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ISSUE ANALYSIS

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Practical Ways to Reform the Child Welfare System

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In recent years it has become frighteningly common for homeschoolers to be wrongfully accused of abuse and neglect on hotlines to state child welfare departments. Individuals who do not like home schoolers can simply make an *anonymous* phone call and fabricate abuse stories about their neighbors. Social workers then have a legal obligation to investigate. Some statistics show that up to 60 percent of children removed from their homes by social workers were taken away from their parents without probable cause of abuse. Approximately 30 percent of reports that are investigated include only one child found to be a victim of abuse or neglect. Fifty-eight percent of the reports are found unsubstantiated.¹ Under this system, which ignores due process of law, many innocent families are subjected to harassment.

Each state has different policies regarding social workers. However, social workers usually want to enter the family’s home and interrogate the children separately. To allow either exposes the family to great risk. Every week, Home School Legal Defense Association (HSLDA) attorneys counsel member families and intervene to protect them from social worker “fishing expeditions.” Unfortunately, the child welfare system sometimes ends up abusing the very families it is supposed to help. To address this problem, HSLDA is working to reform state child welfare laws. We support legislation that would protect families by forcing social workers to abide by the same laws regular law enforcement officials must obey.

The five areas most in need of reform are:

1. **Anonymous Tips:** Child welfare laws should be amended to require *all* reporters of child abuse to give their names, addresses and phone numbers. This will curtail false reporting and end harassment stemming from anonymous tips.
2. **False Reporting:** Child welfare laws should be amended to make false reporting at least a class C misdemeanor.
3. **Probable Cause/Warrant:** Social workers must be held accountable to the same Fourth Amendment standards as the police. A warrant must be obtained before a social worker can enter the home without consent of the parents.
4. **Access to Records:** Many times home schoolers who are investigated by social workers are denied access to the records of their investigation. Child welfare laws should be amended to allow victims of the system to inspect their records in order to seek recourse.
5. **Prohibition of the Violation of Parent’s Constitutional Rights:** The recognition of parental rights is important to create an even playing field during child welfare investigations.

As long as social workers continue to operate outside the bounds of the Constitution, the privacy and parental rights of all Americans will be jeopardized. These amendments to state laws will provide

parents with significant protection from child abuse investigations.

Court Decisions Upholding Fourth Amendment Rights In the Face of Social Worker Investigations

HSLDA has defended many home school parents from unconstitutional investigations by social workers. Below are excerpts from significant appellate court cases which HSLDA won, clarifying the rights of parents when faced with an investigation by a social worker.

1. *H.R. v. State Dept. of Human Resources, 612 So.2d 477 (Ala. Civ. App., 1992).*

The Alabama Court of Appeals vindicated an innocent home school mom, the victim of an anonymous tip, by striking down a lower court order that allowed the social worker to enter the home. The court declared:

We suggest, however, that the power of the courts to permit invasions of the privacy protected by our federal and state constitutions, is not to be exercised except upon a showing of *reasonable or probable* cause to believe that a crime is being or about to be committed or a valid regulation is being or about to be violated ...

The “cause shown” [in this case] was unsworn hearsay and could, at best, present a mere suspicion. A mere suspicion is not sufficient to rise to reasonable or probable cause.

Although home schoolers have continued to fight back in the courts to protect themselves, statutory changes in state child welfare codes will be more effective in preventing abuse by the system *before* it happens.

2. *Calabretta v. Floyd, 189 F.3d 808, (1999).*

This Fourth Amendment right case was originally filed February 24, 1995, by HSLDA on behalf of Robert and Shirley Calabretta in the Eastern District of California federal court. A Yolo County policeman and social worker had forced their way in the home over the objections of the mother. Based simply on an anonymous tip in which the tipster merely said she heard a cry in the night of “No, Daddy, no!” from the Calabretta home. After the coerced entry, interrogation of the children, and the strip search of a three-year-old, no evidence of abuse was found and the officials ended the investigation.

At the trial level, District Court Judge Lawrence K. Karlton ruled that unless there is evidence of an emergency, a social worker and police officer investigating a report of child abuse must have a warrant. The Court clarified that the Fourth Amendment applies just as much to child abuse investigations as it does to any other government search and seizure. An anonymous tip or mere suspicion is not enough to meet the standard of probable cause.

Although the government appealed, the Ninth Circuit U.S. Court of Appeals, on August 26, 1999, unanimously affirmed the lower court decision. Judge Andrew J. Kleinfeld wrote the opinion for the three judge panel. The court declared that the social worker’s act of forcing the mother to pull down the three-year-old’s pants:

“invaded...the mother’s dignity and authority in relation to her own children in her own home. The strip search as well as the entry stripped the mother of this authority and dignity. The reasonable expectation of privacy of individuals in their homes includes the interests of both parents and children in not having government officials coerce entry in violation of the Fourth Amendment and humiliate the parents in front of the children.”

This landmark decision of *Calabretta v. Floyd, et al*, makes it perfectly clear that social workers are bound to obey the U.S. Constitution when investigating child abuse cases. With respect to the Fourth Amendment, the Ninth Circuit settled the social worker question once and for all. No longer can

social workers enter a home without either a warrant or probable cause of an emergency. Child Protective Services agencies are not exempted from the Fourth Amendment's prohibitions against illegal searches and seizures.

3. *North Hudson DYFS v. Koehler Family, Superior Court of New Jersey, Appellate Division (2001)*

Bill and Shereelynn Koehler narrowly avoided a court-ordered home investigation by social workers when on Friday, February 9, 2001 a New Jersey court of appeals "summarily reversed" an earlier court order to allow the investigation. The court of appeals upheld a parent's right to refuse a social services investigation of an uncorroborated anonymous report.

Earlier, following an anonymous tip to the New Jersey Department of Youth and Family Services, a social worker visited the Koehler home. The Koehlers, relying on their Fourth Amendment right to be safe and secure in their own home, refused to allow the social worker to inspect their home and to interview their children. The social worker petitioned a New Jersey court for an order to investigate the Koehler home.

On February 6, 2001, the trial court used the false, anonymous tip to justify home invasion by social workers into the Koehler home. The judge observed that the New Jersey child abuse investigation statute authorizes a court to investigate when it is "in the best interest of the child."

HSLDA immediately filed an emergency application to block the order and appeal the decision. The court of appeals granted the emergency application for a stay and gave both sides a short time to supply additional legal briefs.

On Friday, February 9, 2001, after reviewing the briefs of all parties, the appellate court struck down the order to investigate the Koehlers. The court explained, "[a]bsent some tangible evidence of abuse or neglect, the courts do not authorize fishing expeditions into citizens' houses." The court went on to say, "[m]ere parroting of the phrase 'best interest of the child' without supporting facts and a legal basis is insufficient to support a court order based on reasonableness or any other ground."

Instead, as the court said, "The home is often the 'last citadel for the tired, the weary, and the sick,' and one of the primary purposes of government its to protect the 'well-being, tranquility, and privacy' of the home."

4. *Moodian v. County of Alameda Social Services Agency 206 F.Supp.2d 1030, *1035 (N.D.Cal., 2002)*

"Frankly, it is difficult to conceive how a social worker, whose work is directly governed by state law and regulation, could claim to have a reasonable belief that a warrantless removal that is expressly prohibited by state law and regulation is somehow permitted by the Constitution."

5. *In re Matter of Stumbo, Supreme Court of North Carolina No. 321A01 Filed, July 16, 2003*

The Stumbos' troubles began in September 1999 when their 2-year-old daughter slipped outside halfway through dressing - without any clothes - to chase her new kitten. Although an older sibling retrieved her a few minutes later, it was too late. A passerby reported the family to social services.

Two hours later, a social worker showed up at the Stumbos' door, demanding to enter their home and privately interview each child. At HSLDA's advice, the Stumbos refused to let the social worker in.

Despite having no probable cause for entry and private interviews, the social worker convinced a judge to issue a court order forcing the family to comply. HSLDA immediately challenged the order, but the North Carolina Court of Appeals upheld it, deciding that the order did not constitute a "search" under the Fourth Amendment. The Stumbos then appealed to the supreme court, which heard the case in February 2002.

Finally, on July 16, 2003, the North Carolina Supreme Court ruled 7-0 against the Department of Child Protective Services, declaring that the department did not have a legitimate basis to even begin an investigation of the Stumbo family.

In the majority opinion, Justice Robert Orr, called the Stumbo case "a circumstance that probably happens repeatedly across our state, where a toddler slips out of a house without the awareness of the parent or caregiver - no matter how conscientious or diligent the parent or care giver might be."

Orr further stated that, "such a lapse does not in and of itself constitute 'neglect'."

The majority opinion did not address the fourth amendment issue of whether there was probable cause to order the parents to submit to the interviews for the Stumbo's other children. However, the court issued a concurring opinion indicating that the fourth amendment applies in child abuse investigations. And in this case, there was not sufficient evidence to justify an order requiring the parents to submit their children for interviews.

**MODEL LEGISLATION FOR
CHILD ABUSE & NEGLECT INVESTIGATIONS**

Penalty for False Reporting

“Any person who knowingly or maliciously makes a false report of any type of child abuse or neglect shall be guilty of a Class C misdemeanor and shall be fined five hundred dollars (500) for making a false report. Such person shall also be liable to any injured party for compensatory and punitive damages.” [Alabama, S. 679]

Requirements for Social Workers to Obtain a Warrant

“In the absence of imminent danger, prior to entrance into a home, to remove a child, or for any other reason for which they might seek entrance into a home without consent of the parents, employees of the Department of Human Resources shall be held to the same standard as law enforcement personnel, and shall be required to obtain a warrant, similar in form to a search warrant, issued only on affidavit sworn to before the issuing judge or magistrate authorized by law to issue search warrants and arrest warrants, establishing grounds for issuing the warrant on probable cause, or shall be required to file a dependency petition and receive a pre-adjudication removal order from a judge of competent jurisdiction.” [Alabama, S. 679]

Prohibition of Anonymous Tips

“The division shall not investigate any such report unless the person making such a report provides to the division such person’s name, address and telephone number. The division shall not require the taking of a telephone number if the person making the report does not have a telephone.” [Missouri, H.B. 30]

The Right to Obtain Investigation Records

“Any person who is the subject of an unfounded report or complaint made pursuant to this chapter who believes that such report or complaint was made in bad faith or with malicious intent may petition the circuit court in the jurisdiction in which the report or complaint was made for the release to such person of the records of the investigation. Such petition shall specifically set forth the reasons such person believes that such report or complaint was made in bad faith or with malicious intent. Upon the filing of such petition, the court shall request and the department shall provide to the court its records of the investigation for the court’s in camera review. The petitioner shall be entitled to present evidence to support his petition. If the court determines that there is a reasonable question of fact as to whether the report or complaint was made in bad faith or with malicious intent and that disclosure of the identity of the complaint would not be likely to endanger the life or safety of the complainant, it shall provide to the petitioner a copy of the records of the investigation. The original records shall be subject to discovery in any subsequent civil action regarding the making of a complaint or report in bad faith or with malicious intent.” [Virginia Code section 63.1-248.5:1 (C)]

Government Agency Violation of Parents’ “Fundamental Rights” Prohibited.

Child protective services “shall not contradict the fundamental rights of parents to direct the education and upbringing of their children.” [1997 Tex. Gen. Laws 1022]

(b) No state agency may adopt rules or policies or take any other action which violates the fundamental right and duty of a parent to direct the upbringing of the parent’s child. [1997 Tex. Gen. Laws 1225]

SIMILAR AMENDMENTS OFFERED BY HSLDA TO CONGRESS

The following amendments were offered to Subcommittee on Select Education of the House Committee on Education and the Workforce during a hearing for the reauthorization of the Child Abuse Prevention and Treatment Act (CAPTA) on October 16, 2001.

The five areas where child welfare laws most need reform are:

1. Anonymous Tips: As a condition of receiving federal funds, CAPTA should be amended to mandate states to require *all* reporters of child abuse to give their names, addresses and phone numbers. This will curtail false reporting and end harassment using anonymous tips. CAPTA should be amended by adding subsection 42 U.S.C. 5106a(b)(2)(A)(xiv):

provisions and procedures to assure that no reports shall be investigated unless the person making such a report provides such person's name, address and telephone number and that the information is independently verified.

2. False Reporting: As a condition of receiving federal funds, CAPTA should be amended to mandate that states make it at least a class C misdemeanor to knowingly make a false report. U.S.C. 5106a(b)(2)(A)(iv) should be amended to add:

. . .and penalties for any individuals who knowingly or maliciously makes a false report of any type of child abuse or neglect that includes—

a provision stating that such persons shall also be liable to any injured party for compensatory and punitive damages

and a provision requiring that all reporters be informed of the penalties for false reporting and that the call is being recorded. (e.g. Connecticut).

Twenty-seven (27) states have penalties for false reports in their child welfare code.

3. Specific Declaration of the 4th Amendment Probable Cause Standard: Social workers must be held accountable to the same 4th Amendment standards as the police and other law enforcement authorities. As a condition of receiving federal funds, states should be mandated to declare in their state code that a warrant, supported by probable cause, must be obtained before a social worker can enter the home without consent of the parents. Social workers and those subject to an investigation should be put on notice of the constitutional standards. CAPTA should be amended by adding subsection 42 U.S.C. 5106a(b)(2)(A)(xv):

provisions which specifically require that in the absence of imminent danger, prior to entrance into a home, to remove a child, or for any other reason for which they might seek entrance into a home *without consent of the parents*, social workers shall be held to the same standard as law enforcement personnel, and shall be required to obtain a warrant, issued only on a sworn affidavit that establishes *probable cause*.” (e.g. Oklahoma, Alabama, Minnesota, New Hampshire, South Carolina).

Only seventeen (17) states have even a minimal mention of 4th amendment standards.

4. Requirement that Individuals Have the Right to Know Allegations and Certain Rights: Individuals subject to investigation for child abuse allegations should have the right to know the

allegations and be informed of their 4th Amendment rights. CAPTA should be amended by adding subsection 42 U.S.C. 5106a(b)(2)(A)(xvi):

Provisions and procedures which require states to inform individuals subject to a child abuse investigation of the specific allegations and their rights under the 4th Amendment of the United States Constitution to refuse entry into their home. (e.g. New Jersey).

Only fourteen (14) states have any requirement that social workers inform suspects of their rights. Only five (5) of those states require the social worker to reveal the allegations to the suspected parent.

5. Specific Recognition that Reasonable Corporal Discipline by Parents is Not Child Abuse:

As a condition of federal funds, states should be required to recognize reasonable corporal punishment as not abuse. Many parents are routinely investigated for engaging in traditional discipline for children. The child abuse definition in CAPTA should be amended in 42 U.S.C.S 5106g(2):

The term child abuse and neglect does not include reasonable corporal discipline that does not result in a physical injury. (e.g. Texas, Minnesota, Alabama).

Thirty-six (36) states have such provisions.

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¹ U.S. Department of Health and Human Services, Children's Bureau, *Child Maltreatment 2005*