’s Legislative Report Card

CAI’s 2013 *Children’s Legislative Report Card*, released in early 2014, presented legislators’ votes on nineteen child-friendly measures that made their way to both the Senate and Assembly floors. *The Report Card* also features two additional bills — Assembly and Senate bills that were killed in the scandalous Suspense File of each house’s Appropriations Committee. The Suspense File is where any bill with even a trivial public money implication is sent to silently die without a public vote unless it is affirmatively removed by the leadership for vote. This is the traditional method to kill child-related bills following the “kiss the baby” press event when it is first introduced. CAI has increasingly included this dodge in its Report Card by taking major bills so killed, and recording a negative as to each of them applicable to every member of the legislature. Since this is an institutional feature that, as a group, they have allowed

to continue, it is proper to so provide at least some measure of accountability. In fact, in two recent Report Cards (for 2009 and 2010), reflecting the low number of child-friendly bills enacted and the suspense file execution of so many good bills, CAI summarily issued an “incomplete” grade to the entire body. If only we could hold them back a grade!

In addition to presenting the raw grade earned by each legislator reflecting the number of affirmative “Aye” votes cast for the selected measures, the 2013 *Report Card* also presents a modified grade, reflecting the fact that occasionally a legislator will have an “excused absence” — where an illness, legislative business, or the like prevents the legislator from casting a vote, and where the vote margin was enough to make the absence irrelevant to the outcome.

The Report Card explains its purpose and methodology in some detail, and describes each of the measures selected for inclusion. CAI acknowledges that there is an inbred bias that favors Democrats in this rating. That party has not only controlled both houses, but for much of 2013 had a supermajority in both. Hence, any child-positive Republican legislation (e.g., perhaps



covering debt reduction from public employee pensions and medical coverage, or acknowledgment of individual responsibility to children — including child support, or other measures warranting inclusion) do not reach final floor votes for Assembly- and Senate-wide vote. As noted, two of the bills were killed in suspense, and two others were vetoed by the Governor. Sixteen were enacted. All of them have positive features. However, they do not address many of the major issues currently needing attention — equitable compensation for relatives caring for foster children, mandated conservation of Social Security and other funds belonging to foster children for their future use and benefit, the need for lower tuition and more higher education assistance, parenting education in high schools, implementation of CAI's TLC model discussed above, preventing abuse and neglect, including pediatric dental coverage in subsidized coverage (largely excluded in practice currently), and on and on. There is a lot that has not been done. There is a lot to do.

In addition to a Report Card, CAI also gives out awards to legislators and legislative staff who demonstrate special commitment to children. In 2013, CAI honored Assemblymembers Holly Mitchell and Bob Wieckowski for their performance over the course of the year. Each had an enviable list of successful enactments involving children, some of which were enacted over significant opposition. Assemblymember Mitchell was also recognized for her work to protect and promote the interests of current and former foster youth, delinquent and at-risk youth, and impoverished youth — as was reflected in her successful efforts to ensure greater funding of CalWORKs in the 2013–14 budget. Assemblymember Wieckowski was specifically recognized for his vigorous efforts to protect students from unfair practices of many postsecondary schools — and his resolve in battling and overcoming some of the Capitol's most powerful interests in doing so. CAI also recognized Julie Salley-Gray as the legislative staffer of the year, based on her work on child welfare issues for the Assembly Appropriations Committee; her appreciation of the need for accountability in the foster care system; and her assistance in resolving the inequities created by *Brandon S.* related to family foster home insurance coverage (discussed above).

7. Collaboration with California Colleagues

CAI continues to convene the Roundtable of child advocates in Sacramento. Every three months, CAI's Melanie Delgado organizes a conference that includes presentations from public officials and state and national experts in subject matters relevant to current state issues. The Roundtable members include almost 300 organizations with various interests in child-related state policy. Participants at the Roundtable attend a three-hour meeting to

learn about current issues and to plan common strategies for child advantage.

For example, the February 14, 2013 event featured presentations by the veteran child advocate Margaret Brodtkin; Chantel Johnson of the California Youth Connection (the lobby of former foster youth); Jody Leibman Green of the Children's Law Center of Los Angeles (the firm that provides representation for children in juvenile dependency court); Ben Rubin and Debra Brown of Children Now; and Christian Griffith, chief consultant to the Assembly Budget Committee. Another typical example is the August 15, 2013 Roundtable, which featured presentations from Amy Harfeld, CAI's National Policy Director; Bob Shireman of California Competes; Rigel Massaro of Public Advocates; Hope Richardson of the California Budget Project; and Daniel Heimpel of Fostering Media Connections (and a past recipient of the Price Child Welfare Journalism Award that CAI administers). In addition to bringing together speakers that are leaders among child advocacy groups in the state and nation to inform and educate their colleagues, the Roundtable typically includes group discussion of what major initiatives are underway, and what needs to be done, when and by whom.

CAI staff also collaborated with other California colleagues throughout 2013. For example, Prof. Fellmeth gave the keynote address to the California Headstart Conference in February; he presented at the Osher Lifelong Learning Institute course at San Diego State University in March; and he continued to sit on the Board of the Maternal and Child Health Access Foundation in Los Angeles, which originated at CAI and now is a major education and health coverage resource for women and infants in Los Angeles. Lynn Kersey continues to direct its operations and serves as an important expert resource for statewide advocacy and in the legislative and rulemaking decisions of Sacramento.

During 2013, CAI's Christina Riehl and Elisa Weichel continued to work on CAI's Educational Representative Program, which seeks to recruit, train and oversee volunteers willing to exercise the educational decisionmaking rights and responsibilities for youth involved in Juvenile Court proceedings; they also participated in a local working group of stakeholders seeking to ensure that volunteers are available for all Juvenile Court youth who would benefit from having an ed rights holder appointed. CAI also continued to provide placement clinics in both dependency practice through the Dependency Legal Group of San Diego and delinquency practice through the Public Defender's Office — although the latter is shifting more to the preventive side as the students will seek to find rehabilitative and preventive services for accused delinquents. In addition, a new student-initiated program called ACE works to provide education assistance to children

within the county; Prof. Fellmeth serves as its faculty adviser and it is led by former and current CAI clinic students. And Melanie Delgado continues to sit on the San Diego County Juvenile Justice Commission, serving as First Vice Chair during 2013.

Finally, CAI continued its efforts to assist San Diego County's homeless youth population by providing advocacy and referrals to them through the Homeless Youth Outreach Project (HYOP). Although funding and staffing limitations forced CAI to scale back its HYOP involvement in this area during 2013, CAI Council for Children member Sharon Kalemkarian and her law firm, Ashworth, Blanchet, Christenson and Kalemkarian, led the effort to ensure the continuation of the annual holiday party that CAI has helped pull together for homeless youth for the past several years. We are grateful to Sharon, her firm, and all those who generously donated to cover the costs of the 2013 holiday party (see donor listing below).

C. Federal and State Litigation

During 2013, CAI continued to assure compliance with the order it obtained from the court, confirmed by the 9th Circuit, in *California Foster Parents' Association v. Wagner* (*Lightbourne*). CAI is monitoring state compliance with the increased rates due family foster care providers, as well as the connected compensation for KinGAP and adoption assistance payments. After some initial issues were resolved, all seems to be working as intended. And in 2013, California's final foster care provider group — foster family agencies (non-profit organizations that recruit, certify, and train foster parents for children who require more intensive care than a typical family foster home might be able to provide) — also prevailed in their suit to seek similar increases for that placement type. CAI continued to monitor the implementation of new rates to assure that the families providing care receive the increases. The idea is to see the supply increase for more choices, so siblings can be placed together, children do not have to move between schools and more are adopted.

CAI participated as *amicus curiae* in two cases during 2013. In *In Re Ryan W.*, CAI supported the efforts of attorney Dan Hatcher in his longstanding efforts to require the conservation of survivor and other benefits belonging to a foster child for his/her future use, instead of being expropriated by the state or county. And in *In Re Dependency of M.C.D.P.*, CAI joined several other child advocacy organizations to argue that providing children a constitutional right to counsel in dependency matters is consistent with national trends and best practices, and is solidly supported by state and federal constitutional law.

CAI was also involved in more litigation that was originated by others, such as the appellate defense of Judge Michael Nash's Los Angeles Juvenile Court Blanket Order (*In re A.L.*, discussed above),

and in providing assistance to the efforts of minor's counsel Bob Jacobs — who is attempting to challenge the shameful policy of providing minor's counsel in Family Law proceedings only when the parents can afford to pay (discussed above). Also in this category is *Fraleigh v. Facebook*, in which CAI represents Objector and now Appellant Michael Depot and his children before the Ninth Circuit Court of Appeals (see below for more information).

Beyond these are major cases filed directly by CAI on behalf of clients who are parties to the proceedings. Both were actively litigated during 2013, and are likely to consume substantial resources in 2014. These include *Butterfield v. Lightbourne* (*California Department of Social Services*) and *Barrow v. California Department of Public Health*, discussed below.

(1) *Butterfield v. Lightbourne*

One of the subject areas for CAI advocacy has long been the federal Child Abuse Prevention and Treatment Act's (CAPTA) mandate that states disclose the facts surrounding all child abuse and neglect deaths and near deaths. As noted above, that is the subject of one of CAI's regular national reports (see discussion of CAI's *State Secrecy* report, above). In order to help bring California in line with the CAPTA requirement, and to harness democratic pressure to prevent and detect abuse leading to those outcomes, CAI successfully sponsored SB 39 (Migden) in 2007. Although the legislation did not cover near deaths, it did outline state policies more in tune with the federal mandate where deaths occur. The Legislative intent of the statute was spelled out in its first section of the statute:

- “(a) During 2002, approximately 140 children in California were officially reported as having died as a result of abuse or neglect. The State Death Review Council has concluded that official reports of child abuse deaths represent a significant undercount of the actual number of child abuse and neglect fatalities.
- (b) A child's death from abuse or neglect often leads to calls for reform of the public child protection system. Without accurate and complete information about the circumstances leading to the child's death, public debate is stymied and the reforms, if adopted at all, may do little to prevent further tragedies.
- (c) Providing public access to juvenile case files in cases where a child fatality occurs as a result of abuse or neglect will promote public scrutiny and an informed debate of the circumstances that led to the fatality thereby promoting the development of child protection policies, procedures, practices, and strategies that will reduce or avoid future child deaths and injuries.



- (d) The current procedures for accessing information about a child's death from abuse or neglect are costly, at times resulting in lengthy delays in the release of that information, fail to provide adequate guidance for what information should and should not be disclosed, and permit significant variation from one jurisdiction to another in the nature and extent of the information released.
- (e) Thus, it is the intent of the Legislature to maximize public access to juvenile case files in cases where a child fatality occurs as a result of child abuse or neglect by both providing for an administrative release of certain documents without the filing of a legal petition pursuant to paragraph (2) of subdivision (a) of Section 827 of the Welfare and Institutions Code, while also ensuring that basic privacy protections are consistently afforded, and by enacting reforms to the current process of filing a petition
- (f) In petitions governed by paragraph (2) of subdivision (a) of Section 827 of the Welfare and Institutions Code, the Legislature has concluded that when a dependent child dies within the jurisdiction of the juvenile court,

the presumption of confidentiality for juvenile case files evaporates and the requirement of an expedited decision becomes manifest, because community reaction to the child's death may abate with the passage of time and, without a prompt investigation and assessment, the opportunity to effect positive change may be lost...."

However, responding to the institutional appeal of county welfare directors (CWDA) and social workers (both well organized with professional lobbies in Sacramento), the California Department of Social Services (DSS) adopted regulations — purportedly to implement the statutory provisions that follow the above statement of intent in the statute — that carved out numerous exceptions and limitations that were contrary to both the letter of the new law and to the Legislature's intent in enacting it. These included the limitation on disclosure to only those cases where a parent or guardian was responsible for the death, excluding everyone from boyfriends to babysitters or child care providers to schools or any other non-parent abusers. DSS then defined "causation" to include only the final death-precipitating blow or act, thus excluding the accumulation of acts of abuse that lead to



or precipitate the death, or the neglect that enhanced the danger to contribute substantially to the lethal cause. These and other aspects of the rule were objected to by CAI in the rulemaking process but were ignored by DSS.

CAI responded by filing suit in superior court in San Diego on September 14, 2011, seeking a writ of mandate under Code of Civil Procedure section 1085. The petition was based on the alleged “abuse of discretion” by DSS in adopting rules contrary to the legislative intent of the statute being enforced. The petitioner was Rob Butterfield, a respected attorney in San Diego, a graduate of USD, and one of the founders of the San Diego Child Abuse Prevention Foundation. The respondent was Will Lightbourne, as the Director of DSS. The case was buttressed by the *pro bono* arm of the leading firm of Morrison & Foerster—who fortuitously assigned one of their most brilliant young attorneys, Steve Keane, to the case to serve as lead counsel. Keane and Prof. Fellmeth jointly argued the case before the court.

A final court order was entered on January 2, 2013, making it then ripe for possible appeal. The order provided in relevant part: “Robert K. Butterfield’s petition for writ of mandate...is granted. Administrative regulation that alter or amend the statute or enlarge

or impair its scope are void and courts not only may, but it is their obligation, to strike down such regulations...Plaintiff has met his burden to show that...DSS...adopted regulations that were inconsistent and in conflict with...SB 39. Furthermore, the court finds that DSS’s adoption of the regulations requiring the identity of the perpetrator (and that it must be a parent or guardian only) was arbitrary, capricious, or without reasonable or rational basis.”

The court also ruled that a “causation” requirement in the rules (requiring a singular “result of” connection rather than the statutory language of “leads to”) was impermissibly restrictive. And the court went further, in finding that “DSS contends that because a county child welfare agency is not required to obtain records not in the file,” the court note that the regulation purports to authorize only the “referral” by DSS to other sources as to any documents not required to be in its files. The court rejected that gratuitous limitation on disclosure as well.

The court granted the writ sought as to each of the four elements CAI contended were contrary to the statute’s intent.

Following that ruling, DSS agreed to negotiate new proposed rules that complied with SB 39. For the first six months of 2013, those negotiations took place, leading to a set of rules that do comply with the law and that are expected to be formally adopted in early 2014.

In mid-2013, the court granted the petitioner his attorneys' fees based on actual hours billed, totaling \$500,000, of which approximately \$180,000 was to be received by CAI and \$320,000 by Morrison & Foerster. Except the latter, as they had done previously, turned around and gave CAI a significant portion of its share — \$176,000.

The child death disclosure work illustrates the merits of the initial vision statement of the CAI Council for Children. It elevated CAI's capacity to advocate "in all four public policy fora: the legislature, the agencies (rulemaking/enforcement), the courts, and the public (media)." CAI's work culminating in the 2013 order and the new agency rules in 2014 involved necessary presence in each of these four. If CAI had been absent in any one of them, the outcome would not likely have been the same.

(2) *Fraleigh v. Facebook*

On May 1, 2013, CAI formally filed an objection to the settlement in *Fraleigh v. Facebook* on behalf of two children, by and through their *guardian ad litem* (and father) Michael Depot. This may be the most important case for CAI in its history, as it will directly determine the privacy rights of over ten million American teens. Despite strong objections by CAI and others, the trial court regrettably approved the settlement in the middle of 2013. CAI's objectors then became an objecting party on appeal, together with several parents and children represented by Public Citizen and others. Prof. Fellmeth authored an oped about the need for affirmative review of class action settlements appearing in the *Los Angeles Daily Journal* on July 22, 2013, entitled "*Passive Review and the Proposed Facebook Settlement*." To appreciate the gravity of this case, CAI excerpts the "Statement of the Case" in the brief it filed near the end of 2013 — which summarizes the factual underpinning (extensive citations to the record removed):

"STATEMENT OF THE CASE: Relevant Facts

Facebook is a web-based social networking site with over 150 million subscribers in the United States. Members join Facebook.com for free; however, Facebook generates its revenue through the sale of advertising from a number of programs targeted at its users. One of these many and varied revenue mechanisms has been the "Sponsored Stories" practice. A Sponsored Story is one advertising strategy utilized by Facebook, which may be generated whenever a member utilizes the Post, Like, or Check-in features, or uses an application or plays a game that integrates with the Facebook website, and the content relates to an advertiser in some way determined by Facebook. When this lawsuit was filed, Sponsored Stories were enabled for all users, including teen children.

The nature of the Internet poses unique dangers to children. Children

lack maturity, which may lead to ill-considered decisions. If a child posts regretted information, it is commonly accessible for years. The information can also be retransmitted by others to even larger audiences. Children may not have the maturity to comprehend this reality and its implications. This immaturity is demonstrated in recent studies which found that children do not always know individuals prior to accepting a "friend" request. Studies show that more than two-thirds of teens confess that they have accepted such a Facebook "friend" request from persons they did not know, and nearly one in ten teens admit to accepting all "friend" requests they receive. Moreover, the retransmission allowed in this settlement is not necessarily confined to those designated as "friends," but may well be released to the default audience for postings: "the general public."

The proposed settlement class in this action consists of 150 million members of Facebook, Inc.'s eponymous social network website, whose names and/or likenesses allegedly were misappropriated to promote products and services through Facebook's "Sponsored Stories" program. Information available as of August 31, 2012 indicated that Sponsored Stories had generated total revenue of more than \$230 million. Approximately 10.9 million members of the settlement class are children.

Under the terms of the approved Settlement Agreement, Facebook would be allowed to amend its Statement of Rights and Responsibilities (its new name for "terms and conditions") from the following agreement: "You can use your privacy settings to limit how your name and [Facebook] profile picture may be associated with commercial, sponsored or related content (such as a brand you like) served or enhanced by us. You give us permission to use your name and [Facebook] profile picture in connection with that content, subject to the limits you place." As altered, it would include now the following statement:

You give us permission to use your name, profile picture, content, and information in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us. This means, for example, that you permit a business or other entity to pay us to display your name and/or profile picture with your content or information. If you have selected a specific audience for your content or information, we will respect your choice when we use it.

If you are under the age of eighteen (18), or under any other applicable age of majority, you represent that at least one of your parents or legal guardians has also agreed to the terms of this section (and the use of your name, profile picture, content, and information) on your behalf.

Although the second paragraph is limited to users under the age of majority, the first paragraph applies to all Facebook users. Thus, in addition to "representing" that children agree to whatever Facebook wants to do with the child's name, image, content, and information, the child represents that he has the consent of his/her parent. Both emanate from the above paragraph within a long "Rights and Responsibilities" (formerly



and usually called a “terms and conditions” set of provisions) for clicked check-off. This purported consent vehicle is normally only presented at initial point of subscription.

As to the consent of the 10 million plus current teen subscribers, it will be effective simply by a notice by Facebook that the “Rights and Responsibilities” terms have been altered – without quoting the above graphs in bold or meaningfully explaining what changes have occurred. Continued use after that “notice” will effectuate the blanket consent from children to capture and transmit their posts or photos as Facebook selects without prior notice of what is to be transmitted or to whom, including supposedly conclusive attestation that parents have consented.

The terms of the proposed Settlement Agreement state that Facebook will “encourage new users, upon or soon after joining Facebook, to include in their profile information their family, including their parents and children. Where both a parent and a minor child are users and confirm their relationship, Facebook’s systems will record this relationship and utilize it to provide parental controls and parental educational information.

The Agreement continues: “Facebook will add a control in minor users’ profiles that enables each minor user to indicate that his or her parents are not Facebook users. Where a minor user indicates that his or her parents are not on Facebook, Facebook will make the minor ineligible to appear

in Sponsored Stories until he or she reaches the age of 18.” Of course, Facebook well knows that a trivial percentage of minors will take it upon themselves to so notify the corporation that their parents are or are not subscribers. And if they do not respond, the blanket waiver takes full effect.

Where one of the few minors so responding confirms that parents are Facebook subscribers, the parent is then “able” to opt his child from Sponsored Stories. There is nothing in the Settlement Agreement to require parental notice nor consent to the blanket waiver of all future notice/consent rights. There is utterly no advance notice of actual content seized nor knowledge of its destination. In other words, these “limitations” or “exceptions” are disingenuous fig leaves. There is no real or lawful child or parental consent. The notion that where Facebook knows or learns there is a parent subscriber, that such a parent may somehow figure out that he or she can object to the blanket waiver is not a bona fide anything. Once again, neither the child nor any parent will necessarily nor

even likely see what is being captured and how it will appear and to whom it will be sent. And neither will ever see it before it is sent. And once sent, it is there for many years, without a chance for retraction or qualification. The arrangement is a convoluted and bad faith “required opt out” “in the blind” arrangement. And the vast majority of millions of Facebook-subscribing children, as Facebook well knows, will be subject to the open season of blanket waiver, and parents will, in fact, know nothing about any of this.”

Beyond the above summary of the basic facts, the case is deeply troubling on other levels. It involves a plaintiff class action firm signing off on behalf of both adults and the subclass of teens. The involved attorneys for the teen subclass have little experience representing children (apart from some who may be personal injury victims) and less in representing privacy interests. There is a conflict between the subclass and the class that normally requires separate representation under caselaw. It did not happen here, even though CAI publicly notified the court it would so serve. In contrast to the subclass of teens represented by the firm of Robert Arns, CAI is clearly experienced at representing the interests of children and

youth, and its parent organization, CPIL, is the progenitor of the Privacy Rights Clearinghouse.

Second, the plaintiff firm sought \$10 million and then \$7.4 million in fees for less than one year of “contested” litigation. The court later found that excessive, but after settlement approval still awarded it an astonishing \$4.5 million.

Third, and perhaps uniquely among class action settlements, Facebook cited an obscure and unusual feature of Civil Code section 3344 that the class counsel had included in the pleadings. That statute provides for a “reverse” fee shift — where the plaintiffs would have to pay Facebook their full costs and fees if Facebook prevailed on related claims to that section. Then Facebook openly and repeatedly reminded class representatives — and perhaps class counsel as well — of this feature, one that could bankrupt them if Facebook prevailed and then sought millions in defense attorney fees. So this was a positive and negative (forced) collusion case *in extremis*. Nevertheless the federal district court claimed he did not have the authority to interfere with a settlement arrived at between “contending parties.”

The case only gets worse. The plaintiff class counsel did not even argue much of the applicable law that made the settlement illegal, including no mention whatever of California’s Article I, Section 1 inclusion of the Right to Privacy provision — which centers on “informational privacy,” the very issue here in dispute. Nor were all of the California statutes cited, which is ironic given the fact that Facebook documents concede that “California law applies to its operations.” In fact, plaintiff class counsel, in oral argument, actually argued affirmatively Facebook’s case, denigrating the status of teens as identical to the privacy rights of adults, with consent given from merely continued use. Facebook did not need to argue anything.

Perhaps the most chilling aspect of the case — one which regrettably and strangely impressed the district court judge — is the underlying legal argument that no state statutes applied to Facebook with regard to teenage Facebook users. That argument rested on the absurd proposition that the federal Children’s Online Privacy Protection Act (COPPA) preempts and voids all state statutes providing privacy rights to teens. However, COPPA explicitly applies only to children ages 0–12 and is in no way applicable to any child past the age of 12. Facebook’s minor subscribers — and the entire child class — are all between the ages of 13–18. CAI is working to get the Federal Trade Commission (which administers that federal law) and the California Attorney General to file *amicus curiae* briefs with the 9th Circuit dispelling any idea that COPPA preempts state laws applicable to teens — and we believe both will do so.

Interestingly, the lead plaintiff class representative for the teens withdrew from the case when the settlement terms became clear, publicly disavowing its terms and advocating its repudiation in a declaration filed with the court. In fact, at least two of the twelve entities that were scheduled for generous *cy pres* awards may refuse them. A *cy pres* (literally, second best) award is commonly a sum distributed to one or more charities as a way to provide symbolic or indirect restitution to a class. Often, these recipients are chosen to “dress up” a suspect settlement. But at the start of 2014, it became clear that a number of small, independent beneficiaries had publicly disavowed their scheduled award of from \$500,000 to \$1 million each. One, the Campaign for a Commercial Free Childhood, for whom the scheduled money would be more than two years of its historical revenue, has already rejected its share, and has filed a letter brief with the 9th Circuit affirmatively objecting to the settlement.

Finally, CAI has learned that an impressive array of public interest groups, from the Campaign for Digital Democracy to the American Academy of Pediatrics, are filing one or more *amicus curiae* briefs supporting CAI’s contentions. The case will be argued by Prof. Fellmeth, and is expected to be decided by the 9th Circuit sometime in late 2014.

(3) Steve Barrow v. California Department of Public Health

In November 2013, CAI filed a case in San Diego Superior Court alleging various violations of law pertaining to “Kids’ Plates” — customized vehicle license plates that include a star, heart, plus sign or star. These personalized plates cost extra money but are very popular in California. The new plates arose from a 1992 statute drafted and sponsored by CAI. That drafted statute has been abused by its state overseers. A Bureau of State Audits report dated November 27, 2012, indicates substantial improper subtractions from the Fund for purposes not benefitting its intended child beneficiaries. CAI has been joined by the pro bono arm of the large national firm of Morrison & Foerster, which also assisted CAI in the *Wagner and Butterfield* cases noted above. Together with Morrison & Foerster, CAI filed an initial petition for writ of mandate under Code of Civil Procedure section 1085, and for declaratory relief — to compel compliance with the audit report and revision of policies that do not lead to its expenditure as intended by the Legislature in enacting it. The petitioner in the case is Steve Barrow, who was the CAI lobbyist in Sacramento who wrote and guided the legislation into enactment in the early 1990s. Steve now works with pediatricians and others concerned about child health and safety.

III. CAI's Structure

A. The Council for Children

CAI is guided by the Council for Children, an advisory body that meets twice a year to review policy decisions and recommend action priorities. Its members are professionals and community leaders who share a vision to improve the quality of life for children in California.

The Council authorized invitations to six new members starting in 2012. One of them has accepted a job in the U.S. Department of Health and Human Services that precludes his acceptance at this time. However, all of the remaining five who were invited have agreed to join, and all attended their first meeting in 2013. They include respected veteran child advocate Anne Fragasso, family law expert Sharon Kalemkiarian, child welfare expert David Meyers, and two highly admired former state legislators, Christine Kehoe and Denise Ducheny.

CAI is also honored to have former Council members who served for many years remain a part of the Council as *emeritus* members, including former president of the American Academy of Pediatrics, Dr. Birt Harvey; leading San Diego attorney Paul Peterson; noted Los Angeles psychotherapist and licensed clinical social worker Dr. Louise Horvitz; former President of Children's Hospital Blair Sadler; and respected Los Angeles businessman Owen Smith.

Accordingly, the CAI Council for Children includes the following:

Council Chair:

Gary F. Redenbacher, J.D.

Attorney at law

Council Vice-Chair:

Gary Richwald, M.D., M.P.H.

Consultant Medical Director, California Cryobank

Council Members:

Robert Black, M.D.

pediatrician

Denise Moreno Ducheny

Attorney, Former State Senator

Anne E. Fragasso, Esq.

California Appellate Project, Staff Attorney

John M. Goldenring, M.D., M.P.H., J.D.

Medical Director, Riverside Physician's Network

Sharon Kalemkiarian, CLS-F

Partner, Ashworth, Blanchet, Christenson and Kalemkiarian

Hon. Leon S. Kaplan (Ret.)

Retired Judge, Los Angeles Superior Court

Christine Kehoe

Former California State Senator

James B. McKenna

President, Am Cal Realty, Inc.

David M. Meyers

Chief Operating Officer, Dependency Legal Services

Thomas A. Papageorge, J.D.

Special Prosecutor, Economic Crimes Division, San Diego District Attorney's Office

Gloria Perez Samson

Retired school administrator

Alan E. Shumacher, M.D., F.A.A.P.

*Retired neonatologist; Past President of the Medical Board of California;
President, Federation of State Medical Boards of the United States*

Emeritus Members:

Birt Harvey, M.D.

Professor of Pediatrics Emeritus, Stanford University

Louise Horvitz, M.S.W., Psy.D.

Licensed clinical social worker, individual and family psychotherapist

Paul A. Peterson, J.D.

of Counsel to Peterson and Price, Lawyers

Blair L. Sadler, J.D.

Past President and Chief Executive Officer, Children's Hospital and Health Center

Owen Smith

Past President, Anzalone & Associates

B. Youth Advisory Board

CAI has continued to convene its Youth Advisory Board, which consists of young adults who have personal experience with the foster care system, the juvenile justice system, homelessness, exploitation, and/or other issues of concern to CAI. In addition to advising CAI on advocacy efforts, members of the Youth Advisory Board engage directly in their own advocacy by contributing to CAI's evidence through their personal stories, testifying before boards, commissions, legislative committees and other policymaking entities, participating in key meetings and events. They also contribute to CAI's blog, which had 13 major entries in 2013 (see <http://caichildlaw.wordpress.com/>). CAI hopes to create two foster youth entities in 2014, the Advisory Board, and a group of youth who will agree to testify on legislation CAI sponsors, after consultation with each of them. The 2013 members include:

Helena Kelly

Mercediz Hand

LaQuita Clayton

Melissa Lechner

C. Staff

CAI is extremely fortunate to have the following passionate and dedicated team of employees, all of whom contributed greatly to the work CAI did — and the achievements CAI made on behalf of children and youth across the state and nation — during 2013:

Robert C. Fellmeth

Executive Director

Elisa Weichel

Administrative Director/ Staff Attorney

Mercedes Alcoser

Executive Assistant

Melanie Delgado

Staff Attorney

Amy Harfeld

National Policy Director / Senior Staff Attorney

Ed Howard

Senior Counsel

Christina Riehl

Senior Staff Attorney

IV. Note of Thanks

As always, we are grateful for the help of our friends and supporters, especially our CAI Council for Children, our donors, and our grantors. We are humbled that so many faculty members and administrators of the USD School of Law contribute to our work from their personal pockets. We know that every gift to us, starting with the extraordinary generosity of the late Sol and Helen Price over the years, and longstanding friends such as Paul Peterson, Louise Horvitz, Janet Madden and Robert Price, imposes on us a fiduciary obligation to perform consistent with their expectations.

We are also thankful for the generous grants and gifts contributed by the following individuals and organizations between January 1, 2013, and December 31, 2013, and/or in response to CAI's 2013 holiday solicitation. These funds support CAI's advocacy, outreach, and public education efforts at the local, state and federal levels; without them — without you — CAI would not be able to do what we do.

Dennis and Ginger Ackerman

Prof. Larry Alexander

Anonymous Donors

Anonymous — *in honor of Bob Fellmeth, my professor*

Anzalone & Associates

Maureen Arrigo

Ashworth, Blanchet, Christenson and Kalemkiarian — *for the HYOP holiday party*

Prof. Carl A. Auerbach

Solveig K. Bassham

William M. Benjamin

Alan and Deborah Berger

Prof. Roy L. Brooks — *in memory of Penny Brooks*

Alan & Susan Brubaker — *in memory of James D'Angelo*

Dana Bunnett

Michael J. Butler

The California Wellness Foundation

Paul Cannariato

Carlos R. Carriedo

Shannon Castellani — *in honor of Pat and Matt*

Gordon and Dr. Judy Churchill

Prof. Laurence Clause

Joan Buckler Claybrook

Jim Conran / Consumers First

Michelle Costa

Nancy D'Angelo — *in memory of James A. and Peter T. D'Angelo*

Ann D'Angelo — *in memory of James A. and Peter T. D'Angelo*

Steven B. Davis

Liam Duffy

David Durkin

Joy Eden

Gary Edwards

Rich Edwards & Ellen Hunter

Gene Erbin & Donna L. Freeman

Suzanne F. Evans

Brian and Nancy Fellmeth

Dean Stephen C. Ferruolo

Fidelity Charitable Gift Fund

David Forstadt

Anne E. Fragasso, Esq.

The Hon. Ronald F. Frazier

Donna Freeman & Gene Erbin

Judge Charles D. Gill

Steven Gillis

Beth Givens

Joel and Denise Golden — *for the Joel and Denise Golden Merit Award in Child Advocacy*

John M. Goldenring, MD, MPH, JD

David Goldin

The Hon Jan I. and the Hon. Christine K. Goldsmith

GoodSearch

James and Patricia Goodwin — *in honor of the Jim D'Angelo Family*

Susan M. Gorelick

Amy Harfeld

Dr. Birt Harvey

Prof. Walter Heiser

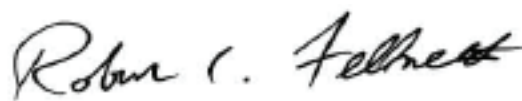
Lionel P. Hernholm, Jr. — *for the HYOP holiday party*

Joanne Higgins and John W. Leslie — *in memory of Jimmy D'Angelo*

Adrienne Hirt & Jeffrey Rodman
 Louise & Herbert Horvitz Charitable Fund
 Peter J. Hughes
 Ted Hurwitz
 Jewish Community Foundation
 Beverly A. Kalasky
 Sharon Kalemkiarian — *for the HYOP holiday party*
 Hon. Leon Kaplan
 Carianne Kapteina — *for the HYOP holiday party*
 Josephine Kiernan
 Kathryn E. Krug — *in memory of James D'Angelo*
Alexandra Kwoka
 Lynnae Lee
 Ruth Levor — *in honor of Luda Berengolts*
 Kevin and Maura Logan
 Prof. Janet Madden
 John C. Malugen
 Michael R. Marrinan and the Hon. Susan P. Finlay
 John P. Massucco
 James B. McKenna
 Edwin Miller
 Laura Miller — *for the HYOP holiday party*
 Prof. John H. Minan
 Morrison & Foerster
 Marley Mueller
 John B. Myer
 James and Frances Peterson
 Paul and Barbara Peterson
 Peterson Charitable Foundation
 Theresa Player
 Gary Redenbacher & Renae Fish
 Susan Reilly — *for the HYOP holiday party*
 Donald Rez
 Gary A. Richwald and Sue Bayley
 Harvey Rosenfield
 Ron Russo
 Blair Sadler
 Gloria Perez Samson
 Kathy Self

Duane Shinnick
 Shinnick & Ryan
 Alan and Harriet Shumacher
 Alan Sieroty, in honor of Beth Meltzer
 Len Simon and Candace Carroll
 The Simon-Strauss Foundation
 Owen Smith
 Prof. Thomas Smith
 Prof. Allen C. Snyder and Lynne R. Lasry
 Melissa E. Soriya-Pearson
 Abigail & Tyson Stephenson
 Howard E. Susman
 Nancy A. Taylor — *for the HYOP holiday party*
 Prof. Edmund Ursin
 John K. Van de Kamp
 Prof. Jorge Vargas
 Nancy L. Vaughan
 Howard Wayne
 Alan Williams
 Carrie Wilson
 Marianne M. Winkler
 Monica J. Yoon
 David & Jennifer Zachry — *for the HYOP holiday party*

A final note about Sol and Helen Price, that we have repeated each year, and which we shall continue to repeat. Their gift of the Price Chair Endowment ensures consistent funding for the academic program of the Center for Public Interest Law and the Children's Advocacy Institute. Their passing will never diminish our duty to represent their ideals for child representation — we strive to be an important part of their legacy. All of us at CAI feel their presence, and what they would want us to do is our guiding lodestar.



Robert C. Fellmeth
Price Professor of Public Interest Law
Executive Director, Children's Advocacy Institute

Help us help kids!

We greatly appreciate your continued support of CAI's work. Here are a few different ideas for how you can help us help kids:

- ❖ Make a tax-deductible donation to CAI using the attached envelope or online at law.sandiego.edu/caigift.
- ❖ Review the list of CAI's legislative priorities currently pending at the state and federal levels (see www.caichildlaw.org) and express support to your elected officials.
- ❖ Make the Children's Advocacy Institute your charity of choice when using www.goodsearch.com to conduct Internet searches or www.goodshop.com when shopping online. GoodSearch is a Yahoo-powered search engine that donates about a penny per search to CAI each time you use it to search the Internet. GoodShop is an online shopping mall which donates up to 30% of each purchase to CAI. Hundreds of vendors — stores, hotels, airlines, and other goods and service providers — are part of GoodShop, and every time you place an order, part of your purchase price will go directly to CAI!
- ❖ Follow us on Twitter: @CAIChildLaw and Like us on Facebook: www.facebook.com/ChildrensAdvocacyInstitute
- ❖ Volunteer to serve as an Educational Representative for a youth under the jurisdiction of San Diego County's Delinquency Court.
- ❖ For attorneys involved in class actions resulting in a cy pres distribution fund, identify CAI as a potential recipient of those funds.
- ❖ Join Lawyers for Kids, which gives attorneys, law students, and others in the legal community the opportunity to use their talents and resources as advocates to promote the health, safety, and well-being of children; assist CAI's policy advocacy program; and work with CAI staff on impact litigation or by offering expertise in drafting amicus curiae briefs.
- ❖ Subscribe to receive E-NewsNotes, periodic emails from CAI about important legislative or regulatory proposals, significant litigation, new reports and publications, and other important events that impact the health and well-being of California's children.
- ❖ Participate in the monthly meetings of the Children's Advocates' Roundtable and/or follow the Roundtable activities on Facebook.
- ❖ Purchase a Kids' Plate, a special license plate featuring one of four special symbols: a star ★, a hand 🖐️, a plus sign +, or a heart ♥️. Proceeds support local and statewide programs to prevent child injury and abuse, as well as childcare health and safety programs.

For information on all of these opportunities, please visit CAI's website at www.caichildlaw.org, call us at (619) 260-4806, or email us at info@caichildlaw.org.



