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A PARENTAL DEFENSE VIEW OF SB99 AND REP STRATTON'S HOUSE FLOOR AMENDMENT 3

To the Members of the SB99 Conference Committee:

I am writing to provide the following information for your consideration as you meet on February 26th to attempt a resolution of the conflict between the Utah House and Senate over Rep. Stratton's House Floor Amendment 3 to SB99 ("Child Welfare Amendments.")

REMOVING "ONLY" FUNDAMENTALLY CHANGES 62A-4a-412(3)(b)

The presence or absence of the word "only" in U.C.A. 62A-4a-412(3)(b) fundamentally affects what DCFS is obligated to disclose to parents and any other "subject of the report." Like the other changes being contemplated for 62A-4a-412, this change is no mere technical change as DCFS has repeatedly suggested.

Simply put, if "only" is removed, 62A-4a-412(3)(b) will no longer serve to *limit* what records DCFS can withhold from disclosure. And, because SB99 in its current form also deletes the important "notwithstanding" clause that currently prefaces 62A-4a-412(3)(b), DCFS will be able to withhold more information from parents and record subjects as long as a justification can be found in another law. The primary source of other justifications for withholding records not otherwise set forth in 62A-4a-412(3)(b)(i)-(iii) will be GRAMA.

REMOVING THE "NOTWITHSTANDING" CLAUSE FROM 62A-4a-412(3)(b) PLACES MORE DCFS RECORDS UNDER THE CONTROL OF GRAMA.

A proper analysis of the necessity of "only" requires considering the importance of the "notwithstanding" clause that SB99 removes from 62A-4a-412(3)(b). This "notwithstanding" clause that begins 62A-4a-412(3)(b) currently serves to indicate to lawyers, parents and juvenile judges that 412 is *the* primary statute that governs what DCFS records should be withheld from parents and record subjects.

GRAMA specifically provides in 63G-2-201(6)(a) for instances where specific statutes or court rules serve to govern the disclosure of certain types of records:

> The disclosure of a record **to which access is governed or limited pursuant to court rule, another state statute**, federal statute, or federal regulation, … **is governed by the specific provisions of that statute, rule,** or regulation. (emphasis added).

Should a statute or court rule found outside of GRAMA "govern" the disclosure of a certain type of record, the provisions of GRAMA only apply "insofar as [GRAMA] is not inconsistent with the [governing] statute, rule, or regulation." 63G-2-201(6)(b). GRAMA is therefore reduced to a "gap-filler" role in these circumstances.

Unfortunately, this provision was poorly drafted and it does not denote *how* the court is to determine whether a non-GRAMA statute "governs" or "limits" disclosure of a certain type of record and as a result overrides GRAMA. In fact, 63G-2-201(6)(a) is a tautology; it says that if another statute or rule governs or limits disclosures of certain records, it is that statute or rule that governs those records.

How do judges or lawyers determine if a non-GRAMA statute or rule overrides GRAMA relative to specific records? It is not as simple as it might seem, but the use of "notwithstanding" clauses is the most common way that the legislature indicates their intent that a certain statute is intended to overrule other statutes that contain a contrary or inconsistent rule. In this instance, the "notwithstanding" clause specifically states that 62A-4a-412(3)(b) overrides GRAMA.

The removal of this clause introduces confusion and ambiguity. It also strengthens the argument that GRAMA supplies the applicable rule and overrides 62A-4a-412(3)(b) relative to more types of DCFS records that are not directly attributed to an "investigation" of a referral of alleged abuse or neglect. This is because the exemptions from disclosure found in GRAMA are broader than what is delineated in 62A-4a-412(3)(b), and are therefore *more restrictive* or *more limiting*. In addition, the loss of the word "only" removes the affirmative implication that *all other DCFS records* which do not fall under 412(3)(b)(i) – (iii) are to be disclosed to parents or record subjects. With "only" removed, the limiting effect of 62A-4a-412 is entirely removed, and the statute no longer can be considered to "govern" these DCFS records per 63G-2-201(6)(a).

GRAMA IS MORE RESTRICTIVE AND NOT TAILORED TO DCFS RECORDS

GRAMA is more restrictive and has disclosure exemptions not tailored to DCFS records. Utah Code 63G-2-202(7)[1] sets forth a procedure for courts to follow in addressing disputed requests for private, controlled or protected records. A record classified private, controlled or protected under GRAMA will only be ordered released by a court if:

(a) the record deals with a matter in controversy over which the court has jurisdiction;
(b) the court has considered the **merits of the request for access** to the record;
(c) the court has considered and, where appropriate, limited the requester's use and further disclosure of the record in order to protect:
    (i) privacy interests in the case of private or controlled records;

[1] Records contained in DCFS' "Management Information System" (see 62A-4a-1003) are primarily classified as protected records in 63G-2-305(44) and (56). A court order is the primary avenue for a parent to obtain DCFS records under 63G-2-202(4)(c)(i) because they almost never qualify otherwise; they rarely are the original person that submitted the record, nor are they able to obtain "notarized releases from all persons, governmental entities, or political subdivisions whose interests were sought to be protected by the protected classification" (see 63G-2-202(4)(b)(i)-(ii).)

…

(iii) **privacy interests or the public interest in the case of other protected records**;

(d) to the extent the record is properly classified private, controlled, or protected, the **interests favoring access, considering limitations thereon, are greater than or equal to the interests favoring restriction of access**; and

(e) where access is restricted by a rule, statute, or regulation referred to in Subsection 63G-2-201(3)(b), the court has authority independent of this chapter to order disclosure.

GRAMA requires weighing "privacy interests," vague "merits of the request" and "interests favoring access" when a parent disputes a GRAMA records denial. These considerations are both broader and vaguer than the more narrowly tailored exceptions in 62A-4a-412(3)(b)(i)-(iii) which mandate the withholding of "only the names, addresses, and telephone numbers of individuals or specific information" that would reveal the referent's identity, impede a criminal investigation, or endanger a person's safety. In total, GRAMA is more restrictive because it provides more bases which DCFS or the court may rely upon to justify non-disclosure.

If the deletion of the "notwithstanding" clause and the loss of "only" pass into law, GRAMA will become the primary statute governing the release of DCFS records, and 62A-4a-412(3) will be considerably diminished. For parents seeking transparency about their children from DCFS, this is not a positive development.

EXAMPLES OF RECORDS THAT COULD BE WITHHELD

Here are some examples of records that DCFS would be more able to justify withholding from parents if these changes intended for 62A-4a-412 pass into law:

1. During an administrative investigation of a child abuse or neglect referral, CPS caseworkers exchange derogatory text messages about a parent that indicate an improper bias against a parent that is not based in actual relevant considerations (perhaps related to race, religion, socio-economic status, a personal bias against a parent, or an unfounded belief that the parent suffers from a mental health disorder not supported by a diagnostician). The statements are tenuously connected to the initial report, nor do they fit the description of information "obtained as the result of an investigation of a report." The child protection Attorney General or the DCFS supervisor obtain the text messages, but decides that withholding the communications is justified because 62A-4a-412 no longer limits the withholding of information to "only" those three enumerated exemptions found in 412(3)(b)(i)-(iii).

2. DCFS receives a child abuse neglect report and as a result of the investigation the child is removed and placed in foster care. The abuse neglect or dependency petition is adjudicated against the parent. During the post-adjudication reunification case, the child spontaneously makes statements to the foster parent that are exculpatory in nature, or otherwise suggests that the initial disclosures of abuse made by the child were false. The

foster parent reports what the child said to the ongoing DCFS caseworker. It is not a new report of alleged abuse, and the initial investigation is concluded. The parent's attorney had a better argument before 62A-4a-412(1) was revised by SB99 that this post-adjudication information was obtained as a result of the referral, but 412(1) is now more specific in referencing information "obtained as the result of an investigation of a report," and this argument that 62A-4a-412(1) is inclusive of such records is less persuasive. The child protection Attorney General reasons that the parent cannot obtain the information under 62A-4a-412(1) for the reasons stated above; even if 412(1) applied to Foster Care Activity Records, the word "only" has been removed and this enables the Attorney General to articulate a justification based in vague protections in GRAMA of "privacy" interest. Again, even if 62A-4a-412 is read to apply to Foster Care Activity Records, the loss of the "notwithstanding" clause allows the AG to argue successfully to the court that GRAMA is the governing law related to Foster Care Activity Records. No longer is 62A-4a-412 clearly "controlling" over any type of record, even the records it specifically mentions.

DCFS' STATED AIMS FOR SB99'S REVISIONS OF 62A-4a-412 ARE NOT CONSISTENT WITH THE PROPOSED CHANGES

DCFS has repeatedly brushed off the concerns voiced by a number of parental defense attorneys and others as false or mis-informed. DCFS has also claimed that the changes made to 62A-4a-412(3) in SB99 are not intended to, and would not, further restrict a parent's access to relevant records.

In one communication, Diane Moore of DCFS states that the re-inclusion of "only" in 62A-4a-412(3)(b) might mean that "DCFS may be in the position where DCFS over-releases information to other parties on the case, such as alleged perpetrators outside of the home" and that "DCFS has no such desire [to restrict access for parents] and this bill wouldn't have done that." DCFS appears, therefore, to claim the "technical changes" are targeted at subjects other than parents.

The problem with this claim is that the provisions of 62A-4a-412(3)(b) apply both to "a subject of the report or a parent of a child." The provision does NOT distinguish between parents and non-parent subjects of the report. The removal of "only" will apply to both parents and non-parent perpetrators. Now that ohers have pointed out why this is concerning, DCFS's response is that we should just trust them to use the additional discretion appropriately and transparently. As a parental defense attorney of six plus years I say that that is not good enough. A promise to be transparent and appropriate is no good if there is not law upon which it can be made good. If DCFS had the specific intention of only reducing access to records for non-parent subjects of records they should have proposed changes to 412 that actually set forth different standards for parents and non-parent record subjects.

THE ISSUE OF TRANSPARENCY AND DISCLOSURE OF DCFS RECORDS (AND WHETHER CURRENT LAW IS ADEQUATE) REQUIRES FURTHER STUDY

DCFS claims these changes to 62A-4a-412(3) will not be weaponized against parents and only will be employed in their discretion against non-parent alleged perpetrators. The fact that there is a disconnect between what is promised and what is actually proposed in the way of changes to the law indicates to me that the changes and their likely impact have **not been carefully thought through**. Or they have been very carefully thought through only from the institutional perspective of DCFS without the inclusion of stake-holder input from a parent or parental defense attorney perspective. Either explanation is troubling if the legislature wants to make changes that balance legitimate concerns from all stakeholders.

CONCLUSION

In the very least, Rep. Stratton's Floor Amendment 3 should be retained because it partially mitigates the apparently unintended outcomes unfavorable to parents that the changes as originally conceived will make. However, the underlying truth is that 62A-4a-412(1) and (3) should remain intact with no changes until there can be a more thoughtful and inclusive process in the interim period that will produce a more thorough and clear reform.

Sincerely,