



THE FEDERAL STATUTORY FRAMEWORK

Hon. Pamela L. Abernethy (Ret.)

Mini CANI, May 2016

A dismal history for children

LEADING UP TO CAPTA

LITTLE PROTECTION FOR CHILDREN UNTIL THE 20TH CENTURY

The history of childhood is a nightmare from which we have only recently begun to awake. The further back in history one goes, the lower the level of child care and the more likely children are to be killed, abandoned, beaten, terrorized and abused.

Lloyd De Mause The History of Childhood 1974

GOVERNMENT'S AUTHORITY OVER (POOR) CHILDREN

- 17th century: Poor Law Policy derived from England
- 19th century: Refuge/Reform Movements
- Late 19th century: Child Saving Movement as part of Progressive Era

FAMILY AUTONOMY PARAMOUNT

- ◉ Massachusetts Stubborn Child Law of 1646: parents could bring rebellious son before the court to be put to death.
- ◉ As in England, state apprenticed poor children for the common good.
- ◉ In *Johnson v. State*, 1840, court reversed parents' criminal conviction for the brutal treatment of daughter holding that parents' right to control and discipline their "refractory and disobedient children" so "necessary to the government of families and to the good order of society that no moralist or lawgiver has ever thought of interfering with its existence * * *."

CHILDREN HAVE NO RIGHT TO LIBERTY

- "The basic right of a juvenile is not to liberty but to custody. He has the right to have someone take care of him, and if his parents do not afford him this custodial privilege, the law must do so." *In Re Gault* 387 US 1, 17 n. 21 (1967) (Citing 1839 and 1882 cases.)

STATE OF JUVENILE JUDGES NOT SO LONG AGO

Of 2,987 juvenile judges listed in 1964 only 213 are full-time, half have no undergraduate degree, a fifth have no college education at all, a fifth are not members of the bar, and three-quarters devote less than one-quarter of their time to juvenile matters. In re Gault supra at 15, n.14.

SUPREME COURT RECOUNTS VIEWS OF JUVENILE JUDGE 1937-1953

- ◉ "The powers of the Star Chamber were a trifle in comparison with those of our juvenile courts . ." 1937 Dean Pound
- ◉ The system must not degenerate into a star chamber proceeding with the judge imposing his own particular brand of culture and morals on indigent people. 1944 Judge Woodward
- ◉ The judge as amateur psychologist, experimenting upon the unfortunate children who must appear before him, is neither an attractive nor a convincing figure. 1953 Chief Justice of the Supreme Court of New Jersey.
- ◉ *In re Gualt*, supra at 18-19, n.25

LEADING UP TO CAPTA

- 1912 Congress created the United States Children's Bureau.
- *1944 US Supreme Court confirmed state's authority to intervene in family relationships to protect children. Prince v. Mass. 321 US 158 (1944).*
- *1962 Dr. C. Henry Kempe published The Battered Child Syndrome in the Journal of the American Medical Association.*
- *1962 Children's Bureau held symposium on child abuse and recommended model reporting law.*
- *By 1967 44 states had mandatory reporting.*

FEDERAL RESPONSE TO CHILD MALTREATMENT



January 31, 1974
President Nixon signs Capta

1974 CHILD ABUSE PREVENTION AND TREATMENT ACT P.L. 93-273

- ◉ Funding to states for investigation and prevention of child maltreatment, if state adopts mandatory reporting law.
- ◉ *CAPTA created the National Center on Child Abuse and Neglect (NCCAN) to serve as an information clearinghouse.*
- ◉ *In 1984, amended to include medically disabled infants, the reporting of medical neglect and maltreatment in out-of-home care, and the expansion of sexual abuse to include sexual exploitation.*
- ◉ In 1996 amended to abolish NCANN (becomes National Center for Child Abuse and Neglect) revise **minimum definition of child abuse to include death serious physical or emotional injury, sexual abuse or imminent risk of harm**; provides for federal grants for CRBs.
- ◉ *In 2003 added mandate to refer all children placed out of home who under 3 to “Early Intervention” (corresponding provision in IDEA)*

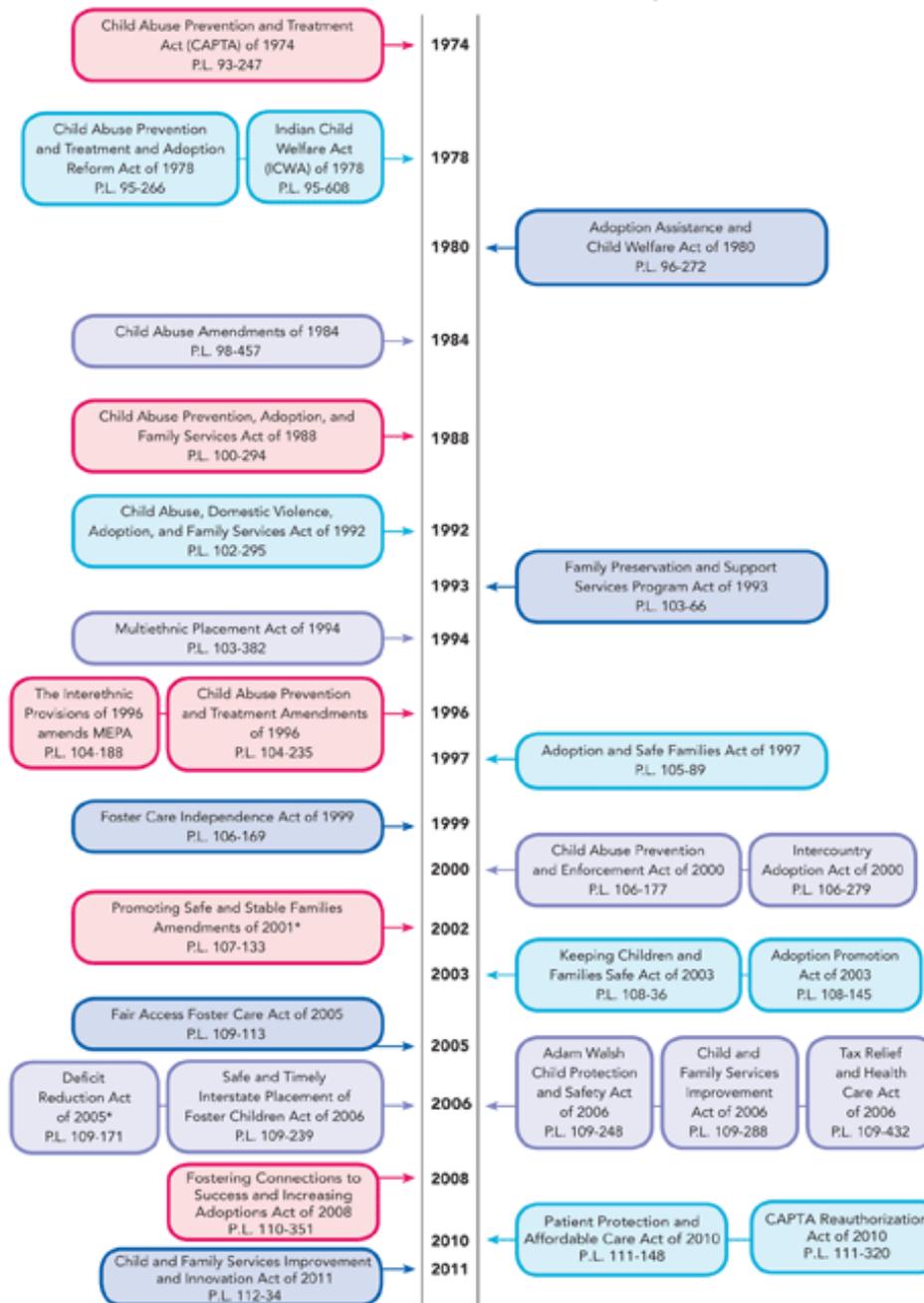
CAPTA CREATES NATIONAL DEFINITION OF CHILD MALTREATMENT

- CAPTA established a minimum standard definition of child maltreatment and guidelines for the development of state child protective systems.
- Before its passage, there was an intense national debate about the parameters of maltreating behavior to be included in the national definition of child maltreatment.
- There was strong opposition to the inclusion of emotional and physical neglect in the definition based on the belief that the government should intrude in family privacy only when there was an issue of demonstrable harm to the child.
- Despite the opposition, emotional and physical neglect were included.
- Source: Dubowitz H. *Neglected Children: Research, Policy and Practice*. (1999)

AND BOOM..... 1974 TO 2011



Timeline of Major Federal Legislation Concerned With Child Protection, Child Welfare, and Adoption



*Some acts were enacted the year following their introduction in Congress.



AND MORE SOUP NOT ON THE CHART

- ◉ 1975 Education for All Handicapped Children Act
- ◉ 1986 Early Intervention(EI) Program for Infants and Toddlers with Disabilities (PL 94-142)
- ◉ 1997 Individuals with Disabilities Education Act (IDEA)

1980 ADOPTION ASSISTANCE AND CHILD WELFARE ACT P.L. 96-272

- Funding for states dependent on reforms to prevent unnecessary foster care placements and to provide children quickly with permanent homes.
- RE to prevent removal required as condition for federal funds.
- Placement must be least restrictive and close to parents.
- Important provisions for case review were also included.

1993 FAMILY PRESERVATION AND SUPPORT SERVICES

- ⦿ Part of 1993 Omnibus Budget and Reconciliation Act
- ⦿ Funds to states through **State Court Improvement Program** -- in Oregon *JCIP* --to assess the impact of Public Law 96-272 on foster care proceedings, to study the handling of child protection cases, and to develop a plan for improvement.
- ⦿ Basis for nationwide movement to improve court practice in dependency cases

1997 THE ADOPTION AND SAFE FAMILIES ACT PUBLIC LAW 105-89

- ◉ Most significant change in federal child welfare law since the Adoption Assistance and Child Welfare Act of 1980.
- ◉ Includes provisions for legal representation, state funding of child welfare and adoption, and state performance requirements.
- ◉ Intended to promote primacy of child safety and timely decisions while clarifying "reasonable efforts" and continuing family preservation.
- ◉ ASFA also included continuation funding for court improvement.

1999 FOSTER CARE INDEPENDENCE ACT (CHAFEE ACT) P.L. 106-169

- Created the John H. Chafee Foster Care Independence Program, run through the States under Title IV-E
- Requires that a portion of State's Independent Living Program appropriation be used for youth ages 18-21 who exit foster care.

42 U.S.C. § 677

INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT (IDEA) OF 2004 [P.L. 108-446]

- Public schools must identify children with disabilities (including homeless youth and wards of the state) who may need specialized education and provide them with individualized education programs and related services
 - Including services designed to prepare them for employment and independent living
- Requires referral to Part C Early Intervention Services for children aged 0-3 involved in substantiated child abuse and neglect cases

2006 SAFE AND TIMELY INTERSTATE PLACEMENT OF FOSTER CHILDREN ACT P.L. 109-239

Improvements to the interstate placement of children:

- ◉ Complete home studies requested by another State w/in within 60 days of request.
- ◉ Accept home studies received from another State w/in 14 days unless contrary to welfare finding.
- ◉ Requires court to determine at permanency hearing whether child's out-of-home placement continues to be appropriate and in child's best interests;
- ◉ State must provide child's health and education records to foster parents at time of placement and to child at no cost upon leaving foster care;
- ◉ In order to continue to receive CIP funds, the highest Court in the state must have a rule that foster parents, pre-adoptive parents, and relative caregivers are notified of proceedings.

2008 FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT

- **Kinship Guardianship Assistance payments**
 - Amends title IV-E to allow states to provide guardianship assistance payments for children in foster care who are being cared for by relatives provided they have been in FC for 6 consecutive mos. and are eligible for FC maintenance payments
 - Allows children who leave FC after age 16 for kinship guardianship or adoption to be eligible for independent living services and education and training vouchers

2008 FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT

- ◉ Maintaining Family Relationships
 - Family Connection Grants
 - Establishes a new program to provide grants for activities designed to keep children in FC (or those at risk of entering FC) connected with their families
 - The funds can be used for kinship navigator programs, family finding efforts, family group decision making meetings within the child welfare system, or residential substance abuse treatment programs for families
 - Sibling Placement
 - States must make reasonable efforts to place siblings in the same FC placement
 - If siblings can't be placed together, the state must make reasonable efforts to provide frequent visitations among the siblings

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

- Improving outcomes for older youth
 - States may extend adoption assistance and/or guardianship payments for youth aged 19, 20, or 21
 - States may provide care and support to youth until the age of 19, 20, or 21 if the youth is:
 - Completing high school or an equivalency program; enrolled in vocational school, participating in a program to remove employment barriers, employed 80 hours/month, or if there is an existing medical condition that prohibits the youth from doing any of these activities

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

- ◉ Improving outcomes for older youth (cont.)
 - Transition planning
 - Requires agency to help youth develop a transition plan during the 90-day period immediately preceding the date the youth ages out of FC. The plan must be detailed and contain the input of the youth. The plan must include the following:
 - Options on housing, health insurance, education, opportunities for mentoring, continuing support services, and work force and employment supports

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

○ Educational stability

- Requires agency to coordinate with local education agencies to ensure that the child remain in their original school if in the child's best interests
- If not in the child's best interests, the state must provide assurances that the child is immediately enrolled in a new school and all records are transferred
- The FC maintenance payment may be used to fund transportation costs to the child's school
- Every state is required in their IV-E plans to provide assurances that every school-age child receiving and adoption assistance payment is enrolled full time in school or has completed school

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

○ Health Needs

- State is required to work with the Medicaid agency to develop, with the consultation of pediatricians and other experts, a plan to coordinate the healthcare needs of FC children that includes health screenings, oversight of medication, and steps taken to ensure continuity of medical homes for children if needed.

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

◉ Tribal Access to IV-E funds

- Allows tribes to directly access and administer IV-E funds by submitting a plan to the federal government
- Allows tribes to access part of the state's Chafee Foster Care Independence Program funds
- Requires the HHS secretary to provide technical and implementation assistance and grants to tribes to help them to administer their own programs

FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008

◉ Adoption Incentives

- Allows states to receive an additional \$1,000 per adoption of a child from foster care
- Expands the Adoption Incentive Grant Program for five more years and awards \$8,000 per child nine and older and \$4,000 per child with special needs (doubles old rates)
- States required to inform all people who are adopting or may adopt a child from state custody of their potential eligibility for the adoption tax credit
- Eligibility for federal funding of adoption assistance is “de-linked” from AFDC eligibility requirements. This will allow more children with special needs to be adopted with federal funding support
 - Phased in over nine years beginning with children 16 and older who will be the first to be de-linked from the AFDC requirement
 - Any child in care over 60 consecutive months is eligible as well as that child's siblings

2010 CAPTA REAUTHORIZATION

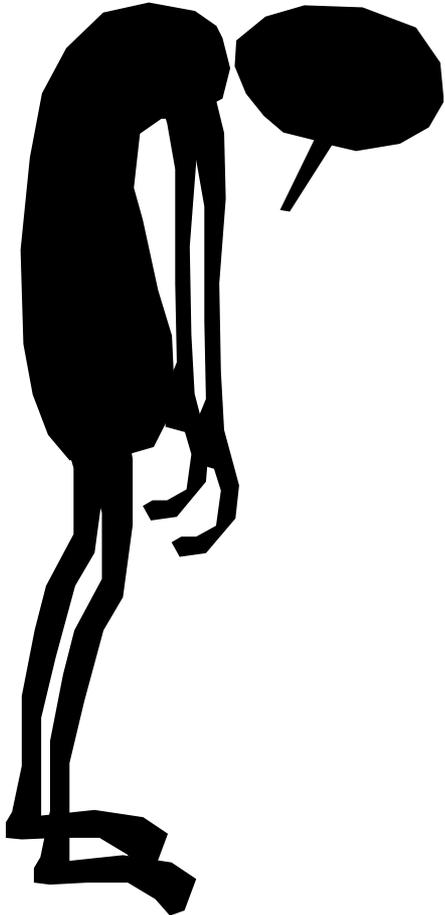
P.L. 111-320

- ◉ Include Fetal alcohol spectrum disorders in development of plan of safe care for substance-exposed newborns
- ◉ Include differential response screening and assessment
- ◉ Requiring GAL (in Oregon -- child's attorney) to be trained in early childhood development, child and adolescent development.
- ◉ Reunification not required where parent committed intrafamily sexual abuse or must register as SO.

2011 CHILD AND FAMILY SERVICES IMPROVEMENT AND INNOVATION ACT P.L. 112-34

- Requires health plan for children to include:
 - Monitoring and treatment trauma/use of psychotropic medications.
- Reduce time children under 5 are without permanent family/address developmental needs of children under 5.
- Peer to peer mentoring and support groups for parents and primary providers
- Services and activities to facilitate visitation of children by parents and siblings.
- Courts to increase/improve engagement of entire family in court process.

ASFA/ POST ASFA DIRECT IMPACT ON COURTS



- ◉ **More complexity**
- ◉ **More hearings of all of the cases**
- ◉ **More termination cases**
- ◉ **More adoption, custody, guardianship and relative placement cases**

APPLYING THE FEDERAL LAW: JUDICIAL OVERSIGHT KEY

- ◉ **Court/agency involvement is simultaneous**
- ◉ **Multiple person/agency involvement creates potential for delay, error and conflict**
- ◉ **Court sets and adjusts direction and plan**
- ◉ **Court approves placement, visits and services**
- ◉ **Court enforces participant's involvement**
- ◉ **Court insures all steps that can be taken are being taken**

JUDICIAL RESPONSIBILITY IN DEPENDENCY CASES

- ◉ **Court must hold system accountable**
- ◉ **Judges can be active in policy, rules and procedures development**
- ◉ **Judges must act as convener and advocate to assure accountability**
- ◉ **Judges must hold participants accountable- and themselves**

ASFA PROVISIONS AFFECTING JUDICIAL ABUSE AND NEGLECT PROCEEDINGS

- ◉ Reasonable efforts
- ◉ Contrary to welfare/or best interests determination
- ◉ Foster care placement; limit on court role
- ◉ Permanency hearing deadline
- ◉ Permanency plan set at hearing
- ◉ Permissible plans
- ◉ Reasonable efforts to finalize plan

ASFA PROVISIONS AFFECTING JUDICIAL ABUSE AND NEGLECT PROCEEDINGS

- ◉ TPR Required; deadline for filing TPR w/in 60 days of felony determination
- ◉ TPR w/in 60 days of abandoned infant determination
- ◉ Exceptions to TPR requirement
- ◉ Adoptive family recruitment at TPR filing
- ◉ Specific contrary to welfare and reasonable efforts findings required

REASONABLE EFFORTS GENERALLY

The State must make reasonable efforts to:

- ⦿ Maintain the family unit and prevent unnecessary removal of a child from his/her home, as long as child's safety is assured;
- ⦿ Effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure immediate safety of the child); and
- ⦿ Make and finalize alternate permanency plans in a timely manner when reunification is not appropriate or possible.

45 C.F.R. § 1356.21(b)

“CONTRARY TO WELFARE/BEST INTERESTS ” DETERMINATION IN FIRST COURT RULING

If “contrary to the welfare” determination is not made in the first court ruling, the child is not eligible for Title IV-E foster care payments for the duration of that stay in foster care.

45 C.F.R. § 1356.21(c)

REASONABLE EFFORTS TO PREVENT REMOVAL

When a child is removed from home, a judicial determination as to whether reasonable efforts were made, or were not required, to prevent removal must be made no later than 60 days from the date the child is removed from home.

45 C.F.R. § 1356.21(b)(1)

REASONABLE EFFORTS NOT REQUIRED

Reasonable efforts to prevent removal or to reunify the family are not required where the state agency has obtained a judicial determination that such efforts are not required because:

- ⦿ Parent has subjected the child to aggravated circumstances (defined by state law);
- ⦿ Parent has been convicted of murder or voluntary manslaughter of another child or parent, aiding or abetting, attempting, conspiring or soliciting to commit murder or voluntary manslaughter, or a felony assault that results in serious bodily injury to the child or to another child of the parent; or
- ⦿ Parental rights have been terminated involuntarily with respect to a sibling

45 C.F.R. § 1356.21(b)(3)

FOSTER CARE PLACEMENT; LIMIT ON COURT ROLE

Federal financial participation in foster care payments is not available when a court orders a placement with a specific foster care provider.

45 C.F.R. § 1356.21(g)

PERMANENCY HEARING DEADLINE

Permanency Planning Hearing must occur within 12 months of the date a child “is considered to have entered foster care,” or within 30 days of a judicial determination that reasonable efforts to reunify the child and family are not required.

- ⦿ A child is considered to have entered foster care on the *earlier* of the date of the first judicial finding of abuse or neglect or the date that is 60 days after the child is removed from the home.

45 C.F.R. § 1355.20(a)

PERMISSIBLE PLANS

Permissible plans or goals under ASFA:

- ⦿ Reunification;
- ⦿ Adoption;
- ⦿ Legal Guardianship;
- ⦿ Permanent Placement with a Fit and Willing Relative; or
- ⦿ Another Planned Permanent Living Arrangement

45 C.F.R. § 1355.20

REASONABLE EFFORTS TO FINALIZE PLAN

A judicial determination that the state agency has made reasonable efforts to finalize the permanency plan must be made within 12 months of the date the child is considered to have entered foster care, and at least once every 12 months thereafter while the child is in foster care.

45 C.F.R. § 1356.21(b)(2)

TPR REQUIRED AND DEADLINE FOR FILING

The State must file or join in a petition to terminate parental rights if the child has been in foster care for 15 of the most recent 22 months.

- The TPR petition must be filed by the end of the child's 15th month in foster care.

45 C.F.R. § 1356.21(i)(1)(i)

TPR REQUIRED AND DEADLINE FOR FILING

If the parent has been convicted of one of the felonies listed in the regulations, the TPR petition must be filed w/in 60 days of judicial determination that reasonable efforts to reunify are not required.

45 C.F.R. § 1356.21(i)(1)(iii)

If child is determined by court to be an abandoned infant, the TPR petition must be filed w/in 60 days of judicial determination that the infant is abandoned.

45 C.F.R. § 1356.21(i)(1)(ii)

EXCEPTIONS TO TPR REQUIREMENT

State agency may elect not to file for TPR if:

- ⦿ The child is being cared for by a relative (at the agency's option);
- ⦿ The agency has documented in the case plan a *compelling reason* for determining that filing a TPR petition would not be in the child's best interests; or
- ⦿ The agency has not provided services to the family deemed necessary for the safe return of the child to the home, when reasonable efforts are required.

45 C.F.R. § 1356.21(i)(2)

ADOPTIVE FAMILY RECRUITMENT

When the State files a TPR petition, it must concurrently begin to recruit, identify, process and approve a qualified adoptive family on behalf of the child, regardless of age.

45 C.F.R. § 1356.21(i)(3)

CRITERIA FOR IV-E FUNDING

- 472 (a) (1) of Act gives two eligibility criteria for IV-E.
 - Voluntary placement/judicial finding that is contrary to child's welfare to be at home;
 - Judicial finding that agency made reasonable efforts to prevent removal, reunify, make & finalize alternate permanent placement if not going home
- No exception to R/E to prevent removal from or to reunify for unaccompanied refugee minor

SPECIFIC FINDINGS REQUIRED

Judicial determinations that remaining in the home would be contrary to the welfare of the child and that reasonable efforts were made to prevent removal and to finalize the permanency plan in effect, as well as judicial determinations that reasonable efforts are not required, must be:

- ⦿ Explicitly documented;
- ⦿ Made on a case-by-case basis; and
- ⦿ Stated in the court order.

45 C.F.R. § 1356.21(d)

REASONABLE EFFORTS FINDING AND FUNDING 45 CFR 1356.21

- ⦿ No distinction between emergency and non-emergency for starting time
- ⦿ Shelter care counts for time computation in hearings out of home
- ⦿ Voluntary placement agreements-these count as days in out of home care
- ⦿ State gets 60 days from date of removal to get judicial determination of R/E
- ⦿ IV-E eligibility absolutely linked to R/E finding
- ⦿ **Cannot nunc pro tunc entry of R/E on 1st hearing**

REASONABLE EFFORTS DOCUMENTATION

- ◉ Language must be in the order
- ◉ Verbal order to remove must be followed by written order.
- ◉ On audit: transcript is OK- affidavit, nunc pro tunc, reference to state law are not.
- ◉ OK if order references/incorporates documents.
- ◉ Unless aggravated circumstances exception, order should state that agency's efforts were reasonable
- ◉ NOT that reasonable efforts were not required
- ◉ If no efforts were reasonable say that i.e. R/E were made based on family circumstances and child health and safety (emergency)

MISCELLANEOUS IV-E

- ◉ Limit of 25 beds for public child care institutions to qualify for IV-E
- ◉ Subsidized legal guardianships can use IV-E funds
- ◉ It is acceptable to extend reunification efforts past the 12 month permanency hearing if parent has been diligently working to reunify and agency and Court expects reunification to occur within time frame consistent with child's development (p. 4035)
- ◉ Foster home, especially relative, must be: fully licensed, no provisional or temporary to qualify for reimbursement; have 60 days to get licensed, State must make this possible; and have 6 months grace time (pp 4021-22 & 4032)

THE ASFA REGULATIONS

- ⦿ **Passed Jan 25, 2000**
- ⦿ **Effective March 27, 2000**
- ⦿ **45 CFR parts 1355, 1356 & 1357**
- ⦿ **Federal Register Vol. 65, No. 16, pp. 4019-4093**
- ⦿ **<http://www.gpoaccess.gov>**

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- ◉ MARVIN VENTRELL “*Evolution of the Dependency Component of the Juvenile Court*” *Juvenile and Family Court Journal*, Fall 1998, Volume 49, Number 4.
- ◉ NCJFCJ
- ◉ *Major Federal Legislation Concerned with Child Protection, Child Welfare and Adoption*
<http://www.childwelfare.gov>