



Adam Walsh Child Protection and Safety Act of 2006: Issues for Child Welfare Agencies

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ISSUES FOR CHILD WELFARE AGENCIES

In July 2006, President Bush signed the Adam Walsh Child Protection and Safety Act of 2006 into law. While the legislation was primarily intended to strengthen laws related to child sexual predators, two provisions embedded within the law have an impact on the process for approving foster and adoptive parents, including relative caregivers. One provision modified existing requirements for conducting criminal background checks and a second provision created a new requirement to conduct child abuse registry checks of prospective foster and adoptive parents.

Many child welfare experts agreed that the modification to the criminal background check requirements were unnecessary given state progress in ensuring safety through various background check procedures. However, there was a perception in Congress that some states – particularly those who had “opted out” of the ASFA requirements for federal background checks – were not rigorous enough in their practices for ensuring safety, particularly for relative caregivers.

Unfortunately, the law has other possible consequences for relatives hoping to become licensed foster or adoptive parents and for children in State custody. The purpose of this brief is to outline the law’s new requirements, address questions related to these requirements, and raise some potential consequences of the law on child welfare agency policy and practice.

NEW REQUIREMENTS OF THE LAW

The 2006 legislation amends previous background check requirements that were enacted 10 years ago under the Adoption and Safe Families Act (ASFA). Under ASFA, states are required to have a process for conducting criminal background checks for prospective foster and adoptive parents caring for IV-E eligible children. If a background check turns up a conviction (from a list of several barrier crimes in Statute), a state can not claim federal IV-E dollars if they decide to place the child with that prospective caregiver.

Under the new provision, states must conduct checks for all placements, whether or not the foster or adopted child is eligible for federal support. States still have discretion about whether or not to place the child, but cannot draw down federal funds if they decide to place the child with a caregiver who fails the background checks. In addition, they cannot draw down funds for a child placed in a foster or adoptive home where the child abuse and neglect registry check is not conducted within that State, or requested of another State as required under the new law.

Under the old system, states could “opt out” of the federal checks by creating their own state system. Nine states chose to “opt out” of the federal system and have created their own systems for conducting checks, which, in most cases, are as or more rigorous than the federal standards. These states are: **Arizona, California, Idaho, Massachusetts, Nebraska, New York, Ohio, Oklahoma and Oregon.** In most cases, these states allow a rebuttable presumption, whereby a court or child welfare agency may determine that in a particular case, a child’s best interests override the mandates of state and federal law.

The new legislation changes four major aspects of the current system and recommends a study to address the variation in state child abuse registry requirements:

- 1) **Requires every state to conduct a fingerprint-based check** using the National Crime Information Database (NCID) for all prospective foster and adoptive parents before licensing or approving the home. In the previous system, the NCID check was not required. This does NOT prohibit the state from placing the child in the home, but the home can not be officially licensed, and states can not draw down IV-E maintenance payments without the results of the background checks. As usual, states could draw down IV-E administrative costs pending licensure within a certain timeframe (in the case of relatives, the average time it takes the state to license a family).
- 2) **Eliminates the “opt out” provision** so that states that had previously opted out (see list above) of the federal system can no longer do so. States that have opted out have until October 2008 to put a new system into place. This includes the requirement to use the NCID fingerprint check if they were not already doing so.
- 3) **Requires state child abuse registry checks** for all adults living in the home of the prospective foster and adoptive parent. The checks must be done for the state in which the adults live, as well as any other state in which they’ve lived in the past five years. The law applies to all prospective families as of October 2006. It also provides some safeguards to ensure that information obtained from the registry checks is not used for any other purpose and to ensure that states receiving the request for a child abuse registry check comply with requests from other states.
- 4) **Instructs Department of Health and Human Services (HHS) to study the feasibility of a National Registry of Substantiated Cases of Child Abuse and Neglect.** Although the legislation requires a study of the feasibility of creating a registry that is consistent across states, HHS will not move forward until the \$500,000 authorized for the study is appropriated by Congress.

ISSUES RELATED TO IMPLEMENTATION OF THE LAW

The legislation was enacted in July 2006, and with the exception of the “opt out” states, the background check requirements were effective immediately. Requirements to conduct checks on the registries became effective October 2006, providing states little time to prepare for the requirements.

The legislation has created the following additional challenges for states:

- ❖ Opt Out States – Those states that had their own systems in place and have not conducted federal fingerprint-based checks have until October 2008 to put the required federal system in place. Most of these states had opted out because they had an effective system that was geared toward optimal child safety and speedy licensing and approval procedures, while granting states the flexibility to make appropriate placement decisions about children in their care¹. There is some indication that states plan to challenge the new requirements in Court.
- ❖ Child Abuse and Neglect Registries – The new requirement to check child abuse registries for all adults living in the home of a prospective foster or adoptive parent and for every state in which they’ve lived over the past 5 years is creating a whole host of challenges for states. State child abuse registries differ significantly in terms of who they include in the registry (substantiated cases or all cases), who they keep on the registry and for how long, and the confidentiality rules that govern them. A few states have NO registries at all, making it virtually impossible to respond to inquiries from other states. Due process rules also differ significantly, and many parents and caregivers have had to spend significant time and resources trying to have their name removed, particularly when they are barred from employment because they are included in the registry.

Key questions about child abuse registries include:

- Is a state in compliance if it requests the information and the other state does not respond?
- What if a state has confidentiality laws that are in conflict with the requirements? States can request a delay of implementation up to the first quarter after the end of their legislative session to make necessary legislative changes, but it is unclear what challenges they will face trying to change their state laws.

¹ In New York, for instance, instead of mandatory disqualification for certain felony convictions, the State statute provides for presumptive disqualification, which may be overcome in certain individual cases only when enumerated safety concerns are satisfied. New York State law is consistent with four Family Court rulings holding that mandatory disqualification for certain felony convictions violates both the federal and New York State constitutions. Without an ability to opt out and allow rebuttable presumptions, there may be situations where children who have lived for years with foster parents or relatives who now want to adopt them could end up having to be removed from their care because of a criminal matter occurring two or three decades earlier that today has no relevance.

- Given the variation in how states handle their child abuse registries, how will states make uniform determinations about safety for the child?
- What due process rules are in place for prospective foster and adoptive parents who want to challenge a decision not to place the child with them due to information learned from the registry check?
- ❖ New Interstate Placement Rules – The recently authorized Interstate Placement Act calls for a receiving state to complete a home study for a child within 60 days of a request. However, the new background checks are very difficult to complete within 60 days. As a result, many states will have to complete home studies without the benefit of completed background checks. The Child Welfare Policy Manual addressed this issue in January and confirmed that the home study process does not have to await results of the background checks. However, there is still confusion about how to reconcile these two requirements.²
- ❖ Relative Placements Are the Most Likely to be Hard Hit – Relative placements, which occur with little warning or preparation, could be the most likely to suffer under these new rules. There are already serious challenges to the licensing and approval process for relatives, which can often take up to 6-8 months. The Adam Walsh Legislation does not create a wholly new problem for licensing relatives, but rather compounds an already burdensome process which requires relatives to be licensed at the exact same standard as unrelated caregivers with regard to safety related issues.

POSSIBLE UNINTENDED CONSEQUENCES

While still new, there are concerns within the field that the Adam Walsh Legislation will exacerbate an already overburdened system for licensing and approving relatives, and have the unfortunate consequence of weakening strong kinship policies and practices. The Children's Bureau's Child Welfare Policy Manual clearly affirms that a state does not have to delay a child's placement with a relative pending the results of a background check³. However, some jurisdictions could hold off on relative placements if they are unclear about the Children's Bureau's policy, or they determine that the system for conducting background checks for a relative is too costly or too burdensome to apply.

² See www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/questDetail.jsp?QAId=1560

³ See the Child Welfare Policy Manual at www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=62#1562, which confirms that the State is not required to complete the finger-print based check of NCID or the child abuse and neglect registry before placing a child in the home of a prospective foster or adoptive parent. It also goes on to say "Although the State may place a child in the home prior to completing the required registry checks, doing so prior to completing thorough safety checks has serious practice implications."

Some issues to watch in state and local communities include the following:

- ❖ **Sidestepping relatives in favor of unrelated caregivers who are already licensed and approved.** This would not likely be a stated policy, but rather the unfortunate consequence of a system that is increasingly burdensome and costly to conduct. If there is a choice between an unlicensed relative and an already licensed and/or approved foster home, the agency might be tempted to favor the latter, even if temporarily. This would hamper efforts to make relative placement a priority, reduce the number of placement moves and keep siblings together.
- ❖ **By-passing family foster care in favor of congregate care settings pending final approval of caregiver.** There is also a concern that if potential background checks can not be done expeditiously, the system will move toward placing children in residential, group home, or shelter settings pending approval of a relative or other caregiver. While this might not be a stated policy, it could be another unintended consequence of having to wait for background checks to be completed and agency and community concerns about safety. These actions could also be the result of budget concerns about placing children with relatives who might not meet IV-E eligibility requirements.
- ❖ **Using information from state child abuse registries as a deterrent to placing children with relatives without due process.** State child registries differ significantly in how they are structured, the information they include, and the due process in place for those whose names come up on the registries. Even where there are strong due process procedures in place, it can take months if not years to have one's name expunged, and individuals must go through a complex legal procedure to accomplish this. Given the fact that families of color are more likely to be investigated for child abuse and neglect and have their children removed, this is a particular concern with regard to racial equity issues.

CONCLUSION

The Adam Walsh Legislation complicates an already complex system for foster and adoptive parents, particularly those who are relative caregivers, and creates new burdens for state and local agencies striving to meet key child welfare outcomes. While still in its infancy, it is important to be aware of the strengths and weaknesses of the new system, and to bring these to bear on policy deliberations in the future.

There are still many unanswered questions related to this legislation. They include:

- ❖ How new background check requirements will impact the ability to effectively and efficiently license relative caregivers, as well as unrelated caregivers, as foster and adoptive parents;
- ❖ Whether the new requirements will alter state and/or local practice with regard to placement, particularly priority placement with relatives;
- ❖ Whether or not due process safeguards can be put into federal law with regard to state child abuse registry checks, as many national organizations are hoping they can accomplish;
- ❖ Whether or not “opt out” states will challenge the new requirements of the legislation in advance of the October 2008 implementation deadline;
- ❖ How the Children’s Bureau will assess state compliance with the requirements as part of its IV-E review process;
- ❖ How states will address needed legislative changes.

ChildFocus invites anyone with information about how the law is playing out in local jurisdictions to contact Jennifer Miller at (401)884-1546 or jennifer@childfocuspartners.com. We are interested in information about challenges in meeting the requirements of the law; unanswered questions about these requirements, and best practices that can be shared with others. Through our collaborations with several national organizations concerned about child welfare and kinship care policy and practice, we will bring the experiences of local communities to the attention of national organizations concerned about the implementation of the Adam Walsh Legislation.

RESOURCES AVAILABLE

The National Resource Center on Foster Care and Permanency Planning has a comprehensive section on its website devoted to resources on the Adam Walsh Legislation. It includes:

- ❖ The Adam Walsh Child Protection Act
- ❖ The Children's Bureau Information Memorandum from September 30, 2006 informing states of the legislation.
- ❖ Sections from the Children's Bureau policy manual addressing questions related to the new requirements. This includes the determination that states can place a child with relatives pending the results of the background check and confirmation that they can claim administrative costs prior to licensing the family.
- ❖ Tapes of web-based teleconference held in November 2006 about the legislation.
- ❖ Information about the child abuse registries from each state. This information is being collected and updated regularly.

To access the website, go to:

www.hunter.cuny.edu/sociwork/nrcfcpp/info_services/Adam-Walsh.html