

**Testimony of David Sanders
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Child Welfare Consent Decrees - Context and Opportunities for Improvement

Good morning. I'm David Sanders, Executive Vice President of Systems Improvement at Casey Family Programs. Casey Family Programs is the nation's largest operating foundation focused on safely reducing the need for foster care and building communities of hope for children and families across America.

Casey Family Programs was founded in 1966 and has been analyzing, developing and informing best practices in child welfare for 50 years. We work with child welfare agencies in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and with 16 American Indian tribal nations, and with the federal government on child welfare policies and practices. We partner with child welfare systems, policymakers, families, community organizations, American Indian tribes and courts to support practices and policies that increase the safety and success of children and strengthen the resilience of families.

Before coming to Casey Family Programs, I led the child welfare systems in both Los Angeles and Minneapolis. And I'm familiar with, and in fact, have visited a large number of, state, county and tribal child welfare agencies over the past ten years during my tenure at Casey Family Programs. Most recently, I had the honor of serving as the Chair of the President's Commission to Eliminate Child Abuse and Neglect Fatalities.

Today, I would like to provide a national perspective around the topic of child welfare consent decrees and to offer observations based on my own experience, as well as what we have learned from jurisdictions across the country, about system reform, oversight and support, and successful opportunities for improvement.

Beginning in 2011, Casey Family Programs convened three meetings to provide a forum to discuss improving outcomes for children and families while operating under a consent decree.

At the first convening in 2011, we gathered participants from 19 states that had the shared experience of operating under consent decrees. It provided the first opportunity for communication, support and connectivity with other states and leaders operating in the same environment.

We held two additional meetings, one in 2014 with 17 jurisdictions participating, and a third in 2016 with 18 jurisdictions participating. At each convening, attendees included leaders and staff from child welfare agencies, in-house counsel, attorney general offices and human service associations, as well as data experts and advocates. The meetings brought together a range of participants, from those who have considerable experience leading agencies through consent decrees to those who had never been in litigation or were in the initial stages.

Before I share some of what we heard and learned during these meetings, I'd like to provide some context for what consent decrees mean in a child welfare environment. Similar to consent decrees in other fields, a consent decree is a judge's order enforcing a voluntary agreement

between parties to a lawsuit. Beginning in the 1970s, consent decrees became more common as a means to resolve class action lawsuits in an effort to reform state government programs or agencies. Cases are typically built around an argument that a federal statutory or constitutional provision has been violated. However, consent decrees are unlike ordinary judgments in that there is no relief provided nor a dismissal of the case. Rather, a consent decree gives a judge ongoing supervisory power to enforce the decree.

Over a period of 40 years, class-action lawsuits have governed some aspect of child welfare practice in nearly 30 states. A survey from Casey Family Programs' first convening shows that 23 jurisdictions have had lawsuits filed against their child welfare agencies. While one state, Massachusetts, went to trial and was successful in fighting off a lawsuit both at trial and in appeal, numerous jurisdictions have had multiple lawsuits filed against them, and a number of these consent decrees have been in place for decades. The consent decrees have an average lifespan of 16.8 years. Some of the longest lasting include: Illinois where there are currently multiple lawsuits in place, some of which reach back 30 years; Ohio, where *Roe v. Staples* has also been in place for 30 years; Baltimore, where *L.J. v. Massinga* has been in place for 28 years; and Connecticut, where *Juan F vs. Malloy* has been in place for 25 years.

Currently, about 15 states are implementing consent decrees related to the reform of their child welfare systems. Only three states have successfully been released or exited from their consent decrees: Alabama, Utah and Massachusetts. A fourth, Tennessee, just announced its exit from federal oversight on July 18 after 17 years. The terms of Tennessee's exit agreement include oversight of the agency by an independent commission for 18 months.

States largely agree that what is common across these agreements is that both the process of agreeing to a consent decree and the decree itself are very labor-intensive and can demand significant time and resources. Also, despite the reality that each of these decrees is individually negotiated, the agreements still follow a "cookie-cutter" template that fails to recognize the unique nature of each state, locality and child welfare system and their distinct challenges in achieving better outcomes for their children and families.

At the same time, the requirements in many decrees are inconsistent with current federal or national benchmarks or measures. In some cases, they are significantly more difficult to achieve than current federal measures. With the development of the third round of the federal Child and Family Services Reviews (CFSR) by the U.S. Department of Health and Human Services (HHS), there is now a standardization of expected outcomes — with guidance, training and technical assistance provided through the HHS Resource Centers — that was not in existence at the outset of many of the current consent decrees.

It is often the case that those negotiating the agreements may not be the same who have the responsibility for executing the changes and achieving compliance with the measures. If decisions are made without a true understanding of the challenges inherent to a particular child welfare agency or system, then the goal of achieving sustainable change over time is unrealistic.

A great deal has changed in the child welfare field since the onset of most of these agreements. Thanks to critical developments in our understanding of brain science, the impact of trauma, and the growing number of evidence-based and promising practices that achieve positive and lasting outcomes for children and their families, we have a better idea of the practices and approaches that can improve outcomes for children and families. And yet the context, rationale and methodology captured in these dated consent decrees has not changed to reflect these developments.

Many consent decrees are focused on process measures instead of outcome measures. We know from our work with states that this leads to a focus on compliance — meaning that the objective becomes checking off the frequency of activities or services rather than having a focus on the quality or effectiveness of programs or services. In other words, the consent decree measures themselves become the objective.

In order for child welfare systems to effectively meet the needs of the children and families they serve, I believe they must focus instead on effective approaches and services that are tied to improved outcomes — and those outcomes for children and families must be measurable.

The other critical consideration regarding consent decrees is the significant cost that is associated with maintaining them. While funds often do enter a system at the onset of a consent decree, Experts estimate that about two-thirds of new expenditures related to implementing consent decrees go directly to plaintiff fees, and not to investments in improving agency capacity or the provision of services for families. The cost of legal fees, monitoring and consulting fees is estimated to reach or surpass \$15 million over the lifetime of a single agreement - and these costs come from limited state general fund dollars, not federal funds. There is often a “hidden cost” to the consent decrees as well, such as the allocation of case workers’ time spent on completing paperwork required for compliance and time lost that could be spent with children and families in the field.

States also found that consent decrees can cause barriers to adopting new service approaches because of the rigidity of the measures. In effect, states are restricted — or frozen in time — by the specific intent and requirements of consent decree language. Absent those restrictions, agencies might prioritize utilizing new approaches to achieve improved outcomes for children and families. Outdated requirements may not allow for the best services for a particular child or case — those based on our understanding of brain science and the impact of trauma and separation — or evidence-informed practices that can better achieve desired outcomes.

Another challenge for states is that exit from the consent decree is not realistic. They typically require compliance with all measures at once — often totaling more than 100 measures — for a sustained period of time, such as six months or two years, before exit is considered. This can reinforce the focus on compliance above all else. Finally, the measures and the targets themselves often continue to move, resulting in a broadening of the agreement over time. In many cases, the consent decree takes on a life of its own.

So what lessons have we learned or what ideas for change have we gleaned through our work with states?

First, robust data analysis should be used to shape the intent and scope of any agreements or renegotiations of existing consent decrees. Data can help determine what areas of practice are deficient and what measures best capture improvement. Data can be used to quantify and measure the outcomes that are desired and to frame and specify the scope of the consent decree itself.

Second, it is valuable to agree to shared definitions of what is being measured and how. For example, how one jurisdiction defines a “visit” may vary from how another jurisdiction does and may vary from the methodology a monitor will use to measure compliance on visits.

Third, communication and collaboration with the monitor is key, not only in setting expectations, definitions and agreement on what and how things are being measured, but also regarding the capacity and skill set of those on the monitoring team. Are there data experts? Practice experts?

Legal experts? And likewise, what is the skillset of those who interface with the monitoring team so that they can be speaking the same language? There should also be a centralized point of contact and routine interface between the monitor and the jurisdiction leader. There is a need to regularly assess and reassess the process: Are we tracking the right measures? Does the methodology still make sense? What was the original intent and is the measure still needed? What does success look like? All of these factors should connect directly to the data and what the data show about the outcomes.

In addition to communication between the monitor and the jurisdiction leader and staff, we know that internal agency communication is critically important to ensure clarity and help staff to understand that their objective is to achieve improved outcomes, not compliance. And external communication, using data to show insight into the agency, is also critical to build greater community and public support.

As mentioned earlier, Tennessee just negotiated an exit to federal oversight after 17 years. But many other systems remain under consent decrees and are considering renegotiation or paths to exit. To be successful, a case has to be built as to the rationale for a renegotiation such as: changing times tell us new things about desired outcomes or how to achieve them; or the majority of measures have already been met so there is a need to “retire” some requirements and narrow the focus of work. Jurisdictions also have to be prepared with data, have a strong understanding of performance on all measures, and be able to articulate a clear vision for improved outcomes and how to achieve them.

We know that utilizing science and data to inform child welfare work is critical. The knowledge base of child welfare has changed significantly from 20 years ago when many of these agreements were determined. The use of evidence-based practices, knowledge of brain science and trauma, the special attention needed for certain populations like very young children, the need for cross-agency coordination, the importance of partnerships within the community, and the ever-evolving use of technology and data — including to help us identify who is at greatest risk for maltreatment in the future — have fundamentally changed the path to successful outcomes.

In addition to — or perhaps, ultimately, in place of — consent decrees, it is critical to create a self-learning and self-correcting agency that can continuously improve its direction and progress based on the production, analysis and use of data over time, both to inform progress and to set goals directly related to desired outcomes. We have seen the value in building an internal capacity to use data, creating systems able to diagnose issues and trends as they emerge, and systems with the sustained vision and ability to make changes today and in the future. In addition to the consistency and support provided by the federal CFSR measures, there is additional expertise and support available, from Casey Family Programs and others, to help jurisdictions use data to create robust continuous quality improvement (CQI) programs to self-correct in real time and into the future. These developments further render aspects of the justification for consent decrees obsolete and inconsistent with current realities.

In conclusion, the question to be considered is how best to balance the potential benefits that consent decrees can bring — such as increased funding to the agency, increased attention on the need to serve children and families correctly, and a focus on needed reforms in a child welfare system — with the limitations or restrictions that can inhibit innovation, flexibility and real time self-assessment. And above all, we should be sure that the goal of improving outcomes for children and families ultimately is prioritized and achieved.

While there may be a continued need and value in the ability of a lawsuit to compel the appropriation of resources for a system in need of reform, might there not be a more viable alternative to the consent decree process for systems in need of support and reform? How can we create a more productive path for child welfare agencies to demonstrate the health and needs of their systems directly and engage in productive problem-solving with governors, legislators, the judiciary, other agencies, the community and advocates at the table?

In addition to attention paid to creating a robust data and CQI process, we know that new and growing knowledge from brain science and what works for children and families mandates a new approach to reform. As I highlighted earlier, there is a fundamental difference between what we knew at the genesis of many of these lawsuits and resulting consent decrees, some 20 years ago and more, and what we know now about best practices, evidence-based programs, family centered services, trauma, brain science, and outcomes of children in families versus outcomes of children in foster care.

But the final point I want to leave you with is this: child welfare alone cannot serve the needs of all children and families who are or may become at risk. Many of the children and families who become involved with child welfare have previously been or are currently known to others beyond the child welfare agency itself. Other agencies involved through health, mental health, domestic violence, substance abuse, law enforcement and education are critical in this work. However, child welfare consent decrees place responsibility for performance and improvement solely with the child welfare agency. Child safety is a community responsibility and, as you consider the merits or challenges of the consent decree process, we ought to consider how best to support collaboration and shared responsibility as a path to successful reform without the necessity of a lawsuit.