



BIPARTISAN ADVOCATES UNITED TO KEEP FAMILIES TOGETHER

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## **Protect Children, Families, and the Constitution in CAPTA:**

### **Proposed Amendments to CAPTA with Bipartisan Support**

#### **A. Introduction—What United Family Advocates Stands for and How We Came Together to Support Policies That Will Protect Children and Families**

We've all read the stories about children who are brutally abused by those who are supposed to love them. United Family Advocates shares in the outrage and the anguish over such cases. But outrage and anguish are not enough. Curbing violence against children requires real solutions. Instead, public policy has made the problem worse, wasted precious resources that could have been better targeted, and caused enormous collateral damage to innocent families.

#### **Who We Are**

Child welfare policy has been formed in large measure by advocates who purport to speak for children. Families most directly affected by child protective intervention have largely been left out of the decisions affecting them—indeed, their voices have rarely been heard by policy makers. This is so when it comes to legal representation as well as policy advocacy. Over the past decade, advocacy groups have formed that recognize the importance of both hearing from the families and addressing the rights and responsibilities of child welfare agencies to serve them better. As advocacy for families has increased, with new legal services programs developing and multidisciplinary supports becoming more widely adopted as a model, families are starting to speak out against the injustices they face and an increasing number of stories in the media have documented how families are harmed by misplaced child protection interventions. Still, millions of families in America who experience child protection investigation have no meaningful access to counsel or other advocacy.

This is a bi-partisan problem and it calls out for bi-partisan solutions. It is an urban problem and it is a rural problem. As a result of the work of groups representing diverse views across the political spectrum, we realized that the voices of families and children caught up in the child welfare system were not being adequately heard by policymakers. United Family Advocates was formed following the 2016 Presidential election to fill this gap by bringing together litigators, academics, and policy advocates who, despite our political differences, share common concerns with the way the child welfare system operates.

The groups and individual members of UFA have long track records of advocacy for families, and their organizations collectively represent the interests of millions of American families who have come into contact with child protective services. A number of our members have been child and family advocates for many decades, but have only now come together to express their views on how CAPTA and the Social Security Act—the two primary child welfare statutory schemes—should better reflect the interests of the families we serve.

UFA’s proposed reforms will make all of America’s children safer.

## **A. Children and Families Deserve Better**

We have so overloaded our child protective services agencies with false reports, trivial cases (like those of children whose parents let them walk home from parks when they are mature enough to exercise that form of independence from round-the-clock overparenting) and cases in which family poverty is confused with “neglect” that child protective services workers in most states have no time to investigate serious abuse cases properly. That almost always is the real reason for the horror stories that make headlines. This overload that starts with initial hotline calls and continues through investigations, registers, and wrongful removal policies discussed below, compelling child protective services workers to spend time on cases where children are safe and well cared for, at the expense of children who are beaten, starved, abandoned, sexually exploited, or even killed.

No system can prevent every child abuse tragedy – just as no police department can prevent every crime. But we can do better. We can have a system that curbs damage to innocent families and gives workers more time to identify children in real danger, who are, fortunately, a small minority of the children currently coming to the attention of the system. Amending CAPTA is one place to start, as CAPTA is the federal law that has created an overloaded hotline and investigation system that leads to the tragedies that we all wish to prevent.

### **The Current System**

Every year in America more than 3.5 million children are forced to endure a child abuse investigation or receive a formal alternative response from the CPS system (2/3 of these children have investigations).<sup>1</sup> In the past two reported years, over 7.4 million children have come to the attention of the hotlines that CAPTA requires states to maintain, necessitating a massive,

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<sup>1</sup> All annualized data in this document concerning reports and substantiation are from U.S. Department of Health and Human Services, Administration for Children and Families, [\*HHS Child Maltreatment 2016; HHS Child Maltreatment 2017.\*](#)

overburdened triage system to screen the calls. State hotlines are plagued by response delays and high employee turnover rates, directly affecting the quality of initial screenings and sweeping in far too many children while failing to prevent serious harm. One study estimates that nearly one-third of American children—and as many as 53 percent of African-American children—will endure such an investigation at some point in their childhoods.<sup>2</sup> An astronomical number of persons are listed as perpetrators of abuse or neglect in child abuse registers based solely on the say-so of a caseworker—all without minimally adequate due process protections. In many states, these individuals will remain listed in the register for 20 to 50 years to life. Efforts are underway in some states to lower these extraordinary registry periods, which often do not distinguish between a parent who lets her children walk to school by themselves from a parent who tortures or starves her child.

Even when well-meaning workers may try to cushion the blow, such an investigation is not a benign act. Children are questioned about the most intimate aspects of their lives; sometimes they are strip searched by workers looking for bruises, photographed without court orders or parental consent, and even genitally examined without notice to their parents.<sup>3</sup> At a time when we are becoming more sensitive to the impact of trauma on children, it's urgent to understand that a child abuse investigation is, itself, a trauma.

The standard for “substantiating” an allegation in virtually all states is minimal. There is almost never a hearing beforehand and little or no chance for the accused to present a defense. Caseworkers simply check a box on a form and process a finding that goes into a child abuse register (in most states: registers are not literally required by CAPTA but virtually all states have such registers as the means of recording the outcome of a Hotline call). The standards for substantiating cases vary from “practically nominal” credible evidence in some states—a standard referred to as creating a “staggering” rate of error,<sup>4</sup>-- to clear and convincing evidence in just one state (Kansas). Most states treat a “preponderance of the evidence” standard as sufficient for a caseworker and supervisor, on their own authority and without judicial or administrative review by a person with legal training, to declare a child to be abused or neglected and register a finding of guilt against the parents as the perpetrators of such abuse or neglect. This practice can not only cause unnecessary trauma to children through unjustified removals, it also sets up a system of blacklisting parents from employment and educational opportunities

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<sup>2</sup> Hyunil Kim, et. al., [“Lifetime Prevalence of Investigating Child Maltreatment Among US Children,”](#) *American Journal of Public Health*, Vol. 107, No. 2, pp. 274-280. February 2017.

<sup>3</sup> These practices have been challenged on constitutional grounds in *Greene v. Camreta*, 661 F. 3d 1201, reversed as moot on other grounds, 563 U.S. 692 (2011); *Tenenbaum v. Williams*, 193 F. 3d 581 (2<sup>nd</sup> Cir. 1999) and *Doe v. Woodard.*, No. 18-1066 (10<sup>th</sup> Circuit, January 3, 2019). Due to broad immunity doctrine that protect caseworkers, practices that may be unconstitutional are not always subject to remedial orders.

<sup>4</sup> See *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, *aff'd in relevant part*, 397 F. 3d 493 (7<sup>th</sup> Cir. 2005). *Dupuy* was a class action suit with a certified class of 150,000 persons who had been listed as perpetrators of abuse or neglect in the Illinois State Central Register. *Dupuy I* challenged the lack of due process on behalf of the members of the plaintiff class who worked with children based on “practically nominal” evidence and also challenged the misleading notices and delayed processes available to clear one’s name off the register. Evidence at the *Dupuy I* trial showed that 75% of those who challenged the registered findings against them were eventually exonerated, but after experiencing serious trauma to their personal, professional, and family lives. (*Dupuy II* was a second phase of the case and challenged the use of shadow removal processes known as “safety plans.”). See generally, D. Redleaf, “Child Abuse Registers Abuse Due Process,” *Verdict Magazine*, April 2018 (available at <https://files.acrobat.com/a/preview/45d0172f-8241-4ee8-bffa-cdd679854179>).

without due process of law.<sup>5</sup> While low-income families are disproportionately victimized by such practices, middle and high income parents who work in the fields of medicine, education, law, child development, and social services are also affected. Because registers operate as employment blacklists, parents waiting months and years for exoneration are very often unable to work in a number of fields—trapping untold thousands of parents in poverty (if not millions, as the numbers of persons listed in registers is not reported in currently-maintained data reports).<sup>6</sup>

And one doesn't have to be an adult to be included – even children have been listed as “child abusers.”<sup>7</sup>

Nevertheless, only 18 percent of investigated reports are determined to be “substantiated.” And the only study we know of on the issue found that workers were two to six times more likely to wrongly substantiate an allegation than to wrongly declare it unfounded.<sup>8</sup> Anonymous reports, allowed under CAPTA and encouraged in practice under mantras that encourage any person to “see something and say something,” have extraordinarily low substantiation rates and actually provide an invitation to politically motivated and other harassing calls, with anemic-to-non-existent protections against such abuses.<sup>9</sup>

In several states, practices of separating families without due process during the investigatory stage have been challenged in federal court cases. Litigation in Illinois and Pennsylvania has documented the use of so-called “safety plans” that issue under threats that if the parents do not leave their home or allow their children to live with relatives or friends, the children will be taken from them and placed with strangers where they will not be allowed to see them.<sup>10</sup>

Safety plan practices are utilized by state child protective agencies without any federal oversight and are not counted in reported statistics, making it difficult to assess the scope of the problem nationally. However, news reports, legal policy review, and litigation show such practices

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<sup>5</sup> Three federal courts of appeals have so found: *Valmonte v. Bane*, 18 F. 3d 992 (2<sup>nd</sup> Cir. 1994); *Dupuy v. Samuels*, 397 F. 3d 493 (7<sup>th</sup> Cir. 2005) and *Humphries v. County of Los Angeles*, 554 F. 3d 1170 (9<sup>th</sup> Cir. 2008).

<sup>6</sup> In *Dupuy*, average delays in exoneration were 18 months and some register appeals took as long as three years. It was this delay that the federal court called “agonizing and frustrating,” and noted that the resulting denial of caregivers’ opportunity to work in their chosen professions caring for children “harm the children of Illinois.” See *Dupuy*, 141 F. Supp. 2d 1090, 1130.

<sup>7</sup> In fact, in *Dupuy*, children as young as 6 years old were listed as perpetrators of abuse or neglect for up to 50 years, until the plaintiffs challenged the practice. In Illinois, children over 10 can be listed as perpetrators but no registered finding can remain in place past the minor’s 23<sup>rd</sup> birthday. Of course, unlike Juvenile Sex Offender Registers, these registered child abuse or neglect findings do not require a court review on the merits or a guilty plea. Like other registered findings, child abuse registry findings against minors usually occur under the same low burdens of proof, lack of prior court action, lack of appointed counsel, and limitations on available administrative remedies as apply to the whole populations of persons who find their names in state central registers.

<sup>8</sup> Study Findings: Study of National Incidence and Prevalence of Child Abuse and Neglect: 1988 (Washington: U.S. Dept. of Health and Human Services, National Center on Child Abuse and Neglect, 1988), Chapter 6, Page 5.

<sup>9</sup> See Dale Margolin Cecka, “How Child Abuse Hotlines Hurt the Very Children They Are Trying to Protect,” *Washington Post* (May 6, 2015). D. Margolin Cecka, Abolish Anonymous Reporting to Child Abuse Hotlines, 64 *U. Richmond L. Rev.* 51 (2014).

<sup>10</sup> See, e.g., *Croft v. Westmoreland County Children Youth*, 103 F3d. 1123 (3d. Cir. 1997);

occurring in Texas, Arizona, and South Carolina.<sup>11</sup> Parents are threatened unconstitutionally with the loss of their children to foster care.<sup>12</sup> Federal oversight on behalf of children and families to protect against such abuses is overdue.

Of those cases that are “substantiated,” the overwhelming majority are nothing like the horror stories. Indeed, many children return home after short stays in foster care or remain home despite substantiations, with no services or supports offered to the family, effectively rendering the investigation nothing more than a “Scarlet Letter” that stigmatizes a parent or, as noted earlier, sometimes even a child, with the label “child abuser.” This is so even though the most common “substantiated” allegations are for “neglect,” which most state statutes define as lack of adequate food, clothing, shelter, or supervision—in short, a definition of poverty.<sup>13</sup> And neglect encompasses amorphous categories of “injurious environment” and “inadequate supervision” that fail to distinguish genuine harm from normal parenting practices (such as letting children play outside in a nearby park when their parents judge them mature enough to do so).

Millions of children each year endure the trauma of needless investigation for nothing. And all the time wasted on those investigations is, in effect, stolen from finding children in real danger.

### **Foster Care Compounds the Trauma**

All of the trauma is vastly compounded when children are needlessly taken from everyone they know and love and placed in foster care.

Sometimes, of course, foster care placement is essential to protect children from serious harm. But often, placements occur when poverty is confused with “neglect.” Three separate studies have found that 30 percent of America’s foster children could be back home right now if their families just had decent housing.<sup>14</sup> Other cases fall between the extremes; there may be real family problems, but problems that can be solved without resorting to foster care.

Two massive studies of more than 15,000 *typical* cases found that even under the current system, where families often get little or no help, children left in their own homes typically fared better even than comparably maltreated children placed in foster care.<sup>15</sup>

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<sup>11</sup> For a recent discussion and debate on this topic, see D. Redleaf, “When the Child Protective Services Systems Gets Child Removal Wrong,” *Cato Unbound*, November, 2018, citing, inter alia, *Hernandez v. Foster*, 657 F. 3d 463 (7<sup>th</sup> Cir. 2011).

<sup>12</sup> See *Doe v. Heck*, 327 F. 3d 492 (7<sup>th</sup> Cir. 2003).

<sup>13</sup> U.S. Dept. of Health and Human Services, Child Welfare Information Gateway, [\*Definitions of Child Abuse and Neglect: State Statutes, Current Through April, 2016\*](#).

<sup>14</sup> Deborah S. Harburger with Ruth Anne White, “Reunifying Families, Cutting Costs: Housing – Child Welfare Partnerships for Permanent Supportive Housing,” *Child Welfare*, Vol. LXXXIII, #5 Sept./Oct. 2004, p.501.

<sup>15</sup> Joseph J. Doyle, Jr., “Child Protection and Child Outcomes: Measuring the Effects of Foster Care,” *American Economic Review*, 97(5), December 2007: 1583-1610; Joseph J. Doyle, Jr., “Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care,” *Journal of Political Economy* 116(4), August 2008: 746-770.

Even when substance abuse is a problem, drug treatment for the parents almost always is a better option than foster care for the children. That was the finding of researchers who studied infants born with cocaine in their systems. Once again, the children left in their own homes fared better than those placed in foster care.<sup>16</sup> For this reason, we support the intentions of the Family First Prevention Services Act to extend preventive services to families in need of support, though we also believe that the hotline should not be a gateway to such service delivery. Rather, families need to be able to access preventive services in the general community. The hotline should be reserved for cases in which child welfare services are more urgently needed to protect children at imminent risk of harm. To the extent Family First creates a broad net of surveillance of families who are poor or in need of social services such as counseling and mental health treatment, we believe that policies and practices are needed to ensure that a tight definition of children at imminent risk of placement is consistently employed and processes are established to insure the voluntariness of services provided to families.

The problems of the foster care system occur even when the foster home is a good one. The majority are. But multiple studies have found abuse in one-quarter to one-third of foster homes – and the record of group homes and institutions is worse.<sup>17</sup>

None of this means that children never should be placed in foster care. But foster care is widely misused and overused. Officially children are taken from their parents and placed in foster care nearly 270,000 times every year.<sup>18</sup> Additionally, many children are taken as a condition of informal “safety plans”—which are shadow removals of children from their homes under the guise of “voluntary agreements” that are procured, oftentimes, by extremely threatening demands for family separation absent definite and articulable evidence of abuse and without affording a process for families to resist such demands.<sup>19</sup> Often these removals are not included in the data on entries into care that states send to the federal AFCARS database.

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<sup>16</sup> Kathleen Wobie, Marylou Behnke et. al., “To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine,” *Pediatric Research* (1998) 43, 234–234.

<sup>17</sup> E.g. Mary I. Benedict and Susan Zuravin, Factors Associated with Child Maltreatment by Family Foster Care Providers (Baltimore: Johns Hopkins University School of Hygiene and Public Health, June 30, 1992) charts, pp.28, 30; J William Spencer and Dean D. Kundsén, “Out of Home Maltreatment: An Analysis of Risk in Various Settings for Children,” *Children and Youth Services Review* Vol. 14, pp. 485–492, 1992; Peter Pecora, et. al., *Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study* (Seattle: Casey Family Programs, 2005); David Fanshel, et. al., *Foster Children in a Life Course Perspective* (New York: Columbia University Press, 1990), p.90.

<sup>18</sup> U.S. Department of Health and Human Services, Adoption and Foster Care Reporting and Analysis System, [Numbers of Children Entering Foster Care By State, FY 2006 – FY 2015.](#)

<sup>19</sup> See n. 8 *supra*. The fact that no data is required as to such shadow removals creates a system that lacks means of redressing this form of overreaching. Nevertheless, court cases in Illinois and Pennsylvania have documented these removals as widespread practices and settlements have called for steps to curtail these practices. See e.g., <https://www.familydefensecenter.net/fdc-cases/2016-safety-plan-settlements>. News stories in Texas, North Carolina, and Arizona have documented similar separations there—all without judicial sanction and under the guise of so-called agreements absent indicia of knowing, voluntary, or intelligent decision-making by the affected parents to demonstrate voluntariness of the family separations in fact.

## **Legal Orphans**

At its worst, children are left to grow up in foster care. A dangerously high number of children placed in foster care run away from foster care placements, become homeless, and a shocking number become the victims of sex traffickers.<sup>20</sup> Even if these worst case scenarios don't occur, many youth age out of foster care and into very unstable lives. With terminations of parental rights outrunning adoptions every year, we've created a generation of legal orphans – children who “age out” of foster care with no ties to their own parents and no adoptive home either. (United Family Advocates will be seeking changes to the Social Security Act to address this tragedy).

## **False Dichotomies**

It's often claimed that keeping children safe and keeping families together are opposites that need to be “balanced.” Or it is claimed, we have to tolerate a lot of “false positives” – wrongly condemning innocent families and needlessly removing children – in order to save children.

Neither is true. On the contrary, the false positives and the needless foster care overload the entire system, making it harder to find children in real danger.

## **CAPTA Reauthorization: A First Step to Set Things Right**

Families and children deserve better. The upcoming reauthorization of CAPTA presents the 116<sup>th</sup> Congress with a unique opportunity to fix the flaws in the current child welfare system that are hurting thousands of American families. UFA calls on Congress to enact the following recommended improvements to CAPTA to further our shared goals of protecting children, strengthening families, and safeguarding fundamental constitutional rights.

UFA's proposed reforms, if enacted in the CAPTA reauthorization process, will make America's children safer.

## **B. CAPTA REAUTHORIZATION PROPOSALS**

### **1. The Policy of Protection of the Legal Rights of Families Should Be Expanded to Insure Fairer Investigations, Notice of Rights, Non-Intervention Against Reasonably Prudent Parents, and Voluntariness of Services**

In 2003, Congress amended the Child Abuse Prevention and Treatment Act (CAPTA) to protect children, while at the same time ensuring that the Constitution and fundamental rights of families are also respected. Some of the 2003 changes were a useful start on recognizing the importance of familial rights in the processes set forth under CAPTA. But these modest provisions do not do justice to the scale of potential impairments of fundamental rights of families through the many processes CAPTA requires. These CAPTA requirements include child abuse reporting, investigation procedures, the appointment of counsel for children, and child

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<sup>20</sup> See, e.g., US. Institute Against Human Trafficking, <https://usiaht.org/the-problem/>; Annie E. Casey, “Fostering Youth Transitions, at <https://www.aecf.org/m/resourcedoc/aecf-fosteringyouthtransitions-2018.pdf> (reporting 30% of 19-21 year old former foster youth had experienced homelessness)

abuse registers that are widely used in nearly all states for screening of persons for employment, licensing and adoption processes).

More protections for families' rights to fair investigations, adherence to a reasonable and prudent parent standard (which is present in the Social Security Act as to foster parents but not parents), notification of rights and processes for redress, and insuring the voluntariness of services would go a long way to conforming state practices to the constitutional requirements that have been declared by federal courts but which have yet to be subject to active oversight through CAPTA reviews or implemented through conforming laws policies and practices in the entities funded by CAPTA. We support the following further changes to 42 U.S.C. § 5106a (b)(2):

- “(xviii) provisions and procedures to require that a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse or neglect investigation, advise the individual of the complaints or allegations made against the individual, in a manner that is consistent with laws protecting the rights of the informant;” and including their right to have all available exculpatory evidence gathered and considered<sup>21</sup> and their right to be heard in the event of any decision affecting their family life or career opportunity.
- (xix) provisions addressing the training of representatives of the child protective services system, including representatives appointed for the children and the parents, regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment. These duties include insuring respect for the rights of reasonably prudent parents to direct the upbringing of their children in the absence of evidence of unfitness or blatant disregard for the duty of care toward a child in such person's care; insuring that whenever services are provided to families absent a court order are provided on a voluntary basis to families; and insuring that the right of families to decline such services is respected;

These provisions, if enacted, would establish a stronger recognition of the fundamental rights of families in the child protection investigation process and create a stronger understanding that legal processes (including the requirement for full and fair consideration of evidence and respect for the rights of parents to direct the upbringing of children) are principles of the child protection system, consistent with the Constitution as interpreted by our courts.

## **2. Change the Child Removal Standard” to Comport with U.S. Constitution’s Due Process Guarantees.**

Current federal law (under the Social Security Act) requires nothing more than that state judges conclude that children may be removed from their parents' custody whenever the judge believes that it would be “contrary to the welfare of the child” to remain at home. This standard is basically indistinguishable from the “best interest of the child” standard, which is notorious for

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<sup>21</sup> This is the constitutional standard set forth by the Seventh Circuit Court of Appeals in the case *Dupuy v. Samuels*, 397 F. 3d 493 (7<sup>th</sup> Cir. 2005).



its open invitation to state officials to make decisions based on the officials' own view of what is good for children. In practice, this open ended standard leads to the removal of children from minority, disadvantaged, and disabled parents at disproportionate rates and without the exacting scrutiny of the true risks to the children. Such power and such unbridled discretion when exercised to interfere with a fundamental right is not merely dangerous; it is unconstitutional.<sup>22</sup> The following changes would alter this "contrary to the welfare of the child" language to the more constitutionally accurate language that "removal is necessary to protect the child from imminent risk of serious harm."

- In CAPTA, 42 U.S.C.A. § 5106a(2)(B)(II)(vi) change "may also be" to "is" and insert the following: "consistent with the requirements of probable cause and exigent circumstances prior to any non-consensual removal of a child without a judicial order and the timely filing of a petition following any removal of a child from his family."

### **3. Reform "Safety Plans" to Better Protect Family Integrity**

As mentioned above, state child protective services routinely use so-called "safety plans," which operate as shadow removals restricting the rights of families outside of the oversight of CAPTA and without constitutionally mandated due process protections. Congress should reform and rein in this practice by:

- a. Reforming how states present and sometimes coerce families to sign "safety plans" by requiring state child protection workers to apply the constitutional standard for the involuntary removal of children before requesting or requiring any agreement that separates children from their parents or restricts children's contacts with their parents;
- b. Requiring state child protection caseworkers to inform families when a safety plan is a legal, binding document, and advise the family of their constitutional right to seek legal advice before signing the safety plan; and
- c. Mandating that States report on the use of safety plans and directives that cause children and families to separate during investigations or live under restrictions that are not court-ordered.

The following changes to the language of CAPTA will accomplish these goals:

- In 42 U.S.C.A. § 5106a(2)(B)(4) remove "risk and" before "safety assessment tools" and insert the following: "providing that such tools, protocols and systems shall not authorize the separation of any child from his legal parent or guardian without a judicial order, absent probable cause and exigent circumstances; and providing that no safety plan, order or directive, restriction on access to the child, or transfer of custody shall issue

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<sup>22</sup> "We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.... We have little doubt that the Due Process Clause would be offended 'if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Quilloin v. Walcott* 434 U.S. 246 (1978) at 255

unless the parent is afforded a timely opportunity to challenge the basis for limiting their association with the child.”

- In 42 U.S.C.A. 5010a(2)(B)(4) (or other section on data reporting) include a requirement (also currently set forth in 42 U.S.C.A. 5106a(2)(B)(4)) of “providing for reporting and data collection concerning safety plans, out-of-court orders, directives, transfers of custody and restrictions on contact that are put in place by child protective services authorities following a hotline call in the absence of judicial sanction and insuring that no separation of the child from his legal parent or guardian or any restriction on contact following a hotline call is deemed “voluntary” absent protections to assure that the decision to separate or abide by such restrictions is the product of a free will and made knowingly and intelligently, without threats or promises, and afford the parent or guardian a meaningful opportunity for review of the basis for the separation or restrictions on contact with the child.”

#### **4. Ensure that States protect Innocent Parents and Caregivers from Wrongful Inclusion on Central Registries of Child Abuse and Neglect**

According to the National Child Abuse and Neglect Data System (“NCANDS”), approximately 3.5 million children were investigated as possible victims of child abuse or neglect in 2016. Of those, CPS agencies determined that more than four-fifths were not, in fact, victims of any form of maltreatment. Of the numerous reports of abuse that are made, only a relatively small percentage are substantiated. Even baseless reports, once submitted to the central registry, may adversely affect a person’s prospects of employment in any child-related career. In reported federal court decisions in New York and Illinois, 75% of those who seek removal of their report from the registry are ultimately successful after enduring hardships that stem from being the subject of such a report.

If a parent or caretaker is accused of abuse or neglect, CAPTA currently provides that there must be a process by which they can request that the report be changed from “indicated” to “unfounded” on the central registry. While CAPTA requires states to develop “provisions, procedures, and mechanisms [...] by which individuals who disagree with an official finding of child abuse or neglect can appeal such finding,” there is no further specificity of the processes that much be in place to hear such appeals.<sup>23</sup> In many states, the process is not transparent or accessible.<sup>24</sup>

Congress should make sure that states are protecting the Due Process rights of individuals by allowing individuals to get off the central state child abuse registries and preventing the use of registered findings to impair family life and careers absent such fair processes. UFA recommends the following changes to CAPTA with respect to registries:

- Insert the following language at the end of 42 U.S.C. § 5106(a)(2)(B)(i): “as to procedures for appealing and responding to appeals of substantiated reports of child abuse or neglect and obtaining a timely fair hearing before a neutral hearing officer on

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<sup>23</sup> See 42 U.S.C. § 5106(b)(2)(B)(xv)(II).

<sup>24</sup> See D. Redleaf, “Child Abuse Registers Abuse Due Process, Verdict Magazine, April 2018 (available at <https://files.acrobat.com/a/preview/45d0172f-8241-4ee8-bffa-cdd679854179>)\_

the merits of any finding against an alleged perpetrator of abuse or neglect and before any finding is entered into a State's child abuse register; protecting against the registry use or disclosure of any finding of abuse or neglect prior to the opportunity for a fair hearing before a neutral hearing officer unless the alleged perpetrator has given written permission to such disclosure; assuring that in any case in which an alleged perpetrator secures a final judicial determination establishing such person is not responsible for abuse or neglect, such person's name shall be removed from the State's child abuse register; and insuring that no report of abuse or neglect is retained for excessively long periods relative to the offense alleged."

## **5. Stop Family Separations, Including Separations Based on Poverty Rather than Neglect**

Many children are removed by state CPS agencies when there is no abuse involved. Public benefits, housing, and preventive services support should be used first rather than removal. During the 115<sup>th</sup> Congress, United Family Advocates worked with Congresswoman Gwen Moore (D. Milwaukee) to support the introduction of H.R. 6288, "The Family Poverty Is Not Child Neglect Act." The focus of this bill was to require states to establish policies that prevent the removal of children from their families for reasons of poverty. In addition to the provisions that would call for states not to separate children from their parents for reasons of poverty, states should be required to define "neglect" more narrowly so that parents who are working as hard as they can to support their child and meet their basic subsistence needs will not be charged with neglect. Consistent with the intent of the Family First Preventive Services Act, we recommend the following changes to CAPTA to accomplish this goal:

- Insert at the end of 42 U.S.C. 5106a(a)(1) the following language to the requirements as to the intake, assessment, screening, and investigation of reports of child abuse or neglect, insuring that reports concerning a child's living arrangements or subsistence needs are addressed through services or benefits and that no child is separated from his parent for reasons of poverty;
- and (4) enhancing the general child protective system by developing, improving, and implementing ~~and~~ risk ~~and~~ safety assessment tools and protocols, including the use of differential response, providing that such tools, protocols, and systems shall not encourage the separation of any child from his legal parent or guardian on the basis of poverty [...].

## **6. Require States to Set Standards for Prompt Disposition of Cases to Streamline Investigations**

Congress should require that states provide "off-ramps" to investigations so that if state child protection workers determine that an accusation is demonstrably false or incorrect, they can close the investigation immediately without having to go through the entire investigation. Congress should make the following changes to CAPTA to provide for the speedy resolution of false or incorrect allegations:

- Insert at the end of 42 U.S.C.A. § 5106a(2)(B)(II)(IV) the following: “including the prompt disposition of reports clearly lacking in merit with a minimum of intrusion into child and family life.”
- Insert at the end of 42 U.S.C.A. § 5106a(2)(B)(II)(v) the following: “the prompt closure of investigations that lack merit.”

## **7. Replace Anonymous Reporting with “Confidential” Reporting**

Anonymous tips are easily abused by disgruntled relatives, neighbors, or others in the community to harass innocent families, while wasting the valuable and limited resources of state and local authorities. This hurts the children who are actually in danger of abuse and neglect. At the same time as anonymous tips should be eliminated, the duties and education of mandated reporters should be reinforced with more clarity as to what needs to be reported in order to meet CAPTA requirements. Congress should replace anonymous reporting with a system that allows confidential reporting; that is, the reporter can still keep her or his identity secret from the accused, but must provide it to the CPS agency. UFA recommends the following language:

- Insert at the end of 42 U.S.C.A. § 5106a(b)(2) the following: “(xxiv) provisions to ensure that all reports of suspected or known instances of child abuse and neglect include the name, address, and phone number of the reporter.”
- Insert at 42 U.S.C.A. § 5106a(b)(2)(VI)(xviii) after “...advise the individual of the complaints or allegations made against the individual,” the following: “including whether such complaints or allegations were reported confidentially [...]”
- Insert in 42 U.S.C.A. § 5106a(b)(2)(VI)(xviii) after “...to improve public education,” the following: “and mandated reporter education” and after “...incidents of child abuse and neglect,” the following: “when the reporter has objectively reasonable suspicion of abuse or neglect.”
- Insert in 42 U.S.C.A. § 5106a(b)(2)(B)(i) after “...individual to report known and,” the word “reasonably.”

## **8. Ensure that state child protection agencies are protecting the constitutional rights of families**

Current CPS practices under CAPTA are suspect as they infringe upon the constitutional due process protections of the targets of child abuse and neglect complaints. These infringements impair constitutional liberty interests in both pursuit of career opportunity and in allowing children to grow up free from the coercive power of the state.

Congress should require that to receive federal CAPTA money, states must submit a plan outlining how they will protect the constitutional rights of those accused of abuse or neglect and the rights of children alleged to be victims, including their 4<sup>th</sup> Amendment protections against unreasonable searches and seizures and 14<sup>th</sup> Amendment protections of due process and equal

protection of the laws. UFA supports the following changes to the language of CAPTA to accomplish this important goal:

- Insert in 42 U.S.C.A. § 5106a(2)(B) after “multidisciplinary teams,” the phrase “of neutral experts” and “fair” before “investigations.”
- Insert at the end of 42 U.S.C.A. § 5106a(2)(B)(i) the following: “and obtaining a timely, fair hearing before a neutral hearing officer on the merits of any finding against an alleged perpetrator of abuse or neglect and before any finding is entered into a State’s child abuse register; protecting against the registry, use or disclosure of any finding of abuse or neglect prior to the opportunity for a fair hearing before a neutral hearing officer unless the alleged perpetrator has given written permission to such disclosure; assuring that in any case in which an alleged perpetrator secures a final judicial determination establishing such person is not responsible for abuse or neglect, such person’s name shall be removed from the State’s child abuse register; and insuring that no report of abuse or neglect is retained for an excessively long period relative to the offense alleged...”

## **9. Narrow the Overbroad Use of “Plans of Safe Care” to Children in Need of Such Plans**

When an infant is at risk of abuse, state laws require that mandated reporters, including medical professionals, must make a report to the child welfare agency. CAPTA unnecessarily expands the scope of state intervention by creating a requirement that in *every* case of substance exposure, a notification to the child welfare agency must be made and a “plan of safe care” must be developed. 42 U.S.C.A. § 5106a(b). This means that even when a mother is fit and able to care for her child and there is no suspicion of abuse or neglect, she is likely to be swept into needless and invasive interventions that place her family at risk of separation.

This problem is compounded by a lack of clarity in terms of *who* must develop a “plan of safe care.” In many states, a presumption has emerged that the child welfare agency must take responsibility for establishing a plan of safe care, *even when* there are no concerns for abuse or neglect and the mother is already providing safe care for her child.<sup>25</sup> Further, the scope of the notification requirement is so broad as to require a notification of the child protection agency even in cases where a mother is receiving a course of medically assisted treatment and her physician has no concerns about her fitness to parent.

This expansion of child welfare intervention beyond the traditionally limited scope of its authority to intervene in instances of abuse or neglect has the perverse consequence of diverting the child welfare agency’s limited resources *away from* children who are truly at risk, instead requiring substantial resources be diverted to families who are safe and not in need of intervention. It also discourages parents with substance use problems from giving birth in hospitals or even seeking out prenatal care.

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<sup>25</sup> See GAO Report: *SUBSTANCE-AFFECTED INFANTS: Additional Guidance Would Help States Better Implement Protections for Children*, GAO-18-196: Published: Jan 19, 2018 (finding that “38 states reported that CPS is required to develop a plan of safe care for all notifications of substance-affected infants that are accepted for investigation, including those that are not substantiated.”).

We therefore recommend that CAPTA eliminate the “plan of safe care” requirement as duplicative of the mandated reporting requirement. In the alternative, we would recommend a presumption in the law that in the absence of a documented safety threat to an infant, a “plan of safe care” will be created by a mother and her physician. We would also eliminate the requirement that health professionals report to child protective services “withdrawal symptoms resulting from prenatal drug exposure,” which needlessly expands child welfare interventions to mothers who are receiving medically-assisted treatment that may cause such symptoms under medical supervision.

The changes we propose would be implemented in the following way (with appropriate repetition in the other instances referencing “plans of safe care”):

- Amend 42 USCA 42 U.S.C.A. § 5106a(2)(B)(ii) as follows: following the language “an assurance...that the State has in effect and is enforcing a State law, or has in effect and is operating a statewide program... that includes—[...] policies and procedures (including appropriate referrals to child protection service systems and for other appropriate services) to address the needs of infants born with and identified as being affected by substance or withdrawal symptoms or a Fetal Alcohol Spectrum Disorder resulting from prenatal drug exposure that has not been treated prior to the birth of the infant or as to which care there is not an appropriate plan agreed upon between parent and the health care provider, including a requirement that health care providers involved in the delivery or care of such infants notify the child protection services system of the occurrence of such condition in infants for whom hotline calls are otherwise deemed necessary and appropriate, except that such notification shall not be construed to—”

**10. Support pilot projects to provide access to family advocates, including legal counsel, in community based prevention programs without requiring a hotline call at the threshold.**

United Family Advocates supports broader access to counsel and advocacy for prevention of abuse or neglect hotline calls and child welfare responses. These programs should be located in community-based agencies that provide housing, mental health, substance abuse, domestic violence, food, and health care services and that operate holistically to prevent child abuse or neglect. The hotline should not be the trigger to such programs, as we believe primary prevention and access to counsel in the community will create stronger communities and prevent the need for child protection interventions. We would appreciate the opportunity to discuss how such programs could be structured to have maximum benefit for American children and families.

## **C. UFA REPOSES TO OTHER PROPOSALS UNDER CONSIDERATION BY CONGRESS**

We understand that Congress will be considering other proposals by advocates with various concerns about the CAPTA. We welcome the opportunity to be consulted on policies that other child and family advocates are seeking. Here, we respond to two of the proposals we believe are being suggested by other advocacy groups or which are of interest to Congressional leaders.

## **1. United Family Advocates Opposes a National Child Abuse Register**

Congress should resist any temptation to create a national child abuse registry. The Adam Walsh Child Protection and Safety Act of 2006 sought just such a provision, calling first for a study on the feasibility of such a registry. The Department of Health and Human Services (HHS) issued an interim report in May of 2009, then its final report to Congress in September 2012.

Perhaps as a result of those reports, Congress never appropriated any funds toward the formation of that registry.

The concerns raised and supported in the 2012 *Report to Congress on the Feasibility of Creating and Maintaining a National Registry of Child Maltreatment Perpetrators* were as follows (verbatim, with discussion omitted):

- Current statutory limits to the information that could be contained in a national registry would prevent the accurate identification of child maltreatment perpetrators.
- Under current law, the predominant use of a national registry would be for employment background checks not explicitly mentioned in the statute.
- If a national registry would be used for employment background checks, due process requirements for a national registry will need to be stronger than those in place in a number of states.
- A national registry of child maltreatment perpetrators would provide limited information for child maltreatment investigations beyond what it already available from existing single state registries.
- A lack of participation in a voluntary registry system could prevent a registry from fulfilling its intent.

The report concludes: “As a result of this research and discussions with a variety of interested parties, we have determined that a functional registry cannot be implemented under the current statutory language in the Adam Walsh Act.”

We agree with these conclusions. We are especially concerned with the due process matter, as a registry would run considerable risk of false-positives while providing no reliable gains for child protection investigators. See our comments on the need for expanded due process protections in child abuse registers.

For further information we would direct lawmakers to review that report, available from the HHS website at <https://aspe.hhs.gov/report/report-congress-feasibility-creating-and-maintaining-national-registry-child-maltreatment-perpetrators>.

## **2. United Family Advocates Opposes the Expansion of Predictive Analytic Approaches to Child Protection Practice**

Child welfare is a field permeated with racial and class bias. Though predictive analytics has been touted as a way to ease these biases, it actually magnifies them. The leading child welfare predictive analytics model currently in use has been aptly described as “poverty profiling.” Predictive Analytics already has been piloted in child welfare – and over and over it

has failed. The problems are not fixable by legislative language demanding reports about self-policing by child welfare agencies. These tools are simply too powerful for agencies that lack any real accountability.

We share the concerns about expansion of predictive analytics that are eloquently discussed by Virginia Eubanks in her excellent book, *Automating Inequality* (the child welfare section is excerpted in [this article for Wired](#)). See also [this discussion in Youth Today](#). And there are better alternatives, such as Blind Removal Meetings, [an approach](#) pioneered by Nassau County, New York.

## **D. CONCLUSION: UNITED FAMILY ADVOCATES APPRECIATES THE OPPORTUNITY FOR FURTHER DISCUSSION AS CAPTA REAUTHORIZATION PROCEEDS**

While UFA is less than two years old, it has brought together and created a network of advocates with deep experience and knowledge of the workings of child protective services programs in America. In preparing this proposal, we have drawn on the vast and diverse experience of our members. As CAPTA moves through the reauthorization process, UFA appreciates the opportunity for continued discussion as to the important issues that Congress is considering to improve the child protection system so that children are protected and families are better able to care for their children, reserving the powers of coercive State authority to those children and those families who cannot safely care for them and providing more community-based supports to the children and families who can and should be cared for at home.

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(Submitted on February 6, 2019)