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University of San Diego School of Law
5998 Alcalá Park / San Diego, CA 92110
(619) 260-4806 / (619) 260-4753 (Fax)

1107 Ninth Street, Suite 880
Sacramento, CA 95814 / (916) 844-5646

1023 15th Street NW, Suite 401
Washington, DC 20005 / (917) 371-5191

Reply to: San Diego Sacramento Washington
info@caichildlaw.org / www.caichildlaw.org

Executive Director Robert C. Fellmeth
Price Professor of Public Interest Law, USD School of Law

JooYeun Chang
Associate Commissioner, Children's Bureau
Administration for Children and Families
U.S. Department of Health and Human Services
370 L'Enfant Promenade, S.W.
Washington, D.C. 20447

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Re: Follow-Up to April 17, 2015 Discussion

Dear Commissioner Chang,

I appreciate the opportunity to respond to two points that arose during our meeting on April 17, 2015 — (1) concerns of the Children's Advocacy Institute (CAI) regarding ACF's repeal of its CAPTA regulations, and (2) identification of a model policy that appropriately implements CAPTA's public disclosure mandate regarding child abuse and neglect fatalities and near fatalities.

(1) ACF's Repeal of CAPTA Regulations / Refusal to Engage in CAPTA Rulemaking. Although CAI initially had concerns about ACF's decision to repeal its CAPTA regulations, we will agree with the Secretary that the CAPTA regulations issued in 1983 and updated in 1990 had become obsolete or outdated in the 25 years since ACF last engaged in CAPTA rulemaking. However, we are concerned that ACF's sole response to the revelation that the CAPTA regulations had become obsolete is to repeal them — without commencing the process to engage in affirmative rulemaking to adopt updated regulations to implement current law. Explanations provided by ACF for not engaging in CAPTA rulemaking — that the rulemaking process takes so long to complete that the resulting regulations might soon be obsolete, or that the Agency would need to get feedback and input from a diverse array of stakeholders prior to issuing regulations — strike us as disingenuous. Why would the length of the rulemaking process or the number of stakeholders involved be any different for CAPTA rulemaking vis-à-vis any other rulemaking effort that federal agencies commence daily to implement federal statutes?

Numerous national studies and reports have indicated that states are failing to implement many aspects of CAPTA in a manner consistent with congressional intent. For example, CAI has now published two national studies revealing that many states have thwarted congressional intent by adopting policies that obstruct, hinder, and restrict the public's ability to access findings and information about child abuse and neglect to an extent that basically renders the CAPTA public disclosure mandate meaningless.¹ These reports also reveal that many states are struggling to

¹ See Children's Advocacy Institute, *State Secrecy and Child Deaths in the U.S.*, 2nd Edition (San Diego, CA; 2012) (available at <http://www.caichildlaw.org/Misc/StateSecrecy2ndEd.pdf>) and Children's Advocacy Institute, *State Secrecy and Child Deaths in the U.S.* (San Diego, CA; 2008) (available at www.caichildlaw.org/Misc/State_Secrecy_Final_Report_Apr24.pdf).

understand what they are required to do to appropriately implement this provision, and ACF has refused to provide clear, binding directives in the form of federal regulations.

ACF's own data collection activity has revealed another area where states are probably not implementing a CAPTA mandate consistent with congressional intent. CAPTA mandates that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem be appointed to represent the child in such proceedings. However, in the past several issues of its annual *Child Maltreatment* report, ACF has acknowledged that less than 20% of child maltreatment victims received court-appointed representatives of any kind. The most recent issue of *Child Maltreatment* states as follows:

Thirty-five States reported that 17.1 percent of victims received court-appointed representatives. These numbers are likely to be an undercount given the statutory requirement in CAPTA, 'in every case involving an abused or neglected child which results in a judicial proceeding, a Guardian ad Litem...who may be an attorney or a court-appointed special advocate...shall be appointed to represent the child in such proceedings...'.

Given the importance of these and other CAPTA mandates, we would again implore ACF to engage in (1) rulemaking to clearly delineate states' responsibilities under federal law, and (2) active monitoring and enforcement to detect and penalize states that are not in compliance with federal law. To date, ACF has done neither.

(2) Model Public Disclosure Policy. During our meeting on April 17, I was asked if CAI could identify any states with public disclosure policies that we believe represent best practices in this area, which could be held up as models for other states, or alternatively if we have a model public disclosure policy we could provide to ACF. Since our last edition of our report card on this subject, *State Secrecy and Child Deaths in the U.S.*, was released in April 2012, we are currently in the process of reviewing each state's public disclosure policies to see what changes, if any, have been made during the past three years.

More significantly, we also need to reevaluate each state's public disclosure policy in light of the changes ACF made to its Child Welfare Policy Manual (CWPM) in September 2012 regarding CAPTA's public disclosure mandate. When CAI researched and evaluated each state's public disclosure policy for the first two editions of its *State Secrecy and Child Deaths in the U.S.* reports, we did so in light of the policy guidance then provided by the CWPM. Then and now, the CWPM states that the intent of CAPTA's public disclosure provision is "to assure the public is informed about cases of child abuse or neglect which result in the death or near death of a child" and that a state "does not have discretion in whether to allow the public access to the child fatality or near fatality information." And prior to the 2012 changes, the CWPM provided that a state's obligation under the public disclosure mandate does not change even if "full disclosure may be contrary to the best interests of the child, the child's siblings, or other children in the household." We believe that all of these statements accurately reflect congressional intent regarding the public disclosure provision — and for purposes of our first two reports, we read and evaluated each state's policy in light of these overarching policy interpretations from ACF.

However, changes made by ACF to the CWPM in 2012 reflected a severe shift in policy, and now allow states to provide less transparency, more limited information and, in some cases, no public disclosure at all. Even more troubling, we believe that a state can refuse to engage in public disclosure under the new CWPM provisions, regardless of what is stated in its public disclosure

policy, unless its policy is drafted in a manner that clearly and unambiguously declines to follow ACF's new policy positions. The ACF policy changes we are referring to include the following:

- The CWPM now provides that states must release information including, but not limited to, “the cause of and circumstances regarding the fatality or near fatality; the age and gender of the child; information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality; the result of any such investigations; and the services provided by and actions of the State on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality.”

While at first blush we welcomed this new specificity, we quickly feared that the CWPM's failure to define what information is to be deemed “pertinent to” the abuse or neglect that led to the fatality or near fatality would lead to under-disclosure or non-disclosure by states that choose to adopt a very limited interpretation of what the term includes. We believe that *any* prior reports, referrals, investigations, results, actions taken, etc. involving a child and his/her family are capable of being “pertinent to” abuse or neglect that eventually results in the child's fatality or near fatality. In fact, we believe that one of the very purposes of the public disclosure mandate is to allow the public access to information that will enable it ascertain if a child welfare agency perhaps misread the significance of prior events or took inappropriate actions in response to various triggering factors (*e.g.*, deemed an incident or report not pertinent to another). If an agency misreads the significance or took inappropriate actions before a child's fatality or near fatality, why are we allowing them to be the ones to determine what information to release after the fatality or near fatality? The fact that ACF allows states to sort through past events in order to pick and choose what information to disclose based on unspecified parameters is unacceptable.

- ACF repealed language from CWPM Section 2.1A.4, Question 4, that previously provided that a state's obligation under the public disclosure mandate does not change even if “full disclosure may be contrary to the best interests of the child, the child's siblings, or other children in the household.” We contend that this interpretation of the CAPTA public disclosure mandate fairly reflected Congressional intent that in just these limited, but most tragic cases involving a child's death or near death, preventing further tragedies through the flow of information trumps the privacy interests involved. We know from our exhaustive study of state disclosure that if given any level of discretion in this matter, states will regularly use it to withhold information that the public needs in order to determine if and what systemic reform is necessary.
- And perhaps most troubling, ACF added new language to 2.1A.4 #8 of the CWPM that is diametrically contrary to its prior policy interpretation, by now broadly stating that “States may allow exceptions to the release of information in order to ensure the safety and well-being of the child, parents and family or when releasing the information would...or harm the child or the child's family.” Again, in enacting the CAPTA public disclosure provision, Congress already determined that, in the limited context of child abuse and neglect fatalities and near fatalities, the benefits of public disclosure outweigh any potential impact that disclosure might have on the children and others. ACF lacks authority to nullify this statutory mandate by allowing states to revisit this issue and make their own unilateral decision (especially when, a cynical observer might note, nondisclosure might protect the state from more embarrassment and angst than those it would purport to be protecting).

CAI appreciates the fact that ACF is currently soliciting public comments on its policy interpretation of CAPTA's public disclosure mandate as articulated in question 2.1A.4 #8 of the CWPM, and we will be providing more detailed information regarding our concerns about the impetus behind and the consequences of those changes when we submit our comments to ACF next month. As we discussed in our meeting, however, the CWPM is not a binding set of rules, and even the best guidance to states there does not require states to comply or provide any enforcement action on the part of advocates or harmed parties when states fall short. Given that Congress explicitly called for binding regulations on this precise issue, public comments on nonbinding guidance to states falls far short of ACF's duty.

Because we need to revisit each state's public disclosure policy to determine what changes have been made since 2012, and then reevaluate each state's public disclosure policy with ACF's new overarching policy interpretations in mind, we are not in a position to identify specific state policies that we are confident will in fact "assure the public is informed about cases of child abuse or neglect which result in the death or near death of a child." However, we are also in the process of reevaluating the basic elements that we believe must be part of a model public disclosure policy (again, with the new CWPM provisions in mind), and we believe we will be able to provide you with a list of those elements within the next few weeks.

Thank you for the opportunity to provide input to ACF and the Children's Bureau regarding actions we believe are necessary in order to fully realize the congressional intent behind CAPTA, and by so doing, ensure the health and well-being of children and youth. We look forward to continuing to work with you toward attaining that goal.

Sincerely,

Amy Harfeld

AMY HARFELD
CAI National Policy Director / Senior Attorney