The Florida Senate

Interim Project Report 2006-104 *September 2005*

Committee on Children and Families Senator Walter "Skip" Campbell, Jr., Chair

COMPARISON OF FLORIDA'S PERMANENCY PROVISIONS FOR FOSTER CHILDREN TO FEDERAL REQUIREMENTS

SUMMARY

Florida's long-standing statutory provisions relating to the protection of children who have been abused, neglected, or abandoned have been impacted by recent federal law, particularly the Adoptions and Safe Families Act (ASFA) and its implementing regulations. Florida's child welfare statutes have not been updated to reflect these federal statutes and regulations. As a result, inconsistencies between Florida and federal law have led to confusion in practice.

Florida is monitored by federal officials to ensure compliance with the relevant federal laws and regulations. The failure to comply may result in significant loss of federal funding.

While some changes were made to Florida law immediately after the passage of ASFA in 1997, three major areas of the law remain in need of updating and conforming to federal law. These areas are "reasonable efforts," case planning, and permanency. It is recommended that Florida law be amended to eliminate inconsistencies with federal law in these three areas.

BACKGROUND

Florida's statutory provisions relating to child welfare long precede federal intervention into this arena. In fact, the responsibility and authority to intervene in situations where a child is or appears to be in need of protection as a result of child abuse or neglect has traditionally been at the state rather than federal level.[1]

However, beginning with the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, the U.S. Congress has enacted a series of laws having significant impact on state child protection and child welfare services.[2]

The primary federal laws impacting Florida's child protection system (listed in order of original enactment) are CAPTA,[3] the Indian Child Welfare Act (ICWA),[4] the Adoption Assistance and Child Welfare Act,[5] the Family Preservation and Family Support Services Program (established as part of the Omnibus Reconciliation Act of 1993),[6] the Multiethnic Placement Act (MEPA),[7] the Adoptions and Safe Families Act (ASFA),[8] the Foster Care Independence Act,[9] the Child Abuse Prevention and Enforcement Act,[10] the Intercountry Adoption Act,[11] the Promoting Safe and Stable Families Amendments[12] and the Keeping Children and Families Safe Act.[13]

The Adoptions and Safe Families Act was enacted in 1997, and its implementing regulations[14] became effective on March 27, 2000. These regulations incorporate provisions of ASFA and MEPA and amend pre-existing regulations by adding new requirements for state compliance with Titles IV-B and IV-E of the Social Security Act.[15]

The Adoptions and Safe Families Act of 1997 (ASFA) was signed into law on November 19, 1997. This law, which amends the 1980 Child Welfare Act, clarifies that the health and safety of children served by child welfare agencies must be the primary concern of those agencies. It emphasizes moving children in foster care more quickly into permanent homes.[16]

State and local child protection agencies that accept federal funds pursuant to Titles IV-B and IV-E of the Social Security Act are required to follow ASFA and its regulations. Congress enacted ASFA pursuant to its power under the "Spending Clause" of the U.S. Constitution.[17]

In FY 2004-2005, the last year for which figures are available, Florida received $29,873,959 in federal funds pursuant to Title IV-B and $190,309,299 in federal funds pursuant to Title IV-E of the Social

Security Act. In that year, these sums amounted to 23.61 per cent of the total budget for Florida's child welfare programs, a percentage which remains fairly consistent.[18]

As a prerequisite to accepting federal funding through Titles IV-B and IV-E of the Social Security Act, states were obligated to amend state legislation to bring it into compliance with ASFA. However, the strict deadlines for compliance[19] required states to draft legislation quickly, increasing the likelihood that inconsistencies would remain between state law and ASFA requirements. Further, since the required date for drafting statutory changes was earlier than the date of the issuance of the final ASFA regulations (January 25, 2000), the likelihood of inconsistencies between state and federal law was greatly increased.

The Florida Legislature in the 1998 session enacted significant changes to Florida's child protection statute, in part with the goal of bringing state law into compliance with ASFA.[20] The ASFA-related changes included:

- Recognizing the parents' right to counsel at the shelter and subsequent hearings and the right, if indigent, to appointed counsel;
- Providing for access by the Department of Children and Families (DCF or the department) to federal and state parent locator services for diligent search activities;
- Increasing requirements for documentation in cases where the case plan goal is not reunification;
- Reducing the time period from 18 to 12 months for judicial review of permanency options for a child;
- Requiring judicial reviews for all children in out-of-home care every six months; and
- Authorizing but not requiring the use of concurrent case planning. Concurrent case planning is the practice of establishing a permanency goal in a case plan which uses reasonable efforts to reunify the child with the parent, **while at the same time establishing an alternative or back-up permanency plan to be implemented if children cannot safely return to their biological parents (emphasis supplied).**[21] If concurrent case planning is not used, the alternative goal is explored only after the court determines that reunification is no longer a viable permanency option for the child, a process which almost inevitably significantly delays permanence for the child.

The major provisions of ASFA which must be reflected in state law may be described as:

- "Reasonable efforts." ASFA redefines "reasonable efforts" to emphasize children's health and safety. It describes at least three circumstances when "reasonable efforts" are required by the state agency in child welfare cases: to prevent foster care placement, to finalize a permanency plan for each child, and to reunify families if such placement has occurred. It also describes situations when reasonable efforts to preserve families are not required;
- Case plan and review requirements. ASFA requires that the case plan and associated reviews specifically address child safety and permanency;
- Increased emphasis on timely permanency decision-making, including shorter time periods (shortened from 18 months to 12 months) to finalize a permanency plan, a new requirement for permanency hearings, and a limitation on the time period for reunification services to families.[22]

These three major provisions of ASFA were, for the most part, not addressed in the 1998 legislation. As a result, Florida law on these issues contains pre-ASFA provisions which are not consistent with current federal law.

Occurring simultaneously with the implementation of the ASFA-related changes, Florida's child welfare system has undertaken the transition from a traditional agency-driven structure to one in which child welfare services are delivered by community-based care agencies. These community-based care agencies are independent, non-profit organizations under contract with DCF to provide child welfare services. There are currently 22 lead agencies, each with several subcontracting agencies. This decentralization of service delivery has allowed additional opportunity for confusion as to the requirements of federal and state law in this area.

When state and federal law are not consistent, the Supremacy Clause of the U.S. Constitution requires state courts to apply federal law.[23] However, since most practitioners and decision makers in the Florida child welfare system are more familiar with Florida law than with federal law, the inconsistencies may not be recognized at the court or agency level and may still result in failures to comply with federal law which are detected when state practices are reviewed as part of

the federal Child and Family Services Review (CFSR) process.

The CFSR process is designed to assess each state's "capacity to promote positive outcomes for children and families engaged in the child welfare system."[24] The review teams consist of federal representatives (including reviewers from child welfare agencies from other states) and representatives of the state agency. Reviews are conducted on a schedule set by federal regulation.[25] After each review, the federal Administration for Children and Families (ACF) issues a report which identifies the state's performance on each of seven outcomes and seven systemic factors. If a state is determined to be out of substantial compliance with any of the factors, it is required to develop, in collaboration with the ACF regional Office, a Program Improvement Plan that addresses all areas of nonconformity. After the Plan is approved, the state is monitored to determine whether substantial compliance has been achieved. If the state fails to make the improvements needed or fails to submit a Performance Improvement Plan, federal funds are withheld from the state commensurate with the level of nonconformity.[26]

Florida's first on-site review was completed in August 2001. The final report was received by DCF on May 2, 2002. Florida was in substantial conformity with one of the seven outcomes and five of the seven systemic factors. Florida's Performance Improvement Plan was approved April 30, 2003. Its deadline for completion was March 30, 2005. There were 22 Plan goals; Florida successfully achieved 19. The three remaining goals are: (1) national standard on repeat maltreatment; (2) national standard on placement stability; and (3) worker visits with children. Florida has until March 30, 2006, to achieve the agreed-upon level of improvement for the remaining three goals in order to avoid financial penalties. The estimated penalty associated with Florida's level of nonconformity on the 2001 CFSR is $3.6 million. However, ACF has rescinded $1.8 million in penalties based on Florida's performance so far on the PIP. Practitioners have identified confusion about the applicable law as a factor in the CFSR performance issues.

Florida's performance was consistent with that of other states. No state achieved substantial performance of the entire CFSR on the first round. The next CFSR has not yet been scheduled, but DCF expects that is will occur sometime in late 2006.

METHODOLOGY

The research for this project included a review of the relevant state and federal law, the associated state rules and federal regulations, and the case law interpreting the law. Research was also conducted of the body of written work interpreting the federal statutes and regulations. Additionally, a workgroup was established with representatives of child welfare professionals and stakeholders. These representatives included members from the Office of the Guardian ad Litem, Children's First!, the Florida Coalition for Children, the Florida Coalition Against Domestic Violence, the Office of the State Courts Administrator, and DCF. This workgroup and its subgroups met throughout the interim period for an approximate total of 15 times to identify the current most serious areas in which Florida law is not consistent with federal law and to provide suggestions for changes to Florida law.

FINDINGS

Since the regulations interpreting ASFA were not adopted until January 2000, two years after the Florida Legislature amended its child protection statute and enacted some of the ASFA-required changes, important areas addressed in the regulations were not addressed in the changes made to Florida's law. These areas relate to reasonable efforts, permanency, and case plans.

Reasonable Efforts

The term "reasonable efforts" refers to at least three requirements placed on states:

- That reasonable efforts are made to prevent a child's removal from his or her home or that such efforts are not required;
- That reasonable efforts have been made to finalize the permanency plan in effect; and
- That reasonable efforts have been made to reunify the parent and child, if reasonable efforts to do so were required.

- **When reasonable efforts are not required**

Federal law excuses states from demonstrating reasonable efforts to prevent removal of a child from his home or reasonable efforts to reunify the parent and child under certain circumstances. ASFA defines those circumstances in which reasonable efforts are not required as "aggravated circumstances."[27] Florida has adopted these circumstances with some modification,[28] but has retained, in addition, the pre-ASFA occasions

when reasonable efforts are not required to prevent removal:

- When the first contact with the family occurs during an emergency;
- When the appraisal of the home situation by the department indicates that the home situation presents a substantial and immediate danger to the child's physical, mental, or emotional health or safety which cannot be mitigated by the provision of preventive services; or
- When the child cannot remain at home, either because there are no preventive services that can ensure the health or safety of the child or because, even with the appropriate and available services being provided, the health and safety of the child cannot be ensured.[29]

The continued inclusion of these three circumstances for avoiding reasonable efforts to prevent removal in practice has meant that every removal case will by definition have avoided the obligation to exert reasonable efforts to prevent removal because children would not have been removed from the home if one or more of these circumstances did not exist.

- **Reasonable Efforts to Finalize the Permanency Plan**

The federal requirement that Florida make reasonable efforts to finalize the permanency plan that is in effect is complicated by the fact that Florida has not defined "permanency plan" nor "permanency hearing." The process of "finalizing" a permanency plan has not been described in state law and is poorly understood in practice.

- **Reasonable Efforts and Parent and Relative Placement**

The "reasonable efforts" issue includes consideration of "non-offending parents" and relative placements. Identifying a parent who may not have been involved in the situation bringing the child into the state's custody raises issues of diligent search, paternity determination, child support, visitation, and placement. Some of these issues rise to the Constitutional level.[30]

Relative placements raise other considerations of permanency and priority, depending on the timing of locating the relatives and their suitability and willingness to assume permanent responsibility for the upbringing of the child. While the preamble to ASFA provides that "relative placements should not preclude consideration of legalizing the permanency of placement through adoption of legal guardianship,"[31] Florida law is not clear in directing agencies and courts as to the priority and weight to be given to potential relative placements. While recent legislation clarified that under some circumstances stability with a foster parent is preferred to relative placement,[32] courts still struggle with balancing the "least restrictive alternative,"[33] the best interest of the child, and permanency for the child.

Case Planning

While Florida law requires the development of a case plan for all children under the supervision of the department[34] and contains extensive requirements for the case plan,[35] the list of requirements is, post-ASFA, both over and under-inclusive. The statute is poorly organized, redundant, and difficult to put into a coherent format understood by practitioners or, even more critically, by the parents whose relationship with their children is governed by it. More critically, the statute itself supports delays in permanency in the following ways:

- The failure to specify that agreeing to a case plan does not constitute an admission to wrongdoing has caused parents' attorneys to advise parents not to agree to a case plan;
- The failure to recognize mediation and family conferencing as means for developing case plans, and to set time and notice requirements for such activities where available, has led to confusion in their role in developing the case plan.
- The failure to define "concurrent planning" and to give direction for its use has fostered the continued use of sequential planning, so that an alternative goal is not identified or developed while reunification is being sought;
- Pre-ASFA language describing "extending the case plan"[36] has undermined the time requirements for permanency;
- The lack of clarity as to authorized actions when it becomes clear that the case plan cannot be completed within the first 12 months the child is in care has caused delays in decisive action;[37]
- The placement of the language that "time is of the essence"[38] far from the requirements of the case plan has allowed courts and agencies to disregard the importance of prompt action in case planning;
- The lack of clarity regarding amending the case plan and the role of the courts in approving amendments has led to problems in using the case plan as a guide to permanency.

Additionally, the case plan and judicial review requirements currently in statute do not adequately address the federal requirements that medical and

educational information be gathered, maintained, and provided to appropriate parties during the time that the child is in the custody of the department.

Permanency

"Permanency hearings" are not described in Florida law. The term "permanency goal" is not distinguished from "case plan goal," and "permanency plan" is not distinguished from "case plan."

The permanency options in Florida law do not track federal law. The Florida permanency option of "long term custody,"[39] for example, is analogous to the acceptable federal option of "legal guardianship,"[40] but the Florida statutory language has not tracked the federal language sufficiently to make the relationship clear. As a result, this permanency option has not been recognized by federal reviewers and has been under-utilized by practitioners.

Additionally, the Florida options of "long term licensed custody"[41] and "independent living"[42] are not federally recognized permanency options but can be re-formulated to fit into the federally recognized category of "Another Planned Permanent Living Arrangement (APPLA)."[43]

RECOMMENDATIONS

Florida law relating to reasonable efforts, case planning, and permanency should be amended to conform to federal requirements.

As to reasonable efforts, Florida law should be amended to:

- Describe the separate requirements for when reasonable efforts are required;
- Clarify the circumstances when reasonable efforts are required;
- Define "permanency plan" and clarify the relationship between the permanency plan and the case plan for a child; and
- Clarify the nature of reasonable efforts required regarding both parental and relative placements at the stages of dependency proceedings.

As to case planning, Florida law should be amended to:

- Provide that agreeing to a case plan does not constitute an admission of wrongdoing or consent to a finding of dependency;
- Recognize the role of mediation and family conferencing in the development of case plans;
- Define "concurrent case planning" and give direction for its use;
- Replace confusing pre-ASFA language relating to "extending the case plan" with clear direction as to the time frames and requirements for permanency hearings;
- Clarify the options available to the court when it becomes clear that a case plan cannot be completed within the first 12 months a child is in care;
- Provide new emphasis on current language that "time is of the essence" in case planning by placing that language more prominently in the statute; and
- Clarify the considerations and process to be used in amending a case plan.

As to permanency, Florida law should be amended to:

- Define "permanency hearings," "permanency plan," and "permanency goal, and
- Conform the permanency options under Florida law to those allowed by federal law.

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[1] National Clearinghouse on Child Abuse and Neglect Information, http://nccanch.acf.hhs.gov (August 1, 2005).
[2] Id.
[3] P.L. 93-247, amended P.L. 95-266, 98-257, 100-294, 102-295, 104-235.
[4] P.L. 95-608.
[5] P.L. 98-272.
[6] P.L. 103-66.
[7] P.L. 103-382, amended P.L. 104-188.
[8] P.L. 105-89.
[9] P.L. 106-169.
[10] P.L. 106-177.
[11] P.L. 106-279.
[12] P.L. 107-133.
[13] P.L. 108-36.
[14] 45 CFR ss. 1355, 1356, 1357; see also the introductory materials and comments, found at 65 FR 4020-4075.
[15] *Making Sense of the ASFA Regulations,* Baker, Debra Ratterman *et al,* American Bar Association (2001), p. 4.
[16] *Adoptions and Safe Families Act of 1997 (H.R. 867)* National Association of Social Workers (December 1997), found at http://www.naswdc.org/archives/advocacy/updates/1997/safeadop.htm.
[17] *Id,* p. 178.
[18] Information supplied by O. Roy Hutcheson, Jr., Chief, Federal Program Eligibility-Revenue Maximization Unit, Child Welfare/CBC Program Office, DCF, August 15, 2005.
[19] P.L. 105-89, s. 103(a)(3).
[20] Ch. 98-403, L.O.F.
[21] *Tools for Permanency: Tool #1: Concurrent Permanency Planning,* National Resource Center for Foster Care and Permanency Planning, Hunter College School of Social Work of the City University of New York, found at www.hunter.curry.edu/socwork/nrcfcpp (July 2005).

[22] This analysis was informed by *Congress Passes Major new Adoption/Foster Care Reform Law,* ABA Center on Children and the Law, found at http://www.abanet.org/child/adofost.html.
[23] *Hilton v. South Carolina Public Railways Commission,* 502 U.S. 197(1991); *Mississippi Power & Light Co. v. Mississippi,* 487 U.S. 354 (1988); *Kalb v. Feuerstein,* 308 U.S. 433 (1940).
[24] *Child and Family Services Reviews Philosophy and Conceptual Framework*, Children's Bureau, Administration for Children and Families, provided by Beth Englander, Director, Child Welfare and Community Based Care Program Office, DCF, July 20, 2005.
[25] 45 CFR 1355.32.
[26] Children's Bureau: Child and Family Services Reviews, Steps in the Review Process. Updated October 2003, found at http://www.acf.hhs.gov/pgrograms/cb/cwrp/tools /hand-3.htm.
[27] 45 CFR 1356(b)(3).
[28] Section 39.806(1)(f)-(i), F.S.
[29] Section 39.402(8)(h)(5), F.S.
[30] S*ee,* for example, *Florida Department of Children and Families v. F.L.,* 880 So.2d 602 (Fl 2004), *Padgett v. Department of Health and Rehabilitative Services,* 577 So.2d 565 (Fl 1991); *Santosky v. Kramer,* 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982).
[31] 65 FR 4060.
[32] Chapter 2004-389, L.O.F., codified as s. 39.812(4), F.S.
[33] See *Padgett, F.L. cases, above.*
[34] Section 39.601(1), F.S.
[35] Section 39.601, F.S.
[36] Section 39.701(9)(f), F.S.
[37] Section 39.601(3)(k), s. 38.701(9)(3), F.S.
[38] Section 39.013(10(e), F.S.
[39] Section 39.622, F.S.
[40] 45 CFR 1355.20.
[41] Section 39.623, F.S.
[42] Section 39.624, F.S.
[43] 45 CFR 1355.20, 45 CFR 1356.21(h)(2).