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Hon. Jason Nelson
Oklahoma State Representative
4117 NW 58th Street
Oklahoma City, OK 73112

May 21, 2012

Re: CAPTA's Public Disclosure Mandate Regarding
Child Abuse or Neglect Fatalities and Near Fatalities

Dear Rep. Nelson,

The three undersigned child advocacy organizations, the Children's Advocacy Institute, First Star, and the National Center for Youth Law (hereinafter CAI/FS/NCYL), are in receipt of a May 9, 2012 letter from Janis Brown, Region VI Program Manager for the Administration for Children & Families (ACF) Children's Bureau, to Preston Doerflinger, Interim Commissioner of the Oklahoma Department of Human Services. The letter expresses various concerns Region VI has with regard to Oklahoma's implementation of the public disclosure mandate in the federal Child Abuse Prevention and Treatment Act (CAPTA). CAI/FS/NCYL strongly disagree with ACF's interpretation of the public disclosure mandate, and we appreciate the opportunity to respond to two issues raised by ACF in its letter.

1) Release of Information or Findings about Prior Investigations or Previous Reports

The CAPTA provision at issue requires states accepting CAPTA funds to have "provisions that allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality" (see 42 U.S.C.S. § 5106a(b)(2)(B)(x)). In its May 9, 2012 letter, ACF has adopted an unduly restrictive interpretation of this provision — one that can be reached only by replacing the word "case" with "incident." In so doing, ACF has taken the stance that states are not authorized to release findings or information about prior abuse or neglect reports or investigations concerning this same child that are part of the child's *case*, and that states may only release findings or information about the final fatal or near fatal *incident*.

When a child becomes involved with child welfare system, the term case typically refers to the body of information that is compiled about that child — it is a term of art used throughout the child welfare system (case file, case plan, caseload, caseworker, etc.). When Congress uses a term of art (such as case), unless Congress affirmatively indicates otherwise, we are to presume Congress intended to incorporate the common definition of that term. This is especially evident in CAPTA, when Congress *did* in fact use the word "incident" when it meant to refer to individual occurrences.¹

¹ See, e.g., 42 U.S.C.S. § 5105(a)(1)(O)(i) (referring to "the extent to which **incidents** of child abuse or neglect are increasing or decreasing in number and severity") and § 5106a (a)(10) ("the nature and basis for reporting suspected **incidents** of child abuse or neglect") (emphasis added).

In addition to the fact that it does not reflect the plain language of the CAPTA statute, ACF's tortured interpretation of the public disclosure mandate ignores the Congressional intent underlying the public disclosure mandate. Specifically, a December 20, 1995 Conference Committee Report discussing the public disclosure mandate states as follows:

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

As Congress knows, there are lessons we can and must learn after a child abuse or neglect fatality or near fatality. The most telling information often does not concern the circumstances surrounding the final tragic event, but from prior opportunities the child welfare system had to prevent that event in the first place — opportunities to save that child from further harm. Findings and information about those missed opportunities, all of which are part of the child's case, are ***exactly*** what Congress intended to be subject to public disclosure.

In 2010, as part of the CAPTA reauthorization, the Senate Committee on Health, Education, Labor and Pensions again addressed the matter of the CAPTA public disclosure mandate:

"The committee believes that the duty of child protective services, required in CAPTA Sec. 106(b)(2)(x), to provide for the mandatory public disclosure of information about a case of child abuse or neglect which has resulted in a child fatality or near fatality ensures improved accountability of protective services and can drive appropriate and effective systemic reform. However, the committee is aware that not all States are in compliance with these CAPTA requirements. The committee calls upon the Secretary of Health and Human Services ***to develop clear guidelines in the form of regulations instructing the States of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities, and to provide technical assistance to States in developing the appropriate procedures for full disclosure of information and findings in these cases.***"³

Regrettably, ACF has refused to adopt clarifying regulations — and now we see that instead of providing technical assistance to States in developing the appropriate procedures for "full disclosure of information and findings in these cases," the May 9 letter constitutes an attempt to move states in the opposite direction.

What minimal guidance ACF has offered to states regarding the public disclosure mandate has primarily been issued in Q&A format in the Child Welfare Policy Manual (CWPM). The CWPM includes a section on general confidentiality requirements with regard to CAPTA (section 2.1A.1), as well as a more specific section discussing the public disclosure mandate in particular (section 2.1A.4).

Curiously, ACF's May 9, 2012 letter to Oklahoma does not cite to the portion of the CWPM that is specific to CAPTA's public disclosure policy, and instead cites only to provisions contained within the CWPM's general CAPTA confidentiality section (Section 2.1A.1). For example:

² U.S. House of Representatives, *Conference Report 104-430* (Dec. 20, 1995), available at <http://www.thomas.gov/cgi-bin/cpquery/T?&report=hr430&dbname=104&> (emphasis added).

³ U.S. Senate, *Sen. Rep. 111-378* (Dec. 18, 2010), available at <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt378/pdf/CRPT-111srpt378.pdf> (emphasis added).

8. Question: Is it permissible under the Child Abuse Prevention and Treatment Act (CAPTA) for the State to disclose to the public information in the child abuse and neglect record that does not pertain to the case of child abuse and neglect that results in a child fatality or near fatality?

Answer: No. Except as discussed below, States must preserve the confidentiality of all child abuse and neglect reports and records in order to protect the rights of the child and family. Consistent with section 106(b)(2)(B)(viii) of CAPTA, reports and records made and maintained pursuant to the purposes of CAPTA shall be made available only to the entities and under the circumstances described in section 106(b)(2)(B)(viii)(I-VI) of CAPTA....

ACF appears to find support in this general confidentiality provision for its claim that with regard to child abuse or neglect fatalities or near fatalities, information or findings about prior reports or investigations are not to be disclosed — but that is not what this Q&A says. It merely says that if the information does not pertain to the **case** (not incident) of abuse and neglect that has resulted in a fatality or near fatality, it is not to be disclosed. How are findings and information about one, or five, or ten prior reports of abuse or neglect (and the agency's responses thereto) not available facts that pertain directly to the case of abuse or neglect that resulted in a child's fatality or near fatality?

As noted above, the CWPM does include provisions specifically pertaining to the public disclosure policy. One of the Q&A in that section illustrates how ACF has replaced the statutory word "case" with the unduly restrictive word "incident":

5. Question: Section 106(b)(2)(B)(x) of the Child Abuse Prevention and Treatment Act (CAPTA) requires a State to have provisions that allow for public disclosure of the findings or information about the case of child abuse or neglect that results in a child's fatality or near fatality. Is the State required to turn over all of the information in the entire case record, when requested?

*Answer: No. The State is not required to release all of the information in the entire case record. Rather, the State must provide for the disclosure of the "available facts" in such situations. As such, the State may determine its procedures in accordance with these parameters, and can release the full investigation; a summary of the investigation; or a statement of findings or available facts **about the incident** among other options....*

CAI/FS/NCYL are extremely concerned with ACF's new and unanticipated stance with regard to CAPTA's public disclosure mandate. We know that ACF understands the importance of knowing when an abuse or neglect fatality involved a child who had previous CPS contact, as is documented in ACF's annual *Child Maltreatment* reports.⁴ We also know that ACF is aware that states other than Oklahoma have laws that allow for public disclosure of findings or information regarding past reports, prior investigations, previous agency action, etc., as is evidenced in its own publication, *Disclosure of Confidential Child Abuse and Neglect Records: Summary of State Laws* (current through June 2010). What we do not know is why ACF is adopting this restrictive interpretation of CAPTA's public disclosure mandate in Region VI instead of ensuring that states engage in full disclosure of information and findings in these cases so that advocates and officials can identify and correct systemic flaws and prevent future tragedies.

⁴ Although the *Child Maltreatment* report states that children whose families had received family preservation services in the five years prior to the child's death accounted for 12.1% of child abuse or neglect fatalities, CAI believes that figure to be vastly understated. CAI's examination of child deaths from abuse or neglect in California found that for a majority of the children who died, not only did their families have prior CPS reports, but they had prior reports substantially related to the very subsequent causes of their respective deaths. See Riehl, Christina, *Child Fatalities and Near Fatalities – Do We Need the Details* (available at <http://caichildlaw.blogspot.com/2012/04/child-fatalities-and-near-fatalities-do.html>).

2) Titles IV-B and IV-E Confidentiality Concerns

The ACF letter also claims that to the extent that Oklahoma law results in the release of information about recipients of Title IV-E or IV-B, the State may be in violation of specified provisions of federal law and regulations. However, ACF's Child Welfare Policy Manual acknowledges that "[t]here may be instances where CPS information is subject both to disclosure requirements under CAPTA and to the confidentiality requirements under title IV-E and 45 CFR 205.50. To the extent that the CAPTA provisions require disclosure..., the CAPTA disclosure provision would prevail in the event of a conflict since the CAPTA confidentiality provisions were most recently enacted."⁵

As ACF's CWPM correctly notes, "[t]he State does not have discretion in whether to allow the public access to the child fatality or near fatality information"⁶ – CAPTA requires states to make this disclosure. Thus, the CAPTA disclosure provision prevails over CAPTA's confidentiality requirements with regard to the mandated disclosure of findings or information about the case of child abuse or neglect that results in a fatality or near fatality.

We appreciate the opportunity to express our strong disagreement with the matters raised in the ACF's Region VI letter of May 9, 2012. We look forward to working with you to resolve these matters in a way that furthers CAPTA's intent to give the public access to information it needs to ensure that child welfare systems are taking all appropriate steps to protect the health and well-being of children.

Sincerely,



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⁵ ACF, *Child Welfare Policy Manual*, Section 2.1A.1, #6, available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=67#319.

⁶ ACF, *Child Welfare Policy Manual*, Section 2.1A.1, #4, available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=67#319.