

This report is an accurate assessment of the Maine child welfare system at the time it was written. Since that time, a new governor has brought new leadership to the Maine child welfare system. That leadership has made notable improvements, including a significant reduction in the number of children taken from their parents and a significant increase in the use of kinship care.

July, 2006

Safe at Home

AN ACTION AGENDA FOR CHILD WELFARE IN MAINE

January 31, 2002

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Child Protection Reform
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ABOUT NCCPR

The National Coalition for Child Protection Reform is a non-profit organization whose members have encountered the child protective system in their professional capacities and work to make it better serve America's most vulnerable children. **Board of Directors:** **President:** *Martin Guggenheim*, Director of Clinical and Advocacy Programs, New York University Law School. **Vice President:** *Carolyn Kubitschek*, attorney specializing in child welfare law, former Co-ordinator of Family Law, Legal Services for New York City. **Treasurer:** *Joanne C. Fray*, attorney with extensive experience with litigation involving the care and protection of children and termination of parental rights, Lexington, Mass. **Directors:** *Elizabeth Vorenberg*, (Founding President) former Assistant Commissioner of Public Welfare, State of Massachusetts; former Deputy Director, Massachusetts Advocacy Center; former member, National Board of Directors, American Civil Liberties Union; *Annette Ruth Appell*, Associate Professor, William S. Boyd School of Law, University of Nevada, Las Vegas; former member of the Clinical Faculty, Children and Family Justice Center, Northwestern University Law School Legal Clinic, former Attorney and Guardian ad Litem, office of the Cook County, Ill. Public Guardian; *Marty Beyer*, Ph.D., clinical psychologist and consultant to numerous child welfare reform efforts; *Ira Burnim*, Legal Director, Judge Bazelon Center for Mental Health Law, Washington, DC; former Legal Director, Children's Defense Fund; former Staff Attorney, Southern Poverty Law Center; Prof. Dorothy Roberts, Northwestern University School of Law. **Staff:** *Richard Wexler*, Executive Director. Author, *Wounded Innocents: The Real Victims of the War Against Child Abuse*. (Prometheus Books: 1990, 1995).

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Overview

One year ago today, a little girl died an agonizing death and a big state agency hoped no one would pay much attention.

In the name of “children’s rights” five-year-old Logan Marr was led down to an unfinished basement. In the name of putting “child protection” ahead of “family preservation” she was bound to a high chair with duct tape. In the name of “erring on the side of the child,” she died in that high chair. Authorities allege that Logan’s foster mother covered the girl’s mouth with duct tape. The autopsy report said the cause of death was asphyxiation.

The foster mother has been charged with manslaughter.

The Maine Department of Human Services responded with indifference bordering on cruelty. DHS Commissioner Kevin Concannon would not even apologize to Logan’s mother until she pressured him to do so. And even as evidence mounted of systemic failures, Concannon insisted that the child welfare system “is not in crisis.”¹

It would be understandable if DHS expected people to accept this. It’s worked in other states. All too often around the country, the same press, public and politicians that are quick to assume that any death of a child in his or her own home “proves” the danger of family preservation, are equally quick to ignore the risks of foster care when a child dies in a foster home.

But to their great credit, Mainers have proved to be different. Maine has refused to ignore the death of Logan Marr. The press and the public have demanded answers, and two legislative committees investigated. Though we have reservations

about the results, the effort itself sets Maine apart.

All of the attention has produced some positive results.

- After months of insisting there is no problem, DHS has finally agreed to seek help. DHS is working with Casey Strategic Consulting,² a division of Casey Family Services, the direct service arm of the Annie E. Casey Foundation. (The Casey Foundation also helps to fund NCCPR).

The Maine child welfare system *is* in crisis. Indeed, when it comes to holding children in foster care with strangers, there probably is no state with a worse record than Maine.

- The Joint Standing Committee on Health and Human Services (“HHS Committee”) issued a report with recommendations that, if followed, could begin to point DHS in the right direction.

- And there are indications that even the Maine Supreme Court is giving these issues more thought. As the *Kennebec Journal* noted: “After affirming all but a handful of decisions to separate children from their parents during the past decade, the Maine Supreme Court has reversed two in a week and pointed out error in a third.”³

But this is far from enough. The Maine child welfare system *is* in crisis. Indeed, when it comes to holding children in

foster care with strangers, there probably is no state with a worse record than Maine.

But, to use a favorite phrase of child welfare agencies everywhere, DHS is “in denial.”

The policies and practices of the Maine Department of Human Services are endangering the safety of Maine’s children.

Even the Assistant Attorney General who testified before the Committee to Review The Child Protective System (the Review Committee) to explain her agency’s view of how the process works acknowledged that children *are*, in fact, held needlessly in foster care when they could safely be in their own homes if services – sometimes, as the Assistant Attorney General herself said, very basic services, were available.⁴

But as recently as last month, the “child welfare” section of Concannon’s annual letter to DHS employees included nothing about doing more keep families together. Nor was there even one word about Logan Marr. The only child welfare program mentioned in the entire section is adoption. Any DHS employee would understand where the rewards are, and where they aren’t.⁵

DHS still wrongly equates child removal with child safety. DHS Deputy Commissioner Peter Walsh reacted to the very modest proposals from the HHS Committee with a little finger wagging: “We don’t have a problem with the majority of the areas in here as long as the focus is on the fact that DHS has to have as its primary goal the safety of the child.”⁶

Walsh and his bosses remain in denial about the fact that child removal does not equal child safety. On the contrary:

- Wrongful removal endangers children by subjecting them to the emotional devastation of needless separation from everyone they know and love – for small children it can be as traumatic as being kidnapped.

- Wrongful removal subjects children to the risk of abuse in foster care itself. Though cases like Logan Marr’s are rare, the rate of abuse in foster care is far higher than in the general population and far higher than generally realized.⁷ And the more a foster care system is overloaded with children who don’t need to be there, the less safe it becomes, as agencies are tempted to overcrowd foster homes and lower standards for foster parents.

- Wrongful removal overwhelms workers making it far more likely that they will make tragic mistakes in both directions. The higher the caseload, the less time a worker has to make decisions for each case. So even as more children are needlessly taken from homes that are safe, or could be made safe with the right kinds of services, other children in real danger are overlooked. That’s why states and localities that have experienced foster care panics -- huge, sudden increases in their foster care populations -- consistently find that the panics are followed by *increases* in total child abuse deaths.⁸

There are a wealth of reasons why DHS must change. But the most important is simply this: The policies and practices of the Maine Department of Human Services are endangering the safety of Maine’s children.

And that is why changes are needed that are much more far-reaching than those proposed by the two legislative committees. Our proposals for change – an Action

Agenda for child welfare in Maine – are presented in the second half of this report.

The Price of Change

We issue this Action Agenda at a time when Maine, like most states, is facing severe fiscal problems. Though saving money is not the goal of the Action Agenda, it is a beneficial side effect.

Almost all of the recommendations are cost neutral, and many save money. For example, nationwide, placing one child in foster care for a year typically costs about \$15,000. Group homes and institutions cost far more. Keeping an entire family together by using an Intensive Family Preservation Services intervention typically costs about \$5,000. For every child kept out of foster care for a year thanks to such an intervention, government saves about \$10,000, typically more.⁹

It is true that the savings to states are reduced by perverse federal financial incentives that provide open-ended assistance to cover part of the cost of most foster care placements, while limiting aid for programs to keep children out of foster care, a problem that may have been worsened in Maine by DHS' apparent shifting of scarce federal funds from family preservation to adoption (See Appendix A). But the federal government has given many states waivers to allow them to divert some foster care money to prevention programs. In its final report, the HHS Committee correctly urges DHS to be aggressive in taking advantage of such opportunities.¹⁰

Doing so would allow DHS to fund many of the initiatives recommended in the Action Agenda by transferring funds now used to pay for unnecessary foster care.

In other cases, even if DHS incurred an additional initial cost, it would be more than offset by savings as soon as the foster care population went down.

Some recommendations, such as more drug treatment and increasing the pay of caseworkers, do require increased spending.

The children are worth it.

DHS Condemns Itself

Those who may expect this report to contain a great deal of criticism of DHS will not be disappointed. But nothing that any critic can say is as damning as the way DHS keeps condemning itself. In just the past 10 months:

- In order to illustrate the progress of a case from initial complaint through termination of parental rights, an Assistant Attorney General presented The Committee to Review the Child Protective System (the Review Committee) with a series of documents describing a hypothetical case. She said the hypothetical is based on an actual case – and is typical, both in the nature of the case and in the DHS and court response. Ultimately, that response was to terminate the hypothetical mother's parental rights.

But all over the country, in very similar circumstances, families have been kept safely together tens of thousands of times, thanks to programs that are, in fact, *safer* than foster care for most children most of the time. But they are programs Maine doesn't have and DHS apparently doesn't want.

Assuming that the facts, as stated in the hypothetical are true (and were this a real case that would be a big leap of faith) there clearly was a need for some sort of intervention. But the intervention in this case was superficial at best.

A federally-funded study of Maine courts done by a Portland consulting firm found that families often are given “cookie cutter” service plans that are not necessarily appropriate to the particular family's needs.¹¹ Sure enough, the hypothetical

mother got one of those cookie cutter plans (no matter what the problem, it's always get "counseling" and "parent education").

Though the mother had a substance abuse problem, she was initially offered no real help, just told to go to A.A. The mother's second so-called "safety plan" was a list of tasks she was expected to perform, with no indication she was given any help performing them. And at no point did anyone take her by the hand and lead her through the labyrinth she'd have to negotiate to get help. It looks like she was just handed referral slips and expected to find her way through it all herself.

The hostility to families that characterizes DHS seeps through as well. The hypothetical mother's past relationship with an abusive man is counted as a big mark against her, even though this man had had no contact with the child for at least four months before DHS ever got involved. Why didn't someone take the fact that the mother apparently had gotten away from this man as a strength, and build on it?

NCCPR sent the same information received by the committee to one of the nation's leading experts on child welfare, Susan Kelly. Ms. Kelly is a consultant to Michigan's equivalent of DHS, the Family Independence Agency, where she formerly ran the nation's largest Intensive Family Preservation Services (IFPS) program. She is now Senior Associate with the nation's foremost child welfare "think tank," the Center for the Study of Social Policy.

Her analysis of how the child in this case probably could have remained safely in his own home is included as Appendix B.

If, as the Attorney General's office maintains, this is a typical case, then the conclusion is clear: Maine *typically* terminates parental rights in cases where the child never needed to be removed from the home in the first place.

If, as the Attorney General's office maintains, [the hypothetical case presented to legislators is typical] then the conclusion is clear: Maine *typically* terminates parental rights in cases where the child never needed to be removed from the home in the first place.

- In our previous report on child welfare in Maine, *A Law Unto Itself*, we told the story of Michaela Corbin Bumford, now age 5. Michaela was born with cystic fibrosis. Her mother and grandmother say that's why she didn't gain enough weight. Concerned about her care, they sought a second opinion from a leading medical center, Boston Children's Hospital. Instead of encouraging this, her clinic in Maine phoned DHS and blamed the mother and grandmother for the lack of weight gain.

So, because she wasn't gaining weight, Michaela was taken away, and placed with her paternal grandmother. But she didn't gain weight there either. So DHS simply reversed itself and said weight gain is not an appropriate way to measure the girl's health.¹²

Nevertheless, a judge did what Maine judges almost always do when asked by DHS to terminate parental rights. He did.

But then both DHS and the judge did something they almost never do: All the pious proclamations about the need for "confidentiality" in order to protect children from "embarrassment" were forgotten. They asked the *Kennebec Journal* to publish the entire decision, and the newspaper obliged.

And for that, all Mainers can be grateful. Because the decision reveals no vindication for DHS. On the contrary, the decision lays bare how quickly and easily DHS will rush to needlessly tear apart a family, and how easy it is for even a conscientious judge to be taken in by psychobabble.

Even if everything in the decision about the Corbins is true, (and that is extremely unlikely) this family could have been kept together safely, and the child could have grown up in her own home as happy and as healthy as her illness would allow. It's been done in tens of thousands of cases that are as "bad" or worse, all over the country. (Our complete analysis of the decision, published as an op ed article in the *Kennebec Journal*, is included as Appendix C.)

The Corbins appealed, and the case took another bizarre turn. The brief submitted by the Attorney General's office was so rife with factual error concerning what actually was said during the trial that, after Corbin's lawyer complained, Attorney General G. Steven Rowe ordered it changed. State Sen. Michael J. McAleve, who compared the brief to the trial transcript, charged that the brief was a deliberate attempt to mislead the court.

The Attorney General's office says all the mistakes were honest errors (all of which happened to favor the state's position). The Attorney General's office says the errors weren't all that serious – but there is no way for press or public to check, because everything has once again been declared confidential.¹³

- At a hearing of the Review Committee, the Maine Equal Justice Project and the Maine Civil Liberties Union presented a draft of a pamphlet they suggested might be given to families when they are under investigation by DHS. The pamphlet did not give families any new rights – it only explained

in simple language the few rights they already have.

But the DHS appointee to the committee – a DHS child protective supervisor – was furious. She condemned the pamphlet at length, declaring that if families ever saw it, it would be extremely difficult, if not impossible for DHS workers to do their jobs.¹⁴

In other words, according to the supervisor chosen by DHS to represent DHS on the committee, DHS workers can't do their jobs without violating the rights of families.

- The Review Committee recommended that, in general, interviews with children conducted by DHS investigators should be audiotaped. Deputy Commissioner Walsh said this would require a significant investment in equipment and "training."

In fact, it would require only that each worker have a portable cassette tape recorder, easily available for \$29.99 from any Radio Shack.¹⁵ (Bulk purchase discounts might bring the price down further). As for the alleged need for training, that claim is an insult to DHS workers that sounds like the punchline for a bad joke: How many DHS workers does it take to push "record" and "play" at the same time?

Unfortunately, what DHS has done to Maine's children is no joke.

As telling as what DHS has effectively admitted about itself is what we know about the human toll of the agency's actions.

That toll was described by *Portland Press Herald* columnist Bill Nemitz, when he told the story of a Cambodian refugee who survived Pol Pot's killing fields, but doesn't know how she will survive her family's encounter with DHS.¹⁶

Given what she had to endure both in her native land and in this country, it is understandable that Mom Chum suffers from depression. But it is depression that can be

controlled with medication – and Mom is on such medication and doing well.

But that’s not enough for DHS. Head lice, chaotic living conditions and missed medical appointments were cause enough for DHS to tear away her children – and move to terminate parental rights. Speaking little English – she’s now taking lessons – Mom was bewildered by it all.

But she knows this: If she loses her children forever, “I’ll feel like I’m dead. I’ll feel like I don’t want to live anymore. Life will have no meaning for me without my children.”

And what will it mean for the children? They’ve already been separated into two foster homes. And the odds of any one family adopting four Cambodian children, ages 10, 6, 4, and 3, are extremely slim. They may well bounce from foster home to foster home, losing everyone they love and trust. All because DHS would rather tear them from their mother forever than provide some mental health services and help with the housekeeping.

This kind of case is far more typical than the horror stories DHS prefers to point to, about the very few parents who torture and brutalize their children. Indeed, as we discussed in our previous report, the biggest single problem in child welfare is the confusion of poverty with “neglect.”

We disagree with Mr. Nemitz on one point: He described the case as “one of many tough calls...” In fact, this case is *not* a tough call. The Corbin case is not a tough call. That hypothetical case presented to the legislative committee was not a tough call. And the case of Logan Marr was not a tough call either.

In every one of those cases there were safe, proven alternatives that almost certainly would have kept the families together – and certainly could have been tried first, without endangering the children.

Evidence of Wrongful Removal

The report of the Review Committee states that some members of the committee say “they have not seen any hard data about families being ‘ripped apart’ erroneously.”

Then they haven’t looked.

As Appendix D shows, the most recent federal data show that Maine has proportionately more children in foster care than all but four other states, California, New York, Rhode Island, and Nebraska.

That would be damning enough. But at least three of those four states compensate in part for their high placement rates by placing a significant portion of foster children with relatives. And all four states do a better job of this than Maine. Nebraska places 13.8 percent of its foster children with relatives.¹⁷ In Rhode Island, 20 percent of foster children are in these “kinship care” placements.¹⁸ New York is at the national average of 29 percent of children placed with relatives.¹⁹ In California, 38 percent of placements are with relatives.²⁰ But as we noted in our previous report, in Maine, DHS says fewer than 8.2 percent of foster children have the security of a placement with a loved one.²¹

There are some signs that, when it comes to kinship care, DHS may be starting to get the message. The Director of DHS’ Bureau of Child and Family Services, Karen Westburg, claims placements with relatives increased last year. She says that’s partly because Maine “looked at the national perspective...”²²

Responding to a survey of lawyers for parents and guardians ad litem for children conducted by the Maine Equal Justice Project and the Maine Civil Liberties Union, 58 percent of the lawyers polled assessed DHS’ kinship care efforts negatively, 35 percent were positive. But “a theme running through the comments” was that things were getting better.

But since guardians ad litem themselves often are criticized for sharing the same outlook as DHS, and accepting DHS' assessment of a case too easily, even the survey results probably underestimate the problem.

Very few places have been able to turn around failing child protection systems. But none has done it without embracing family preservation.

As one lawyer said in response to the survey: "DHS creates deep divisions within families. Often other family members who might otherwise take a child do not, out of fear DHS will target them next."²³

When it comes to holding children in foster care with strangers, these data indicate that there probably is no state worse than Maine.

And there is no excuse.

In all of the months since NCCPR first called attention to Maine's shameful overuse of foster care, DHS has offered not one shred of evidence that its take-the-child-and-run approach has made children safer. As outlined in detail in our previous report, DHS offered only excuses, evasions and non-sequiturs. Unfortunately, in the ensuing months, Concannon added something new to that list: Prejudice.

Concannon claimed that states with lower percentages of children in foster care are generally southern states, and there was nothing Maine could learn from such states. He's wrong on two counts. First, almost *every* state has a smaller percentage of its children in foster care than Maine. And second, as we noted in our first report, as it

happens, the state that is leading the nation in reforming child welfare *is* a southern state: Alabama.

Thanks to a lawsuit that led to a landmark consent decree,²⁴ Alabama is rebuilding its entire child welfare system to emphasize keeping families together. Twenty-one counties have completed the rebuilding process. In those counties, the foster care population is down by 33 percent,²⁵ and an independent, court-appointed monitor has found that children are safer now than they were before the changes.²⁶ The monitor also has found that child welfare practice in counties that have adopted the reforms is "as good ... as you can find in the United States."²⁷

Other success stories – from such "southern" locales as Illinois and Pittsburgh, Pennsylvania, also are cited in our previous report. These places have one thing in common: Leadership that abandoned the take-the-child-and-run approach and embraced safe, proven programs to keep families together. Very few places have been able to turn around failing child protection systems. But none has done it without embracing family preservation.

The Threat to the Maliseets

In Australia, between 1910 and 1970, the government used the child welfare system in a deliberate attempt to wipe out the country's Aboriginal population by taking away Aboriginal children and placing them in white foster homes, adoptive homes, and institutions. Authorities sincerely believed all this was in "the best interests of the children." Now, however, the children are known as "the stolen generations."²⁸

There is no evidence that DHS ever has had any such intent. But for a small band of Indians in Maine, the result could be the same.

Between 1996 and 2001 16 percent of Houlton Maliseet children were taken from their parents and placed in non-Indian homes. That's a rate of removal more than five times the national average for Native Americans.²⁹

If the policies and practices of DHS remain unchecked for a few more generations, those policies and practices have the potential to eradicate the Houlton Maliseet community.

Yet the Review Committee could not even bring itself to endorse a plan to transfer Maliseet cases from state courts to Penobscot Nation tribal courts. The committee recommended only that the idea be given "proper consideration" by the legislature.³⁰

The Myth of the Drunken Mainer

The huge number of children held in foster care in Maine cannot be explained by objective conditions in the state.

DHS has produced no evidence that there is, in fact, more child abuse in Maine than in the 46 states that have smaller percentages of their children in foster care.

Claims have been made that conditions that can lead to child abuse are more prevalent in Maine. But, again, there is no evidence to support those claims.

It is often alleged that there is more alcohol and drug abuse in Maine than in most other states. Indeed, one of the legislative committees reportedly was told that Maine has the highest rate of alcoholism in the country.

Happily, that's not true.

The most comprehensive study of drug and alcohol abuse rates, the federal government's National Household Survey on Drug Abuse, found that the rate of alcoholism in Maine actually is a little below the national average. Cocaine use also is below the national average. Use of any illegal drug except marijuana is almost exactly the na-

tional average. (More information on this survey is in Appendix E).³¹

These data say many good things about Maine and its people. They reflect a state with an exceptional commitment to helping the less fortunate – particularly children. It is only in the area of child protection where that commitment has gone tragically wrong.

Maine also does well using other measures of child well-being. Two compilations of data from the Annie E. Casey Foundation, the *2001 Kids Count Databook* and *The Right Start Online*, provide statistical information on a wide range of factors that measure child well-being. Some, but not all, also can be risk factors for child maltreatment.

There were 29 risk factors in the two documents. It is possible to generate, online, a customized table comparing national figures to any state.³² Maine ranks as follows:

Total risk factors: 29

Factors where Maine is better than the national average: 23

Factors where Maine is worse than the national average: 4

Factors where Maine and national average are the same: 2

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tion where that commitment has gone tragically wrong.

The approach taken by some members of the Review Committee also has an element of hypocrisy.

During a series of public hearings held by the two committees, speaker after speaker told their stories of abuse at the hands of DHS. Apparently, these Review Committee members were unmoved, and felt the speakers could not “prove” their claims.

But those same committee members voted to deny families the ability to present their proof. They recommend continuing to keep records and court hearings secret – so DHS can continue to claim that families are wrong, while insisting it can’t tell its side of the story – and those who want to disbelieve any allegation of wrongful removal can continue to grasp at that straw.

(In fact, even now DHS *can* tell its side of the story in many cases. Under Maine Revised Statutes §4008-A, the DHS Commissioner has extraordinary latitude to speak out under several circumstances, including when a parent has gone public, and when the child has died. The guardian ad litem and, if the child is 13 or older, the child, must agree to the disclosure).

In most cases, when DHS won’t provide information in its own defense it’s not because the law won’t permit it. It’s because the agency’s actions are indefensible.

Indeed, when all sides of the story have been forced into the open, as in the Corbin case, the evidence is overwhelming that families are indeed “ripped apart.”

Furthermore, the committee members who claim to find no evidence of family destruction also ignored a survey of some of the few people who can see the entire system – lawyers who represent parents and children. (See page 11).

Trying to Have it Both Ways

Instead of allowing legislators and the public access to all the information needed to make an informed decision, DHS is trying to have it both ways: Releasing only brief, one-sided accounts of alleged horror stories.

That’s what the agency did toward the end of the legislative investigations, releasing brief synopses of 40 cases.³³ But that’s all they were: A DHS summary of a DHS case record based on a DHS worker’s assessment. With names omitted, there was no way for the families discussed to tell their side of the story.

Even if they’re true, the case summaries raise more questions than they answer. In one case, a premature infant is taken away “because the parents failed to follow through on needed medical care for the baby; the couple had lost three children to the state previously because of physical neglect.”³⁴ But is that because the parents didn’t want to care for their children, or because they didn’t know how, or because they didn’t have the resources? The right way to handle the case depends on the answer to that question.

It would be easy to make that hypothetical case presented by the Attorney General’s office look like a horror story when boiled down to a carefully-chosen sentence or two. But the full story turns out to be very different.

Defenders of DHS make two other points: They fall back on a so-called audit conducted by the federal government. When auditors testified about their work, they said Maine should be taking away even more children. DHS defenders also cite the testimony of some former foster children who said that DHS was right to take them from their parents – indeed, they said, they should have been taken away sooner.

But the audit was based on a sample of only 41 cases.³⁵ That alone makes the conclusions worthless, because it is far too low a number to know if the sample is truly representative. When class action lawsuits are brought against child welfare systems the plaintiffs do "case readings" with a minimum of 300 cases, 500 is considered preferable.

In addition, there is a built-in bias in the audit methodology. It's easy to come up with a quantifiable measure when the state does too little: If a child is left in his own home and then reabused, clearly *something* should have been done. (This measure does not, however, tell us what the "something" is). In contrast, it is much harder to measure when the state does too much. It is much harder to look at a file of a child already in foster care and come up with a way to measure if the child never needed to be taken away in the first place.

To measure this, it is necessary to compare Maine to states that have systematically implemented safe, proven programs to keep families together. If these places have lowered their foster care populations (which they have) and *reduced* reabuse, (which they have) then Maine is taking away too many children.

As Rep. Thomas Kane pointed out, even reliable data showing that a certain number of children are reabused when left in their own homes show only that the state is failing. They don't explain the cause of the failure. Evidence from other states indicates that this result simply means that, as Rep. Kane said, Maine isn't providing "the necessary infusion of supports."³⁶

Indeed, if the auditors are right and Maine should have even more children in foster care, then presumably all those other states must take still more – just to catch up with Maine. But if every state had children in foster care in the same proportion as Maine the number of foster children in the

United States would rise from 588,000³⁷ to at least 849,000³⁸

The comments of the current and former foster children deserve more respect. Several testified that they were not taken away soon enough. But legislators also heard testimony from former foster child Melinda Moody, who spent six years pleading with DHS to be allowed to go back to her own home. She said she felt like a prisoner in her foster home. "The only reason I was able to go home when I was 17-and-a-half was because my foster mother had a nervous breakdown and they had nowhere else to place me," Moody said.³⁹

And at a demonstration in Skowhegan, a 14-year-old, now pregnant, described being raped while in foster care. She was finally allowed to return home after running away from foster home after foster home.⁴⁰

Who's right? Quite possibly all of them.

Child welfare systems are arbitrary, capricious and cruel. They do indeed leave some children in dangerous homes, even as they tear many other children from homes that are safe or could be made safe with the right kind of services.

The HHS Committee members recognized this when, citing a national study, they said in their final report that "conventional child welfare systems ... often ... overinclude families that should not be in the system and underinclude families that should be there."⁴¹

The best way to ensure that children in real danger are found and removed from their homes sooner, is to stop overwhelming the system with children who never should have been taken away at all.

Unchecked and Unbalanced

It is difficult to give DHS the benefit of the doubt and assume the agency simply

is making honest errors, when DHS officials never tire of repeating what they must know is a fiction.

As Walsh put it, “we have a system of checks and balances that starts with the caseworker and includes the judiciary and defense attorneys.”⁴²

It is the caseworker who decides to remove a child in the first place. Walsh did not explain how the caseworker serves as a “check and balance” against her own decision. And the defense attorneys – and guardians ad litem appointed for children – have said, over and over, that the deck is stacked to the point of absurdity.

They said it repeatedly in the survey conducted by the Maine Equal Justice Project and the Maine Civil Liberties Union.⁴³

For all intents and purposes, DHS can take away any child it wants from whomever it wants whenever it wants. At the very least, that child will be held for up to ten days before parents even can try to get him or her back.

Caseworkers routinely obtain “*ex parte*” orders to take away children, without a parent – much less a parent’s attorney – having a chance to present any defense at all. Judges almost never deny such requests.

And the first hearing, up to ten days later, is little more than a charade. When lawyers for parents and children were asked in the MEJP/MCLU survey if this hearing gave all sides a chance to provide adequate evidence, 74 percent said no. Among the comments:

*“Of course not. Hearsay upon hearsay against parent with **no time** to get witnesses,” [emphasis in original].*

“Appointment of counsel frequently takes place within one or two days (or even on the day of hearing!)”

“[The hearings] are stacked in

favor of DHS in that even as guardian ad litem no real information is provided prior to hearing.”

“As a summary proceeding, the parents get little or no opportunity to confront or cross-examine the witnesses or evidence against them.”

“The summary hearing process is outrageously violative of due process.”

The lawyers said the deck was further stacked by DHS’ insistence that only its own “experts” be used to evaluate parents and children.

“There really are only two professionals used by DHS in this area for psych evals. The feeling is that they are ‘hired guns’ and could find problems with anybody.”

“DHS uses its own hired hacks. Any attempt to deviate from DHS providers can endanger the threat of a take-away.”

“[T]he evaluator ... often goes only on the DHS reports and the foster parents’ information.”

“DHS has viewed particular choices as evidence of non-cooperation. It is their way or no way as for as shrinks go.”

“This is the major problem. The adjudication process has become totally dependent upon the opinion of “experts.” This is an area where expertise is always questionable and the experts employed in the cases are usually incompetent.”

And if the defense wants to hire its own experts at the second hearing, called the Jeopardy hearing...

“Try, just try to get the funds necessary for expert. Then try to find one on funds allowed.”

“No funds are provided to obtain separate experts, medical doctors, counselors, etc. independent of state-paid ones who are frequently ‘mouthpieces.’”

An unseemly closeness between DHS and the courts that are supposed to be “checking” and “balancing” the agency was revealed when a committee of lawyers in Androscoggin County handed out its annual Law Day awards in May, 2001, three months after Logan Marr died.

Among the recipients: The guardian ad litem who supported the placement of Logan Marr in the home of the foster mother accused of killing the child, and one of the supervisors who reportedly helped supervise the Marr case. The chairman of the awards committee was the judge who oversaw the Logan Marr case.⁴⁴

How can any child or parent feel confident that he or she will be treated fairly in court when the judge has just chaired a committee that gave an award to one of the lawyers trying to separate them? How can a lawyer feel comfortable cross-examining a DHS supervisor when the judge chaired a committee that handed an award to that same supervisor for doing such a wonderful job?

Is this what DHS means by “checks and balances”?

Adoption at All Costs

Adoption should be an important part of any state’s efforts to find permanent homes for children. But DHS is putting al-

most all its efforts into adoption, while ignoring safe, proven programs to keep families together. That has grave pitfalls for children, including the potential for disruption of quick-and-dirty, slipshod placements and creation of a generation of “legal orphans” as terminations of parental rights outpace the state’s ability to actually find homes for the children. These pitfalls are outlined in detail in our previous report.

For most children most of the time, the most humane, the most effective, the swiftest, the surest, and most important, the *safest* road to permanence is family preservation.

And now the “legal orphan” problem may get worse. Despite the fanatical drive for adoption-at-all-costs the number of adoptions in Maine dropped significantly in 2001, perhaps by 25 percent or more,⁴⁵ illustrating still another pitfall of putting all the agency’s eggs in the adoption basket.

Maine’s “adoption at all costs” philosophy has perverted one of the most important concepts in all of child welfare: Permanence.

The concept of permanence was essentially invented by the family preservation movement. Family preservation advocates were the first to recognize the harm to children from living in the limbo of foster care, harm that is compounded by moving from foster home to foster home.

For most children most of the time, the most humane, the most effective, the swiftest, the surest, and most important, the *safest* road to permanence is family preservation.

Innovators in child welfare understand this. The head of the Department of Human Services in Allegheny County, Pa., which has a population roughly equal to the State of Maine – but about 25 percent fewer foster children -- has written:

The Maine Department of Human Services is turning the foster care system into the ultimate middle-class entitlement: Step right up, and take a poor person's child for your very own.

“From the start, we recognized that the term permanency had come to suggest adoption when, in fact, it encompasses a continuum of services designed to ensure safety and stability for children, with adoption as a final option when others fail.”⁴⁶

That's one reason why Allegheny County has so many fewer foster children than Maine – and an outstanding record for keeping children safe.

Since NCCPR's first report on Maine was published, data have been made public which suggest that Maine is forcing children into adoptive homes even when those children could safely have been left with or returned to their birth families.

Nationwide, 15 percent of the children who leave foster care typically go to adoptive homes. In Maine, it's more than 40 percent. In isolation that would not necessarily be a problem. If Maine were above average because it was placing children who clearly could not return home and otherwise had no option except foster care, then the figure would represent success.

But that's not what is happening. The data also show that nationally, 70 per-

cent of children who leave foster care go back to their birth parents or other family members. In Maine, it's only 42 percent.⁴⁷ That suggests that DHS is permanently taking away children who, in other states, return home. It is one more indication that the Maine Department of Human Services is turning the foster care system into the ultimate middle-class entitlement: Step right up, and take a poor person's child for your very own.

The Committee Reports

It is always difficult for a part-time legislature with limited staff to investigate an executive branch agency. Like families facing DHS, the legislature is outgunned at every turn. So most of the members of both committees deserve credit for an intense and sincere effort to learn about child welfare and try to fashion real solutions.

Both committees deserve an “A” for effort (with an A+ to Sen. Karl Turner for co-chairing one and serving on both). When it comes to results, the Joint Committee on Health and Human Services deserves a B-. But the Committee to Review the Child Protective System produced work earning, at best, a D.

Health and Human Services Committee

More important than any specific recommendation in this report was its tone. The report of this committee treats families caught up in the system with respect, and that is all too rare in Maine.

More specifically, this report:

- Recognizes the crucial role of poverty in needlessly trapping families in the child welfare system.

- Recognizes the need for a “strengths-based” approach to families, an approach that replaces a wagging finger with

a helping hand – the approach that has been at the heart of successful reforms in places like Alabama.

- Recognizes that child welfare systems “overinclude” families who shouldn’t be caught up in it as well as “underincluding” families where children are in real danger.

- Endorses one of the most important national reforms in child welfare – “differential response.”

- Recommends that Maine maximize the use of resources for family preservation, including seeking waivers from federal rules – a proposal which, at least by implication, calls on DHS to reverse its apparent practice of diverting such funds to adoption.

- Recommends more substance abuse treatment.

Equally important are some of the things that are not in the report. Throughout the committee’s work, trial balloons were floated, recommending a series of non-solution “solutions.” At best, these ideas would give the appearance of change without really changing anything. At worst, some of them would have made the system worse.

Only one of these fake solutions, support for an “ombudsman” who supposedly would handle complaints about DHS, turned up in the report.⁴⁸

But this good work is counterbalanced by the report’s overwhelming flaw: its vagueness. For example, the report includes “action steps” such as: “The committee recommends that the legislature require DHS to improve kin and sibling contact and communication.”⁴⁹ The committee also wants the legislature to “require DHS to monitor compliance with state and federal laws...”⁵⁰

Broad, general recommendations might be enough, were the committee dealing with an agency that was, itself, committed to change and looking for help. But

DHS remains an agency in denial. It can reasonably be expected to report back that it has complied with the directive to improve sibling contact even if the compliance is taken at best. And DHS can reasonably be expected to report back that it is not breaking any laws.

Indeed, even if the legislature instructs DHS to do everything the committee says should be done, the instructions are so vague that DHS can claim to have complied without changing very much.

Although the committee hopes to monitor DHS’ compliance with these recommendations, the measures it wants to use are inadequate.

For example, the committee wants to know how often DHS does not pursue termination of parental rights within the time frames called for by the so-called Adoption and Safe Families Act because DHS failed to offer services to a family.

It is reasonable to expect that DHS’ official response will be “never – or almost never.” But that’s because the committee is asking the wrong question. DHS can claim it almost always “offers services.” The problem concerns what constitutes an offer and what constitutes a service.

To DHS, telling the mother in the hypothetical typical case to go and find an A.A. meeting is offering a service. So the real questions the committee must explore are: Are the services offered to families what those families really need? Does DHS really “offer” these services at all, by making them readily available and accessible?

And even if the committee asks those questions, it apparently expects to take DHS at its word for the answers.

In addition, although the report commendably omits several phony solutions, it omits a number of real ones, too.

Review Committee

This committee spent months listen-

ing to witnesses, reading documents and studying the system – and managed to ignore almost all of it. The committee recommends almost no change at all, settling mostly for tinkering here and there and endorsing the work of others now and then. If the idea was to produce recommendations everyone could agree on, then those members of the committee who really wanted a change paid too high a price to achieve consensus.

Even where the committee recommends something that looks like a change, it includes so many loopholes that DHS can claim to go along while making no real changes at all.

Logan Marr is dead partly because the state violated *her* right to family integrity.

For example, the report received a lot of attention for suggesting that DHS workers be required to tape all interviews. But look more closely.

- The report calls for taping interviews only with children. DHS workers remain free to at best misunderstand and at worst misrepresent parents and others they interview.

- The report says the recording should be done only “to the extent such recording is possible.”

- If the recording isn’t made, DHS should be free to use the worker’s notes, summaries, etc. in court anyway.

Perhaps most shamefully, the report calls for maintaining the secrecy that has allowed DHS abuses to flourish.

The committee failed because it made one fundamental mistake: It framed the issue exactly the way DHS frames the issue: as a clash between the needs of chil-

dren and the rights of parents.

Thus, the committee’s report describes Maine law as directing “a continuing exercise in the art of balancing the State’s interest in protecting children with the right of the *parents* to family integrity,” [emphasis added].

In fact, the committee got it backwards. What is crucial is the right of the *child* to family integrity. It is the child, not the parent, who suffers most if he is needlessly taken from everyone he knows and loves. It is the child who, if young enough, sometimes feels like he or she has been kidnapped. It is the child who may be left with lifelong emotional scars.

And it is the child who is placed in physical danger if the state takes him or her from a safe home, or one that could have been made safe, and places that child in a dangerous foster home.

Logan Marr is dead partly because the state violated *her* right to family integrity.

Similarly, in discussing why it would not recommend raising the standard of proof in most child protective proceedings, the committee writes that “the risk of harm to the parents from an erroneous result is that their child will be removed for some period of time. The risk of harm to the State (representing the child’s best interests) of an erroneous result is that the child would continue to stay in a dangerous place.”⁵¹

A more accurate framing of the issue would be: The risk of harm to the *child* from an erroneous result in favor of the state is that the child may be traumatized for life by wrongful removal from a loving home, or, even worse, face physical and sexual abuse in an unsafe foster home. The risk of harm to the state is that the child would continue to stay in a place the state believes to be dangerous.

When the issue is framed this way, it is clear why it is essential to raise the stan-

standard of proof the state should meet before tearing a child from his or her parents. Perhaps had such a higher standard existed, Logan Marr would be alive today.

(It is deeply disturbing, by the way, that the committee assumes that the state, not the parents, will always be the party “representing the child’s best interests.”)

In retrospect, it appears this committee was doomed from the start.

The deck was stacked against families almost as much as it is in court. DHS had a representative on the committee.

There also was a foster parent, and a judge. But the committee apparently refused to ask for the appointment of a birth parent who lost his or her child to the system.

The omission suggests that the committee majority has bought into the stereotype of all birth parents as worthless louts, brutally abusive or hopelessly addicted, who don’t really deserve to sit at the table with the rest of them.

The committee also should have had as a member a present or former foster child.

The Action Agenda

THE CASE FOR CHANGE IS OVERWHELMING.
THESE ARE SOME WAYS TO ACHIEVE IT:

Reforming HHS

- **FINANCIAL INCENTIVES:** **Change the financial incentives that govern the behavior of private agencies.** This is the single most important change that Maine, or any state, can make.

In every community some foster care placements are handled by private agencies. These agencies are told that their first job is permanence. The children should either be reunited with their birth parents or adopted. But the agencies don’t get paid for that. Instead, typically, they’re paid for each day they allow a child to remain stuck in foster care.

Of course, these agencies piously proclaim that they don’t even think about this. Every placement is essential, they tell us, and the cases are so incredibly complex that all the children simply must remain “in care” for a long, long time.

And then Illinois called their bluff.

In 1993, Illinois experienced a foster care panic. The state chose to approach child

welfare much as Maine is now, with a take-the-child-and-run mentality. By 1997, Illinois was holding more children in foster care, relative to its child population, than any other state – more than 51,000 in all.⁵²

Eventually, the panic eased, people calmed down, looked around, and said, in effect: “Oh my God, what have we done.”

That created an opportunity for the Illinois branch of the American Civil Liberties Union, which had a longstanding consent decree with the state child welfare agency. In 1997, the ACLU persuaded the state to start paying the private agencies for permanence.

Now, agencies are rewarded for adoptions. But they’re also rewarded for returning children to birth parents. They are penalized for letting children languish in foster care. And far fewer children are taken away in the first place.

When the financial incentives changed, suddenly the “intractable” became tractable, the “dysfunctional” became functional, and the foster care population now has been cut by slightly more than half. And

39 percent of the children still in foster care are placed with relatives.⁵³

Change the financial incentives, and the agencies themselves will find all sorts of ways to do better.

Illinois still has very serious problems. It's taken a huge effort just to undo the damage of the foster care panic. But Illinois now has proportionately fewer children in foster care than Maine. And as this has happened, the rate at which children left in their own homes are reabused also has gone down. In other words, the children became safer.

Change the financial incentives, and the agencies themselves will find all sorts of ways to do better.

Unfortunately, on this single most important issue in child welfare, the HHS Committee is silent.

As noted earlier, the committee does call on the state to maximize government resources for family preservation. But even here, the committee does not go far enough.

• FEDERAL FUNDS: DHS needs to stop its apparent practice of diverting federal funds from programs to keep families together, in order to finance its attempts to run roughshod over families in order to push children into adoptive homes.

As we noted in our previous report, documents submitted by DHS to the U.S. Department of Health and Human Services raise questions about the agency's priorities. They show a nine percent cut in federal funds used for family preservation and a 31 percent cut in federal funds used for family reunification. The funds appear to have been redirected toward promoting adoption.

The data also suggest that Maine is not dividing federal aid under the federal Promoting Safe and Stable Families Act equally among adoption, family preservation and other categories, as the federal government recommends. Instead, it appears to spend less on family preservation and more on adoption. ("Family preservation" is not the same as "family support," a much broader funding category than can include programs with little direct relationship to child maltreatment. DHS may try to hide its true priorities by issuing statements combining these very different categories). These issues are discussed in detail in Appendix A.⁵⁴

• COPING WITH POVERTY: DHS should transfer resources from substitute care to hard services to ameliorate the worst aspects of poverty.

When an impoverished refugee like Mom Chum needs help, "counseling" is not enough. She also needs English lessons, a translator, help with housekeeping and someone to help transport the children to those doctor's appointments. But rather than provide that help, DHS has sent four children to two different foster homes and is now seeking to terminate Mom's parental rights. If the affront to common decency isn't bad enough, consider this: All those hard services cost less than putting four children into foster care.

As noted earlier, even the Assistant Attorney General who testified before the Review Committee to explain her agency's view of how the process works acknowledged that children *are*, in fact, held needlessly in foster care when they could safely be in their own homes if services – sometimes, as the Assistant Attorney General herself said, very basic services, were available.

Though not an issue in Mom Chum's case, children all over the country often are torn from their parents because those parents

lack decent housing. The critical shortage of housing in the Portland area is well-known.

Innovative child welfare agencies don't ignore the housing problem. In Allegheny County, Pa, for example, which includes Pittsburgh, there is a housing counselor in every child welfare agency office in order to help prevent children from losing their parents because of housing problems.

• **IFPS PROGRAMS: DHS should make Intensive Family Preservation Services available statewide to any family that needs it.** These programs provide extremely intensive help to families for a short time, followed by links to less intensive, ongoing support. Services are provided in the family's home, and the family preservation worker is on call 24-hours-a-day seven-days-a-week. The programs combine counseling with hard services.

If the problem is a messy home, the family preservation worker will still provide counseling – but she'll do it while helping the parent clean the house.

Unfortunately, any program can use the term "family preservation." The Intensive Family Preservation Services programs that work are those that rigorously follow the model of the first such program, Homebuilders, in Washington State.

Maine has no such program. DHS claims it doesn't have it because there are studies that say it doesn't work. That's true. What DHS doesn't say is that several better studies show that it does.⁵⁵ Furthermore, the most recent study to claim that IFPS doesn't work was the subject of a devastating critique by one of the nation's leading child welfare scholars, Prof. Ray Kirk of the University of North Carolina School of Social Work. He called the claim that IFPS doesn't work: "a non-finding from a failed study."⁵⁶

• **DRUG TREATMENT: The State of Maine should make substance abuse treatment available immediately for any parent who needs it.**

Contrary to the common stereotype, most parents who lose their children to foster care are neither brutally abusive nor hopelessly addicted. Far more common are cases in which a family's poverty has been confused with child "neglect." Other cases fall on a broad continuum between the extremes, the parents neither all victim nor all villain.

Many of these cases involve drug abuse. And that raises an obvious question: Why even bother with such parents? Why not just rush to terminate parental rights?

The answer is that we should not provide help for the sake of the parents. We should do it for their children.

As we explained in our previous report:

In a University of Florida study of "crack babies" one group was placed in foster care, another with birth mothers able to care for them. After six months, the babies were tested using all the usual measures of infant development: rolling over, sitting up, reaching out. Consistently, the children placed with their birth mothers did better. For the foster children, the separation from their mothers was more toxic than the cocaine.⁵⁷

It is extremely difficult to take a swing at "bad mothers" without the blow landing on their children. Therefore, if we really believe all the rhetoric about the needs of the children coming first, we must put those needs before anything – even our anger at their parents.

This does not mean that addicts simply can be left alone to raise children. It does mean that the answer in most such cases is drug treatment.

Maine, therefore, should have treatment available for every parent who needs it. In some cases that can be outpatient treatment. Where inpatient treatment is required it should be in places where parents can keep their children with them.

And since the custodial parent usually is the mother, it needs to be treatment geared to the needs of women, for whom the approach generally needs to be different than that used with men.

Until enough treatment is available, parents with children in foster care, or at risk of losing their children to foster care, should be “moved to the front of the line” for the programs that are available.

• **FAMILY TO FAMILY: DHS should establish Family to Family programs throughout the state. DHS should adopt the entire program, not just bits and pieces.**

This initiative of the Annie E. Casey Foundation probably is best known for Team Decisionmaking, also sometimes called “Family Group Conferencing,” in which everyone with any connection to a family who might be able to help – extended family, friends, neighbors, clergy, etc. – sits around a table and, working with a child protective services caseworker, comes up with a plan either to keep the child safely at home or return that child home as soon as possible.

But there is much more to Family to Family than Team Decisionmaking. Family to Family recruits foster parents from the neighborhoods foster children come from, so if children must be taken from their parents, they at least can visit those parents easily, and they don’t have to lose their friends or change schools.

The foster parents are trained to work as mentors to the birth parents, instead of seeing themselves as adversaries.

Family to Family has been evaluated by a team from the University of North Carolina. They found that, where Family to Family was implemented, fewer children were taken away, placements were shorter, and there was less bouncing of children from foster home to foster home.

Most important: Even though cases in which children *were* taken away and placed in foster care were more difficult, there was no increase in the recidivism rate, that is, the rate at which children returned home had to be placed in foster care again, and in some locations recidivism decreased. That means all this positive change was accomplished while making children safer.⁵⁸

Family to Family is a model that might go a long way toward helping the children of the Houlton Band of Maliseets. DHS should ask Maliseet tribal leaders if they would be interested in adapting the program to their needs and, if so, DHS should ask the Casey Foundation to assist in this process.

• **COMMUNITY PARTNERSHIPS: DHS should contract with the Edna McConnell Clark Foundation and/or the Center for the Study of Social Policy to establish at least one Community Partnership for Child Protection site in Maine.**⁵⁹ Like Family to Family, this is a broad, multi-faceted program. Team Decisionmaking typically is part of Community Partnership initiatives. But these initiatives revolve around decentralizing child protective services.

Under a Community Partnership model, DHS workers might be based at a community center in a poor neighborhood. They would become a part of the life of the community, meeting residents, taking part in local activities, and finding out about the wide array of formal and informal supports that exist in even the poorest neighborhoods. Local community groups and churches would have a chance to build bridges and overcome their often understandable suspicion of DHS.

In a Community Partnership, the neighborhood centers also become “one-stop shopping” centers, where a wide array of supportive services are made available to

families in order to help them keep their children out of foster care.

• **DIFFERENTIAL RESPONSE:** **DHS should institute a true system of “differential response.”** (As noted above, this recommendation also was made by the HHS Committee).

This reform goes by a variety of names, such as “two tier,” “dual track,” and “family assessment.” A review of the literature, commissioned by the federal government, found that all studies done on differential response found better safety outcomes.⁶⁰

And that’s particularly important to emphasize in Maine, because it appears that differential response *may* be the one major, successful national child welfare reform that Maine actually is trying. And it is the one case in which some of the criticism of DHS may be unfounded.

Differential response has to do with what happens when a complaint is received by a state child abuse hotline.

There have been calls for Maine to “investigate” every allegation of maltreatment. In fact, no state investigates every allegation. They can’t. Every state has at least a rudimentary screening mechanism, for allegations that are obviously off the wall.

Nationwide, about half the “reports” alleging some form of child maltreatment are “screened out” by the nation’s child protective hotlines.⁶¹

If the states decided to “investigate every case,” the caseload of every CPS investigator in the country would instantly double. That would be the ultimate nightmare for children.

Under such a system, agencies would be paralyzed as workers spent perhaps 90 percent of their time investigating false allegations. Even now, with minimal screening, workers nationwide spend about two-thirds of their time spinning their wheels. When

Florida cut way back on screening and further opened the floodgates a couple of years ago, a report commissioned by the state found that the move had backfired, creating a backlog of uninvestigated cases, a backlog that endangers children’s lives.

Pulling a child out of school and asking the most intimate possible questions is a terrifying experience. It is even worse if a worker, in a rush and looking for bruises, stripsearches the child, a common practice around the country. (If anyone else did it, of course, it would be child sexual abuse).

“The hotline is supposed to be a gate,” the researcher who conducted the study said. “They’ve got the gate rusted, stuck open” creating the backlog. “I equate that to the game of playing Russian roulette. It’s just a matter of time before some child in the backlog pool is really badly injured.”⁶²

There always will be some screening. The problem is, in most cases, the screening decision amounts to “all or nothing.” Either the case is screened out and nothing is done or a full-scale, traumatic, coercive investigation is launched.

That kind of investigation does harm to a child. Pulling a child out of school and asking the most intimate possible questions is a terrifying experience. It is even worse if a worker, in a rush and looking for bruises, stripsearches the child, a common practice

around the country. (If anyone else did it, of course, it would be child sexual abuse).

How many children should be subjected to this trauma on the extremely slim chance that one of them might be a real victim? Few of us voluntarily would let a stranger do it to our own children.

We don't do this to adults. If the police think there's a child murderer in the neighborhood, they can't simply burst into every home and stripsearch every adult looking for, say, the murder weapon.

If we won't do that to adults, why do it to children based on calls that almost certainly are false or trivial?

Even if it would be possible to "investigate every case," the enormous trauma it would inflict on children still would make it bad public policy.

In order to spare children such trauma, and save resources for serious cases, some states have come up with an option in between "all" and "nothing." Differential response. Differential response both narrows the net of intervention and widens it. Cases that fall on the midrange of the continuum – some that normally would be thrown out, and some that normally would lead to a full-scale investigation, instead are diverted to agencies that are supposed to do family assessments.

Under this model, workers from the agency go to the home, knock on the door and offer help. They do not do an investigation. They're not supposed to. They do an assessment to help them and the family together figure out what's wrong and what help can be provided. They make clear that it is voluntary. Offer help on those terms and most people will accept it.

It has to be done in person. A phone call isn't enough. But it is a sound alternative to the "all or nothing" approach, and if anything, Maine doesn't do it enough.

Yes, under "differential response" some serious cases may be missed. But

more of those serious cases are missed when worker are overwhelmed. And, as noted above, the federal government has found that every study of this approach showed that it made children safer.

It's possible, of course, that DHS isn't actually following this careful, sophisticated differential response model. It's possible that the agency is not even trying, or it is failing at proper implementation. It's possible that Maine uses differential response only to widen the net and not to narrow it. But it's also possible DHS may be doing something right. If so, the HHS Committee is right to encourage it. The model should not be perverted by saying that anyone who dares turn down the help should be a suspect – obviously, when you do that, the help is no longer voluntary.

• **BAN ANONYMOUS REPORTS: Anonymous reports should be screened out entirely.** Of all the sources of child abuse reports, anonymous reports consistently are the least reliable. They're almost always wrong.

A study of every anonymous report received in The Bronx, New York, over a two year period found that only 12.4 percent met the incredibly low criteria for "substantiating" reports – and not one of those cases involved death or serious injury. The researchers found that "one case was indicated for 'diaper rash' one case for welfare fraud, and two cases because the apartment was 'dirty.'"⁶³

Anonymous reporting should be replaced by *confidential* reporting. If someone who may have a grudge or someone who simply may be clueless wants to claim that a neighbor is abusing her child, that person should be required to give the hotline operator his or her name and phone number. That information still should be kept secret from the neighbor in almost all cases,⁶⁴ but the hotline needs to know. That will immediately discourage false and trivial reports.

It is far safer for children if cases are screened rationally by eliminating the anonymous reports, rather than screen them irrationally based on which file floats to the top of the pile on a caseworker's desk.

Of course, DHS will object, arguing that some anonymous calls are legitimate.

That's true.

If you ban anonymous reports, some real cases might be missed – though anyone who is sincere and has genuine reason to suspect maltreatment should be comfortable with confidential reporting.

But more real cases are missed now by overloading the system. The more cases that cascade down upon investigators the less time they get for each one. So some get short shrift. It is far safer for children if cases are screened rationally by eliminating the anonymous reports, rather than screen them irrationally based on which file floats to the top of the pile on a caseworker's desk.

As the authors of the Bronx study put it, in recommending that anonymous reports be rejected: "The resources of child protective agencies are not limitless. The time and energy spent investigating false reports could better be given to more serious cases, and children may suffer less as a result."⁶⁵

• **RAISE WORKER PAY: DHS frontline caseworkers should get a large pay raise.** By and large, DHS workers are *not* jack-booted thugs who relish tearing children from their families. They are dedicated, well meaning people who are underprepared, undertrained and terribly over-

whelmed. Their decisions are literally matters of life and death. So pay them accordingly. Don't just give them a token raise. Let Maine be a trendsetter and pay its child welfare workers more than anyplace else in the country. Then DHS can set standards for training and experience commensurate with that pay.

Spending more on the caseworkers DHS already has would be a better investment of scarce funds than hiring new workers. Concannon has said new workers are needed to reduce caseloads. Caseloads do need to be cut – but the way to do that is to stop taking away so many children who safely could remain in their own homes.

As one DHS caseworker said at a public hearing, doing more to keep families together "would keep children out of our system, which would have a trickle-down effect on the caseload."⁶⁶

• **APPEALS: DHS should create a fair, impartial appeals procedure for people who are listed in the state's central register of alleged child abusers.** Though this issue has implications for both committees, neither addressed it.

Maine's lack of due process for people listed in its database of alleged child abusers may well be the worst system in the nation.

-- We are aware no other state that *both* lacks any way to appeal the decision of one caseworker *and* releases the information to potential employers. (Florida, for example, doesn't allow appeals, but it doesn't release the information either).

--Maine's approach has been ruled unconstitutional in two other states. In *Valmonte v. Bane*,⁶⁷ the U.S. Court of Appeals for the Second Circuit ruled that even though New York State does have an appeals process, it did not provide adequate protection for the accused. Such protection is needed, the court ruled, because listing someone who works with children in the

state's central register of alleged child abusers almost always deprives the accused of employment in their chosen field.

The second decision handed down by a federal district court in Illinois is even more sweeping. In the case of *DuPuy v. McDonald*⁶⁸ that court found the central register process unconstitutional on a variety of grounds, including the fact that, while it was possible to appeal, the process was incredibly cumbersome and lengthy.

One key point that was common to both cases: In both Illinois and New York, when people did manage to appeal, the original finding of abuse or neglect was overturned 75 percent of the time. Perhaps that's the real reason there is no appeals process in Maine.

-- Most alarming, however, -- but certainly to be expected - is the DHS claim that the issue is one that "balances" rights of parents and children. Once again, DHS is using children as rhetorical human shields behind which to hide failed policies.

The fact is, depriving people of employment based on rumor and innuendo is enormously harmful to children.

--Obviously, if a parent can't get work, that will affect his or her children.

--If information based on little more than a caseworker's guess is allowed to pile up in secret files, sooner or later some DHS worker is likely to claim that there is a "pattern" and use that as the basis to take away the children.

Children need protection from the mindless piling up of rumor and innuendo in files about their families.

(This is particularly true when *unfounded* reports are kept. These are files on people who are so innocent that the meager amount of evidence needed for one worker to substantiate the allegation couldn't be found. Keeping such reports is an incentive for people to use the system for harassment. Make enough anonymous calls, set off

enough investigations, and sooner or later something is bound to stick.

(When a report is "unfounded" all records should be expunged immediately).⁶⁹

--If you make it too easy for a worker to accuse the most convenient suspect, list them as "substantiated" child abusers and move on, there is a good chance that in situations where there really is abuse, the wrong person will be accused - and someone who really is guilty will never be caught.

Children need protection from the mindless piling up of rumor and innuendo in files about their families.

--And, perhaps most important, these listings are not necessarily limited to adults. Children themselves can be listed as child abusers. In the lead case in *DuPuy* the accused was a ten-year-old girl who was accused of sexual abuse after she pulled up the pants of some much younger boys who were "playing doctor" in the day care home run by her family.

As the appeals process dragged on and on, the child became so depressed that at one point she attempted suicide.

• **FIELD TRIPS: DHS officials should take "field trips" to states and localities to study successful reform efforts.** As noted above, and in our previous report, Alabama and Pittsburgh, Pa. are among the national leaders, and Illinois is making great strides by changing financial incentives.

• **REACH OUT FOR HELP: DHS should get additional outside help to reform the system.** To put it, once again, in the language of child welfare agencies, DHS is profoundly "dysfunctional." It is urgently

in need of “counseling” and “agency education.”

DHS’ willingness to work with Casey Strategic Consulting is an encouraging first step. But the description of the work in the HHS Committee’s report suggests that the scope of that work is far too limited.

DHS needs to engage the services of a firm with a proven track record in child welfare reform in order to change the agency’s policies, practices, and culture from top to bottom.

As Prof. Joanne Nicholson, Associate Director of the Center for Mental Health Services Research at the University of Massachusetts Medical School told the HHS Committee: “Folks within these agencies are committed, if not entrenched, and I think to address that sometimes there needs to be someone from the outside to open that up.”⁷⁰

The choice of consultant is crucial. Some national groups are as dedicated to preserving and protecting the status quo as is DHS. They would only make the situation worse. But non-profit organizations like the Child Welfare Policy and Practice Group, the Child Welfare Institute, and the Center for the Study of Social Policy are change agents. They can move DHS in the right direction by using the same strengths-based approach DHS should be using with families. (NCCPR itself does not do any consulting work).

Like most families, most child welfare agencies are not evil. They are made up of good people who, in some cases, may have lost their way. Families can be shown the way back. So can DHS.

Reforming the Courts

• **OPEN HEARINGS AND RECORDS: All court hearings in child maltreatment cases and almost all documents should be subject to a “rebuttable presumption” of openness.**

The public should be allowed to attend all hearings except those at which DHS is seeking a preliminary protection order.⁷¹ Documents would remain closed until the C-1 hearing.

At that time they would be opened unless the lawyer for the parents or the guardian ad litem for the child could persuade the judge, by clear and convincing evidence, that opening a given record would cause severe and lasting emotional damage to a child.

The judge then would keep closed only the minimum amount of material needed to avoid the severe and lasting damage. Portions of hearings could be closed for the same reason, with the party seeking closure required to meet the same standard of proof.

As noted above, the people who work for DHS are not evil. But even the best of us would have trouble coping with nearly unlimited power and no accountability. One caseworker in another state allegedly told some parents: “I have the power of God.” It’s alarming if he said it. But what’s even more alarming is: It’s true. Caseworkers do have the power of God.

To give a young, inexperienced worker the power of God, send her out on what she is convinced is a Godly mission to rescue innocent children from the scum of the earth and then expect her to exercise *self-restraint* is more than can be expected of most human beings. Rarely is the power of God accompanied by the wisdom of Solomon.

The power must be checked by accountability. And accountability is not possible in secret. Instead of real accountability, we get people with the same worldview as DHS and the same bias against families telling us everything is o.k. and we should just take their word for it.⁷²

It’s not supposed to work that way in a democracy. That is why it is so urgent

that all court hearings and almost all records in child welfare cases be presumed open.

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An exception would be made to the presumption of openness for portions of documents that name people who reported child abuse in confidence. Though even then, if a parent claims to be a victim of harassment, that parent should be allowed to ask a judge to review the record and, if the judge agrees there has been harassment, open this record as well.

Only the lawyer for a parent and the guardian ad litem for a child should be allowed to request secrecy. DHS shouldn't even be allowed to *ask* for it. DHS has no interest in secrecy other than as a way to cover up its failings. If secrecy is truly needed to protect a child – that's what the GAL is there for.

The Review Committee failed even to acknowledge the need for accountability. It erroneously described the purpose of opening hearings as “to educate the public” without mentioning any other benefits.

Then the committee bought into the party line of secrecy advocates everywhere, claiming that “child protective proceedings often include intimate details that are traumatic to the child when revealed, especially in a public proceeding.”

Although the Review Committee recommended broadening the categories of people with a direct interest in a case who could sit in, it also said it “supports the clarification of contempt powers...” should any of those people actually tell anyone what he or she saw.⁷³

In other words, more people would be free to witness injustices meted out to their families – but they'd better not tell anyone about it.

This argument that opening hearings and records will traumatize children fails on several counts:

--The alleged potential for “embarrassment” does not explain why information is kept secret even after a child has died.

--In the overwhelming majority of cases there are no graphic details to report. Most cases involve “neglect.” A child will not be testifying about being beaten or raped because that's not the accusation.

--The most traumatic cases are likely to involve not only child protection proceedings but criminal cases as well. These cases already are public. And when parents who feel they have been wronged file their own civil suits, trials and records in those cases are public as well. Yet we have never seen nor heard a single account of a child saying that she or he was traumatized by the fact that such a trial was public. Nor do we know of any adult coming forward years after the fact to complain of such trauma.

--Ten states have opened child protection proceedings to the press and the public. Two more let in reporters only. In every one of these states, the same fears were expressed initially as in Maine. But a comprehensive nationwide examination by

the *Pittsburgh Post-Gazette* found that none of the problems materialized. Indeed, over and over, one-time critics became converts.⁷⁴

“Everyone complains about everything in New York,” says Judith Kaye, chief judge of that state’s highest court, the Court of Appeals. But, she says, in more than four years since she ordered all of the state’s family courts opened, “we’ve had no complaints about this.”

Her deputy, Chief Administrative Judge Jonathan Lippman says “It has been 100 percent positive with no negatives ... Our worst critics will say it was the best thing we ever did. Their fears were unfounded ... I wish other states would do it.”

One of those who opposed the change was Michael Gage, former administrative judge of the New York City family court. But now, Gage says, “I think it worked. From my view, it worked remarkably well.”

Another opponent was Jane Spinak, then head of the Juvenile Rights Division of the Legal Aid Society in New York City. But, Spinak says, “the consensus now is that [the court] is better open than when it was closed.”

Once the courts were opened, reporters saw the shabby conditions families had to endure. That led to funding for repairs. It’s also helped increase pressure to raise fees paid to the lawyers who defend impoverished parents – at \$40 an hour in court and \$25 an hour out of court, they’re the second lowest in the country.

And Kevin Concannon’s counterpart in New York City at the time, Nicholas Scoppetta, says opening up the process helped him improve his agency. “We have not experienced a downside,” he said.⁷⁵

New York is not alone. In Indianapolis, Judge James Payne made an exception to his state’s closed courts policy for a national news program. He says well-run

court systems can only benefit from openness. “I think we do a lot of good work in our system, and people don’t know about it ... because we keep the hearings closed.”

Payne argues that it is disingenuous for some child welfare agencies to demand closed hearings to avoid “embarrassing” children and then post the children’s pictures, and intimate details about their problems, on websites promoting their adoption. (Indeed, one can find plenty of embarrassing information about children, along with their pictures, at the “Maine’s Waiting Children” website).

In Illinois, the press has been allowed into juvenile court for more than a century, and Concannon’s counterpart in that state, Jess McDonald, says the public should be allowed in, too. “We will only make mistakes if we are hidden in the back room,” McDonald says.

The reform-minded head of Allegheny County, Pennsylvania’s child welfare system, Marc Cherna also supports opening hearings, which now are closed in that state.

In Oregon, hearings in abuse and neglect cases have been open for more than 20 years. “The appearance of being treated fairly is compromised when things are done in secret,” says Oregon Circuit Judge Daniel Murphy. “People are suspicious of anything done secretly.”

And in Florida, the director of the Children First project at Nova Southeastern University, Chris Zawisza, supports the state’s open courts: “The newspapers in Florida have played an exceptional watchdog function and caused many significant changes in child welfare,” Zawisza says, “and that is because they have had access to this stuff.”

Of course, that may be just what the child welfare establishment in Maine is afraid of.

But perhaps most revealing is this: Of all the states to open proceedings, not

one has closed them again. On the contrary, after three years of experimenting in 12 counties, just last month the Minnesota Supreme Court ordered open courts in child maltreatment cases statewide.⁷⁶ Surely if the experiment had been traumatizing children, it never would have been expanded.

And that shouldn't come as a surprise. Cases likely to be covered by the media are likely to fall into these categories:

--Cases where the child has been killed.

--Cases where the alleged abuse is so brutal that the details already are public knowledge because of police reports. These cases also are likely to be the subject of public, criminal proceedings.

--Overview stories about court systems, in which case examples can be used without revealing names.

No state court judge in America has a better reputation for concern about the welfare of children than Judge Kaye in New York. She stands by what she said when the courts first were opened:

"Sunshine is good for children."

Judge Kaye says her counterparts in other states have discussed New York's experiment with her at conferences – in fact, that's what prompted Minnesota to open its own hearings. So it's hard to understand how Maine's former Chief Justice, Daniel Wathen, got the impression that New York had "run into trouble with the federal regulations" because it opened its family courts.

A spokesman for Judge Kaye told the *Kennebec Journal* that's simply not true.

"They [federal officials] are not pressuring us," the spokesman said. "They've taken no enforcement action. They're not pushing the issue now, and we are going ahead doing what we think is right..."⁷⁷

The Maine Attorney General's office has claimed that Maine could lose federal funds if it opens child abuse

hearings. But the requirements of federal law are a matter of dispute.

"Sunshine is good for children."

--Judith Kaye, Chief Judge,
New York State Court of Appeals

We are aware of no state with open courts that ever has actually been penalized. And the federal Department of Health and Human Services agreed not to withhold funds after it discovered how many states had gone ahead and opened their hearings. In fact, the only thing HHS has done is ask proponents to get federal law clarified.⁷⁸

Of course if a state decided to approach the issue differently from all the others by, for example, asking HHS for a formal waiver (from rules that may or may not apply) before it opened any hearings, -- thereby backing federal officials into a corner -- it could probably count on being turned down.

DHS proposed to do exactly that, when it claimed to favor a pilot project to open courts in two locations.⁷⁹ The project eventually was shelved.

Sometimes even the threat of sunshine is good for children. Maine judges are allowed to open their courts now – but they almost never do it. The lawyer for Logan Marr's mother, C. Clifton Fuller, says he knows of only one case in which the Attorney General's office did not oppose opening a termination of parental rights hearing to the press and the public. Minutes after the judge ruled the hearing would be open, Fuller said, DHS decided to drop the case.⁸⁰ How many other cases proceed only because DHS knows it can hide the flimsiness of its evidence from the public?

The demands for secrecy also are hypocritical. The bizarre game of peek-a-boo played with information concerning the case of Michaela Corbin Bumford makes clear that agencies and courts will use confidentiality when it suits their purposes, and gladly risk “embarrassing” a child if they think they can benefit from making an exception.

Of course it is impossible to guarantee that no child ever would be embarrassed if hearings and case records were opened. But the embarrassment is far outweighed by the improvement Mainers would see in how the courts are run.

We all do better when someone is looking over our shoulder. We think things through a bit more. We’re better prepared. We explore more options. As we said in our previous report, had the hearings in the case of Logan Marr been public, she might someday have been embarrassed. But perhaps open hearings would have led to alternatives to taking Logan away, or to placement with relatives. Perhaps had the hearings been open, Logan Marr might have lived long enough to blush.

• **TAPING INTERVIEWS: All interviews conducted by DHS personnel in the course of child maltreatment investigations – not just interviews with children – should be, at a minimum, audiotaped. For interviews conducted at DHS offices or similar settings, videotape is preferable. Information from any interview that is not taped should be inadmissible in all court proceedings.**

In the television series, *The West Wing*, there is an episode in which the President and his Chief of Staff go to the office of the White House Counsel. There the President says something like: “I need to know if I’ve involved 17 people in a conspiracy to obstruct justice and undermine the Constitution of the United States.”

The very first thing the Counsel does is to pick up a gavel and smash to bits a microcassette tape recorder on his desk.

The counsel wants to make sure that the White House version of events is the only version of events.

DHS wants to make sure the tape recorders are smashed. It wants to make sure that its version of what a child said or what a parent said is the only version.

And that is very, very dangerous to children.

The most obvious danger is reflected in the mass molestation hysteria of the 1980s, in which hundreds of children in cases like the McMartin Preschool were pressured into saying what interrogators wanted to hear. Only the existence of tape recordings prevented even worse miscarriages of justice.

The Review Committee offers a loophole-filled recommendation that interviews with children be taped.

But it’s just as important to maintain a record of interviews with everyone else. Over and over again, all over the country, one hears the same refrain from victimized families: The worker was selective. The worker wrote down only what supported her position and ignored the rest. As one victim in another state, later effectively proven innocent, told a reporter: “They lie, they lie, they awfully lie.”⁸¹

If DHS thinks that’s unfair, then let the agency prove it. Tape all the interviews, and then the people of Maine will know. Indeed, DHS should welcome this requirement, since it isn’t just a way to protect the innocent – it’s a way to convict the guilty. A defense lawyer can’t successfully claim that a child was manipulated or a parent’s comments were distorted if there is a tape that proves otherwise.

And even when it is clear that workers are not lying – and in most cases, they

probably do not misrepresent facts on purpose -- taping still is essential.

If taping is “required,” but notes from interviews that were not taped still can be used in court, it is an invitation for tape recorders to “jam,” workers to “forget” and batteries to “die” on a regular basis.

A basic tenet of communications theory is that people tend to hear what they want to hear or what they expect to hear. Everything we hear is filtered through our life experiences, our beliefs, and our prejudices. (Sometimes, that’s even true with what we read – witness all those mistakes in the Attorney General’s office reading of the Corbin case transcript).

There is no excuse *not* to require that every interview done by a DHS worker in the field be, at a minimum, audiotaped and every interview done at a DHS office or similar facility be videotaped.

Make that: No *good* excuse. DHS reportedly has maintained that, after everything else a child has been through, either as a result of actual abuse, or removal from the home or both, putting a tiny little tape recorder on the table is going to make him uncomfortable. And then came the even more absurd claim that using these simple and cheap devices is enormously expensive and would require “training” for caseworkers.

Indeed, DHS is so desperate to avoid having its mistakes caught on tape that after a home video of Logan Marr saying she was abused turned up, DHS reacted not by welcoming such taping as another way to make

sure children are safe, but by telling parents they couldn’t even videotape their children during visits. Later, DHS said the restriction was just a misunderstanding.⁸² But this much is clear: It wasn’t the video camera that was making Logan Marr uncomfortable in her foster home.

As important as requiring taping itself is a requirement that interviews that are not taped be treated, in effect, as though they don’t exist – an idea the Review Committee specifically rejected.

In criminal cases, evidence obtained improperly cannot be admitted – no matter how compelling that evidence may be. That’s because such a requirement is the only way to be sure that police are scrupulous about the rights of citizens when they gather evidence.

If taping is “required,” but notes from interviews that were not taped still can be used in court, it is an invitation for tape recorders to “jam,” workers to “forget” and batteries to “die” on a regular basis.

• **DAILY VISITS: DHS should arrange for daily visits between parents and children from the time a child is taken pursuant to a “preliminary protection order,” to the day of the first hearing at which all sides are represented (the C-1 hearing) unless DHS can show, by clear and convincing evidence, that this would cause severe, and lasting emotional harm.**

There are very few “front door” methods to prevent wrongful removal of children. This is a way of getting at the problem through the “back door.”

As noted earlier, DHS has what amounts to a “free shot” at any child in the state for up to ten days.

That’s because the DHS worker or lawyer can get an order to remove the child in an *ex parte* proceeding. The parent can’t defend himself because the parent is not even there. At that point, the judge can either take the worker’s word for it that things

really are so bad that the child must be taken before the parent even can speak, or he can put his entire career on the line and turn DHS down.⁸³

The incentives for judges are the same as the incentives for caseworkers. Every judge knows that if he allows even one child to remain in his own home over a child welfare agency's objections and something goes wrong, his career may well be over. A judge in Washington D.C. had her career ended by such a decision in 2000. In New York City, judges actually admitted to a panel of national child welfare experts that they take away children even when they think the city child welfare agency hasn't made its case, because they're so afraid of the adverse publicity if they leave a child in a dangerous home.⁸⁴

But a judge can take hundreds of children needlessly from their homes and no matter how much harm is done to those children, the judge is safe.

So what can be done? Maine could toughen the language for what kind of case is serious enough to justify an *ex parte* order. That would help a little. Narrow the definition of neglect to make it harder to confuse neglect with poverty. That would help a little. Raise the standard of proof to clear and convincing. That would help a little. Require that parents are fully notified of their right to attend every hearing – so parents aren't shut out of hearings when they are, in fact, able to attend. That would help a little.

But none of these steps would be as effective as requiring daily visits until the C-1 hearing.

This idea was first proposed as part of a very good model law written by Prof. Michael Wald of Stanford University Law School in 1976, and revised by an American Bar Association Committee in 1981.

A requirement for daily visits, unless DHS can show by clear and convincing evi-

dence that this would cause severe and lasting emotional trauma to the child, (physical trauma can be prevented by having the visits supervised) will help *ease* the trauma of the removal itself.

DHS will scream about how burdensome it is. But that's the whole idea. If a worker knows that taking a child with an *ex parte* order will be followed by a requirement that she set up ten days worth of visits, she'll be a lot more careful about when she goes to get an *ex parte* order.

• **STANDARD OF PROOF: The standard of proof in all court proceedings should be raised from the current “preponderance of the evidence” standard to “clear and convincing” The standard also should apply when a worker decides to “substantiate” alleged maltreatment.**

There are few punishments one can inflict on a *child* that are more severe than needlessly tearing away his family. And yet, when it's time for courts to decide to place a child in foster care, they do not apply the standard used to convict a child murderer – “beyond a reasonable doubt,” or even the middle standard, “clear and convincing” evidence. Instead, Maine courts apply the lowest standard of proof, “preponderance of the evidence,” the same standard used to decide which insurance company pays for a fender-bender. When the time comes to decide whether to *keep* the child in foster care, the same pathetically low standard applies.

Only at the very end, when the issue is termination of parental rights, does the standard rise to clear and convincing – and, it took a U.S Supreme Court case to make that the law of the land in all 50 states.⁸⁵

The Review Committee recommends raising the standard only at the penultimate court hearing, when a decision is made whether or not to stop trying to reunify a family. In fact, as the committee acknowledged, these “cease reunification” hearings

are tantamount to termination hearings, since if there is no effort to reunify a family, obviously the next step almost always is termination.

To their credit, five committee members wanted to raise the standard of proof at the “Jeopardy Hearing.” But even that doesn’t go far enough.

The “clear and convincing” standard should be the standard for every decision, from substantiating a case, through initial removal, through continuing foster care.

Opponents say, in effect, that if DHS workers ever actually had to prove a parent did something wrong before they took away the children, then children might be left in unsafe homes – and the Review Committee bought the argument.

But if the standard is not raised, many more children will be subject to the unconscionable trauma of needless foster care – and some of them will be abused in foster care itself. As we noted earlier, if Maine’s standard for removal were “clear and convincing,” Logan Marr might be alive today. And the “clear and convincing” standard is still lower than the standard required to convict a child murderer and keep him off the streets.

• **ADEQUATE COUNSEL:** The state should create an institutional provider of counsel for impoverished parents. This could be either a new state agency or a private contractor. But either way, this entity must have resources equal to those available to the Attorney General’s office for handling cases of alleged child maltreatment.

The Review Committee does a good job of discussing the inadequacy of counsel for indigent parents. The committee report makes clear that parents typically are represented by inexperienced, underpaid, overworked lawyers, who must do battle with all the resources at the command of the Attorney General’s office.

But the Committee then proposes to do almost nothing about it – it recommends only a token pilot project involving contracting with a private law firm.

• **RIGHT TO SUE:** People who feel they have been wronged by the Department of Human Services should be able to sue the agency. DHS workers should have “qualified” immunity.

As the law stands now, people like Logan Marr’s mother must get permission from the legislature before they can sue in Maine courts.

That barrier should be removed.

Saying “let people sue” is not the same as saying let them win. But allow a court to decide. Most of the people wronged by DHS are poor. Not that many are going to be able to sue. Not that many lawyers will take cases on a contingency fee basis if there is little chance of winning.

The change is needed in order to send a message that the arrogance that has become so much a part of the culture of DHS has a price. Let those who feel aggrieved get a real day in court.

Individual workers do need some protection from such suits. They should not have absolute immunity, but they should have “qualified immunity” also sometimes called “good faith” immunity.

In layman’s terms, this means the workers are immune unless they were clearly malicious or their actions reflected an extraordinary amount of laziness or stupidity.

DHS as an agency should not have any immunity.

• **LEAST DETRIMENTAL ALTERNATIVE:** In all places where it appears, the phrase “best interests of the child” should be replaced with the phrase “least detrimental alternative.”

Currently, almost all state laws involving custody of children are liberally

sprinkled with the phrase “best interests of the child.”

But that is a phrase filled with hubris. It says we are wise enough always to know what is best and capable always of acting on what we know. In fact, those are dangerous assumptions that can lead us to try to fix what isn't broken or make worse what is.

Nearly 30 years ago, three of the leading child welfare scholars of the 20th Century, Albert Solnit, the late Joseph Goldstein, and the late Anna Freud proposed an alternative phrase. They said the phrase “best interests of the child” should be replaced with the phrase “least detrimental alternative.”⁸⁶

“Least detrimental alternative” is a humble phrase. It recognizes that whenever we intervene in family life we do harm. Sometimes we must intervene anyway, because intervening is *less* harmful than not intervening. But whenever we step in, harm is done.

The phrase “least detrimental alternative” is a constant reminder that we must always balance the harm that a family may be doing against the harm of intervening. It is exactly the kind of shot of humility that DHS needs.

The Dangers Ahead

The hardest part of the job of reforming child welfare isn't making the changes – though that's hard enough. The hardest part is keeping those changes. And that's why legislators will need not only the courage to make change, but the courage to defend those changes against the inevitable assault that will follow.

No child welfare system can prevent every child abuse fatality. Sooner or later, another child in Maine will die of abuse. And if the child dies in his or her own home, and especially if that child was, in some

way, “known to the system,” DHS almost certainly will place the blame on anyone who has taken any stand or proposed any legislation the agency doesn't like.

No matter what the actual circumstances of the death, and despite the fact that such deaths occur almost every year, the next time it happens, expect DHS to say it was because “we were second guessed too much.” They'll say it's because “the legislature tied our hands.”

That's how agencies like DHS get their power, and that's how they keep it.

Such claims are nonsense. Again, the evidence is overwhelming that it is the few states and localities that emphasize safe, proven programs to keep families together that actually have the better track records for safety.

But that won't stop DHS from saying it. So if Maine's vulnerable children are ever to see a brighter future, the legislature not only will have to make changes, it will have to be ready to stand firm and back up those changes in the face of such attacks.

In truth, even the broad, general suggestions offered by the HHS Committee and the minor changes proposed by the Review Committee probably offended the DHS leadership so much that they will prompt these kinds of attacks. So lawmakers have nothing to lose by taking the bolder steps needed to truly ensure the safety and well-being of Maine's children.

And there is good news for lawmakers brave enough to try: In the year since the death of Logan Marr the people of Maine have been unwilling to buy the excuses DHS has been trying to sell. When DHS starts trying to scapegoat the legislature for the agency's own failings, the people of Maine are unlikely to buy that either.

NOTES:

- ¹ Kevin Concannon, "Maine does better helping children," *Portland Press Herald*, Aug. 12, 2001
- ² *Final Report of the Joint Standing Committee on Health and Human Services Review of the Child Welfare System* (Augusta, ME: December, 2001), p.8. Hereafter: HHS Committee Report.
- ³ Gary J. Remal, "Court reverses two child-custody rulings," *Kennebec Journal*, July 27, 2001.
- ⁴ Assistant Attorney General Elizabeth Stout made the comments at a meeting of the Committee to Review the Child Protective System on Sept. 10, 2001. The author of this report was a witness before the committee that day and heard the comments.
- ⁵ Kevin Concannon, *Year End Letter to Staff*, Dec. 21, 2001, available online at www.state.me.us/dhs/pressnn.htm
- ⁶ Ruth-Ellen Cohen, "Legislative committee urges greater oversight, accountability of DHS," *Bangor Daily News*, Dec. 26, 2001.
- ⁷ For an extensive review of studies showing the high rate of abuse in foster care, see NCCPR Issue Paper #1, *Foster Care vs. Family Preservation on the Track Record on Safety* available at www.nccpr.org
- ⁸ For details on this, see NCCPR Issue Paper #2, *Foster Care Panics* available online at www.nccpr.org
- ⁹ The actual numbers will vary from state to state. For example, in 1997, it cost the state of Michigan \$12,384 to keep one child in family foster care. The state's Intensive Family Preservation Services program cost \$4,367 per family. (State of Michigan, office of the Auditor General, *Performance Audit of the Families First of Michigan Program*, July 1998, p.3).
- ¹⁰ HHS Committee Report, p.15.
- ¹¹ Gary J. Remal, "Study: Courts should have unbiased info," *Kennebec Journal*, Sept. 20, 2001
- ¹² Information on the Corbin case from Gary Remal, "Daggett joins Corbins in custody battle for Michaela," *Kennebec Journal*, July 2, 2000; "Family did girl harm, DHS says," *Kennebec Journal*, Aug. 4, 2000; Gary Remal, "Girl permanently taken from mother," *Kennebec Journal*, March 23, 2001.
- ¹³ Gary J. Remal, "AG orders changes in legal document involving custody case," *Kennebec Journal*, Oct. 18, 2001.
- ¹⁴ The author of this report was a witness before the committee that day and witnessed the exchange.
- ¹⁵ E.G. the Optimus CGR-112, found online at <http://www.radioshack.com/category.asp?catalog%5Fname=CTLG&category%5Fname=CTLG%5F002%5F001%5F006%5F000&Page=1>
- ¹⁶ Bill Nemitz, "Recordings might protect family's future," *Portland Press Herald*, Dec. 12, 2001.
- ¹⁷ Personal Communication with Patricia Reddick, administrative assistant, Nebraska Department of Health and Human Services, Division of Protection and Safety.
- ¹⁸ *2001 Rhode Island Kids Count Factbook*, p.28 (total number of Rhode Island foster children) and p.29, (number of such children placed with relatives). Available online at <http://www.rkidscount.org/2001.html> then scroll down to section headed "safety."
- ¹⁹ U.S. Dept. of Health and Human Services, *Report to The Congress on Kinship Foster Care* (Undated, probably 2000) National average: p.vi, New York data, chart, p.B-18.
- ²⁰ California Department of Social Services, *Children in Out of Home Care: Characteristics for California*, December, 2001. Available online at <http://www.dss.cahwnet.gov/research/childrensprogram/CWSCMS2.htm>
- ²¹ Federal data actually put the percentage even lower, at 7.5 percent. See "Report to The Congress..." Note 19 supra.
- ²² Joanne Lanin, "Bridging the Gap," *Portland Press Herald*, January 20, 2002.
- ²³ Maine Civil Liberties Union, Maine Equal Justice Partners, *Report on the Survey of Private Practice Attorneys involved with Maine's Child Protective System*, Sept. 8, 2001.
- ²⁴ The lawyer who brought the suit, for the Bazelon Center for Mental Health Law, now is a member of the NCCPR Board of Directors.
- ²⁵ Ivor D. Groves, *A Summary Report on Implementation Status of the R.C. v. Petelos Consent Decree* (Tallahassee, FL: Human Systems and Outcomes, Inc., December, 1999).
- ²⁶ Ivor D. Groves, *System of Care Implementation: Performance, Outcomes, and Compliance*, March, 1996, Executive Summary, p.3.
- ²⁷ Bill Poovey, "Federal monitor commends progress with abused, neglected children," Associated Press Alabama State Wire, Oct. 16, 2000.
- ²⁸ Commonwealth of Australia, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 1997*. Available online at www.austlii.edu.au
- ²⁹ Ruth-Ellen Cohen, "Indians question DHS actions," *Bangor Daily News*, Nov. 6, 2001.
- ³⁰ *Final Report of the Committee to Review the Child Protective System*, (Augusta ME: December 2001) (Hereafter: Review Committee Report,) p.30.
- ³¹ U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, (SAMHSA) *National Household Survey on Drug Abuse*. Tables with state by state results are available online at <http://www.samhsa.gov/oas/NHSDA/99StateTabs/tables2.htm#7a>
- ³² To obtain these data go to www.aecf.org then click on Kids Count and follow the instructions for generating customized tables. Or go directly to www.aecf.org/cgi-bin/kc2001.cgi?action=profile&area=Maine and to www.aecf.org/cgi-bin/rightstart2.cgi?action=profile&area=Maine
- ³³ Editorial, "Reforming DHS," *Bangor Daily News*, Dec. 27, 2001.
- ³⁴ Ibid.
- ³⁵ Ruth-Ellen Cohen, "DHS too slow to aid children, says new study," *Bangor Daily News*, Oct. 27, 2001.
- ³⁶ Ibid.
- ³⁷ U.S. Dept. of Health and Human Services, *The AFCARS Report*, available online at www.acf.dhhs.gov/programs/cb/publications/afcars/apr2001.htm
- ³⁸ U.S. Census data show 72.3 million Americans under age 18. Maine has 10.8 foster children for every thousand children. If 10.8 of every thousand Americans under age 18 were in foster care, the total would be 849,600.
- ³⁹ Gary J. Remal, "Dozens testify on department's handling of child-protective cases," *Kennebec Journal*, Aug. 25, 2001.

⁴⁰ Alan Crowell, "30 attend rally in Skowhegan to criticize DHS," *Central Maine Morning Sentinel*, Nov. 30, 2001.

⁴¹ HHS Committee Report, p.10.

⁴² Bonnie Washuk, "Families say DHS is 'out of control'" *Lewiston Sun-Journal*, Aug. 25, 2001.

⁴³ Maine Civil Liberties Union, Maine Equal Justice Partners, Note 23 supra.

⁴⁴ Associated Press, "Two involved in Logan Marr case honored," May 8, 2001.

⁴⁵ In 2000, Maine placed 423 children in adoptive homes. ("Rise in adoptions, note 47, infra). But according to the Commissioner's *Year End Letter to Staff* (note 4 supra), there were "more than 300" adoptions in 2001.

⁴⁶ Allegheny County Department of Human Services, Office of Children, Youth, and Families, Ensuring Permanency in Allegheny County, <http://trfn.clpgh.org/acdhs/CYF /permrep799.htm>

⁴⁷ Gary J. Remal, "Courts careful, Wathen asserts," *Kennebec Journal*, May 31, 2001; Paul Carrier, "Rise in adoptions of foster children prompts questions," *Portland Press Herald*, June 10, 2001.

⁴⁸ There are two problems with relying on ombudsmen: First, if they have the same world view and the same background as the people in the agency they're watching, they are likely to become defenders of that agency. For example, one of the first people to rush to the defense of DHS after the death of Logan Marr and the allegations that followed about agency arrogance was a former DHS ombudsman – who also served at one time as DHS Commissioner and head of DHS' child welfare bureau (Paul Carrier, "Parents say DHS displays arrogance" *Portland Press Herald*, May 13, 2001). Similarly, in Connecticut, the state's first child welfare "ombudsman" was so closely "in-sync" with the take-the-child-and-run philosophy that has dominated that state in recent years that she succeeded the commissioner she was supposed to be monitoring. Second, the "take the child and run" approach tends to be politically popular. Therefore, ombudsmen tend to score points by chiding agencies for doing too little, instead of for doing too much.

⁴⁹ HHS Committee report, p.15.

⁵⁰ HHS Committee report, p.13.

⁵¹ Review Committee report, p.18.

⁵² State of Illinois Department of Children and Family Services, *Executive Statistical Summary*, December, 2001, available online at <http://www.state.il.us/dcfs/liv1.pdf>

⁵³ *Ibid.*

⁵⁴ The figures can be found in charts, called "Annual Summary of Child and Family Services" submitted with Maine's annual State Plan for child welfare services, filed with the U.S. Department of Health and Human Services. "Family preservation" and "family reunification" are not the same as "family support," a much broader funding category that can include programs with little direct relationship to child maltreatment.

⁵⁵ For a detailed description of this program and the studies that show its success, see NCCPR Issue Papers 9 and 10, available at www.nccpr.org

⁵⁶ R.S. Kirk, *A Critique of the "Evaluation of Family Preservation and Reunification Programs: Interim Report,"* May, 2001.

⁵⁷ Kathleen Wobie, Marylou Behnke et. al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, paper presented at joint annual meeting of the American Pediatric Society and the Society for Pediatric Research, May 3, 1998.

⁵⁸ Charles L. Usher, *Evaluation of Family to Family* (Jordan Institute for Families, School of Social Work, University of North Carolina at Chapel Hill and Health and Social Policy Division, Research Triangle Institute, Research Triangle Park, NC, December, 1998).

⁵⁹ The Clark Foundation is turning over responsibility for this program to CSSP.

⁶⁰ Walter R. McDonald & Associates, *National Study of Child Protective Service Systems and Reform Efforts: Literature Review* (Washington, DC: U.S. Dept. of Health and Human Services, Administration for Children and Families, March, 2001) pp. 7,8.

⁶¹ U.S. Dept. of Health and Human Services, *Child Maltreatment 1999*, Table 1-2, available online at <http://www.acf.dhhs.gov/programs/cb/publications/cm99/table1b.htm> The table shows that Maine screens out more than 50 percent of calls, but that figure may be an artifice of Maine's existing differential response system. DHS may be listing calls referred to private agencies for assessment as being "screened out."

⁶² Shana Gruskin, "Child abuse workers call for curbs on hotline," *Ft. Lauderdale Sun-Sentinel*, January 14, 2001.

⁶³ William Adams, Neil Barone and Patrick Tooman, "The Dilemma of Anonymous Reporting in Child Protective Services," *Child Welfare* 61, no. 1, January, 1982, p.12.

⁶⁴ The law should allow the accused to go to a judge and explain why he feels he is being harassed by false reports, and by whom. The judge should check the record and, if the accused is right, and if the judge is persuaded that the reports are an act of harassment, the name should be released to the accused, who should have the right to sue for damages.

⁶⁵ Adams, et. al., note 64 supra.

⁶⁶ Paul Carrier, "Unwieldy caseloads hinder care," *Portland Press Herald*, October 13, 2001.

⁶⁷ 18 F.3d 992 (2nd Cir. 1994). A member of NCCPR's Board of Directors served as counsel for plaintiffs in this case.

⁶⁸ No. 97 C 4199, slip op. at 78-79 (N.D. Ill. March 30, 2001). A former NCCPR board member served as co-counsel for plaintiffs.

⁶⁹ The only exception should be if the accused believes he or she is being harassed and wants time to ask a judge for permission to see the record.

⁷⁰ Gary J. Remal, "Changing child-protective system is 'difficult' work," *Kennebec Journal*, Sept. 29, 2002.

⁷¹ Often these are not "hearings" at all. A worker may simply call a judge on the phone.

⁷² See for example the comments of the former Chief Justice of the Maine Supreme Court in Gary Remal, "Courts careful, Wathen asserts," *Kennebec Journal*, May 31, 2001.

⁷³ Review Committee Report, p.17.

⁷⁴ All of the quotes from outside Maine in this section of the report are from the *Pittsburgh Post-Gazette* series, "Open Justice," by reporter Barbara White Stack. (Sept. 23-25 2001). The series is available at <http://www.post-gazette.com /headlines/ 20010923 opencourt0923p8.asp>

⁷⁵ Barbara White Stack, "Freedom to speak can lead to reform," *Pittsburgh Post-Gazette*, Sept. 24, 2001.

⁷⁶ Associated Press, Minnesota wire "Court orders child protection records opened to public," Dec. 27, 2001.

⁷⁷ Gary J. Remal, "Wathen view on child hearings disputed," *Kennebec Journal*, June 22, 2001.

⁷⁸ Open Justice, note 74, *supra*.

⁷⁹ Gary J. Remal, "DHS to propose opening 2 child-protective courts," *Kennebec Journal*, May 31, 2001.

⁸⁰ Gary J. Remal, "Lawyers not to oppose open custody hearing," *Kennebec Journal*, April 20, 2001.

⁸¹ M.P. McQueen: "Cradle to Grave: City yanks 4 children after tragedy," *New York Newsday*, March 9, 1992.

⁸² Gary J. Remal, "Foster-child recording ban resulted from misunderstanding," *Kennebec Journal*, July 26, 2001.

⁸³ In fact, under Maine Statutes, Title 22, Subtitle 3, Part 3, Chapter 1071, Subchapter III, Subsection 4023., DHS workers don't even have to go to a judge at all, if they deem the case an "emergency." It appears, however, that ex parte orders are so easy to get that this section of the law may not be used very often.

⁸⁴ Special Child Welfare Advisory Panel for New York City, *Advisory Report on Front Line and Supervisory Practice*, March 9, 2000, p.48. Available online at <http://www.aecf.org/child/frontline.pdf>

⁸⁵ *Santosky v. Kramer*, 455 U.S. 745 (1982). The lawyer who won this case now serves as President of NCCPR.

⁸⁶ Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child*, (New York: The Free Press, 1973), p.53.