THE ABANDONED INFANTS ASSISTANCE ACT: IMPROVEMENTS TO HELP "BOARDER BABIES" AND THEIR FAMILIES

*Honorable Donald M. Payne**

I. Introduction

The Tenth Congressional District of New Jersey mirrors the daunting challenges facing urban America. [1] While successful urban revitalization efforts are underway in Newark and similar cities throughout our nation, cities continue to struggle with an array of economic and social problems. These urban centers are plagued with drug abuse and the spread of the AIDS virus. Additionally, problems become compounded by the phenomenon of mothers who are addicted to drugs abandoning their babies at birth or soon thereafter. Many of these parents abandon their children because they believe they are incapable of caring for them properly. Because these infants literally board at the hospital for an indefinite amount of time, they have come to be called "boarder babies."[2]

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[1] The 10th Congressional District of New Jersey covers parts of Essex and Union counties which include New Jersey's largest urban center, Newark.

[2] The Abandoned Infants Assistance Act § 103, 42 U.S.C. § 670 note (1988) defines abandoned infants and young children as "infants and young children who are medically cleared for discharge from acute care hospital setting, but who remain hospitalized because of a lack of appropriate out-of-hospital placement alternatives." Abandoned children who have been exposed to drugs before birth are at risk for physical and emotional problems. *Field Hearing on the Abandoned Infants Assistance Act: Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 102d Cong., 1st Sess. 100 (1991) (Prepared statement of Phyllis Gurdin, Director, Specialized Foster Care Boarding Home Program, Leake and Watts Children's Home) [hereinafter Hearing]. Abandonment of these babies is also costly to the federal and state governments in the form of Medicaid and to local governments in the form of increase debt for public hospitals. These children do not need

II. Improving Assistance for Abandoned Infants - H.R. 2722

When the issue of "boarder babies" began to emerge, I was eager to assess the problem to determine what action Congress could take to improve the chances of success for these infants who begin life under such difficult circumstances.[3] On June 20, 1991, I sponsored H.R. 2722,[4] a bill which is designed to improve the Abandoned Infants Assistance Act of 1988 (Act).[5] The

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the assistance of a pediatric hospital, they are better suited for foster or adoptive family care. *See* H.R. REP. No. 821, 100th Cong., 2d Sess. 2, *reprinted in* 1988 U.S.C.C.A.N. 3194.

[3] For many years I have taken a personal interest in issues involving infants and children. As a former President of the YMCAs of the USA, and as a member of UNICEF, I have been active in efforts to improve the quality of life for all children. In 1990, I held a public forum on children in preparation for the World Summit for Children held at the United Nations. Some of the issues addressed were problems children face as a result of poverty, inadequate housing, poor health care and substandard schools.

[4] The Abandoned Infants Assistance Act Amendments of 1991, H.R. 2722, 102d Cong., 1st Sess. (1991) (Amendments). H.R. 2722 was signed into law by President George Bush on December 12, 1991. H.R. 2722 amends the Abandoned Infants Assistance Act which was enacted in 1988. *See* P.L. 100-505, 102 Stat. 2533, 42 U.S.C. § 670 note (1988). In 1988 when Congress passed The Abandoned Infants Assistance Act, it found that:

> 1) throughout the Nation, the number of infants and young children who have been exposed to drugs taken by their mothers during pregnancy has increased dramatically;
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> 2) the inability of parents who abuse drugs to provide adequate care for such infants and young children and a lack of suitable shelter homes for such infants and young children have led to the abandonment of such infants and young children in hospitals for extended periods;
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> 4) hospital-based child care for these infants and young children is extremely costly and deprives them of an adequate nurturing environment;
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> 6) a particularly devastating development is the increase in the number of cases of acquired immune deficiency syndrome in infants and young children, and the number of such cases has doubled within the last 13 months;
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> 7) more then 80 percent of infants and young children with acquired immune deficiency syndrome have at least one parent who is an intravenous drug abuser;
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> 8) infants and young children with acquired immune deficiency syndrome are particularly difficult to place in foster homes, and are being abandoned in hospitals in increasing numbers by mothers dying of acquired immune deficiency syndrome, or by parents incapable of providing adequate care.

Abandoned Infants Assistance Act of 1988 at § 2, 42 U.S.C. § 670 note.

[5] P.L. 100-505, 102 Stat. 2533 codified at 42 U.S.C. § 670 note.

Act authorizes the Secretary of Health and Human Services (HHS) to provide funding and support for:

> demonstration projects for the family support, foster care, and residential care of infants and young children who have been abandoned in hospitals. Projects are to be developed and operated to prevent such abandonment, to recruit and retain foster families, and to provide for other residential care and professional training.[6]

This legislation was written to address the initial reports of an increasing number of babies abandoned in hospitals due primarily to substance abuse and the attendant spread of the HIV virus.[7] Although this crisis mainly affects the inner city hospitals, there were many indications that the worsening of the drug problem meant that cities that were unaffected by the problem of boarder babies may be subject to the problem in the future.[8] The House Committee on Education and Labor summarized the goals of the Act in its report accompanying the amendments to the Act:

> [b]y developing model approaches designed to prevent abandonment as well as develop effective treatment methods the nation as a whole could 'stay ahead of the curve.' This was a proper Federal role in that only the Federal government was positioned to fully test out, evaluate, disseminate and replicate a variety of models that could, in the long run, save unnecessary duplication of effort and assist in the development of cost effective approaches.[9]

Section 101 of the Act authorizes HHS to make grants to public and private nonprofit entities for the development of demonstration projects.[10] These demonstration projects are not intended to solve

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6 H.R. REP. No. 821, 100th Cong., 2d Sess. 1, *reprinted in* 1988 U.S.C.C.A.N. 3193.

7 H.R. REP. No. 209(I), 102d Cong., 1st Sess., pt. 1, at 5-6, *reprinted in* 1991 U.S.C.C.A.N. 1467.

8 *Id.* at 6, *reprinted in* 1991 U.S.C.C.A.N. 1467.

9 *Id.*, *reprinted in* 1991 U.S.C.C.A.N. 1467.

10 Abandoned Infants Assistance Act of 1988 § 101, 42 U.S.C. § 670 note. Section 101(a) of the Act enumerates seven demonstration methods which HHS may issue grants: 1) to promote the prevention of abandonment of infants and young children, 2) to identify and address the needs of abandoned children, 3) to assist abandoned children to reside with their natural family or foster care where appropriate, 4) to recruit and train foster families for abandoned children, 5) to implement residential care programs for abandoned children, 6) to implement respite care programs for families and foster families of children with acquired immune deficiency syndrome, and 7) to recruit and train health care and social services

all the problems of financing the high cost of caring for boarder babies. Instead, these projects are intended to create successful examples for the provision of non-hospital care so that other cities might replicate similar models.[11]

The Abandoned Infants Assistance Act became law on October 18, 1988. Section 104 of the Act appropriated $37 million in funds for the development of the demonstration projects. These funds were to be allocated from 1989 to 1991. The funds, however, were not distributed to the grantees until 1990.

In discussing the plight of abandoned infants with health care providers and social workers, I found that there were a number of changes that could be made to improve the Act. To explore the possibility of a broader legislative initiative to address the care and placement of "boarder babies," I arranged for a hearing of the Subcommittee on Select Education of the Education and Labor Committee which was convened at the United Hospital Medical Center in Newark, New Jersey on May 10, 1991.[12] The hearing was chaired by Congressman Major Owens (D-N.Y.). I believe that it is important to receive input from members of the community who work directly with abandoned infants and their families so that the subcommittee may base any new proposals on the first-hand experience of those closest to the problems. The Subcommittee heard testimony from nine persons who are intimately involved with the problems of AIDS and boarder babies.[13] A significant but unfortunate theme of the testimony at the hearing was that pregnant women with substance abuse problems often avoid treatment because they fear legal pun-

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personnel to work with families, foster families and residential care programs for abandoned infants and children. Section 101(a) requires that these demonstration projects focus attention on children with acquired immune deficiency syndrome.

[11] *See* H.R. REP. No. 821 at 2, *reprinted in* 1988 U.S.C.C.A.N 3194.

[12] *Field Hearing on the Abandoned Infants Assistance Act: Before the Subcomm. on Select Education of the House Comm. on Education and Labor*, 102d Cong., 1st Sess. (1991).

[13] The Subcommittee heard testimony from: Bernard Dickens, President, United Hospitals Medical Center, Newark, N.J.; Barbara Kern, Director, Special Child Health Services, Trenton, N.J.; Dr. Frances J. Dunston, Commissioner, New Jersey Department of Health, Trenton, N.J.; Dr. Susan Adubato, Program Director, Protestant Community Centers, Inc., Newark, N.J.; Pickens Moore, Specialized Foster Care Program, Leake and Watts Children's Home, Inc., Yonkers, New York; Dr. Terrence Pond Zealand, Executive Director, AIDS Resource Foundation for Children, Newark, N.J.; Mary G. Boland, Coordinator, Children's Hospital AIDS Program, Newark, N.J.; Joseph Altheimer, Executive Director, Institute for Families and Children, New York, New York; and Dorothy Knauer, Deputy Executive Director, Protestant Community Centers, Inc., Newark, N.J. *Id.* at III.

ishment for their addiction.[14]

There are a variety of approaches the states have taken to address the problem of drug-addicted pregnant women.[15] For example, some states have attempted to use criminal sanctions against these mothers,[16] others have used the courts to intervene to protect the fetus during the pregnancy[17] or after the pregnancy.[18] New Jersey is "strongly opposed" to adopting criminal sanctions against mothers who are addicted to drugs.[19] One of the recommendations

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[14] *Id.* at 13 (statement of Dr. Dunston).

[15] *See* Hon. George Bundy Smith & Hon. Gloria M. Darbiri, 2 SETON HALL CONST. L.J. 53 (1991). The authors surveyed three approaches taken by the states to address the problem of women who abuse drugs during their pregnancy: (1) criminal prosecution; (2) controlling a woman's behavior during the pregnancy to protect the fetus; and (3) intervention by child protection agencies immediately after the birth of the child.

In Johnson v. State, 578 So.2d 419 (Fla. App. 1991), a Florida appeals court upheld a conviction of a mother who took drugs during her pregnancy. The court, relied upon a Florida statute, FLA. STAT. ANN. § 893.13(1)(c)(1) (West Supp. 1991), which makes it unlawful for persons 18 years of age or older to deliver drugs to a minor, therefore convicting a woman who overdosed on crack cocaine one month before the birth of her second child. *Id.* at 421. In Michigan, a woman was charged under a similar statute. The appellate court, however, dismissed the charges because the state failed to show that the legislature intended the statute to apply to pregnant women. People v. Hardy, 469 N.W.2d 50, 53 (Mich. App.), *amended*, 471 N.W.2d 619 (Mich. 1991).

The courts have intervened to attempt to control a woman's behavior during her pregnancy. For example, a Washington, D.C. Superior Court judge ordered the imprisonment of a pregnant mother to protect the fetus. 2 SETON HALL CONST. L.J. at 81 (citing United States v. Vaughn, Crim. No. F2172-88B (D.C. Super. Ct. 1988)). In Ohio, a court ordered a woman not to use drugs during her pregnancy and required that she be periodically screened by a physician for use of drugs. Cox v. Court of Common Pleas, 537 N.E.2d 721, 723 (Ohio App. 1988). The appeals court reversed the order on the grounds that the ordering court did not have jurisdiction. *Id.* at 725.

Many states now intervene to protect the child after the pregnancy. *See* 2 SETON HALL CONST. L.J. at 83-84 n.142 for a list of federal and state statutes which give authority to states to take steps to protect the health and safety of children.

[16] *See supra* note 15.

[17] *See supra* note 15.

[18] *See supra* note 15.

[19] Dr. Francis Dunston, New Jersey Commissioner of Health commented:

> We are working to develop a casefinding, intervention and treatment process which will serve to arrest and repair the damage which results from addiction to chemicals for both mother and baby. We treat addiction services as a mainstream health care delivery issue incorporated in good prenatal care.
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> We need the same national leadership in the effort to provide health

at the Subcommittee hearing in Newark was that preventive measures be implemented so that the problems of drug abuse and abandonment could be addressed before an infant's birth.[20]

New Jersey has been successful in implementing its demonstration programs pursuant to the Act.[21] New Jersey's Health Commissioner reported that, of the first 400 pregnant addicted women treated, none went into preterm labor or had other medical complications common among substance-abusing mothers.[22]

On June 20, 1991, I introduced H.R. 2722, the Abandoned Infants Assistance Act Amendments of 1991.[23] In fashioning a new bill, I incorporated a number of recommendations that had been given to the Subcommittee by health care professionals and other interested persons. For example, H.R. 2722 included language changes to reflect developments in medical science since 1988. Section 101 of the Act used the term "acquired immune deficiency syndrome" (AIDS).[24] This provision was amended to replace AIDS with immunodeficiency virus (HIV) because a diagnosis for AIDS cannot accurately be made in very young children.[25] The Amendments also clarified that the population to be served by grant programs are children who have been infected with HIV[26] or have been

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> care for pregnant addicted women. Women need assurance that their medical records will not be used against them in a court of law. They need objective clinical assessment and drug and alcohol testing. If they are at risk of addiction, they need education and treatment to support recovery and non-use. This can be enforced without punishment. In every case of a pregnant addicted woman brought to our attention, the treatment alternative was a welcome one.

Hearing, *supra* note 2, at 17-18.

20 *Id.*

21 *See, e.g.*, Hearing, *supra* note 2, at 82. (Testimony of Dr. Susan Adubato, Project Director for the Protestant Community Center's Project B.A.B.I.E.S., which is one of 12 such demonstration projects in the country that is primarily funded by the Abandoned Assistance Act of 1988).

22 Hearing, *supra* note 2, at 13 (testimony of Dr. Francis J. Dunston, N.J. Commissioner of Health).

23 H.R. 2722, 102d Cong., 1st Sess. (1991). The Abandoned Infants Assistance Act of 1988 was also legislatively set to expire after September 30, 1991. Therefore, reauthorization for purposes of funding was necessary. Abandoned Infants Assistance Act of 1988 § 105, 42 U.S.C. § 670 note (1988).

24 *Id.* at § 101, 42 U.S.C. § 670 note.

25 Abandoned Infants Assistance Act Amendments § 3, 105 Stat. 1812. *See also* H.R. REP. No. 209(I), 102d Cong., 1st Sess., pt. 1, at 6, *reprinted in* 1991 U.S.C.C.A.N. 1468.

26 Abandoned Infants Assistant Act Amendments § 3(b)(1), 105 Stat. 1813.

prenatally exposed either to HIV or to a dangerous drug.[27]

During the hearings to consider amending the Act, it was evident that a critical factor, in maintaining family units, is the availability of conveniently located and "user friendly services."[28] Parents who rely on public transportation to obtain services often have difficulty when the services they need are located at widely scattered locations.[29] In addition, the splintering of services between multiple agencies often leads to further anxiety and frustration, which could cause families to discontinue treatment altogether.[30]

After the passage of the Act, a number of communities established model programs for the coordination of services in high risk neighborhoods.[31] Among the services offered were day care, parental support, and ombudsman services.[32] This integrated service

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27 *Id.* at § 3(b)(2), 105 Stat. 1813.

28 Hearing, *supra* note 2, at 84-85. (Testimony of Dr. Adubato). *See also* H.R. REP. No. 209(I), 102d Cong., 1st Sess., pt.1, at 7, *reprinted in* 1991 U.S.C.C.A.N. 1468.

29 Dr. Adubato recounted the difficulty a mother in this situation has faced when trying to visit her son:

> [Ms. D] began our program [by] coming daily to see her 3 month old son, who resides in our home. Suddenly, she stopped visiting. Staff thought it might be resistance to the demands of our program. A home visit yielded our answer . . . [S]he was baby sitting her 16 month old daughter, who was supposedly in the custody of her ex-husband . . . [who left the little girl] with Ms. D., but collect[ed] the public assistance for her [without] sharing it with Ms. D. Ms. D had no money to use for childcare services, no money for busfare, no one [with whom] to leave her little girl . . . [Ms. D. was too] embarrassed and frightened to tell us, thinking we would call child protective services, and they would take her daughter, as her ex-husband had told her they would. Outside observation saw a mother who did not care for her son. Reality showed a woman too frightened and overwhelmed . . . to find childcare help for her daughter, busfare to visit her son, a drug treatment program for herself, and a parent education class, which she was told she needed . . . to get her son back.

Id. at 85.

30 The committee report described this dilemma as aggravating

> an already stressful situation, costing time and money for travel, extra effort and patience, and causing other problems to surface, such as child care for siblings. All this means is that assistance is not sought or that follow ups are not pursued, with the resulting effect that family structure is continued to be threatened and potential for instances of abusive behavior are increased.

H.R. REP. No. 209(I) at 7, *reprinted in* 1991 U.S.C.C.A.N. 1468.

31 *See, e.g.*, Hearing, *supra* note 2, at 82 (Testimony of Dr. Adubato).

32 *Id.* at 86.

concept was one which the Committee on Education and Labor sought to expand when adopting the Amendments.[33] The Committee decided that this expansion program should encompass existing centers as well as new models with different mixes of client services.[34] For example, "the public entity may be able to arrange for the housing of such a center in a facility, or coordinated with a facility, already existing in a neighborhood, particularly where such programs are conducted in the evenings."[35]

The Amendments were offered to ensure necessary services to reunite children with their families when it is in the best interest of the child. The Amendments define a "natural family" broadly for the purposes of grant eligibility to include "natural parents, grandparents, family members, guardians, children residing in the household, and individuals residing in the household on a continuing basis who are in a care-giving situation with respect to infants and young children covered under this Act."[36]

In making grants, the Secretary of HHS is to consider programs with the most comprehensive services offered, as determined by need for services and as evidenced by the number of children and their families who are covered by the Act and Amendments.[37]

The funding made available by the Amendments includes $20 million for fiscal year 1992. The funding level will rise to $25 million in fiscal year 1993, $30 million in fiscal year 1994, and $35 million in fiscal year 1995.[38]

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33 H.R. REP. No. 209(I) at 7, *reprinted in* 1991 U.S.C.C.A.N. 1468.

34 The Abandoned Infants Assistance Act Amendments of 1991 § 3(b) provide:

> [1) The Secretary [of HHS] may make grants to public and nonprofit private entities for the purpose of developing, implementing, and operating projects to demonstrate methods—]
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> to prevent the abandonment of infants and young children, and to care for the infants and young children who have been abandoned, through model programs providing health, educational, and social services at a single site in a geographic area in which a significant number of infants and young children . . . reside (with special consideration given to applications from entities that will provide the services of the projects through community-based organizations).

35 H.R. REP. No. 209 at 7, *reprinted in* 1991 U.S.C.C.A.N. 1468-69.

36 P.L. No. 102-236, § 5, 105 Stat. 1812, 1815.

37 H.R. REP. No. 209(I) at 7, *reprinted in* 1991 U.S.C.C.A.N. 1468-69.

38 Abandoned Infants Assistance Act Amendments of 1991 § 6, 105 Stat. 1815.

III. Conclusion

I am hopeful that the changes Congress made to the Act during the reauthorization process will be an important step forward in addressing the plight of abandoned infants and their families. Since the enactment of the Act, there have been improvements in the lives of many children and families. However, the lessons learned from the past will help make the Amendments improve even more lives in the future.