

THE CHILD'S REPRESENTATION UNDER CAPTA: IT IS TIME FOR ENFORCEMENT

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I. INTRODUCTION

The Child Abuse Prevention and Treatment Act ("CAPTA")¹ has been recognized as very influential in the effort to provide children with advocates when they have been victims of abuse and neglect. Due to CAPTA's mandates, each state is required to provide advocates for children in dependency proceedings² where decisions will be made about the most important things to children: whether and how often they will see their families; where they will live and attend school; whether they will have to leave their friends and homes; and whether they will be living with strangers.

The *UNLV Conference*³ recommends strengthening the role of the child's voice in CAPTA by mandating that CAPTA comply with the Convention on the Rights of the Child ("CRC").⁴ The CRC requires a child be given the opportunity to be heard in any judicial proceeding affecting the child.⁵ The difference between CAPTA and the CRC is that CAPTA requires an advocate

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¹ Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107 (2000).

² In this article, the term "dependency proceedings" will be used to describe what other authors define as "child welfare proceedings" or "child protection proceedings." See Randi Mandelbaum, *Revisiting the Question of Whether Young Children in Child Protection Proceedings Should be Represented by Lawyers*, 32 *LOY. U. CHI. L.J.* 1 n.2 (2000).

³ The Conference, *Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, was held January 12-14, 2006 and brought together a multidisciplinary group of children's scholars and advocates. The conference produced a series of recommendations. *Recommendations of the UNLV Conference on Representing Children in Families: Children's Advocacy and Justice Ten Years after Fordham*, 6 *NEV. L.J.* 592 (2006). This article is only addressing one of those recommendations: that CAPTA comply with the Convention on the Rights of the Child.

⁴ U.N. Office of the High Commissioner for Human Rights, Convention on the Rights of the Child, Sept. 2, 1990, <http://www.unhcr.ch/html/menu2/6/crc/treaties/crc.htm>.

⁵ Article XII of the Convention on the Rights of the Child states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

to recommend what is in the best interest of a child,⁶ whereas the CRC requires that a child be given the opportunity to be heard.⁷ While I support the Conference recommendation to strengthen CAPTA to bring it into compliance with the CRC, the recommendation, even if adopted by Congress, is meaningless unless the representation provision of CAPTA is enforced. Many states do not provide the child representation required by CAPTA.⁸ Thus, unless states are required to comply with the mandate of CAPTA (which is now over thirty years old) to provide representation to these children, changing the language regarding the nature of children's representation will not make a difference.

This Article will discuss CAPTA in Part II. Following this introduction of CAPTA, Part III will discuss how states are complying with CAPTA. Then, there will be a discussion of other child welfare enforcement mechanisms in Part IV. Part V will discuss whether the child representation provisions can be enforced through litigation. Finally, the article will recommend that, if CAPTA is to be revised, it provide for better oversight and enforcement of its child representation provisions, that the Department of Health and Human Services ("HHS") enforce CAPTA regardless of statutory changes, and that advocates use litigation to enforce the representation mandate of CAPTA.

II. CHILD ABUSE PREVENTION AND TREATMENT ACT

CAPTA, first passed in 1974, was the first major federal legislation to address child abuse.⁹ CAPTA encourages states to reform their juvenile courts and foster care systems through the enticement of federal money.¹⁰ To obtain additional federal dollars, the states had to agree to the following reforms: a child abuse and neglect reporting system; sufficient resources to promptly investigate and effectively deal with allegations of abuse and neglect; methods to preserve the confidentiality of child abuse and neglect records; cooperation

⁶ 42 U.S.C. § 5106a (b)(2)(A)(xiii)(II) (2000).

⁷ Convention on the Rights of the Child *supra* note 5, at art. XII

⁸ See discussion *infra* Part III.

⁹ See Sara J. Klein, Note, *Protecting the Rights of Foster Children: Suing Under § 1983 To Enforce Federal Child Welfare Law*, 26 CARDOZO L. REV. 2611, 2618-19 (2005) (The federal government's involvement in child welfare began in 1909 but CAPTA was the federal government's first major effort to "to lay the foundation for the modern child welfare system.") *Id.* at 2618.

¹⁰ See 42 U.S.C. §§ 5101-5107 (2000 & Supp. 2005). The concerns that led Congress to take action included: a recognition that a growing number of children were being neglected, maimed and killed; "an urgent desire to prevent these tragic events;" concerns that professionals were not reporting suspected child abuse despite state mandated reporting statutes; that many incidents of abuse were not being brought to the attention of medical professionals; and the awareness of the lack of resources in the social service community to address these concerns. See H.R. REP. NO. 93-685 (1973), *reprinted in* 1974 U.S.C.C.A.N. 2763, 2764-66.

Congressional authority to make these laws conditioned on federal spending derives from Article 1, Section 8, clause 1, which provides that: "The Congress shall have the power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform through out the United States." U.S. CONST. art. I, 8, cl. 1. This clause has been interpreted as authorizing Congress to tax and spend in order to provide for the general welfare. *U.S. v. Butler*, 297 U.S. 1, 64-67 (1936).

of law enforcement, courts and human service agencies; and that “in every case involving an abused or neglected child which results in a judicial proceeding a guardian ad litem shall be appointed to represent the child in such proceedings.”¹¹ This article focuses on this last mandate that every state accepting federal funds for child abuse prevention efforts provide every abused or neglected child an advocate.

Although the language of CAPTA initially mandated the appointment of a guardian ad litem to represent the child, the language of CAPTA was changed in 1996. It now mandates each state submit a plan which “contain[s] an outline of the activities that the State intends to carry out using amounts received under the grant to achieve the purposes of this subchapter, including . . .

(xiii) provisions and procedures requiring that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—

(I) to obtain first-hand, a clear understanding of the situation and needs of the child; and

(II) to make recommendations to the court concerning the best interests of the child.”¹²

Since the passage of CAPTA the federal government has encouraged additional child welfare reforms through other legislation.¹³ However, CAPTA

¹¹ 42 U.S.C. §§ 5101-5107 (2000 & Supp. 2005).

¹² 42 U.S.C. § 5106a (b)(2)(A)(xiii) (2000). The legislative history indicates that these changes were motivated by concerns regarding the quality of representation provided to children. “Under the current system, there are more and more cases where an appointed guardian has made virtually no contact with the child, while proceeding to make unfounded recommendations to the courts. This legislation strengthens the requirement that these representatives know and actively advocate the best interests of the children they are representing.” 142 CONG. REC. H11140, 11149 (Sept. 25, 1996) (Statement of Rep. Goodling).

¹³ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 (1997) (codified at 42 U.S.C. §§ 601-679 (2000)) (to promote the adoption of children in foster care); Foster Care Independence Act of 1999, Pub. L. No. 106-169 (2000) (codified at 42 U.S.C. §§ 404-1396 (2000)) (to amend part E of title IV of the Social Security Act to provide states with more funding and greater flexibility in carrying out programs designed to help children make the transition from foster care to self-sufficiency); Child Abuse Prevention and Enforcement Act, Pub. L. No. 106-177 (2000) (codified at 42 U.S.C. §§ 14601-64 (2000)) (to reduce the incidence of child abuse and neglect); Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-314 (2000) (codified beginning at 42 U.S.C. §§ 620, 670 (2000)) (to improve the administrative efficiency and effectiveness of the nation’s abuse and neglect courts and for other purposes consistent with the Adoption and Safe Families Act of 1997); Promoting Safe and Stable Families Amendments of 2001, Pub. L. No. 107-133 (2002) (codified at 42 U.S.C. §§ 629-677 (Supp. 2002) (to extend and amend the program entitled Promoting Safe and Stable Families under title IV-B, subpart 2 of the Social Security Act, and to provide new authority to support programs for mentoring children of incarcerated parents; to amend the Foster Care Independent Living program under title IV-E of that Act to provide for educational and training vouchers for youths aging out of foster care); Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36 (2003) (codified at 42 U.S.C. §§ 5101-5116 (Supp. 2005) (to amend the Child Abuse Prevention and Treatment Act to make improvements to and reauthorize programs under that Act).

remains a key source of funding for the states.¹⁴ Although virtually every state receives this CAPTA money, there is no evidence that the states are complying with the mandate to provide every child an advocate.¹⁵ Unlike subsequent federal foster care legislation, CAPTA does not have a detailed monitoring system or effective enforcement mechanism.¹⁶

III. STATES' COMPLIANCE WITH CAPTA'S CHILD REPRESENTATION PROVISION

One could interpret the representation provision of CAPTA to merely require states to have "provisions and procedures" mandating the appointment of an advocate for every child in a judicial proceeding arising out of abuse and neglect. In other words, states could meet the federal mandate if they have a law that mandates representation, even if the reality is that no one follows the law due to the lack of funding or resources.¹⁷ However, such an interpretation would make the federal mandate meaningless. Furthermore, the governor of each state must assure the federal government that the state is "enforcing the state law" promulgated to comply with CAPTA.¹⁸ Thus, to meet the requirement of CAPTA, states must not only have a law mandating appointment but also a means to provide an advocate in every dependency case.

States have varying provisions designed to comply with the CAPTA requirement. Thirty-one states have laws providing for lawyers as guardians ad litem,¹⁹ some states have laws that provide court appointed special advocates

¹⁴ The funding for FY 2006 is \$27,280,000. Currently forty-eight States, the District of Columbia and Puerto Rico receive the grant. CHILDREN'S BUREAU, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CHILD ABUSE PREVENTION AND TREATMENT ACT (CAPTA) STATE GRANTS, http://www.acf.hhs.gov/programs/cb/programs_fund/state_tribal/capta.htm (last visited May 17, 2006).

¹⁵ See *infra* Part III for more detail on states' compliance with this provision of CAPTA.

¹⁶ See *infra* Part IV for a discussion on newer federal legislation with enhanced reporting and enforcement mechanisms.

¹⁷ See *Eric L. v. Bird*, 848 F. Supp. 303, 313 (D. N.H. 1994) (CAPTA "only requires that New Hampshire enact the specified child abuse laws in order to qualify for federal funds under the Act."). See also *Jeanine B. v. Thompson*, 967 F. Supp. 1104, 1117-18 (E.D. Wis. 1997).

¹⁸ 42 U.S.C. § 5106a(b)(2)(A). The regulation implementing this provision of CAPTA makes it clear that there is an expectation that each child get an advocate:

Guardian ad litem. In every case involving an abused or neglected child which results in a judicial proceeding, the State must insure the appointment of a guardian ad litem or other individual whom the State recognizes as fulfilling the same functions as a guardian ad litem, to represent and protect the rights and best interests of the child. This requirement may be satisfied: (1) By a statute mandating the appointments; (2) by a statute permitting the appointments, accompanied by a statement from the Governor that the appointments are made in every case; (3) in the absence of a specific statute, by a formal opinion of the Attorney General that the appointments are permitted, accompanied by a Governor's statement that the appointments are made in every case; or (4) by the State's Uniform Court Rule mandating appointments in every case. However, the guardian ad litem shall not be the attorney responsible for presenting the evidence alleging child abuse or neglect.

¹⁹ 45 C.F.R. § 1340.14(g) (2005).

¹⁹ ALA. CODE § 26-14-11 (2005); ARK. CODE ANN. § 9-27-316 (2004); CAL. WELF. & INST. CODE § 317(c) (West 2005); COLO. REV. STAT. §§ 19-1-111, 19-1-103(59) (2004); CONN. GEN. STAT. ANN. § 46b-129a (2006); D.C. CODE ANN. §4-1301.02(13) (2005); IOWA CODE

(“CASAs”)²⁰ and others have a statutory scheme that provides for a combination of both.²¹

Although required to report their compliance with CAPTA,²² many states are not reporting whether they are meeting the CAPTA mandate that every child have a representative.²³ CAPTA requires each state to report “the num-

§ 232.89 (2005); KAN. STAT. ANN. § 38-1505(a) (2005); KY. REV. STAT. ANN. § 620.100 (2004); LA. CHILD. CODE ANN. ART. 607 (2005); MD. CODE ANN., CTS. & JUD. PROC. § 3-813(d-e) (West 2005); MASS GEN. LAWS ch. 119, § 29 (2004); MICH. COMP. LAWS § 712A.17c (2005); NEB. REV. STAT. § 43-272 (2005); N.J. STAT. ANN. § 9:6-8.23 (West 2005); N.M. STAT. § 32A-1-7(D) (2005); N.Y. SOC. SERV. LAW § 358-a(6) (McKinney 2005); N.C. GEN. STAT. § 7B-601(a) (2005); OKLA. STAT. tit. 10, § 7003-3.7 (2004); 42 PA. CONS. STAT. § 6311 (2005); S.C. CODE ANN. § 20-7-110(1) (2004); S.D. CODIFIED LAWS § 26-8A-9 (2005); TENN. CODE ANN. § 37-1-149 (2005); TEX. FAM. CODE ANN. § 107.001 (Vernon 2004); UTAH CODE ANN. § 78-3a-912 (2005); VT. R. FAM. P. 6 (2005); VA. CODE ANN. § 16.1-266 (2005); W.VA. CODE § 49-6-2 (2005); WIS. STAT. § 48.23 (2004); WYO. STAT. ANN. § 14-3-211 (2005). These attorneys perform a variety of roles. Some function in a traditional attorney-client role. *See e.g.*, CAL. WELF. & INST. CODE § 317(c) (West 2005); KY. REV. STAT. ANN. § 620.100 (2004); MASS GEN. LAWS ch. 119, § 29 (2004); N.J. STAT. ANN. § 9:6-8.23 (West 2005); VT. R. FAM. P. 6 (2005). Some function as “best interest” advocates. *See e.g.*, MICH. COMP. LAWS § 712A.17c (2005); UTAH CODE ANN. § 78-3a-912 (2005). Other states have the attorneys fulfill both roles. *See e.g.*, CONN. GEN. STAT. ANN. § 46b-129a (2005); MISS. CODE ANN. § 43-21-121(4) (2005); W.VA. CODE § 49-6-2 (2005); WYO. STAT. ANN. § 14-3-211 (2005). If a conflict arises between best interest and the child’s wishes, some states provide the opportunity or mandate to appoint an additional advocate to carry out one of the conflicting roles. *See e.g.*, D.C. SUPER. CT. R. GOV. NEGLECT & ABUSE PROC. R. 42 (2005) and D.C. SUP. CT. NEGLECT & ABUSE PROC R. 42 (2005); MICH. COMP. LAWS § 712A.17c (2005); TENN. SUP. CT. R. 40(e)(2) (2004); WYO. STAT. ANN. § 14-3-211 (2005).

²⁰ Three states imply that they only appoint a CASA or non-lawyers as GAL. HAW. REV. STAT. §§ 587-2; 587-34 (2004) (makes reference to GAL as a person appointed by the court); IDAHO CODE ANN. §§ 16-1602(19)-(20), 16-1614 (2005); OR. REV. STAT. §§ 419A.170, 419B.195 (2005). In North Dakota it is not clear whether a guardian *ad litem* needs to be an attorney. N.D. CENT. CODE § 27-20-48 (2005).

²¹ ALASKA STAT. §§ 47.10.050 and 25.24.310 (2005); ARIZ. REV. STAT. ANN. § 8-824 (West 2006); DEL. CODE ANN. tit. 13 § 701(c) (2005); FL. STAT. ANN. §§ 39.820, 39.822 (2005); GA. CODE ANN. § 15-11-9 (2005); 705 ILL. COMP. STAT. 405/2-17 (2005); IND. CODE §§ 31-32-3-1, 31-32-3-3, 31-32-3-5 (2004); ME. REV. STAT. ANN. tit. 22, § 4005 (2005); MINN. STAT. §§ 260C.163(3)(b), 260C.163(5) (2004); MISS. CODE ANN. § 43-21-121(4) (2005); MO. REV. STAT. § 210.160 (2005); MONT. CODE ANN. § 41-3-112 (2004); NEV. REV. STAT. §§ 432B.420, 432B.500, 432B.505 (2004); N.H. REV. STAT. §§ 169-C:10(I) & (II) (2004); OHIO REV. CODE ANN. § 2151.281 (West 2005); R.I. GEN. LAWS § 40-11-14 (2005); WASH. REV. CODE § 13.34.100 (2005). Three states imply that they only appoint a CASA or non-lawyer as GAL. HAW. REV. STAT. §§ 587-2; 587-34 (2004) (makes reference to GAL as a person appointed by the court); IDAHO CODE ANN. §§ 16-1602(19) & (20), 16-1614 (2005); OR. REV. STAT. §§ 419A.170, 419B.195 (2005). Although Florida’s statute suggests that an attorney or non-attorney volunteer can be appointed, in the overwhelming majority of cases, the advocate is not an attorney. *See* FLORIDA STATEWIDE OFFICE OF THE GUARDIAN AD LITEM, THE VOICE FOR FLORIDA’S ABUSED AND NEGLECTED CHILDREN 2004 PROGRESS REPORT (2004), available at http://www.guardianadlitem.org/forms/gal_report.2k4.pdf. In North Dakota it is not clear whether a guardian *ad litem* needs to be an attorney. N.D. CENT. CODE § 27-20-48 (2005).

²² 42 U.S.C. § 5106a(d)(12) (2000).

²³ There is a provision within CAPTA that gave states an excuse for not providing this data. CAPTA requires the data to be provided “to the maximum extent practicable.” 42 U.S.C. § 5106a (d) (2000). This may have been a legitimate excuse when CAPTA was first promulgated in the 1970s before the revolution of the modern computer systems. However,

ber of children for whom individuals were appointed by the court to represent the best interests of such children and the average number of out of court contacts between such individuals and children."²⁴ Only half the states provide information on the number of children appointed representatives and only a few states provide information relevant to the number of out of court contacts.²⁵ Even among the states that report some statistics, the data that is provided is useless. Some numbers are obviously inflated²⁶ and what is reported to HHS is not consistent with reports generated by other agencies within the states.²⁷ According to official reports produced by HHS, the percentage of children being represented in dependency proceedings ranged from less than one percent in Indiana to more than one-hundred percent representation in several states.²⁸ Thus one should not rely on HHS data to assess states' compliance with CAPTA's representation mandate.²⁹

Some states have published what appears to be more accurate data on their compliance with the representation mandate of CAPTA in judiciary reports,³⁰ while other states have a centralized office that coordinates children's representation throughout the state and which provides published reports on the

it is difficult to believe that each state cannot collect how many children are being represented in dependency proceedings with modern judicial data collection systems.

²⁴ 42 U.S.C. § 5106a(d)(12) (2000).

²⁵ ADMIN. ON CHILD., YOUTH AND FAM., CHILDREN'S BUREAU, U.S. DEPT OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2003, 82-83 (2005), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf> [hereinafter CHILD MALTREATMENT 2003] (Only twenty-five states provided information related to the number of children represented and only four states provided information on the average number of contacts.). See also ADMIN. ON CHILD., YOUTH AND FAM., CHILDREN'S BUREAU, U.S. DEPT OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2002, 77-78 (2004), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm02/index.htm>.

²⁶ The following states report greater than 100% representation: Arizona (130%); Florida (373%); Hawaii (337%); Iowa (964%); Kentucky (1016%); Maine (184%); Mississippi (1002%). CHILD MALTREATMENT 2003, *supra* note 25, at 82-83.

²⁷ For example, according to the HHS report Florida provides over 100% representation, CHILD MALTREATMENT 2003, *supra* note 25, at 82-83, but the Florida Statewide Guardian Ad Litem reports only 56% of the children in dependency proceedings are provided representation. FLORIDA STATEWIDE GUARDIAN AD LITEM OFFICE, GUARDIAN AD LITEM 2005 ANNUAL REPORT 24 (2006), available at <http://www.gal.fl.gov/forms/Annual%20Report.pdf>.

²⁸ CHILD MALTREATMENT 2003, *supra* note 25, at 82-83. While this report does not calculate the percentage of victims represented whose case resulted in a judicial proceeding. The figure can be calculated by taking the reported number of victims with court-appointed representatives and dividing this by the number of victims with court action. *Id.* at 82. The resulting representation rates show a widespread failure to comply with the CAPTA mandate.

²⁹ Some of the data is also suspect because the chart indicating the number of victims with court action in some states is illogical. For example, Kentucky reports 18,178 reported victims and only 25 victims with court action. Florida reports 138,499 victims and only 259 victims with court action. *Id.* at 82.

³⁰ See e.g., GEORGIA ADMINISTRATIVE OFFICE OF THE COURTS, CHILD PLACEMENT PROJECT COURT IMPROVEMENT INITIATIVE SUMMER ASSESSMENT REVIEW 2004 (2005), available at <http://www.georgiacourts.org/agencies/cpp/pdf/2004SummerAssessmentReview.pdf>.

agency's performance.³¹ These state reports differ from what is being reported to HHS. In these "internal" state reports, Minnesota reports ninety percent representation of abused or neglected children.³² Georgia reports providing representation to seventy-four percent of the children in dependency proceedings.³³ Indiana reports seventy-two percent of cases with a GAL or CASA leaving 3475 children waiting for an advocate.³⁴ Florida reports providing representation to sixty percent of the children in dependency proceedings leaving 17,558 children without representation in Florida.³⁵ Washington State reports that out of the 4032 new dependency filings in 2004 there were 2275 new case assignments. This would suggest a representation rate of fifty-six percent.³⁶

In addition to these reports that show between ten and fifty-four percent of the children being without the federal mandated advocates, there are serious concerns about the quality of the advocacy that is provided even to those children receiving some type of representation.³⁷ Quality concerns have often focused on the lack of resources needed to support competent representation and the confusion over the role to be played by the advocates.³⁸ CAPTA only

³¹ See e.g., FLORIDA STATEWIDE GUARDIAN AD LITEM OFFICE, *supra* note 27; WASHINGTON STATE CASA, 2004 CASA PROGRAM STATISTICS COMPILATION, (2005), <http://www.wacasa.org/stats/2004%20Stats/2004%20Report.pdf>.

³² MINNESOTA JUDICIAL BRANCH, 2003 ANNUAL REPORT 11 (2004), <http://www.courts.state.mn.us/documents/CIO/annualreports/2003>.

³³ GEORGIA ADMINISTRATIVE OFFICE OF THE COURTS, *supra* note 30, at 9. Although providing an advocate does not always mean providing an effective advocate. See *Kenny A. v. Perdue*, 356 F. Supp 2d 1353 (N.D. Ga. 2005) (finding a caseload in two counties ranging from 439 children per attorney to 183 children per attorney leads to ineffective representation).

³⁴ INDIANA STATE OFFICE OF GAL/CASA, DIV. OF STATE COURT ADMIN., 2003 STATISTICS REPORT 3 (2004), <http://www.in.gov/judiciary/galcasa/reports/2003ann-rept.pdf>.

³⁵ FLORIDA STATEWIDE GUARDIAN AD LITEM OFFICE, *supra* note 27, at 24.

³⁶ WASHINGTON STATE CASA, 2004 CASA PROGRAM STATISTICS COMPILATION 1, 13 (2005), <http://www.wacasa.org/stats/2004%20Stats/2004%20Report.pdf>. In 1998, Washington "candidly informed [an appellate court] that trial courts regularly fail to appoint a guardian ad litem in these circumstances or find good cause for not appointing one based on lack of resources." *In re Dependency of A.G.*, 968 P.2d 424, 431 (Wash. Ct. App. 1998).

³⁷ See *Kenny A. v. Perdue*, 356 F. Supp. 2d 1353, 1362-63 (N.D. GA. 2005) (finding ineffective representation in two counties where every child was represented but with caseloads that make effective counsel impossible); See also Rick Coleman, et al., REPORT TO THE UTAH LEGISLATURE: A PERFORMANCE AUDIT OF THE OFFICE OF GUARDIAN AD LITEM 30 (2005), available at http://www.le.state.ut.us/audit/05_01rpt.pdf#search='Utah%20office%20of%the%20Guarding%20ad%20Litem' ("Since the aim of the GAL is to protect and represent children, carrying average case loads of 174 cases per GAL makes this representation a significant challenge, particularly because many cases involve more than one child."); Astra Outley, *Representation for Children and Parents in Dependency Proceedings*, <http://pewfostercare.org/research/docs/Representation.pdf> (last visited May 17, 2006); Wanda Mohr, Richard Gellers & Ira Schwarz, *Will Juvenile Court System Survive? Shackled in the Land of Liberty: No Rights for Children*, 564 ANNALS AM. ACAD. POL. & SOC. 37, 44 (1999) ("[I]t is often the case that the representative of the child is untrained and unaware of federal and state law as well as existing precedents."); Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 268 (1992).

³⁸ See Outley, *supra* note 37, at 4; Duquette, *supra* note 37, at 268 ("Lawyers are not specially trained in this role and often lack the knowledge of psychology, family dynamics, child interviewing, and child advocacy, which are essential to competent performance in this

recently began to address the requirement that advocates have some level of competency.³⁹

IV. ENFORCEMENT MECHANISMS IN CHILD WELFARE LAWS

The federal government has failed to enforce its mandates in the federal child welfare statutes. The statutory remedy provided in most federal spending statutes is the denial of federal dollars or a penalty to the states that have failed to live up to their obligations under the federal statutes.⁴⁰ Understandably, no one advocates for this remedy, which would make the plight of foster children in the offending state worse.⁴¹

In CAPTA, the first major child welfare statute, there are no specific enforcement mechanisms.⁴² The CAPTA statute does not even expressly provide for financial penalties to noncompliant states. More recent federal child

role. Nor do lawyers ordinarily assume an aggressive follow-up responsibility for activities outside the court where much of value can be accomplished for the child. State laws, generally, provide neither clear descriptions of the role and responsibility of the child advocate, nor adequate pay for the services.”); SUSAN A. SNYDER, PROMISES KEPT, PROMISES BROKEN: AN ANALYSIS OF CHILDREN’S RIGHT TO COUNSEL IN DEPENDENCY PROCEEDINGS IN PENNSYLVANIA 38 (2001), available at <http://www.jlc.org/home/publications/pkpb.php> (“[M]any attorneys do not understand the important differences between being a child’s GAL appointed to advocate for his *best interests*, as compared to being a child’s attorney appointed to advocate for his *expressed interests*.”).

³⁹ Recent amendments to CAPTA have added the requirement that states assure that an advocate appointed to represent a child “has received training appropriate” to the role of representing the child. 42 U.S.C. § 5106a (b)(2)(A)(xiii) (2000).

⁴⁰ See *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981) (“In legislation enacted pursuant to the spending power, the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State.”).

⁴¹ See Pew Commission on Children in Foster Care, *Fostering the Future* 29-30 (2005) <http://pewfostercare.org/research/docs/FinalReport.pdf>. To avoid these negative consequences, the Pew Commission recommends “a portion of the financial penalties resulting from . . . [failures in the foster care system] be reinvested in a state’s child welfare system to address identified shortcomings.” *Id.*

⁴² According to 42 U.S.C. § 5106a(d) (2000 & Supp. 2004), CAPTA requires annual reports but there are no provisions for the Secretary of HHS to enforce noncompliance or breach of the assurances provided by the states’ governors. The only enforcement appears to be a request for corrective action and a suggestion in an HHS manual that funds could be jeopardized. According to the HHS Child Welfare Policy Manual:

If there are instances in which ACYF is presented with evidence of potential deficiencies [in state statutes or policies] (e.g., through the new child and family services program reviews being conducted by the Children’s Bureau, or other sources), action will be taken to verify whether a problem actually exists. If a deficiency is verified, the State will be notified in writing and will be required to take corrective action within a specified timeframe. Funds will not be jeopardized unless the State fails to correct the deficiency within the specified timeframe.

HHS CHILD WELFARE POLICY MANUAL (2006), http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=64. Based on correspondence relating to pending litigation in Nevada, it appears that HHS would use the program improvement plan mechanism to enforce CAPTA even though this is not an explicit tool of CAPTA. HHS Spokeswomen, Susan Orr, indicated in an inquiry from the Las Vegas Sun newspaper that the federal government would place Nevada under a program improvement plan if it were found that the state had not complied with the representation mandates of CAPTA. See David Kihara, *State Fails to Provide Representation for Many Abused, Neglected Children*,

welfare legislation mandates performance evaluations and specifically threatens loss of funds for failure to improve or for falling below national standards.⁴³

The first federal legislation to impose outcome measures in the child welfare context was the Social Security Amendments of 1994.⁴⁴ This legislation created the Child and Family Service Review system which mandates states to provide information on basic outcomes for children who have been victims of abuse or neglect.⁴⁵

The Adoption and Safe Families Act ("ASFA"), enacted in 2001, strengthened the Child and Family Services Reviews by requiring quantitative and qualitative reports on outcomes for children and families served.⁴⁶ If states are not performing in substantial conformity with national standards, they must submit a program improvement plan.⁴⁷ Failure to improve and begin to perform in substantial conformity will lead to the withholding of federal funds.⁴⁸

Although this new system of accountability raises hope that the federal government is getting more serious about enforcement, initial results are not very promising. After the first round of assessments, not one state has passed the reviews⁴⁹ and the penalties have yet to be imposed.

V. INDIVIDUAL ENFORCEMENT RIGHTS THROUGH COURT ACTION

Efforts to enforce CAPTA through private litigation have also failed. Courts have ruled that there is no private right of action under CAPTA to enforce many provisions.⁵⁰ However, there have been no published opinions directly related to the clause mandating representation.

Under U.S. Supreme Court precedent, to permit a private right of action to enforce a federal spending clause statute like CAPTA,⁵¹ courts must consider

LAS VEGAS SUN, January 16, 2006, <http://www.lasvegassun.com/sunbin/stories/sun/2006/jan/16/519972071.html>.

⁴³ See e.g., Adoption and Safe Families Act of 1997, § 203, Pub. L. No. 105-89, 111 Stat. 2115, (1997) (codified at 42 U.S.C. § 679b); U.S. DEPT. HEALTH & HUMAN SERVICES, CHILD AND FAMILY SERVICES REVIEWS PROCEDURES MANUAL 2000, http://www.acf.hhs.gov/programs/cb/cwmonitoring/tools_guide/procedures/manual.pdf.

⁴⁴ Social Security Act Amendments of 1994, Pub. L. No. 103-432, 108 Stat. 4398 (1994).

⁴⁵ 42 U.S.C. § 1320a-2a (2000). See Gail Chang Bohr, *For the Well-Being of Minnesota's Foster Children: What Federal Legislation Requires*, 31 WM. MITCHELL L. REV. 897, 899 (2005) ("The CFSR is, therefore, a comprehensive and hands-on assessment process that monitors and evaluates child and family services, including protective services, family preservation and support, foster care, independent living and adoption services.").

⁴⁶ 45 C.F.R. § 1355.34 (2005).

⁴⁷ 45 C.F.R. § 1355.35.

⁴⁸ 42 U.S.C. § 674 (d)(1) (2000); 45 C.F.R. § 1355.36 (2005). Penalties range from two percent to forty-two percent of foster care funds for noncompliance with ASFA and failure to implement a corrective action. The funds affected by ASFA are separate from, and substantially greater than, CAPTA funds.

⁴⁹ Pew Commission on Children in Foster Care, *supra* note 42 at 29; Bohr, *supra* note 46, at 898; Klein, *supra* note 10, at n. 28.

⁵⁰ See *Eric L. v. Bird*, 848 F. Supp. 303, 313 (D. N.H. 1994).

⁵¹ Most of the litigation in this area arises in the context of a civil rights action under 42 U.S.C. § 1983. However, the U.S. Supreme Court has indicated that the standard for evaluating whether a statute raises an independent implied right of action or § 1983 claim would be the same. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 290 (2002).

three factors when determining whether a particular statutory provision gives rise to a federal right. First, Congress must have intended that the provision in question benefit the plaintiff.⁵² Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.⁵³ Third, the statute must unambiguously impose a binding obligation on the States.⁵⁴

Relying upon this precedent, lower federal courts have largely rejected claims that CAPTA creates a right to private enforcement.⁵⁵ Only one court has found such an enforceable right under CAPTA.⁵⁶ However, none of these CAPTA cases have addressed the representation provision of CAPTA.⁵⁷

The U. S. Supreme Court denied the right to bring a private action under the Adoption Assistance and Child Welfare Act of 1980 (“Adoption Act”) in *Suter v. Artist M.*⁵⁸ In many respects CAPTA is a similar statute to the Adop-

⁵² *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

⁵³ *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430 (1987).

⁵⁴ *Id.* at 431-432; for application of this three part test, see e.g., *Jeanine B. v. Thompson*, 967 F. Supp. 1104, 1109 (E.D. Wis. 1997).

⁵⁵ See *Hilbert S. v. County of Tioga*, 2005 WL 1460316, at *14 (N.D.N.Y. 2005); *Charlie H. v. Whitman*, 83 F. Supp 2d 476, 496-97 (D. N.J. 2000); *Jordan v. City of Philadelphia*, 66 F. Supp 2d 638, 648-49 (E.D. Pa. 1999); *Doe v. District of Columbia*, 93 F.3d 861, 868 (D.C. Cir. 1996); *Tony L. v. Childers*, 71 F.3d 1182, 1189 (6th Cir. 1995), *cert. denied*, 517 U.S. 1212 (1996); *A.S. v. Tellus*, 22 F. Supp 2d 1217, 1224 (D. Kan.1998); *Thompson*, 967 F. Supp. at 1111-20; *Bird*, 848 F. Supp. at 313; *Baby Neal v. Casey*, 821 F.Supp. 320, 329 (E.D. Pa. 1993), *rev'd. on other grounds* 43 F.3d 48 (3d Cir. 1994); *Jensen v. Conrad*, 570 F. Supp. 91, 112-13 (D. S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir.1984), *cert. denied*, 470 U.S. 1052 (1985).

⁵⁶ *Marisol A. v. Giuliani*, 929 F. Supp. 662, 683-84 (S.D.N.Y. 1996).

⁵⁷ All of the cases in which plaintiffs have raised a claim under CAPTA the claims have involved right to prompt and appropriate investigation of reports of abuse or neglect; their right to protection from those who endanger their health and welfare; and the right to administrative procedures, trained and qualified personnel, effective programs and facilities. See e.g., *Giuliani*, 929 F. Supp. at 683 (Claims arise out of the CAPTA obligations for prompt investigations and the requirements for procedures, personnel, training, facilities to deal with child abuse and neglect allegations.); *Whitman*, 83 F. Supp 2d at 496 (Plaintiffs’ claims focus on the CAPTA requirements for prompt and professional investigations of allegations of abuse or neglect and the right “to protection from those who endanger their health and welfare.”). In *Jensen*, the court addressed all provisions of CAPTA but concluded, “The plaintiff has not directed the court to any substantive provision of the two acts which would have given her decedent a tangible right to be unqualifiedly protected from, or free from, abuse within the contemplation of § 1983.” 570 F. Supp. at 112.

⁵⁸ 503 U.S. 347 (1992). Lower federal courts have limited the holding of *Suter* to the “reasonable efforts” clause. See *Brian A. v. Sundquist*, 149 F. Supp 2d 941 (M.D. Tenn. 2000) (finding that the Adoption Act’s required elements of a written case plan with mandated elements, a periodic review system, and a State plan providing for establishment of a State authority responsible for maintaining standards for foster family homes and child care institutions, created private rights enforceable through a private action); *But see Whitman*, 83 F. Supp. 2d at 476 (finding no cause of action arising out of various portions of the Adoption Act). Congress also limited *Suter* with amendments to the Adoption Act in 1994:

In an action brought to enforce a provision of this chapter, such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in *Suter v. Artist M.*, 112 S.Ct. 1360 (1992) but not applied in prior Supreme Court decisions respecting such enforceability; provided, how-

tion Act. Both are federal funding statutes that provide states with funds to support their child welfare and foster care system.⁵⁹ To participate, the states must submit a plan to the Secretary of the Health and Human Services.⁶⁰ One of the primary justifications for the Court to deny the private right of action in *Suter* was the lack of specific standards or requirements in the Adoption Act, combined with the existence of a specific enforcement mechanism in the Adoption Act. The statutory terms the plaintiffs were seeking to enforce were the right to “reasonable efforts” to prevent removal from a family and “reasonable efforts” to reunify a family. The Court found that these provisions gave the states broad limits within which to comply rather than specific standards or requirements.⁶¹ In addition, the Court found that the Adoption Act provided sufficient enforcement mechanisms for the Court to find Congressional intent to foreclose a private right of action.⁶² Comparing these facts of *Suter* to the representation provision of CAPTA, it is clear that the representation mandate of CAPTA is much more specific in its “rights creating” language than is the Adoption Act’s reasonable efforts section or other sections of CAPTA. Furthermore, CAPTA has no enforcement mechanism for any of its provisions.⁶³

If there is any provision within CAPTA that creates a specific, privately enforceable right, it is the representation provision. Although like the Adoption Act, CAPTA requires states to submit a plan on how they will use the funds allocated,⁶⁴ the thrust of CAPTA is not the plan but the assurances required under CAPTA to qualify even for a CAPTA grant.⁶⁵ Even if many of these assurances are related to broad policy and practices,⁶⁶ the representation section creates a specific obligation to a specific class of beneficiaries, by mandating that an advocate “shall be appointed to represent the child in such proceedings.”⁶⁷ This mandate meets the U.S. Supreme Court’s criteria for finding that a spending clause statute raises a private right of action. This language clearly indicates that Congress intended to confer individual rights upon

ever, that this section is not intended to alter the holding in *Suter v. Artist M.* that section 671(a)(15) of this title is not enforceable in a private right of action.

42 U.S.C. § 1320a (2000 & Supp. 2005)

⁵⁹ *Suter*, 503 U.S. at 351-52.

⁶⁰ *Id.* at 352. The requirement of submission of a plan is not dispositive on the denial of a private right of action. In *Wilder v. Virginia Hosp. Ass’n.*, 496 U.S. 498, 522-23 (1990), there was also a requirement in a Medicaid statute that relied upon a plan submitted to the Secretary of HHS, but the court found that the Medicaid statute permitted a private cause of action because of the specificity of the requirements relevant to the plaintiffs. *Id.* at 519.

⁶¹ *Suter*, 503 U.S. at 360.

⁶² *Id.* at 360-61. The court explained, “[w]hile these statutory provisions may not provide a comprehensive enforcement mechanism so as to manifest Congress’ intent to foreclose remedies under § 1983, they do show that the absence of a remedy to private plaintiffs under § 1983 does not make the ‘reasonable efforts’ clause a dead letter.” *Id.*

⁶³ Based on this Supreme Court precedent, courts have concluded that each provision of a claimed statutory right must be examined in the context of whether the individual provision at issue unambiguously confers a private right of action. See *Whitman*, 83 F. Supp 2d at 484; *Sundquist*, 149 F. Supp 2d at 941 (citing *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)).

⁶⁴ 42 U.S.C. § 5106a (b)(1)(A) (2000).

⁶⁵ 42 U.S.C. § 5106a (b)(2)(A).

⁶⁶ 42 U.S.C. § 5106a (b)(2)(A)-(C).

⁶⁷ 42 U.S.C. § 5106a (b)(2)(A)(xiii). See also 45 C.F.R. § 1340.14(g) (2005) (mandating that states insure a guardian ad litem for every child).

a class of beneficiaries,⁶⁸ and the conferred entitlements are “sufficiently specific and definite to qualify as enforceable rights” to individuals.⁶⁹ CAPTA also meets the additional requirement that the statute lack an administrative means of enforcement.⁷⁰ Thus, based on Supreme Court analysis in *Suter*, a court should find that the representation provision of CAPTA could be enforced by private action.

VI. RECOMMENDATIONS

Without enforcement, the child representation component of CAPTA becomes meaningless. Given the absence of a statutory enforcement provision or even an effective administrative enforcement policy, a private right of action should be acknowledged to enforce CAPTA’s child representation requirement. Advocates should pursue this litigation to enforce the CAPTA representation provision. This could be accomplished through class actions or individual claims for civil remedies.

In addition, CAPTA should be amended to require states to report accurately their compliance with the representation provision of CAPTA, as part of the Child and Family Service Reviews.⁷¹ If CAPTA were amended in this way, the enforcement mechanism for CAPTA would be the same as ASFA and the sanction would be the fines permissible under ASFA.⁷²

Even without this revision to the Act, the U.S. Department of Health and Human Services should more strenuously enforce the child representation component of CAPTA. Individuals and organizations should be able to complain to HHS and get zealous enforcement against states that accept CAPTA funds while blatantly violating CAPTA.

VII. CONCLUSIONS

As the first federal child welfare legislation, CAPTA has fueled much of the movement to provide children with advocates in juvenile dependency proceedings. However, the Act has failed to fulfill its mandate, that in every case involving an abused or neglected child which results in a judicial proceeding, an advocate be appointed to represent the child. To ensure this federal mandate becomes a reality in every juvenile court in the nation, CAPTA needs to be strengthened to provide stronger enforcement mechanisms. The U.S. Depart-

⁶⁸ *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002)

⁶⁹ *Id.* at 280 (quoting *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430 (1987)).

⁷⁰ *Gonzaga Univ.*, 536 U.S. at 280-81 (citing *Wilder v. Virginia Hosp. Ass’n.*, 496 U.S. 498, 522-23 (1990)).

⁷¹ CAPTA would need an additional section on enforcement which would state that the provisions of CAPTA would be enforced in the same manner as 42 U.S.C. §674(d). This could be accomplished with a modification to 45 C.F.R. § 1355.34, without statutory changes.

⁷² The fines under ASFA may be greater than what an individual state receives in grants under CAPTA. For the fines under ASFA are based on what a state receives in Title IV-B and Title IV-E of the Social Security Act which is substantially more than what is received under CAPTA. After more than thirty years of non-compliance and annual false assurances, substantial fines seem justified.

ment of Health and Human Services should enforce this mandate and advocates should seek specific enforcement of this mandate through litigation.

Children who are victims of abuse and neglect and who have their cases presented to a juvenile court, face loss of the most important things to a child: family, friends and an education. Congress was wise in mandating that these losses should not be faced by a child without an advocate. However, the U.S. Department of Health and Human Services and the states have failed these children by failing to enforce CAPTA's representation provision. Thus, it is time for Congress to review CAPTA and provide better enforcement as well as provide better oversight of the executive branch department responsible for its enforcement.