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#### GOLDEN ANNIVERSARY ISSUE

#### FEDERAL LAW AND STATE INTERVENTION WHEN PARENTS FAIL: HAS NATIONAL GUIDANCE OF OUR CHILD WELFARE SYSTEM BEEN SUCCESSFUL?

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\* Director, American Bar Association (ABA) Center on Children and the Law. The author dedicates this article to his mentor, Professor Sanford N. Katz, whose early scholarship on child protective legal intervention has set a high standard for those who have followed.

The judicial decision to intrude into a family, in the main, rests on legal standards formulated by a legislature and interpreted by the courts. From a governmental perspective, state intervention is meant to be a response to parental failure.

When viewing the process of public intrusion, the immense amount of discretion that is available outside the judicial process is striking. \*\*

\*\* Sanford N. Katz. WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN 56, 43 (1971).

#### TEXT:

##### **[\*481] I. Introduction**

A system that both rests on legal standards *and* affords an immense amount of discretion in its operation is one that is likely (especially if underfunded) to be troubled. That's been the case for the nation's public child welfare system for many decades. It is beyond the scope of this article to recount the many problems faced by state or local child protective services (CPS) agencies, their too common lack of public respect (often borne out of citizen ignorance of the complexity of their responsibilities), and their severe lack of adequate financial support from government appropriators.

**[\*482]** For too long in our history, state courts failed to seriously look at the process of judicial intervention in the family, and our state legislatures benignly neglected those public safety entities known generally as "child protective services agencies." Even today, public attention to this system (referred to in this article as the "child welfare system"

and which includes both executive branch social service agencies and child protective courts) is generally highlighted only when there's been a horrific death of a child due to abuse or neglect, in their own home or in a foster care setting.

And too often, the juvenile court has been complacent in its own oversight role to make sure that abused and neglected children receive the services they need. No one has since stated it better than Judge Justine Wise Polier did in 1968:

Too often the courts have permitted themselves to become actors in a ceremony of official approval for whatever is being done or left undone for neglected children. Without sufficient or qualified staff to discover the needs of and the possibilities for children placed with foster agencies, the voluminous files loom larger than the child. The court is not made aware of the separation of siblings, the failure to work with the parents, and the failure to institute legal action on behalf of the child to free him for adoption and is given only a brief statement on why the child should be continued in placement. The lack of appropriate service by the social agencies, thus sanctioned and subsidized by court action, condemns countless children to emotionally arid lives. n1

n1 *Id.* at 113. (citing JUSTINE WISE POLIER, RULE OF LAW AND THE ROLE OF PSYCHIATRY 119 (1968)). Judge Polier, like Professor Katz, is another of our field's pioneers whose writings about state intervention and child protection in the 1960s and 1970s are very insightful and still extremely relevant.

As I will explore in this article, federal guidance on what the courts should do in terms of child welfare agency oversight *has helped address her concerns immeasurably*, but the "rubber stamp" of judicial approval of what agency caseworkers report is still something against which advocates must constantly be on guard.

## **II. Early Federal Legislative Efforts to Help Improve the Child Welfare System**

1935--In the Social Security Act of 1935, there was an important provision intended to enable the U.S. Children's Bureau (then in the Department of Labor) to better support state and local government child welfare services, or as the Act put it, "for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent." n2 For the fiscal year ending June 30, 1936, the Act authorized [\*483] \$ 1.5 million for distribution to state child welfare systems based on "plans developed jointly by the State agency and the Children's Bureau." n3 Note that, from the beginning, a federal role was to promote federal-state planning partnerships to enhance services. Congress wanted this initial money targeted to rural regions and areas of special needs and thus established early that it would focus on child-welfare-system reform in ways *it* deemed critical. n4

n2 Social Security Act of 1935, 74th Cong., ch. 531, 49 Stat. 620.

n3 *Id.* at § 521(a).

n4 *See id.*

1961--Almost thirty years would pass before Congress again addressed the child welfare system. Child welfare experts in the late 1950s had advocated for extending federal support through establishment of a formula for open-ended (unlimited) federal matching funds to supplement state costs for each case of child-welfare-service provision. In 1961, a federal program of financial support to states, known as the Aid to Families with Dependent Children Foster Care Program (AFDC-FC), was created. It provided federal funding to partially match costs of states for support of their foster-care systems, which largely housed children from poor families receiving, or otherwise eligible for, support

through the AFDC program. By tying federal foster-care maintenance funds to a family-of-origin income determination (as is still unfortunately the case today, well over forty years later), Congress endorsed the concept, and the general reality, that foster care is a program largely for children from very poor families.

1962--This year saw another federal amendment of the Social Security Act's child welfare provisions. Here began the requirement of having a state court judge review the necessity of a child's foster-care placement, tying federal AFDC-FC funding to a requirement that states assure for each child's placement covered by that aid that there is a "judicial determination" that remaining in the home would be "contrary to the welfare" of that child. The "contrary to the welfare" judicial-determination language is pretty vague, but it is still, in 2008, a requirement for federal support of children's foster-care costs. It is important to note that, beginning in 1962, agency funding was tied to specific things child protective *courts* had to do in each case, without the courts getting any federal funds. It would be over thirty years before Congress partially rectified this by creating a funding program to aid state court improvement in the handling of child-abuse-and-neglect-related cases.

It is also in the 1962 amendments that a federal requirement for states to "periodically review" the necessity of each child's placement is first found. That language required state child welfare agencies to not only [\*484] assure proper care of the child but also to assure that services were provided to improve the conditions in the home they were removed from, or to otherwise make it possible for the child to be placed with a relative. Here we first find the concept of "family reunification services" and "kinship care" addressed in federal law. The 1962 amendment also required states, to the extent practicable, to place children in licensed foster-family homes or nonprofit private, and licensed, child-care institutions (group homes). By doing so, Congress was first addressing quality of care for children removed from their homes.

The 1962 amendments also enhanced authorized funding for state child-welfare services generally, with \$ 30 million for the 1962-63 fiscal year and a raise in funding levels thereafter as high as \$ 50 million by the 1968-69 year. States were also required to work toward, by 1975, having child welfare services available statewide to all children in need. The period of the 1960s and 1970s thus witnessed an unprecedented expansion of government-run child protective and foster care services, making the state, rather than private charitable and religious groups, the primary provider of these services in most places in the country.

1968--In these amendments to the Social Security Act, Congress converted the original Title V to a new Title IV-B child welfare services program, with authorized amounts rising to \$ 100 million by the decade's end. Despite congressional recognition of a great need by the states for this financial support, by 1970, the actual *appropriated* amount was only \$ 46 million, less than half the authorized spending amount. By 1980, the appropriation was still only \$ 66 million.

## PERSONAL OBSERVATIONS

We continue today to see a funding imbalance: *open-ended* federal matching funds for foster care services (when children are removed from their homes) but a very *limited set amount* of appropriated funds for child welfare services to help keep children from having to be removed from their families or to speed family reunification. We also see, early on, a difference between the *rhetoric* of authorizing a large amount of money for child welfare services improvement and the *reality* of far more limited appropriated funds. Finally, we still struggle with the recognition that child protective interventions disproportionately continue to involve poor families, and especially families of color. Foster care in the 1960s, as today, is largely a program for children from families who lived at or near the poverty level, but although we cannot remove children from their homes *simply* because of family impoverishment, we still find most foster children coming from homes where parents have *lacked resources to help keep their children safe*.

## [\*485] III. A New Federal Role in Addressing Child Abuse and Neglect

### A. Child Abuse Prevention and Treatment Act

1974--The Child Abuse Prevention and Treatment Act (CAPTA) n5 has since become, through eight reauthorizations that *each added on federal requirements* for the operation of state and county CPS agencies, an important vehicle for shaping the child welfare system's early intervention. CAPTA established a state grant program for "developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs." n6 At first, it had only ten "eligibility" requirements for state participation in this grant program, mandating states to have, through law or uniform policy and practice, mechanisms to help assure that child maltreatment gets reported, investigated, and treated. n7

n5 Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. § 5101 (2006)). Analysis of this and other subsequent federal laws will focus on *mandates to the states as a condition of their receiving federal funding*, not on the laws' establishment or expansion of discretionary grant programs, changes in federal program organization and research activities or studies, or on other provisions not binding on the states.

n6 *Id.* § 4(B)(1).

n7 *See id.* § 4(B)(2). The original ten Child Abuse Prevention and Treatment Act (CAPTA) eligibility factors were:

1. Have provisions for immunity from prosecution of reporters of child abuse or neglect;
2. Have provisions for reporting known and suspected child abuse and neglect;
3. Conduct prompt investigations of reports, and if substantiated, take immediate steps to protect the child as well as other children in the home who might be in danger of abuse or neglect;
4. Have an administrative process, trained personnel, institutions, and facilities to care for maltreated children, and, where necessary, multidisciplinary programs to help the state deal effectively with cases;
5. Preserve the confidentiality of all records related to child abuse and neglect;
6. Provide for the cooperation of law enforcement, courts, and other state human service agencies,
7. Provide, in every (juvenile court) case, a guardian ad litem (GAL) to represent the child;
8. Assure that financial support for child abuse and neglect related activities does not fall below earlier levels, and that federal funds would hopefully increase funding available for these activities;
9. Disseminate information to the public on child abuse and neglect and the facilities, as well as the prevention and treatment methods, available; and
10. To the extent feasible, insure that parental organizations combating child abuse and neglect were given preferential treatment (in essence, encouraging states to provide support to the Parents Anonymous organizations established to help families where child maltreatment occurs).

*Id.*

It is important to note that CAPTA created a federal definition of child abuse and neglect that states were expected to *generally* follow in their own statutes, should they desire to receive grant funds under CAPTA. The child maltreatment definition was notable for several reasons. It included [\*486] not only physical injury, sexual abuse, and negligent treatment (neglect), but also "mental injury," resulting in many states adding this form of maltreatment to their statutory definitions. It clarified that child abuse and neglect laws should protect all children under age eighteen. The

scope of covered perpetrators was broadly (and vaguely) defined as those "responsible for the welfare of children." n8 And it suggested that children were appropriate subjects of child-abuse-and-neglect intervention if subject to "threatened" harm, not only actual harm.

n8 *Id.* at § 4(A)(1).

The entire Act, including both a discretionary (demonstration and research project) grant program and the state grant program, had only a \$ 15 million authorization its first year, and no more than 20% of the appropriated funds was made available for distribution to states. Most funding was for discretionary grants, technical assistance, and other initiatives. However, as has always been true with CAPTA, very limited state funding (never more than \$ 27 million has been annually distributed among states through the CAPTA Basic State Grant Program) has not stopped the vast majority of states from taking steps to comply with its eligibility provisions, and as of 2008, every state has been deemed CAPTA State Grant eligible.

1978--The first amendments to CAPTA did not modify state-grant eligibility requirements, but rather provided a special focus on child-sexual-abuse cases. n9 They also included a new federal program (not a state grant program), called "Adoption Opportunities," that authorized discretionary grants to facilitate adoption of children from the foster care system. The amendments also required "Model Adoption Legislation and Procedures," and the interdisciplinary panel developing them chose to limit their focus to adoptions involving special needs children in the foster care system.

n9 Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, Pub. L. No. 95-266, § 202(c), 92 Stat. 205.

1984--The next CAPTA amendment again resulted from heightened national awareness of child sexual abuse. It added to the federal definition of abuse and neglect a wider description of sexual abuse that included using, persuading, inducing, enticing, or coercing a child to engage in sexually explicit conduct (or simulations) for purposes of producing visual depictions of it (i.e., child pornography); the rape, molestation, prostitution, or other forms of sexual exploitation of children; and incest with children.

Only one new state grant eligibility requirement was added in 1984, and again, it was a congressional response to a public controversy. There had been reported cases in which doctors and hospitals, with parental consent, had allegedly cut off medically indicated treatment from severely [\*487] disabled newborns and infants. These were known as "Baby Doe" cases, and CAPTA was changed to require (and still does) procedures and programs for responses to and consultations concerning reports of withholding medically indicated treatment from disabled infants with life-threatening conditions. States were required to assure that they had authority under state law to pursue legal actions in court to prevent such withholding of care.

1986--An amendment to CAPTA known as the Children's Justice Act (CJA) created another state grant program to aid abused and neglected children. n10 This provided a focus on those children involved in the justice system. Unlike the CAPTA state grant program, which entirely depends upon congressional appropriations, the CJA state grant money comes out of a set-aside share of the federal Crime Victims Fund, money collected by federal courts from convicted criminals. These funds (in recent years, \$ 17 million annually divided among eligible states) are intended to improve the handling of cases, particularly sexual abuse cases, in a manner "which limits additional trauma to the child victim," and to improve case investigation and prosecution. n11 To be eligible for these funds, states have had to establish and maintain a multidisciplinary expert task force that makes and adopts recommendations for reform.

n10 Children's Justice and Assistance Act of 1986, Pub. L. No. 99-401, tit. I, 100 Stat. 903.

n11 *Id.* § 102(a)(2).

1989--Congress, through a Child Abuse Prevention Challenge Grants Reauthorization Act, n12 transferred funds from one part of the U.S. Department of Health and Human Services (HHS) to create an additional part of CAPTA. This money helped establish a new Title II program within CAPTA of grants to states for community-based child abuse prevention activities.

n12 Pub. L. No. 101-126, *103 Stat. 764* (1989).

1992--This federal child abuse prevention program was redesignated the Community-Based Child Abuse and Neglect Prevention Grants program, with funds available for a broad range of child maltreatment prevention activities. Additional 1992 amendments were quite significant. Finally, we first saw specific language on how these (albeit quite limited) CAPTA state grant funds were to be used by the states. As so designated by Congress, they were to assist in improving a variety of child protection practice areas. n13 This law required states to submit *every four years* a plan [**\*488**] that specified in which areas the state was using CAPTA funds, and the amendments required states to provide CPS data to quantify the work of state CPS agencies. n14

n13 Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, § 114(a), *106 Stat. 187*. 192. Those areas included:

- Intake and screening of reports, through improvement of information received, decision making, public awareness, and staff training;
- Investigation response time, decision-making service referrals, and staff training;
- Use of multidisciplinary teams and interagency protocols to enhance investigations;
- Legal preparation and representation;
- Response time for delivery of family services, and increasing the number of families served;
- Assessment tools, automation and referral systems, and overall training to "meet minimum competencies"; and
- Prevention, treatment, and research programs.

*Id.*

n14 See *id.* § 114(c). Among these initial reportable elements, now part of data collected for a "National Child Abuse and Neglect Data System" (NCANDS), were:

- Intake and screening staff and the number of cases handled;
- Training programs for staff;
- Public education activities conducted;
- Number of reports received, response time for initiation of investigations, and number of workers conducting investigations;
- Number of substantiated and unsubstantiated reports;
- Response time for the actual provision of services;
- Description of interagency coordination and protocols;
- Use of multidisciplinary teams and child fatality review panels;
- Pre-service and in-service training programs;
- Description of agency legal representation;
- Procedures for appealing substantiation findings of abuse or neglect;

- Information on use of automation to track reports through final disposition, risk assessment tools, and information and referral systems linked to child protective services agencies (CPS) and public information activities,
- Staff training needs; and
- Research and demonstration activities.

*Id.*

1996--Congress made more changes to the CAPTA state grant program than in any prior reauthorization. n15 In doing so, it was responding to concerns of both child advocates and "parent rights" critics about how the child protection system operated. The amendments also listed additional data that each state was to collect and provide to the federal government [\*489] annually "to the maximum extent practicable." n16

n15 See CAPTA Amendments of 1996, Pub. L. No. 104-235, § 107, *110 Stat. 3063, 3071-78*. Major elements of these changes included requirements that:

- Every five years each state must specify which activities listed in CAPTA it intended to address with its federal funding;
- The CAPTA plan be coordinated with the state's Title IV-B child welfare services plan;
- There be procedures for "immediate" screening and safety assessments following a report, as well as a prompt investigation;
- Immediate steps be taken to ensure and protect the safety of the reported child and others under the same care, ensuring placements in a safe environment;
- The immunity for reporters provision now be provided only for reports made in good faith;
- Listed agencies, programs, and individuals may receive otherwise confidential child protective records, including release of information upon a child death or near-fatality (essentially opening up access to otherwise private records and information to those with a genuine need to access them);
- The GAL requirement be explicitly fulfilled by either an attorney or a court appointed special advocate (CASA), and the GAL must obtain a first-hand clear understanding of the "situation and needs" of the child and "make recommendations" to the court concerning the child's best interests;
- States create "Citizen Review Panels" to provide oversight of the CPS agency;
- States provide early termination of parental rights for abandoned infants;
- States provide appellate procedures for those who disagree with official findings of the CPS agency; and
- States must not require family reunification of a child if the parent is convicted of murder of another child or other severe offenses involving another child, and these offenses must constitute grounds for termination of parental rights.

*Id.*

n16 *Id.* § 107(d). Beyond collecting data on the number of reports, there was an intent that the following information be provided:

- Substantiated and unsubstantiated investigative outcomes,
- Agency response times to reports.
- Number of CPS workers handling investigations,
- Number of child maltreatment deaths,

- Number of abused or neglected children who did not receive follow-up services,
- Number removed from home,
- Number of families receiving preventative services, and
- Number of children reunited with their families.

*Id.*

Finally, in 1996, the CAPTA Title II program was redesignated the Community-Based Family Resource and Support Grants program, with a much broader focus than simply child abuse prevention (but note below that in 2003, Congress once again refocused this grant program exclusively on child abuse prevention). Congress also imposed many new restrictions and requirements upon the states as eligibility requirements for these Title II funds.

2003-This brings us to the most recent (as of the date of this article) reauthorization of CAPTA (although the Act has been scheduled for reauthorization in 2008, final congressional action is not likely until 2009 at the earliest). In the Keeping Children and Families Safe Act of 2003, Congress added provisions reflecting then-current problems and issues related to child maltreatment. n17 Reflecting additional concerns of the child [\*490] protection advocacy community, Congress added language to CAPTA clarifying that opening up juvenile court abuse and neglect (dependency) cases to the public would not jeopardize a state's CAPTA funding (similar language was later added to the Title IV-B and IV-E child welfare law provisions so that those funds would not be jeopardized by the opening of juvenile dependency court hearings to the public). It also added provisions requiring that recommendations of each citizen review panel be responded to in writing by the state child welfare agency and that the work of each state citizens review panel be summarized in a report to the federal government. n18

n17 Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, *117 Stat. 800*. The added provisions included Congress stating that there was a need for:

- Policies and procedures to address the needs of infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure and that include notification of CPS about such cases and the development of a "safe care plan" for each child;
- Triaging cases of children not at risk of imminent harm through referrals to community voluntary agencies;
- Assuring greater access to CPS records and information to those outside the agency with responsibilities to protect children from abuse or neglect;
- Assuring that every GAL for a child has received training "appropriate to" their role;
- Parents being advised of the complaints or allegations against them at the time of their initial contact with CPS, and caseworkers being trained on parental legal rights;
- Children, under age three, substantiated for child maltreatment, to get an assessment of their need for early intervention services under the federal Individuals with Disabilities Education Act; and
- Prospective foster and adoptive parents, and other adult relatives and non-relatives in their home, to uniformly undergo criminal history background checks.

*See generally id.*

n18 *See id.*

Reflective of the fact that foster youth often find themselves transferred to the custody of the juvenile justice system

even for minor offenses, states were also encouraged to provide data on the number of children in the care of the child protection system who were transferred into the custody of the juvenile justice system. Five years later, data still does not appear to be available from the states on this.

The CJA's areas of focus were expanded in the 2003 law to add improved handling of cases of child victims with disabilities or serious health-related problems. In the 1992 CAPTA reauthorization, the CJA focus had also been expanded to address the improved handling of cases of suspected child abuse and neglect fatalities. As mentioned above, in 2003, Congress once again adjusted the focus of the CAPTA child-abuse-prevention state grant program (Title II) by redesignating it the Community-Based Grants for the Prevention of Child Abuse program. n19

n19 Space requirements for this article limit my ability to go into the many changes to that program's requirements imposed by the federal amendments to Title II, but they may be found in sections 121-41 of Pub. L. No. 108-36, *117 Stat. at 813-18*.

## PERSONAL OBSERVATIONS

The U.S. federal framework for guiding the work of state and county CPS agencies is probably the most advanced in the world. Yet in one major area it is woefully deficient: federal support, commensurate with the scale of the problem and scope of child maltreatment, to help the states truly enhance and sustain improvement in frontline CPS casework (or what is often called the "front end of the child welfare system"). The total [\*491] amount of the CAPTA state grant program has never exceeded \$ 27 million annually, divided among the fifty states and the District of Columbia. This is hardly ample enough for use by anything but special projects and small initiatives. Likewise, the CJA annual funding has not exceeded \$ 17 million annually, again making short-term modest projects possible but not major reforms in how, for example, law enforcement can improve its handling of child maltreatment victim cases.

### *B. Victims of Child Abuse Act*

1990--As part of broad criminal justice system reform legislation, Congress enacted provisions on child victim and witness rights, made specifically applicable to children involved in federal prosecutions brought against their perpetrators. It also enacted the first mandatory child abuse (broadly defined to include neglect) reporting law applicable to offenses identified as having been committed on federal land or in federally operated or contracted facilities. n20

n20 Victims of Child Abuse Act. Pub. L. No. 101-647, §§ 225-31, *104 Stat. 4798, 4798-4809 (1990)*.

Congress used the Victims of Child Abuse Act (VCAA) to accomplish several goals. First, it authorized new discretionary funds to promote multidisciplinary child abuse investigation and prosecution programs, enhance the number of Court-Appointed-Special-Advocate (CASA) programs, improve training of juvenile court judges and attorneys involved in child protection cases, and enhance juvenile court "model programs" within the states (known as the National Council of Juvenile and Family Court Judges' "Model Courts Program"). Second, it recognized that too often the federal criminal justice system does not pay sufficient attention to the needs and welfare of child victims of crime, thus aggravating trauma they have already experienced. Third, it took note that state child maltreatment reporting laws failed to cover situations where children are victimized within areas of exclusive federal jurisdiction.

The child-victim-rights section of the law was modeled on the best practices known at that time to help children who might need to testify in court. It provided for (at the discretion of the prosecutor and when authorized by the court) a set of important procedures that could be utilized. n21 [\*492] This law also extended the federal statute of limitations for acts of child sexual or physical abuse up to the child's twenty-fifth birthday. It also required the stay of any related

civil actions until the end of all phases of the criminal action.

n21 *See id.* § 225. These optional protective procedures include:

- Taking of a child's trial testimony by two-way closed circuit television;
- Taking of a videotaped deposition of the child, which may later be used at trial;
- Presuming the child's competency as a witness, with competency examinations conducted only if the court determines, on the record, that compelling reasons (other than age) exist;
- Authorizing court records to be private and authorizing privacy-related protective orders (and making a breach of that privacy an act of criminal contempt);
- Authorizing closing of the courtroom during the child's testimony if not doing so would cause substantial psychological harm to the child or would cause the child to be unable to effectively communicate;
- Requiring that the probation department request a multidisciplinary child abuse team or other resource to prepare a victim impact statement that includes the child's and family's views about the victimization;
- Consulting with multidisciplinary child abuse teams, including those established by the government;
- Authorizing the appointment of a GAL for the child in the criminal proceeding;
- Permitting the child to have an "adult attendant" remain in close proximity during their testimony, but to videotape the testimony when this is done;
- Providing for the court to designate a case with a child victim/witness as "of special public importance" so that the case is completed expeditiously; and
- Authorizing a child to use anatomical dolls, puppets, drawings, etc., to assist when testifying.

*Id.*

The provisions establishing the first federal mandatory child abuse reporting law, modeled on state laws existing since the 1960s, required the U.S. attorney general to designate an agency to receive and investigate such reports. With formal written agreements, a nonfederal agency (for example, state or local CPS agency) could be so designated. Although CAPTA has never addressed mandatory "cross-reporting" by CPS to the police, VCAA required immediate reporting to law enforcement by social services or health-care agencies when cases involve sexual abuse, serious physical injury, or life-threatening neglect. n22

n22 *See id.* § 226. The law further:

- Gave a preference for joint social services-law enforcement investigations, with a view toward avoiding unnecessary multiple interviews with the child victim;
- Required that there be a standard reporting form disseminated to all mandated reporter groups;
- Provided good faith criminal and civil immunity not only to those reporting abuse, but also to those who investigate it or participate in judicial actions related to it, and if the sued person prevails in such litigation, the court can award them attorney's fees;
- Made failure to report by mandatory reporters a misdemeanor offense; and
- Mandated all these reporter groups to receive periodic training on their reporting obligations and on how to identify abused and neglected children.

*Id.*

Finally, the law established a new grant program for states, counties, and communities to help them purchase and use equipment for closed-circuit televising and video recording of the testimony and statements of children. Although it is a discretionary grant program, it is mentioned here because the American Bar Association Center on Children and the Law [\*493] has long been the Department of Justice's grantee for technical assistance, evaluation, and other support services under this program of the federal Bureau of Justice Assistance, one that helps localities use technology to ease the trauma of child victims and witnesses.

#### PERSONAL OBSERVATIONS

The VCAA could be far more useful if we had data or evaluation information on the number of federal criminal prosecutions involving child victims and witnesses, as well as on how often the trial-related aids to child victims authorized by the law have been utilized and what their impact has been on case success. Little also is known about reporting of child abuse suspected to have taken place on federal lands, or on the responses thereto.

### **IV. Federal Mandates to Help Improve Foster Care and Permanency Planning for Children**

#### *A. Indian Child Welfare Act*

1978--The Indian Child Welfare Act (ICWA) was a congressional response to "an alarmingly high percentage of Indian families" broken up by "the removal, often unwarranted, of their children" by nontribal agencies and their placement in non-Indian foster and adoptive homes and institutions. n23 A further concern was that state courts handling child protection cases were failing to recognize tribal relationships of children and families involved in these cases. As a remedy, federal standards were established for removal of Indian children from their families and their placement into foster or adoptive homes.

n23 Indian Child Welfare Act of 1978, Pub. L. No. 95-608, § 2(4), 92 Stat. 3069.

ICWA gives Indian tribes exclusive jurisdiction over any state child welfare intervention-related proceeding involving an Indian child when the child resides or is domiciled within a tribal reservation. More significantly, it requires state courts making foster-care or termination-of-parental-rights decisions, in the absence of good cause to the contrary, to transfer such cases upon tribal or parental petition to the jurisdiction of the child's tribe unless a parent objects to this or the tribe declines jurisdiction. It further gives tribes the right to intervene at any point in state foster care or termination-of-parental-rights proceedings.

In any state child-protective proceeding, when the court knows or has reason to know an Indian child is involved, the child's tribe must be notified of the pending proceeding and its right to intervene in it. Foster-care and termination-of-parental-rights cases are supposed to be stayed to [\*494] give time for tribal or Indian parent intervention. ICWA gives indigent Indian parents a right to court-appointed legal counsel and court authority for appointment of legal counsel for the child, even where state law does not provide for it (and when appointed, the Secretary of the Interior is to pay lawyer fees and expenses).

ICWA was the first federal law to require state child welfare agencies to provide services to families *before removal* of a child from home due to abuse or neglect. Prior to an initial foster placement (or subsequent foster placements) or preceding the termination of parental rights of an Indian child, the court must find "active efforts" were made by the child welfare agency to provide remedial services and rehabilitative programs to prevent family breakup, and the court must find that those efforts were unsuccessful.

The law also requires that before a court orders a child into foster care placement, it must find by clear and convincing evidence, including expert testimony, that continued parental custody is "likely to result in serious emotional or physical damage" to the child. n24 ICWA prevents termination of parental rights of an Indian child unless the

grounds for termination are proven beyond a reasonable doubt (no matter what the state statutory level of evidence), including obtaining the same evidence regarding continued parental custody that is required prior to foster placement. Finally, any foster or pre-adoptive placement must be "in the least restrictive setting" that most approximates a family and in which the child's special needs will be met, and placements with the Indian child's extended family or other tribal-approved setting are prioritized. n25

n24. *Id.* at § 102(e).

n25 *Id.* § 105(b). Other important provisions in the Indian Child Welfare Act included:

- Special procedures for parents challenging the voluntary nature of foster care placements or terminations of parental rights, or withdrawing their consent thereof;
- Allowing an Indian child, Indian parent or custodian, or tribe to petition a court to invalidate a foster care or termination of parental rights action that fails to comply with the above provisions;
- Giving adopted children, after turning eighteen, the right to have the court inform them of the tribal affiliation of their biological parents to protect rights that may flow from that tribal relationship, and to aid them in tribal enrollment;
- Authorizing states and tribes to enter into agreements regarding care and custody of Indian children and jurisdiction over proceedings, including provisions for orderly transfer of jurisdiction agreements for concurrent state/tribal jurisdiction;
- Setting an "imminent physical danger or harm to the child" standard for emergency removals of children from an Indian parent or custodian, if the child was a resident of or domiciled on a reservation but temporarily off the reservation;
- Creating a federal grant to tribes program to help prevent breakup of Indian families, helping assure removal is a last resort, and supporting Indian foster and adoptive homes (including an adoption subsidy program); and
- Requiring copies of *all* final adoption decrees of Indian children to be filed with the Secretary of the Interior.

*See generally id.*

#### [\*495] PERSONAL OBSERVATIONS

ICWA had noble intentions, but no funding has been available then or since to give tribes an adequate ability to provide services to children and families over whom they might assert jurisdiction. Its implementation has been very slow, and case decisions interpreting it have often been controversial. The implementation of ICWA is more likely to be pursued in accord with the spirit and letter of the law in areas with large Native American populations or in areas near Indian reservations. Its limitations on removal of Indian children from their homes and its restrictions on parental rights terminations, when followed, can help keep Native American families together. These same rules are worth examining in respect to policy reform that could help address the disproportionate number of African-American children in foster care and the termination of their parents' parental rights.

#### *B. Adoption Assistance and Child Welfare Act*

1980--The Adoption Assistance and Child Welfare Act (AACWA) n26 was, at the time of its enactment, the most comprehensive federal law affecting state and local child welfare agency and court practices. The law created a new Part E of the Social Security Act's Title IV that became the basis of federal financial support for state foster care and adoption assistance (subsidies to support families adopting special needs children) programs. This funding was

open-ended (an entitlement of federal financial support for all eligible children's placements). AACWA also established extensive new requirements for states receiving both Title IV-E and Title IV-B, the state grant child-welfare-services program established in 1962 described above, including specifying mandated elements required in all state child-welfare plans. n27 A child's eligibility for federally supported [\*496] foster-care maintenance and adoption-subsidy payments to the state was predicated upon their having received or been eligible for the Title IV AFDC program (in 2008, long after the AFDC program has ceased to exist and been replaced by the federal Temporary Assistance to Needy Families (TANF) program, this AFDC eligibility requirement remained in the law).

n26 Pub. L. No. 96-272, § 94 Stat. 500 (1980).

n27 *See id.* Among these key elements, states were required to:

- Safeguard the privacy of information on persons assisted with IV-E or IV-B funds except for such things as the investigation and civil/criminal prosecution of cases;
- Report to police or the court situations where children supported with such funds are in unsuitable settings because of neglect, abuse, or exploitation;
- Set standards for foster and institutional care of children supported with such funds, including periodically reviewing these, as well as foster care maintenance and adoption subsidy rates;
- Give those eligible for these programs a fair hearing if benefits are denied or not promptly provided;
- Have an independent tri-annual audit of these benefit programs;
- Provide adoption assistance payments to promote adoption of children with special needs;
- Set goals for a maximum number of children who will need to be, and remain in, federally supported foster care and who will have to remain in care beyond twenty-four months, and describe how these goals will be achieved;
- Make "reasonable efforts" in each case, prior to foster care, to prevent or eliminate the need for removing the child from home, and to make it possible for removed children to return home; and
- Provide every child in foster care a written case plan, detailed case review specifying services to prevent placement and reunify families, and a "dispositional hearing" within eighteen months of placement.

*Id.*

Also, a child's placement can be financially eligible for federal support only if there has been (1) a judicial determination that continuation at home is contrary to the welfare of the child (restating an element of the 1962 law) and (2) that the court has made requisite "reasonable efforts" factual determinations that the agency took appropriate steps to prevent the need for placement, and later steps to, where appropriate, reunify the child with their family. Note that these two judicial findings must be made (and made affirmatively), or the child welfare agency loses federal funding for that child's placement. The law also limited federal reimbursement of voluntary foster-care placements to 180 days, unless there is a judicial finding within that period that the placement is in the best interests of the child. There is no financial benefit or penalty to the court for making or not making any of these determinations.

Importantly, the law also limited Title IV-E eligible public institutions in which a child was placed to those with no more than twenty-five children (generally what is called a "group home"). Excluded specifically were detention facilities, forestry camps, training schools, or any facility operated primarily for the detention of delinquent children. Many children not in the custody of a child welfare agency, but rather under the jurisdiction of a juvenile justice agency, can still have their placement covered with this federal Title IV-E assistance as long as they are placed in eligible foster or group home settings.

The newly enacted adoption-assistance program provided for the child welfare agency to develop written

agreements between the agency and adoptive parents, with subsidy amounts (that cannot be more than the monthly foster-care payment rate) based on the circumstances of the adoptive parents and need of the individual child(ren), adjusted periodically in consultation with the adoptive parents. These adoption subsidies end when the child turns eighteen, or they can be paid up to age twenty-one [\*497] if the child has a mental or physical handicap. Recognizing that children adopted from foster care often have serious medical or mental-health-treatment needs, the law also made children covered by an adoption subsidy eligible for the federal Medicaid program.

Adopted children are only eligible for subsidies if the agency concludes that they could not be placed for adoption without making the subsidy available, due to their special needs, except in situations where it would be against their best interests to seek other adoptive parents because of such factors as, for example, significant emotional ties with prospective adoptive parents who have been providing foster care. The adoption assistance agreement must specify both the financial subsidy amount and the noncash assistance (such as casework services) that will be provided. The agreement must also indicate that it remains in effect if the adoptive parents move to another state, and the law required development of interstate compacts to help assure that these subsidies and services continued after parents move to another state.

Another critical component of the law was a requirement that federally supported foster-care placements have to be in the "least restrictive" (most family-like) setting available and "in close proximity to the parents' home, consistent with the best interests and special needs of the child." n28 The law also requires each foster child's status to be reviewed no less than once every six months by either a court or an administrative body (at which the child's parents can participate and which has at least one reviewer not responsible for the child's case management or family services) to determine the continuing need for placement and the agency's compliance with the child's case plan.

n28 *Id.*

The law further provided a new way to help expedite legal permanency for foster children. A special "dispositional hearing" was required, not later than eighteen months after a child enters care and periodically thereafter, held either by a court or a court-appointed administrative body, to "determine the future status of the child." n29 The options listed (without stating any statutory preference) were return home, continuation in foster care for a set period, placement for adoption, or--because of the special needs of the child--continuation in "long-term" foster care.

n29 *Id.*

A few final provisions of this law are important to mention. It required states to conduct an "inventory" of all children in foster care over the past six months, determining for them the appropriateness and necessity of their current placement, whether the children should be returned home or freed for adoption or legal guardianship, and the services necessary to [\*498] effectuate this. A statewide foster-care information system was also required, as well as reporting foster-child statistical information to the federal government in what later became the federal Adoption and Foster Care Analysis and Reporting System (AFCARS). Within the 1993 law referenced immediately below, a significant level of federal matching funds was made available to help develop and operate statewide mechanized data collection and information retrieval systems.

## PERSONAL OBSERVATIONS

One critical omission from AACWA was its lack of a federal child and family legal entitlement to services other than foster care. In retrospect that is surprising, because a guiding force for AACWA were several reports that expressed concern about the immense size of the U.S. foster care population. n30 To its credit, AACWA was the first federal law to emphasize and help move large numbers of foster children's cases towards permanent legal outcomes. In

being so extremely prescriptive, it transformed the federal-state partnership in that it raised federal oversight of state child-welfare cases to a high level, only to be exceeded in seventeen years by the Adoption and Safe Families Act.

n30 See generally JANE KNITZER & MARYLEE ALLEN, CHILDREN WITHOUT HOMES: AN EXAMINATION OF PUBLIC RESPONSIBILITY TO CHILDREN IN OUT-OF-HOME CARE (1978).

#### *C. Federal Court Improvement Program*

1993--Within the federal Omnibus Budget Reconciliation Act of that year, a new program was created called "Entitlement Funding for State Courts to Assess and Improve Handling of Proceedings Relating to Foster Care and Adoption." n31 It established federal grants to state court systems to assess how the courts were helping implement Titles IV-B and IV-E, issuing rulings on advisability and appropriateness of foster placements, and making determinations to terminate parental rights and approving adoptions or other permanent placements. The funding also supported implementation of needed changes identified during the assessments. What is known as the "Court Improvement Program" has since been twice reauthorized (through 2011), and additional areas of special grant support to state courts have been made available to (1) help, through enhanced data collection, improve tracking and analysis of child abuse and neglect cases and safe and timely permanency decisions, and (2) train judges, attorneys, and other legal personnel in child-welfare cases. n32

n31 Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, *107 Stat. 312*.

n32 Child and Family Services Act of 2006, Pub. L. No. 109-288, § 120 *Stat. 1233*.

#### [\*499] PERSONAL OBSERVATIONS

The Court Improvement Program was wisely targeted to funding recipients with the maximum clout to help achieve meaningful and long-lasting reforms in the handling of juvenile dependency cases: each state supreme court or other highest court of every state. For the first time, it provided a funding mechanism to help courts do what earlier federal laws (especially AACWA) had required of them. It was not enough money, however, to provide the courts with new resources that could greatly enhance court-based services to children and families or lower the workloads of judges and other court personnel so that cases could be resolved in a more careful and timely manner.

#### *D. Multiethnic Placement Act*

1994--Title V of the Improving America's Schools Act of 1994 n33 contained provisions that Congress hoped would help eliminate racial, ethnic, and national origin discrimination and bias in adoption and foster care recruitment, selection, and placement of minority foster children. Known as the Multiethnic Placement Act (MEPA), it prohibited federal assistance to child welfare agencies that categorically denied opportunities to become foster or adoptive parents solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved. It further prohibited delaying or denying placement of a child for adoption or foster care, or otherwise discriminating in a placement decision, solely on the basis of those same factors. It also provided a federal right of action for any person whose rights under this law were violated. Two years later, these provisions were amended by clarifying the process through which federal funding could be withheld to states if they denied "to any person" the chance to become a foster or adoptive parent on the basis of his or her, or a child's, race, color, or national origin, or if a child's placement into foster care or for adoption was delayed or denied for those same reasons. These amendments, known as "Removal of Barriers to Interethnic Adoption," also deemed these violations to be a breach of Title VI of the Civil Rights Act of 1978. n34

n33 Pub. L. No. 103-382. *108 Stat. 3518 (1994)*.

n34 See 42 U.S.C. §§ 622(6)(9) § 671(a)(18) § 674(d).

## PERSONAL OBSERVATIONS

MEPA and its two-year later amendments can be seen as a direct opposite of ICWA. In one, use of racial considerations, when tied to delay or denial of placements, is forbidden. In the other, race is a key factor triggering special efforts to keep families together. To show how serious the [\*500] proponents of MEPA were, it is the only federal child welfare law with an explicit private right of action for its violation. Yet many in our field would argue that either it has not been actively enforced or that its application has made the plight of African American children in foster care worse. A recent report on the impact of this law has stirred anew the controversy surrounding MEPA and racial considerations in child welfare work. n35

n35 See, EVAN B. DONALDSON ADOPTION INST., FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE (2008), <http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf>.

### *E. Adoption and Safe Families Act*

1997--The Adoption and Safe Families Act (ASFA) n36 was a congressional response to a perceived failure of AACWA to (1) adequately address the safety of children in child protective decision-making, (2) significantly reduce the size of the country's foster care population, and (3) move foster children into permanency more rapidly. There was congressional concern that AACWA's requirement of child welfare agencies having to make "reasonable efforts" to prevent removal of children from their homes and to reunify them had occasionally sacrificed both child safety and permanency success. Key responses included a set of provisions to add "child safety" language to various aspects of federally guided state decision-making and to modify the reasonable efforts requirement itself.

n36 Pub. L. No. 105-89, *111 Stat. 2115 (1997)*.

First, in making such reasonable efforts, "the child's health and safety" now has to be considered a paramount concern. The provision on reasonable efforts to reunify specifically adds a qualifier of "safely" reunifying children, and child safety considerations have to be included in all actions taken to implement the child welfare agency's case plan. Second, the law clarifies that if reasonable efforts are determined inconsistent with timely achievement of a child's permanency plan, a new type of reasonable efforts is required--efforts to place the child in a permanent setting and to finalize the permanency plan. Third, the law provides a set of factors permitting agencies to completely dispense with making reasonable efforts in cases involving serious parental offenses committed against children or where parental rights to a child's sibling have been terminated involuntarily. Fourth, if reasonable efforts are dispensed with, the law requires reasonable efforts to place the child for adoption or with a permanent legal guardian. And fifth, the law authorized reasonable efforts to place a child for adoption or guardianship to be made *concurrently* with efforts to reunify the child and family.

[\*501] Reflecting the concern that far too many children stayed in foster care for years, the law does something no earlier federal law on child protection had done: with certain exceptions it mandates that states initiate court proceedings to sever the parent-child relationship in order to free children for adoption under certain circumstances (when a child is in foster care for fifteen of the most recent twenty-two months; if a child is judicially found to be an

abandoned infant; or if a parent committed offenses that justify making no reasonable efforts). n37 To help assure expeditious and legally secure permanent placements, the law substitutes a judicial "permanency hearing" for AACWA's "dispositional hearing" and clarifies that the child's permanency must be *determined* at that hearing, held either no later than twelve months after the child enters care or thirty days after the court makes a "no reasonable efforts for reunification required" determination. n38

n37 *Id.* § 103(a)(3). Exceptions to this requirement include where a child is being cared for by a relative, where there is a compelling reason why filing for termination of parental rights would not be in the child's best interests, or where the state has not provided the child's family, as required in the family case plan, the services (reasonable efforts) that would make the child's safe return home possible. *Id.*

n38 *Id.* § 302.

ASFA also imposes on states a further set of requirements that go beyond earlier federal mandates. n39 Finally, ASFA creates two important new programs of federal support to the states. The first program provides adoption incentive grants to increase the number of children adopted from foster care (amended in 2003 to incentivize adoptions of foster children age nine and older). n40 The other is a new "Subpart 2" to the Title IV-B-child-welfare-services state grant program called "Promoting Safe and **[\*502]** Stable Families" that encompasses what had also been known as the Family Preservation and Family Support Services Program. Probably the *most far-reaching addition to the federal role in oversight* of state child welfare agencies, since the original 1935 federal law supporting child welfare system improvement, is in an ASFA section entitled "Performance of States in Protecting Children." In this section, federal, state, and local child welfare authorities and advocates are required to develop a set of outcome measures to assess state performance in operating child protection and child welfare programs, including rating state performance on outcome measures. It is that authority under which the periodic federal Child and Family Services Review (CFSR) process was initiated.

n39 See *id.* §§ 104-107. These requirements include:

- Foster parents, pre-adoptive parents, and relative caregivers must be given notice of all reviews and court hearings and an opportunity to be heard at them. This language, limited somewhat by later federal regulations, was later strengthened by another piece of federal legislation (see below); Unless states opt not to do so (an exception deleted in more recent federal law as mentioned below), prospective foster and adoptive parents must undergo criminal background screening, after which they would be disqualified if they have a felony conviction for child abuse or neglect, spouse abuse, other crimes against children, or for serious crimes of violence, and further disqualified if they simply have an assault, battery, or drug-related conviction within the last five years;
- States are required to plan for effective use of cross-jurisdictional resources to facilitate timely permanency for children across state lines where appropriate;
- The use of "long term foster care" is no longer an option for states, and the law substitutes for it something called "another planned permanent living arrangement" (APPLA), that would signify the placement is not simply meant to be long-term but rather is "permanent" (at least through the child's eighteenth birthday); and
- States must annually report foster care and adoption data, meeting requirements of the Adoption and Foster Care Analysis and Reporting System tAFCARS), as determined by federal regulations.

*Id.*

n40 Adoption Promotion Act of 2003. Pub. L. No. 108-145, *117 Stat. 1879*.

## PERSONAL OBSERVATIONS

With all the additional requirements on states imposed by ASFA, it is important to commend HHS for actively trying to help states achieve significant child welfare reforms related to ASFA's provisions. Unlike most other federal child welfare laws, this one was followed in 2000 by extensive new regulations. n41 ASFA, its regulations, and HHS staff also put in place a new form of federal review, the CFSR, which took federal oversight in a huge new direction. HHS and its technical assistance providers are actively trying to help shape key reforms in child safety, permanency, and well-being, and to base reforms (the implementation of what are called state "Program Improvement Plans") on examination of systematically collected data and CFSR findings. This is far different from the prior federal "eligibility reviews" that were much more limited in scope. Yet, critics of the CFSR process correctly note that the relatively small number of cases reviewed do not give an adequate picture of the child welfare agency's strengths and weaknesses, and ideally, more targeted federal money would be made available to improve the CFSRs and to financially incentivize state success in implementing their Program Improvement Plans.

n41 See generally 45 C.F.R. §§ 1355, 1356, 1357 (2008); DEBRA RATTERMAN BAKER ET AL., MAKING SENSE OF THE ASFA REGULATIONS: A ROADMAP FOR EFFECTIVE IMPLEMENTATION (2001).

### *F. Foster Care Independence Act*

1999-As better data became available on the nation's foster care population, it appeared more evident that a large number of youth were emancipating out of the foster care system at age eighteen (in 1990, about 20,000 per year). That is, they were transitioning to adult independence without adequate preparation for success. Congress enacted the Foster Care Independence Act (FCIA), n42 Title I of which was intended to [\*503] improve state "independent living programs" through creation of a new federal grants to states program entitled the "John H. Chafee Foster Care Independence Program" (named after its Senate sponsor). To obtain these funds, state plans must show how this money will be made available statewide to children at various ages and stages of achieving independence, and involving both the public and private sector to help these children. n43

n42 Pub. L. No. 106-169, *113 Stat. 1822* (1999).

n43 See *id.* § 101(b). Funds can be used to:

- Aid in youth transition to self-sufficiency;
- Assist in helping youth get a high school diploma, career exploration, vocational training, job placement, and job retention;
- Train youth in daily living skills, including budgeting and financial management skills;
- Provide youth with substance abuse prevention and preventive health assistance (including smoking avoidance, nutrition education, and pregnancy prevention);
- Help youth receive the education, training and services necessary to obtain employment, and help youth prepare for and enter post-secondary training and education institutions;
- Secure mentors for youth and the help of dedicated adults to youth ageing out of foster care; and
- Give financial, housing (including support of room and board costs), counseling, employment, education, and other support to former foster youth (ages eighteen to twenty-one) to help them achieve successful self-sufficiency.

*Id.*

FCIA established requirements for states to compile data on the youth participating in this program, services provided them, and the outcomes of youth emancipating from the system. However, almost ten years later, the federal government still has not begun the process of collecting this data, and elements of the data which states must report are still being finalized. Finally, FCIA authorized states to optionally continue Medicaid coverage for youth ages eighteen through twenty who transition out of the foster care system at their eighteenth birthday or thereafter. In 2002, FCIA was amended to add a program whereby federal vouchers for education and training of foster youth are allotted to the states.  
n44

n44 Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133, § 201, *115 Stat. 2413*, 2422-25 (2002).

#### PERSONAL OBSERVATIONS

FCIA's Chafee Program was only the beginning of federal attention to the plight of older children nearing emancipation from the child welfare system, but it was a good start. Today, there are several additional federal approaches to help older foster youth, including state options to continue Title IV-E funded foster-care support through age twenty-one. Chafee money (currently \$ 140 million annually) provides a critical foundation to help older children in foster care, but far more needs to be done so that youth exiting foster care have their educational, vocational and job placement, **[\*504]** physical and mental health, and other needs met before emancipating to adult independence, and no child should ever be permitted to exit from foster care to homelessness.

##### *G. Safe and Timely Interstate Placement of Foster Children*

2006-Many abused and neglected children may be appropriately placed with a parent or family members or others in a state other than that of their current residence. The Safe and Timely Interstate Placement of Foster Children Act of 2006 (STIPFCA) n45 was intended to help speed completion of such placements, especially when home studies are required before children can be moved into safe, permanent out-of-state homes. The law created a program of federal incentive payments to states completing home studies within thirty days after receipt of a request from another state child welfare agency, but even absent these funds, states have been given only sixty days for home study completion. To help expedite successful interstate placements where appropriate, STIPFCA authorizes courts to obtain information and testimony from those in other states without requiring interstate travel, and it requires child welfare agencies, as part of their "reasonable efforts" and case planning activities, to identify and consider both in-state and out-of-state placement options.

n45 Pub. L. No. 109-239, *120 Stat. 508* (2006).

STIPFCA also enhances several earlier federal requirements for state child welfare agencies. Health and education records, which since 1997 have had to be kept up-to-date in every foster child's case file, must now be supplied to a child leaving foster care upon reaching the age of majority. The right of foster parents, kinship care providers, and pre-adoptive parents to be heard in court proceedings affecting a child was strengthened by requiring that there be state court rules ensuring their notification of any proceeding related to the child.

#### PERSONAL OBSERVATIONS

Getting home studies done upon request of a sister state remains a problem often delaying, for inordinate amounts of time, the interstate placement of children, especially with relatives who are fit, able, and willing to care for children who might otherwise be in the foster care system. There is a concern that the home study "request" process itself can cause delays, with states asking for complex forms to be filled out, sending back incomplete forms, etc. Home studies, for many states, are not the only part of a process that may improperly delay completed interstate placements. Underlying all this is not only STIPFCA's approaches towards reform, but also the Interstate Compact on the Placement of Children, which [\*505] observers have long noted needs reform to help speed completion of the interstate placement process.

*H. Child and Family Services Improvement Act*

2006--In findings at the beginning of the Child and Family Services Improvement Act (CFSIA), n46 Congress noted that in 2004 there were 872,000 children found to be abused or neglected by parents or caretakers, and that about \$ 700 million annually was being spent on child welfare programs other than foster care. Yet no state had yet been found in compliance with the federal standards set in the CFSR.

n46 Pub. L. No. 109-288. § 2, 120 Stat. 1233, 1233-34 (2006).

Congress also noted that the frequency of caseworker visits with foster children was associated with timely achievement of permanency, and that parental methamphetamine abuse had become a major cause of abuse and neglect. This law therefore targeted part of the federal "Promoting Safe and Stable Families - Title IV-B funding for states to (1) enhance the ability of child welfare agencies to assure children in foster care have at least *monthly* caseworker visits, and (2) improve interagency collaboration and integration of programs and services to help increase safety, permanency, and well-being of children in or at risk of out-of-home placement due to parental or caretaker methamphetamine or other substance abuse.

The law also addressed involvement of youth in judicial decision-making regarding their exit from the foster care system. It requires, at any permanency hearing, or any hearing related to a youth's transition from foster care to independent living, that the youth be consulted in an age-appropriate manner regarding any proposed permanency or transitional plan. Today, states must go further and require child welfare agencies to work with foster youth on developing personal transition plans. There is also a requirement that states have policies and administrative and judicial procedures for children abandoned at or shortly after birth, enabling permanency decisions to be made expeditiously with respect to the child's placement. This is similar to an earlier-enacted CAPTA state grant eligibility provision.

There was a further new requirement, that child welfare agencies assure that physicians and other medical professionals are "actively consulted and involved in" health and well-being assessments and appropriate medical treatment for youth in the child welfare system. n47 This was a response to the need for states to better address the health care needs of children in foster care, as identified through the CFSR process. Finally, in response to the hurricanes of 2005 and their impact on affected child [\*506] welfare systems, the law required all states to have procedures for how their child welfare agencies will (1) identify, locate, and continue availability of services for children under state care or supervision who are displaced or adversely affected by a disaster, (2) respond to new child welfare cases in areas adversely affected by a disaster and provide services in those cases, (3) remain in communication with caseworkers and other essential child welfare personnel who are displaced because of a disaster, (4) preserve essential program records, and (5) coordinate services and share information with other states.

n47 *Id.*

## PERSONAL OBSERVATIONS

CFSIA stresses the importance of, and attempts to guide practice into achieving, at least monthly visits of caseworkers to all children in foster care. But it does *not* do something equally important: help assure that children living at home under the protective supervision of a child welfare agency, and their parent or caretaker, have at least a monthly caseworker visit. Another provision of CFSIA is the first federal recognition of the importance of youth involved in the child welfare system having a direct say in their permanency outcomes. Hopefully it will not be the last time Congress requires courts (and agencies) to actively involve young people in the very decisions that will affect their lives forever.

### *I. Adam Walsh Protection and Safety Act*

2006--Principally intended to keep children safe from sexual predators, the Adam Walsh Protection and Safety Act (the Adam Walsh Act) n48 contains language to eliminate states' ability to "opt out" of criminal record check provisions in Title IV-E for prospective foster and adoptive parents, and it requires that these checks (1) be done on all children (not just those IV-E eligible) and (2) be "fingerprint-based checks of national (FBI) crime information databases."

n48 Pub. L. No. 109-248, *120 Stat. 587* (2006).

This law also requires a background check of any child abuse and neglect registry maintained by a state on any prospective foster or adoptive parent or on "any other adult living in (their) home" in states in which they have resided during the preceding five years. n49 Further, it requires states to cooperate in providing that registry information. It also requires safeguards be in place to prevent unauthorized disclosure of that registry information, or its use for purposes other than foster or adoptive placement background checks.

n49 *Id.*

Another important section of this law gives child welfare agencies access to Federal Bureau of Investigation (FBI) criminal information data-bases, [~~507~~] to be used in investigating or responding to reports of child abuse, neglect, or exploitation (for example, to conduct "checks" on adults in homes being investigated for child maltreatment). The FBI is required through this law to do fingerprint-based checks of its national crime information databases at the request of a child welfare agency conducting an investigation of abuse or neglect of a child. The law further gives child welfare agencies the ability to have data terminals with direct terminal access to certain FBI databases (for example, the National Crime Information Center (NCIC)) if those agencies meet all requirements set by the Attorney General, including training, certification, and background screening of those using the terminals.

Finally, the Adam Walsh Act requires HHS to establish a "national registry" of substantiated cases of child abuse or neglect, with states providing information for this registry in a "standardized electronic form" that HHS will determine, with "case-specific identifying information" that includes the name of the perpetrator and the nature of the substantiated case. n50 Registry information is only to be accessible by federal, state, Indian tribe, or local government entities, or any agent of those entities with a need for this information in order to carry out responsibilities under law to protect children from child abuse and neglect. HHS must establish standards for the dissemination of information in its registry and must also, within a year from the date of this law, conduct a study on the feasibility of "establishing data collection standards" for the registry, looking at the costs and benefits of such standards, identifying current standards in use, and examining due process procedures. Absent appropriated funding targeted for this national registry, it has not yet been implemented.

n50 *Id.* § 633(2).

## PERSONAL OBSERVATIONS

The Adam Walsh Act begins with a list of the names of eighteen child victims of murder, abduction, or sexual assault, and then in seven subtitles adds requirements for federal and state governments intended to help prevent such tragedies. However, implementation cannot succeed without sufficient appropriated funds to carry out the functions outlined in the Adam Walsh Act, and to date that has not been forthcoming from Congress. Therefore, for example, there have been no targeted funds available to HHS to create a national registry of information on substantiated child abuse and neglect cases or for states to upgrade the quality of their central registry information systems so that sharing of information with other states, as also required in the Adam Walsh Act, can be promptly and effectively carried out. Also, few states to date have taken advantage [~~\*508~~] of the Adam Walsh Act's authorization of CPS workers to obtain criminal history information during their casework with adults in the homes being investigated (or to which children may be returned from foster care). This federal law, like others, will not succeed in making children safer until it is both widely used and adequately funded.

### V. Concluding Thoughts

How successful has all this federal legislation been, especially since state requirements were significantly expanded in 1980? Are maltreated children better protected from repeat abuse and neglect? Are they safer when removed from home and placed in foster homes, with relatives, or in other settings? Are they much more likely to have their education, physical and mental health, and other needs addressed? Are their parent or relative caretakers better accessing services needed to enhance caretaking? Has the time children spend in foster care gotten appreciably shorter? Are children transitioning from the foster care system to independence better prepared to live as successful and thriving adults? Unfortunately, the data we have does not permit us to answer any of these questions affirmatively.

After the final draft of this article had been submitted to the editor, an important new law was enacted in the 110th Congress to further support state efforts in addressing these concerns. n51 But at the end of 2008, legislation still was not enacted that arguably is most needed to make available federal financial support to states so that at least as many dollars are available for services to help keep families safely together as for support of the costs of children's foster placements. As of federal fiscal year 2008, the expected annual cost of the Title IV-E federal foster-care program is about \$ 4.5 billion. Expected money available to states for both the Title IV-B child welfare services and "safe and stable families" programs is only about \$ 368 million. As mentioned earlier, this imbalance has been there since the 1960s.

n51. Shortly before this article went to press, in October 2008, President Bush signed Public Law 110-351, the Fostering Connections to Success and Increasing Adoptions Act. To further advance earlier child-welfare reforms described in the article, the Act's major provisions:

- Require notice to relatives when children enter foster care;
- Enhance federal support to engage extended family members in aiding abused and neglected children;
- Support a new IV-E federally subsidized permanent relative guardianship program;
- Encourage keeping siblings together in placements (or otherwise facilitating sibling visits), and encourage foster children to stay in school and to be in good health;
- Improve services for youth transitioning from foster care, including work with each youth to develop a personal transition plan;
- Provide, for the first time, Federal IV-E financial assistance to Indian Tribes;
- Use Federal IV-E assistance for costs of legal, judicial, and other training; and

- Allow states to use IV-E money for youth in foster care up to age 21.

[\*509] The federal CFSRs conducted by HHS are an essential part of the federal oversight function, and the next administration must strengthen the review process. I believe that Congress should build a set of financial incentives for states to *exceed* national standards, rather than the current ability of the federal government to simply impose financial penalties for noncompliance with those standards. Congress should also provide financial incentives to states to encourage strengthening of citizen review panels, and also provide federal support (as has been done in the elder services area) for state level Children's Ombudsman or Independent Office of the Child Advocate programs to help children, parents, and others who have complaints regarding any aspect of the child welfare system. Local juvenile and family courts should have federal matching funds for improving court-based services troubled families need, for lowering the workloads of judges handling child-abuse-and-neglect-related cases, for assuring that children and parents receive the best possible court-appointed legal advocacy, and for restructuring the court in a more holistic fashion to address the full range of child and family needs.

A decade ago, for the Millennium Issue of the *Family Law Quarterly*, I wrote about American child protection policy and practice. n52 Recognizing then, as now, the vast negative impact on society of child maltreatment, I suggested we need new policy solutions to help address the problem, and then not only to fully fund them but further to *mandate* them. We need adequate support from government to encourage evidence-based practice improvements (based upon tightly-constructed demonstration projects that have had rigorous social science evaluations). We should no longer see proven practices and programs unfunded or vastly [\*510] under-funded. Finally, government child-protection reform should also include support of substantial court and legal practice improvement, but that support should be accompanied by funding for social science evaluation that can help demonstrate the positive impact of those improvements.

n52 See Howard Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765 (1999). The ten-point agenda I proposed in that article included:

1. Requiring the public child protection system to be far more professional and child-focused;
2. Focusing interventions on serious and chronic problems leading to child maltreatment, and providing child protective services through local neighborhood programs;
3. Requiring child protective service agencies and courts to make specific findings on the relationship of family poverty to children's entry or continuation in the child welfare system;
4. Using the law to help end inappropriate and harmful physical punishment of children;
5. Holding batterers more accountable for exposing children to domestic violence;
6. Doing more to address parental substance abuse that endangers children;
7. Changing laws to make more appropriate use of kinship placements;
8. Taking quicker decisive action to terminate parental rights when warranted;
9. Increasing penalties for serious crimes committed against children, revising evidence laws and court practices to promote more effective prosecution of such crimes, and funding court system collection of prosecution and sentencing data; and

10. Providing better identification of, and protections for, a wider range of child victims.

*Id.*