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Chapter 10: Federal Child Welfare Legislation*

by Frank E. Vandervort

§ 10.1 Introduction

This chapter provides a brief overview of federal statutes that impact the practice of child welfare law. Since the enactment of the Child Abuse Prevention and Treatment Act in 1974 (CAPTA), the federal government has played an ever increasing role in handling child maltreatment cases.

In the early history of America, the welfare of children who were abused, neglected, or abandoned was addressed only by local authorities. Later, individual states developed responses to cases of child maltreatment. Over the past four decades the federal government has played an ever increasing role in child welfare. With few exceptions, federal child welfare legislation is not substantive. That is, the federal government cannot tell any state how it must handle individual cases of child maltreatment. Rather, most federal legislation establishes funding schemes by which an individual state may avail itself of federal funds if it complies with various requirements established by the federal government. While a state may decline to take the federal dollars offered through the various programs, and thereby release itself from any duty to comply with the federal requirements, as a practical matter the funding provided by the federal government is essential to states’ efforts to deliver


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3 A notable exception is the Indian Child Welfare Act (ICWA), 25 U.S.C. §§ 1901 et seq. For a discussion of the ICWA, see Chapter 12.
child welfare services. Today every state accepts federal funding; they are at pains to comply with the requirements of the various federal statutes.

§ 10.2 The Early Years

Since the earliest days after European contact with America, the law has provided for the protection of children from maltreatment by their parents or legal custodians. During the pre-Civil War period, the protection of children was primarily the responsibility of local authorities, who were assisted by various private organizations. In the 1860s, state governments began playing a role in child protection by providing funding assistance to local communities and oversight regarding the use of those monies.

The federal government’s role in child welfare began with the 1909 White House Conference on the Care of Dependent Children. Among the recommendations that emerged from this meeting of the national child welfare leadership was the creation of an office within the federal government to address the needs of abused, neglected, and dependent children. In April of 1912 the Children’s Bureau was established and charged with the duty to “Investigate and report . . . upon all matters pertaining to the welfare of children. . . .”

The role of the federal government in child well-being began with the passage of the Social Security Act of 1935 (SSA). Among other efforts on behalf of children and families, the SSA provided for the Children’s Bureau to work with state authorities to improve the provision of child welfare services to abused and neglected children. For four decades following the enactment of the SSA, the federal government’s role in child welfare was modest, limited to the provision of AFDC benefits for eligible children placed in the foster care system. But in the 1970s the federal government, acting pursuant to the spending clause of the United States Constitution, dramatically increased its role in all phases of preventing and responding to child maltreatment. Since then, the federal role in the child welfare system has steadily increased to the point that today it plays a dominant role.

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5 Id. at 11, 58.
6 Id. at 58.
7 Id. at 58–59.
8 Id. at 59, 61.
9 Id. at 61 (citation omitted).
10 Id. at 63.
§ 10.3 Current Federal Law

Current federal law provides a detailed scheme for funding all areas of child welfare practice. Although federal law provides funding for all phases along the child welfare continuum—from primary prevention through early intervention to termination of parental rights and adoption—it still provides inadequate amounts of money to deal with the problem of child maltreatment comprehensively.

§ 10.3.1 Child Abuse Prevention and Treatment Act

Congress expanded its involvement in child welfare in 1974 with the enactment of the Child Abuse Prevention and Treatment Act (CAPTA).\(^{13}\) CAPTA must be periodically reauthorized. Broadly speaking, CAPTA accomplishes two goals. First, it establishes federal programs for research on the causes of child abuse and neglect and for implementation of programs of best practice in the states. CAPTA permits the Secretary of the Department of Health and Human Services (DHHS) to appoint an advisory board on child abuse and neglect for the purpose of making recommendations to the Secretary and to congressional committees "concerning specific issues relating to child abuse and neglect."\(^{14}\) Additionally, the statute requires that the DHHS establish a Clearinghouse for child welfare information.\(^{15}\) The purpose of the Clearinghouse is to "maintain, coordinate and disseminate information" regarding programs aimed at the "prevention, assessment, identification, and treatment of child abuse and neglect and hold the potential for broad scale implementation and replication."\(^{16}\) The Secretary of DHHS is also charged with "carry[ing] out a continuing interdisciplinary program of research ... that is designed to provide information needed to better protect children from abuse or neglect and to improve the well-being of abused or neglected children."\(^{17}\) Additionally, the DHHS must conduct research regarding the national incidence of child abuse and neglect.\(^{18}\)

Secondly, the statute provides states with a mechanism for accessing federal dollars to support their efforts to prevent and respond to cases of child maltreatment, including but not limited to neglect, physical abuse, and sexual abuse. The Secretary of DHHS must make grants to states "based on the population of children under the age of 18 in each state that applies for a grant."\(^{19}\) If a state wishes to draw down the


\(^{14}\) 42 U.S.C. § 5102(a).

\(^{15}\) 42 U.S.C. § 5104.

\(^{16}\) 42 U.S.C. § 5104(b).

\(^{17}\) 42 U.S.C. § 5105(a)(1).

\(^{18}\) 42 U.S.C. § 5105(a)(2).

\(^{19}\) 42 U.S.C. § 5106a(a).
financial support provided by CAPTA, it must present to the DHHS for approval a state plan that complies with the commands of the statute. The application must address each of the areas of concern established in the statute. Basically, the state’s application must establish a comprehensive program for: (1) mandated reporting of suspected child abuse or neglect; (2) responding to those reports with assessment methods that will distinguish valid from invalid reports; and (3) taking action that is appropriate to the level of risk of harm to the child involved.

Among CAPTA’s numerous provisions are several that may be of particular interest to child welfare lawyers. First, the statute provides that if judicial proceedings are necessary to protect a child, a guardian ad litem (GAL) must be appointed to represent the child’s interests. That GAL “may be an attorney.” The state must ensure that GALs appointed to represent children in child protective proceedings have received “training appropriate to the role.” A GAL appointed to represent a child in a protective proceeding is to “obtain first-hand, a clear understanding of the situation and the needs of the child” as well as “make recommendations to the court concerning the best interests of the child.”

A portion of the federal dollars provided to the states through CAPTA may be used to train professionals, including GALs, regarding the prevention of and response to child maltreatment. If implemented, these training programs may include information regarding the legal rights of children and families.

Additionally, CAPTA provides federal funding for states to improve their child protection systems, by “improving legal preparation and representation” relating to “(i) procedures for appealing and responding to appeals of substantiated reports of abuse and neglect; and (ii) provisions for the appointment of an individual . . . to represent a child in judicial proceedings.” That is, a state may use a portion of its federal CAPTA dollars to ensure there is a process in place for a parent to appeal a CPS finding that he or she maltreated his or her child and for the appointment of a representative for the child when a child protection action is filed with the court. Finally, when CAPTA was reauthorized and amended in 2003 as part of the Keeping Children and Families Safe Act, among the additions to the statute was one that permits each state to decide whether court proceedings regarding child abuse and neglect will be open to the public.

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20 The commands of state plans are comprehensive and detailed. Space limitations do not permit a truly detailed discussion of the requirements of a state plan. See 42 U.S.C. § 5106a(b) (detailing the requirements of a state plan).


CAPTA mandates that a state plan submitted pursuant to its requirements be coordinated with the state’s plan submitted under Title IV-B of the Social Security Act, which seeks to preserve families in which child abuse or neglect have been found to exist and to prevent children from entering the foster care system. Thus, when taken together with Titles IV-B and IV-E, CAPTA attempts to provide a comprehensive funding scheme to respond to reports of child maltreatment.

§ 10.3.2 Titles IV-B and IV-E

By the late 1970s, in part as a result of heightened awareness of child maltreatment and mandated reporting, the number of children in the foster care system nationally had grown to more than a quarter of a million. Throughout the decade of the 1970s child advocates grew increasingly concerned about the number of children in foster care and the length of time those children spent in the foster care system. At that time, children who entered foster care often spent years in the legal “limbo” of the system, which was intended to provide temporary care for the children, not returning to their parents yet never being freed for adoption. The facts in two United States Supreme Court cases from that era provide vivid and typical examples of this problem. In Smith v. Organization of Foster Families for Equity and Reform (OFFER) foster parents brought suit alleging that their constitutional rights were violated when state child welfare workers moved foster children who had been in their care for extended periods of time, sometimes for years, without adequate due process. In its opinion, the Court noted that, on average, children in New York’s foster care system stayed in temporary foster care for more than four years, with some children having lived with their foster parents for 10 years. Similarly, the oft cited Santosky v Kramer, in which the court established the constitutionally mandated standard for termination of parental rights as clear and convincing, involved three children. One child entered foster care in November 1973, the other two in September 1974. In September 1976, the state sought to terminate parental rights. The court, however, denied the state’s request. The children remained in foster care until October 1978 before the state again sought to free the children for adoption.

In addition to the problem of foster care “limbo,” there was concern about “foster care drift,” the phenomenon of children being moved from one placement to another, often repeatedly. For instance, in Smith v OFFER the court pointed out that in 1973-

29 See 42 U.S.C. §§ 621 et seq.
31 Id. at 836.
33 Of course, the Supreme Court did not issue its opinion in the case until March 1982, so the final resolution of the children’s legal status took more than eight-and-one-half years.
1974 approximately 80% of child who were removed after spending at least one year in a foster home were removed to be placed in another foster home.\textsuperscript{35}

\textbf{The Adoption Assistance and Child Welfare Act of 1980}

Concern about the numbers of children entering the foster care system, as well as the length of time they remained subject to placement instability, led Congress to pass and President Jimmy Carter to sign into law the Adoption Assistance and Child Welfare Act of 1980 (AACWA), which established Titles IV-B and IV-E of the Social Security Act.\textsuperscript{36} The act’s overarching goal was to reduce the number of children entering foster care and to reduce the length of time they remained in the system after they entered. Broadly speaking, the legislation addressed the problem in three ways. First, it sought to reduce the number of children entering foster care by requiring that “reasonable efforts” be made to keep children in their families. Next, the statute attempted to reduce children’s lengths of stay by mandating that “reasonable efforts” be made to reunify children with their parents.\textsuperscript{37} The statute also introduced for the first time the idea of permanency planning. Specifically, the law mandated that either the state child welfare agency or the court hold periodic reviews of cases to monitor progress (at least every six months) and that a permanency planning hearing be held after the child was in out-of-home care for 18 months. Finally, the legislation provided, for the first time, federally funded adoption subsidies in an effort to move special needs children—older children and those with emotional or behavioral problems—from the temporary status of foster care into permanent homes.

Like CAPTA, the legislation sought to accomplish its goals by establishing a program of contingent funding for the states. If states developed child welfare and foster care programming consistent with the federal government’s requirements, the state would be eligible to receive federal funding to support those efforts. Typically, the funds provided by the federal government require a state match, which varies from 25% to 80% depending on the nature of the expenditure.\textsuperscript{38}

\textsuperscript{35} \textit{Id.} at 829, n. 23. While there has been some improvement in placement instability, it remains a substantial problem. For instance, a 2004 study conducted by the Children and Family Research Center at the University of Illinois Urbana-Champaign found that 40% of Illinois’ foster children experience placement instability, which was defined as having at least four placements while in foster care. \textit{See Children and Family Research Center, Multiple Placements in Foster Care: Literature Review of Correlates and Predictors (2004), available at www.cfrc.illinois.edu/LRpdfs/Placement Stability.LR.pdf.}

\textsuperscript{36} 42 U.S.C. §§ 621 \textit{et seq.}; 42 U.S.C. §§ 670 \textit{et seq.}

\textsuperscript{37} The AACWA did not define “reasonable efforts,” nor have subsequent amendments to the statute. For helpful guidance in understanding the reasonable efforts concept and its application in practice, see ABA CENTER ON CHILDREN AND THE LAW, MAKING SENSE OF THE ASFA REGULATIONS: A ROADMAP FOR EFFECTIVE IMPLEMENTATION (2001); CECILIA FIERMONTE & JENNIFER RENNE, ABA CENTER ON CHILDREN AND THE LAW, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN (2002).

\textsuperscript{38} 42 U.S.C. § 674 (detailing percentages of reimbursements on expenditures).
Federal funds available pursuant to Title IV-B are intended for use in preventing and responding to cases of child maltreatment. Its purposes are broadly outlined in the statute:

The purpose of [Title IV-B] is to promote State flexibility in the development and expansion of a coordinated child and family services program that utilizes community-based agencies and ensures all children are raised in safe, loving families, by—

1. protecting and promoting the welfare of all children;
2. preventing the neglect, abuse, or exploitation of children;
3. supporting at-risk families through services which allow children, where appropriate, to remain safely with their families or return to their families in a timely manner;
4. promoting the safety, permanence, and well-being of children in foster care and adoptive families; and
5. providing training, professional development and support to ensure a well-qualified child welfare workforce.

In order to be eligible to draw down the federal money, the state, together with the Secretary of DHHS, must develop a state plan for the provision of child welfare services that meets certain federal requirements. The statute requires that the state’s Title IV-B plan be coordinated with the state’s other child welfare plans pursuant to various other federal child welfare legislation. The state’s child welfare agency must also “demonstrate substantial, ongoing, and meaningful collaboration with state courts” in implementing their plans.

Title IV-E funds provide federal assistance to states to help offset the costs of placing abused and neglected children into the foster care system when they cannot be safely maintained in their homes. It has long required states to develop a plan for the delivery of child welfare services, which must be approved by the federal government. Among its many requirements are that each child that enters foster care must have a plan that articulates the permanency goal for the child, establishes a schedule of services that the parents and child are to receive to facilitate reunification or, if reunification is not the permanency goal, a plan for achieving the identified permanent goal.

The AACWA began to have its intended impact. By 1982 the number of children in foster care began to decline. But two phenomena converged shortly thereafter to

41 42 U.S.C. § 622(b)(2).
42 42 U.S.C. § 622(b)(13).
dramatically increase the number of children entering the nation's foster care system. First, in response to the election of Ronald Reagan as President, a more conservative government began to cut economic benefits to poor and working families. Between 1982 and 1984 nearly a half million families were removed from public assistance and another half million lost their Social Security disability payments. Secondly, new social forces emerged—crack cocaine and HIV/AIDS—that dramatically increased the demand for child welfare services, and professionals began to see more families with multiple problems. Whereas in 1982 there were about a quarter of a million children in the nation's foster care system, by 1993 that number had grown to 464,000.

One response to the increased demand for child welfare services through the decade of the 1980s that was consistent with the federal mandate of the AACWA to preserve families was the increased use of family preservation programs. In hindsight, these politically popular programs may have been utilized beyond what the evidence of their efficacy would support. As Professor Elizabeth Bartholet has observed, advocates for these programs often measured their success by whether they maintained children in their homes rather than whether children were safe and well cared for. In a number of high profile cases, children were seriously injured or killed by parents in families in which child protective services had been involved. This led policy makers to act once again.

**Adoption and Safe Families Act**

Concerned that its intent with regard to the handling of child welfare cases—and especially that its intentions regarding the application of the "reasonable efforts" and family preservation provisions of the AACWA—had been misunderstood and misapplied, Congress, in 1997, passed the Adoption and Safe Families Act (ASFA), which became law in November of that year. ASFA amended Titles IV-B and IV-E to clarify the intent of Congress with regard to the provision of child welfare services. ASFA maintained the basic formula established in the AACWA. First, it reaffirmed the federal government's commitment to family preservation as a means of reducing the number of children removed from their homes and placed into the foster care system. It maintained the requirement that in most cases state child welfare

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44 Id.
45 Id. at 131–32.
46 Id. at 131.
47 Id. at 132–33; see also ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE, NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999).
48 Id. at 113–121.
50 Id. (arguing that family preservation had become the "central mission" of the child welfare system and that it placed children at unacceptable risk of harm).
agencies should make “reasonable efforts” to maintain familial integrity, and it substantially increased the funding available to states for family preservation services. In doing so, however, the Congress specifically sought to make clear that “in determining reasonable efforts to be made with respect to a child . . . the child’s health and safety shall be the paramount concern.”

Next, when a child’s safety in the familial home cannot be guaranteed, ASFA provides for a differential response depending on the nature of the harm done to the child. In cases of serious abuse in which the child or a sibling of the child has suffered grave harm, that has resulted in a criminal conviction of the parent for killing or inflicting serious harm on a child or where a parent has experienced previous involuntary termination of parental rights, ASFA eliminates the reasonable efforts requirement altogether and requires that the state child welfare agency immediately initiate or join an effort to terminate the parent’s rights or otherwise place the child permanently. Thus, for the first time, the federal law demanded that states seek immediate termination of parental rights or that another alternative permanent plan be sought in order to protect the child from abuse, neglect, or abandonment.

ASFA also invited, but did not require, each state to establish for itself a set of “aggravated circumstances” cases, which the state determines by either statute or policy will render a parent ineligible for either family preservation or family reunification services. That is, ASFA permitted each state to define for itself a category of cases in which it will immediately seek to terminate the parents’ rights or implement an alternative permanency plan. While the federal legislation allows each state to determine the specific types of cases that will fall within the “aggravated circumstances” designation, it suggests that appropriate cases may include situations where the parent has subjected the child to “abandonment, torture, chronic abuse, and sexual abuse.” Finally, ASFA permits the state child welfare agency to seek, and the court to grant, a request for immediate or early termination of parental rights in any case

53 See 42 U.S.C. § 671(a)(15)(D)(ii). See also 45 C.F.R. § 1356.21(b)(3) (requiring that the parent be convicted of the relevant crime before ASFA’s mandatory termination requirement is triggered).
55 Id. Note, again, that this list is merely suggestive and that each state is free to determine for itself whether or not to include these or other types of cases in its definition of “aggravated circumstances” cases. For example, Michigan has adopted a definition of “aggravated circumstances” cases that includes child sexual abuse involving penetration or an attempt to penetrate, but has excluded those sexual abuse cases which involve only fondling. See Mich. Comp. Laws Ann. § 722.638 (requiring state child protection agency to petition the court and seek termination of parental rights at the initial dispositional hearing); Mich. Comp. Laws Ann. § 712A.19b(3)(k) (establishing aggravated circumstances as a basis for termination of parental rights). For more information regarding the bases for involuntary termination of parental rights, including information as to how individual states have defined “aggravated circumstances,” see the following page on the Children’s Bureau’s Child Welfare Information Gateway: http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.cfm#4.
57 42 U.S.C. § 678.
where the facts and circumstances of that particular child’s situation warrant such action. Illinois has, for instance, adopted a statute that codifies this authority. Its law permits an appropriate party to seek termination of parental rights “in those extreme cases in which the parent’s incapacity to care for the child, combined with an extremely poor prognosis for treatment or rehabilitation, justifies expedited termination of parental rights.” Statutes such as this may place an additional burden on the child’s attorney. For instance, some states allow the child’s advocate to petition the court to terminate parental rights or to otherwise move to permanency at any time after the case is filed. In a state that permits such action, it is a good practice for the child’s advocate to consider at each stage of every case whether the facts merit an effort to pursue early permanency or whether continued efforts to reunify the family will best serve the child.

Unless the court has determined that no “reasonable efforts” are required and permits a party to immediately implement an alternative permanent plan, the state must make “reasonable efforts” to reunify the child with his or her parent. While the federal law requires “reasonable efforts” be made in most cases, it does not define what constitutes “reasonable efforts.” Defining “reasonable efforts” in a way that is truly helpful and provides practitioners with guidance has proven elusive. Missouri, for example, uses this definition:

“Reasonable efforts” means the exercise of reasonable diligence and care . . . to utilize all available services related to meeting the needs of the juvenile and the family. In determining reasonable efforts to be made and in making such reasonable efforts, the child’s present and ongoing health and safety shall be the paramount consideration.

In order to operationalize the definition, some states have combined a definition of “reasonable efforts” with criteria to help courts determine whether the state agency has undertaken the necessary steps to comply with the requirement. The Iowa statute provides an example of this approach:

“reasonable efforts” means the efforts made to preserve and unify a family prior to the out-of-home placement of a child in foster care or to eliminate the need for removal of the child or make it possible for the child to safely return to the family’s home. Reasonable efforts shall include but are not limited to giving consideration, if appropriate, to interstate placement of a child in the permanency planning decisions involving the child and giving consideration to in-state and out-of-state placement options at a permanency hearing and when using concurrent planning. If returning the child to the family’s home is not appropriate or not possible, reasonable efforts shall

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include the efforts made in a timely manner to finalize a permanency plan for the child. A child’s health and safety shall be the paramount concern in making reasonable efforts. Reasonable efforts may include but are not limited to family-centered services, if the child’s safety in the home can be maintained during the time the services are provided. In determining whether reasonable efforts have been made, the court shall consider both of the following:

(1) The type, duration, and intensity of services or support offered or provided to the child and the child’s family. If family-centered services were not provided, the court record shall enumerate the reasons the services were not provided, including but not limited to whether the services were not available, not accepted by the child’s family, judged to be unable to protect the child and the child’s family during the time the services would have been provided, judged to be unlikely to be successful in resolving the problems which would lead to removal of the child, or other services were found to be more appropriate.

(2) The relative risk to the child of remaining in the child’s home versus removal of the child.\(^60\)

Despite the definitional difficulties, when “reasonable efforts” must be made the state’s child welfare agency must establish a written case plan. That plan must include a description of the child’s placement and a schedule of services to be provided to the child, the child’s parents, and the foster parents to facilitate reunification.\(^61\) Additionally, the plan must contain information about the child’s health care, schooling, and related information.\(^62\) If the child is 16 years of age or older, the case plan typically must contain a schedule of services aimed at helping the youth develop independence.\(^63\) If the permanency planning goal is adoption or some other alternative (e.g., permanent guardianship), then the case plan must include a description of the “reasonable efforts” made to achieve the identified goal.\(^64\)

In addition to the provisions that more clearly define the need to make “reasonable efforts,” ASFA made numerous procedural changes aimed at expediting children’s moves through the foster care system.\(^65\) The state’s plan for providing

\(^{60}\) 42 U.S.C. § 675(1)(E).

\(^{61}\) 42 U.S.C. § 675(1) (defining “case plan” and detailing the contents of that plan).

\(^{62}\) IOWA CODE § 232.102(10)(a).

\(^{63}\) See § 10.5, The Foster Care Independence Act (Chaffee Act). It should be noted that some states have made these independent living skills programs and services available to youth younger than 16. You should consult your state laws and policy to determine your state’s approach to this question.

\(^{64}\) 42 U.S.C. § 675(1)(E).

\(^{65}\) 42 U.S.C. § 675(5).
foster care services must include a “case review system” that provides for periodic review of the case by a court or an administrative agency at least every six months, as well as a permanency planning hearing to be held at least once every 12 months for as long as the child remains in foster care.66 Subject to several specific exceptions, when a child has been in foster care for 15 of the most recent 22 months, ASFA requires that the state child welfare agency pursue termination of parental rights.67 At least one state’s supreme court has held, however, that more than the mere passage of time is necessary when considering termination based on the child’s being in foster care for a defined period of time.68

Several other provisions of ASFA focused on expediting children’s moves through foster care. ASFA continued AACWA’s effort to move children out of the foster care system and into permanent placement by permitting the use of concurrent planning.69 Concurrent planning allows the state to simultaneously pursue efforts aimed at reunification as well as efforts to place the child in an alternative permanent setting if family reunification cannot be achieved. Such a concurrent approach, as opposed to the seriatim approach often used by child welfare agencies, may shorten substantially the child’s stay in temporary foster care.

Next, in addition to continuing the subsidies available to individual families to assist with expenses associated with adoption, ASFA provided each state a financial incentive to focus on efforts to move children who could not be returned to their family of origin into adoptive homes. It did so by establishing a baseline number of adoptions and then paying the state a bonus for each adoption from foster care finalized in excess of that baseline.70

Finally, the ASFA expanded the permanency options available for resolving cases.71 For instance, permanent guardianship was specifically recognized as a form of permanency.72 As a last resort for those children who could not be returned to their family of origin but for whom more complete legal permanency could not be achieved, ASFA permitted the state to use “another planned permanent living arrangement” (APpla).73 APPLA “is a case plan designation for children in out-of-home care for

66 42 U.S.C. § 675(5).
68 In re H.G., 757 N.E.2d 864 (Ill. 2001) (termination based merely on child’s placement in foster care for 15 of 22 months violated parent’s substantive due process right to custody of the child).
70 42 U.S.C. § 673b.
71 See generally DONALD N. DUQUETTE & MARK HARDIN, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (Children’s Bureau 1999).
72 42 U.S.C. § 675(7) (defining “legal guardianship” as a judicially created relationship that is intended to be permanent). It should be noted here that additional amendments to Title IV-E enacted as part of the Fostering Connections Act have further ensconced legal guardianship as a permanency plan and provides federal funding to assist in the establishment of permanent, subsidized legal guardianships. These changes are discussed in more detail later in this chapter.
whom there is no goal for placement with a legal, permanent family." Before using an APPLA, the caseworker must document and present to the court compelling reasons why a more appropriate, legally permanent placement option (e.g., return home, adoption, permanent placement with a willing relative) is not available for the child or youth. APPLA may include independent living for an older foster youth who does not wish to be adopted, long-term foster care placement for a youth who has a strong bond with his or her natural parent but whose parent is unable to care for the youth or, in the case of an Indian child, a situation where the child’s tribe has established a different plan for the child’s permanent placement.

§ 10.4 Multiethnic Placement Act and the Interethnic Adoption Provisions

§ 10.4.1 History

Through much of American history, minority children—and particularly African American children—were excluded from receiving publicly funded child welfare services or received fewer services in less family-like settings than Caucasian children. Some non-governmental child welfare programs provided services to children without regard to race, yet the needs of children of color often went unmet or were improperly addressed. In the early decades of the twentieth century, African American women began establishing privately funded programs to provide services for Black children in need of such services. Over time, these organizations contracted with public authorities to provide services to children of color. Today it would be illegal to deny a child services to a child or family based on race.

In recent years, the concern of child welfare professionals has not been the lack of services to children of color, but rather the overrepresentation of minority children,

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75 42 U.S.C. § 675(5).
76 See Jennifer Renne & Gerald P. Mallon, Facilitating Permanency for Youth: The Overuse of Long-Term Foster Care and the Appropriate Use of Another Planned Permanent Living Arrangement as Options for Youth in Foster Care, in CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS (Gerald P. Mallon & Peg McCarr Hess eds., 2005).
78 Id.
80 A number of commentators have argued, of course, that children and families of color are provided the wrong or inadequate services. See JOHN E. B. MYERS, CHILD PROTECTION IN AMERICA: PAST,
and particularly African American children, in the nation’s public child welfare system. As African American children began to be served by the public system, a number of controversies emerged. Among these, few have been more contentious than the placement of children across racial lines, principally, although not exclusively, the placement of African American children with Caucasian families. On the one hand, the failure to place children across racial lines means that there is a smaller foster family pool to draw from, and this may deprive children of a family and condemn them to shuffle from temporary foster home to temporary foster home or institutional care. On the other hand, there is concern that placing children across racial lines may dislocate children from their racial and ethnic identity and will not adequately prepare minority children for dealing with a racist society.

Placement of children across racial lines for foster care and adoption has had a contentious history in this country. This may in part stem from a long-standing misperception that African Americans families were unwilling to adopt. But it also has its roots in the historical failure of public authorities to license African American homes to provide foster care to children, sometimes because of overt racism and sometimes because of the application of race neutral licensing criteria, which historically have had a disproportionate negative impact on African Americans. In 1972, the National Association of Black Social Workers adopted a policy position opposing the adoption of African-American children by non-African-American parents. While over the years the organization's position has developed nuance, it continues to oppose the trans-racial adoption of African-American children in most circumstances. For decades, child welfare agencies maintained race matching

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84 Id. at 395–96.
85 See generally Id. (discussing the conflict surrounding interracial adoption); ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE, NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 123–40 (1999) (discussing the history of the controversy surrounding race matching in adoption).
88 Id.
policies for foster children and those in need of adoption services. During that time, placement of a child across racial lines was permitted only as a last resort. Too frequently, however, children were removed from stable trans-racial foster home placements only to prevent the possibility of a trans-racial adoption. Those policies often resulted in minority children remaining in temporary foster care for unnecessarily long periods of time.

In an effort to address these issues, Congress passed the Multi-Ethnic Placement Act (MEPA) in 1994, which amended portions of Title IV-B and IV-E of the Social Security Act. The Act sought to eliminate—or at least dramatically reduce—race, color, and national origin as considerations in making foster care and adoptive placement decisions. The original statute, however, contained language that was easily interpreted to permit just what it intended to prohibit—the consideration of race, color, or national origin of the child or the parent when making foster care or adoptive placement decisions. For example, the statute prohibited the “routine” consideration of race, color, or national when making placement decisions, which implied that these factors were legitimate considerations rather than wholly prohibited.

Two years after the enactment of MEPA, Congress enacted the Interethnic Adoption Provisions of the Small Business Job Protection Act (IEP). These amendments sought to clarify Congress’s intent that, consistent with other civil rights legislation, considerations of race, color, or national origin were not to be permitted when making placement decisions in the public child welfare system. The IEP also engrafted significant financial penalties in the form of loss of Title IV-E funding onto the law for violation of its terms. Moreover, the amendments explicitly provided a right to sue to any child or adult aggrieved by its violation.

Broadly speaking, the MEPA-IEP seeks to achieve three goals. First, it seeks to eliminate the consideration of a person’s race, color, or national origin with regard to licensing foster parents. The current law provides that:

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90 Id. at 4.
91 Id.
92 Id. at 5.
95 Id. at 131.
96 42 U.S.C. § 674(d)(1).
Child Welfare Law and Practice

... neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

(A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the person, or of the child, involved.98

Next, it prohibits state child welfare agencies, their workers or agents, and the courts from considering the race, color, or national origin of either a child or a parent when making decisions regarding foster care or adoptive placement of a child. The law provides that state agencies or their agents shall not "delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved."99

Finally, it requires state child welfare authorities to make diligent efforts to recruit foster and adoptive parents "that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed."100 Specifically, the law, as interpreted by the Department of Health and Human Services, mandates that, among other things, state authorities do all of the following:

- Develop recruitment plans that reach all parts of the community
- Use diverse methods and avenues for disseminating information about fostering and adopting
- Ensure all prospective foster or adoptive parents have timely access to the home study process
- Train workers to work with diverse cultures
- Develop methods to overcome language barriers101

§ 10.4.2 Delay

Any delay in placement based on race, color, or national origin is prohibited by the statute. Thus, for instance, using "holding periods" for the purpose of placing a child in racially congruent foster or adoptive home would violate the law.

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§ 10.4.3 Denial

Under MEPA-IEP, race, color, or national origin cannot be used to render a child ineligible for foster care or adoption or to deny a person the opportunity to become a foster parent. Additionally, the agency must not take race, color, or national origin into consideration when making decisions regarding efforts aimed at reunification, concurrent planning, or the termination of parental rights.

Although race, color, and national origin may not be considerations used to deny foster care or adoptive placement, MEPA-IEP does not prohibit all consideration of these factors when assessing the needs of a particular child in an individual case. Guidance published by the DHHS in 1997 and 1998 provides that in certain, narrowly tailored situations, the best interests of a particular child may support some consideration of race, color, or national origin in placement decision-making. To be legitimate, however, consideration of these factors must grow out of the unique needs of a particular child. The 1997 policy guidance provides insight into the types of consideration which may be permissible:

[I]t is conceivable that an older child or adolescent might express an unwillingness to be placed with a family of a particular race. In some states older children and adolescents must consent to their adoption by a particular family. In such an individual situation, an agency is not required to dismiss the child’s express unwillingness to consent in evaluating placements.

In very carefully circumscribed instances such as these, consideration of race, color, or national origin may be appropriate under the law. Even in situations such as these, however, the caseworker should not blindly defer to the young person. Rather, this should be seen as a situation in which the child may need counseling. Agencies’ actions in such cases will be carefully scrutinized to ensure that there are not more narrowly tailored responses available to meet the child’s expressed reluctance.

When a child has a specific need relating to race, color, or national origin, that need as well as less impactful methods of addressing the child’s need should be carefully documented in the child’s case file. Doing so will help prevent the routine consideration of race, color, or national origin that the law so clearly prohibits. Race, color, or national origin, then, should only rarely be taken into consideration when making placement decisions.

Two important issues must be accounted for when race, color, or national origin influence a placement decision. First, race, color, or national origin cannot be considered for certain categories of children. For instance, infants are presumed
to have

103 Id.
104 Id. at 4.
no special needs concerning race, color, or national origin. As such, consideration of race, color, or national origin during placement decision-making for an infant cannot grow out of the unique needs of the individual child, and any consideration of them when making decisions regarding infants is prohibited. Secondly, any consideration of race, color, or national origin will be subjected to strict scrutiny and must be narrowly tailored to meet a compelling governmental interest. Thus, even in a situation where race, color, or national origin may be properly considered, the agency’s response must not be overly broad and the agency must seek out the least restrictive means of addressing the individualized needs of the specific child. Responses to a child’s individualized needs regarding race, color, or national origin must be narrowly tailored to meet that specifically articulated need.

§ 10.4.4 MEPA-IEP and the Indian Child Welfare Act

MEPA-IEP specifically provides that its provisions do not apply to any child who qualifies as an “Indian child” under the ICWA.105 Because ICWA applies only to children who are members of or eligible for membership in a federally recognized Indian tribe (i.e., one who meets the definition of “Indian child”), MEPA-IEP’s provisions would apply to those children who are of Native American heritage but who are not member of or eligible for membership in a tribe.

§ 10.4.5 Enforcement

MEPA-IEP contains strict enforcement mechanisms. First, violations of the MEPA-IEP’s requirements may constitute a violation of Title VI of the Civil Rights Act of 1964.106 Next, failure to comply with the statute’s mandates may result in substantial financial penalties for the state in the form of lost Title IV-B funding.107 Similarly, a state may lose Title IV-E funds if it violates the statute.108 Specifically, the statute provides for a penalty of a 2-percent reduction in the state’s Title IV-E funds for the fiscal year for a first violation, a 3-percent reduction for a second violation, and a 5-percent reduction for the third violation. These penalties could easily run into the tens of millions of dollars. Finally, the statute explicitly provides an individual cause of action for any individual child or prospective foster or adoptive parent who has been aggrieved as a result of a violation of the statute.109 MEPA-IEP provides a two-year statute of limitations for bringing an action.110

107 42 U.S.C. § 623(a); 45 C.F.R. § 201.6(a).
108 42 U.S.C. § 674(d).
Chapter 10: Federal Child Welfare Legislation

§ 10.5 The Foster Care Independence Act (Chaffee Act)

Although discussed in more detail in Chapter 23, the Foster Care Independence Act (commonly referred to as the Chaffee Act) merits a brief mention here. For some time it has been clear that youth who age out of the foster care system without having found a stable family face major obstacles in their transition to young adulthood. Among the challenges these young people face are lack of adequate education, lack of marketable job skills, homelessness, poverty, teen pregnancy, and involvement in the juvenile and criminal justice systems. To address these problems, in 1986 Congress amended Title IV-E to establish the Independent Living Program. The Program aims to provide services to older foster youth to prepare them for adulthood. In 1999 Congress expanded the services available to these youth by amending various provisions of Title IV-E. Basically, the Chaffee Act established the Chaffee Foster Care Independence Program, which allowed states to provide Medicaid coverage to youth 18 to 21 years of age who are in foster care on their 18th birthday, permitted foster care youth to have assets valued at up to $10,000 and remain eligible for Title IV-E funding (up from only $1000), required state child welfare authorities to ensure that foster parents are prepared initially and on an ongoing basis to care for the youth placed in their homes, and authorized increased adoption incentive payments to states to aide in establishing permanent homes for these youth.

§ 10.6 Fostering Connections to Success and Increasing Adoptions Act

The Fostering Connections to Success and Increasing Adoptions Act (Fostering Connections Act), which amends numerous provisions of Titles IV-B and IV-E, became law on October 7, 2008. In broad terms, these amendments seek to maintain a child’s ties with family, expedite children’s passage through the foster care system, provide prompt permanency, and achieve better outcomes for youth once they leave the foster care system. More specifically, the Fostering Connections Act: (1) expands permanency options for foster children and youth; (2) requires increased efforts of state child welfare authorities to locate members of a child’s kinship network where that child is in or at risk of entering the child welfare system; (3) requires state child welfare authorities to undertake more aggressive efforts to notify a child’s adult relatives that the child has entered the foster care system; (4) permits waiver of certain foster home licensing rules in order to place a child with relatives; (5) permits states to maintain youth in foster care until age 21 under certain circumstances; (6) requires that the agency work with youth close to aging out of foster care to develop a plan for


transitioning to independence; (7) encourages educational stability by requiring state child welfare authorities to coordinate with educational providers; (8) ensures children in foster care have access to health care; (9) ensures that when possible siblings are placed together; (10) permits Indian tribes to directly access Title IV-E funds rather than having to work through states to receive these funds; (11) provides incentives for adoption of children from the foster care system. Each of these goals will be discussed briefly.

§ 10.6.1 Expanded Permanency Options

The Fostering Connections Act permits each state to establish a subsidized kinship guardianship program. Under such a program “grandparents and other relatives” who have cared for a child in the role of foster parents and who are willing to make a permanent commitment to raising the child may become legal guardians of the child. This program would work much the same way as the adoption assistance program. The adult relative would be given guardianship over the foster child that is intended to be permanent. The relative-guardian would receive financial assistance to provide care for that child. Among other requirements, to be eligible for a subsidized guardianship, the relative must have cared for the child as a foster care provider for six consecutive months. Additionally, the state can be reimbursed by the federal government for up to $2000 per child for nonrecurring expenses related to getting the guardianship put in place (e.g., filing fees). Before a relative-guardian may receive kinship guardianship assistance payments, the agency must conduct a criminal background check using national crime information data bases of the guardian and any other adult living in the home. Moreover, before placing a child in a kinship guardianship, the case worker must document the steps that were taken to determine that returning the child to the parent is not an appropriate permanency plan, why placement with a relative in a permanent guardianship will serve the child’s best interests, that adoption by the relative has been discussed and why adoption is not being pursued, and what efforts were made to discuss the matter with the child’s parents.

§ 10.6.2 Locating Adult Relatives

The amendments permit the DHHS to make a limited number of matching grants to the individual states, local, tribal, or private agencies to help children who are in or are at risk of entering the foster care system to reconnect with adult relatives. Among the services that may be made available through these grants are kinship navigator programs, which assist adult caregivers in locating services that will assist them in providing for the needs of a child who is placed with them. Included in the bundle of services that should be made available through the kinship navigator program is assistance in locating and obtaining legal counsel.

These grants may also be used to implement “intensive family-finding efforts” to locate members of the child’s extended family, to work toward reestablishment of
relationships with these newly located relatives, and to find permanent family placements for children.

Family connection grants may also be used to fund “residential family treatment” programs that would “enable parents and their children to live in a safe environment for a period of not less than 6 months” and which would provide various services to the child and the parent, either in that program or by way of referral to another program.\(^{113}\)

**§ 10.6.3 Providing Notice to Relatives**

The Fostering Connections Act amends Title IV-E to require that each state’s plan provide that within 30 days of the child’s removal from the parental home state authorities will “exercise due diligence to identify and provide notice to all adult grandparents and other adult relatives of the child” unless there has been family or domestic violence involving that adult.\(^{114}\) The statute contains a number of requirements for the information that must be provided in such a notification.

**§ 10.6.4 Waiving Licensing Rules**

The statute clarifies that non-safety related licensing rules may be waived to facilitate placement of children into relative foster homes.\(^ {115}\) However, such waivers must be made on a case-by-case basis and may not be made as a matter of policy. Each state may define for itself what constitutes a “non-safety” licensing rule.

**§ 10.6.5 Extending Age of Foster Care Placement**

While it is the federal government’s general policy to move children out of the foster care system and into permanent placements as soon as possible, for older youth, remaining in the foster care system longer may actually enhance the young person’s chances of a successful transition into adulthood.\(^{116}\) For instance, in a study comparing the outcomes of youth who were released from the foster care system at 18 and those who were maintained in the system until age 21, researchers at Chapin Hall found evidence that youth maintained in the system until age 21 had improved outcomes in terms of education, earnings from employment, and delayed teen pregnancy.\(^{117}\) In part as a result of this research, effective October 1, 2010, the Act

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\(^{113}\) 42 U.S.C. § 627(a)(4).


\(^{115}\) 42 U.S.C. § 671(a)(10).


permits the federal government to provide funding to support youth if a state elects to extend their stays in the foster care system to the age of 21. To be eligible for Title IV-E funding between the ages of 18 and 21, the youth must be completing high school or an equivalent program, be enrolled in college or a program of vocational education, be engaged in a program to obtain employment, be employed for at least 80 hours per month, or be unable to be involved in one of these programs because of a medical condition.118

§ 10.6.6 Transition Plan

The Fostering Connections amendments require that during the 90 days immediately preceding a youth’s emancipation from foster care, whether at age 18 or older if the state chooses, agency caseworkers must meet with the youth and others who are supportive of the youth for the purpose of developing a transition plan for exiting the foster care system.119 The plan must be “personalized at the direction of the child” and must specifically address the youth’s housing, health insurance, education, available mentors, continuing support services that are available to the youth, work force supports, and employment services. The plan must be as detailed as the youth chooses.

§ 10.6.7 Educational Stability

Children entering the foster care system have often been required to move to a new school system. These moves have inevitably resulted in foster children losing momentum in their educational progress. The Fostering Connections Act seeks to address this problem by requiring that State child welfare authorities work with relevant educational authorities to ensure that children who are removed from the homes of their biological parents can remain in their elementary or secondary school after the move.120 Thus, each state’s plan for foster care must contain assurances that: (1) the appropriateness of the child’s educational placement is taken into consideration when making decisions about moving the child, and (2) foster placements, whenever possible, are coordinated to ensure the child can remain in his or her school if doing so is in the best interests of the child. Where remaining in the school in which the child was enrolled at the time of placement is not in the child’s best interests, then the state plan must provide for the immediate placement of the child in an appropriate school setting. The federal government will also reimburse states for travel expenses associated with maintaining a child in his or her pre-placement school.

118 42 U.S.C. § 675(8).
§ 10.6.8 Health Care

Children entering the foster care system have numerous health care needs, sometimes due to naturally occurring maladies or due to the neglect and abuse they have experienced before entering the system. There has been long-standing concern about the promptness, continuity, and quality of health care foster children receive while in care. Fostering Connections requires that states’ plans for delivery of services to children in foster care include a strategy to ensure that children are provided appropriate health care, including for mental and dental health. In addition to initial and periodic physical exams, the state may develop a plan for ensuring that the child’s medical records are created and stored electronically and are accessible as health care providers may change. The state must also include in its plan for delivery of foster care services a plan to ensure continuity of medical care and the agency may establish a medical home for the child.

§ 10.6.9 Keeping Siblings Together

Fostering Connections establishes a preference that when removed from the home of their parents, siblings will be placed together. Thus, it amends Title IV-E to require each state’s plan for providing foster care services must include a commitment that the state will make “reasonable efforts” to place siblings together—whether in the home of a relative, foster home with an unrelated person, or for adoption—unless placing the children in the same home would not protect the safety and well-being of one or more of the children. When siblings cannot be placed in the same home, the agency must provide for “frequent visitation or other ongoing interaction between the siblings” unless such frequent contact would not serve the child’s interests.

§ 10.6.10 Tribal Access to Title IV-E Funds

Historically Indian tribes have not had direct access to Title IV-E funds. To gain access to this money, tribes have been required to develop agreements with state child welfare authorities to draw down their share of these federal dollars. Only about half the federally recognized tribes have such an agreement in place. The Fostering Connections Act attempts to change this by establishing a system that permits tribes or tribal consortiums to develop their own plans for providing child welfare services, thereby gaining direct access to federal financial assistance.
To avail itself of this direct federal funding, the tribe or tribal consortium must develop a plan for delivery of child welfare services similar to the plans states have been required to have in place. Each such plan must ensure that it has the capacity to provide for adequate fiscal management of federal programs and must describe the service areas and the populations that will benefit from the tribe’s child welfare services program. The law requires that the Secretary of DHHS provide technical assistance to tribes to assist them in developing a Title IV-E plan for the delivery of child welfare services. Additionally, tribes are eligible for a one time grant of up to $300,000 to offset the costs of developing and submitting the plan.¹²⁷

§ 10.6.11 Adoption Incentives

To encourage states to press for the adoption of foster children who are in need of adoption services, the Fostering Connections Act increases adoption incentive payments to states. Since the enactment of ASFA, states have been able to receive incentive payments for each adoption of an older child or a child with special needs above the state’s base number of adoptions. The way this works is that the state has a base number of adoptions completed as of a certain date. For each adoption of an older child or a child with special needs beyond this base number, the state will be eligible to receive an incentive payment from the federal government.

Fostering Connections enhances these payments in several ways. First, it increases adoption incentive payment to the state for each child adopted beyond the base number from $2000 to $4000. If the adopted child is a special needs child, the state will receive an additional $4000. Finally, when the adoption involves an older child the state will be eligible for the $4000 incentive payment plus an additional $8000 payment (note that this payment is only available for each adoption exceeding the state’s base number of adoptions of older children). The intent of these incentives is to motivate the states to focus on the adoption of special needs and older children from the foster care system.

§ 10.7 Child Well-Being Statutes

Numerous federal statutes unrelated to preventing and responding to child maltreatment play a crucial role in supporting families and promoting child well-being. Some of these establish federal programs to assist particular children or families (e.g., Temporary Assistance to Needy Families (TANF), Medicaid, and the food stamps program), while others provide block grants to the states to provide particular services (e.g., Social Services Block Grants (SSBG) and Maternal and Child Health Block grants). For this latter type of program, the state must establish the program, then individuals apply to the state to gain the benefit of the program. Some of these programs include at least some amount of direct funding for child welfare

¹²⁷ 42 U.S.C. § 676(c).
purposes (e.g., Temporary Assistance to Needy Families, Social Services Block Grants); others are supports generally available to assist categories of children and families, with some children and families who are involved in the child welfare system included in those categories (e.g., Child Care, Title I Education for the Disadvantaged). Some are open-ended entitlements, meaning that federal funding automatically expands or contracts annually to provide a defined benefit for all eligible persons (e.g., foster care, adoption assistances). Most programs are funded at specific levels rather than being limited only by the level of need (e.g., TANF and SSBG).

The following are the significant programs that provide assistance to qualifying individuals and include substantial child welfare services funding.

§ 10.7.1 Temporary Assistance to Needy Families

TANF is a block grant program created in 1996 to replace Aid to Families with Dependent Children (AFDC), which was an open-ended entitlement.\(^\text{128}\) TANF funds time-limited cash assistance to low income families with children. Receipt of TANF funds is contingent on meeting work-hour requirements. The program provides some work supports for participants (e.g., training, child care, transportation). Most TANF beneficiaries are children living with their parents, but a substantial percentage are children residing with relatives, some of whom are placed with that relative as a result of a child welfare proceeding. Indeed, TANF is a significant source of funding for child welfare services including support for children in relative placements as just mentioned, adoption, and related services. Additionally, individual states may choose to transfer a portion of their TANF funds to the SSBG program under Title XX, which funds may be used to provide child welfare services.

§ 10.7.2 Medicaid

Medicaid is an entitlement program that provides health care benefits to low income persons.\(^\text{129}\) Eligibility requirements, the specific services covered, and the level of reimbursement for medical services provided vary from state to state.

Eligibility

States are required to cover pregnant women and children under 6 years of age with a family income below 133% of the federally established poverty rate, and children between 5 and 19 years of age whose family income is below the poverty line. Individual states may choose to also cover pregnant women and children whose family income is between 133% and 185% of the federally established poverty line. States must also provide Medicaid benefits to recipients of Title IV-E foster care and adoption assistance to age 18. Individual states may choose, under the Chaffee Act, to


\(^{129}\) 42 U.S.C. §§ 1396–1396v.
provide Medicaid benefits to young people who are or were in foster care to age 21. States may also choose to cover some children and youth who do not fall within these categories of recipients, and some states elect to provide services to foster children. States are prohibited from imposing cost sharing on services provided to children under age 18 or for services related to pregnancy.

**Benefits**

Medicaid includes both mandatory services (e.g., hospitalization, lab and x-ray fees, family planning and pregnancy-related services) and optional services (e.g., eyeglasses, prescription drugs, dental care, and case management). Those under age 21 are entitled to receive preventative care through “Early and Periodic Screening, Diagnosis and Treatment,” including comprehensive physical exams, immunizations, lead screening, vision and dental services, and other healthcare services necessary to address medical need identified through the exams. Children receiving Medicaid services may receive those services through managed care organizations.

§ 10.7.3 State Children’s Health Insurance Program

In 1997 Congress enacted the State Children’s Health Insurance Program (SCHIP). The program was reauthorized and expanded to cover more children in 2009. The SCHIP program establishes a defined federal financial commitment to provide medical care to children who are ineligible for Medicaid because their family income is too high yet who lack health insurance. Often these children hail from working poor families. Currently, the program covers children and youth under age 19 whose families earn less that approximately $36,200 per year (for a family of four). States may implement their SCHIP programs by expanding their Medicaid program, by establishing an entirely separate program, or by combining the two programs.

§ 10.7.4 Supplemental Security Income

The Supplemental Security Income (SSI) program is a means tested program, administered by the federal government, which was established in 1972. To receive benefits under this program, the individual must meet income eligibility requirements and have a qualifying disability (e.g., physical handicap, mental illness, etc.). SSI is fully federally funded and individual states do not have to match the federal funds.

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§ 10.7.5 Other Federal Programs

In addition to the programs already discussed, there are numerous other programs that may provide aide to children and families involved in child welfare proceedings. These include:

- Food Stamps – a means tested entitlement program. ¹³³

- The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) – a non-entitlement program that provides nutritional support to low income pregnant women and their children to age 5. ¹³⁴

- Child Nutrition Program – funds, among other things, school breakfast and lunch programs. ¹³⁵

- Section 8 housing – not an entitlement program, but it provides rental assistance to low income persons. ¹³⁶

- The Child Care and Development Block Grant – provides child care assistance to low-income working parents. ¹³⁷

- Head Start – a non-entitlement program aimed at providing quality early childhood education and comprehensive services to low-income, preschool aged children. ¹³⁸

§ 10.8 Miscellaneous Federal Statutes

In addition to the child welfare and child well-being legislation discussed above, child welfare lawyers should be aware that other federal statutes may impact your handling of child welfare cases. In this portion of this chapter, we will discuss two statutes of this sort.

§ 10.8.1 Americans with Disabilities Act

The Americans with Disabilities Act (ADA) ¹³⁹ was enacted to address the long-standing and pervasive discrimination against persons with physical and mental disabilities. ¹⁴⁰ The statute intends to guarantee that persons with disabilities have the same access to services, programs, and activities as persons without disabilities. Thus,

¹³⁹ 42 U.S.C. §§ 12101 et seg.
the ADA requires that in certain circumstances public bodies make reasonable accommodations for persons with qualifying disabilities.141

There are three general areas of concern regarding the application of the ADA to child welfare cases. First, the ADA guarantees that all litigants have reasonable access to legal proceedings.142 The states must make reasonable accommodations for parents and children with disabilities to ensure that they may participate in the proceedings. This would include such things as physical access to the courthouse and assistive listening devices or sign language interpreters for the deaf.

The second area of concern relates to the substantive application of the ADA to efforts by state child welfare agencies to preserve and reunify families in which child maltreatment has occurred. It appears that the ADA does not directly apply to child welfare cases.143 To the extent that the ADA applies in the child welfare context, most courts have held that proceedings involving the termination of parental rights do not constitute “services, programs and activities” within the meaning of the ADA, so the ADA does not act to bar proceedings to terminate parental rights.144 Some courts have held that the ADA applies to a limited extent to child welfare proceedings.145 These courts have generally held that if the state has met the “reasonable efforts” requirement it has also met the ADA’s “reasonable accommodation” requirement.146 Although the ADA may apply to the agency’s efforts to reunify and the types of services offered, it does not provide a defense to a termination of parental rights action.147

Finally, the ADA applies to children who are the subject of child protective proceedings to protect them from discrimination based on a disability. For instance, a child care center must make an individualized determination as to whether a particular child’s disability should be accommodated by the program.148

141 See 42 U.S.C. §§ 12131 et seq.
142 See Tennessee v. Lane, 541 U.S. 509 (2004) (upholding against Eleventh Amendment immunity attack Title II of ADA requiring that disabled persons have access to courthouses and that their disabilities be accommodated so that they may participate in legal proceedings); see generally Peter Blanck, Ann Wilichowski & James Schmeling, Disability Civil Rights Law and Policy: Accessible Courthouse Technology, 12 WM. & MARY BILL OF RTS. J. 825 (2004).
143 In re B.S., 166 Vt. 345, 693 A.2d 716, 720 (1997); State v Raymond C. (In re Torrance P.), 187 Wis. 2d 10, 522 N.W.2d 243 (1994).
§ 10.8.2 Children’s Health Act of 2000

The Children’s Health Act of 2000 includes provisions regarding the rights of children who are placed in a “non-medical, community-based facility for children” such as group homes or residential treatment facilities. The Act protects children placed in such facilities from physical or mental abuse, corporal punishment, and restraints or involuntary seclusion imposed for the purpose of discipline or for convenience. The statute strictly limits the use of restraints and seclusion to those members of the staff of such programs certified by the state and trained in taking such action.

§ 10.9 Case Example: Applying Selected Federal Funding Streams and Statutory Requirements

To understand how the various federal statutes interact, it may be instructive to consider them in the context of a specific child welfare case:

Laura is a 22-year-old single young woman who is pregnant with her first child and is staying in the home of friends. Laura had an unfortunate childhood. Her mother is a long-standing polysubstance abuser whose drugs of choice are marijuana, cocaine, and alcohol, although she has sometimes used other substances. To support her drug habit, Laura’s mother sometimes resorted to prostitution. During her childhood, Laura was sexually abused by several of her mother’s male partners. Laura was removed from her mother’s care at the age of 11 and placed into the foster care system. By the time she aged out of foster care at 18, Laura had lived in nine foster homes, a residential treatment facility, and a group home. Laura did not finish high school and has struggled with homelessness and poverty since her emancipation. Although Laura has no contact with her baby’s father at this time, he is a 38-year-old man she met in her neighborhood.

Because she is living in poverty, Laura receives public assistance under the TANF program and receives monthly food stamps, as well. Also, because of her pregnancy, she is eligible to receive supplemental nutritional services through the WIC program. In addition to these more general services, because there is an elevated risk of child abuse or neglect, Laura is eligible to receive nurse home-visitor services paid for by Title IV-B’s Promoting Safe and Stable Families program as well as early intervention services provided through CAPTA. The nurse home-visitor provides educational support to Laura about her pregnancy, provides developmental information about the baby Laura will soon have, and acts as a conduit to other services. For instance, the nurse referred Laura to the local housing office for Section 8 housing. Unfortunately, there are no current housing units available, and the wait list is long.

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150 42 U.S.C. § 290jj.
Despite these efforts, at the time Laura gave birth to her son, Michael, he was born with both THC and cocaine metabolites in his system. When interviewed by a hospital social worker, Laura admitted that she smoked marijuana off and on throughout her pregnancy—most recently three days before her delivery—and used cocaine only the day before giving birth to Michael. Michael was born two weeks prematurely, although he is 5 pounds and 13 ounces. While in the hospital, he experienced some mild tremors and rigidity, which the doctors ascribe to his prenatal exposure to illicit drugs. Because of Michael’s condition, CAPTA’s mandatory reporting law, which has been integrated into the state’s child protection law, the doctor who attended his birth files the necessary report with children’s protective services. A caseworker is assigned to investigate the report—which is financially supported, in part, by CAPTA.

The worker interviews Laura and observes Michael. During the interview, Laura explains that her drug use is the result of the stress of her pregnancy and her poverty. She has no place to go because her friends have informed her that she cannot return to live with them. She says that she very much wants help for her drug usage and that she desperately wants to raise Michael and does not want him placed into foster care. At the conclusion of the worker’s investigation, he substantiates that Michael is a neglected child. He files a petition with the local family court and, accessing funds provided through Title IV-E by the Fostering Connections Act, and after an assessment of her needs, he places Laura into a residential drug treatment program where Michael will join her when he is ready for release from the hospital in a few days.

Because a court petition was filed, the court, consistent with the requisite provisions of CAPTA, appoints an attorney to represent Michael’s interests as his guardian ad litem. At the initial hearing, held within 48 hours of the filing of the petition, the court finds that there is sufficient evidence of neglect to permit the case to proceed, that reasonable efforts were made or were unnecessary to preserve the family, and that placement with Laura without court intervention would be contrary to Michael’s welfare, meeting the requirements of Title IV-E. Under state law, Michael “entered” foster care on the day the court authorized the case to proceed, so the state must conduct a permanency planning hearing in 12 months unless the case is resolved earlier.

Michael is released from the hospital and is placed with Laura in the drug treatment program. Laura is very happy that she is able to see her son daily and to parent him, although she quickly learns that it will be difficult to care for him while working to overcome her addiction. Her daily therapy sessions are very difficult as she begins to deal with the underlying traumas that have led her to use drugs. Laura’s substance abuse related treatment is paid for, in part, by the state’s substance abuse block grant while other portions of her treatment are covered under the state’s Title XX Social Services Block Grant, and Michael’s well baby visits are paid for by Medicaid. She continues to receive WIC, which pays for Michael’s formula.

The residential program is designed to last 90 days to six months depending on the severity of the parent’s substance abuse. For the first couple of weeks, Laura does
well. But as her treatment proceeds, she finds it harder to confront her past and to work through the trauma she has experienced. The stress is enormous and she sometimes lacks the energy to care for Michael. When a staff member of the program raises this issue with her, she has an angry outburst and leaves the program, leaving Michael behind. The program immediately contacts the CPS worker. The worker is unaware of any relative who could care for Michael, so he is placed into a foster home on an emergency basis while the worker seeks out possible relatives with which to place Michael. When Laura returns to the program three days later, she is informed that she has been expelled and Michael placed in foster care. She meets with her worker and identifies several members of her extended family who may be able to provide for Michael. Consistent with federal law as adopted by the state, Michael is shortly thereafter placed in the home of Laura’s aunt who will pursue foster care licensing, a placement which is supported, in part, by Title IV-E funds.

By this time, the workers, using the federally funded parent locator system, have contacted Michael’s father, William. Paternity is established but William indicates that he is in no position to care for his son. He relates an extensive history of drug usage, a long criminal record including two convictions for domestic violence, and a general unwillingness to parent the baby.

The court case proceeds. Michael is adjudicated a neglected child after Laura and William each admit various allegations in the agency’s petition. Michael’s placement continues to be funding through Title IV-E. Also consistent with the Fostering Connections Act, the agency makes a concerted effort to identify other relatives on both sides of Michael’s family, and several other potential relative caregivers are identified. These relatives are provided notice of the proceeding.

At the dispositional hearing, the agency recommends, and the court adopts, a permanency goal of reunification with Laura. By this time, she has reentered drug treatment, albeit in an intensive outpatient program. She is ordered to continue and complete the substance abuse treatment program, undergo psychological and psychiatric assessments, and to follow any recommendations regarding medication and mental health treatment, to complete parenting classes and, to visit Michael at least two times per week under the supervision of her aunt. Her substance abuse treatment is paid for from Title XX and from state funds received through the federal Substance Abuse and Mental Health Services Administration, and the other services are paid for by IV-E funds as matched with state money.

After a couple of months in treatment, Laura again drops out. She continues to visit Michael; however, her aunt reports that she is belligerent and has come to some of the visits appearing to be intoxicated. The aunt reports that at the last visit Laura showed up with a man who scared the aunt and who, like Laura, was obviously high. The aunt is fed up and is no longer willing to care for Michael because of Laura’s behavior. The aunt says she believes a different permanent plan needs to be made for Michael.

The agency convenes a case meeting with the relevant parties to consider options. At the meeting are the workers, Michael’s guardian ad litem, Laura, and several
relatives. There is a consensus that Laura has not made adequate progress. It is decided that the time has come, consistent with the ASFA, to institute a concurrent plan for Michael. He needs to be placed in a placement that will commit to providing for him permanently in the event that Laura or William cannot regain custody. Laura says she has heard on the street that William is back in prison on a parole violation. Unfortunately, for one reason or another, none of the relatives is willing to commit to caring for Michael permanently. No other relatives can be identified, so Michael is placed with foster parents who are interested in adopting a child. Laura again insists that she wants to get clean and care for Michael, so she re-enters drug treatment.

Within a few weeks, however, Laura again drops out of treatment, and her whereabouts are unknown. Meanwhile, Michael has begun to show signs of developmental delay, which medical professionals attributed at least in part to prenatal exposure to illicit drugs. Another case conference is held. Michael’s lawyer explains that she recently attended some training funded by Title IV-E in which early termination of parental rights was one of the issues discussed. She believes the permanency goal should change to termination of parental rights and adoption. The workers were resistant. Even if Laura could get clean, the lawyer argued, she would not be able to meet Michael’s special needs.

In the end, the worker agrees, and a termination petition was filed. At the pretrial hearing on the petition, the judge referred the matter to the county’s new child protection mediation program. Laura had resurfaced and agreed to appear at the mediation. After carefully listening to the workers and Michael’s lawyer, Laura agreed that it was not fair to Michael to have to wait longer for her to be in a position to care for him. After consulting with her attorney, she decided to release her parental rights.

A hearing was scheduled at which Laura released her parental rights. William’s rights were involuntarily terminated. Michael is adopted by his foster parents. Because of his special needs, the foster parents will be eligible for a Title IV-E funded adoption subsidy, which will provide both a cash subsidy and Medicaid to help provide for his needs throughout his childhood.

§ 10.10 Conclusion

Since the federal government entered the child protection and foster care arena in the 1960s, its role and influence has steadily expanded. As the case of Laura and Michael demonstrates, today virtually no aspect of a child welfare case is free of the impact of federal law, either directly or indirectly. Thus, it is incumbent upon child welfare law practitioners, whether representing the child, the parents, or the agency, to be intimately familiar with the workings of the various federal statutes in the field.

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