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## When the Need to Know Outweighs Privacy: Granting Access to Child Welfare Records in the Fifty States

By Courtney Barclay\*

### I. INTRODUCTION

In June 2012, a ten-year-old girl known as “L.P.” was found locked in a closet when Kansas City police officers responded to a tip called in to the Missouri Children’s Division hotline.<sup>1</sup> She weighed thirty-two pounds.<sup>2</sup> The county prosecutor reported that “[a]ll indicators are she spent a substantial amount of time in that room.”<sup>3</sup> L.P. told officers that she was rarely allowed outside of the closet and routinely went days without food.<sup>4</sup> Court records revealed that L.P. was taken from her mother’s custody in 2006, but L.P.’s mother proved she was a fit parent and her daughter was returned to her.<sup>5</sup>

Unfortunately, similar cases came to light in Missouri later that same year.<sup>6</sup> Just one month after L.P. was found, an eight-year-old girl was found malnourished, locked in her bedroom.<sup>7</sup> She had not been to school since kindergarten and the girl’s sister reported that she was almost always locked inside, and even had to “potty” in her bedroom.<sup>8</sup> In October 2012, a four-year-old boy died after his stepmother kicked him in the stomach.<sup>9</sup> Reports suggest that the Missouri Department of Social Services (“DSS”) had investigated the boy’s home multiple times.<sup>10</sup> The case, however, was dismissed.<sup>11</sup>

These tragic cases prompted news outlets to request child abuse records from DSS.<sup>12</sup> The state disclosure law in Missouri permits the director of DSS to release information in child welfare cases resulting in fatalities or serious injury.<sup>13</sup> Despite thirteen years of apparent openness under the disclosure law, the agency initially declined to provide any information to

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<sup>1</sup> Dawn Bormann, *Mother of Missouri Girl Found in Barricaded Closet Is Charged with Child Abuse*, KAN. CITY STAR (June 25, 2012), <http://www.kansascity.com/2012/06/23/3672776/mother-charged-in-closet-girl.html>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

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

<sup>5</sup> Laura Bauer, *Secrecy Shrouds the Case of Girl Found in Closet*, KAN. CITY STAR (Oct. 7, 2012), <http://www.kansascity.com/2012/10/06/3851469/secrecy-shrouds-the-case-of-girl.html#storylink=cpy>. L.P.’s mother “reportedly had worked through a checklist of requirements set by the state,” and her daughter was returned to her after thirteen months. *Id.*

<sup>6</sup> Annie Greenberg, *Innocence Lost: A Timeline of Child Abuse Cases in the Kansas City Area* (Feb. 6, 2013), 41 ACTION NEWS, <http://www.kshb.com/dpp/news/crime/innocence-lost-a-timeline-of-child-abuse-cases-in-the-kansas-city-area>.

<sup>7</sup> Lisa Benson & Syed Shabbir, *KCMO Couple Charged After Girl, 8, Found Malnourished in Bedroom*, 41 ACTION NEWS (July 20, 2012), [http://www.kshb.com/dpp/news/local\\_news/kcmo-couple-charged-after-girl-8-found-malnourshed-in-bedroom](http://www.kshb.com/dpp/news/local_news/kcmo-couple-charged-after-girl-8-found-malnourshed-in-bedroom).

<sup>8</sup> Probable Cause Statement Form, Detective David Alberts (July, 19, 2012), *available at* <http://media.kshb.com/NWT/pdf/MicheleKraftProbableCause.pdf>.

<sup>9</sup> Melissa Yeager, *Two Local Child Abuse Cases to Be Unsealed, State Says*, 41 ACTION NEWS (Apr. 30, 2013), [http://www.kshb.com/dpp/news/local\\_news/investigations/missouri-to-release-records-concerning-two-cases-of-child-abuse-in-kansas-city](http://www.kshb.com/dpp/news/local_news/investigations/missouri-to-release-records-concerning-two-cases-of-child-abuse-in-kansas-city).

<sup>10</sup> Judy L. Thomas & Laura Bauer, *State Releases Records in Death of 4-Year-Old Boy in Holt, Mo.*, KAN. CITY STAR (May 20, 2013), <http://www.kansascity.com/2013/05/20/4245695/state-releases-records-in-death.html>.

<sup>11</sup> *Id.*

<sup>12</sup> Laura Bauer & Judy L. Thomas, *Missouri Agency Will Release Records in KC Case of Child Locked in Closet*, KAN. CITY STAR (Apr. 20, 2013), <http://www.kansascity.com/2013/04/20/4193997/missouri-agency-will-release-records.html>.

<sup>13</sup> *Id.*

avoid “hinder[ing] the criminal justice process.”<sup>14</sup> This refusal to provide information seemed contrary to more than a decade of policy implementation since the passage of the Missouri disclosure law in 2000.

The Missouri disclosure law was passed in 2000 in response to the torture and death of two brothers.<sup>15</sup> Records from the Missouri Division of Family Services indicated that social workers believed the boys were being abused, but failed to recommend removal from the home.<sup>16</sup> The state legislature passed the disclosure law, granting sole discretion to the Director of DSS to release information following the death or serious injury of a child.<sup>17</sup> Missouri newspapers’ request for records revealed that DSS released records in a majority of the twenty-two cases that prompted media records requests filed between 2009 and 2012.<sup>18</sup> All of these records were released prior to the trials of or pleadings by the suspects.<sup>19</sup> The result of this records audit indicates that the reticence DSS showed in disclosing records in L.P.’s case is a new development.

In the nearly fifteen years since the Missouri disclosure law was passed, states have continued to struggle in an attempt to balance accountability with protecting the privacy of children and families in these tragic situations. In 2008, the Children’s Advocacy Institute (“CAI”) issued a report calling for changes to state disclosure laws in fatal or near-fatal child abuse cases.<sup>20</sup> In 2010, the U.S. Senate noted that not all states were in compliance with federal disclosure requirements and directed the Department of Health and Human Services (“HHS”) to create national guidelines.<sup>21</sup> Although HHS has yet to issue any guiding documents, CAI reported in 2012 that more than twenty states had made changes to the disclosure policies surrounding child abuse cases that resulted in fatalities or serious injury.<sup>22</sup>

States, however, and particularly the state-level agencies responsible for child welfare, are wary of the threat to privacy involved in releasing sensitive information from child abuse case reports. The concern over the correct balance of disclosure of information and confidentiality is so great that the Children’s Bureau of the U.S. Department of Health and Human Services threatened the state of Oklahoma with the loss of federal funding based on a claim that the state was disclosing *too much* information about child abuse cases resulting in fatalities.<sup>23</sup> Although the Children’s Bureau eventually rescinded the threat,<sup>24</sup> even the threat of losing funding for disclosing too much information underscores the tension between disclosure and confidentiality, accountability and privacy.

This Article details the balance federal and state governments have attempted to strike between the public’s right to access child abuse information to hold child welfare agencies accountable, and maintaining confidentiality to preserve children’s and families’ right to privacy.

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<sup>14</sup> *Id.*

<sup>15</sup> MO. ANN. STAT. § 210.150 (West 2014); Bauer & Thomas, *Missouri Agency*, *supra* note 12.

<sup>16</sup> ‘Multiple Personality’ Mother Guilty of Murder, ABC NEWS (Oct. 21, 2000), <http://abcnews.go.com/US/story?id=95299&page=1>.

<sup>17</sup> Bauer & Thomas, *Missouri Agency*, *supra* note 12.

<sup>18</sup> Laura Bauer and Judy L. Thomas, *Missouri Falls Silent in Children’s Deaths, Declining to Release Records*, KAN. CITY STAR (Mar. 17, 2013), <http://www.kansascity.com/2013/03/16/4126231/missouri-falls-silent-in-childrens.html>.

<sup>19</sup> *Id.*

<sup>20</sup> CHILDREN’S ADVOCACY INST. & FIRST STAR, STATE SECRECY AND CHILD DEATHS IN THE U.S. iii (2008), [http://www.caichildlaw.org/Misc/State\\_Secrecy\\_Final\\_Report\\_Apr24.pdf](http://www.caichildlaw.org/Misc/State_Secrecy_Final_Report_Apr24.pdf).

<sup>21</sup> CHILDREN’S ADVOCACY INST. & FIRST STAR, STATE SECRECY AND CHILD DEATHS IN THE U.S. 6 (2d ed. 2012), <http://www.caichildlaw.org/Misc/StateSecrecy2ndEd.pdf>.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> Randy Ellis, *Public’s Future Access to Child Abuse Information Is Unclear*, OKLAHOMAN (June 1, 2012), <http://newsok.com/publics-future-access-to-child-abuse-information-unclear/article/3680615>.

<sup>24</sup> Ginie Graham, *Feds Nix Threat to Withdraw DHS Funds*, TULSA WORLD (June 21, 2012), [http://www.tulsaworld.com/news/local/federal-agency-backs-off-threat-to-withhold-oklahoma-s-dhs/article\\_be76c668-7588-58fb-b586-c5b854032aa3.html](http://www.tulsaworld.com/news/local/federal-agency-backs-off-threat-to-withhold-oklahoma-s-dhs/article_be76c668-7588-58fb-b586-c5b854032aa3.html).

To assess the level of confidentiality afforded to child abuse records nationwide, this Article will analyze the Child Abuse Prevention and Treatment Act and corresponding federal regulation<sup>25</sup> and the relevant statutes of all fifty states and the District of Columbia to determine the number and scope of individuals and entities specifically granted access to child welfare records. The federal law is used as a benchmark for the state statutes in this analysis because federal funding is contingent on the states statutorily providing for the confidentiality of child abuse records, and federal laws provide guidelines for the states.<sup>26</sup> The state statutes<sup>27</sup> will be compared and contrasted to one another and to the federal regulation based on the individuals and entities<sup>28</sup> each state permits to access information contained in child abuse records. These individuals are included as either mandatory recipients – parties the federal or state law determines “shall” have access to the records – or discretionary recipients – parties who may be granted access to records at the discretion of the recordkeepers.

Part II of this Article discusses the federal laws and regulations that mandate states protect the confidentiality of child abuse records. Part III offers a comparative summary of the laws analyzed in Part II and subsequently provides recommendations for achieving an optimal balance between accountability and privacy. Finally, Part IV offers conclusions from the analysis and recommendations for future disclosure laws.

## II. FEDERAL LAWS

It was not until the mid-nineteenth century that child abuse came into the national spotlight and states began criminally prosecuting parents for beating their children.<sup>29</sup> In 1874, the case of a young girl, Mary Ellen, hit the front pages of *The New York Times*, documenting a court proceeding against the child's two caretakers for cruel abuse.<sup>30</sup> This case prompted private societies and charity organizations to intervene in incidents of child abuse.<sup>31</sup>

Nevertheless, the government did not begin to actively protect children until Dr. Henry Kempke published the article *Battered Child Syndrome* in 1962.<sup>32</sup> Kempke, a pediatrician, identified certain injuries in children that could only result from abuse.<sup>33</sup> Armed with this new knowledge, states enacted legislation requiring certain persons, known as mandated reporters, to report incidents of child abuse.<sup>34</sup> By 1967, every state had passed a mandatory reporting statute.<sup>35</sup>

In 1974, Congress passed the Child Abuse Prevention and Treatment Act (“CAPTA”)<sup>36</sup> in an attempt to create a “focused Federal effort to deal with the problem [of child abuse].”<sup>37</sup> This

<sup>25</sup> Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C.A. §§ 5101–5106 (West 2014)); 45 C.F.R. § 1340.14 (2014).

<sup>26</sup> 42 U.S.C.A. § 5106a(b)(2)(B)(viii) (West 2014).

<sup>27</sup> A state-by-state legislative search in LexisNexis Law was conducted using the following search terms: “‘child abuse’ AND ‘records’”; “‘confidential records’”; “‘child abuse reports’”; and “‘child abuse.’” In some states, when relevant statutes did not appear in the search results, the states’ legislative tables of contents were searched for statutes relevant to records created by child-protection services.

<sup>28</sup> For a list of the categories of parties and their definitions, see *infra* Appendix I.

<sup>29</sup> Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1418, 1422-24 (1999).

<sup>30</sup> *Id.* at 1424.

<sup>31</sup> *Id.* at 1424-25.

<sup>32</sup> C. Henry Kempke, et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962).

<sup>33</sup> Mangold, *supra* note 29, at 1429.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C.A. §§ 5101–5106 (West 2014)).

<sup>37</sup> Susan Vivian Mangold, *Reforming Child Protection in Response to the Catholic Church Child Sexual Abuse Scandal*, 14 U. FLA. J.L. & PUB. POL'Y 155, 158 (2003) (citing *Child Abuse Prevention Act, 1973: Hearing Before the Subcomm. of Children & Youth of the S. Comm. on Labor & Pub. Welfare*, 93d Cong. 2 (1973) (letter from Walter Mondale to Hon. Harrison A. Williams)).

legislation created the present-day Office on Child Abuse and Neglect (the "Office"), housed in the HHS.<sup>38</sup> CAPTA tasked the Office with funding state initiatives to follow new federal directives regarding the identification, prevention, and treatment of child abuse.<sup>39</sup> These directives included mandatory reporting within state child-protective agencies, investigation of reports of child abuse or neglect, and preserving confidentiality of records.<sup>40</sup> Before 1974, few states met the standards CAPTA demanded.<sup>41</sup>

In 1992, Congress amended CAPTA to loosen confidentiality requirements following the death of a New York boy named Adam Mann, who child welfare officials knew had long suffered abuse.<sup>42</sup> The amendment allowed for the release of records to multidisciplinary fatality review teams.<sup>43</sup> Congress intended that these teams would increase the level of accountability in child welfare agencies.<sup>44</sup>

Currently, CAPTA makes federal funding for child-welfare programs contingent on each individual state meeting several requirements. One of the requirements is the filing of annual reports with the secretary of HHS.<sup>45</sup> These annual reports must include aggregate information about the state agency's activities, such as the number of children reported as abused or neglected, the number of those reports that were substantiated, and the number of case workers responsible for all intake and assessment of the reports.<sup>46</sup> CAPTA further requires the secretary of HHS to prepare a report based on all of the states' annual reports and present it to Congress and the National Clearinghouse on Child Abuse and Neglect Information.<sup>47</sup>

In addition, CAPTA requires states to provide methods to "preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians."<sup>48</sup> Providing general guidelines, CAPTA allows for access to records by:

- (I) individuals who are the subject of the report; (II) Federal, State, or local government entities, or any agent of such entities . . . ; (III) child abuse citizen review panels; (IV) child fatality review panels; (V) a grand jury or court, upon a finding that information in the record is necessary for the determination of an issue before the court or grand jury; and (VI) other entities or classes of individuals statutorily authorized by the State to receive such information

<sup>38</sup> 42 U.S.C.A. § 5106a(b)(2)(B) (West 2014). "The original CAPTA authorized the creation of the National Center on Child Abuse and Neglect (NCCAN)" housed in the U.S. Department of Health, Education, and Welfare (HEW) "to help establish the parameters of the problem and to provide incentives for developing effective methods of treatment." S. REP. 111-378, at 4 (2010). In 1980, HEW split into the Department of Education and the HHS. Kurt Stout, *Spotlight: Centers for Medicare and Medicaid Services*, CAPITOL MARKETS (Nov. 14, 2013), <http://www.capitolmarkets.com/category/agencies/hhs/>. In 1984, CAPTA was amended to reflect this split. See Act of Oct. 9, 1984, Pub. L. No. 98-457, § 101, 98 Stat. 1749, 1749 ("striking out 'Health, Education, and Welfare' and inserting in lieu thereof 'Health and Human Services'"). CAPTA was again amended in 1996; those amendments included renaming the Center to the Office on Child Abuse and Neglect. See Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, § 101, 110 Stat 3063, 3064.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Mangold, *supra* note 29, at 1434.

<sup>42</sup> See Juvenile Justice and Delinquency Prevention Amendments of 1992, Pub. L. No. 102-586 § 9(a), 106 Stat. 4982 (codified at 42 U.S.C.A. § 5106a (West 2014)). The case of Adam Mann had prompted a documentary that revealed failures in the child welfare system based on records obtained by the filmmaker. See *Who Killed Adam Mann?*, (PBS Frontline Dec. 3, 1991); Robert Koehler, *TV Review: A Tragedy of Abuse in PBS' "Adam Mann,"* L.A. TIMES (Dec. 3, 1991), [http://articles.latimes.com/1991-12-03/entertainment/ca-426\\_1\\_adam-mann](http://articles.latimes.com/1991-12-03/entertainment/ca-426_1_adam-mann). The records that served as the basis of conclusions in the documentary were not usually available to journalists, and what they revealed prompted calls for more openness and accountability in the child welfare system. *Id.*

<sup>43</sup> Juvenile Justice and Delinquency Prevention Amendments § 9(a); see also *id.* § 9(c) (providing a "sense of the Congress" that all states develop formal "interagency, multidisciplinary teams" to review cases in which a child known to have suffered abuse or neglect dies, and whenever there is evidence of negligence by the State in handling a report of abuse).

<sup>44</sup> *Id.* § 9(a)(9).

<sup>45</sup> 42 U.S.C.A. § 5106a(c)(6), (d) (West 2014).

<sup>46</sup> *Id.* § 5106a(d).

<sup>47</sup> *Id.* § 5106a(e).

<sup>48</sup> *Id.* § 5106a(b).

pursuant to a legitimate State purpose.<sup>49</sup>

The corresponding federal regulation that the HSS issued provides states with more specific guidance.<sup>50</sup> This regulation requires that states “provide by statute” that all child abuse records are confidential and “that their unauthorized disclosure is a criminal offense.”<sup>51</sup> The federal regulation grants states the discretion to disclose information in child abuse records to additional persons, “for the purpose of carrying out background and/or employment-related screening of individuals who are or may be engaged in specific categories of child related activities or employment.”<sup>52</sup>

The regulation also provides that certain parties *may* access child abuse records or reports.<sup>53</sup> These parties include agencies receiving and investigating child abuse reports, a court, a grand jury, an agency investigating a report, a person legally able to place a child in protective custody, a physician suspecting abuse, an agency authorized to “diagnose, care for, treat, or supervise a child who is the subject of a report,”<sup>54</sup> a subject of a report, a child named in the report, a government official responsible for overseeing the child protective services, and persons involved in bona fide research.<sup>55</sup> These individuals and entities included in the federal regulation form the baseline for the comparison and analysis of the fifty states’ statutes in the following section.

### III. COMPARATIVE GUIDE TO THE FIFTY STATES

All fifty states have a statutory provision safeguarding the confidentiality of child abuse records and reports,<sup>56</sup> meeting the requirements for funding set by CAPTA<sup>57</sup> and the federal HHS regulation.<sup>58</sup> Each state differs, however, on the number of parties and which parties are allowed to access those records. Most states specifically name the parties to whom the records may be released, but some states merely have a general statement of confidentiality, leaving disclosure to the discretion of the courts or the child-welfare agency officials.

This Part of the Article will compare the states’ statutes through a discussion of the categories of parties enumerated by each of the states. First, Section A will discuss the states that guarantee confidentiality using a broad, general statement of confidentiality. Section B will then discuss the state laws that specifically grant access to the parties defined in the federal regulation. Finally, Section C will discuss parties that states have added under the discretion allowed by the federal laws.

#### A. General Statements of Confidentiality

Six states do not include a specific list of parties having access to child abuse records, but rather have general statements providing confidentiality for all such records.<sup>59</sup> These state laws

<sup>49</sup> *Id.* § 5106a(b)(2)(B)(viii).

<sup>50</sup> *See* 45 C.F.R. § 1340.14 (2014).

<sup>51</sup> *Id.* § 1340.14(i)(1).

<sup>52</sup> *Id.* § 1340.14(i)(3).

<sup>53</sup> *Id.* § 1340.14(i)(2).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* § 1340.14(i)(2)(i)-(xi).

<sup>56</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T HEALTH & HUMAN SERVS., DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS 2 (2013), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/confide.pdf#Page=2&view=XYZ](https://www.childwelfare.gov/systemwide/laws_policies/statutes/confide.pdf#Page=2&view=XYZ).

<sup>57</sup> 42 U.S.C.A. § 5106a (West 2014).

<sup>58</sup> 45 C.F.R. § 1340.14(i)(2).

<sup>59</sup> The states that have only general statements of confidentiality are Delaware, Hawaii, Idaho, New York, Ohio, and Virginia. *See* DEL. CODE ANN. tit. 29, § 9017 (West 2013); HAW. REV. STAT. § 350-1.4 (West 2013); IDAHO CODE ANN. §§ 16-1629, 9-340B (West

provide for discretionary disclosure, usually by authorization of the child welfare agency director or agency regulations. For example, the Delaware law provides that the "Department [of Health and Social Services] shall have the discretion to release information from its records to public and private agencies if it determines that such release will serve the best interest of children in its care."<sup>60</sup> As standards for the child's "best interest" may vary greatly among records custodians, these general statements allow the child welfare agencies a great deal of flexibility.<sup>61</sup> However, such broad legislative mandates fail to provide consistent protection for confidentiality and necessary disclosures.

### B. States Granting Access to Parties Defined in the Federal Regulation

CAPTA requires that in order for states to be eligible for funds supporting the prevention, investigation, and treatment of child abuse and neglect, states must implement a plan to preserve the confidentiality of the records created.<sup>62</sup> As a part of the states' plans, CAPTA requires that the records "shall only be made available" to certain persons and entities.<sup>63</sup> The enacted federal regulation further enumerates eleven categories of persons to whom states may statutorily grant access to child welfare records consistent with CAPTA.<sup>64</sup> This Section will discuss the parties identified in the regulation that at least some states have provided access to in the state statutes.

#### 1. Child Welfare Agencies

This category of parties, as defined in the federal regulation, includes the agency or organization "legally mandated by any Federal or State law to receive and investigate reports of known and suspected child abuse and neglect."<sup>65</sup> Thirty-seven states and the District of Columbia specifically authorize the agency or employees of the agency to access child abuse records.<sup>66</sup> It is conceivable, however, that other states' legislatures have not found it necessary to specify this party because the agency would be the origin of the reports and, therefore, would necessarily have access to them.

#### 2. Courts and Grand Juries

The federal regulation provides generally that state courts and grand juries shall have access under terms set forth by the individual states.<sup>67</sup> Thirty-one states and the District of Columbia specifically mention the courts or court officials as parties to whom disclosure of child abuse records may be made.<sup>68</sup> Seventeen states identify grand juries as an entity to which records may be disclosed.<sup>69</sup> Most states impose requirements of relevance or necessity on the disclosure

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2013); N.Y. COMP. CODES R. & REGS. tit. 18, § 465.1 (2013); OHIO REV. CODE ANN. § 5153.17 (West 2013); VA. CODE ANN. § 63.2-1515 (West 2013).

<sup>60</sup> DEL. CODE ANN. tit. 29, § 9017(b).

<sup>61</sup> The Idaho statute also provide for disclosure when it is in the "best interest" of the child. *See* IDAHO CODE ANN. § 9-340B. However, the statute does not provide any guidance as to what factors should be considered in determining whether such disclosure is necessary. *See id.* The Idaho statute adds "best interests of the child" as an additional justification for disclosure to a list including health, safety, or public interest. *Id.* § 9-340B(6).

<sup>62</sup> 42 U.S.C.A. § 5106a(b)(2)(B)(viii).

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

<sup>64</sup> 45 C.F.R. § 1340.14(i)(2) (2014).

<sup>65</sup> *Id.* § 1340.14(i)(2)(i).

<sup>66</sup> The states that grant access to child welfare agencies are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

<sup>67</sup> 45 C.F.R. § 1340.14(i)(2)(ii).

<sup>68</sup> The states that grant access to courts are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming.

<sup>69</sup> The states that grant access to grand juries are Alabama, Arkansas, Florida, Georgia, Illinois, Indiana, Maine, Michigan, Missouri, Nevada, New Hampshire, New Jersey, South Carolina, Tennessee, West Virginia, Wisconsin, and Wyoming. *See* ARK. CODE ANN. § 12-18-909(g)(11)(A) (West 2013); GA. CODE ANN. § 49-5-41(a)(3) (West 2013); 325 ILL. COMP. STAT. ANN. 5/11.1(a)(9) (West 2013); IND. CODE ANN. § 31-33-18-2(10) (West 2013); FLA. STAT. ANN. § 39.202(2)(g) (West 2013); ME. REV. STAT. ANN. tit. 22, §

to courts and grand juries. South Carolina, for example, specifies that “family courts conducting procedures” relevant to child abuse and neglect may access child abuse records.<sup>70</sup> West Virginia law requires that records disclosed to the court be “necessary for the determination of an issue” before the court.<sup>71</sup> In reference to grand juries, New Hampshire law requires that, in order to obtain information in child welfare records, a grand jury must determine that access to the records “is necessary in the conduct of its official business.”<sup>72</sup> Although states may not specifically include courts or grand juries in the confidentiality statutes, agency policy or practice may allow for information to be provided to these entities. For example, Hawaii’s administrative rules for the Department of Human Services specify that the Hawaii DHS can disclose child welfare records to a court for *in camera* review and to a grand jury “when connected with the prosecution of a child abuse or neglect case.”<sup>73</sup>

Judges and jurors should have access to accurate and reliable information about the cases before them. The balance between confidentiality and access can be preserved by placing relevance and necessity requirements on the information provided to the courts. Limits that restrict access based on relevance or necessity fulfill the needs of the court while preventing unnecessary disclosures to judges or officers of the court.

### 3. Health-Care Providers and Other Authorized Care Institutions

The federal regulation specifies physicians, as well as “[a]n agency authorized by a properly constituted authority to diagnose, care for, treat, or supervise a child who is the subject of a report or record of child abuse or neglect” as parties able to view confidential records.<sup>74</sup> The federal regulation requires that to access child welfare records, physicians must first suspect the child to have been abused or neglected.<sup>75</sup>

While the federal regulation mentions only physicians, some states have also recognized other medical professionals as authorized to have access to child abuse records. Thirty-three states and the District of Columbia allow child welfare records to be disclosed to physicians, dentists, nurses, or other hospital or medical personnel.<sup>76</sup> Despite this expanded definition of the category of physician, most states follow the federal regulatory language, specifying that in order to access child welfare records, the healthcare provider must suspect that a child under his or her care has been abused or neglected. For example, New Jersey specifies that, in addition to physicians, “authorized member[s] of the staff of a duly designated regional child abuse diagnostic and treatment center”<sup>77</sup> and “a hospital director or his designate” may inspect child abuse records for the purpose of determining whether placing the child in protective custody is needed.<sup>78</sup> Some states place even further restrictions on access to child welfare records. For

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4008(3)(C) (West 2013); MICH. COMP. LAWS ANN. § 722.627(2)(h) (West 2013); MO. ANN. STAT. § 210.150(2)(6) (West 2013); NEV. REV. STAT. ANN. § 432B.290(1)(k) (West 2013); N.H. REV. STAT. ANN. § 170-G:8-a(II)(a)(7) (West 2013); N.J. STAT. ANN. § 9:6-8.10a(b)(7) (West 2013); S.C. CODE ANN. § 63-7-1990(B)(12) (2013); TENN. CODE ANN. § 37-1-612(c)(3) (West 2013); W. VA. CODE ANN. § 49-7-1(c)(5) (West 2013); WIS. STAT. ANN. § 48.981(7)(14) (West 2013); WYO. STAT. ANN. § 14-3-214(b)(vi) (West 2013).

<sup>70</sup> S.C. CODE ANN. § 63-7-1990(B)(10).

<sup>71</sup> W. VA. CODE ANN. § 49-7-1(c)(5).

<sup>72</sup> N.H. REV. STAT. ANN. § 170-G:8-a(II)(a)(7); *see also* ARK. CODE ANN. § 12-18-909(g)(11)(A) (permitting the child welfare agency to disclose information from reports to grand juries in Arkansas if access to the records “is necessary for the determination of an issue” before the grand jury).

<sup>73</sup> HAW. CODE R. § 17-1601-6(1), (2) (LexisNexis 2013).

<sup>74</sup> 45 C.F.R. § 1340.14(i)(2)(vii) (2014).

<sup>75</sup> *Id.* § 1340.14(i)(2)(v).

<sup>76</sup> The states that grant access to health-care providers are Alabama, Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, Wisconsin, and Wyoming.

<sup>77</sup> N.J. STAT. ANN. § 9:6-8.10a(b)(3) (West 2013).

<sup>78</sup> *Id.* § 9:6-8.10a(b)(4).



example, Wyoming law permits disclosure to mental health professionals only when the child welfare agency “determines the information is necessary to provide appropriate ... therapeutic interventions.”<sup>79</sup>

In contrast, Florida law provides broader access, allowing the state child welfare agency (Florida Department of Children and Family Services)<sup>80</sup> to release any information necessary for “professional persons” to diagnose and treat not only a child abuse victim, but also a child abuse perpetrator.<sup>81</sup> The statute does not further define this category of persons to whom records may be released.<sup>82</sup> And, although the law limits this access to information *necessary* for diagnosis and treatment,<sup>83</sup> further safeguards should be put in place to protect the privacy interests of the child or children involved. Just as judges and grand juries must prove relevance or necessity before gaining access to information, only necessary information should be disclosed for the purpose of treating the perpetrator of child abuse. For example, only information about abuse of the child attributed to the perpetrator should be released, whereas information about the treatment or placement of the child should not be made available to the perpetrator’s health care providers.

In addition to mental-health professionals, agencies authorized to care for children are interpreted in this Article to include mental-health facilities and educational institutions. Twenty-seven states identify these institutions as agencies eligible to view child welfare records.<sup>84</sup> As with the expanded inclusion of a variety of physicians and medical personnel, the states restrict this access to that required for the treatment or care of a child. For example, New Mexico allows school personnel to access records, but only when “the records concern the child’s social or educational needs.”<sup>85</sup> Likewise, Arizona provides that a school may access child abuse records in order to “meet its duties to provide for the safety, permanency and well-being of a child.”<sup>86</sup> This kind of disclosure is seemingly intended as a response to the unique needs that a child may have while under the care or investigation of the department of child services. School officials should be made aware of information necessary to meet those needs, such as counseling or medical attention. However, broad permission of access may lead to too much disclosure. Department policy should therefore limit information disclosure to the bare minimum required for services.

#### 4. Investigating and Service-Providing Authorities

The federal regulation allows states to provide confidential information to a variety of entities that investigate reports of abuse or provide services to children and families, including a person who is legally authorized to place a child in protective custody, such as a child welfare agent.<sup>87</sup> Each state defines the scope of these agencies and the individuals authorized to place children in custody. Twenty-eight states sanction disclosure to the individuals and entities with this authority.<sup>88</sup>

Much of this authority is vested in state and local agencies. For example, Montana law specifically grants access to records for federal agencies, military enclaves, and Indian tribal

<sup>79</sup> WYO. STAT. ANN. § 14-3-214 (b)(viii) (West 2013). The Wyoming statute grants access to both a mental health professional and an education professional “serving the child.” *See id.*

<sup>80</sup> FLA. STAT. ANN. § 39.01(21) (West 2013).

<sup>81</sup> *Id.* § 39.202(3).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> The states that grant access to authorized agencies are Arizona, Arkansas, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Wyoming.

<sup>85</sup> N.M. STAT. ANN. § 32A-4-33(B)(12) (West 2013).

<sup>86</sup> ARIZ. REV. STAT. ANN. § 8-807(B)(1) (West 2013).

<sup>87</sup> 45 C.F.R. § 1340.14(i)(2)(vi) (2014).

<sup>88</sup> The states that grant access to investigating or service-providing agencies are Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Missouri, Montana, Nevada, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Vermont, West Virginia, Wisconsin, and Wyoming.

organizations that are legally authorized to investigate reports of abuse.<sup>89</sup> Montana also provides access for state advocacy programs<sup>90</sup> and interdisciplinary teams that formulate and monitor treatment plans for children and families that interact with the child welfare system.<sup>91</sup> California provides access to child abuse records to interdisciplinary teams called “hospital scan teams,” whose purpose is to identify child abuse or neglect.<sup>92</sup> These teams consist of health-care professionals, child-protective services employees, and law enforcement representatives.<sup>93</sup>

Additionally, eleven states grant broad permissions to individuals authorized to place a child in protective custody.<sup>94</sup> California, for example, authorizes disclosure to “[p]ersonnel from an agency responsible for making a placement of a child.”<sup>95</sup> Some states do place a “need threshold” on the access; for example, Wyoming law grants access to individuals responsible for temporary placements when the information is needed to determine the necessity of protective custody.<sup>96</sup> Alternatively, Rhode Island allows disclosure to “individuals or public or private agencies for the purposes of temporary or permanent placement of the person” at the discretion of the director of the child-welfare agency.<sup>97</sup> States that place these kinds of added limitations – need thresholds and director approval – on access to child welfare records help ensure disclosures are proper and necessary rather than providing unfettered access to these individuals.

### 5. Subjects of the Report

Federal law provides for “[a] person about whom a report has been made” to access the information contained in child-abuse records.<sup>98</sup> In addition, a child named in the report, or his or her guardian *ad litem*, may access the records.<sup>99</sup> However, the federal regulation requires that the name of the person who reported the abuse or suspected abuse not be released, or that it be redacted.<sup>100</sup> Child welfare state agencies may also redact any other names of or identifying information about persons they believe the release endangers.<sup>101</sup>

Seventeen states and the District of Columbia specifically allow the accused access to the reports or records.<sup>102</sup> Thirty-four states and the District of Columbia allow the child or the child’s guardian *ad litem* or other legal representative to access the reports.<sup>103</sup> The purpose of disclosure to the accused may be different than the purpose of disclosure to the child, therefore the distinctions drawn by the states in allowing these different parties access to the information are important to note.

<sup>89</sup> MONT. CODE ANN. § 41-3-205(3)(a) (West 2013).

<sup>90</sup> *Id.* § 41-3-205(3)(f).

<sup>91</sup> *Id.* § 41-3-205(3)(k).

<sup>92</sup> CAL. PENAL CODE § 11167.5(b)(7) (West 2013).

<sup>93</sup> *Id.*

<sup>94</sup> The states that allow access to persons placing a child in protective custody are California, Illinois, Indiana, Michigan, Minnesota, Nevada, New Jersey, North Dakota, Rhode Island, Utah, and Wyoming. *See* 45 C.F.R. § 1340.14(i)(2)(vi) (2014); *see e.g.* IND. CODE ANN. § 31-33-18-2(5) (West 2013); MICH. COMP. LAWS ANN. § 722.627(2)(d) (West 2013); NEV. REV. STAT. ANN. § 432B.290(1)(b) (West 2013); N.J. STAT. ANN. § 9:6-8.10a(b)(4) (West 2013); N.D. CENT. CODE ANN. § 50-25.1-11(1)(b) (West 2013); WYO. STAT. ANN. § 14-3-214(b)(iv) (West 2013) (for statutes granting access to records to persons placing children in protective custody).

<sup>95</sup> CAL. PENAL CODE § 11167.5(b)(10).

<sup>96</sup> WYO. STAT. ANN. § 14-3-214(b)(iv).

<sup>97</sup> R.I. GEN. LAWS ANN. § 42-72-8(b)(2) (West 2013).

<sup>98</sup> 45 C.F.R. § 1340.14(i)(2)(viii).

<sup>99</sup> *Id.* § 1340.14(i)(2)(ix).

<sup>100</sup> *Id.* § 1340.14(i)(2)(viii).

<sup>101</sup> *Id.*

<sup>102</sup> The states that allow the accused access to the child abuse reports or records are Arizona, Arkansas, District of Columbia, Florida, Indiana, Iowa, Kentucky, Maine, Michigan, Missouri, Montana, Nevada, New Jersey, North Dakota, Pennsylvania, South Carolina, Utah, and Vermont.

<sup>103</sup> The states that allow access to the child, the child’s guardian *ad litem*, or other legal representative are Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

States granting access to the accused child abuser often place restrictions on what information can be disclosed or under what circumstances the information will be disclosed.<sup>104</sup> New Jersey, for example, only permits disclosure to an accused perpetrator who is appealing a finding of substantiated child abuse or neglect – that is, the investigating agency must have found evidence of abuse or neglect.<sup>105</sup> Moreover, either the division of child-protective services or a judge must determine that disclosure of the information is necessary for the alleged abuser's appeal.<sup>106</sup>

States also place restrictions on access to records by the child who is the subject of the report. For example, South Carolina requires the child to be at least fourteen years of age to access his or her records, and allows the child welfare agency to withhold from any victim, regardless of age, information in the record that it determines could cause harm to the child's emotional well-being.<sup>107</sup> New Jersey permits the child welfare agency to disclose information to a child "as appropriate to the child's age or condition, to enable the child to understand the basis for the department's involvement and to participate in the development, discussion, or implementation of a case plan for the child."<sup>108</sup>

The accused's need for access is obvious in many cases; these individuals will need information to appeal or defend a finding of substantiated abuse or neglect. Children who may have been the victims of abuse or neglect also have an obvious right to the information; as the New Jersey law evidenced, this information can help children better understand their situation. Additionally, this information may be helpful as victims seek medical treatment.

Some of the restrictions states place on disclosure to subjects of the report, however, may hinder accountability. For example, limiting the accused's access to substantiated cases of abuse, or for the purpose of criminal defense, prevents those individuals from reviewing records of government investigation that resulted in unfounded reports of abuse. This access would seem to offer a great deal of information about the process of investigation. Additionally, if unsubstantiated records are retained for future use by agencies, the accused should have the ability to challenge any inaccurate information. In contrast, the limits placed on a minor's access to child abuse records in South Carolina seem reasonable; restricting access to sensitive information by age likely reduces the risk of further distress to the victims. To maximize accountability, however, once the child reaches the age of majority,<sup>109</sup> restrictions should be lifted to allow the child full access to the records.

In addition to these protections for minors, states should redact any sensitive information, such as the name or identifying information of the person who filed a report of suspected abuse, when an individual named in the agency record requests access, to provide a more balanced approach to disclosure. This would allow individuals to have relevant access and the ability to challenge any inaccurate information, while also promoting accountability and oversight of child welfare agencies by those most closely associated with an agency's investigative and placement procedures.

<sup>104</sup> See, e.g., FLA. STAT. ANN. § 39.202(2)(e) (West 2013) (permitting disclosure when the accused is not a parent and limiting the disclosure to information about the investigation process); MICH. COMP. LAWS ANN. § 722.627(2)(f) (West 2013) (requiring the name of the reporter to be redacted); MO. ANN. STAT. § 210.150(2)(5) (West 2013) (prohibiting disclosure before a criminal "indictment is returned or an information filed").

<sup>105</sup> N.J. STAT. ANN. § 9:6-8.10a(b)(12) (West 2013).

<sup>106</sup> *Id.*

<sup>107</sup> S.C. CODE ANN. § 63-7-1990(B)(6) (2013).

<sup>108</sup> N.J. STAT. ANN. § 9:6-8.10a(c).

<sup>109</sup> Children exit or "age out" of child welfare systems between the ages of eighteen and twenty-one, depending on state policy. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2012 5 n.4 (2013), available at <https://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

### 6. State and Local Officials

The federal regulation allows for access to “[a]n appropriate State or local official responsible for administration of the child protective service or for oversight of the enabling or appropriating legislation, carrying out his or her official functions.”<sup>110</sup> Twenty-one states and the District of Columbia<sup>111</sup> allow access to records for some sort of government official acting in his or her official capacity. For example, Oklahoma gives access to the governor and any person whom the governor designates in writing; the speaker of the State House of Representatives and the president pro tempore of the Senate may also grant written permission to any member of the state legislature.<sup>112</sup> In contrast, West Virginia allows for a much broader interpretation of the provision, granting access to records to any “Federal, state or local government entities, or any agent of such entities.”<sup>113</sup> West Virginia, however, places a purpose limitation on this access, allowing disclosure *only* when those agents are acting in an official capacity to protect children from abuse or neglect.<sup>114</sup>

The purpose of limiting officials’ access in West Virginia strikes an effective balance between access and confidentiality. Government officials, such as legislators and executives (e.g., governors, attorneys general, department secretaries), should have access to aggregate data on the reports of abuse filed and the resulting investigations to evaluate the effectiveness of child protection agencies. In general, however, these representatives should not need identifiable, sensitive file information. For further review of agency practices, states could set up oversight committees, such as Florida’s Blue Ribbon Panel, implemented in 2002 after a child went missing from the state’s foster care system.<sup>115</sup> Oversight committees, such as a Blue Ribbon Panel, a standing legislative subcommittee, or a citizens’ oversight commission, would have limited personnel and, therefore, could have access to full case records as surrogates for the public. This allows an independent body to review the full case records under confidentiality agreements; the panels can then submit aggregated or redacted reports, as well as suggested policy or law changes, to state leadership without publicly disclosing sensitive, personally identifiable information.

### 7. Bona-Fide Researchers

The federal regulation and twenty-three states specifically allow persons involved in research to access child abuse records.<sup>116</sup> The federal regulation specifies only that the party must be conducting a “bonafide research or evaluation project.”<sup>117</sup> Furthermore, the federal regulation limits researchers’ access to information identifying individuals, allowing such access only if the

<sup>110</sup> 45 C.F.R. § 1340.14(i)(2)(x) (2014).

<sup>111</sup> The states that grant access to state and local officials are Alabama, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Montana, Nevada, New Jersey, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, and West Virginia.

<sup>112</sup> OKLA. STAT. ANN. tit. 10A, § 1-6-103(A)(9), (11) (West 2013).

<sup>113</sup> W. VA. CODE ANN. § 49-7-1(c)(1) (West 2013).

<sup>114</sup> *Id.*

<sup>115</sup> *Governor’s Blue Ribbon Panel on Child Protection*, CNN.COM (May 27, 2002),

<http://edition.cnn.com/2002/US/05/27/florida.child.report/index.html>. This panel was a special, limited-time appointment to investigate the system failures that led to the disappearance Rilya Wilson. *Id.* A former caregiver of Rilya Wilson was convicted of kidnapping and child abuse in connection with Rilya Wilson’s disappearance; despite the fact that a body was never found prosecutors included a charge of murder in the first degree, but the jury failed to convict on that charge. Curt Anderson, *Geralyn Graham Sentenced to 55 Years in Rilya Wilson Case*, HUFFINGTON POST (Feb. 12, 2013), [http://www.huffingtonpost.com/2013/02/12/geralyn-graham-sentenced-\\_n\\_2670157.html](http://www.huffingtonpost.com/2013/02/12/geralyn-graham-sentenced-_n_2670157.html).

<sup>116</sup> The states that grant access to researchers are Alabama, Arizona, Arkansas, Colorado, Connecticut, Florida, Illinois, Iowa, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, North Dakota, Oklahoma, South Carolina, Tennessee, Utah, Washington, and Wisconsin.

<sup>117</sup> 45 C.F.R. § 1340.14(2)(xi) (2014).

information is essential to the research or evaluation, and permission or approval is given by the child through his or her representative and the appropriate state official.<sup>118</sup>

States permitting disclosure of child abuse records to researchers employ a variety of limitations on the information provided, as well as limits on the researchers requesting the information. For example, Iowa specifies that researchers will have access only to “founded” child abuse records; referring to records generated in cases in which the investigating agency found supporting evidence of abuse or neglect.<sup>119</sup> Additionally, the child welfare agency may only disclose identifying information if the data is “essential” to the research and the department can obtain written consent from the child, the child’s guardian or guardian *ad litem*, and from the accused.<sup>120</sup>

While Oklahoma does not require consent from the child or the accused, the state restricts how researchers can use the information.<sup>121</sup> State law prohibits the publication of names or identifying information of anyone named in a child abuse report.<sup>122</sup> Similarly, Florida predicates state authorization of researchers on a “privacy and security agreement.”<sup>123</sup> By signing this agreement, researchers promise to “comply with all laws and rules governing the use of [child abuse] records” and to treat any identifying information in the records as confidential and “not [to] be released in any form.”<sup>124</sup> Requiring privacy agreements can be an effective assurance of confidentiality when records are released to third-parties, such as researchers. Given the nature of research, that it is undertaken with an intent to publish and share information, privacy agreements can detail the precautions a state finds necessary to protect the confidentiality of those named in the records.

Some states, however, predicate authorization for research on more than promises of confidentiality. For example, Arkansas requires that the state Department of Human Services find “value” for future program planning in the proposed research.<sup>125</sup> Requiring researchers to be contracted or employed by the state is overly restrictive and may hinder or even prevent valuable research by allowing the state agencies to discriminate based on the focus or purpose of the research. Rather, access should be predicated on researchers’ ability to safeguard the data and confidentiality of the information. Researchers should be required to report in their application to the state agencies the methods of data storage and the security measures the researchers will undertake to protect the data from unauthorized breaches. Additionally, researchers should be required to submit the reporting methods that will be used in the research and any subsequent publication of the findings to protect the confidentiality of any individuals named in the records.

### C. States Granting Access to Persons Not Specifically Authorized in the Federal Laws

In addition to the categories specified by the federal regulation as discussed above, forty-two states add various categories of parties who may gain, to at least some extent, access to child abuse records.<sup>126</sup> These additional persons to whom the state child welfare agency may disclose

<sup>118</sup> *Id.*

<sup>119</sup> IOWA CODE ANN. § 235A.15(2)(e)(1) (West 2013).

<sup>120</sup> *Id.*

<sup>121</sup> OKLA. STAT. ANN. tit. 10, § 1-6-103(B)(5) (West 2013).

<sup>122</sup> *Id.*

<sup>123</sup> FLA. STAT. ANN. § 39.202(2)(i) (West 2013).

<sup>124</sup> *Id.*

<sup>125</sup> ARK. CODE ANN. § 12-18-909(g)(6)(A) (West 2013). The statute also prohibits researchers from publishing or otherwise disclosing any confidential information. *Id.* § 12-18-909(g)(6)(B), (C). The Arkansas Division of Children and Family Services’ master policy document specifies that the Division must find that the research has value for the “evaluation or development of policies and programs” within the Division. ARK. DEP’T OF HUMAN SERVS., DIV. OF CHILDREN & FAMILY SERVS., POLICY & PROCEDURE MANUAL 11 (Aug. 2013), available at <http://humanservices.arkansas.gov/dcf/dcfDocs/Master%20DCFS%20Policy.pdf>.

<sup>126</sup> The author identified the additional categories of persons eligible to access the records as the following: adoption administrations, attorneys, child advocacy centers, coroners/medical examiners, court-determined, director-determined, federal programs, foster-care

child abuse records include individuals or agencies offering services to the child, such as adoption administration agencies.<sup>127</sup> More than twenty states specifically grant access to attorneys representing clients involved in child-welfare or other types of juvenile proceedings.<sup>128</sup>

Some of the additional parties identified in the state laws, however, seem to be an extension of the persons granted access in the federal laws. For example, the federal regulation identifies health-care providers as eligible to access child abuse records;<sup>129</sup> ten states grant access to coroners or medical examiners to determine cause of death or to investigate a report of child abuse that resulted in a fatality.<sup>130</sup> The federal regulation also grants access to government officials responsible for overseeing the child protective services.<sup>131</sup> Two states allow child abuse records to be released for the purpose of administering federal funds or federally funded programs, including those that aid in the prevention and treatment of child abuse.<sup>132</sup> This Section discusses the persons and entities states grant access to that are most divergent from those identified in the federal laws, as well as those that offer methods of oversight that can be important in improving the care provided to children that are in the care of or under investigation by child protection agencies.

### 1. Child-Advocacy Centers

Many states have supported the certification and inclusion of child-advocacy centers (“CACs”). CACs are not-for-profit organizations that work in partnership with state child welfare agencies to investigate reports of possible abuse.<sup>133</sup> CACs generally provide a universal location for police, social workers, therapists, attorneys, and healthcare providers to conduct one

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review boards, law enforcement and corrections departments, licensing/employment agencies, mandatory or adult reporters, news media and/or public, other states, parents, tribal governments, and miscellaneous categories.

<sup>127</sup> The states that grant access to adoption administration agencies are Arizona, Arkansas, Colorado, District of Columbia, Florida, Iowa, Michigan, Oklahoma, South Dakota, and Utah. This category consists of any agency or individuals that administer adoption proceedings, including permanent placement of a child and screening and certifying prospective adoptive parents. For example, South Dakota grants access to “a person eligible to submit an adoptive home study report” in order to screen applicants. *See* S.D. CODIFIED LAWS § 26-8A-13 (2013). In Iowa, any agency employee or licensed child-placing agency responsible for adoptive placements and any certified adoption investigator may access child abuse records. *See* IOWA CODE ANN. § 235A.15(2)(c)(15) (West 2013).

<sup>128</sup> The states that allow certain attorneys to access child abuse and neglect records are Alabama, District of Columbia, Florida, Georgia, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Utah. This category includes attorneys representing the agency, the accused, or any other parties involved in child abuse proceedings, such as hearings to terminate parental rights. Twenty-two states and the District of Columbia specifically allow certain attorneys to access child abuse records. In Georgia, the district attorneys or assistant district attorneys may access records in connection with their official duties. *See* GA. CODE ANN. § 49-5-41(a)(4) (West 2013). The attorney general for the state of Georgia may also access such records through a written request. *Id.* § 49-5-41(a)(9). In Alabama, an attorney defending the child or the child’s parents or guardians may access records when involved in a court proceeding relating to the abuse or neglect of the child. *See* ALA. CODE § 26-14-8(c)(8) (2013).

<sup>129</sup> 45 C.F.R. §§ 1340.14(i)(2)(v), (vii) (2014).

<sup>130</sup> The states that grant access to coroners and medical examiners are California, Georgia, Illinois, Indiana, Kansas, Michigan, Minnesota, Montana, South Carolina, and West Virginia. Five states – California, Kansas, Michigan, Montana, and South Carolina – permit access to medical examiners when it is necessary to determine the cause of death. *See, e.g.,* CAL. PENAL CODE § 11167.5(b)(8) (West 2013). Wisconsin has a similar provision, but also specifies pathologists and other physicians as parties that may access child abuse records when “investigating the cause of death of a child whose death is unexplained or unusual or is associated with unexplained or suspicious circumstances.” WIS. STAT. ANN. § 48.981(7)(15m) (West 2013). Georgia and Indiana specify that the coroner or medical examiner must be investigating a reported or known case of child abuse. *See* GA. CODE ANN. § 49-5-41(a)(8); IND. CODE ANN. § 31-33-18-2(3) (West 2013). Illinois allows access only to coroners and medical examiners that are responsible for child abuse investigations or background checks. 325 ILL. COMP. STAT. ANN. 5/11.1(a)(11), (13) (West 2013).

<sup>131</sup> 45 C.F.R. § 1340.14(i)(2)(x).

<sup>132</sup> Pennsylvania provides that federal auditors may access records if the information is required for federal funds to be distributed to the state agencies, but the auditors may not remove any reports containing identifiable information from the child-welfare agency. 23 PA. CONS. STAT. ANN. § 6340(a)(8) (West 2013). Minnesota’s statute simply states that access to records is provided in order to “administer federal funds or programs.” MINN. STAT. ANN. § 13.46 subd. 2(6) (West 2013). For more information on federal funding, see *Federal Funding Sources*, CHILD WELFARE INFO. GATEWAY, [https://www.childwelfare.gov/management/funding/funding\\_sources/federal\\_funding.cfm](https://www.childwelfare.gov/management/funding/funding_sources/federal_funding.cfm) (last visited Nov. 30, 2013).

<sup>133</sup> *Child Advocacy Centers*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/responding/iaa/investigation/advocacy.cfm> (last visited Jan. 23, 2014).

centralized investigation of child abuse, making the process easier on the child.<sup>134</sup> CACs also provide ongoing services to children and families, such as counseling and community education.<sup>135</sup>

Seven states allow child-advocacy centers and employees of such centers to access child abuse records.<sup>136</sup> Some states, such as Kentucky<sup>137</sup> and Tennessee,<sup>138</sup> permit employees or other designates of child-advocacy centers to access child abuse records with no further stipulations regarding disclosure. Georgia, however, specifies that for a child-advocacy center to access child abuse records, the center must be “certified by the Child Abuse Protocol Committee” or similarly accredited organization.<sup>139</sup> This certification requires that the advocacy center be operated for the purpose of investigating known or suspected cases of abuse or neglect and treating a child or family suffering from abuse or neglect.<sup>140</sup> Further, Georgia law requires the center to have been created through “intracommunity compacts” between the center and law enforcement or child-protection agencies, district attorneys’ offices, and other like institutions.<sup>141</sup> If an advocacy center does access records, the Georgia statute requires that the center be bound to the confidentiality provisions and subject to penalties for disclosing the confidential information.<sup>142</sup>

The restrictions Georgia law placed on these centers limit the purpose of disclosure and the use of the information to the extent necessary for the centers to serve the needs of the child. These limits foster the provision of necessary services while protecting the privacy of the families involved. CACs serve as valuable resources to the community and the state; the Department of Justice called the development of CACs “[o]ne of the most important innovations of this decade in providing services to child victims.”<sup>143</sup> Limits on the certification or authorization of these centers should therefore be closely drawn, as Georgia’s law illustrates, to ensure the required standards of care will be provided. Once a CAC is identified as an accredited partner, however, its employees should have the access to records necessary to the extent their roles require to treat the children in the CAC’s care, such as prior abuse history, treatment plans, and previous placements.

## 2. Court-Determined Parties

Twenty states allow additional parties access to child abuse records pursuant to a court order.<sup>144</sup> Using the courts as a screening device ensures stringent analysis of the competing interests in a disclosure request. Most states’ legislatures, however, limit the courts’ discretion in granting access in some way, such as requiring an in-camera inspection before admitting the

<sup>134</sup> Jessica Dixon Weaver, *The Principle of Subsidiarity Applied: Reforming the Legal Framework to Capture the Psychological Abuse of Children*, 18 VA. J. SOC. POL’Y & L. 247, 299 (2011).

<sup>135</sup> See *Child Advocacy Centers*, *supra* note 133; see also *Child and Family Friendly Facilities*, NAT’L CHILD. ALLIANCE, <http://www.nationalchildrensalliance.org/index.php?s=36> (last visited Dec. 29, 2013) (listing services offered by the CACs registered with the National Children’s Alliance).

<sup>136</sup> The states that allow child-advocacy centers and their employees to access child abuse records are Florida, Georgia, Iowa, Kentucky, South Dakota, Utah, and Wisconsin.

<sup>137</sup> KY. REV. STAT. ANN. § 620.050(5)(g) (West 2013).

<sup>138</sup> TENN. CODE ANN. § 37-1-612(b)(1) (West 2013).

<sup>139</sup> GA. CODE ANN. § 49-5-41(a)(7.1) (West 2013).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 HAMLINE J. PUB. L. & POL’Y 315, 324 (2006) (citing U.S. DEP’T OF JUSTICE, OFFICE FOR VICTIMS OF CRIME, NEW DIRECTIONS FROM THE FIELD: VICTIMS’ RIGHTS AND SERVICES FOR THE 21ST CENTURY 394-95 (1998)).

<sup>144</sup> The states that grant access to court-determined parties are Colorado, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Jersey, North Carolina, Oregon, South Carolina, Texas, Washington, and West Virginia. See, e.g., KY. REV. STAT. ANN. § 620.050(5)(h) (West 2013) (granting access to “[t]hose persons authorized by court order”).

records into evidence in a court proceeding.<sup>145</sup> Kansas specifically directs courts to consider particular interest, including whether the disclosure is “in the best interests of the child” and, under certain circumstances, that the disclosure will not negatively effect the privacy interests of the child.<sup>146</sup>

North Carolina uses the court as a primary method to protect the confidentiality of child abuse records, mandating that “records shall be withheld from public inspection and . . . may be examined only by order of the court.”<sup>147</sup> Only a few parties—the child, the guardian *ad litem*, the department of social services, and the child’s parent, guardian, or custodian, as well as those parties’ attorneys—may access records without a court order.<sup>148</sup>

Although using the courts as a filter in this way ensures a case-by-case evaluation of the appropriateness of information being disclosed to certain parties or the general public, it may also hinder accountability. If the majority of requests go through the courts, access to records may be delayed as a result of the time required to petition the court for such access. In contrast, South Dakota offers a more balanced approach, allowing a court to order the public release of confidential information by an authorized recipient, such as a physician or foster parent.<sup>149</sup> This allows a variety of enumerated persons and agencies to access the records for necessary purposes, but also provides an option for those individuals and the public to appeal for public disclosure.

### 3. Director-Determined Parties

In addition to identifying specific individuals and entities who may access child abuse records, three states allow additional, unspecified disclosures at the discretion of a person with administrative responsibilities in the child-protection agency. Ohio, while granting access to the child-welfare agency and the director of the agency’s and county’s director of job and family services, requires all other persons to acquire written permission of the executive director of the agency.<sup>150</sup> Rhode Island permits records to be disclosed when “the director determines that there is a risk of physical injury by the person to himself or herself or others, and that disclosure of the record is necessary to reduce that risk.”<sup>151</sup> Oregon allows the Department of Human Services to release records to:

any person, administrative hearings officer, court, agency, organization or other entity when the department determines that such disclosure is necessary to administer its child welfare services and is in the best interests of the affected child, or that such disclosure is necessary to investigate, prevent or treat child abuse and neglect, to protect children from abuse and neglect or for research when the Director of Human Services gives prior written approval.<sup>152</sup>

This discretionary disclosure provides flexibility, but little predictability because of the application of the ill-defined “best interest of the child” standard.<sup>153</sup> There should be clear

<sup>145</sup> See, e.g., LA. REV. STAT. ANN. § 46:56(F)(8)(b) (2013); MONT. CODE ANN. § 41-3-205(2) (West 2013); NEV. REV. STAT. ANN. § 432B.290(1)(e) (West 2013).

<sup>146</sup> KAN. STAT. ANN. § 38-2212(e), (f)(2) (West 2013).

<sup>147</sup> N.C. GEN. STAT. ANN. § 7B-2901(a) (West 2013). West Virginia allows access to records pursuant to court order provided that the court reviews the records for relevancy and materiality, and may limit the use of such records. W. VA. CODE ANN. § 49-7-1(b)(4) (West 2013).

<sup>148</sup> N.C. GEN. STAT. ANN. § 7B-2901(a)(1)-(4).

<sup>149</sup> S.D. CODIFIED LAWS § 26-8A-13 (2013).

<sup>150</sup> OHIO REV. CODE ANN. § 5153.17 (West 2013).

<sup>151</sup> R.I. GEN. LAWS ANN. § 42-72-8(b)(3) (West 2013).

<sup>152</sup> OR. REV. STAT. ANN. § 419B.035(3) (West 2013).

<sup>153</sup> Although states use the standard of “best interests of the child” for determinations relating to children in the child welfare system, there is no standard definition. See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T HEALTH & HUMAN SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 2 (2012), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/best\\_interest.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf). Some relevant factors used in state statutes include child/parent relationship, ability of parents or guardians to provide basic needs,



guidelines for discretionary disclosure to prevent too much information from being disclosed. For example, the department directors can be authorized to release confirmation and disposition information about reports, but not personally identifying or sensitive information. The circumstances for releasing personally identifying information would need to be outlined in the statutes or state administrative code. Alternatively, there could be restrictions on *when* the directors could release information in an agency record, such as when there is imminent danger. In the Oregon law, this could be accomplished by removing the “best interest” provision. In addition to clarifying when records would be kept confidential, more specific guidelines would allow citizens to hold the departments to standards for access to information under freedom of information laws.<sup>154</sup>

#### 4. Citizen Review Boards

Twenty-nine states recognize citizen review boards, and other similar oversight teams that function as evaluators of child welfare agencies, as parties eligible to access child abuse records.<sup>155</sup> These teams consist of volunteers representative of the community at large. Federal law requires that some members have expertise in child abuse prevention and investigation.<sup>156</sup> These review boards act as auditors of the child-welfare system.<sup>157</sup> CAPTA states that the function of citizen review boards is to examine policies, procedures, and practices of the child welfare agencies in order to evaluate the effectiveness of the child-protection services.<sup>158</sup> This includes examining specific cases and investigating the deaths of children who could reasonably be suspected as victims of child abuse or neglect.<sup>159</sup> Traditionally, these review boards convene at regular intervals to review individual case files, creating aggregate reports on the performance of state child welfare agencies.<sup>160</sup>

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mental and physical health of the child, and presence of domestic violence. *Id.* at 3. However, these are applied in varying combinations by only approximately twenty states. *Id.*

<sup>154</sup> More specific provisions granting access or providing confidentiality provide more predictability for public records requestors. Specific provisions also provide the basis for appeal if records are withheld.

<sup>155</sup> The states that grant access to foster-care review boards are Alabama, Arizona, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, West Virginia, and Wisconsin. These review boards are constituted under various names, such as citizen review panels, child fatality review boards, and child death review boards. *See* ALA. CODE § 26-14-8(c)(10) (2013); ARIZ. REV. STAT. ANN. § 8-807(C), (I)(5) (West 2013); ARK. CODE ANN. § 12-18-909(g)(9)-(10) (West 2013); CAL. PENAL CODE § 11167.5(b)(14) (West 2013); COLO. REV. STAT. ANN. § 19-1-307(2)(p) (West 2013); GA. CODE ANN. § 49-5-41(a)(8) (West 2013); 325 ILL. COMP. STAT. ANN. 5/11.1(a)(16) (West 2013) (referencing panels defined in 325 ILL. COMP. STAT. ANN. 5/7.1); IND. CODE ANN. § 31-33-18-2(12) (West 2013) (requiring that a court determine the necessity of the records for the review board to fulfill its duties); IOWA CODE ANN. § 235A.15(2)(e)(7) (West 2013); KAN. STAT. ANN. § 38-2212(c)(3), (7) (West 2013); LA. REV. STAT. ANN. § 46:56(F)(4)(a) (2013); ME. REV. STAT. ANN. tit. 22 § 4008(2)(E) (2013); MASS. GEN. LAWS ANN. ch. 18B, § 6A; ch. 119, § 51E (West 2013) (requiring the consent of the child welfare agency’s commissioner); MICH. COMP. LAWS ANN. § 722.627(2)(q), (s) (West 2013); MINN. STAT. ANN. § 626.556 (11d)(c)(2) (West 2013); MISS. CODE ANN. § 43-21-261(19) (West 2013); MO. REV. STAT. § 210.150(2)(3), (12) (West 2013); MONT. CODE ANN. § 41-3-205(3)(u) (West 2013); NEB. REV. STAT. ANN. § 28-726(6) (West 2013); NEV. REV. STAT. ANN. § 432B.290(1)(x) (West 2013); N.J. STAT. ANN. § 9:6-8.10a(b)(22) (West 2013); N.M. STAT. ANN. § 32A-4-33(B)(6) (West 2013); OKLA. STAT. ANN. tit. 10A, § 1-6-103(B)(2) (West 2013); OR. REV. STAT. ANN. § 419B.035(1)(d) (West 2013); 23 PA. CONS. STAT. ANN. § 6340(a)(16) (West 2013); R.I. GEN. LAWS ANN. § 42-72-8(d) (West 2013); S.C. CODE ANN. § 63-7-1990(B)(21) (2013); W. VA. CODE ANN. § 49-7-1(c)(3) (West 2013); WIS. STAT. ANN. § 48.981(7)(15g) (West 2013).

<sup>156</sup> 42 U.S.C.A. § 5106a(c)(2) (West 2014).

<sup>157</sup> CHILD WELFARE INST., ASFA+ FOSTER CARE REVIEW SERIES, COLLECTING REVIEW DATA AND GETTING IT USED 3 (2002), [http://web.archive.org/web/20040413162915/http://www.naefcr.org/docs/Collecting\\_Review\\_Data\\_Getting\\_It\\_Used.pdf](http://web.archive.org/web/20040413162915/http://www.naefcr.org/docs/Collecting_Review_Data_Getting_It_Used.pdf).

<sup>158</sup> *See* 42 U.S.C.A. § 5106a(c)(4)(A).

<sup>159</sup> *Id.*

<sup>160</sup> *See* CHILD WELFARE INST, *supra* note 157, at 4; *see also* 42 U.S.C.A. § 5106a(c)(3) (providing that each panel “shall meet not less than once every 3 months”); *Id.* § 5106a(4)(A) (establishing guidelines for the panel to examine “policies, procedures, and practices of State and Local agencies”); *Id.* § 5106a(6) (mandating that each panel prepare and distribute annual reports to the State and public “containing a summary of the activities of the panel and recommendations to improve the child protection services system at the State and local levels”).

In general, states broadly recognize review boards as entities that may access child abuse records.<sup>161</sup> Some states, however, restrict these panels' access to information. For example, Nebraska specifies that its Foster Care Review Office may access the records when they relate "to a child in a foster care placement" and the records will "not include the name or identity of any person making a report of suspected child abuse or neglect."<sup>162</sup> These review panels serve an important purpose of providing key oversight to agencies providing for the safety and welfare of children. Releasing information to these kinds of review panels in certain cases has proved helpful. For example, in Florida, the formation of a new task force assisted in identifying children under the care of the state who had gone missing.<sup>163</sup> The release of case files to review committees also revealed flaws in the Florida agency's record keeping and system of care provided to children in need.<sup>164</sup>

Review panels' access to records created by these child welfare agencies should be unfettered as these records can reveal problems with case workers or system procedures.<sup>165</sup> Restricting the content available to these panels defeats the purpose of robust and comprehensive oversight. A better approach to limiting the disclosure of sensitive information would be to place confidentiality requirements on members of the panels,<sup>166</sup> so that they may not publicly disclose personally identifiable information about subjects of the records. These types of agreements make restricting the information that can be disclosed to members of these panels an unnecessary limitation on accountability mechanisms.

#### 5. Law Enforcement and Corrections

The federal regulation allows for disclosure to any agency authorized to investigate reports of abuse or neglect.<sup>167</sup> This would include traditional law-enforcement agencies, such as police and sheriff departments. However, states have seemingly interpreted this to include additional investigative or correctional facilities, such as juvenile-justice employees, and parole and probation boards.<sup>168</sup> These agencies often participate in the investigation and treatment of child abuse victims and perpetrators.<sup>169</sup>

<sup>161</sup> See, e.g., ALA. CODE § 26-14-8(c)(10); IOWA CODE ANN. § 235A.15(2)(e)(7); MISS. CODE ANN. § 43-21-261(19).

<sup>162</sup> NEB. REV. STAT. ANN. § 28-726(6) (West 2013).

<sup>163</sup> See, e.g., *DCF Chief Says Progress Made in Finding Kids*, GAINESVILLE SUN (Sept. 13, 2002), <http://www.gainesville.com/article/20020913/NEWS01/209130335>.

<sup>164</sup> See, e.g., *Foster Care Case Files Incomplete*, GAINESVILLE SUN (July 1, 2002), <http://www.gainesville.com/article/20020701/NEWS/207010304/0/search> (reporting systemic problems including: improper filing, such as some children's records being filed with other children's; most reports missing current addresses for children in state custody; and "mostly blank reports of visits to foster homes"); see also Richard Lezin Jones & Leslie Kaufman, *New Jersey Opens Files Showing Failures of Child Welfare System*, N.Y. TIMES (Apr. 15, 2003), <http://www.nytimes.com/2003/04/15/us/new-jersey-opens-files-showing-failures-of-child-welfare-system.html?pagewanted=all&src=pm> (detailing the "mistakes, missed opportunities, and other missteps" of New Jersey's child welfare system that were documented in over 2,000 pages of confidential files released to the public).

<sup>165</sup> See, e.g., Jones & Kaufman, *supra* note 164. In April 2003, more than a dozen New Jersey child welfare records were made public. *Id.* Included in the released documents were social workers' notes made during family visitations, medical records, interoffice emails and memos, and interviews with siblings of a child who had died as a result of abuse. *Id.* The interoffice communication, which revealed gaps in public reporting and a general lack of oversight, serves as particularly strong support for citizen review of child abuse records. One e-mail released as part of these records included an admission to consistent errors and showed severe resignation, if not apathy, by a child-welfare worker. *Id.* The e-mail, which referred to a recently discovered error in the computer system, read, "Have those corrections made, do your own, or do nothing. I've accepted that most of what we put on SIS is wrong, and I'll get over it." *Id.*

<sup>166</sup> Many states do apply confidentiality requirements to the review panels.

<sup>167</sup> 45 C.F.R. § 1340.14(i)(2)(iv) (2014).

<sup>168</sup> The states that allow access to any agency authorized to investigate reports of abuse or neglect are Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>169</sup> Parole and probation officers are often mandatory reporters of suspected child abuse and neglect. See *Child Abuse and Neglect Reporting State Statute Overview*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/human-services/child-abuse-and-neglect-reporting-statutes.aspx> (last visited Jan. 30, 2014).

Thirty-four states and the District of Columbia allow for access to at least one of these parties.<sup>170</sup> Thirty states and the District of Columbia grant access to law-enforcement officials, seven states grant Department of Corrections officials access, and six states grant juvenile-justice officials access.<sup>171</sup> Table 1 provides a complete breakdown of which states provide access to each of the parties identified in this category.

Table 1. Law Enforcement and Corrections

States	Law	Corrections	Juvenile	States	Law	Corrections	Juvenile
Alabama	1			Nevada	1	1	
Arizona	1			New Jersey	1		
California	1			New Mexico	1		
Colorado	1			Oklahoma	1	1	1
District of Columbia	1			Oregon	1		
Florida	1		1	Pennsylvania	1		
Georgia	1			Rhode Island		1	
Illinois	1			South Carolina	1		
Indiana	1			South Dakota	1		
Iowa	1			Tennessee	1	1	
Kansas	1		1	Texas	1		
Kentucky	1			Utah	1		
Maine			1	Vermont		1	
Maryland	1			West Virginia	1		
Minnesota	1			Wisconsin	1	1	
Mississippi	1			Wyoming	1		
Missouri	1		1	Totals	31	7	6
Montana		1	1				
Nebraska	1						

#### 6. Licensing/Employment Agencies

The federal regulation also allows states to grant access to persons responsible for screening individuals who may work with children.<sup>172</sup> Nineteen states permit the child welfare agency to disclose records to entities responsible for licensing or certifying the organizations that provide services to children and to agencies, as well as organizations responsible for employing

<sup>170</sup> The states allowing access to law enforcement and/or corrections are Alabama, Arizona, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

<sup>171</sup> See *infra* Table 1.

<sup>172</sup> 45 C.F.R. § 1340.14(i)(3).

persons who work with or care for children.<sup>173</sup> New Jersey, for example, provides access to any “person or entity” required to consider child abuse and neglect allegations when screening potential employees who will provide services to children.<sup>174</sup> Vermont similarly allows disclosure to an employer in deciding whether to hire someone, if that person will be providing “care, custody, treatment, transportation, or supervision of children or vulnerable adults.”<sup>175</sup> For the purposes of access, the Vermont statute considers volunteers as employees.<sup>176</sup>

For employment background check purposes, generally a confirmed result that a potential employee has been investigated for child abuse or neglect and whether that investigation produced substantiated evidence of child abuse or neglect would likely be sufficient. There is no reason a potential employer would need sensitive or personally identifiable information contained in child abuse records. In most states, this can be accomplished with a search of a central state registry of child abuse reports, rather than a request to the child welfare agency.<sup>177</sup> The content and availability of these registries, however, vary from state-to-state.<sup>178</sup> Some state registries contain full child abuse reports,<sup>179</sup> which would disclose more information than necessary for employment background checks. Perhaps more concerning, though, is the fact that some of the registries include unfounded reports as well as founded reports.<sup>180</sup> Therefore, an individual could be wrongfully denied an employment opportunity based upon a report of alleged abuse or neglect for which investigators found no supporting evidence.

#### 7. News Media and the Public

In general, child welfare records are not released to the public or the news media. Public disclosure, however, is specifically allowed in most states when there has been a fatality or near-fatality of a child. This reactionary measure works to explain failures in the child protection system and, hopefully, prevent future failures. In 2012, a Kentucky appellate court found that the public interest outweighed potential harm to children in the care of the Kentucky state child welfare agency when it ordered that child abuse records must be publicly disclosed when the cases result in death or near fatal injuries.<sup>181</sup>

Thirty-three states allow for this kind of access.<sup>182</sup> Some of these states place prerequisites on the disclosure, such as requiring that criminal charges be filed against a perpetrator of the abuse.<sup>183</sup> Other states only allow for such disclosure when the child involved

<sup>173</sup> The states that grant access to licensing and/or employment agencies are California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Maine, Michigan, Minnesota, Montana, Nebraska, New Jersey, Oregon, South Carolina, Utah, Vermont, and Wisconsin.

<sup>174</sup> N.J. STAT. ANN. § 9:6-8.10a(b)(13) (West 2013).

<sup>175</sup> VT. STAT. ANN. tit. 33, § 4919(a)(3) (West 2013).

<sup>176</sup> *Id.*

<sup>177</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., ESTABLISHMENT AND MAINTENANCE OF CENTRAL REGISTRIES FOR CHILD ABUSE REPORTS 1 (2011), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/centreg.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/centreg.pdf).

<sup>178</sup> *Id.* at 3.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 3, 14.

<sup>181</sup> Amanda Simmons, *Child Abuse Records Must Be Disclosed to Newspapers, Ky. Appellate Court Rules*, REPORTERS COMM. FOR FREEDOM OF THE PRESS (July 12, 2012), <http://www.rcfp.org/browse-media-law-resources/news/child-abuse-records-must-be-disclosed-newspapers-ky-appellate-court->. Newspapers in Kentucky had been denied records related to fatalities and near fatalities of children in the care of the State of Kentucky from 2008 to 2010. *Ky. Cabinet for Health & Family Servs. v. Courier-Journal, Inc.*, Nos. 2012-CA-000179-MR, 2012-CA-000482-MR, 2012-CA-000902-I, order at 12-13 (Ky. Ct. App. July 9, 2012), available at [http://www.rcfp.org/sites/default/files/docs/20120712\\_151113\\_kentuckyabuse.pdf](http://www.rcfp.org/sites/default/files/docs/20120712_151113_kentuckyabuse.pdf). The trial court held that release of these records “will help to keep the Cabinet accountable to prevent future tragedies and to answer to taxpayers who fund the Cabinet.” *Id.* at 13.

<sup>182</sup> The states that allow for public disclosure of records when they result in near death or child fatalities are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, and Virginia.

<sup>183</sup> N.C. GEN. STAT. ANN. § 7B-2902(b)(1) (West 2013) (allowing for disclosure when a criminal charge also is pending); OKLA. STAT. ANN. tit. 10A, § 1-6-105(I)(1) (West 2013).

was in state custody at the time of the abuse that resulted in fatality or near fatality.<sup>184</sup> Fourteen states allow limited release of information when information has already become public knowledge through another source, such as someone involved in the investigation or the media.<sup>185</sup> Kansas permits disclosure in those situations, but limits disclosure to only confirmation of procedural details,<sup>186</sup> such as the disposition of the investigation. Kansas also permits the disclosure of additional information with the written consent of the individuals involved.<sup>187</sup>

Public disclosure can facilitate accountability within child welfare agencies. In 2013, New Jersey proposed changing disclosure laws to limit the information released following the death of a child under the care or investigation of the state's child welfare agency.<sup>188</sup> Directors at Advocates for Children of New Jersey argued that this may curtail access to the "trail of investigations by a child's caseworker that precedes a death from abuse or neglect."<sup>189</sup> The directors added that disclosure "is an effective means to improve case practice, which can result in keeping New Jersey's children safer."<sup>190</sup> Maintaining public access in cases of fatality is integral to evaluating and improving the child welfare system.

Public access to information contained in child abuse records in cases other than fatalities may also be imperative to protecting children under the care of the states. Too restrictive privacy protections have been cited as obstructing the process of finding missing children.<sup>191</sup> Although citizen review panels can be an effective regular oversight mechanism, giving agencies the discretion to release certain types of information to the public and the news media can be in the best interest of the child. Therefore, solutions to allow greater public access to inspect records need to be explored.

#### 8. Other States' Investigative Agencies

The ability to access information from other state agencies is sometimes imperative to determining the safety of a child's placement. Families move from one state to another, children are adopted across state lines, and foster parent applicants have not always lived in one place. But this interstate access is not always easy. Twelve states allow disclosure of child abuse records to agencies and officials of other states that are investigating suspected child abuse or neglect.<sup>192</sup> Although these states may identify child welfare agencies or other government entities as eligible to access the records, the process may be burdensome due to various state processes and requirements. For example, three states only allows access to case report information from "founded reports," those cases in which investigators found evidence supporting allegations of abuse.<sup>193</sup>

To address the potential for barriers of communication across state lines, in 2006, Congress passed a law directing HHS to develop a national child abuse registry that would allow

<sup>184</sup> GA. CODE ANN. § 49-5-186(b)(2) (West 2013); S.C. CODE ANN. § 63-7-1990(H) (2013) (permitting disclosure after the death of a child in the state's custody at the time of death).

<sup>185</sup> The states that allow for disclosure when the information has become public knowledge are Alaska, Arizona, Connecticut, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Montana, Nebraska, New York, and South Carolina.

<sup>186</sup> KAN. STAT. ANN. § 38-2212(d)(3)(B) (West 2013).

<sup>187</sup> *Id.* § 38-2212(d)(3)(A).

<sup>188</sup> Susan K. Livio, *N.J. Child Welfare Agency Proposes Less Disclosure in Fatal Child Abuse Cases*, NJ.COM (June 12, 2013), [http://www.nj.com/politics/index.ssf/2013/06/nj\\_child\\_welfare\\_agency\\_proposes\\_less\\_disclosure\\_in\\_fatal\\_child\\_abuse\\_cases.html](http://www.nj.com/politics/index.ssf/2013/06/nj_child_welfare_agency_proposes_less_disclosure_in_fatal_child_abuse_cases.html).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Sarah Netter, *Finding Missing Foster Children: Kids Who Disappear from State Care Often at Disadvantage*, ABC NEWS (July 27, 2010), <http://abcnews.go.com/US/missing-foster-children-state-privacy-laws-lack-family/story?id=11251835>.

<sup>192</sup> The states that grant access to other state agencies and officials are Alabama, Florida, Georgia, Illinois, Iowa, Kansas, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Wisconsin.

<sup>193</sup> IOWA CODE ANN. § 235A.15(2)(e)(4) (West 2013); R.I. GEN. LAWS ANN. § 42-72-8(b)(10) (West 2013); S.C. CODE ANN. § 63-7-1990(B)(13) (West).

for information-sharing between states.<sup>194</sup> In 2012, HHS conducted a study on the feasibility of a national registry.<sup>195</sup> HHS reported that twenty-eight percent of the states reported a willingness to change state laws to participate in a national registry.<sup>196</sup> A majority of the states reported that a national registry would save time and improve child safety.<sup>197</sup> Despite these studies and some limited interstate agreements,<sup>198</sup> however, the goal of a national registry that would promote interstate information sharing has yet to be realized.

#### 9. Persons Reporting Potential Abuse or Dangerous Situations

Every state requires certain persons in their official capacities to report suspected cases of child abuse and neglect, and all citizens are permitted to report any suspicions or knowledge of mistreatment.<sup>199</sup> Twenty-one states also allow reporters of abuse to have limited access to child abuse records.<sup>200</sup> For example, Georgia allows any adult who has made a report to request notification of the status and outcome of the investigation by the department.<sup>201</sup> In general, no personally identifying information or other sensitive data contained in the record is released.<sup>202</sup> As the information is limited to confirmation and disposition of an investigation, this type of disclosure presents little risk to the child. Allowing the reporter to follow up on whether any action was taken, however, does provide limited accountability.

#### 10. Miscellaneous

Four states provide access to additional parties that do not share a common theme with the federal regulation or a majority of other states.<sup>203</sup> Most of these additions are to individuals or agencies with corrolary duties to those categories listed above, such as additional agencies tasked with the responsibility to conduct employment background checks.<sup>204</sup> The most removed group

<sup>194</sup> 42 U.S.C.A. § 16990(a) (West 2014).

<sup>195</sup> See generally Laura Radel, U.S. Dep't of Health & Hum. Servs., Presentation for the State Liasion Officers: Study of the Feasibility of a National Child Abuse Registry (Apr. 16, 2012), <http://nrceps.org/wp-content/uploads/Study-of-the-Feasibility-of-National-Child-Abuse-Registry-CJA-SLO-Annual-Meeting-April-2012.pptx> (outlining the findings of a feasibility study on a national child abuse registry, focusing on the costs and benefits, current and future data collection standards, and due process procedres for a national registry).

<sup>196</sup> *Id.* at 18.

<sup>197</sup> *Id.* at 22 (seventy-four percent of states indicated the registry would save time and sixty percent felt it would improve child safety).

<sup>198</sup> See, e.g., *Interstate Compact on the Placement of Children*, CAL. DEP'T SOC. SERVICES, <http://www.childsworld.ca.gov/pg1316.htm> (last visited Jan. 30, 2014).

<sup>199</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., MANDATORY REPORTERS OF CHILD ABUSE AND NEGLECT 2-3 (2012), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf).

<sup>200</sup> The states that grant access to persons making a report are Alaska, Arizona, California, Colorado, Connecticut, Georgia, Iowa, Maine, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, North Dakota, Ohio, Pennsylvania, Rhode Island, and Wyoming.

<sup>201</sup> GA. CODE ANN. § 49-5-41(a)(5) (West 2013).

<sup>202</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., DISCLOSURE OF CONFIDENTIAL CHILD ABUSE AND NEGLECT RECORDS 2 (2013), available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/confide.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/confide.pdf).

<sup>203</sup> The states providing access to additional parties are Florida, Maine, New Jersey, and Tennessee. See REV. STAT. ANN. tit. 22, § 4008(2)(k) (2013) (granting access to animal control); N.J. STAT. ANN. § 9:6-8.10a(b)(11) (West 2013) (granting access to the Victims of Crime Compensation Board); TENN. CODE ANN. § 37-1-612(c)(8) (West 2013) (granting access to the Tennessee Claims Commission, which adjudicates tax claims). Florida stands out as the state with the most miscellaneous additions, allowing for disclosure to five parties not recognized by other states or federal law. FLA. STAT. ANN. § 39.202(2) (West 2013). The first is "any appropriate official" of the Agency for Persons with Disabilities responsible for "taking appropriate administrative action concerning an employee ... who is alleged to have perpetrated child abuse," or who is responsible for the employment of personnel. *Id.* § 39.202(2)(h). The second party is the state "Division of Administrative Hearings for the purposes of any administrative challenge." *Id.* § 39.202(2)(j). The third party is the Public Employees Relations Commission when the records are needed as evidence during disputes between public employees and their employers. *Id.* § 39.202(2)(m). This provision limits release of the records only after redaction of information identifying any person other than the employee. *Id.* The fourth party is the employees or agents of the Florida Department of Revenue in order to assist in child-support enforcement. *Id.* § 39.202(2)(n). Finally, Florida grants access to health-plan payors as long as the information is used only for "insurance reimbursement purposes." *Id.* § 39.202(6).

<sup>204</sup> See FLA. STAT. ANN. § 39.202(2)(a), (h) (granting access to the Agency for Persons with Disabilities); N.J. STAT. ANN. § 9:6-8.10a(b)(11) (granting access to the Victims of Crime Compensation Board).

may be an example from Maine, which grants access to local animal control officers and the state animal welfare program in cases where there is a suspicion of animal cruelty.<sup>205</sup>

#### D. Summary of Statutorily Permitted Disclosures

All of the states, in compliance with CAPTA, have statutory provisions that guarantee the confidentiality of child abuse records. However, the extent to which these laws provide access to individuals, organizations, and the public, varies. For example, six states have only a general statement of confidentiality.<sup>206</sup> Including the categories of parties granted access by the federal regulation and those categories of parties granted access by only the states, Florida grants access to the most categories of parties; twenty-four, including five categorized under Miscellaneous.<sup>207</sup> New Jersey is close behind, granting access to twenty categories of parties. South Carolina and Montana grant access to eighteen and nineteen categories respectively.<sup>208</sup> The number of parties granted access to child abuse records is an indicator of the scope of disclosures.

However, much of the disclosure specified by state law is discretionary, not mandatory.<sup>209</sup> This provides protection for the privacy of the children and other individuals identified in the report. The majority of the persons granted access to records have a personal or professional stake in the records requested—attorneys, physicians, or parents. When disclosure is made for oversight to the public it is reactive; public disclosures are made in response to cases of child fatalities or near fatalities. This kind of reactive disclosure is an important step in reviewing the events that led to the death or serious injury. More consistent oversight, however, can be the means of proactive, ongoing review of the child welfare system. Although citizen review panels review policies and cases in a more regularized fashion, state laws vary as to the formation and training of review boards, as well as the information disclosed to these boards and the information disclosed to the public following the boards' investigations.

### IV. RECOMMENDATIONS

Tragedies in the child-welfare systems of Missouri,<sup>210</sup> Florida,<sup>211</sup> and New Jersey<sup>212</sup> have served as catalysts for calls to action, specifically for changes in the law that would allow greater access to child abuse records. Florida and New Jersey, however, authorize disclosure to more persons than any other state,<sup>213</sup> yet they are still plagued with tragic deaths and near fatalities in the child-welfare system.<sup>214</sup> The extent of the permissible disclosures does not appear to be the root of the problem in these states. However, the number of parties states *may* disclose

<sup>205</sup> ME. REV. STAT. ANN. tit. 22, § 4008(2)(k).

<sup>206</sup> See DEL. CODE ANN. tit. 29, § 9017 (West 2013); HAW. REV. STAT. § 350-1.4 (West 2013); IDAHO CODE ANN. §§ 16-1629; 9-340B (West 2013); N.Y. COMP. CODES R. & REGS. tit. 18, § 465.1 (2013); OHIO REV. CODE ANN. § 5153.17 (West 2013); VA. ANN. CODE § 63.2-1515 (West 2013).

<sup>207</sup> See *supra* text accompanying notes 203-205.

<sup>208</sup> The tables in Appendix III provide a complete listing of the categories of parties granted access to the records under federal law and those granted access under state law; the tables in Appendix IV list all fifty states and D.C. in the order of the number of the total categories of parties granted access by the states. For a complete list of abbreviations used in these tables, see *infra* Appendix II.

<sup>209</sup> The federal regulation gives states the option to authorize disclosure to certain individuals and organizations. See 45 C.F.R. § 1340.14(i)(2) (2014). "If a State chooses to, it may authorize by statute disclosure to any or all of the following persons and agencies, under limitations and procedures the State determines." *Id.*

<sup>210</sup> See *supra* text accompanying notes 1-11.

<sup>211</sup> See *supra* text accompanying notes 115, 163-164.

<sup>212</sup> See *supra* note 165.

<sup>213</sup> See *supra* text accompanying notes 207-208.

<sup>214</sup> See, e.g., *DCF in Freefall?*, FLA. COURIER (Dec. 25, 2013), <http://flcourier.com/2013/12/25/dcf-in-freefall/>; Thomas Zambito, *Grandmother Testifies DYFS Workers Told Her to 'Stop Calling,' After She Found Drug Pipe in Diaper Bag*, NJ.COM (Dec. 5, 2013), [http://www.nj.com/essex/index.ssf/2013/12/grandmother\\_says\\_dyfs\\_workers\\_told\\_her\\_to\\_stop\\_calling\\_after\\_she\\_finds\\_drug\\_pipe\\_in\\_diaper\\_bag.html](http://www.nj.com/essex/index.ssf/2013/12/grandmother_says_dyfs_workers_told_her_to_stop_calling_after_she_finds_drug_pipe_in_diaper_bag.html); *N.J. DYFS Is Still Failing to Help Troubled Families Under Their Supervision, Report Says*, NJ.COM (Dec. 14, 2011), [http://www.nj.com/news/index.ssf/2011/12/dyfs\\_is\\_still\\_failing\\_to\\_help.html](http://www.nj.com/news/index.ssf/2011/12/dyfs_is_still_failing_to_help.html).

information to may not be representative of the amount and quality of information reaching those parties, as state agencies can withhold records in violation of the laws.

The state laws allow disclosure to certain individuals, often at the discretion of the agency. The laws also give discretion to the agencies as to what information is released. These limitations sometimes restrict information to what is necessary for the requestor to provide services to the child or otherwise in the "best interest" of the child. Restrictions on access, based on necessity rather than the identity of the requestor, allow the agencies to provide services and protect the privacy of the children in its care.

Additionally, states may withhold records from individuals that are statutorily recognized as authorized recipients. The state agency in Kentucky withheld records from the media when the state statute clearly allowed for such access in the case of child fatalities.<sup>215</sup> In Missouri, journalists were denied the records related to the near fatality of L.P., despite clear provisions for such access.<sup>216</sup> The issue of such denials for access could be addressed through the current citizen review panels.<sup>217</sup> In addition to reviewing various processes for investigation and placement, the panels should review the disposition of requests for access to child abuse records to ensure proper disclosures have been made.

Further, the balance between the family and child privacy and access can be improved. Individual privacy protections can be maximized through the use of long-standing data privacy protection principles (purpose and use limitations, data quality, individual participation, and accountability).<sup>218</sup> Some of the state laws discussed in this Article already employ these principles.<sup>219</sup> However, the implementation of these principles can be more standardized across and within states. For example, some parties granted disclosure may be subject to purpose limitations, while others are granted nearly unfettered access.

Accountability through public disclosure of these records also can be maximized. More proactive reviews of the system using aggregate data and review panels would offer more consistent assessment of the child welfare agencies. The use of dedicated review panels allows ongoing, detailed review without undue disclosure.

#### A. Safeguarding Confidentiality Through Data Privacy Protection Principles

Irrespective of the number of categories of parties granted access, the analysis in this Article illustrates that no two states offer the same level of confidentiality to children and families in the child welfare system, as well as alleged abusers. To adequately protect the sensitive information that can be contained in child abuse records, states should draw on key principles of data privacy protection. Specifically, purpose and use limitations should be applied whenever the state permits disclosure beyond the department responsible for child welfare. These limitations would require that data be gathered and used or shared only for the stated purpose, such as when particular services are provided to a child.<sup>220</sup>

In child welfare law, the data is information learned throughout the course of an investigation of alleged child abuse or neglect, as well as any subsequent treatment. In adherence to these data limitation principles, states should only share the information with authorized persons or entities *as necessary*. Many of the current state statutes reflect this principle,

<sup>215</sup> The state agency in Kentucky withheld records despite clear statutory provisions. See *supra* note 181 and accompanying text.

<sup>216</sup> See *supra* text accompanying notes 1-11.

<sup>217</sup> See *supra* text accompanying notes 155-166.

<sup>218</sup> ORG. FOR ECON. CO-OPERATION & DEV., OECD GUIDELINES GOVERNING THE PROTECTION OF PRIVACY AND TRANSBORDER FLOWS OF PERSONAL DATA 14-16 (2013), available at <http://www.oecd.org/sti/ieconomy/2013-oecd-privacy-guidelines.pdf>.

<sup>219</sup> For example, states that restrict access by certain parties to particular uses implement purpose limitation. States granting access to subjects of the report – victims and alleged abusers – hints at individual participation by allowing subjects to inspect the records. Citizen review panels represent a mechanism for accountability.

<sup>220</sup> ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 218, at 15.



requiring, for example, that a physician receive records only when necessary to treat a child before him or her.<sup>221</sup> The resultant benefit is protection against any sensitive information being shared unnecessarily, such as a grant of blanket access to child abuse records for all physicians.

These purpose and use limitations should be particularly stringent when information is disclosed to third-parties, such as researchers, who are not directly providing care or services to a child. Researchers should be required to submit a detailed purpose statement as part of the request for access. Disclosure should be restricted to the information necessary to serve this purpose.

#### B. Accountability with Non-Personally Identifiable Information

As discussed earlier in this Article, federal and state laws require the information contained in child abuse records to be compiled into aggregate reports annually.<sup>222</sup> This information, which includes the number of child abuse reports made and investigated, the outcomes of those investigations, and the number of children in protective custody,<sup>223</sup> along with reports of citizen review panel investigations, would likely be sufficient to provide public oversight of the government agencies responsible for child welfare. To be an effective form of oversight, however, these reports need to be made more visible and accessible to the public. Currently, these reports are available online at many of the official state websites<sup>224</sup> and the HHS Children's Bureau site.<sup>225</sup> This data can provide a rich resource for holding state and private organizations accountable for the services provided to children in need. Making the data available more frequently, and in a more timely manner,<sup>226</sup> could help in evaluating the disposition of reports of suspected abuse and the efficacy of the state agencies. The news media, which acts as the public's surrogate for government information, can improve public knowledge of this information, as it can easily reach a broad audience. In an effort to increase proactive oversight, news outlets should periodically publish the results of the aggregate reports, even in times when child abuse tragedies are not in the news.

Community-based care programs that rely on private organizations and child-advocacy centers may help direct the public's attention as these programs allow for greater community involvement and for more funding opportunities.<sup>227</sup> Community-based care programs are created to tackle unique community challenges and offer diverse solutions across a state. The local interest, and volunteers' investment of time and energy, may make citizens more diligent in maintaining a working child-welfare system rather than just fixing it with stopgap measures when the system breaks. These programs work not only to investigate reports of abuse, but also to help families cope and transition to a healthier environment through ongoing therapy and community building activities.

#### C. Enhanced Accountability Through Proactive Disclosure

In Florida, a committee's access to records is bound by confidentiality, and a publicly disclosed committee-published report shed light on errors in record keeping and other

<sup>221</sup> See *supra* text accompanying notes 78, 114.

<sup>222</sup> 42 U.S.C.A. § 5106a(d) (West 2014); see also *supra* text accompanying notes 45-47.

<sup>223</sup> 42 U.S.C.A. § 5106a(d)(1)-(3).

<sup>224</sup> See e.g., FLORIDA, Child and Family Services Annual Progress and Services Reports, <http://www.myflfamilies.com/about-us/publications> (last visited Feb. 18, 2014); NEW JERSEY, Child Welfare Statistics, <http://www.state.nj.us/dcf/childdata/> (last visited Feb. 18, 2014); PENNSYLVANIA, Child Abuse Reports, <http://www.dcyf.state.pa.us> <http://www.dpw.state.pa.us/publications/childabusereports/index.htm> (last visited Feb. 18, 2014).

<sup>225</sup> *Child Welfare Outcomes*, CHILD. BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/cwo> (last visited Jan. 30, 2014).

<sup>226</sup> The latest reports on the HHS website contain data from 2011. See *id.*

<sup>227</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., COMMUNITY-BASED RESOURCES: KEYSTONE TO THE SYSTEM OF CARE 1-4 (2009), <https://www.childwelfare.gov/pubs/acloserlook/community/community.pdf>.

deficiencies.<sup>228</sup> Access to government information is essential to holding government agencies accountable to the public, but the child and families' right to privacy, which is essential to autonomy and self-government, must also be considered. In an effort to balance these competing interests, access to child-welfare records by independent citizen review panels would be the most effective check on the state while still protecting the right to privacy. A majority of the states already statutorily provide for disclosure to citizen review panels.<sup>229</sup>

The panels, like the Blue Ribbon Panel convened in Florida in 2002,<sup>230</sup> review case files periodically and publish reports to the public assessing the workings of the child welfare agencies. These panels allow accountability to move beyond beyond the disposition data contained in aggregate reports that are publicly available. Entrusted citizens gain access to information contained in the full agency records, which generally would not be disclosed to the public due to significant privacy and safety concerns (e.g., names of reporters, specific medical information of the child, placement locations). This full access adds valuable data, such as caseworker notes and emails, to the assessment of child protection activities and provides greater context to the review process.

To receive value from this kind of review, states must create an adequate number of review panels to allow for consistent and frequent evaluations of cases. Additionally, these review panels should have unfettered access to case reports and records to ensure a robust review of the investigative and treatment processes.

## V. CONCLUSION

This Article analyzed the statutory requirements for safeguarding the confidentiality of and access to child welfare records. As the Missouri media requests for records in the L.P. case discussed in the beginning of this Article suggest, state agencies do not always follow the letter of the law with information disclosure. To serve the confidentiality needs of families and the public's general right to receive information, legislation and policies must emphasize limitation of purpose and use, as well as increased efforts at aggregate reporting. Dedicated review panels would take advantage of all of these measures and offer enhanced, ongoing oversight of child welfare agencies.

This Article reviewed the state statutes for confidentiality provisions, as well as the agencies' discretion to disclose information from case records. In addition to providing greater context for the recommendations provided in this Article, the data can be used to further understand how information in child abuse records is being shared in practice by serving as the foundation for information request audits. Audits reviewing how information requests are handled by the state agencies in comparison with the obligations placed on and the discretion granted to child protection agencies would likely provide a clearer picture of the measures agencies are taking to effectively strike a balance between disclosure and confidentiality, accountability and privacy.

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<sup>228</sup> See *supra* text accompanying notes 115, 163-164.

<sup>229</sup> See *supra* text accompanying notes 155-166.

<sup>230</sup> See *supra* text accompanying note 115.

## APPENDIX I

## Categories of Parties

The following is a list of categories used in the analysis of the state statutes. The categories consist of the parties permitted access to child abuse records by the federal regulation, state statute, or both. Many categories are self-defining; however, for those categories that are not, a definition as developed by the author during the analysis has been provided.

- **Accused**—the suspected perpetrator of child abuse and/or neglect.
- **Adoption administration**—agencies that certify prospective adoptive parents.
- **Attorneys**—attorney of all parties involved in the child abuse investigation, including the agencies' attorneys, state prosecutors, the child's parents' attorneys, and, if the alleged perpetrator is not a parent, the perpetrator's attorney.
- **Authorized agencies**—agencies that “diagnose, care for, treat, or supervise a child who is the subject of a report;”<sup>231</sup> this was interpreted to include education facilities and mental-health facilities.
- **Child advocacy centers**—agencies that advocate on behalf of children whom are suspected to have suffered abuse. Services may include assistance to state agencies in investigations, counseling, court advocacy, and training of child-welfare investigators. These agencies are usually non-profit organizations, recognized or certified by some state or local government agency and may receive funding from the state to continue their services.
- **Child-welfare agency**—the state agency authorized to receive and investigate reports of suspected abuse.
- **Child/guardian ad litem**—the child that is the subject of the abuse report, or his/her guardian *ad litem*, a “guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party.”<sup>232</sup>
- **Coroners or medical examiners**
- **Courts**—this includes judges and all court officials in their official capacity.
- **Court determined**—any additional parties that the court declares have the right to access the child abuse reports; this could include the media and general public.
- **Director of the department**—release of the records is at the discretion of the director of the child welfare department or agency.
- **Federal programs**—the administration of federal programs or federally assisted programs that provide assistance on the basis of need.
- **Foster-care review boards**—teams developed for the purpose of auditing the child-welfare agency; this includes child fatality review boards and citizen review panels.
- **Grand juries**—a body of people that decides whether to issue indictments.<sup>233</sup>
- **Health-care providers**—includes general practitioners, dentists, psychiatrists, and psychologists.
- **Investigating or service-providing authority**—an entity that investigates reports of abuse or provides services to children and families, including a person who is legally authorized to place a child in protective custody.
- **Law enforcement and corrections**—includes police departments, sheriff departments, parole and probation boards, intake and assessment workers, and the department of juvenile justice.

<sup>231</sup> 45 C.F.R. § 1340.14(i)(2)(vii) (2014).

<sup>232</sup> BLACK'S LAW DICTIONARY 713 (7th ed. 1999).

<sup>233</sup> *Id.* at 706.

- **Licensing/employment agents**—agencies responsible for the licensing of child-care facilities and child protection service facilities; agencies or other state-authorized persons responsible for hiring or employing persons who will work with or care for children.
- **Mandatory or adult reporters**—those persons required by law to report suspected incidences of child abuse or neglect; other adults that report suspected abuse or neglect.
- **Miscellaneous**—administrative hearings, county, department of revenue, minister, parties in termination proceedings (any parties involved in dependency or parental termination proceedings), state facilities involved, health-plan payors, victims' compensation boards, developmental disabilities assistance, and public employees relations commission.
- **News media and/or the public**
- **Other states**—child welfare agencies or licensing agencies in other states when acting in a professional capacity.
- **Parents**—natural parents of the child who is the subject of the report; foster and/or adoptive parents (current or prospective foster or adoptive parents).
- **Persons placing child in custody**—any person authorized to place a child in protective custody.
- **Researchers**—any entity “engaged in a bonafide research or evaluation project.”<sup>234</sup>
- **State officials**—any government official acting in his/her professional capacity; includes local, state, and federal representatives (mayors, commissioners, state senators and legislators, federal congressmen and women, and any agency director or supervisor).
- **Tribal governments**—representatives of Native American tribes.

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<sup>234</sup> 45 C.F.R. § 1340.14 (i)(2)(xi). While each state that specifically grants access to researchers may place different restriction on this access, this serves as a general definition applicable to all states.

**APPENDIX II**

**Key To Abbreviations**

GS	General statements of confidentiality	RB	Foster-care review boards
CW	Child welfare agencies	LE	Law enforcement and corrections departments
CT	Courts	EM	Licensing/employment agencies
GJ	Grand juries	RP	Mandatory or Adult Reporters
IA	Investigating or service-providing authority	MP	News Media and/or the Public
HC	Health-care providers	MS	Miscellaneous
PC	Person placing child in custody	OS	Other states
AA	Authorized agencies	PR	Parents
AC	Accused	TG	Tribal governments
CG	Child/guardian ad litem	RS	Researchers
SO	State/local official	AD	Adoption administrations
CA	Child advocacy centers	AT	Attorneys
ME	Coroners/medical examiners	DD	Director-determined
CD	Court-determined		
FP	Federal programs		

**APPENDIX III****Persons and Entities Eligible to Access Records in the Federal Laws**

<b>States</b>	<b>GS</b>	<b>CW</b>	<b>CT</b>	<b>GJ</b>	<b>IA</b>	<b>HC</b>	<b>PC</b>	<b>AA</b>	<b>AC</b>	<b>CG</b>	<b>SO</b>	<b>RS</b>
Federal Regulation		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Alabama		Y	Y	Y	Y	Y				Y	Y	Y
Alaska												
Arizona		Y	Y	Y	Y	Y		Y	Y	Y	Y	Y
Arkansas		Y	Y	Y	Y			Y	Y	Y	Y	Y
California		Y	Y		Y	Y	Y					
Colorado		Y	Y		Y	Y		Y		Y	Y	Y
Connecticut		Y	Y		Y	Y	Y	Y				Y
Delaware	Y											
District of Columbia		Y				Y			Y	Y	Y	
Florida		Y	Y	Y	Y	Y		Y	Y	Y	Y	Y
Georgia		Y	Y	Y	Y						Y	
Hawaii	Y											
Idaho	Y											
Illinois		Y	Y	Y	Y	Y	Y	Y		Y		Y
Indiana		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
Iowa		Y	Y		Y	Y		Y	Y	Y	Y	Y
Kansas		Y	Y		Y	Y		Y		Y	Y	
Kentucky		Y	Y		Y	Y			Y	Y	Y	
Louisiana	Y											
Maine		Y	Y	Y		Y		Y	Y	Y	Y	Y
Maryland		Y			Y							
Massachusetts		Y								Y		
Michigan		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Minnesota		Y					Y					
Mississippi			Y			Y		Y				Y
Missouri		Y			Y	Y			Y	Y		Y
Montana		Y	Y		Y	Y		Y	Y	Y	Y	Y
Nebraska						Y		Y				Y
Nevada		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
New Hampshire		Y		Y				Y		Y		
New Jersey		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
New Mexico		Y	Y			Y		Y		Y		

<b>States</b>	<b>GS</b>	<b>CW</b>	<b>CT</b>	<b>GJ</b>	<b>IA</b>	<b>HC</b>	<b>PC</b>	<b>AA</b>	<b>AC</b>	<b>CG</b>	<b>SO</b>	<b>RS</b>
New York	Y	Y										
North Carolina		Y								Y		
North Dakota		Y	Y		Y	Y	Y		Y	Y	Y	Y
Ohio	Y											
Oklahoma		Y	Y		Y	Y		Y		Y	Y	Y
Oregon						Y				Y		
Pennsylvania		Y	Y		Y	Y		Y	Y	Y	Y	
Rhode Island			Y			Y	Y	Y		Y		
South Carolina		Y	Y	Y	Y			Y	Y	Y	Y	Y
South Dakota		Y	Y		Y	Y		Y		Y	Y	
Tennessee		Y	Y	Y		Y		Y		Y		Y
Texas		Y				Y		Y		Y		
Utah		Y	Y			Y	Y	Y	Y	Y		Y
Vermont					Y				Y			
Virginia	Y											
Washington		Y				Y				Y		Y
West Virginia				Y	Y					Y	Y	
Wisconsin		Y	Y	Y	Y	Y				Y		Y
Wyoming		Y	Y	Y	Y	Y	Y	Y		Y		
<b>Totals</b>	<b>7</b>	<b>38</b>	<b>30</b>	<b>17</b>	<b>28</b>	<b>33</b>	<b>12</b>	<b>27</b>	<b>18</b>	<b>35</b>	<b>22</b>	<b>23</b>

**Persons and Entities Eligible to Access Records Under State Law**

States	AD	AT	CA	ME	CD	DD	FP	RB	LE	EM	RP	MP	MS	OS	PR	TG
Alabama		1						1	1			1		1		
Alaska											1	1				
Arizona	1							1	1		1	1			1	1
Arkansas	1						1	1				1			1	
California				1				1	1	1	1					
Colorado	1				1			1	1	1	1	1				
Connecticut											1	1				
Delaware												1				
District of Columbia	1	1							1						1	
Florida	1	1	1		1				1	1		1	1	1	1	
Georgia		1	1	1	1				1	1	1	1		1		
Hawaii																
Idaho																
Illinois				1				1	1	1				1		
Indiana				1	1			1	1	1		1			1	
Iowa	1		1					1	1	1	1	1		1	1	
Kansas				1	1			1	1	1		1		1	1	1
Kentucky			1		1				1			1			1	
Louisiana												1				
Maine					1			1	1	1	1	1	1		1	1
Maryland									1							
Massachusetts					1			1			1				1	
Michigan	1			1				1		1		1	1		1	
Minnesota		1		1	1		1		1	1	1					
Mississippi					1				1		1	1	1			
Missouri								1	1			1				
Montana		1		1	1			1	1	1	1	1			1	1
Nebraska		1						1	1	1	1	1			1	
Nevada		1			1			1	1		1	1			1	
New Hampshire											1		1		1	
New Jersey		1			1			1	1	1	1	1	1		1	
New Mexico		1						1	1			1		1	1	1
New York												1				
North Carolina					1										1	
North Dakota											1					



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Ohio					1					1						
Oklahoma	1	1						1	1					1	1	1
Oregon		1		1	1			1	1	1			1			
Pennsylvania		1					1	1	1			1	1	1	1	
Rhode Island		1			1			1	1			1	1	1		
South Carolina		1		1	1			1	1	1			1	1	1	
South Dakota	1	1							1				1			1
Tennessee		1	1						1				1	1		
Texas		1			1				1				1			1
Utah	1	1	1						1	1						1
Vermont									1	1						
Virginia													1			
Washington		1			1											
West Virginia		1			1			1	1							1
Wisconsin		1	1	1				1	1	1			1	1	1	1
Wyoming		1							1				1			1
Totals	10	23	7	10	19	3	3	25	35	19	21	33	7	12	27	7

<sup>i</sup> Florida grants access to four parties categorized here as Miscellaneous.

<sup>ii</sup> Mississippi grants access to two parties categorized as Miscellaneous.

**Total Categories of Parties**

<b>States</b>	<b>Total Categories</b>
Florida	24
New Jersey	20
Montana	19
Iowa	18
Maine	18
Michigan	18
Nevada	18
South Carolina	18
Arizona	17
Indiana	17
Wisconsin	17
Kansas	16
Pennsylvania	16
Colorado	15
Oklahoma	15
Arkansas	14
Georgia	14
Illinois	14
Utah	14
Alabama	13
Kentucky	12
New Mexico	12
Rhode Island	12
South Dakota	12
Tennessee	12
Wyoming	12
Mississippi	10
California	10
Nebraska	10
North Dakota	10
Connecticut	9
District of Columbia	9
Minnesota	9
Missouri	9

<b>States</b>	<b>Total Categories</b>
Oregon	9
Texas	9
West Virginia	9
New Hampshire	7
Massachusetts	6
Washington	6
North Carolina	4
Vermont	4
Maryland	3
Alaska	2
New York	2
Ohio	2
Delaware	1
Louisiana	1
Virginia	1
Hawaii	0
Idaho	0

Note: These totals include the parties categorized as Miscellaneous.



