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## SYSTEMIC GOVERNMENTAL RECALCITRANCE IN REGULATING CONFIDENTIALITY UNDER THE CHILD ABUSE, PREVENTION & TREATMENT ACT (CAPTA): A CASE STUDY

*William Wesley Patton<sup>†</sup>*

### ABSTRACT

In 2003, Congress amended the Child Abuse, Prevention and Treatment Act (CAPTA) to provide states with more flexibility in designing open child dependency hearings. The Federal Children's Bureau has interpreted those amendments as a congressional waiver of CAPTA confidentiality in open court proceedings, and therefore, currently tens of millions of abused and neglected children no longer have federal protection from being re-traumatized by disclosure of confidential CAPTA child welfare case information. This article demonstrates that the Children's Bureau's statutory interpretation is inconsistent with congressional intent and that states are still mandated to reasonably prevent the republication of confidential data by the media and the general public who attend those open hearings.

### INTRODUCTION

Imagine being a teenaged girl, brutally abused by your father for years and who is now brought into court to determine your best interest. You have kept your anguished life a secret from your friends and potential bullies at school, but now you have become a pawn in a supervising juvenile court judge's unscientific social experiment to determine whether admitting the press into cases like yours will somehow increase system accountability, public support for the court system, and quality of case outcomes.<sup>1</sup> You ask your attorney for a chance to tell the juvenile court judge

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<sup>1</sup> Unfortunately, judges can conduct social experiments in their courtrooms without having to undergo any regulation or review by an institutional review board. In contrast, if scientists conducted an experiment in the courtroom to determine whether media access exacerbates children's psychopathologies, they would have to demonstrate the safety of the procedures. See 56 Fed. Reg. 28,003-28,023 (Jun. 18, 1991). See The Department of Health and Human Services' ("HHS") regulations implementing the Common Rule are codified at 45 C.F.R. part 46, subpart A, "Human Subjects Research Protections: Enhancing Protections for Research Subjects and Reducing Burden, Delay, and Ambiguity for Investigators." 76 Fed. Reg. 44,512-44,531 (Jul. 26, 2011); see also *Report and Recommendations for Institutional Review Boards*, THE NATIONAL COMMISSION FOR THE PROTECTION OF HUMAN SUBJECTS, U.S. GOVERNMENT PRINTING OFFICE 1 (Sept. 1, 1978).

why you oppose the press attending your trial, but a *Los Angeles Times* reporter and his attorney argue that this severely abused child has no right to speak with the judge outside their presence. The child's attorney zealously argues against this catch-22—if the child victim discloses her fears in front of the media, they will no longer be confidential, but if she does not tell the judge, the *Times* and any other media can attend her hearing.<sup>2</sup> Making matters worse, the *Blanket Court Order*<sup>3</sup> not only presumptively admitted the press, it also shifted the burden from the media to the child abuse victim to prove that press attendance will cause him or her harm.

Since the Child Abuse Prevention and Treatment Act's ("CAPTA") inception in 1974, Congress has required extensive confidentiality protections for abused children and their families that are involved in governmental regulatory schemes. For example, the 1974 act required states to provide "for methods to preserve the confidentiality of all records in order to protect the rights of the child, his parents or guardians...."<sup>4</sup> Congress has continued to require confidentiality protection for children and family members each time that CAPTA has been amended and has assured such protection each time a new group of individuals has been granted access to governmental child welfare information. In the 1988 amendments, Congress provided the Secretary of Health and Human Services jurisdiction to provide grants to public agencies and nonprofit private organizations, but only if such organizations provide "assurances to the Secretary that in the conduct of the project the confidentiality of medical, social, and personal information concerning any person...shall be maintained, and shall be disclosed only to qualified persons...."<sup>5</sup> In 1996, Congress amended CAPTA to require the Secretary to "ensure that methods are established and implemented to preserve the confidentiality of records relating to case specific data" used to compile information in the "National Clearinghouse For Information Relating To Child Abuse"<sup>6</sup> and mandated strict confidentiality rules for members of "Citizen Review Panels."<sup>7</sup> In 2003, Congress amended CAPTA in order to provide states some latitude to experiment with admitting the general public into child dependency proceedings by providing that the public may attend as long as state "policies shall, at a minimum, ensure the safety and well-being of the child, parents, and families."<sup>8</sup> The 2003 CAPTA amendment did not alter the Secretary's duties to "preserve the confidentiality of records relating to case specific data,"<sup>9</sup> protect parents' and children's

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<sup>2</sup> These descriptions are based upon the facts in *In re A.L.*, 224 Cal. App. 4th 354 (Cal. Ct. App. 2014).

<sup>3</sup> Super. Ct. L.A. County, Juvenile Div., *Blanket Order* (Jan. 31, 2012).

<sup>4</sup> Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974).

<sup>5</sup> Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, title I, § 7, 102 Stat. 102 (Apr. 25, 1988). In 1988, Congress also passed the Family Violence Prevention and Services Act, Pub. L. No. 100-294, 102 Stat. 125, title III, § 313 (Apr. 25, 1988), which requires that those receiving federal grants for family violence prevention "provide assurances that procedures will be developed to guarantee the confidentiality of records pertaining to any individual for whom data are compiled through this subsection."

<sup>6</sup> Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, title I, § 104, 110 Stat. 3063 (Oct. 3, 1996).

<sup>7</sup> *Id.*

<sup>8</sup> Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, title I, § 113, 117 Stat. 811 (Jun. 25, 2003).

<sup>9</sup> § 113, 117 Stat. 802.

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“applicable Federal and State privacy laws,”<sup>10</sup> and protect the confidentiality of children’s and family members’ “medical, social, and personal information.”<sup>11</sup>

This article will demonstrate that the Department of Health and Human Services and its succession of secretaries since 2003 have left abused and neglected children and their family members with no protection from serious violations of their privacy rights and their CAPTA medical, psychological, and educational child welfare information disclosed during child dependency proceedings. The Department of Health and Human Services has not issued a single regulation defining what CAPTA’s requirement of providing “safety” to abused children in public dependency proceedings means and has not found even one CAPTA confidentiality violation in the hundreds of thousands of public children dependency proceedings annually litigated in the United States.

#### I. THE LOS ANGELES SUPERIOR COURT BLANKET ORDER ADMITTING THE PUBLIC INTO DEPENDENCY PROCEEDINGS

For some inexplicable reason, Presiding Juvenile Court Judge Michael Nash, who drafted the new Los Angeles County open court policy, did not provide abused children and their family members any of the protections included by other states when the media is admitted into child dependency proceedings. Judge Nash earlier testified in favor of California Assembly Bill 73 that would have created a Pilot Project for open dependency courts in California but which included extensive protections for “personally identifiable information about the child or about the child’s sibling or parent confidential and to prevent release of that information in any court hearing open to the public.”<sup>12</sup> However, Judge Nash failed to build such protections into his *Blanket Order* which failed to inform the media that much of the information disclosed during these hearings is protected by federal and state confidentiality laws, failed to warn that disclosure of identifying information about the child victim and/or family members would either be in contempt of court or relevant in determining the reporter’s attendance at future proceedings, and failed to limit press attendance to only certain procedural stages as many other state statutes require.<sup>13</sup> In so doing, Judge Nash left abused children vulnerable and stripped of their federal and state confidentiality protections in a room presumptively open to reporters.

Fortunately, two years after the child victim objected to the *Times*’ attendance at her hearing, the California Court of Appeal in *In re A.L.* not only held that

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<sup>10</sup> § 113, 117 Stat. 807.

<sup>11</sup> § 113, 117 Stat. 805.

<sup>12</sup> CA A.B. 73, §1(e) (amended Apr. 14, 2011).

<sup>13</sup> See *Doe v. Daviees County Div. of Children and Family Services*, 669 N.E.2d 192, 195 (Ind. Ct. App. 1996); *In re K.B.*, 894 N.E.2d 1013, 1017 (Ind. Ct. App. 2008); *In re Pedro M.*, 81 Cal. App. 4th 550, 554-555 (Cal. Ct. App. 2000); *In re Kristine W.*, 94 Cal. App. 4th 521, 528 (Cal. Ct. App. 2001); *In the Matter of B.*, 886 N.Y.S. 2d 70 (Fam. Ct. 2009); 2009 N.Y. Slip Op. 50841(U), at 8 (Feb. 5, 2009, unreported disposition); *In re Keisha T.*, 38 Cal. App. 4th 200, 240 (Cal. Ct. App. 1995); FL ST §39.809(4) (2016); KS ST 38-2247(b) (Jan. 18, 2017).

Judge Nash violated California law in presumptively admitting the media and shifting the burden of proof onto the child victim, the Court also stated:

The Blanket Order effects a paradigm shift from the plain meaning of section 346. Section 346 says the public “shall not be admitted ...” The Blanket Order, on the other hand, declares that members of the press “shall be allowed access” ...[and] (1) entirely eliminates the statutorily designated role of the “judge or referee” in deciding whether to admit members of the press to the hearing, and (2) places new burdens on the child to monitor entrance to the courtroom, to make objections, and to prove harm is likely—before any member of the press may be excluded from the courtroom.<sup>14</sup>

During that two-year open court experiment more than 200,000 abused and/or neglected children and their family members suffered the loss, or risk of loss, of their governmentally protected confidentiality.<sup>15</sup> Since Judge Nash did not design his open court experiment with any evidence-based methodology to determine whether or how many children were psychologically harmed by his experiment, we simply do not know the extent of exacerbation of those abused children’s pre-existing psychopathology.<sup>16</sup> One would hope that Judge Nash read the Assembly Committee on Human Services’ bill analysis of AB 73 before he testified.<sup>17</sup> That bill analysis discussed the Connecticut open court pilot project, an experiment that included empirical surveys of attorneys, judges, and parties in those dependency proceedings that were later used to determine that the pilot project should be ended and not be expanded statewide because of concerns regarding abused children’s safety.<sup>18</sup>

The instant investigatory report is about governmental agencies and employees who failed to protect California’s abused children from being harmed by Judge Nash’s *Blanket Order* for more than two years. Why did these public servants violate our trust and their official duty to protect these child victims? Why did some either

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<sup>14</sup> In re A.L., 224 Cal. App. 4th at 364.

<sup>15</sup> There were more than 125,676 dependency court hearings in 2011 and 118,528 hearings in 2013-14 in the Los Angeles County dependency courts. *The State Of Child Abuse in Los Angeles County Compiled from 2014 Data*, INTER-AGENCY COUNCIL ON CHILD ABUSE AND NEGLECT 1 (2015), [http://ican4kids.org/Reports/State%20of%20Child%20Abuse/Data\\_2015.pdf](http://ican4kids.org/Reports/State%20of%20Child%20Abuse/Data_2015.pdf).

<sup>16</sup> For a discussion of the mental health data regarding abused/neglected children’s psychopathology and the effects of open courts on these vulnerable children see William Wesley Patton & Kelly Crecco, *An Update To Striking A Balance: Freedom of the Press Versus Children’s Privacy Interests in Juvenile Dependency Proceedings*, 12 FIRST AMEND. L. REV. 575 (2014); William Wesley Patton, *Open Dependency Courts And Their Risks to LGBTQ Child Abuse Victims: The Price of Sunshine*, 11 J. OF HATE STUDIES 145 (2014); William Wesley Patton, *Bringing Facts Into Fiction: The First “Data-Based” Accountability Analysis Of The Differences Between Presumptively Open, Discretionarily Open and Closed Child Dependency Systems*, 44 U. MEM. L. REV. 831 (2014); William Wesley Patton, *The Psychiatric Implications Of Media Ethics Code Policies Regarding The Publication of Child Abuse Victim Data: A Universal Deontological Model Code*, 16 U. C. DAVIS J. OF JUV. L. & POL’Y 427 (2012).

<sup>17</sup> CA A.B. 73, Assembly Committee on Human Services (Apr. 26, 2011), accessed at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0051-0100/ab\\_73\\_cfa\\_20110425\\_093017\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0051-0100/ab_73_cfa_20110425_093017_asm_comm.html).

<sup>18</sup> *Id.* For a discussion of the Connecticut open court pilot project, see William Wesley Patton, *Connecticut’s Failed Open Juvenile Dependency Court Pilot Project: Presumptively Open Juvenile Court Doors Closed Again to Protect Abused Children*, 11 WHITTIER J. CHILD & FAM. ADVOC. 85 (2011).

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silently cheer the opening of the courts or, through conscious omission, choose not to protect them through available legal remedies?

Sadly, during the two and half years of the instant investigation, not a single one of the dozens of emails and letters among federal, state and local governmental employees and officials about the legality of the *Blanket Order* ever discussed the ongoing danger to abused children and family members whose federally protected confidential information was being illegally disclosed in court on a daily basis.<sup>19</sup> The federal Administration for Children and Families (“ACF”)/Children’s Bureau, the State of California Department of Social Services and the California Administrative Office of the Courts all failed to even send investigators into the open courtrooms to determine whether CAPTA violations were placing abused children and their families at risk.<sup>20</sup> Instead, the dozens of letters and emails among federal and state governmental child welfare agencies merely discussed whether the original *Blanket Order* and its various amendments met amorphous minimal federal safety standards or whether the California Court of Appeal might at some future *indefinite time* declare the *Blanket Order* illegal under California Law so that those agencies would not need to get their hands dirty using legal intervention to assure abused children’s safety.

Hopefully, the following deconstruction of the *Blanket Order*’s history will lead to a change of culture and policy within those federal and state organizations. Once the federal or state government determines that a judge is violating the law and placing abused children and family members at risk, direct legal intervention to protect those children should proceed *before* beginning the lengthy process of negotiating procedural and statutory legal changes.

#### A. The California Department of Social Service (“CDSS”)

After attending more than twenty dependency court hearings as a journalist and witnessing numerous federal CAPTA, Social Security Act, FERPA and HIPPA privacy invasions occurring on a daily basis under the *Blanket Order*, I wrote an investigatory white paper and sent it to the Department of Health & Human Services, ACF, requesting a federal investigation of Judge Nash’s *Blanket Order*. Approximately three months later, I received a letter from ACF informing me that they had “made contact with the California Department of Social Services (“CDSS”). At our request, they are “in the process of fact finding.”<sup>21</sup>

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<sup>19</sup> The first correspondence regarding the *Blanket Order* that was disclosed in my FOIA and California Records Requests was on October 17, 2012, in an email from Debra Samples, ACF, to other ACF staff regarding “California Open Court.” The last correspondence I have discovered was on March 31, 2014, in an email from Steven Keller, HHS/OGC to Larry Bolton, DSS[California] regarding “Amended Blanket Order re Access to Dependency Court.” Both are on file with the author.

<sup>20</sup> California Welfare & Institutions Code § 346 permits discretionary attendance by those like governmental regulators or researchers with “a direct and legitimate interest in ...the work of the court.” See Cal. Welf. & Inst. Code § 346 (2016). In addition, Los Angeles Superior Court Juvenile Division Rule § 7.3(d) provides discretionary access to an “agency seeking to conduct research involving children under juvenile court jurisdiction for educational, scientific, or public policy purposes...” See Los Angeles Superior Court Juvenile Div. Rules, ch. 7, § 7.3(d) (Jan. 1, 2017), <https://www.lacourt.org/courtrules/CurrentCourtRulesPDF/Chap7.pdf>.

<sup>21</sup> Letter from Douglas Southard, Regional Program Manager, Region IX, Children’s Bureau Administration of Children and Families, to William Wesley Patton on October 31, 2012 (on file with author).

After waiting many weeks for a federal resolution of the *Blanket Order* confidentiality violations, I filed a Freedom of Information (“FOIA”) request with ACF for all correspondence between the Federal Government and the State of California regarding the *Blanket Order*.<sup>22</sup> In addition, I filed a California Records Request (“CRR”) with CDSS. The documents discovered were remarkably disturbing. For instance, on October 24, 2012, an internal email between two ACF employees stated that CDSS admitted that they had known of the *Blanket Order* since its implementation in January 2012, had discussed the Order with the California Administrative Office of the Courts and “CDSS has assessed that the Court is out of compliance with state law.”<sup>23</sup>

On its webpage, the CDSS states, “The mission of the California Department of Social Services is to serve, aid, and protect needy and vulnerable children and adults in ways that strengthen and preserve families, encourage personal responsibility, and foster independence.”<sup>24</sup> The CDSS proclaims that it has “oversight of programs that affect nearly 3 million of California’s most vulnerable residents—foster children and youth, children and families...”<sup>25</sup> An important part of CDSS’ mission is to collaborate with the California Judicial Council and the Administrative Office of the Courts (“AOC”) regarding children’s safety.<sup>26</sup> CDSS’ Strategic Plan Policy Initiatives include a “critical priority” of ensuring that “rules defining confidentiality are appropriate.”<sup>27</sup> CDSS has admitted that disclosure of confidential CAPTA information may cause abused children and adult recipients exploitation and embarrassment.<sup>28</sup> CDSS also receives reports regarding confidentiality concerns from the Child Welfare Council Prevention and Early Intervention Committee, appointed as one of California’s federally mandated Citizen Review Panels, regarding federal CAPTA confidentiality regulations.<sup>29</sup>

Even though CDSS admitted that its attorneys determined that the *Blanket Order* was illegal and that abused children were at risk of disclosure of confidential federal information, it did nothing to protect them until after the Federal Government contacted CDSS shortly before November 2012. During that ten-month period of inaction by CDSS, tens of thousands of child victims and their family members potentially had their most intimate facts illegally disclosed in court to the press on a daily basis.

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<sup>22</sup> FOIA request filed on December 15, 2012 (on file with author).

<sup>23</sup> Email sent by Douglas Southard (ACF) to Kathleen McHugh (ACF), dated October 24, 2012) (on file with author).

<sup>24</sup> *Our Mission*, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES (2007), <http://www.dss.cahwnet.gov/cdssweb/PG190.htm>.

<sup>25</sup> *Programs and Services*, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES 1, 2 (Aug. 2011), [http://www.dss.cahwnet.gov/cdssweb/entres/pdf/PUB417-CDSS\\_Brochure.pdf](http://www.dss.cahwnet.gov/cdssweb/entres/pdf/PUB417-CDSS_Brochure.pdf).

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Strategic Plan Policy Initiatives*, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES 1, 2 (2002), <http://www.childsworld.ca.gov/res/pdf/POLICYINITIATIVES1.pdf>.

<sup>28</sup> *California DSS Handbook: Child Welfare Services Program Requirements*, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, §19.001, 288.1 (Jul. 1, 1993), <http://www.dss.cahwnet.gov/ord/entres/get-info/pdf/cws1.PDF>.

<sup>29</sup> *2013–14 Annual Report*, CALIFORNIA CHILD WELFARE COUNCIL 1 (Jul. 2014), [http://www.chhs.ca.gov/Child%20Welfare/CWC\\_2013-14\\_Annual\\_Report\\_APPROVED.pdf](http://www.chhs.ca.gov/Child%20Welfare/CWC_2013-14_Annual_Report_APPROVED.pdf).

Even if CDSS can hinge its inaction on protecting child victims and the abrogation of its duty as California's agency in charge of assuring confidentiality under CAPTA and the Social Security Act,<sup>30</sup> how can it explain its *active role* in convincing the Federal Government not to immediately seek rescission of the *Blanket Order* and protect child abuse victims? The Federal Government sought CDSS's efforts to help fix the *Blanket Order*. On December 18, 2013, after Judge Nash finally agreed to make modest changes to his Order, CDSS argued that the Federal Government should not require him to do so because it was "premature at this point for Judge Nash to issue a revision to the current blanket order before the final decision from the Court of Appeals in *In re A.L.*"<sup>31</sup> In addition, CDSS concluded that it "could cause confusion for all parties if Judge Nash were to issue a new court order prior to the Court of Appeals ruling."<sup>32</sup>

Because CDSS convinced the Federal Government not to press Judge Nash for an immediate modification of the *Blanket Order*, more than 200,000 child victims and relatives were forced to continue undergoing illegal confidentiality violations because the opinion in *In re A.L.* was not filed until fourteen months later on March 3, 2014. In addition, Judge Nash's final modification of the *Blanket Order* was not issued until August 8, 2014, which added an additional six months. Only CDSS can explain why it chose to avoid "confusion to the parties" rather than the protection of child abuse victims in its plea to the Federal Government about its decision not to require California and Judge Nash to immediately comply with CAPTA confidentiality laws.

The sad irony is that on January 31, 2013, Judge Nash agreed to modify his *Blanket Order*:

[T]he CDSS has engaged this issue with the Presiding Judge of the Los Angeles County Dependency Court [Judge Nash], and has discussed possible revisions of the Blanket Order to ensure conformity with the Child Abuse Prevention and Treatment Act (CAPTA), and Title IV-E. As a result of that dispute, the Presiding Judge is in the process of revising the Blanket Order to address federal conformity concerns.<sup>33</sup>

Pursuant to 45 C.F.R. §205.50, CDSS had "authority to...enforce the provisions for safeguarding information about applicants and recipients" of federal assistance under the State Plan. Only CDSS can explain why they waited for Federal Government intervention before they even attempted to protect California's abused children, and why they convinced the Federal Government that the *Blanket Order*

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<sup>30</sup> "The CDSS is responsible for the supervision and coordination of programs funded under federal Titles IV-B, IV-E... of the Social Security Act...[and] CAPTA...." See California's Title IV-B Child And Family Services Plan Federal Fiscal Year 2010-2014, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES 1, 5 (Jun. 30, 2009), [http://www.childsworld.ca.gov/res/TitleIV-B/CFSP\\_2010-2014.pdf](http://www.childsworld.ca.gov/res/TitleIV-B/CFSP_2010-2014.pdf).

<sup>31</sup> Letter to Douglas Southard (ACF) from Gregory E. Rose, Deputy Director, Children and Family Services Division, CDSS on December 18, 2013 (on file with author).

<sup>32</sup> Email from Larry Bolton, [CA]DDS, to Robert Keith and Steven Keller, HHS/OGC, on December 19, 2013, regarding "Doug Southard Letter December 2013" (on file with author).

<sup>33</sup> Letter from Gregory E. Rose, Deputy Director Children and Family Services Division, CDSS to Douglas Southard, Child Welfare Regional Program Manager, federal Administration for Children and Families, Children's Bureau, Region IX, January 31, 2013 (provided to author in a Freedom of Information Request).

should not be immediately modified, especially since their own attorneys had determined that it was illegal.<sup>34</sup>

### B. The California Judicial Council

The California Judicial Council [CJC] is a long-time presumptively open court advocate. From 2000 to 2011, it supported and lobbied for passage of three separate proposed California statutes that would have presumptively opened the dependency courts to the media and general public.<sup>35</sup> Judge Nash was a member on the Judicial Council from 2003 to 2006 and was a member on the Judicial Council Family and Juvenile Law Advisory Committee from 1999 to 2003 and again from 2006 to 2012<sup>36</sup> during the CJC's period of zealous open court advocacy. Judge Nash was the 2014 recipient of the California Courts Justice for Children & Families Award, Juvenile Court Judge of the Year, Chair of the Juvenile Court Judges of California, and President of the National Council of Juvenile and Family Court Judges, another organization that strongly supports presumptively open dependency courts.<sup>37</sup> One must wonder whether the close relationship between Judge Nash and the Judicial Council, and his prominence as one of the most influential juvenile court judges in the United States, created an ethos of deference in the Judicial Council toward any formal action regarding the illegality of his *Blanket Order*.<sup>38</sup>

What we know from my FOIA requests is that the CDSS sought assistance from the AOC,<sup>39</sup> the administrative arm of the CJC, regarding the legality of the *Blanket Order* after the Federal Government contacted it about the order's possible illegality under California and federal law: "[CDSS] has had a conversation with the Administrative Office of the Courts about the order after we [the federal ACF] notified them of the issue."<sup>40</sup> The FOIA data does not include information regarding whether CDSS informed the Judicial Council that its agency lawyers determined that the *Blanket Order* violated California law, and it does not indicate what the CJC's

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<sup>34</sup> On January 31, 2014, Gregory E. Rose (CDSS) wrote a letter to Douglas Southard (ACF) and told the Federal Government that because of the *In re A.L.* case and Judge Nash's willingness to modify his order that "it is CDSS's assessment that no further action by the CDSS is needed at this time to ensure that CAPTA and Title IV-E requirements are being met."

<sup>35</sup> The Judicial Council lobbied for passage of CA A.B. 73 in 2011, CA A.B. 2627 in 2004, and CA S.B. 1391 in 2000.

<sup>36</sup> *Fact Sheet*, JUD. COUNCIL OF CAL., FAMILY AND JUVENILE LAW ADVISORY COMMITTEE (Nov. 2014), <http://www.courts.ca.gov/documents/fjla.pdf> ("The Judicial Council of California's Family and Juvenile Law Advisory Committee makes recommendations to the council for improving the administration of justice in all cases involving marriage, family, or children.")

<sup>37</sup> *Resol. No. 9, Resol. in Support of Presumptively Open Hearings With Discretion of Cts. to Close*, NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES 68TH ANNUAL CONF. (Jul. 20, 2005), <https://www.ncjfcj.org/sites/default/files/resolution%2520no.%25209%2520open%2520hearings.pdf>.

<sup>38</sup> Cal. Cts., The Jud. Branch of Cal., Cal. Cts., Distinguished Serv. Award Past Recipients (2017), <http://www.courts.ca.gov/26915.htm>.

<sup>39</sup> Jud. Council of Cal., Jud. Council Governance Policies, 1, 11 (Jun. 2008), [http://www.courts.ca.gov/documents/appendix\\_d.pdf](http://www.courts.ca.gov/documents/appendix_d.pdf) ("The Administrative Office of the Courts assists the council and its Chair in carrying out their duties under the Constitution and laws of the State of California.")

<sup>40</sup> Email from Douglas Southard ("ACF") to six other ACF employees regarding "Judge Nash-blanket order" (Oct. 24, 2012) (on file with author).

response was to the request for assistance from CDSS.<sup>41</sup> One would think that the CJC/AOC would assist CDSS since the issue involved a rule of court and because if that rule violated California law, the state could lose more than \$1.5 billion in federal funding for child welfare programs.<sup>42</sup>

The FOIA data also demonstrates that the federal ACF contacted the AOC about the *Blanket Order* sometime before November 17, 2012:

RO [regional officer for the ACF] has spoken with AOC who acknowledges knowing that the [Blanket] Order was in place since January 2012 and that politically it is controversial. AOC's position is that the CDSS and its attorneys would need to make a determination about whether the Judge's action is in compliance with state law. They were going t[o] have conversation with the CDSS.<sup>43</sup>

This correspondence between the CDSS and the AOC, and between the ACF and the AOC, makes it clear that (1) the AOC and CDSS had conversations about the legality of the *Blanket Order*; (2) the AOC wanted the CDSS to determine the legality of the order; (3) CDSS attorneys concluded that the *Blanket Order* violated California law; and (4) CDSS asked for help from the AOC on how to respond to what the AOC termed the “politically...controversial” court order.

In order to discover more background facts, I filed a California Records Request with the Judicial Council for all documents between anyone in the CJC and/or the AOC with anyone else regarding the *Blanket Order*. In response, I was only provided with two emails. The first email is from a federal ACF employee to a CJC employee on August 7, 2012, in relation to their “previous conversations” about CAPTA “disclosures and access to information.”<sup>44</sup> The return email from CJC to ACF states that a conference call among the federal ACF, the state CDSS, and CJC was being set up to discuss the *Blanket Order*. The Judicial Council stated that CJC works “closely with judges—you will remember Judge Nash was on our CIP Meeting statewide team . . . .”<sup>45</sup>

In an email response, a CJC employee stated that he did not want to enter the *Blanket Order* dispute because it would probably be settled in court or in the California Legislature, and his involvement might send the wrong message to dependency court attorneys who were litigating the legality of the *Blanket Order*.<sup>46</sup>

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<sup>41</sup> CDSS often counsels with the Judicial Council on federal benefit programs for children and families. See California's Title IV-B Child And Family Services Plan, *supra* note 30, at 5.

<sup>42</sup> See *Juvenile Court Hearings: Open Court: Hearing on SB – 1391 Before Assembly Committee on Appropriations* (Cal. 2000), [http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb\\_13511400/sb\\_1391\\_cfa\\_20000808\\_112718\\_asm\\_comm.html\\_\(One\\_of\\_the\\_reasons\\_that\\_S.B.1391,\\_a\\_prior\\_presumptively\\_open\\_dependency\\_court\\_bill,\\_failed\\_is\\_that\\_the\\_Legislative\\_Analyst\\_determined\\_that\\_it\\_might\\_violate\\_federal\\_privacy\\_regulations\\_and\\_cost\\_the\\_State\\_of\\_California\\_“\\$1.49\\_billion\\_from\\_these\\_programs\\_\(\\$1.4\\_billion,\\_Title\\_IV-E;\\_\\$84\\_million,\\_Title\\_IV-B;\\_and\\_\\$7million,\\_CAPTA\).”\)\\_Although\\_CAPTA\\_was\\_later\\_modified\\_to\\_provide\\_states\\_with\\_greater\\_discretion\\_to\\_admit\\_the\\_public,\\_that\\_exemption\\_only\\_applies\\_when\\_a\\_state,\\_not\\_a\\_single\\_judge\\_like\\_Judge\\_Nash,\\_changes\\_its\\_laws\\_to\\_admit\\_such\\_non-parties.\\_Judge\\_Nash’s\\_Blanket\\_Order,\\_therefore,\\_jeopardized\\_federal\\_funding\\_for\\_California\\_child\\_welfare\\_programs.\\_See\\_42\\_U.S.C.\\_§\\_5106a\\_\(2012\).](http://www.leginfo.ca.gov/pub/99-00/bill/sen/sb_13511400/sb_1391_cfa_20000808_112718_asm_comm.html_(One_of_the_reasons_that_S.B.1391,_a_prior_presumptively_open_dependency_court_bill,_failed_is_that_the_Legislative_Analyst_determined_that_it_might_violate_federal_privacy_regulations_and_cost_the_State_of_California_“$1.49_billion_from_these_programs_($1.4_billion,_Title_IV-E;_$84_million,_Title_IV-B;_and_$7million,_CAPTA).”)_Although_CAPTA_was_later_modified_to_provide_states_with_greater_discretion_to_admit_the_public,_that_exemption_only_applies_when_a_state,_not_a_single_judge_like_Judge_Nash,_changes_its_laws_to_admit_such_non-parties._Judge_Nash’s_Blanket_Order,_therefore,_jeopardized_federal_funding_for_California_child_welfare_programs._See_42_U.S.C._§_5106a_(2012).)

<sup>43</sup> Email from Debra Samples, ACF, to Douglas Southard, ACF (Nov. 17, 2012) (on file with author).

<sup>44</sup> Email from David Kelley, ACF, to Will Don, CJC, (Aug. 7, 2012) (on file with author).

<sup>45</sup> Email from Will Don, CJC, to David Kelley, ACF, (Aug. 6, 2012) (on file with author).

<sup>46</sup> *Id.*

This CJC explanation is problematic on several levels. First, the CJC chose comity among constituents rather than protecting abused children. Second, since dependency attorneys were trying to have the courts declare the *Blanket Order* illegal, they would only be upset by CJC involvement if the CJC defended Judge Nash and the *Blanket Order's* legality. However, such a defense would be inconsistent with the CDSS attorneys' determination that the *Blanket Order* was clearly illegal. Although I have been unable to obtain information about the conversations between CDSS and the AOC, from the context of the above emails, we must assume that the CDSS informed the AOC that its attorneys had determined that the *Blanket Order* violated California state law. We also know that the Federal Government stated that if the *Blanket Order* violated California state law that it would also be in violation of federal law and that California would be "out of compliance with the requirements of the State's CAPTA plan."<sup>47</sup>

It is possible that the Judicial Council simply determined that its policy of "promoting public access to the justice system" outweighed its goals of "upholding the rule of law," "fairness," "quality of justice," and "adherence to statutory and constitutional mandates."<sup>48</sup> What is clear is that the Judicial Council chose not to implement any formal or public intervention regarding the *Blanket Order* even though it has authority under its Litigation Management Committee to act on "[i]mportant policy or court operations issues [which] may include...*how to resolve disputes where the outcome might have statewide implications.*"<sup>49</sup>

We also have no information as to whether the Judicial Council Family and Juvenile Law Advisory Committee met its obligation of "[i]dentifying issues and concerns affecting court administration and recommending solutions to the council" regarding the very well-publicized confidentiality issues inherent in the *Blanket Order*. Pursuant to California Constitution, art. 6, sec. d, overseeing the administration of justice pursuant to rules of court, such as the *Blanket Order*, improving the "administration of justice" and making "recommendation to the courts...for court administration, practice and procedure" is a central Judicial Council obligation.<sup>50</sup> Why did the Judicial Council apparently sit on the sidelines while abused children and their family members suffered illegal violations of their federal and state confidential information?

### C. The County of Los Angeles Board of Supervisors, Department of Child and

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<sup>47</sup> *Id.*

<sup>48</sup> Jud. Council of Cal., Jud. Council Governance Policies, 1, 1-3 (Jun. 2008), [http://www.courts.ca.gov/documents/appendix\\_d.pdf](http://www.courts.ca.gov/documents/appendix_d.pdf).

<sup>49</sup> *Id.* at 8 (emphasis added). (The Litigation Management Committee "[o]versees litigation and claims—against trial and appellate courts, the Judicial Council, the AOC, and employees of those bodies that seek recovery of \$100,000 or more, or raise important policy issues.") (See also Cal. Cts., The Jud. Branch of Cal., Litigation Management Committee, <http://www.courts.ca.gov/litigationmanagement.htm>). Since Judge Nash was being sued by a young child abuse victim regarding his illegal *Blanket Order* and since the Judicial Council in lobbying for three open court bills already determined that the litigation raised "important policy issues," the Litigation Management Committee's jurisdiction was implicated. See In re A.L., *supra* note 2.

<sup>50</sup> Jud. Council of Cal., Jud. Council Governance Policies, 1, 7 (Jun. 2008), [http://www.courts.ca.gov/documents/appendix\\_d.pdf](http://www.courts.ca.gov/documents/appendix_d.pdf).

*Family Services, County Counsel, and the Office of Child Protection*

In terms of public policy advocacy, the Los Angeles County Board of Supervisors (“Board”), Department of Child and Family Services (“DCFS”), County Counsel (“CC”) and the new Office of Child Protection (“OCP”) can functionally be considered aligned in terms of child dependency public policy. The Board hires and can fire the DCFS director and the Director of the Office of Child Protection, and since CC represents DCFS, it cannot ethically argue against its client.<sup>51</sup>

A central DCFS mission is to protect abused and neglected children. DCFS for decades opposed presumptively open child dependency proceedings. However, after the Board formally issued a legislative agenda to open dependency courts, DCFS abruptly changed its position.<sup>52</sup> Both the Board and DCFS filed support in the Legislature for passage of AB 73, which would have statutorily opened the Los Angeles dependency courts to the press and public.<sup>53</sup>

This “lock-step” public policy agenda among these four interconnected Los Angeles County governmental bodies is not surprising. However, DCFS’s and CC’s position on Judge Nash’s *Blanket Order* is very troubling. DCFS and CC were privy to all of the tragic facts in the abused child’s fight to keep the press out of her hearing in *In re A.L.* Since DCFS purports to provide safety for abused children, one would expect it to support the child victim in that case, especially since a finding by the Court of Appeal that the *Blanket Order* was legal would place tens of thousands of Los Angeles County’s abused children at risk of further trauma in public hearings. But astonishingly, DCFS and CC filed a letter in that case stating that they would not take a position on the *Blanket Order*, and they further waived oral argument, thus

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<sup>51</sup> Jim Newton, *Newton: L. A. County’s Five Angry Bosses*, L.A. TIMES (Jul. 13, 2014), <http://articles.latimes.com/2013/jul/14/opinion/la-oe-newton-column-board-of-supervisors-dcfs-20130715> (The Director of DCFS is hired by the board “and the supervisors can fire him at will.”); Garrett Therolf, *L.A. County Supervisors Vote to Hire ‘Child Protection Czar’*, L.A. TIMES (Jun. 10, 2014), <http://latimes.com/local/count-government/la-me-foster-reform-20140611-story.html> (The Director of the new Office of Child Protection (“OCP”) shall “report directly to the [Board of] supervisors” and shall “manage and coordinate” child welfare with DCFS and County Counsel); see *Los Angeles County Director of Child Protection Job Announcement*, m/Oppenheim Associates 1-3 (Sep. 2014). On September 14, 2015, the OCP responded to my email request regarding its independence in policy decisions that “[t]he Los Angeles County Board of Supervisors establishes policy for the entire County and it is the position of the Office of Child Protection to adhere to the agenda they set. As such, our position as it relates to the child dependency courts aligns with the position established by the Board.” California offices that administer “public social services” shall notify “the appropriate legal officer (“county counsel”) if an issue regarding a law suit involves the disclosure of agency confidential information. Child Welfare Services Program Requirements, *supra* note 10, at 235; see *The State Of Child Abuse*, *supra* note 15, at 102.

<sup>52</sup> The Los Angeles County Board of Supervisors voted to support a legislative agenda to “[s]upport proposals to open Juvenile Dependency hearings to the public” and has continued to support such open court proposals today. Letter from William T. Fujioka, County of Los Angeles Chief Executive Office, to Board of Supervisors regarding Update to the County’s State Legislative Agenda for the Second Year of the 2011-12 Session 1, Attachment 1, 3 (2015-2016), [http://ceo.lacounty.gov/pdf/Cluster\\_Agendas/cms1\\_188632.pdf](http://ceo.lacounty.gov/pdf/Cluster_Agendas/cms1_188632.pdf).

<sup>53</sup> Dependency Proceedings Public Access: Hearing on AB 73 Before Assembly Committee on Human Services 1, 25 (Cal. 2011) [ftp://leginfo.ca.gov/pub/11-12/bill/asm/ab\\_00510100/ab\\_73\\_cfa\\_20110425\\_093017\\_asm\\_comm.html](ftp://leginfo.ca.gov/pub/11-12/bill/asm/ab_00510100/ab_73_cfa_20110425_093017_asm_comm.html); Terry Francke, *Editorial: Open up Juvenile Dependency Courts*, CALIFORNIANS AWARE: THE CENTER FOR PUBLIC FORUM RIGHTS (Dec. 19, 2010), <http://calaware.org/uncategorized/editorial-open-up-juvenile-dependency> (“Agencies that once resisted... [opening the courts] are generally coming around. DCFS itself is now recommending open hearings....”).

making them unavailable to assist the Court of Appeal in deciding this critically important legal question.<sup>54</sup>

As long as the Board of Supervisors controls policy positions for DCFS, CC, and OCP, child safety decisions will too often be based primarily on political concerns rather than child welfare principles and expertise. It is time for the Board to provide its agencies the freedom to independently determine what is in children's and families' best interests.

*D. The Federal Department of Health & Human Services, Administration of Children and Families, and the Children's Bureau*

On or prior to October 14, 2012, ACF was informed by DSS that its attorneys had determined that Judge Nash's *Blanket Order* violated California law.<sup>55</sup> Three days later an email among ACF staff included an analysis that stated that a local court law such as the Los Angeles open court *Blanket Order* violating state law also violates CAPTA; therefore, the state fails to comply with "the requirements of the State's CAPTA Plan."<sup>56</sup> At that point, ACF knew that the *Blanket Order*, a local law, violated CAPTA and Social Security confidentiality laws. ACF should have immediately informed DSS that California was out of compliance with its State Plan. If it did not immediately correct that violation, it would lose over \$1.5 billion in federal child abuse funds. The Children's Bureau ("CB") Child Welfare Policy Manual, Section 2.1, Answer to Question 2, provides that:

If there are instances in which ACYF is presented with evidence of potential deficiencies...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.

The ACF/CB violated its own policy by failing to notify the state that it was out of compliance and providing the state with a "specified timeframe" for compliance. Instead, the ACF/CB enabled Judge Nash to proceed with his illegal experiment for more than eighteen additional months while tens of thousands of abused/neglected children and family members underwent dependency proceedings outside federal confidentiality protection.

There is a continuing problem with ACF's enforcement of CAPTA confidentiality based upon its interpretation of the 2003 CAPTA amendments sanctioned open dependency proceedings, but only if the state assures safety to abused children and their family members.

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<sup>54</sup> See Docket Sheet, *Children and Family Services v. A.L.*, B242179, (Cal. Ct. App. 2014).

<sup>55</sup> Email from Douglas Southard, ACF, to Kathleen McHugh, ACF (Oct. 24, 2012) (on file with author).

<sup>56</sup> Email from Debra Samples, ACF, to Douglas Southard, ACF (Oct. 17, 2012) about *Memorandum on California Open Court Issue in Los Angeles County* (on file with author).

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## 1. Legislative History of the 2003 Senate Bill 342 Amendments to CAPTA.

CAPTA and the Social Security Act confidentiality rules involve a simple two-step analysis to determine whether and to whom that data can be disclosed. Step one requires a finding that a state has promulgated a “statewide” open dependency court policy. If a state does not have a “statewide” open court policy, the analysis ends and confidential information may not be disclosed in open court. 42 U.S.C § 671(c); 42 U.S.C.A. § 5106(a)(G); 42 U.S.C § 5106(a) (b)(1)(C).; 42 U.S.C §5106a(2)(G). If, and only if, the state has adopted a statewide open court policy and filed it with the Secretary of H.H.S as part of its State Plan is step two relevant. Step two asks whether under that statewide open court policy children and their families are reasonably protected in light of such disclosures of otherwise confidential data.

Both CAPTA and the Social Security Act provide for confidentiality of information contained in child welfare records.<sup>57</sup> In 2001, the CB received a request to clarify whether those statutes limited the disclosure of otherwise confidential child welfare information if a state opened its juvenile court system to the press and public.<sup>58</sup> The CB responded that “there is no provision which allows for public disclosure of such [confidential] information” under the Social Security Act or under CAPTA.<sup>59</sup> Those concerned with federal confidentiality regulations in state open dependency proceedings sought an amendment to CAPTA and the Social Security Act.<sup>60</sup> For instance, on August 2, 2001, Randy Burton, Director of Justice for Children, testified that Congress should modify CAPTA to permit open dependency proceedings.<sup>61</sup> However, Ms. Burton noted that the issue of whether states should be granted more flexibility in designing open court procedures involves two separate issues: (1) whether CAPTA and the Social Security Act prevent states from opening their courts and (2) what procedures must states use to protect confidential child welfare information once the courts are open. She listed the following means of meeting CAPTA confidentiality in an open court system:

1. First, “[t]ypically, the contents of records are not read in court...”;
2. [I]f records need to be addressed in court, then the judge can protect CAPTA confidentiality by:
  - a. Discussing them in chambers;

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<sup>57</sup> See Social Security Act § 471(a)(8); 42 U.S.C. § 5106a; 45 C.F.R. 205.50; 45 C.F.R. 1355.21 (a).

<sup>58</sup> See Child Welfare Pol’y Manual, *infra* note 66, at 2.1A.3; Child Welfare Pol’y Manual, *infra* note 66, at 2.1A.1; *Do the confidentiality provisions for title IV-B [Social Security Act] restrict information that can be discussed in open court?* Children’s Bureau, Child Welfare Pol’y, 7.2 Title IV-B, [https://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=55](https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=55).

<sup>59</sup> See Child Welfare Pol’y Manual, *infra* note 66, at 2.1A.3; Children’s Bureau, Child Welfare Pol’y, 7.2 Title IV-B, *supra* note 58.

<sup>60</sup> Veena Srinivasa, *Sunshine For D.C.’s Children: Opening Dependency Court Proceedings and Records*, 18 GEO. J. POV. L. & POL’Y 79, 92 (2010) (“Fearful of losing federal funding, states enacted strict confidentiality statutes for dependency hearings and records.”).

<sup>61</sup> CAPTA: *Success And Failures At Preventing Child Abuse And Neglect*, Subcommittee on Select Education Of The Committee on Education and the Workforce, H.R. REP. NO. 107-28, pt. 1, at 123 (Aug. 2, 2001), <http://files.eric.ed.gov/fulltext/ED471702.pdf>.

- b. “[T]emporarily clear[ing] the courtroom for sensitive testimony relating to these records”; and,
- c. Providing judges with the power to force the media to agree to not publish identifying CAPTA information.<sup>62</sup>

Ms. Burton indicated that states which open their court hearings should be provided with discretion to “individually...address the issues of open courts and methods for maintaining record confidentiality.”<sup>63</sup>

After numerous congressional hearings from 2001 through 2003, the Senate agreed to adopt a House Amendment to CAPTA<sup>64</sup> which stated that nothing in subparagraph (A) [defining state requirements under CAPTA] “shall be construed to limit the State’s flexibility to determine State policies relating to public access to court proceedings to determine child abuse and neglect, except that such policies, at a minimum, ensure the safety and well-being of the child, parents, and families.”<sup>65</sup>

## 2. The Children’s Bureau/ACF Interpretation of the 2003 CAPTA Confidentiality Amendment

After Congress added the language regarding states’ flexibility in designing procedures for open child dependency courts, the CB deleted its earlier findings in its *Child Welfare Manual* that confidential child welfare case information could not be disclosed to the press and public in open dependency court hearings.<sup>66</sup> The CB interpretation of the new CAPTA amendment is that the express CAPTA confidentiality protections for child welfare case information in 42 U.S.C. § 5106 are now inapplicable to state open court proceedings: “The 2003 amendments to CAPTA specifically give States flexibility to determine State policies with respect to open courts, so long as such policies ensure the safety and well-being of the child, parents and families...; [however] [t]here may be other federal confidentiality restrictions for the state to consider when implementing this CAPTA provision.”<sup>67</sup> The CB interprets the 2003 CAPTA amendment to permit states to share confidential “information contained in child abuse and neglect reports and records” in open dependency court proceedings.<sup>68</sup>

The CB’s interpretation of the 2003 CAPTA amendment states that it no longer has an obligation to exclude the public and or media during open dependency proceedings when confidential child welfare case information is introduced or discussed.<sup>69</sup> Its interpretation is that CAPTA requires only for states to provide “safety

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<sup>62</sup> *Id.* at 125.

<sup>63</sup> *Id.*

<sup>64</sup> The House amendment was introduced on February 11, 2011 (42 U.S. Code § 5106b(2)(g)), Proceedings and Debates of the 108<sup>th</sup> Congress, First Session, Statements On Introduced Bills and Joint Resolutions.

<sup>65</sup> This language is still currently operative in 42 U.S.C. § 5106a.

<sup>66</sup> See Child Welfare Pol’y Manual, 2.1A.3 (2006); see also *Child Welfare Pol’y*, Title IV-B, 7.2 (2008), [https://www.acf.hhs.gov/cwpm/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp.jsp?citID=55](https://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=55). On April 17, 2006, the Children’s Bureau deleted its earlier response that orally discussing child welfare case material in open court violated CAPTA confidentiality.

<sup>67</sup> Child Welfare Pol’y Manual, *supra* note 66, at 2.1A.3.

<sup>68</sup> See Child Welfare Pol’y Manual, *supra* note 66, at 2.1A.

<sup>69</sup> See Child Welfare Pol’y Manual, *supra* note 66, at 2.1A.

and well-being” to parties and family members. The problem, however, is that the CB, during the *thirteen years* subsequent to the 2003 CAPTA amendment, has not issued any regulations, interpretations, or advice regarding the requirement of “safety and well-being” in open dependency court proceedings.<sup>70</sup> States are subject to certain requirements regarding disclosure of historically confidential and embarrassing information about abused and/or neglected children’s intimate, private lives without threat of federal sanctions and without having to notify the Secretary regarding the specific state protections provided. Under the current CB interpretation of CAPTA, the press and public are free to republish previously confidential identifying information on the Internet in news stories and in the community with identifying and embarrassing information gleaned during the public dependency court hearings.

### 3. The CB Interpretation of the 2003 CAPTA Amendment Is Not Only Inconsistent With Congressional Intent and Statutory Construction, It Places Tens of Millions of Abused Children and Their Families At Risk

Instead of merely providing states with “flexibility” in designing court procedures as Congress intended, the Children’s Bureau has provided states with discretion to permit the media and public to discover and republish previously protected confidential information. For several reasons, this result clearly violates Congress’s CAPTA legislative scheme to protect both confidential information and those child welfare recipients whose information is disclosed.

First, there is not a single sentence in the hundreds of pages of legislative history concerning the 2003 CAPTA amendments that indicates that Congress intended that CAPTA confidentiality protections are inapplicable in open court hearings.<sup>71</sup> Second, the only legislative history on the open court/confidentiality issue was Ms. Burton’s testimony. In that testimony, Randy Burton carefully delineated for Congress the separate questions of whether opening the courts is consistent with CAPTA and whether once those hearings are open what prophylactic measures a state must take to protect confidential child welfare case information from being disclosed to the general public and press from being republished outside the courtroom.<sup>72</sup>

Third, the CAPTA amended language, “[n]othing in subparagraph (B) [defining state requirements under CAPTA] shall be construed to limit the State’s flexibility to determine State policies relating to public access to court proceedings to determine child abuse and neglect, except that such policies, at a minimum, ensure the safety and well-being of the child, parents, and families”<sup>73</sup> must be read in relation to the rest of the CAPTA confidentiality language contained in 42 U.S.C. § 5106a.

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<sup>70</sup> Douglas Southard, Regional Manager, (*Children’s Bureau, Region IX, October 10, 2015*) in an email response to William Wesley Patton, indicated that he was not aware of any Children’s Bureau policy regarding the CAPTA “safety and well-being” requirements. On October 11, 2015, I conducted several searches on the CB’s web page and was unable to find any discussion and/or policies regarding state requirements in open courts to protect the “safety and well-being” of children, parents, and family members in open dependency proceedings.

<sup>71</sup> See generally Subcommittee on Select Education of The Committee on Education and The Workforce, House of Representatives, *supra* note 61, at 123.

<sup>72</sup> See generally Subcommittee on Select Education of The Committee on Education and The Workforce, House of Representatives, *supra* note 61, at 123.

<sup>73</sup> 42 U.S.C. § 5101a(1)(c) (2010).

An axiomatic canon of construction is that different sections within the same statute must be construed regarding their interdependence in relation to the statute's overall legislative purpose. The 2003 CAPTA amendments balanced the growing necessity of sharing confidential child welfare case information with the equally important necessity of protecting child welfare clients from the deleterious effects of disclosure of that information. 42 U.S.C § 5106a mentions the terms "confidentiality" or "confidential" in three sections, and mentions "information exchange," "interagency collaboration," and "collaboration" of information five times. A central goal of CAPTA is "safety" [seven statutory references] and "protection" [twelve references], and Congress mentions "disclosure" of information seven times.<sup>74</sup> Therefore, CAPTA § 5106(b)(2), which provides discretion to states to open child dependency proceedings, must be read in relationship with the rest of the CAPTA statute, which focuses on safety, protection and a limited use of that confidential information. Any interpretation that Congress meant to provide the public with unlimited access to confidential child welfare case information and the right to unlimited use, disclosure, and republication of that information is simply inconsistent with the rest of the statute. It also leads to the following irrational result: members of state death review teams and citizen review panels are vetted by the government before they are appointed to serve on those committees that have access to confidential case information. Even though panel members have been hand selected by the state, they (a) cannot disclose identifying information regarding children and family members and (b) are subject under CAPTA to "civil sanctions for a violation" of confidentiality.<sup>75</sup>

It is irrational to conclude that Congress would limit these vetted and authorized recipients of confidential information in terms of their disclosure and republication of that data and subject them to civil sanctions but not limit the disclosure and republication of that identical information by members of the general public and media who just walk into a dependency courtroom. There is not one word in CAPTA § 106(b)(2) that demonstrates congressional intent to provide members of the public with an unfettered right to disclose confidential and identifying information gleaned during an open child dependency proceedings. Such an interpretation belies the many references in 42 U.S.C. § 5106a regarding the very limited right to disclosure of identifying information and the goal and necessity of protecting abused and-or neglected children and their family members from such disclosures.<sup>76</sup>

Fourth, in CAPTA § 106(b)(2)(B)(viii), Congress delineated the classes of individuals authorized to receive confidential child welfare information who must assure that the child welfare information obtained remains confidential: (1) subjects of the report; (2) some governmental entities; (3) citizen review panels; (4) child fatality review panels; (5) a grand jury or court; and (6) "classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate state purpose."<sup>77</sup>

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<sup>74</sup> *Id.*; see also 42 U.S.C. § 5106a (2016).

<sup>75</sup> *Id.* at § 5106a(c) (2016) ("[c]itizen review panels" and members of those panels who unlawfully publish confidential child welfare case information are subject to "civil sanctions....").

<sup>76</sup> See generally *id.* at § 5106a(a).

<sup>77</sup> 42 U.S.C. § 5106b(2)(B)(viii) (2016).

In order for states to change their “State plan,” they must notify the Secretary that they have modified their state laws in a way that will “ensure and protect the safety of a victim of child abuse or neglect” and of “methods to preserve the confidentiality of all records in order to protect the rights of the child and the child’s parents....”<sup>78</sup> If states modify their laws to permit the general public and press to receive otherwise confidential child welfare case information, the press and general public become “*authorized*” state recipients. For example, Judge Nash presumptively admitted the press into dependency proceedings only after determining that “members of the press are deemed to have a legitimate interest in the work of the court.”<sup>79</sup>

Therefore, the media and public come within CAPTA’s category 6 of authorized recipients—“classes of individuals statutorily authorized by the State to receive such information pursuant to a legitimate state purpose.”<sup>80</sup> Since the general public and the media come within the parameters of CAPTA’s § 106(b)(2)(B)(viii) confidentiality provisions, they, like all other similarly situated authorized recipients of child welfare data, are constrained in their use and/or republication of that information. The Children’s Bureau has determined that “[a]uthorized recipients of confidential child abuse and neglect information are bound by the same confidentiality restrictions as the child protective services agency. Thus, recipients of such information must use the information only for activities related to the preservation and treatment of child abuse and neglect. Further disclosure is permitted only in accordance with the CAPTA standards.”<sup>81</sup>

Despite congressional intent to control the dissemination of confidential child welfare case information by those “authorized” to receive it, the Children’s Bureau, in evaluating Judge Nash’s *Blanket Order*, determined that the *Blanket Order*, did not violate CAPTA standards.<sup>82</sup> Under Judge Nash’s *Blanket Order*, (1) the press was presumptively admitted, and (2) no CAPTA confidentiality protections were in the order. There was no requirement that the media be excluded when CAPTA data is discussed or presented on a large document television screen. There was no warning provided to the media that CAPTA information and/or identifying child victim information was disclosed. No limitations were placed on republishing, even on the internet, any CAPTA, Social Security, FERPA, and HIPPA information disclosed during the open court dependency proceeding. The only mention of CAPTA was on the modified open court blanket order which merely cited judges to 42 U.S.C. 5106a (b)(2) regarding a state’s flexibility under CAPTA.<sup>83</sup>

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<sup>78</sup> See generally *id.* at § 5106b.

<sup>79</sup> See *Blanket Order*, *supra* note 3, at 4; see also Cal. Welf. & Inst. Code § 346 (1982) (containing a similar provision that allows judges to admit “such persons [who have] a direct and legitimate interest in a particular case or the work of the court”).

<sup>80</sup> See *id.* at § 5106b(2)(B)(viii).

<sup>81</sup> See Child Welfare Pol’y Manual, *supra* note 66, at 2.1A.1.

<sup>82</sup> See Letter from Joo Yeun Chang, Associate Commissioner (*Children’s Bureau*, October 3, 2014).

<sup>83</sup> See generally *Blanket Order*, *supra* note 3; see also Child Abuse and Treatment and Adoption Act, 42 U.S.C. §§ 5101-5119c (2016). I attended more than twenty open court hearings held under Judge Nash’s *Blanket Order*. In only one of those hearings did the juvenile court judge enquire about my identity and purpose for attending the hearing, and I was not admonished regarding the confidentiality or republication of the considerable confidential CAPTA, FERPA, Social Security, and HIPPA information that was disclosed in my presence while attending the hearings as a reporter.

Based upon the ACF/CB investigation of the *Blanket Order*, on October 3, 2014, it found that Judge Nash's Open Court *Blanket Order* conformed with 106(b)(2)(B)(viii).<sup>84</sup> The Children's Bureau found that the *Blanket Order* fully complied with CAPTA confidentiality requirements based solely on the single fact that judges have discretion to protect the safety and wellbeing of children and family members.<sup>85</sup>

The problem, however, was that Judge Nash's *Blanket Order* provided *no protection* regarding republication of confidential CAPTA information disclosed to the press and public during the child dependency proceeding. The *Blanket Order* provided: (1) no limitation on what CAPTA data could be disclosed to the general public or press; (2) no limitations on the republication of otherwise confidential CAPTA data gleaned by the media and general public; and (3) no methods to deter or punish republication of that CAPTA confidential case welfare information. Since the CB determined that the *Blanket Order*, even without any confidentiality protections, met CAPTA requirements, the CB has apparently determined that CAPTA confidentiality protections are simply inapplicable to open court dependency proceedings.

Even if one accepts the CB's conclusion that CAPTA only requires states to demonstrate that their open court system provides safety to children, parents and family members, its implementation and regulation of that standard has been non-existent. In fact, the CB has not issued a single statement, regulation or definition of what "safety" means or what variables it uses in reviewing a state's open court CAPTA confidentiality protections.<sup>86</sup>

Countless abused/neglected children and their family members are at risk from disclosure of their child welfare case information since the CB abandoned its duty to assure that states provide protection from such harm. Because the CB has abrogated its statutory duty to assure that children and family members in open courts

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<sup>84</sup> See Letter from Joo Yeun Chang Associate Commissioner (*Children's Bureau, October 3, 2014*).

<sup>85</sup> *Id.* ("We have determined that the revised Blanket Order issued by Judge Nash on August 8, 2014, which includes language giving judges the discretion to consider the safety and well-being of the child, parents, and family conforms...with CAPTA.").

<sup>86</sup> See Email to Douglas Sutherland, Regional Project Manager, (October 7, 2015) (on file with author). I sent the following question via email to Douglas Southard: "[C]an you tell me if the Children's Bureau has ever issued any guidelines on the language "safety and well-being" of children, parents, and family members regarding the disclosure of confidential information disclosed in open child dependency proceedings?" See Email from Douglas Sutherland, Region IX Regional Project Manager, (October 8, 2015) (on file with author). Mr. Southard responded: "I am not aware of policy on safety and well-being." In addition, on October 25, 2015, I searched the Children's Bureau and the Department of Health and Human Services webpages for any definition, regulations, or standards regarding CAPTA's "safety" language. Consistent with Mr. Southard's conclusion, I was not able to find a single word regarding the definition of the "safety" requirements created by the 2003 amendments to CAPTA. See Email from Kimberly N. Epstein, FOIA Officer (October 13, 2015) (on file with author). In addition, on October 1, 2015, I filed a FOIA request with the HHS/ACF for all correspondence between the Children's Bureau/ACF and anyone else regarding the CAPTA "safety" language and any guidance, regulations, standards or findings by the Children's Bureau regarding a state's non-compliance with the CAPTA safety requirements. FOIA request number 15-0854, renumbered by ACF to FOIA number 16-0003 (Oct. 13, 2015). None of the data provided in this FOIA request provided new evidence regarding CAPTA's "safety" language.

are safe, Congress must amend 42 U.S.C. § 5106a to clarify that states have flexibility in designing their open court child dependency courts, but that they must provide protection from the republication of confidential child welfare case information by the general public and/or media who attend those open court hearings.

### E. The Media as Advocate

The United States Supreme Court has described the essence of the *First Amendment* as providing “the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”<sup>87</sup> However, one may overlook or forget the media’s role as an advocate, thereby squelching the free flow of ideas and opinions. The following data chronicles the *Los Angeles Times*’ (“*Times*”) efforts to advance its perspective on the debates that take place within the child dependency courts. Oftentimes, it fails to adequately depict both sides of this important public policy issue.

Since the first California bill to presumptively open the child dependency courts in 1999 up until 2014, my research demonstrates that the *Times*’ coverage of the open court debate has been inconsistent:

YEARS APPEARED <sup>88</sup>	Articles in Support	Editorials in Support	Articles in Opposition	Neutral Articles
1999	1 <sup>89</sup>			
2000	1 <sup>90</sup>			
2002				1 <sup>91</sup>
2010		1 <sup>92</sup>		
2011	2 <sup>93</sup>	4 <sup>94</sup>	1 <sup>95</sup>	3 <sup>96</sup>

<sup>87</sup> *Hustler v. Falwell*, 108 S. Ct. 876, 879 (1988).

<sup>88</sup> The table tracks all articles published in the *L.A. Times* regarding opening the dependency courts. In many years, no articles were published. The publication of articles increased in years when open-court bills were presented in the California legislature or when a judge issued a new order opening the courts. Therefore, many years are excluded because no political action prompted attention by the *L.A. Times*.

<sup>89</sup> See generally, Shawn Hubler, *Shedding Light on the Dark World of Child Abuse*, L.A. TIMES, at B1 (Mar. 11, 1999).

<sup>90</sup> See generally, Sandy Banks, *Secrecy Doesn’t Seem to Be the Answer*, L.A. TIMES, AT E1 (Jun. 27, 2000).

<sup>91</sup> See generally, Stuart Pfeifer, *Pleading for Less Secrecy in Juvenile Court*, L.A. TIMES, B2 (Jul. 5, 2002).

<sup>92</sup> See generally, Editorial: *An open-and-shut-case*, L.A. TIMES, A37 (Dec. 19, 2010).

<sup>93</sup> See generally, Jim Newman, *Secrecy That Hurts Kids*, L.A. TIMES, A11 (Mar. 8, 2011); Gerald Therolf, *Presiding judge Prepares to Open L.A. County Dependency Courts*, L.A. TIMES (Nov. 8, 2011).

<sup>94</sup> See generally, Editorial: *A Dependency Court Cure*, L.A. TIMES, A24 (Feb. 12, 2011); see generally Editorial: *Let Sun Shine on Dependency Court*, L.A. Times (Apr. 26, 2011); Editorial: *Open Courts for Kids: An L.A. Judge’s Proposal to Let the Public Observe Dependency Court Proceedings is a Step Forward*, A22 (Nov. 10, 2011).

<sup>95</sup> See generally, Marcy Valenzuela, *Protecting the Most Vulnerable*, L.A. TIMES, A19 (Nov. 28, 2011).

<sup>96</sup> See generally, Victoria Kim, *Dependency Courts Should Be Open, Panel Told*, L.A. TIMES, A3 (Mar. 2, 2011); Garrett Therolf, *Push for Open Dependency Courts Set for Key Test on Tuesday*, L.A. TIMES (Apr. 25, 2011), <http://latimesblogs.latimes.com/lanow/2011/04/push-for-open-dependency-courts-set-for-key-test-on-tuesday.html>; Garrett Therolf, *Foster Children Protest Public Juvenile Dependency Proceedings*, L.A. TIMES (Nov. 21, 2011), <http://latimesblogs.latimes.com/lanow/2011/04/push-for-open-dependency-courts-set-for>

2012	4 <sup>97</sup>	3 <sup>98</sup>
2013	2 <sup>99</sup>	1 <sup>100</sup>
2014		3 <sup>101</sup>

From the beginning of its coverage in 1999 through 2014, my data demonstrates that the *Times* published 1 out of 27 articles, or 3.7%, in opposition to opening the child dependency courts to the press. In contrast, my data suggests that the *Times* published 15 out of 27 articles, or 55.6%, that advocated opening the child dependency courts.

People assume that articles in opposition to open courts were not published because no one submitted or attempted to gain permission to publish such an article. That is not always the case. As an expert on the open court debate, I have offered on several occasions to publish an article in opposition to opening the courts, but the *Times* denied my offers.<sup>102</sup>

#### CONCLUSION

This is a story of a presiding judge who abused his discretion by promulgating an illegal rule of court, a story of federal and state agencies that either looked the other way or failed to follow statutory remedies and safety procedures while abused

key-test-on-tuesday.html.

<sup>97</sup> See generally, Jim Newton, *For L.A. Dependency Court, a First: The Press*, L.A. TIMES (Feb. 13, 2012), <http://articles.latimes.com/2012/feb/13/opinion/la-oe-newton-column-dependency-court-20120213>;

Jim Newton, *Does Secrecy Serve the Children?* L.A. TIMES (Mar. 19, 2012),

<http://articles.latimes.com/2012/mar/19/opinion/la-oe-newton-dependency-court-20120319>;

Jim Newton, *Whom Does Secrecy Serve?* L.A. TIMES, Mar. 19, 2012, at A13; see generally Jim Newton, *The Cost of Delay*, L. A. Times, A13 (Jun. 4, 2012).

<sup>98</sup> See generally, Garret Therolf, *L.A. Judge Plan to Open Child Dependency Courts to Press, Public*, L.A. TIMES, (Jan. 30, 2012), <http://latimesblogs.latimes.com/lanow/2012/01/judge-to-allow-public-access-to-dependency-court.html>; John Hoeffel, *Group Sues Over L. A. Judge's Decision to Open Juvenile Courts*, L.A. TIMES (Feb. 7, 2012), <http://latimesblogs.latimes.com/lanow/2012/02/group-sues-over-la-judges-decision-to-open-juvenile-courts.html>; Garret Therolf, *Media Gain Access to L.A. County Children's Courts*, L.A. TIMES, AA (Feb. 8, 2012); *Appeals Court Denies Effort to Keep Press Out of Children's Courts*, L.A. TIMES (Feb. 15, 2012), <http://latimesblogs.latimes.com/lanow/2012/02/appeals-court-childrens-courts-media.html>.

<sup>99</sup> See generally, Editorial: *An Open Dependency Court Harms No One*, L.A. TIMES (Dec. 18, 2013), <http://articles.latimes.com/2013/dec/18/opinion/la-ed-dependency-court-nash-los-angeles-20131218>;

Editorial: *The Press as Court Watchdog*, L.A. TIMES, A24 (Dec. 18, 2013).

<sup>100</sup> See generally, Garrett Therolf, *Appeals Court Prepares to End Press Access to Child Dependency Courts*, L.A. TIMES (Dec. 12, 2013), <http://articles.latimes.com/2013/dec/12/local/la-me-ln-child-dependency-courts-20131212>.

<sup>101</sup> See generally, Garrett Therolf, *Judge Erred in Opening Dependency Court to Media, Appeals Court Rules*, L.A. TIMES (Mar. 3, 2014), <http://www.latimes.com/local/la-me-open-youth-courts-20140304-story.html>; Garrett Therolf, *Judge Reaffirms Press and Public Access to Foster Care Proceedings*, L.A. TIMES (Aug. 8, 2014), <http://www.latimes.com/local/lanow/la-me-ln-press-public-access-foster-care-proceedings-20140808-story.html>; Garrett Therolf, *Foster Care Cases to Remain Public Under New Order*, L.A. TIMES (Aug. 8, 2014), <http://www.latimes.com/local/countygovernment/la-me-media-access-20140809-story.html>.

<sup>102</sup> I give credit to Jim Newton, a retired senior op-ed and editorial Times staff member, for agreeing to participate in a point/counter-point op-ed with me. Emails from William Wesley Patton to Jim Newton on March 8, 2011 and July 11-12, 2012 are on file with author.

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children and parents suffered possible emotional distress in and outside the courtroom, a story of the media advancing its own interest at the expense of its First Amendment responsibility. Where does all this leave the public?<sup>103</sup>

First, we need to rethink whether there should be specific term limits for the position of presiding judge. Although building expertise and continuity are important, the longer a judge presides, the more likely deference will shield abuses of discretion and protect the *status quo*. Second, the structure of the Judicial Council Advisory Committees needs to change. Chairs or co-chairs should not be leading the committees for up to seven years. A judge should not serve on the same advisory committee for up to eleven years. In addition, Advisory Committee reports should be treated like the California Supreme Court treats proposed changes to the rules of court—they should be available for public comment.<sup>104</sup> A public comment period would assist the Judicial Council by gaining insights from experts, especially academics, who are not on the internal Judicial Council committees so that issues and policy positions can be subject to broader intellectual debate before they are adopted by the Judicial Council.

In addition, citizens need more avenues for charting the quality and fairness of media publications. Currently, several organizations provide awards for excellent journalism.<sup>105</sup> But there is no official organization that charts journalistic breaches of ethics and public trust. Perhaps it is time for a press-regulatory organization like the Independent Press Standards Organisation (“IPSO”) in England to operate within the First Amendment constraints in the United States. “IPSO is the independent regulator for the newspaper and magazine industry in the UK...[and] uphold[s] the highest standards of journalism by monitoring and maintaining the standards set out in the Editors' Code of Practice, and provide[s] support and redress for individuals seeking to complain about breaches of the Code.”<sup>106</sup>

It is time for the California Judicial Council, the Administrative Office of the Courts, and the California Department of Social Services to explain why they did not protect California’s abused children from what they had determined was an illegal violation of California and federal confidentiality laws.

Finally, Congress must amend 42 U.S.C. § 5106a to clarify that although states have flexibility to design open child dependency proceedings, they must, at a minimum, provide procedures to protect against the general public and media from republishing confidential child welfare case information, including any identifying data, gleaned during those open court proceedings.

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<sup>103</sup> *L.A. Times Ethics Guidelines*, L.A. TIMES (2014), <http://www.latimes.com/about/la-about-ethics-guidelines-story.html> (stating that the paper’s news coverage should not lead a reader “to infer that the newspaper is promoting any agenda” outside its editorials and columns and that the paper “seeks out intelligent, articulate views from all perspectives.”). Not permitting the publication of more than one side of an issue may violate that ethical precept.

<sup>104</sup> *The Judicial Branch of Government: Invitations to Comment*, California Courts, <http://www.courts.ca.gov/policyadmin-invitationstocomment.htm>.

<sup>105</sup> See generally, *Journalism Awards*, ONLINE NEWS ASSOCIATION, <https://journalists.org/awards/>; see also, *Newspaper Awards*, NEW ENGLAND NEWSPAPER & PRESS ASSOCIATION, <http://www.nenpa.com/awards-recognition/>; see also *The Pulitzer Prizes*, <http://www.pulitzer.org/>.

<sup>106</sup> *About*, INDEPENDENT PRESS STANDARDS ORGANISATION, <https://www.ipso.co.uk/about-ipso/>.