

**CAPTA RE-AUTHORIZATION ISSUE:
REQUIRING “OPEN COURTS” IN
JUVENILE DEPENDENCY HEARINGS**

CAPTA Memo #3: July 11, 2001

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Justice for Children (JFC) believes that a policy of “open courts” in child dependency proceedings is crucial to reforming and improving the delivery of services to children under the care of the state, and to the formulation of decisions regarding these children’s futures. The Child Abuse, Prevention and Treatment Act (CAPTA) is currently silent on the issue of open courts. JFC proposes that amendments to CAPTA include provisions supporting the opening of dependency proceedings in states receiving funds under CAPTA.

JFC provides the following arguments in support of its position:

1. Public Scrutiny Will Enable Parties in the Dependency System to Be Held Accountable for Their Actions, Improve Procedural Regularity in Dependency Proceedings, and Provide Opportunities for Reform.

The juvenile court system, by its very nature, is informal and not subject to the rigorous procedural rules applied in adult courts. Additionally, juvenile court judges have significant powers of discretion in deciding cases. As early as 1967, the U.S. Supreme Court began to recognize such deficiencies with respect to the juvenile courts. It noted the “[f]ailure to observe the fundamental requirements of due process” creates “unfairness to individuals and inadequate or inaccurate findings of facts and unfortunate prescriptions of remedy.”¹ Public access would force a greater level of procedural regularity in juvenile courts, permit the public to hold courts accountable for inconsistent application of rules, and reduce flaws in fact finding. New York State took this position in 1997, after the tragic and preventable death of a six-year-old female child under its care; the child had been battered and sexually abused. Extended family members reported serious errors in how caseworkers and the juvenile court handled her case.² The legislature responded by adopting presumptively open courts in dependency proceedings.

Open courts provide an opportunity for members of the public to critique flaws in the system, become educated about the child welfare proceedings, initiate informed research and, ultimately stimulate reform where needed.

2. Open Courts Will Improve the Protection of Children and Can Still Be Sensitive to Important Privacy Issues.

One of the greatest criticisms of open dependency hearings is that public access will violate children’s right to privacy and jeopardize their psychological and physical safety. To date there is no empirical evidence indicating that children are traumatized by the presence of an audience while giving testimony.³ Legal scholars and other children’s advocates argue, moreover, that legislation creating “presumptively open” courts can also

allow for judicial discretion to close the proceedings if the trial judge finds that publicity may be harmful to the child.⁴

In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the U.S. Supreme Court struck down a Massachusetts statute requiring closure of the court during the testimony of minors in sex-offense trials. The Court ruled that minors can only be protected by a case-by-case analysis, and that a blanket closure requirement was unconstitutional.⁵ The Appellate Division of the New York Supreme Court, in In re Katherine B., 189 A.D. 2d. 443 (N.Y. App. Div. 1993), suggested several factors for consideration in weighing a decision to close a proceeding: the nature of the abuse allegations (with sexual abuse allegations weighing heavily against closure); the child's age and maturity level; peer pressure from classmates in school; and the potential for embarrassment.⁶

In sum, "presumptively open" proceedings permitting public access in all cases -- except those with a standardized finding of necessity for closure -- provide one way of ensuring that the child protection system works as effectively as possible in protecting children's interests. To eliminate any concern over potential delays in proceedings, state statutes can provide that motions for closing a hearing be considered as soon as they are made.

3. Open Courts Will Improve the Fairness of Dependency Proceedings to Respondents and Need Not Delay Placement of the Child.

Critics argue that open courts will delay final placement of a child because parents who are subject to public pressures and/or able to garner support from the public will more frequently contest cases. Closed courts, by contrast, often permit the state to exert formidable pressures on parents to make some admissions of guilt before it will allow parents to be reunited with their children. In some cases, in fact, admissions of guilt have been required to obtain social services for reunifying the family.⁷

But if respondents sincerely need or wish to contest the charges against them, open court proceedings will improve the ultimate fairness of the proceedings to the family. Moreover, the unfortunate fact that many parents do not have a genuinely enduring interest in the disposition of their child diminishes the argument that open courts will delay placement of the child. (Parents who, by contrast, have a genuine interest in raising or being involved with their child can request that their case be channeled into alternative dispute resolution procedures that are more private, such as mediation or family conferencing.)

4. Historically, Dependency Hearings Were Open to the Public.

The procedures often employed in state dependency hearings in the U.S. originated in the historical procedures for guardianship found in the English courts of Chancery and Law. In England, the Chancery Courts traditionally acted as dependency courts do today in the U.S.; they had jurisdiction over displaced, abused or neglected children,

administered the provision of a guardian, and otherwise acted to assure the children's safety. These Chancery proceedings were conducted in open court. Moreover, cases involving babies in need of protection, which in the eighteenth century came under the jurisdiction of the English Law Courts, were also heard in public.⁸

The commonly held belief in the U.S., that our juvenile courts since their inception in 1899 have always been closed, is not entirely supported by the facts, either. A survey of American juvenile courts in the 1960's describes a juvenile courtroom "as full of the covert turmoil created by the bustle of staff, witnesses, and guests of the court as any adult court."⁹ In addition, the survey notes, "... the exceptions made in the case of persons or agencies deemed to have a legitimate need to inspect are so numerous as to seem as much the rule as the exception."¹⁰

There is an expanding trend toward open hearings.¹¹ Currently, state practice in ten jurisdictions presume courts to be open with judicial discretion to close; the state of Oregon requires open proceedings in all dependency cases.¹² An additional twelve jurisdictions have presumably closed proceedings, but permit judicial discretion to open them.¹³ A California Appellate Court, in considering the press's access to a dependency proceeding, declared in a 1991 ruling its "support of the proposition that the states should remain free to continue their exploration for a system best suited for addressing the problems of our youth."¹⁴ JFC believes CAPTA should be amended to encourage states to open their dependency proceedings as a matter of uniform procedure and accountability.

5. Open Hearings Do Not Necessarily Violate the Record Confidentiality Provisions of CAPTA or Title IV-E of the Social Security Act.

Opponents argue that permitting open hearings will expose members of the public to the contents of children's records, thereby violating the confidentiality requirements under both CAPTA and the Social Security Act. Typically, the contents of records are not read in court and any portions of the records that may need to be included in court discussions may be managed in such a way as to protect the privacy rights of the child. Pertinent portions may be discussed in chambers, the judge may temporarily clear the court room for sensitive testimony relating to these records, and the judge may make special arrangements with members of the press restricting their ability to publish the identities of the parties and witness. Both the Conference of Chief Justices and the Conference of State Court Administrators support open court hearings and recommend that CAPTA be revised to permit the states individually to address the issues of open courts and methods for maintaining record confidentiality.¹⁵

6. The Public Has Fiscal and Civic Interests in Being Able to Attend Dependency Proceedings.

The petitioner in dependency proceedings is typically the local child protective services agency, which works in tandem with the local county counsel. Dependency courts, the agencies involved in the disposition of children coming into the court system,

and related social programs are all funded by state and federal taxpayers. Judges are frequently elected officials. Cumulatively, then the public has a significant interest in knowing how its tax dollars are being used, and has a right to observe and evaluate the performance of its elected officials.

1 In re Gault, 387 U.S. 1, 19-20 (1967).

2 *Girl's Death*, N.Y. Times, Nov. 29, 1995, at B8.

3 Debra Whitcomb et al., U.S. Dep't of Justice, *When the Victim is a Child: Issues for Judges and Prosecutors* 46 (1985).

4 See Mary McDevitt Gofen, *The Right to Child Custody and Dependency Cases*, 62 U. Chi. L. Rev. 857 (1995); San Bernardino v. Sun Newspaper, 232 Cal. App. 3d 188 (Cal. Ct. App. 1991).

5 Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608-609 (1982).

6 Emily Bazelon, *Public Access to Juvenile and Family Court: Should the Courtroom Doors be Open or Closed?* 18 Yale L. & Pol'y Rev. 155, 162-63 (1999) (citing In re Katherine B., 189 A.D. 2d 443 (N.Y. App. Div. 1993); See also, San Bernardino, 232 Cal. App. 3d 188).

7 See, e.g. In re Jessica B., 254 Cal. Rptr. 883 (Cal. Ct. App. 1989) (the court refused to order reunification services until the father admitted abusing his infant daughter).

8 Samuel Broderick Sokol, *Trying Dependency Cases in Public: A First Amendment Inquiry*, 45 UCLA L. Rev. 881, 905-908 (1998).

9 See Orman W. Ketcham, *The Unfulfilled Promise of the American Juvenile Court*, in *Justice for the Child* 31 (Margaret K. Resenheim ed., 1962)

10 *Id.* at 29.

11 Sokol, *supra* note 8, at 911.

12 Kay Farley, *The Washington Review*, 14 *The Court Manager* 39 (1999) (the ten jurisdictions are Florida, Indiana, Iowa, Maryland, Minnesota, Nebraska, New York, North Carolina, Northern Mariana Islands, and Texas). **NOTE: We are awaiting final confirmation from Kay Farley that this information is still accurate and that we have correctly interpreted the categories she created.**

13 *Id.* (The twelve jurisdictions are Alabama, Arizona, Colorado, Connecticut, Maine, Michigan, Missouri, Oklahoma, South Dakota, Tennessee, Virgin Islands and Wisconsin.) **NOTE: We are awaiting final confirmation from Kay Farley that this information is still accurate and that we have correctly interpreted the categories she created.**

14 San Bernardino, 232 Cal. App. 3d at 343.

15 Telephone Interview with Kay Farley, Staff Member, National Association for Court Management (June 13, 2001).