

SHAME ON U.S.

Failings by All Three Branches of Our Federal Government
Leave Abused and Neglected Children Vulnerable to Further Harm



in collaboration with



Acknowledgements

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About the Children's Advocacy Institute

The **Children's Advocacy Institute** (CAI), founded in 1989 as part of the Center for Public Interest Law at the University of San Diego (USD) School of Law, is one of the nation's premiere academic, research, and advocacy organizations seeking to improve the lives of children and youth, with special emphasis on improving the child protection and foster care systems and enhancing resources that are available to youth aging out of foster care. Through its offices in San Diego, Sacramento, and Washington, D.C., CAI seeks to leverage change for children and youth through impact litigation, regulatory and legislative advocacy, and public education. Active at the local, state, and federal levels, CAI's efforts are multi-faceted — comprehensively and successfully embracing all tools of public interest advocacy to improve the lives of children and youth.

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About First Star

First Star was founded in 1999 as a national 501(c)(3) public charity dedicated to improving life for child victims of abuse and neglect. We fight for a future in which America's abused and neglected children will have won full recognition of their fundamental right to be heard and protected by the systems legally entrusted with their care. A future in which those systems are fully resourced, transparent and accountable to the public. First Star improves the lives of America's abused and neglected children by strengthening their rights, illuminating systemic failures and igniting necessary reforms. We pursue our mission through research, public engagement, policy advocacy, education and litigation.

First Star's Co-Founder and President, Peter Samuelson, is a media executive, president of www.aspirelab.org. He founded www.starlight.org, the children's charity in 1982, www.starbrightworld.org, the social network for ill children in 1995 and www.edar.org, serving the homeless in 2005. Sherry A. Quirk, Esq., Co- Founder and Vice Chair of First Star, is a partner of Schiff Hardin, LLP, and past president and founder of One Voice and the National Coalition of Abuse Awareness. First Star is proud to be a pro-bono client of Schiff Hardin, LLP.

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Preface

This study was triggered by growing evidence of the federal government's failure to protect our nation's most vulnerable children. Our work began with an October 2011 Freedom of Information Act request of the U.S. Department of Health and Human Services (HHS) for documents reflecting its performance in enforcing aspects of two important statutes upon which children rely for their safety: the Child Abuse Prevention and Treatment Act and the Adoption Assistance and Child Welfare Act. What we learned through the documents provided, those not provided, and those that do not exist — as well as our interviews and research over the last three years — is deeply disturbing.

We begin with a brief explanation of the problem: the generation currently in power is obsessed with adult groupings and adult rights; personal responsibility to children is not really on the table culturally or politically. But the problem is well beyond blinders to the future; it extends to the here and now, to the extraordinary incidence of child poverty — and to the abuse, molestation, and all too common neglect of millions of American children.

Notwithstanding the new trend to remove children from dangerous homes only in very extreme circumstances, more than 400,000 U.S. children live in foster care. Our Children's Advocacy Institute (CAI) has had a clinic in juvenile dependency court for 23 years, and First Star has been dedicated to improving life for child victims of abuse and neglect for the past 15 years. We understand that removal of children is properly a last resort. But too often, decisions to keep children in (or return vulnerable children to) their homes is occurring based on public financial cost. Moreover, the number in public care could be a fraction of current levels with a much needed cultural sea change about reproduction and adult obligations, as well as basic parenting education in our high schools.

Congress has enacted several child welfare statutes, including the two noted above. These and other major federal child welfare statutes give us a number of sensible federal floors that states must maintain in order to be eligible for federal child welfare funds. Most of these floors are commonly violated by states. Our knowledge of this fact is buttressed by national studies we have been undertaking for almost a decade into three of the areas of state violation. Our prior studies are not theoretical or subtle, for the violations are commonly brazen. In those reports, we described the applicable laws and rules in the states, compared them to the letter and spirit of the Congressional mandate, and graded the states from A to F. Most statutes at B— or below are in violation of federal law; those at C and below, grossly so. How can this happen on our watch?

In general, when states violate federal statutes, the executive branch monitors and detects such violations and takes action to ensure state compliance, especially where federal funding is contingent on such compliance. The executive branch has the effective hammer to compel compliance — the withholding of federal funds. It rarely has to actually deprive states of those funds in practice, because the political force of a cut-off for failure to perform is immense. In the area of child abuse and neglect, where billions of federal dollars are involved, HHS is responsible for assuring state compliance with federal child welfare laws. Here we detect a very different executive branch pattern — one that has continued across administrations. With regard to many areas where Congress has set minimal floors for state compliance, HHS is not monitoring, is not detecting violations, is not insisting that states meet the national floor — and is virtually never imposing sanctions or penalties for chronic noncompliance. The lack of enforcement breeds future contempt for the statutes themselves.

To be fair, there is at least one area where HHS does enforce states' compliance with federal child welfare laws — and that is ensuring that states do not claim federal reimbursement for children who do not meet title IV-E eligibility requirements. One such requirement is the so-called "look back" provision of federal law.

What is that? Brace yourselves. In 1996, Congress enacted a statute providing that no federal money would be used to support any child in foster care unless the parents from whom the child was removed had income below the poverty line as it existed in 1996. And over the last 18 years there has been no cost of living adjustment to that test, by the way — not even to just bring it up to the current poverty line. Needless to say, fewer and fewer children meet that test each year, and the federal government is effectively relieving itself of the obligation to reimburse cash-strapped states for even a portion of foster care maintenance expenses and related administrative costs. Of course, regardless of its precise level, any income-based test has nothing to do with the needs of the children removed due to abuse or neglect, or with the merits of providing federal assistance to the state for that child’s care and support. But this irrational remnant is, in fact, an element of the one area where HHS is engaged in enforcement of federal law. So a major area of effective monitoring and intervention happens to involve the saving of federal monies using at least one criterion that is arbitrary, irrational, and certainly unrelated to the protection of children or the prevention of their abuse.

With regard to the rest of the federal statutes, HHS routinely allows states to fall well below the minimum floors. Could this possibly be because foster children are just that — children, with no ability to self-advocate or organize to cry “foul”? Perhaps, but legally, foster kids are all our kids. We, through our democracy, have taken custody of them. They are ours at perhaps a level no other grouping can claim.

The callous hypocrisy of U.S. practices for abused children is not confined to the executive branch. The federal judicial branch has joined their abandoning brethren, and over the past decade has in various ways reversed prior precedents that allowed children access to the courts — from imposing new barriers to access based on standing and remedy, to choosing to abstain in favor of their state court colleagues (even where such abstention leaves plaintiffs with no practical remedy). This new trend of blockage of access to the courts by the judiciary underlines the gravity of the executive branch’s abandonment of child-centered law enforcement.

Circling back to the Congress, the legislative branch has similarly abandoned the nation’s abused and neglected children in many respects. It has not eliminated nor even adjusted the irrational “look back” provision discussed above. Nor has it responded to the judiciary’s retreat from its intended role as a third branch check to assure compliance with Congressional intent, and certainly with directly stated Congressional mandates; notwithstanding recent decisions abandoning any private remedy in an area of significant federal funding, it has done nothing to legislatively clarify that child welfare statutes do in fact include a private or other enforcement mechanism to assure compliance. Nor has Congress responded to the executive branch’s failure to properly implement and enforce the minimum floors of state compliance as set forth in statute after statute, or the executive branch’s blatant refusal to adopt regulations to implement many child welfare laws — even when the statutes expressly require it to do so.

This is one area where partisanship cannot rationally be at issue. As a nation, there can be no better test of “family values” than how we treat these abused and neglected children. Nor should the use of federalism to address state nonfeasance be a concern for either party. This is not interference with state discretion, it is “law and order” to make certain that billions in federal funds are expended effectively and as intended. Use of these children as pawns in the culture wars suggests a larger ethical decline.

These abused and neglected children are typically not discussed in the media as a group. Occasionally there will be coverage on specific tragic events such as the murder or horrific torture of a child — but even then the focus is rarely on the larger implications, or the factors that might have prevented the tragedy. A celebrity chef’s admitted use of a socially condemned term twenty years ago, the rantings of an 80-year-old sports owner billionaire, and even the nuptials of D-list celebrities evoke more public attention than the plight of America’s foster children. You were probably familiar with these three pop culture references, but did you know that every year, almost 2,000 American children are killed by abuse or neglect? That is more than 166 children each month whose lives are cut tragically short. Did you know countless more children suffer near fatal injuries each year due to abuse or neglect? That every day youth age out of foster care with basically no support system or safety net — with society expecting them to be self-sufficient at 18 (or even 21) when their

peers typically need (and get) a significant amount of support from their parents through age 26? These children are part of a concealed and faceless group — one that lacks voting power, campaign contribution leverage or lobbying presence. They are just kids — yours and ours. Almost everything that happens to these children is cloaked in endemic secrecy, and most efforts by the media and advocates to provide the public with much needed transparency — which leads to accountability — are thwarted by the very governmental entities and officials who have turned their backs on their official duties to children.

Our culture and much of our media — just like all three branches of our federal government — have failed these children. By allowing that to happen, each of us has failed them as well. They deserve so much more. Until these children are no longer neglected by all of us responsible for their safety and their fate, **Shame on U.S.**



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Executive Summary

I. Introduction

The Scope and Impact of Abuse and Neglect on the Child Victims. During 2012, at least 686,000 American children were the victims of abuse or neglect.^a A conservative estimate of the number of those children who were killed that year by abuse or neglect is 1,640^b — meaning that **abuse or neglect leads to the death of at least 4–5 children every day in the U.S.** Sadly, the real numbers of both child abuse/neglect victims and fatalities are much higher, due in part to unreported abuse.^c

During 2012, 252,000 abused or neglected children entered into the foster care system.^d In order to serve those children, state courts became their legal parents, assuming the authority to determine where they should live, where they will attend school, who they may see, and countless other details of their lives. This extraordinary governmental intervention into family affairs is intended not to punish parents or other caretakers — but to protect children from abuse and neglect, and to temper negative consequences.

The foster care system skews the childhood experience for these children. Foster youth miss the rites of passage experienced by their peers, lack control over even minor aspects of their lives, and are provided little opportunity to attain independence and self-sufficiency on the same timeframe as their peers. Most foster youth do not have a strong familial support system to guide or help them through the difficulties that young adults face as they set out on their own. These youth miss out on the guidance and support (financial and emotional) that most families provide to their young adult children. And what is most regrettable in this litany of despair is that many foster youth suffer additional abuse and neglect while in the very system that was supposed to protect them.

Societal Costs of Abuse and Neglect. The societal costs of abuse and neglect include direct costs such as hospitalization, chronic health and mental health problems, the child welfare system itself, law enforcement, and judicial expenses, as well as indirect costs associated with early intervention, homelessness, transitional housing, special education, health care, juvenile delinquency, lost work productivity, and adult criminality. In one recent study, the total annual cost of child abuse and neglect for just one year was estimated to be over \$80 billion.^e

Scope and Purpose of this Report. This study looks at how the federal government enacts, monitors, interprets, funds, and/or enforces federal child welfare laws to ensure that states are appropriately protecting children from abuse and neglect, complying with minimum federal child welfare requirements and outcomes, and providing foster youth with a path to adulthood.

Each branch of our federal government plays an integral role in the child welfare system, and when even one fails to perform its role in an appropriate manner, children are put at risk of harm. Because all three branches must be

^a U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2012* (2013) at 19 (available at <http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf>) (hereinafter *Child Maltreatment 2012*).

^b *Child Maltreatment 2012*, *supra* note 1, at 51.

^c U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, Office on Child Abuse and Neglect, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice* (Washington, D.C.; 2003) at 71 (“[n]umerous professionals admit that during their careers, they have failed to report suspected maltreatment to the appropriate agencies”) (available at www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf).

^d U.S. Department of Health & Human Services, Administration for Children, Youth and Families, U.S. Children's Bureau, *Trends in Foster Care and Adoption—FFY 2002-FFY 2012* (based on data submitted by states as of November 1, 2013) (available at http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf).

^e Gelles, Richard J., & Perlman, Staci, *Estimated Annual Cost of Child Abuse and Neglect*, Chicago IL: Prevent Child Abuse America (2012) at 3 (available at [https://www.preventchildabusenc.org/assets/preventchildabusenc/files/Scms\\$100/1299.pdf](https://www.preventchildabusenc.org/assets/preventchildabusenc/files/Scms$100/1299.pdf)) (hereinafter *Estimated Annual Cost of Child Abuse and Neglect*).

performing optimally to ensure a well-functioning child welfare system, this report discusses the performance of each branch in this arena. Specifically, the report:

- ✓ provides an overview of the scope and purpose of major child welfare laws as enacted by Congress, and to what extent current laws meet the needs of children;
- ✓ examines how the judicial branch has interpreted those laws;
- ✓ discusses to what extent the executive branch implements and enforces those laws;
- ✓ comments on the potential efficacy of each branch's scope and reach;
- ✓ provides examples of shortcomings in all three branches with regard to their respective roles *vis-à-vis* the child welfare system;
- ✓ discusses issues where the purpose or intent of child welfare laws are being openly violated by some states; and
- ✓ calls for more robust activity from all three branches — and particularly enforcement by the executive branch charged with enforcing Congressional intent and, when necessary, withholding federal funding or imposing penalties where states are clearly not meeting minimum standards.

II. The Legislative Branch

Federal Child Welfare Laws and Minimum Federal Statutory Requirements. The U.S. Congress has enacted many laws over the past forty years to protect children from maltreatment and to provide support, resources, and assistance to those who have been abused or neglected. Such programs set minimum requirements and authorize funding for states that meet or exceed stated minimum expectations. These federal child welfare programs include the Social Security Act's Foster Care program (Title IV-E) and Child Welfare Services program (Title IV-B), and the Child Abuse Prevention and Treatment Act (CAPTA), among others.

These and dozens of other programs and laws have been patched together over the last forty years to serve as the basis of our country's child welfare system. It is an anemic and dysfunctional system in need of a major overhaul — but at the moment it is all we have to protect our children from abuse and neglect.

Unfortunately, congressional intent is being frustrated by the other two branches of government in several respects — and responsive actions by the legislative branch are necessary to assure actualization of that national intent, but they have not been forthcoming. For example, apparently Congress must expressly mandate that the executive branch *actively* engage in monitoring and enforcing state compliance with all federal child welfare laws. And it must provide the executive branch with express authority to impose sanctions, withhold funds, and take other punitive actions where state noncompliance is discovered. Similarly, Congress must expressly direct the executive branch to engage in formal regulatory activity to implement and interpret federal child welfare laws through the adoption of binding federal regulations — not simply send memos or adopt policy manual provisions which states are free to ignore without consequence. Additionally, Congress must provide for statutorily-mandated sanctions that will befall the executive branch itself for failing to engage in appropriate oversight, enforcement, and rulemaking, and/or expressly provide a private right of action to bring litigation against the executive branch for failing to engage in regulatory activity as directed by Congress. And Congress must clarify — both generally and expressly within each and every child welfare statute — that there is in fact a private right of action to compel compliance and satisfy congressional intent of these very important provisions; this is a critical step to take to ensure that there is some available recourse for these children to seek justice.

The Congress must review and adjust its laws to the realities facing these children and the optimum federal rule. For example, the Congress has irresponsibly created what is called a “look back” provision that cancels all federal contribution for foster care for any child coming from a family with income above the 1996 federal poverty line. Certainly parents with resources are properly assessed the costs imposed on others due to unfit parenting. But the level and theory behind the look back are now unconnected to any logical rationale and it is leading to the irrational and unconscionable federal abandonment of these children. Its continuation is an affront to our basic ethical obligations.

In addition to addressing those issues, Congress must engage in meaningful child welfare financing reform and fund all child welfare programs appropriately in order to ensure a robust and effective child welfare system.

III. The Executive Branch

The authority and responsibility to implement and enforce federal child welfare laws and programs rests with the executive branch—and specifically with the U.S. Department of Health and Human Services (HHS), through its

Administration for Children and Families (ACF), Administration on Children, Youth and Families (ACYF), and Children's Bureau. Particular actions — and inactions — of the Social Security Administration (SSA) also impact the health and well-being of children and youth during and after foster care.

HHS' Monitoring, Implementation and Enforcement Activities. Responsible for implementing and enforcing an extremely varied and complex array of child welfare laws, HHS has no easy task before it. It must ensure that states meet and maintain eligibility requirements specific to several diverse programs — not only to ensure that states are entitled to billions of dollars of federal child welfare money, but also to ensure that states are adequately protecting children from abuse and neglect consistent with congressional intent. While the scope and importance of HHS' responsibilities and duties are significant, so are the consequences that children suffer when our child welfare system fails to protect them. In order to ensure that states comply with federal law and achieve positive outcomes for children and families using the billions of dollars of federal tax money doled out annually, HHS has created a few monitoring tools — some of which, at least in theory, also encompass enforcement. The Agency's two main tools for monitoring such compliance are its Child and Family Services Reviews (CFSR) and Title IV-E Foster Care Eligibility Reviews (IV-E Eligibility Reviews).

Federal law currently requires HHS to review state child and family service programs to determine if they are in “substantial conformity” with (1) the state plan requirements set forth in titles IV-B and IV-E of the Social Security Act, (2) regulations promulgated by the HHS Secretary, and (3) the relevant approved state plans.^f To carry out this mandate, HHS conducts CFSRs, periodic reviews of state child welfare systems, to assess state conformity with certain federal requirements for child protection, foster care, adoption, family preservation and family support, and independent living services. Federal law directs HHS to withhold federal matching funds if a state's program fails to substantially conform to federal law and the approved state plan.^g However, HHS must first afford the state an opportunity to adopt and implement a “corrective action plan” (referred to as the Program Improvement Plan, or PIP) to so conform; make technical assistance available to the state to enable it to develop and implement such a corrective action plan; to suspend funds withholding while such a corrective action plan is in effect; and to rescind any withholding if the corrective action plan is completed.^h

In gauging whether a state has successfully implemented a PIP, HHS does not hold states to the same original thresholds it uses during the CFSR process. According to HHS, “ACF and the State may negotiate a level of improvement in the PIP that results in performance less than the applicable standards required for substantial conformity.”ⁱ Thus, HHS may find that a state successfully completed a PIP and rescind a state's penalty, even if that state's performance still fails to substantially conform to the original standard baseline federal requirements. In other words, a state could fail to conform to federal child welfare laws in every single CFSR it undergoes—and yet never be subject to any withholding of federal funds or any other inducement to obey federal law.^j

HHS states that the first goal of the CFSR process is “ensure conformity with federal child welfare requirements.”^k However, after two full rounds (and more than thirteen years), the CFSR process has failed to ensure that even a single state is in full conformity with federal child welfare requirements, even with regard to the limited aspects of federal child welfare law that the CFSR review process encompasses — let alone with the plethora of federal child welfare requirements that the CFSR process omits altogether.

The IV-E Eligibility Reviews focus on determining whether children in foster care meet federal eligibility requirements for IV-E foster care maintenance payments.^l The review team, which is comprised of federal and state representatives, examines sample cases to determine federal eligibility requirements were met.^m A payment disallowance is imposed for all cases that fail to meet such requirements. If a state fails in more than a specific percentage of cases, it is considered not in substantial compliance with the federal foster care program requirements. States that do not achieve substantial compliance will develop and implement PIPs, after which a secondary review is conducted. After the

^f 42 USCS § 1320a-2a.

^g 42 U.S.C. § 1320a-2a(b)(2).

^h 42 U.S.C. § 1320a-2a(b)(4).

ⁱ Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 13 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

^j See 45 C.F.R. 1355.35; 45 C.F.R. 1355.36.

^k HHS, Children's Bureau, *Child and Family Services Reviews* (available at <http://www.acf.hhs.gov/programs/cb/monitoring/child-family-services-reviews>).

^l HHS Children's Bureau, *Children's Bureau Program Assessment for Child and Family Services Reviews and Title IV-E Foster Care Eligibility Reviews* (available at <http://www.acf.hhs.gov/programs/cb/resource/cfsr-title-iv-e-fact-sheet>).

^m HHS Children's Bureau, *Children's Bureau Program Assessment for Child and Family Services Reviews and Title IV-E Foster Care Eligibility Reviews* (available at <http://www.acf.hhs.gov/programs/cb/resource/cfsr-title-iv-e-fact-sheet>).

secondary review, if the state is still not in substantial compliance, a larger disallowance is assessed on the basis of the state's total foster care population during the period under review.¹¹

One serious failing of the IV-E eligibility review process is attributable to Congress, not HHS. One of the eligibility criteria, as authorized by Congress, continues to tie federal foster care maintenance payment eligibility to whether a child could have met the AFDC eligibility requirements of 1996, with no indexing for inflation. By continuing this so-called “look back” provision, discussed above, Congress is slowly but surely relieving the federal government of financial responsibility for foster care maintenance payments, since the percentage of children capable of meeting the 1996 eligibility rules diminishes each year — it dropped from 55% in 1998 to 44% in 2010, and is no doubt even lower in 2014.¹²

The primary fault by HHS in overseeing compliance in this area is the narrow scope of “eligibility requirements” that it considers when conducting these reviews. Although HHS claims that it conducts these reviews to determine whether federal funds are spent “in accordance with federal statute, regulation, and policy,”¹³ it chooses not to use the IV-E eligibility review process to determine whether agencies are in compliance with the broad scope of federal statutes, regulations and policies that also must be complied with in order for a state to be eligible for federal reimbursement. For example, HHS could utilize this process to ensure that IV-E agencies are in conformity with the federal requirement that foster care maintenance payments are adequate to “cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.”¹⁴ In other words, while HHS could use this review process to determine if states are doing everything they are mandated to do in order to be eligible for federal child welfare funding, it chooses not to do so.

Other HHS Monitoring Tools. HHS acknowledges that the CFSR process does not constitute an exhaustive analysis of states’ conformity with all state plan requirements set forth in federal child welfare law.¹⁵ Thus, HHS is supposed to use the “partial review” process “to determine conformity with State Plan requirements outside the scope of the child and family services reviews.”¹⁶ Little information is available on HHS’ website about the use of the partial review process in the realm of child welfare. The underutilization of the partial review is of particular concern due to the many aspects of federal child welfare law that are not addressed through either the CFSR or IV-E eligibility reviews.

Another way that HHS may enforce state compliance with federal child welfare laws is through the review, approval and oversight of state plans, such as the Child and Family Services Plan. In order for a state to be eligible for funding through certain federal programs, it must submit a state plan to the HHS Secretary explaining how the state will comply with applicable federal requirements. If these plans do not comply with the relevant statutory provisions, the HHS Secretary is not authorized to approve it. And if the Secretary finds that a state plan that had been approved no longer complies with the relevant provisions, or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, federal law mandates the Secretary to inform the state that further payments will not be made to the state, or that payments will be reduced as the Secretary deems appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and “until he is so satisfied he *shall* make no further payments to the State, or *shall* reduce such payments by the amount specified in his notification to the State.”¹⁷ Congress clearly envisioned that HHS would use its state plan review, approval and oversight authority to ensure state compliance with federal child welfare laws. The responsibility given to HHS by Congress goes far beyond reviewing and approving paperwork on a regular basis — it entails active, independent oversight with regard to how states are implementing the provisions contained in their state plans, as well as the imposition of fair but serious consequences where states are not in compliance with federal law. Unfortunately, however, much of the Agency’s oversight with regard to state plans allows state self-certification that their state plans and programs adhere to federal requirements.

¹¹ HHS Children’s Bureau, *Children’s Bureau Program Assessment for Child and Family Services Reviews and Title IV-E Foster Care Eligibility Reviews* (available at <http://www.acf.hhs.gov/programs/cb/resource/cfsr-title-iv-e-fact-sheet>).

¹² Christina James Brown, CWLA, *Look Back Anniversary Is a Time to Call for New Direction*, Huffington Post (July 19, 2012) (available at http://www.huffingtonpost.com/christine-jamesbrown/look-back-anniversary-is-b_1676640.html). See section II.B.3, *supra*, for more discussion.

¹³ HHS Children’s Bureau, *Title IV-E Foster Care Eligibility Review Guide* (Dec. 2012) at 4 (available at http://www.acf.hhs.gov/sites/default/files/cb/title_iv_e_review_guide.pdf).

¹⁴ 42 U.S.C. § 675(4)(A).

¹⁵ See, e.g., HHS, Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 1 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

¹⁶ Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 1 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

¹⁷ See, e.g., 42 U.S.C. 671(b) (emphasis added).

Congress also directed HHS to collect various types of data from the states to better inform the public and policymakers about the workings and efficacy of the child welfare and foster care systems. In 1986, Congress directed HHS to devise a system for the collection of data relating to adoption and foster care, and directed that the system be fully implemented by October 1, 1991.^u In 1994, the HHS Secretary adopted regulations to implement this mandate, creating the Adoption and Foster Care Analysis and Reporting System (AFCARS) Assessment Review process “to assure the accuracy and reliability of the foster care and adoption data.”^v During these reviews, a federal review team assesses the efficiency and effectiveness of states’ data collection, extraction, and reporting processes, and provides technical assistance to state staff responsible for those processes.^w AFCARS collects case level information on all children in foster care for whom state and Tribal title IV-E agencies have responsibility for placement, care or supervision and on children who are adopted under the auspices of the state and Tribal title IV-E agency. Because many critical processes rely on the information generated by AFCARS, it is imperative that states provide reliable, consistent, and complete data as required by federal law. And when the Secretary finds that a state is not in substantial compliance with AFCARS data reporting responsibilities, federal law requires the Secretary to notify the state of the failure and that specified payments to the state will be reduced if the state fails to submit the data, as so required, within six months after the date the data was originally due to be so submitted.^x Yet this does not play out in reality. There is no meaningful oversight and the states know it.

States were required to report the first AFCARS data to ACF for FY 1995. However, it was not until FY 1998 — when ACF implemented AFCARS financial penalties for states not submitting data or submitting data of poor quality — that the data became stable enough for ACF and others to use for a wide variety of purposes.^y But after several states appealed their AFCARS penalties, ACF declared in 2002 that it “will not assess penalties for States determined not to be in substantial compliance with the AFCARS standards.”^z Following that pronouncement, Congress enacted the Adoption Promotion Act of 2003, in which it expressly stated that if the Secretary finds that the state has failed to submit the data, as so required, by the end of a six-month period, he/she is *mandated* to reduce the amounts otherwise payable to the state until the Secretary finds that the State has submitted the data, as so required, by specified amounts.^{aa} However, in 2004 ACF declared that it “is not assessing AFCARS penalties at this time...and will not take penalties until new, final AFCARS regulations are issued implementing...the Adoption Promotion Act of 2003”^{bb} — **which, as of September 2014, HHS still has not yet done.**^{cc} Thus, for the past decade, ACF has openly flouted a direct and express Congressional mandate. And by refusing to impose financial penalties on states that fail to comply with federal data reporting requirements, ACF has ignored one of the most incentivizing tools it has to ensure states’ submission of reliable, consistent, and complete data — information that could have meaningfully contributed to the improvement of the adoption and foster care processes.

HHS Failure to Properly Interpret and/or Implement Federal Child Welfare Laws. Generally, Congress sets broad guidelines to allow states the flexibility to appropriately structure their own programs that best serve their particularly unique demographic. In turn, it is the duty of HHS to craft regulations, rules, and guidance that provide states with clear and unambiguous parameters for those programs and which are consistent with legislative intent. When HHS is silent on the regulatory front, states may be legitimately confused about their obligations, may knowingly take advantage of the lack of specific guidance to do as little as possible in return for federal funding, or may, in the worst cases, use legislative ambiguity and regulatory omissions to contravene what the money is intended for. Each of these scenarios is harmful to children and illustrates the need for HHS to establish clear, minimum levels of performance, where appropriate, via the regulatory process. This Report illustrates several instances where HHS has been derelict in its duty to interpret or implement child welfare laws via formal rulemaking.

^u 42 U.S.C. § 679.

^v HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf).

^w HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf).

^x 42 U.S.C. § 674(f)(1).

^y ACF, Notice of Proposed Rulemaking, Docket # ACF-2007-0125-0 (Jan. 11, 2008) (available at <http://www.regulations.gov/#!documentsDetail;D=ACF-2007-0125-0001>).

^z HHS, Administration for Children and Families, *Informational Memorandum ACYF-CB-IM-02-03* (April 8, 2002) (available at <http://www.acf.hhs.gov/programs/cb/resource/im0203>).

^{aa} 42 U.S.C. § 674(f)(2).

^{bb} HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf) at 1, fn. 2.

^{cc} For more information on HHS’ resistance to adopting implementing regulations for federal child welfare programs, see section III.B., *infra*.

Social Security Administration (SSA) and Foster Youth. A variety of policy and practices of SSA detrimentally impact the welfare of transition age foster youth by impeding their path to self-sufficiency and financial independence. For example, when selecting a representative payee for eligible beneficiaries in foster care, SSA is supposed to use its payee preference list as an aid to identify and develop potential payees who would best serve the interests of the child; on those lists, foster care agencies are ranked last in order of preference. However, across the country, state child welfare agencies serve as the representative payees for thousands of foster children in their custody. SSA appears to appoint states to so serve with little to no effort to locate a more appropriate representative. And most of those agencies **routinely and automatically** divert foster children’s SSA proceeds to pay for the cost of foster care—without first determining the best use of the funds for each particular beneficiary (as a representative payee is legally obligated to do). It is difficult to understand how it is in a child’s best interests to use that child’s own money to reimburse the state for services that the child is under no obligation to pay for in the first place.

IV. The Judicial Branch

When HHS fails to adequately—or even minimally—monitor state and local child welfare agencies for compliance with federal law, private litigation becomes the only available means to pursue justice and bring states into compliance with federal requirements for services to abused and neglected children. Advocates for foster children and their caretakers have sought relief numerous times from the federal court system. Some of these cases have resulted in judgments for the plaintiffs while most have been resolved through settlement processes and eventual consent decrees—often after initial attempts at dismissal have failed in court.^{dd} However, the risks, disadvantages and limitations of litigation are well known to anyone who has been involved in a lawsuit—and they are not ameliorated in child welfare litigation. Child advocacy organizations bringing such lawsuits commonly operate on shoestring budgets, leading plaintiffs to pursue every other option before deciding to escalate their efforts into the “major, multi-year commitment of [an] organization’s time and resources”^{ee} for litigation.

The disadvantages faced in child welfare reform litigation include a lack of access to the judiciary, remedy and standing barriers that often preclude court redress by the victims, practical difficulties in finding factually compelling petitioners who are able and willing to stay the course for an extended period of litigation, high costs, delays, and a final product of court orders that are often limited in scope and time. In spite of the numerous limitations involved in resorting to the judicial branch for relief when states violate federal child welfare laws, HHS’ failure to adequately monitor and/or enforce those laws has compelled private parties to file numerous lawsuits over the past few decades—litigation seeking to compel state compliance with federal child welfare laws.

Over 100 such lawsuits have been filed by advocates over the last few decades against states and counties for failure to comply with these particular elements of federal law affecting children in foster care.^{ff} Many of the private lawsuits address similar state deficiencies, such as the failure to ensure that social workers have manageable caseloads and receive adequate training and supervision; timely investigate and address reported abuse and neglect incidents (both within natural families and within foster care placements); properly license and train foster parents; place children in adequate and safe foster family and group homes; ensure adequate parent-child or sibling visitation; provide children and families with adequate case planning and review; and provide needed medical, dental and mental health services to foster children.^{gg}

The record of private court enforcement necessarily reflects the extremely limited resources of the child advocacy organizations undertaking them, and the barriers that those bringing a federal court case must surmount. And where brought, those cases are limited in their reach, often covering a widespread violation in only a small state or one of several counties. Further, recent appellate court decisions effectively bar the courts from entertaining cases and preclude any appeal or writ that might reach the U.S. Supreme Court for the large-scale resolution needed. Indeed, the federal courts have, to a large extent and increasingly, have walked away from any role as a check on state compliance with the

^{dd} E.g., Child Welfare League of America, *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005* (2005) (available at <http://thehill.com/images/stories/whitepapers/pdf/consentdecrees.pdf>).

^{ee} Marcia Robinson Lowry, *A Powerful Route to Reform or When to Pull the Trigger: The Decision to Litigate*, For the Welfare of Children: Lessons Learned from Class Action Litigation, Center for the Study of Social Policy (Jan. 2012) at 2 (hereinafter *The Decision to Litigate*).

^{ff} Comparing lists of cases included on the National Center for Youth Law Foster Care Reform Docket (http://www.youthlaw.org/publications/fc_docket/alpha/?&type=98), the website of Children’s Rights listing the class actions in which it has been counsel (<http://www.childrensrights.org/reform-campaigns/legal-cases/>), in *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005*, Child Welfare League of America and the American Bar Association (Oct. 2005), two cases filed by Children’s Advocacy Institute (CAI) (*California State Foster Parent Association, et al. v. Wagner* and *E.T. v. Cantil-Sakauye*), and four other cases (two in California, one in Missouri and one in Indiana) regarding foster care reimbursement rates for group homes and foster family agency homes, CAI is aware of 111 unique cases that have been filed since 1977. There are likely even more, as the Child Welfare League of America report discusses 18 cases not listed by the National Center for Youth Law, Children’s Rights’ website reflects two cases not listed by CWLA and CAI knows of four cases not listed by NCYL.

^{gg} Child Welfare League of America and the American Bar Association, *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005* (October 2005) at 5.

Constitution or federal law applicable to these children. Cases over the last decade have contradicted longstanding precedents that traditionally allow those intended to benefit from mandatory federal rights to have standing and implicit remedy to secure compliance through the courts.

V. Examples of Child Welfare Law Requirements Meriting Federal Oversight and Enforcement

The accumulated body of private child welfare litigation provides the executive branch with relative “gimmees” with regard to areas of the law where it needs to step up enforcement. Each produces either dispositive judicial findings of violation or a consent decree concession by the respondent state. It is relatively easy to take a specific finding or concession and then apply it to the neighboring counties and states that similarly underperform. Such an extension of specific standards is relatively easy, is unlikely to produce meritorious defenses, and enhances consistent application of the law — itself a hallmark of justice. After all, should a youth in foster care be protected merely because of the jurisdiction in which he or she lives?

Regrettably, this low-hanging fruit does not consistently exhaust all of the important areas where states are failing to comply with minimum federal requirements. There are major areas of non-compliance that have not brought private litigation at all, either because of the practical difficulties or the continuing contraction of federal court jurisdiction. These include areas where the only effective enforcement mechanism is the executive branch. Several particular examples where states’ violations of federal child welfare law have been well documented include (a) states’ refusal to provide public disclosure of findings and information regarding child abuse or neglect fatalities and near fatalities; (b) the failure of many states to provide *guardians ad litem* (GALs) (let alone independent counsel) for abused and neglected children in dependency court proceedings, and (c) federal and state policies and practices that result in actual takings from the meager assets of abused and neglected children and detrimentally impact the outcomes of youth after leaving care.

VI. The *Status Quo* is Hurting Our Children

Combine weak, inconsistent, underfunded, and piecemeal laws from the legislative branch with ineffective executive branch implementation, oversight, and enforcement, and add a judicial branch that seems increasingly willing to reject private efforts to protect children’s rights and interests, and you have the U.S. child welfare system. How this plays out in the states for our children is a national disgrace. A sampling of recent headlines from across the country reveals how children are faring under the current child welfare system:^{hh}

California: *Los Angeles’ Child Abuse Reporting System Underfunded & Underutilized* (Chronicle of Social Change, February 23, 2014)ⁱⁱ — Better information sharing between law enforcement and child welfare topped a list of recommendations made to Los Angeles’ Board of Supervisors by a blue ribbon commission created to reform the county’s child protective services; *Los Angeles County Department of Children and Family Services kept foster kids’ money, audit says* (Los Angeles Daily News, May 01, 2014) — The county Department of Children and Family Services failed to provide about \$1.8 million in child support and other payments owed to foster kids after they reached adulthood and left the system, according to a new audit released Thursday;^{jj} *Child welfare records in 3-year-old’s death still secret* (KTVU, February 05, 2014) — Napa County Child Welfare officials say a juvenile court judge denied their request to release more information about previous contact with Kayleigh Slusher before the child was found dead on Feb. 1.^{kk}

Georgia: *DFCS facing \$1 million lawsuit after teen starves to death* (WSBTV, June 16, 2014)^{ll} — In an affidavit, a veteran social worker hired by the plaintiff listed several red flags and missteps by DFCS which in her opinion “constitutes negligence,” and “a proper DFCS investigation is likely to have prevented Markea Berry’s death by starvation.”

Illinois: *2 Investigators: Clerical Error Keeps Sisters Stuck In Abusive Foster Care For Years* (CBS Chicago, March 10, 2014)^{mmm} — Their aunt, Stephanie Crockett-McLean, says she quickly learned about their situation but couldn’t get them out of the foster-care system because of a clerical error. She hired lawyers and fought DCFS for six years, all the way to the Illinois Supreme Court, to get custody.

^{hh} All of these headlines and article summaries were featured in recent issues of *Child Welfare in the News*, an email service of the Child Welfare Information Gateway Library.

ⁱⁱ See <https://chronicleofsocialchange.org/news/los-angeles-award-winning-child-abuse-reporting-system-underfunded-underutilized/5341>.

^{jj} See <http://www.dailybulletin.com/social-affairs/20140501/los-angeles-county-department-of-children-and-family-services-kept-foster-kids-money-audit-says>.

^{kk} See <http://www.ktvu.com/news/news/crime-law/child-welfare-records-3-year-olds-death-still-secr/ndfKC/>.

^{ll} See <http://www.wsbtv.com/news/news/local/dfcs-facing-1-million-lawsuit-after-teen-starves-d/ngMNO/>.

^{mmm} See <http://chicago.cbslocal.com/2014/03/10/2-investigators-sisters-were-stuck-in-abusive-foster-care-for-years-family-claims/>.

Massachusetts: *‘Disturbing’ practice saw DCF select offices to be inspected* (Boston Herald, March 9, 2014)ⁿⁿ — The embattled state child welfare agency skirted state oversight for decades by directing investigators to hand-picked DCF offices, court documents show, in a maneuver one fed-up lawmaker called “disturbing.”

North Carolina: *Lawmaker outraged at DSS, examines policy* (Elkin Tribune, February 20, 2014)^{oo} — A state lawmaker expressed outrage after learning of a report that minors, already victims of a sexual abuse case in Wilkes County, were allegedly subjected to additional sexual abuse in Yadkin County, after being placed by social workers in the home of a convicted child abuser.

South Carolina: *Leaked DSS documents show noncompliance, confusion* (Free Times, March 5, 2014)^{pp} — Internal documents from the South Carolina Department of Social Services obtained by Free Times show the agency’s Child Protective Services division to be consistently in violation of laws meant to shield children from neglect and abuse and staffed by workers with little understanding of important agency policies and practices.

Virginia: *New Richmond DSS head asks auditor to investigate department* (WTVR, February 20, 2014)^{qq} — David Hicks asked Richmond City Auditor Umesh Dalal to conduct an audit of the Administration and Finance, Economic Support and Independence, and the Comprehensive Services Act. Specifically, Hicks asked Dalal to look into DSS’s finances, the efficiency and effectiveness of programs, and the agency’s compliance with federal, state and local laws and regulations.

VII. Findings and Recommendations

Findings. Much of the discussion in this Report echoes the findings contained in a report issued by the HHS’ Office of Inspector General (OIG) on what it perceived to be shortcomings of ACF’s review process and its performance in enforcing child welfare laws. The OIG report concluded that “[f]ederal oversight has not recently prompted States to improve and address new and complex problems in child welfare” and that “[s]everal State officials mentioned that they had a hard time convincing their legislatures of the need for a change without Federal dollars being at risk.”^{rr} The report also mentioned that ACF had repeatedly failed to detect and act on state child welfare failures which had been the subject of federal adjudication,^{ss} implying that the agency’s failure to appropriately monitor and enforce state compliance with federal child welfare laws left federal courts with the task of addressing claims stemming from these violations, which in many cases resulted in settlements or judgments against states.^{tt}

The most remarkable aspect of this particular OIG report is not its factual findings or recommendations *per se* but rather the realization that **the report was published in June 1994**. Twenty years later, we have reached the same conclusions. Regrettably, however, the situation is worse today in that federal courts have turned their backs on private attempts to enforce federal child welfare law and Congress has shown little interest in advancing the law itself or addressing the failings of the other two branches.

HHS is substantially moribund in its enforcement of federal law and standards, allowing non-compliance to run rampant with little consequence for those who run afoul of the law. This failure is accentuated by three contextual factors: (1) HHS possesses perhaps determinative authority to drive state compliance — the ability to reduce federal monies where expended inconsistent with applicable federal law; (2) current enforcement is largely relegated to the meager offices of non-profit child advocacy groups, who themselves now face judicial barriers to securing compliance, as discussed above; and (3) child protection performance by the states is largely concealed from public accountability by its ubiquitous confidentiality status.

Federal statutes and funding intersect with many of these failures, and the executive branch charged with the task of monitoring this is increasingly the only possible guarantor of state compliance. America’s abused and neglected children do not have PACs, contribute nothing to campaigns, and are without direct organization or powerful lobbyists. They cannot vote. But they have a claim to priority and attention borne of their status as the legal children of state courts. In a democracy, they are all our children — not in just a rhetorical sense, *but as a matter of law*. We, the electorate, choose and pay their judicial parents and foster providers. How we perform in that role, one that we have assumed unto ourselves, is ultimately the real measure of our nation’s values.

ⁿⁿ See http://bostonherald.com/news_opinion/local_coverage/2014/03/disturbing_practice_saw_dcf_select_offices_to_be_inspected.

^{oo} See http://www.elkintribune.com/news/community-home_top-news/3091214/Lawmaker-outraged-at-DSS-examines-policy.

^{pp} See <http://www.free-times.com/news/leaked-dss-documents-show-noncompliance-confusion>.

^{qq} See <http://wtvr.com/2014/02/20/department-social-services-audit-request/>.

^{rr} Office of Inspector General, U.S. Dept. of Health and Human Services, *Oversight of State Child Welfare Programs*, OE1-01-92-00770, at 8 (June 1994) at 8–9.

^{ss} *Id.*

^{tt} *Id.*

The findings and recommendations of this Report are not intended as a contribution to any politically motivated ambition. Many child advocates are deeply frustrated and disappointed by the limited enforcement of federal law by today's HHS. But it is a failure that covers both Democratic and Republican administrations and reaches back more than three decades. It is not a reflection of any particular party's hypocrisy. Indeed, this is an area seemingly most amenable to bipartisanship. For the beneficiaries of the minimum requirements and of the federal funds here discussed appeals to the core values of both parties: These children were victimized and need the public's help, and they now have our state court judges as their legal parents. They are part of our family in more than an ethereal sense. But they suffer from an impotence that stretches across both parties and all three branches of government.

In order to change the *status quo*, all three branches of federal government must attach real consequences to noncompliance with federal child welfare laws, and directly target specific failed practices, so that state legislators will not only be prompted to act but will know more precisely what they must do and by when.

The nature of more defined standards buttressed by the withholding of federal funding presents child advocates with a serious dilemma. On one hand, the threat of denying states access to critical federal funds might significantly motivate lawmakers to adopt changes that will ultimately improve child welfare. On the other, following through with penalties may reduce the capacity of the states to fund the very services in dire need of improvement. Some stakeholders argue that, especially given the current financial crisis, withholding funds might punish the children who depend on those funds as much — or more — as it would urge states to comply. Nevertheless, it is plainly apparent that for decades, state legislatures and policymakers have been calling HHS's bluff on the threat of real enforcement and in a time of sweeping spending cutbacks, defending expanded federal funding of state child welfare programs may become more and more difficult when program supporters can cite limited measurable improvements. Moreover, it is clear from the record of funding deprivation threat in area after area outside of child welfare, that it decisively and consistently achieves compliance. And many small sums of federal matching funds have quickly driven compliance with everything from child care to child support collection. It is not employed in child welfare because of the political weakness of involved children, not on the merits.

Recommendations. Ensuring that this country has an efficient and effective child welfare system is the duty of all three branches of government. In order to provide for appropriate agency oversight and enforcement of clear and express legislative directives, with the opportunity to obtain judicial intervention when warranted, the following actions are recommended.

Legislative Branch

- LB-1. Congress must provide clear private remedies for children within *all* federal child welfare statutes.
- LB-2. Congress must repeal or revise current law to ensure that all foster children are treated equally, that states comply with all aspects of all child welfare laws or suffer real consequences, and that HHS plays an active and vigilant role in ensuring state compliance via monitoring and enforcement activities. Such amendments must include eliminating the look back provision that makes a child's eligibility for federal foster care funds dependent on whether the child's family would have qualified for AFDC in 1996; tying each state's receipt of any child welfare funding contingent on its substantial compliance with the requirements set forth in all child welfare laws; expressly mandating HHS to engage in enforcement and rulemaking activities with regard to all child welfare provisions, and imposing consequences on HHS for failing to follow through with such oversight and enforcement; and clarifying the statutory mandate that HHS impose financial penalties on states for non-compliance with child welfare laws.
- LB-3. Congress must fund child welfare programs at levels that ensure a robust and effective child welfare system, and it must enact comprehensive child welfare finance reform to address a wide range of problems — such as a complex mix of mandatory and discretionary funding that results in haphazard payments to states; the widely condemned arcane and nonsensical look back provision to determine Title IV eligibility; swaths of uncoordinated funding from disparate sources with inconsistent mandates; a host of unfunded mandates; and a dearth of accountability for the money spent on the part of the states.
- LB-4. Ideally, Congress would unify federal child welfare laws into a comprehensive and cohesive framework that ensures adequate incentives for state compliance. Congressional enactment of a comprehensive, cohesive body of child welfare law that provides clear direction to HHS, states, and child advocates is essential to resolving many of the problems discussed in this report.

- LB-5. In order to give states more incentive to comply with all child welfare laws, Congress must make states' receipt of *any* child welfare funding contingent on their substantial compliance with the requirements set forth in *all* child welfare laws.
- LB-6. Congress must expressly mandate HHS to *actively* engage in enforcement and rulemaking activities with regard to all child welfare provisions, and impose consequences on HHS for failing to follow through with such oversight and enforcement.
- LB-7. Congress must clarify and strengthen the statutory mandate that HHS impose financial penalties on states for non-compliance with child welfare laws and/or with the terms of approved state plans, requiring that such penalties be applied quickly, without loopholes or exceptions.
- LB-8. When statutorily mandating that HHS adopt regulations to implement child welfare laws, Congress must set a deadline for such adoption and provide a private enforcement mechanism in the event HHS does not meet the deadline.
- LB-9. Congress must establish a formal process for members of the public to request that HHS initiate a Partial Review regarding a specific area of suspected state non-conformity with federal child welfare standards. The process must set timelines for HHS response to such requests, and require that if HHS decides not to engage in a requested Partial Review, it must provide a written response to the requestor explaining the basis of its decision.
- LB-10. Congress must clarify and strengthen CAPTA's mandate requiring the public disclosure of information about child abuse and neglect fatalities and near fatalities and explicitly direct HHS to engage in active monitoring, regulatory and enforcement activities that ensure state compliance with congressional intent.
- LB-11. Congress must strengthen and clarify CAPTA's child representation mandate to require client-directed representation by appropriately trained and competent attorneys for all children at all stages of a dependency case, and to set maximum caseloads of child clients per attorney.
- LB-12. Congress must revise federal law to require the conservation of a fair and appropriate amount of a foster child's OASDI and/or SSI benefits for his/her use after leaving the foster care system, as long as the child's current maintenance, support, and special needs are being provided.
- LB-13. Congress must revise federal law to require SSA to notify a foster child's attorney and/or *guardian ad litem*, as well as to the child (if the child is over the age of 12) and the child's foster parent, if applicable, whenever a foster care agency applies to serve and/or is appointed to serve as representative payee for a foster child.
- LB-14. Congress must revise federal law to require that SSA, when in receipt of a foster care agency's application to serve as representative payee for a foster child, to document (1) what affirmative action SSA took to identify and develop alternate potential payees; (2) the identities of all persons and/or entities that SSA investigated as a possible representative payee for that child; (3) the length of SSA's investigation into alternate potential payees, (4), if SSA appoints the foster care agency to serve as representative payee, why SSA selected the agency instead of any other identified potential payees, and (5) how the agency plans to utilize the funds for either provision of special needs services to the child beyond general maintenance or how it may conserve/preserve some funds in an IDA.
- LB-15. Congress must revise the statutory definition of the term "misuse of benefits" to expressly provide that it is a misuse of benefits for *any* representative payee to use a beneficiary's benefits to pay for the beneficiary's current maintenance when another person or entity is already legally obligated to provide for the beneficiary's current maintenance.
- LB-16. Congress must revise statutory law to clarify that when another person or entity is legally obligated to provide for a beneficiary's current maintenance, the beneficiary's funds must be used to meet other, additional and/or

specialized needs or conserved for future use and how those funds must be preserved in a special account that will be exempt from arbitrary and counterintuitive asset caps.

LB-17. Congress must statutorily mandate states to screen all foster children for Social Security benefit eligibility and assist SSI-eligible youth in establishing and/or maintaining eligibility post-18.

LB-18. Congress must raise or eliminate the asset cap for current and former foster youth through age 26.

Judicial Branch

JB-1. The federal judicial branch must acknowledge its role as a check and balance to the executive branch enforcement of child welfare laws, and any ambiguity as to whether a particular child welfare statute contains a private right of action to seek such enforcement should be decided in favor of recognizing that right.

JB-2. The federal judiciary must be extremely cautious in its use of the abstention doctrine so as not to deny private litigants any and all judicial recourse when seeking child welfare improvements from a state judicial branch.

JB-3. The federal judicial branch must ensure that states entering into consent decrees bring their child welfare systems into compliance with federal law in a more timely manner than is currently the case.

Executive Branch: HHS

EB-1. HHS' oversight and enforcement activities must independently and actively evaluate states' conformity with *all* federal child welfare standards and state plan requirements, including active, independent oversight to ensure that each state operates its child welfare programs in a manner that is consistent with federal law and the approved state plan and the imposition of fair but serious consequences where states' implementation falls below minimum federal standards.

EB-2. HHS must revise any "performance improvement plan" processes to require that states come into substantial conformity with *all* applicable federal mandates in order to avoid penalties for nonconformity—and not a compromised set of lowered expectations.

EB-3. HHS must utilize its rulemaking authority in a more robust manner with regard to the interpretation of federal child welfare laws, and must immediately commence rulemaking to interpret and implement CAPTA, the Fostering Connections to Success and Increasing Adoptions Act of 2008, the Adoptions Promotion Act of 2003, and all other laws where Congress has expressly directed HHS to engage in such rulemaking.

EB-4. HHS must revise any "performance improvement plan" processes to immediately impose penalties after one year of a state's plan implementation if the state has not achieved substantial conformity with at least half of the items where it was previously found not to be in such conformity.

EB-5. HHS must immediately re-commence imposition of financial penalties for state noncompliance with AFCARS reporting requirements and must subject states to AFCARS Assessment Reviews on a regular basis of no less than once every five years.

EB-6. HHS must utilize its rulemaking authority in a more robust manner with regard to the interpretation of federal child welfare laws, and must immediately commence rulemaking to interpret and implement CAPTA, the Fostering Connections to Success and Increasing Adoptions Act of 2008, the Adoptions Promotion Act of 2003, and all other laws where Congress has expressly directed HHS to engage in such rulemaking.

EB-7. HHS must immediately review all court opinions and/or consent decrees entered in the last 25 years that indicate that states or localities were failing to comply with federal child welfare laws; determine whether its oversight, monitoring and enforcement activities are appropriately encompassing the issues litigated; and revise its activities as needed to ensure that all jurisdictions are in substantial conformity with federal standards and requirements involved.

- EB-8. HHS must expand its monitoring, regulatory, and enforcement activities to encompass issues that to date have been mostly ignored by the Agency, such as states' blatant noncompliance with the CAPTA public disclosure requirement regarding the release of findings or information about child abuse or neglect deaths and near deaths, where HHS must
- comply with the HELP Committee's request to adopt regulations mandating state responsibilities consistent with CAPTA;
 - withhold states' CAPTA funding where noncompliance is documented; and
 - repeal Child Welfare Policy Manual changes that undermine CAPTA's public disclosure requirement and issue replacement language that clarifies and strengthens such language until HHS adopts new regulations that do the same.
- EB-9. HHS must stop ignoring signs of probable state noncompliance with the current obligation to provide appropriate *guardians ad litem* for abused or neglected children, and take appropriate steps.
- EB-10. HHS must ensure that states are properly assisting foster youth in repairing credit issues prior the youth aging out of care.

Executive Branch: SSA

- EB-11. SSA must adopt a representative payee preference list specific to foster children, expressly stating the general rule that a foster parent who has custody of a child, a close relative, or a close friend of the family is to be given higher preference than a foster care agency and expressing under what circumstances and with what limitations the state may serve as representative payee of last resort.
- EB-12. SSA must comply with federal law by conducting complete investigations of any representative payee applicant, including active inquiry into the existence of other potential representative payees.
- EB-13. SSA must comply with federal law by ensuring that foster care agencies who are serving as representative payees are in fact engaging in mandated individualized determinations with regard to each child beneficiary in order to determine the beneficiary's total needs (current *and* future) and using or conserving the child's benefits in a manner appropriate to the best use in light of the child's circumstances. SSA must require foster care agencies to document the specific amount and use of any funds spent on behalf of child beneficiaries and submit such accounting on a regular basis.
- EB-14. SSA must prohibit a foster care agency from serving as representative payee for a foster child wherever it appears more likely than not that the entity is not taking the unique and personal needs of each child beneficiary into consideration prior to determining what use of the funds would best serve the beneficiary's interests (*e.g.*, where the state mandates via statute, rule or policy that a public agency use a dependent child's income to cover the child's cost of care).
- EB-15. SSA must revise the regulatory definition of the term "misuse of benefits" to expressly provide that it is a misuse of benefits for *any* representative payee to use a beneficiary's benefits to pay for the beneficiary's current maintenance when another person or entity is already legally obligated to provide for the beneficiary's current maintenance.
- EB-16. SSA must revise regulatory law to clarify that when another person or entity is already legally obligated to provide for a beneficiary's current maintenance, the beneficiary's funds must be used to meet other, additional and/or specialized needs or conserved for future use and how those funds must be preserved in a special account that will be exempt from arbitrary and counterintuitive asset caps.

SHAME ON U.S.

Failings by All Three Branches of Our Federal Government
Leave Abused and Neglected Children Vulnerable to Further Harm

I. Introduction

A. The Scope and Impact of Abuse and Neglect on the Child Victims

During 2012, at least 686,000 American children were the victims of maltreatment (abuse or neglect).¹ A conservative estimate of the number of those children who were killed that year by abuse or neglect is 1,640² — meaning that **abuse or neglect leads to the death of at least 4–5 children every day in the U.S.** Sadly, the real numbers of both child abuse/neglect victims and fatalities are much higher, due in part to unreported abuse.³

According to the U.S. Department of Health and Human Services (HHS), “abuse and neglect can have consequences for children, families, and society that last lifetimes, if not generations.”⁴ Such long-term consequences may be

- physical (*e.g.*, impaired brain development, poor physical health);
- psychological (*e.g.*, low self-esteem, depression, anxiety, relationship difficulties);
- behavioral (*e.g.*, juvenile delinquency, adult criminality, teen pregnancy, low academic achievement, alcohol and drug use, mental health problems, abusive behavior); and
- societal (*e.g.*, direct costs associated with maintaining a child welfare system to investigate and respond to allegations of child abuse and neglect, as well as expenditures by the judicial, law enforcement, health, and mental health systems, and indirect costs associated with juvenile and adult criminal activity, mental illness, substance abuse, domestic violence, loss of productivity due to unemployment and underemployment, the cost of special education services, and increased use of the health care system).⁵

During 2012, states served about 638,000 foster children, including 252,000 abused or neglected children who entered into the foster care system that year.⁶ In order to serve those children, state courts became their legal parents, assuming the authority to determine where they should live, where they will attend school, who they may see, and countless other details of their lives. This extraordinary governmental intervention into family affairs is intended not to punish parents or other caretakers — but to protect children from abuse and neglect, and to temper negative consequences.

¹ U.S. Department of Health and Human Services, Administration for Children and Families, Administration for Children, Youth and Families, Children’s Bureau, *Child Maltreatment 2012* (2013) at 19 (available at <http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf>) (hereinafter *Child Maltreatment 2012*).

² *Child Maltreatment 2012*, *supra* note 1, at 51.

³ U.S. Department of Health and Human Services, Administration for Children and Families, Administration for Children, Youth and Families, Children’s Bureau, Office on Child Abuse and Neglect, *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice* (Washington, D.C.; 2003) at 71 (“[n]umerous professionals admit that during their careers, they have failed to report suspected maltreatment to the appropriate agencies”) (available at www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf).

⁴ U.S. Department of Health & Human Services, Child Welfare Information Gateway, *Long-Term Consequences of Child Abuse and Neglect* (2013) at 1 (available at https://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf).

⁵ U.S. Department of Health & Human Services, Child Welfare Information Gateway, *Long-Term Consequences of Child Abuse and Neglect* (2013) at 2–6 (available at https://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf).

⁶ U.S. Department of Health & Human Services, Administration for Children, Youth and Families, U.S. Children’s Bureau, *Trends in Foster Care and Adoption—FFY 2002-FFY 2012* (based on data submitted by states as of November 1, 2013) (available at http://www.acf.hhs.gov/sites/default/files/cb/trends_fostercare_adoption2012.pdf).

However — and perhaps unavoidably — the foster care system skews the childhood experience for these children. Foster youth miss the rites of passage experienced by their peers, lack control over even minor aspects of their lives, and are provided little opportunity to attain independence and self-sufficiency on the same timeframe as their peers. Most foster youth do not have a strong familial support system to guide or help them through the difficulties that young adults typically face as they set out on their own. And what is most regrettable in this litany of despair is something that **is** largely avoidable — many foster youth suffer additional abuse and neglect while in the very system that was supposed to protect them.

Many foster children stay in care until they age out of the system; historically that has been at age 18, but states that have fully implemented the Fostering Connections to Success Act of 2008 now give foster youth the option to stay in care until age 21. In 2012, 28,000 youth aged out of foster care (most at age 18) and were expected to immediately be independent, self-sufficient and contributing members of society — with little to no assistance from others. These are young adults who experienced significant psychological trauma during their formative years, including being neglected and/or abused, being separated from their homes, friends, families and most things familiar to them, and often enduring multiple placements in homes and institutions. Those foster youth who live their teen years in group homes especially may not benefit from normal growing-up experiences that most of us took for granted, but which prepared us for adult life — things such as seeing an adult pay bills each month, do the laundry, buy groceries, pay taxes, arrange for car insurance, or undertake the dozens of other mundane tasks required to function as an adult.

Further, these youth miss out on the guidance and support (financial and emotional) that most families provide to their young adult children. While the value of the emotional support provided is immeasurable, the median amount of financial support that a parent spends on his/her child after the child reaches the age of 18 is about \$50,000.⁷ Typical foster youth, parented by the state, have historically received a median amount less than one-fifth this amount — and it is disproportionately received by the very few who are admitted to college.⁸ In a society where the median age of self-sufficiency is not 18 or 21, but 26, this shortfall is most marked where youth have no family or home as a backstop. Most foster youth who age out of care are substantially abandoned by states, reflecting the true “family values” of our political leaders. The consequences of this nonfeasance include:

- Low educational attainment — although most foster youth express a desire to attend college, only about 3% earn four-year degrees.⁹
- Low employment/low earning power — by age 21, only about half of foster care alumni are employed, significantly fewer than their peers with no history of foster care.¹⁰
- Homelessness/inconsistent housing — 17% of foster care alumni experience “literal homelessness” and an additional 33% are precariously housed (*e.g.*, doubled up with others and/or couch surfing).¹¹
- Poor health outcomes — 50% former foster youth experience chronic health problems.¹²

⁷ According to Schoeni, Robert F. and Ross, Karen E., Chapter 12: Material Assistance Received From Families During Transition to Adulthood. *On the Frontier to Adulthood: Theory, Research and Public Policy*. Edited by Richard A. Settersten, Jr., Frank F. Furstenberg, Jr., and Rubén G. Rumbaut (2005), published by the John D. and Catherine T. MacArthur Foundation Series on Mental Health and Development, Research Network on Transitions to Adulthood and Public Policy, in 2001 dollars, the average amount parents paid to assist their children post-18 was \$38,340. According to the Bureau of Labor Statistics’ CPI Inflation Calculator at www.bls.gov/data/inflation_calculator.htm, this figure is \$50,456 in 2013 dollars. The yearly average tends to be larger during the earlier years when the young person is in school and decreases over time; Dr. Schoeni reported that parents pay \$2,323 a year to support their adult children aged 25–26, with this amount decreasing to \$1,556 annually for adult children aged 33–34 (in 2001 dollars). *See also* Bahney, A., *The Bank of Mom and Dad*, THE NEW YORK TIMES (April 20, 2006) at G2, p.1; *see also* Children’s Advocacy Institute, *Expanding Transitional Services for Emancipated Foster Youth: An Investment in California’s Tomorrow* (San Diego, CA; Jan. 2007) (available at www.caichildlaw.org/Transitional_Services.htm#Rpt).

⁸ Children’s Advocacy Institute and First Star, *The Fleecing of Foster Children: How We Confiscate Their Assets and Undermine Their Financial Security* (2011) at i (available at http://www.caichildlaw.org/Misc/Fleecing_Report_Final_HR.pdf).

⁹ Casey Family Programs, *Foster Care by the Numbers* (Sept. 2011) (available at <http://www.casey.org/Newsroom/MediaKit/pdf/FosterCareByTheNumbers.pdf>).

¹⁰ *Id.*

¹¹ Paul Toro, Amy Dworsky, Patrick Fowler, *Homeless Youth in the United States: Recent Research Findings and Intervention Approaches* (March 2007) (available at <http://aspe.hhs.gov/hsp/homelessness/symposium07/toro/>).

¹² *Supra* note 9.

- Credit issues — identity theft is a growing problem among foster youth, a problem that many do not discover until they exit care. When applying for a college loan, an apartment, a car loan, etc., many former and current foster youth discover that their identity has been stolen while they were in care, and their credit has been destroyed. Additionally, many former foster youth are targeted by expensive “diploma mills” — private postsecondary schools that seemingly guarantee students extensive financial aid and lucrative careers upon graduation. When such employment is not forthcoming following degree completion (or when students are unable to complete their studies and must withdraw prior to completion), they are often forced to default on loans, wreaking further havoc on their credit record.

B. Societal Costs of Abuse and Neglect

The societal costs of abuse and neglect include direct costs such as hospitalization, chronic health and mental health problems, the child welfare system itself, law enforcement, and related judicial expenses, indirect costs of early intervention, homelessness and transitional housing, special education, health care, juvenile delinquency, lost work productivity, and adult criminality. In one recent study, the total annual cost of child abuse and neglect for just one year was estimated to be over \$80 billion.¹³ Another study of the economic burden of child maltreatment in the U.S. reached a higher total, estimating the lifetime costs of child maltreatment at \$210,012 per child in 2010 dollars (including \$32,648 in costs for childhood health care; \$10,530 in adult medical care; \$144,360 in productivity loss; \$7,728 in child welfare and \$6,747 in criminal justice costs; and \$7,999 for special education); the estimated average lifetime cost per death is \$1,272,900, including \$14,100 in medical costs and \$1,258,800 in productivity losses, and the total lifetime economic burden resulting from one year of new cases of fatal and nonfatal child maltreatment in the U.S. was put at approximately \$124 billion.¹⁴

C. Scope and Purpose of this Report

This study looks at how the federal government enacts, monitors, interprets, funds, and/or enforces federal child welfare laws to ensure that states are appropriately protecting children from abuse and neglect, complying with minimum federal child welfare requirements and outcomes, and providing foster youth with a path to adulthood.

These concerns are underlined by the federal and state assumed role in this subject area — one that has increased in scope over the last 75 years. Federal law and the statutes of every state now create a system of child protection, including mandated abuse reporting, investigation, detention, reasonable efforts necessary to facilitate possible (and favored) parental reunification, termination of parental rights where parents are found unfit by clear and convincing evidence, and the permanent placement of those children. The intended end result of the federal child protection statutory scheme is clear — ensuring that we as a society give each child a meaningful opportunity to develop into a healthy, self-sufficient adult. The outcomes noted above indicate that to a great extent, we are not achieving that goal.

The plight of children seized by the state and subject to its all-encompassing power raises important constitutional issues, such as children’s basic due process rights to liberty. After all, foster care is tantamount to state

The intended end result of the federal child protection statutory scheme is clear — ensuring that we as a society give each child a meaningful opportunity to develop into a healthy, self-sufficient adult. The outcomes noted above indicate that to a great extent, we are not achieving that goal.

¹³ Gelles, Richard J., & Perlman, Staci, *Estimated Annual Cost of Child Abuse and Neglect*, Chicago IL: Prevent Child Abuse America (2012) at 3 (available at [https://www.preventchildabusenc.org/assets/preventchildabusenc/files/\\$cms\\$/100/1299.pdf](https://www.preventchildabusenc.org/assets/preventchildabusenc/files/cms/100/1299.pdf)) (hereinafter *Estimated Annual Cost of Child Abuse and Neglect*).

¹⁴ *Id.* at 3 (note c), citing Fang, Brown, Florence, & Mercy (2012).

custody, and the decisions made during the child welfare adjudicative process influence the most fundamental aspects of a child's life. A number of federal statutes set minimum child protection requirements and expectations that states must meet in order to receive federal funding. These statutes, many of which are summarized in Appendix A, provide minimum standards (or "floors") that reflect Congressional intent as to how federal monies are to be used by states.

The judicial and executive branches both play important roles and provide key checks and balances with regard to the child welfare system. The judicial branch is charged with interpreting our laws and ensuring that they are appropriately applied consistent with legislative intent, while the authority and responsibility to implement, monitor, and enforce federal child welfare laws and programs rests with the executive branch—and specifically the U.S. Department of Health and Human Services (HHS), through its Administration for Children and Families (ACF), Administration on Children, Youth and Families (ACYF), and its Children's Bureau.

Each branch of our federal government plays an integral role in the child welfare system, and when even one fails to perform its role in an appropriate manner, children are put at risk of harm. Because all three branches must be performing optimally to ensure a well-functioning child welfare system, this report discusses the performance of each branch in this arena. Specifically, the report:

- ✓ provides an overview of the scope and purpose of major child welfare laws as enacted by Congress, and to what extent current laws meet the needs of children;
- ✓ examines how the judicial branch has interpreted those laws;
- ✓ discusses to what extent the executive branch implements and enforces those laws;
- ✓ comments on the potential efficacy of each branch's scope and reach;
- ✓ provides examples of shortcomings in all three branches with regard to their respective roles *vis-à-vis* the child welfare system;
- ✓ discusses issues where the purpose or intent of child welfare laws are being openly violated by some states; and
- ✓ calls for more robust activity from all three branches — and particularly enforcement by the executive branch charged with enforcing Congressional intent and, when necessary, withholding federal funding or imposing penalties where states are clearly not meeting minimum standards.

II. The Legislative Branch

A. Examples of Federal Child Welfare Laws and Minimum Federal Statutory Requirements

The U.S. Congress has enacted many laws over the past forty years to protect children from maltreatment and to provide support, resources, and assistance to those who have been abused or neglected. Such programs set minimum requirements and authorize funding for states that meet or exceed stated minimum expectations. Appendix A presents details about some of the major federal child welfare statutes, including the purpose of the statutes and programs and the current funding levels; Appendix A also presents some of the many requirements that must be met in order for a state to receive funding from these child welfare

programs. Presented below are examples of some of the minimum requirements that states must meet in order to be eligible to receive funding through some of the federal child welfare programs:

The **Foster Care** program (Title IV-E) requires that states, among other things:

- set standards for foster family homes and child care institutions, including admission policies, safety, sanitation, and protection of civil rights;
- periodically review the amounts paid as foster care maintenance payments and adoption assistance to assure their continuing compliance with eight specific costs that must be covered by those payments;
- set standards so children in placements are safe and healthy.

The **Child Welfare Services** program (Title IV-B) requires that states, among other things:

- engage in diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of foster children in the state;
- provide services to help children at-risk to remain safely with their families, help children return to families from which they have been removed, and help children who must be removed to be placed for adoption, with a legal guardian, or in some other permanent arrangement;
- coordinate and provide health care services for any child in a foster care placement, including mental health and dental health; and
- at a minimum, ensure that each child is visited by his/her caseworker on a monthly basis to ensure the safety, permanency, and well-being of the child.

The **Child Abuse Prevention and Treatment Act (CAPTA)** requires that states, among other things:

- adopt immediate steps to protect a victim of child abuse or neglect and any other child under the same care who may also be in danger and ensuring their safe placement;
- except as discussed below, preserve the confidentiality of records to protect the rights of the child, among others;
- allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality;
- in every case involving a victim of child abuse or neglect which results in a judicial proceeding, appoint a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), to represent the child in such proceedings; and
- improve the training, retention, and supervision of caseworkers.

The **John H. Chafee Foster Care Independence Program** requires that states, among other things:

- design and deliver programs that will help current and former foster children make the transition to self-sufficiency;

- provide services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities;
- help children who are likely to remain in foster care until 18 years of age receive the education, training, and services necessary to obtain employment; and
- help children who are likely to remain in foster care until 18 years of age prepare for and enter postsecondary training and education institutions; provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults; and provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood.

B. Legislative Branch Actions Necessary to Protect Children From Harm

The laws described above and dozens of others have been patched together over the last forty years to serve as the basis of our country’s child welfare system. It is a dysfunctional system in need of a major overhaul — but at the moment it is all we have to protect our children from abuse and neglect. However, congressional intent is being frustrated by the other two branches in several respects — and responsive actions by the legislative branch are necessary to assure actualization of that national intent, but they have not been forthcoming. Examples of federal child welfare laws that are not being implemented or enforced as Congress envisioned include the following:

The laws described above and dozens of others have been patched together over the last forty years to serve as the basis of our country’s child welfare system. It is a dysfunctional system in need of a major overhaul — but at the moment it is all we have to protect our children from abuse and neglect.

| Federal Law / Specific Provision | Examples of How Congressional Directive and/or Legislative Intent are Being Frustrated |
|--|---|
| <p>Social Security Act 42 USCS § 1320a-2a <i>Review of Child and Family Services Programs</i></p> | <p>The statute requires HHS to review state child and family service programs to determine if they are in substantial conformity with the state plan requirements set forth in titles IV-B and IV-E of the Social Security Act, regulations promulgated by the HHS Secretary, and the relevant approved state plans. HHS is also required to set a timetable for conformity reviews of the states and to withhold funds where a state’s program fails substantially to so conform (after affording the state an opportunity to adopt and implement a corrective action plan designed “to end the failure to so conform”). After two rounds of its CFRs, HHS has yet to determine that a single state program is in “substantial conformity” with even the few selected criteria examined as part of those reviews — but more importantly, the entire CFR process is not designed to determine substantial conformity to federal child welfare laws (as required by statute), but merely conformity to a national standard set at the 75th percentile of all states’ performance on those few selected criteria. Further, the performance improvement plan implemented by HHS fails to ensure that a state’s corrective action plan is designed to “end the failure to so conform” as it merely requires the state to meet negotiated, individualized, and typically less stringent goals than substantial conformity with the requirements set forth in titles IV-B and IV-E. Further, HHS is in violation of the review timetable that it adopted into regulation (<i>see</i> section III(A)(1)(b) <i>infra</i>).</p> |

| | |
|---|---|
| <p>Adoption Assistance and Child Welfare Act of 1980</p> <p>42 U.S.C.S. § 675(4)(A)</p> <p><i>Adequate Reimbursement Rates for Foster Care Providers</i></p> | <p>The statute requires states to provide foster care maintenance payments to licensed foster care providers that “cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.” HHS allows states to merely self-certify that they are in compliance with this provision, and it engages in no further monitoring, investigation, or enforcement to ensure actual compliance. This approach has allowed states to provide payments that do not comply with the federal floor set by Congress. While initial efforts by private parties to enforce compliance on a state-by-state basis through the federal judiciary were successful, the most recent attempt was shot down by the 8th Circuit Court of Appeals, which held (contrary to precedent from the 9th Circuit) that the Act provides no private right of enforcement (<i>see</i> section IV(A)(2) <i>infra</i>).</p> |
| <p>Child Abuse Prevention and Treatment Act (CAPTA)</p> <p>42 U.S.C.S. §5106a(b)(2)(B)(x)</p> <p><i>Public Disclosure of Child Abuse and Neglect Fatality and Near Fatality Findings and Information</i></p> | <p>The statute requires states to have and enforce “provisions that allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality.” HHS allows states to merely self-certify that they are in compliance with this provision, and engages in no further monitoring, investigation, or enforcement to ensure actual compliance. Further, HHS ignored a 2010 HELP Committee Report directive to develop clear guidelines in the form of regulations instructing the states of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities, and to provide technical assistance to States in developing the appropriate procedures for full disclosure of information and findings in these cases. Instead, HHS amended its Child Welfare Policy Manual to allow states to withhold information under circumstances so broad that they effectively nullify CAPTA’s public disclosure mandate entirely (<i>see</i> section V(A) <i>infra</i>).</p> |
| <p>Child Abuse Prevention and Treatment Act (CAPTA)</p> <p>42 U.S.C.S. §5106a(b)(2)(B)(xiii)</p> <p><i>Representation for Abused and Neglected Children</i></p> | <p>The statute requires states to provide an appropriately trained <i>guardian ad litem</i> (who may be an attorney or a court appointed special advocate) to represent each child in child abuse and neglect proceedings. HHS allows states to merely self-certify that they are in compliance with this provision, and engages in no further monitoring, investigation, or enforcement to ensure actual compliance. HHS has ignored substantial evidence showing that many states are failing to comply with CAPTA’s requirement to appoint a GAL for abused and neglected children and that other states require the appointed representatives to carry caseloads so excessive that children are effectively denied the intended representation (<i>see</i> section V(B) <i>infra</i>). The 9th Circuit Court of Appeals has thwarted at least two attempts at private enforcement in this area (<i>see</i> section IV(A)(1)–(2) <i>infra</i>).</p> |
| <p>Child Abuse Prevention and Treatment Act (CAPTA)</p> <p>42 U.S.C.S. § 5104(C)(1)(c)</p> <p><i>Child Welfare Data Collection</i></p> | <p>The statute requires HHS to develop a federal data system which shall include standardized data on false, unfounded, unsubstantiated, and substantiated reports; information on the number of deaths due to child abuse and neglect; information about the incidence and characteristics of child abuse and neglect in circumstances in which domestic violence is present; and information about the incidence and characteristics of child abuse and neglect in cases related to substance abuse. HHS responded to this mandate by establishing and maintaining NCANDS, a voluntary data-reporting system that receives incomplete, piecemeal and inconsistent data submissions by the states. For example, a report by the U.S. Government Accountability Office states that questions have been raised as to whether NCANDS, which is based on voluntary state reports to HHS, fully captures the number or circumstances of child fatalities from maltreatment (<i>see</i> section III(B) <i>infra</i>).</p> |
| <p>Adoption Promotion Act of 2003</p> <p>42 U.S.C.S. § 674(d)(1)</p> <p><i>Child Welfare Data Collection</i></p> | <p>This Act provides that if the HHS Secretary finds that a state has failed to submit data pursuant to the Adoption and Foster Care Analysis and Reporting System (AFCARS) as required, the Secretary “shall reduce” the amounts otherwise payable to the state as specified, until the Secretary finds that the state has submitted the data as so required. In 2004 HHS announced that it “is not assessing AFCARS penalties at this time...and will not take penalties until new, final AFCARS regulations are issued implementing...the Adoption Promotion Act of 2003” — which, as of August 2014, HHS has not yet done (<i>see</i> section III(A)(5)(b) <i>infra</i>).</p> |

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| <p>Fostering Connections to Success and Increasing Adoptions Act of 2008</p> <p>42 U.S.C.S. § 672(c)(2)</p> <p><i>Placements for Transition Age Youth in Foster Care</i></p> | <p>This Act, among other things, gives states the option to allow youth to stay in foster care until age 21. The Act expressly directed the HHS Secretary to establish in regulations such conditions that states must meet with regard to a new placement authorized by the Act, referred to as “a supervised setting in which the individual is living independently.” As of August 2014, the HHS Secretary has yet to comply with the 2008 legislative mandate to establish such conditions in regulations (<i>see</i> section III(B) <i>infra</i>).</p> |
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In addition to clarifying and expanding upon its intent with regard to existing child welfare laws, further Congressional action is needed in a variety of other ways as well — such as legislatively addressing issues that are not encompassed by current law, funding current and prospective legislation at levels that are adequate to meet the needs of the children that programs are intended to serve, and ensuring that the letter and intent of its enactments are being furthered by the other two branches of government.

1. Congress Must Provide Clear Private Remedies for Children

As is explained in more detail in section III below, the lack of adequate and appropriate executive branch enforcement activity has compelled private litigants across the nation to seek judicial relief for states’ noncompliance with federal child welfare laws. In fact, some of the most significant reforms to states’ child welfare systems have occurred not because of HHS monitoring and enforcement, but because private litigants went through the time and expense to successfully adjudicate states’ noncompliance with federal child welfare laws. Examples of such vindicating lawsuits are contained in section III.

However, a disturbing trend has surfaced within the federal judiciary; as is discussed below in section III, courts are refusing to recognize a private right of action with regard to the enforcement of these laws. In other words, courts are finding that abused and neglected children — the very ones intended to be the beneficiaries of the child welfare system — have no private right of action to challenge a state’s compliance with federal child welfare laws in a court of law. In other words, courts are finding that children have no right to seek justice in court when they have been harmed by their state’s failure to comply with applicable federal law — even when such failure is not being adequately addressed by the executive branch.

Congress must clarify — both generally and expressly within each and every child welfare statute — that there is in fact a private right of action to compel compliance and satisfy congressional intent of these very important provisions. This is a critical step to take to ensure that there is some available recourse for these children to seek justice. Continued Congressional inaction will leave abused and neglected children with no recourse whatsoever — with the executive branch allowing state noncompliance and the judicial branch finding that private litigants have no standing to pursue state compliance.

2. Congress Must Unify Federal Child Welfare Laws in order to Create a Comprehensive and Cohesive Framework that Ensures Adequate Incentives for State Compliance

In the 40 years since the Child Abuse Prevention and Treatment Act (CAPTA) of 1974 was enacted, Congress has passed no less than 60 additional laws that contribute to the body of child welfare law — and the Children’s Bureau considers almost half of those enactments to be “major” pieces of legislation concerned with child protection, child welfare, and adoption.¹⁵ The result is a patchwork and dysfunctional framework for what is supposed to be the nation’s child welfare “system.” Congressional enactment of a comprehensive, cohesive body of child welfare law that provides clear direction to HHS, states, and child advocates is essential to resolving many of the problems discussed in this report.

¹⁵ Children’s Bureau / ACYF, Child Welfare Information Gateway, *Index of Child Welfare Laws* (accessible from <https://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm>); *see also* Children’s Bureau / ACYF, Child Welfare Information Gateway, *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* (Washington, D.C.; Current Through April 2012) at 3 (available at <https://www.childwelfare.gov/pubs/otherpubs/majorfedlegis.pdf>).

The nation has gained much knowledge over the last four decades with regard to the wide panoply of elements that need to be part of an effective child welfare system, what information needs to flow from the states to the federal government and the general public regarding their handling of those elements, what financial assistance states need in order to meet minimal standards of performance, and what an effective oversight and enforcement system would entail. Taking into consideration all of the lessons learned over the past 40 years, Congress must unify the various federal child welfare provisions into one comprehensive and cohesive framework that provides clear direction to states regarding their responsibilities and the consequences for noncompliance with those responsibilities, to HHS regarding its oversight and enforcement role, and to the courts — clarifying that they do in fact have a role to play in ensuring that states and HHS meet Congressional expectations.

Such a wholesale revamping of federal law in this area could perhaps prevent Congressional “turf wars” from paralyzing future attempts to refine child welfare laws. Specifically, different Congressional committees have jurisdiction over various policy issues and/or statutes and often are unwilling to collaborate in any way that might result in their loss of authority or jurisdiction — even when legislative change is necessary to protect abused and neglected children. For example, child advocates have approached relevant Committee staff about a legislative proposal to make states’ eligibility for IV-B and IV-E child welfare funding contingent on their compliance with several specific provisions set forth in CAPTA; advocates believe that tying the CAPTA provisions to significantly larger streams of federal dollars would induce more states to adhere more faithfully to the protections contained within CAPTA. However, staffers cautioned that turf wars between committees vying for jurisdiction over the various child welfare statutes would make such a change difficult or impossible to achieve. Repealing and recasting all federal child welfare laws into one comprehensive body of law, with clear Congressional intent as to which committee will consider future amendments, would help alleviate the dysfunctional paralysis that otherwise jeopardizes reform attempts.

3. Congress Must Repeal or Revise Current Provisions to Ensure That All Foster Children are Treated Equally and that States Comply with All Child Welfare Laws

Perhaps because of the disjointed and spurtive manner in which our child welfare laws were created, the current legislative scheme contains several anomalies and antiquated provisions that need to be addressed by Congress, regardless of whether or not it engages in the complete overhaul recommended above. For example:

- Foster care was removed from the welfare program more than 30 years ago, and the Aid to Families with Dependent Children (AFDC) program was abolished more than 15 years ago, but to this day federal law includes a so-called “look back” feature that provides that a child is eligible for federal foster care support only if the child’s family would have been eligible for AFDC in 1996 — and this 18-year-old income test has never been adjusted for inflation.¹⁶ This provision requires cash-strapped states to pick up an increasing proportion of foster care costs as fewer families meet the grossly outdated eligibility standard. If this quirk in federal law is not corrected, soon there will be no children eligible for federal foster care support — and states will have to pick up the entire cost themselves. The increasing load on state fiscal resources has already led some states to provide differing levels of foster care assistance to “state-only”

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¹⁶ See Pew Charitable Trusts, *Time for Reform — Fix the Foster Care Lookback* (2007) at 1 (available at http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/FixtheFosterCareLookbackpdf.pdf).

foster children than what is provided to children who are eligible for federal assistance.¹⁷ **All** abused and neglected children should receive the same level of support and protection from our federal government, regardless of the income levels of their families¹⁸ — and Congressional action is needed to immediately right this wrong.

- In many of its child welfare statutes, Congress clearly provides that states must comply with specific federal requirements and minimum standards in order to be eligible for the concomitant federal funding. However, because of the piecemeal way our child welfare laws came to be, many of the most important safeguards for children were written into programs that do not constitute significant sources of funding to states. This underfunding creates an unfortunate combination of consequences: states feel that it is not worth their time and effort to comply with the requirements because so little money is at stake, and the feds feel that it is not worth their time to pursue enforcement action against states who are not in compliance because so few federal dollars are at stake. The result is dual complacency. States have become accustomed to continually applying for and receiving federal child welfare dollars while flagrantly contradicting the terms under which that money is granted to them. The feds have grown used to turning a blind eye to states' noncompliance. The failures on both ends of this equation are happening at the expense of some of America's most vulnerable children.
- For example, the Child Abuse Prevention and Treatment Act (CAPTA) requires states to engage in several critically important activities that are aimed at reducing the incidence of child abuse and neglect, such as requiring that states provide for the public disclosure of findings or information about cases of child abuse or neglect fatalities and near fatalities, so that the public has the information it needs to ascertain if there are areas where the child welfare system is in need of systemic reform. CAPTA also requires that states must ensure that a *guardian ad litem* who has received training appropriate to the role, is appointed to represent each child in abuse and neglect proceedings. However, the amount of funding tied to CAPTA is miniscule compared to funding tied to other laws such as the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act), and it basically allows states to “self-certify” their compliance via their state plans with little to no verification by federal officials. States' blatant noncompliance with some of these CAPTA provisions has been well documented.¹⁹

In order to ensure state compliance with all of the vital protections that have been built into the various legislative enactments over the past 40 years, Congressional action is needed to tie states' receipt of *all* federal foster care and child welfare funding to their compliance with *all* federal foster care and child welfare requirements and minimum standards — and to clarify that HHS is to play an active and vigilant role in ensuring state compliance via monitoring and enforcement activities as appropriate.

4. Congress Must Expressly Mandate HHS to Engage in Enforcement and Rulemaking Activities with Regard to *All* Child Welfare Provisions — and Impose Consequences on HHS for Noncompliance

As noted above, some Congressional enactments appear to allow states to simply “self-certify” their compliance with mandatory provisions of child welfare law. Other provisions do not expressly address the oversight and enforcement role that HHS is to take with regard to ensuring state compliance. Congress must expressly mandate that HHS *actively* engage in monitoring and enforcing state compliance with all federal child

¹⁷ For example, California pays different rates depending on whether non-eligible children are placed in a family foster home or with relatives.

¹⁸ Subject to state recoupment of child support from families, where appropriate, with pro rata reimbursement to the federal government.

¹⁹ *See, e.g.*, Children's Advocacy Institute and First Star: *State Secrecy and Child Deaths in the U.S.*, 2nd Edition (2012) (available at www.caichildlaw.org/Misc/StateSecrecy2ndEd.pdf) and *A Child's Right to Counsel*, 3rd Edition (2012) (available at www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf).

welfare laws, and provide HHS with express authority to impose sanctions, withhold funds, and take other punitive actions where state noncompliance is discovered.

Similarly, Congress must expressly direct HHS to engage in formal regulatory activity to implement and interpret federal child welfare laws through the adoption of binding federal regulations, not simply send memos or adopt policy manual provisions which states are free to ignore without consequence. Additionally, Congress must provide for statutorily-mandated sanctions that will befall HHS for failing to engage in appropriate rulemaking, and/or expressly provide a private right of action to bring litigation against HHS for failing to engage in regulatory activity as directed by Congress.

5. Congress Must Enact Meaningful Child Welfare Finance Reform

Comprehensive child welfare finance reform has been a hot topic of discussion and debate for decades, but has failed to take root, despite bipartisan interest in doing so. The need for reform is urgent and manifold: a complex mix of mandatory and discretionary funding that results in haphazard payments to states; the widely condemned arcane and nonsensical “look back” provision to determine Title IV eligibility (discussed above); swaths of uncoordinated funding from disparate sources with inconsistent mandates; a plethora of

The current federal system of financing child welfare simply fails to adequately serve the children and families in its charge, and it is now upon us to both rectify the legislative framework and ensure that legislation is adequately funded in order to successfully protect and serve children.

unfunded mandates, and a dearth of accountability for the money spent on the part of the states. The current federal system of financing child welfare simply fails to adequately serve the children and families in its charge, and it is now upon us to both rectify the legislative framework and ensure that legislation is adequately funded in order to successfully protect and serve children.

Spending on children generally, and in child welfare in particular, has declined abruptly in the last few years. As First Focus published recently in its *Children’s Budget 2014*, total federal spending on children between 2010 and 2014 was slashed by 13.6%, which amounts to nearly \$47 million. Specifically in the child welfare arena, the report documents that funding for child welfare in 2014 was almost 13% less than it was in 2010. While it is not surprising that those with the least political capital are first on the chopping block, it remains unconscionable.

Some advocates have been debating reform proposals for years. It has proven very difficult for the advocacy community to come to consensus about a comprehensive plan. One element, however, seems to have near-universal support — addressing the IV-E “look back” provision that irrationally denies federal foster care funds to children based on the income of their families. If the family income is above the 1996 federal poverty line (not adjusted for inflation), federal funds are not made available to help pay for the child’s support and maintenance. This provision lets the federal government off the hook for providing any financial support for about 60% of the nation’s abused and neglected children, and that figure will continue to grow year after year. As discussed elsewhere, this abdication based on an arbitrary and capricious factor has no justification. Its continuation is itself a basic ethical failing of the Congress — one which warrants its institutional condemnation.

Advocates are hopeful that comprehensive child welfare finance reform might be enacted within the next several years. Congressional staff, advocates, and foundations have been collaborating in a series of brainstorming and strategy sessions to advance the fate of these “children of the state.” One such proposal, repeatedly advanced by the Annie E. Casey Foundation, is flawed in a way that underlines why unintended consequences warrant close attention. That Foundation and others associated with it have an enviable record of commitment to foster children and child welfare in general. But it has advanced an idea to preserve revenue neutrality by cutting off federal funds to the states for abused and neglected children after one year in care for some and after three years for others. The concept here is to provide revenue for deserving child

investment by so diverting it, and to incentivize states to remove foster children from care earlier. The latter intent is to stimulate the laudable intent of “permanent placement” into adoptive families or kin care. But, in fact, states have substantial incentive to accomplish that end already — irrespective of federal matching funds. Such permanency removes those children from caseloads that cost substantial state monies that are not matched anyway, from court costs to social worker monthly visits on site, to county counsel and many other expenses.

Moreover, the federal money connection to state foster care grants is critical. It allows the enforcement of federal floors. “State only” funds have no such floor and are subject to politically based cuts — a forum where foster children do not fare well. A typical example is provided by the 2010 9th Circuit case of *California Foster Parents Association v. Wagner* (624 F.3d 974) brought by the Children’s Advocacy Institute to mandate substantial increases in foster care payments based on the eight out-of-pocket costs articulated in the federal Child Welfare Act that must be covered. It was possible only because federal matching funds invoked federal floors. Similarly, the federal case of *Miller v. Youakim* (440 U.S. 125 (1979)) requires that relatives not suffer discrimination in foster care compensation. But California for years has excluded children not receiving a federal match from that floor, accomplishing an irrational discrimination against relatives — who are purportedly entitled to a measure of preference. The excision of federal monies based on one or three years of care allows state compensation reductions after that point in time — without any limit or floor whatever. That is an unintended and very real consequence typifying what is prudently considered when advocating major legislative or funding change.

The most important method to achieve permanence is to increase the supply of family foster care providers by, among other things, assuring the reimbursement of at least out-of-pocket expenses so these sources of desired permanence will not have to risk the loss of their savings in committing to a child is essential. That assurance means a larger supply of qualified homes for adoption, and for kin care. The suggestion to cut off federal funds after an arbitrary time in care would not only remove existing floors, but create reasonable uncertainty about any compensation after one or three years of care — hardly a prospect stimulating the rich supply of homes and parents that is so important to these children.

It is critical for the discussion of improved law and policy to pass two tests. First, understand the unintended consequences of suggested policies. Consider with care the current incentives that operate, and the federal/state financing relationship, including their implications in assuring a reasonable floor. Second, do not accept the idea that all proposals must be revenue neutral, and that these children do not warrant additional investment. Public financial choices are made by the Congress and state legislatures involving many choices, from tax credits to attract plants or at the behest of special interests, to defense spending that is properly measured against monies foregone for the children that we have seized and now directly parent.

Unfortunately, some advocates appear to have conceded defeat before the real debate even gets underway. It is true that the current political and economic climates make it difficult to successfully advocate for increased federal investment in any area. But instead of demanding such increased investment in the area of child welfare, some groups are instead willing to accept the status quo and lock in current funding levels, despite the recent deep cuts. But when the health and well-being of our country’s most vulnerable and wounded citizens are at stake, it is the responsibility of advocates and experts to stand up and demand what is just and necessary for these families and children — and not just ask for what is politically palatable. Advocates in the child welfare and foster care arena must be steadfast in our commitment to demand adequate funding for all child welfare programs. Taking a defensive posture, and allowing these programs to be locked into the cuts we have already suffered, are not appropriate ways to kick off the child welfare finance debate. Reallocating and shifting current federal dollars is not enough. Revenue-neutral proposals may achieve quick bicameral and bipartisan support, but they will fail to protect and provide for our nation’s abused and neglected children.

III. The Executive Branch

As noted above, the authority and responsibility to implement and enforce federal child welfare laws and programs rests with the executive branch—and specifically the U.S. Department of Health and Human Services (HHS), through its Administration for Children and Families (ACF), Administration on Children, Youth and Families (ACYF), and Children’s Bureau. However, because particular actions — and omissions — of the Social Security Administration (SSA) also impact the health and well-being of children and youth during and after foster care, a brief discussion about that agency is also provided later in this section.

A. HHS’ Monitoring, Implementation and Enforcement Activities

Responsible for implementing and enforcing an extremely varied and complex array of child welfare laws, HHS has no easy task before it. It must ensure that states meet and maintain eligibility requirements specific to several diverse programs — not only to ensure that states are entitled to billions of dollars of federal child welfare money, but also to ensure that states are adequately protecting children from abuse and neglect consistent with congressional intent. While the scope and importance of HHS’ responsibilities and duties are significant, so are the consequences that children suffer when our child welfare system fails to protect them.

In order to ensure that states comply with federal law and achieve positive outcomes for children and families using the billions of dollars of federal tax money doled out annually, HHS has created a few monitoring tools — some of which, at least in theory, also encompass enforcement. The Agency’s two main tools for monitoring such compliance are its Child and Family Services Reviews (CFSR) and Title IV-E Foster Care Eligibility Reviews (IV-E Eligibility Reviews), discussed below.

1. Child and Family Services Reviews

a) Background and Purpose

Federal law requires HHS to review state child and family service programs to determine if they are in “substantial conformity” with (1) the state plan requirements set forth in titles IV-B and IV-E of the Social Security Act, (2) regulations promulgated by the HHS Secretary, and (3) the relevant approved state plans.²⁰ To carry out this mandate, HHS conducts CFSRs, periodic reviews of state child welfare systems, in order to assess state conformity with certain federal requirements for child protection, foster care, adoption, family preservation and family support, and independent living services. According to HHS, the Children’s Bureau conducts the CFSRs to achieve three goals:

- 1) ensure conformity with federal child welfare requirements;
- 2) determine what is actually happening to children and families as they are engaged in child welfare services; and
- 3) assist states in helping children and families achieve positive outcomes.²¹

As part of the CFSR, HHS first assesses statistics borne out by data reported by state agencies,²² and then engages in onsite reviews during which teams composed of federal and state employees examine a sample of individual cases under the responsibility of state child welfare agencies. Both phases of a CFSR assess state programs by evaluating a state’s conformity to seven outcomes and seven systemic factors. The seven outcomes, which pertain to the areas of safety, permanency and family and child well-being, are as follows:

²⁰ 42 USCS § 1320a-2a.

²¹ HHS, Children’s Bureau, *Child and Family Services Reviews* (available at <http://www.acf.hhs.gov/programs/cb/monitoring/child-family-services-reviews>).

²² HSS, Children’s Bureau, *Child and Family Services Reviews Procedures Manual* (2006) (available at www.acf.hhs.gov/programs/cb/cwmonitoring/tools/guide/procedures/manual.pdf).

| CFSR — Outcomes Examined | |
|------------------------------------|---|
| Safety | 1. Children are, first and foremost, protected from abuse and neglect. |
| | 2. Children are safely maintained in their homes whenever possible and appropriate. |
| Permanency | 3. Children have permanency and stability in their living situations. |
| | 4. The continuity of family relationships and connections is preserved for families. |
| Family and Child Well-Being | 5. Families have enhanced capacity to provide for their children’s needs. |
| | 6. Children receive appropriate services to meet their educational needs. |
| | 7. Children receive adequate services to meet their physical and mental health needs. |

The reviews also examine seven systemic factors that affect the quality of services delivered to children and families and the outcomes they experience. The systemic factors relate to the following areas:

| CFSR — Systemic Factors Examined |
|--|
| 1. Statewide Information System — <i>e.g.</i> , can the state system identify the status, demographic characteristics, location and goals of children in foster care |
| 2. Service Array — <i>e.g.</i> , what is the availability and accessibility of services, and can services be individualized to meet unique needs |
| 3. Case Review System — <i>e.g.</i> , is there a process for developing a case plan and for joint case planning with parents, and for subsequent case reviews and hearings; is there a process for notifying caregivers of reviews and hearings and for opportunity for them to be heard |
| 4. Staff Training — <i>e.g.</i> , are initial and ongoing staff training provided |
| 5. Quality Assurance System — <i>e.g.</i> , are there standards to ensure quality services and children’s safety and health |
| 6. Agency Responsiveness to the Community — <i>e.g.</i> , does the agency engage in ongoing consultation with critical stakeholders in developing the Children and Family Services Plan |
| 7. Foster & Adoptive Parent Licensing, Recruitment, & Retention — <i>e.g.</i> , are there standards for foster family and child care institutions and are they applied equally to all foster family and child care institutions |

A state found not to be in substantial conformity must submit a program improvement plan (PIP) to ACF for approval within 90 calendar days from the date it receives the written notification from ACF that it is not operating in substantial conformity.²³ ACF retains the authority to establish time frames for the program improvement plan consistent with the seriousness and complexity of the remedies required for any areas determined not in substantial conformity, not to exceed two years. Particularly egregious areas of nonconformity impacting child safety must receive priority in both the content and time frames of the program improvement plans and must be addressed in less than two years.²⁴

Federal law provides that HHS is to withhold federal matching funds if a state’s program fails to substantially conform to federal law and the approved state plan.²⁵ However, HHS must first afford the state an opportunity to adopt and implement a corrective action plan designed to end the failure to so conform; make technical assistance available to the state to the extent feasible to enable the state to develop and implement such a corrective action plan; suspend the withholding while such a corrective action plan is in effect; and to rescind any withholding if the corrective action plan is completed.²⁶

Interestingly, in gauging whether a state has successfully implemented a PIP, HHS does not hold states to the same original thresholds it uses during the CFSR process. According to HHS,

“ACF and the State may negotiate a level of improvement in the PIP that results in performance less than the applicable standards required for substantial conformity....For example, with respect to outcome achievement, the State and Regional Office may agree on a percentage of cases that meet the criteria for substantial conformity that is different from that defined for the CFS

²³ 45 C.F.R. § 1355.35[c][1]. Substantial conformity means that the state has met federal criteria established for an outcome or systemic factor.

²⁴ 45 C.F.R. § 1355.32.

²⁵ 42 U.S.C. § 1320a-2a(b)(2).

²⁶ 42 U.S.C. § 1320a-2a(b)(4).

reviews....Additionally, progress may be measured through an alternate method such as a special study or a quality assurance review. The State may also be permitted to use methods for determining the effectiveness of its improvement efforts in ways other than evaluating cases for substantial conformity.”²⁷

Thus, HHS may find that a state successfully completed a PIP and rescind the state’s penalty, even if that state’s performance still fails to substantially conform to the original standard baseline federal requirements. In other words, a state could fail to conform to federal child welfare laws in every single CFSR it undergoes—and yet never be subject to any withholding of federal funds or any other inducement to obey federal law.²⁸ As explained below, this scenario has in fact played out for the vast majority of states.

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By 2004 all 50 States, the District of Columbia, and Puerto Rico had completed their first CFSR (referred to as Round 1) — and HHS found that no jurisdiction was in substantial conformity with all seven outcome areas and all seven systemic factors. After all 52 jurisdictions completed the two-year PIP implementation following Round 1, HHS found that 43 states achieved all of their individualized PIP goals and implemented all required PIP activities. HHS assessed penalties on the remaining nine jurisdictions; however, it subsequently rescinded penalties for seven of them. Although there was no assurance that any of the 52 states had brought their programs into substantial conformity with federal outcomes and systemic factors following the PIP process, HHS ultimately assessed penalties on just two states.²⁹

According to ACF, in order

“to determine whether the first round of program improvement has resulted in an increased number of states being in substantial conformity, it is necessary to complete a second round of onsite CFSRs, including the issuance of final reports assessing the degree to which states were in substantial conformity with the outcomes and systemic factors.”³⁰

Accordingly, HHS began Round 2 of the CFSR process in 2007, and by 2010 it had completed the process for all 52 jurisdictions. HHS again found that no jurisdiction was in substantial conformity with all seven outcome areas and all seven systemic factors. Thus, although one of the stated goals of the CFSRs is to “ensure conformity with Federal child welfare requirements,”³¹ all 52 jurisdictions failed to be in substantial conformity with federal requirements during the first two rounds of the CFSRs — and as noted above, the PIP process does not even attempt to ensure substantial conformity with federal child welfare requirements. Appendix B shows the extent to which all jurisdictions failed to be in substantial conformity with the outcome areas and system factors during both rounds of the CFSR completed to date.

²⁷ Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 13 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

²⁸ See 45 C.F.R. 1355.35; 45 C.F.R. 1355.36.

²⁹ HHS, Children’s Bureau, *Child and Family Services Reviews Status of Program Improvement Plans and Subsequent Child and Family Services Reviews* (copy available upon request from the Children’s Advocacy Institute).

³⁰ HHS, Administration for Children and Families, *FY 2012 Online Performance Appendix* at 51–52 (available at http://www.acf.hhs.gov/sites/default/files/opre/2012_appendix.pdf).

³¹ HHS Children’s Bureau, *Child and Family Services Reviews Fact Sheet* (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_factsheet.pdf).

At this writing, the Round 2 PIP implementation periods for all 52 jurisdictions have long since expired, but according to HHS' last report on the issue, only 16 states have in fact completed their PIPs. According to HHS, as of September 2012, the PIP Final Closeout Date for the remaining 36 jurisdictions was "TBD."³²

Round Three of the CFSR process was supposed to commence during FFY 2012.³³ However, on April 5, 2011, the Children's Bureau (CB) published a notice in the Federal Register asking for public comment on ways to improve the CFSR process.³⁴ Several dozen individuals and/or entities submitted comments to the CB; the deadline for such comments was May 20, 2011. Almost two years later, CB issued Technical Bulletin #6, stating that based on the comments received from the public, it was still in the process of evaluating the CFSR process for Round Three. The Bulletin further stated:

"Since the CB is in the process of evaluating the CFSR process, states should disregard any projected years for Round Three CFSRs listed in previous documents or guidance that we provided. These include projected start dates in, but are not limited to, a document titled the "Status of Program Improvement Plans and Subsequent Child and Family Services Reviews" that was posted on the CB website. States should not initiate statewide assessments for the purposes of Round Three CFSRs until notified to do so by the CB.

We strongly encourage States to review the information contained in ACYF-CB-IM-12-07 regarding establishing and maintaining continuous quality improvement (CQI) systems in State child welfare agencies. We also encourage states to continue their efforts to improve child and family outcomes, agency practices and systems."³⁵

On March 20, 2014, the CB released CFSR Technical Bulletin #7 to announce that Round Three of the CFSR process would commence in FFY 2015. The Bulletin noted that CB "is finalizing changes to how we conduct reviews to accomplish the following:

- Support a state's capacity to self-monitor for child and family outcomes, systems functioning and improvement practices;
- Better integrate the monitoring process with the state's five-year title IV-B Child and Family Services Plan (CFSP) and Annual Progress and Services Reports (APSR); and
- Ensure data measures and methods used to establish national standards better reflect state practices and improvement efforts."³⁶

The Bulletin further noted that "[t]he overall goals of the reviews remain to...[e]nsure conformity with title IV-B and IV-E child welfare requirements...."³⁷

The CB is tentatively scheduled to review eight states in 2015, fifteen states and the District of Columbia in 2016, fifteen states in 2017, and thirteen states and Puerto Rico during 2018.

b) **Problems with the CFSR Process**

According to HHS, one goal of the CFSR process is "ensure conformity with federal child welfare requirements."³⁸ After two full rounds (and more than thirteen years), the CFSR process has failed to ensure that even a single state is in conformity with federal child welfare requirements, even with regard to the

³² See *supra*, note 29. A February 25, 2014 Freedom of Information Act request from the authors to HHS for more current information regarding the status of the 16 incomplete PIPs has gone unanswered at this writing.

³³ *Id.*

³⁴ See 76 FR 18677 (Apr. 5, 2011) (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_fedreg_notice.pdf).

³⁵ HHS, Children's Bureau, *Technical Bulletin #6* (Feb. 4, 2013) (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_tb6.pdf).

³⁶ HHS, Children's Bureau, *Technical Bulletin #7* (March 20, 2014) (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_tb7.pdf).

³⁷ HHS, Children's Bureau, *Technical Bulletin #7* (March 20, 2014) (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_tb7.pdf).

³⁸ HHS, Children's Bureau, *Child and Family Services Reviews* (available at <http://www.acf.hhs.gov/programs/cb/monitoring/child-family-services-reviews>).

limited aspects of federal child welfare law that the CFSR review process encompasses — let alone with the plethora of federal child welfare requirements that the CFSR process does not consider or evaluate.

This review process is perhaps HHS’ best opportunity to evaluate states’ actual implementation of, and conformity with, a wide spectrum of federal child welfare requirements. In mandating that HHS adopt regulations for the review of state child and family services programs, Congress clearly envisioned a much broader evaluation than what the CFSR process entails; specifically, Congress directed that the HHS review be designed to determine whether state programs “are in substantial conformity with (1) State plan requirements under ... parts B and E [of title IV], (2) implementing regulations promulgated by the Secretary, and 3) the relevant approved State plans.”³⁹ HHS’ decision not to use the CFSR process to review and assess state performance with regard to *all* state plan requirements set forth in parts B and E allows states’ performance *vis-à-vis* many critical areas of federal child welfare law to go unchecked — contrary to Congressional intent.

Further, far from “ensur[ing] conformity with federal child welfare requirements”, the PIP element of the CFSR process, as devised by HHS, actually allows the Agency and states to set negotiated, individualized, and typically less stringent goals for states to meet after failing the original review. States are given substantial amounts of time to meet the lowered expectations. Although the imposition of financial penalties or sanctions is a tool HHS has within its discretion that, arguably, could in fact ensure state conformity with federal requirements, thus far HHS has only imposed penalties on states that cannot even meet the terms of their own customized PIP. Thus, at no time since it began has the CFSR process has HHS ensured conformity with federal child welfare requirements.

According to HHS, one goal of the CFSR process is “ensure conformity with federal child welfare requirements.”⁴¹ After two full rounds (and more than thirteen years), the CFSR process has failed to ensure that even a single state is in conformity with federal child welfare requirements, even with regard to the limited aspects of federal child welfare law that the CFSR review process encompasses — let alone with the plethora of federal child welfare requirements that the CFSR process does not consider or evaluate.

As noted above, HHS should have started Round Three reviews in FFY 2012. In fact, HHS’ own regulations require that programs “found not to be operating in substantial conformity during an initial or subsequent review” — in other words, all 50 states, D.C., and Puerto Rico — must “[b]egin a full review two years after approval of the program improvement plan.”⁴⁰ ACF’s approval of a PIP comes prior to the implementation of the PIP,⁴¹ but even using the PIP start date to start the two-year clock running, the chart below illustrates how HHS’ delay in commencing Round Three caused all 52 jurisdictions to be in current and ongoing violation of a federal regulation — a violation that, for many states, will continue through FFY 2018.⁴²

Although the efficacy of the CFSR process is highly questionable in terms of ensuring state conformity with federal child welfare laws and standards, it at least provided *some* modicum of external oversight and monitoring of at least a few aspects of federal child welfare law. HHS’ failure to adhere to its own timeline for

³⁹ 42 USCS § 1320a-2a(a).
⁴⁰ 45 CFR 1355.32(b)(2)(ii).
⁴¹ 45 CFR 1355.35(2).

⁴² In Technical Bulletin #6, HHS stated that “[s]ince the CB is in the process of evaluating the CFSR process, states should disregard any projected years for Round Three CFSRs listed in previous documents or guidance that we provided. These include projected start dates in, but are not limited to, a document titled the “Status of Program Improvement Plans and Subsequent Child and Family Services Reviews” that was posted on the CB website. States should not initiate statewide assessments for the purposes of Round Three CFSRs until notified to do so by the CB.” HHS, Children’s Bureau, *Child and Family Services Review Technical Bulletin #6* (Feb. 4, 2013). Any authority authorizing HHS to waive the terms of a duly adopted regulation via the issuance of a “technical bulletin” is unknown to the authors.

full reviews means that the Agency has been failing to provide abused and neglect children with even that level of protection.

| State / Jurisdiction | Date of Round 2 PIP Start Date (following PIP approval) | Federally mandated start date of next full review | HHS' tentative schedule of start dates for next full review |
|----------------------|--|---|---|
| Alabama | 8/31/09 | 8/31/11 | FFY 2018 |
| Alaska | 12/1/09 | 12/1/11 | FFY 2017 |
| Arizona | 10/1/08 | 10/1/10 | FFY 2015 |
| Arkansas | 7/1/09 | 7/1/11 | FFY 2016 |
| California | 7/1/09 | 7/1/11 | FFY 2016 |
| Colorado | 5/1/11 | 5/1/13 | FFY 2017 |
| Connecticut | 1/1/10 | 1/1/12 | FFY 2017 |
| Delaware | 10/1/08 | 10/1/10 | FFY 2015 |
| District of Columbia | 1/1/09 | 1/1/11 | FFY 2016 |
| Florida | 7/1/09 | 7/1/11 | FFY 2016 |
| Georgia | 8/31/08 | 8/31/10 | FFY 2015 |
| Hawaii | 1/1/11 | 1/1/13 | FFY 2017 |
| Idaho | 4/1/09 | 4/1/11 | FFY 2016 |
| Illinois | 1/1/11 | 1/1/13 | FFY 2018 |
| Indiana | 6/1/09 | 6/1/11 | FFY 2016 |
| Iowa | 10/1/11 | 10/1/13 | FFY 2018 |
| Kansas | 10/1/08 | 10/1/10 | FFY 2015 |
| Kentucky | 3/1/10 | 3/1/12 | FFY 2016 |
| Louisiana | 9/1/11 | 9/1/13 | FFY 2018 |
| Maine | 10/1/10 | 10/1/12 | FFY 2017 |
| Maryland | 4/15/11 | 4/15/13 | FFY 2018 |
| Massachusetts | 10/1/09 | 10/1/11 | FFY 2015 |
| Michigan | 6/1/11 | 6/1/13 | FFY 2018 |
| Minnesota | 1/1/10 | 1/1/12 | FFY 2016 |
| Mississippi | 4/1/11 | 4/1/13 | FFY 2018 |
| Missouri | 10/1/11 | 10/1/13 | FFY 2017 |
| Montana | 1/1/10 | 1/1/12 | FFY 2017 |
| Nebraska | 7/1/10 | 7/1/12 | FFY 2017 |
| Nevada | 12/1/10 | 12/1/12 | FFY 2018 |
| New Hampshire | 8/10/11 | 8/10/13 | FFY 2018 |
| New Jersey | 4/1/10 | 4/1/12 | FFY 2017 |
| New Mexico | 4/1/08 | 4/1/10 | FFY 2015 |
| New York | 1/1/10 | 1/1/12 | FFY 2016 |
| North Carolina | 4/1/08 | 4/1/10 | FFY 2015 |
| North Dakota | 7/1/10 | 7/1/12 | FFY 2016 |
| Ohio | 10/1/10 | 10/1/12 | FFY 2017 |
| Oklahoma | 10/1/09 | 10/1/11 | FFY 2016 |
| Oregon | 1/1/09 | 1/1/11 | FFY 2016 |
| Pennsylvania | 6/30/10 | 6/30/12 | FFY 2017 |
| Puerto Rico | 1/1/12 | 1/1/14 | FFY 2018 |
| Rhode Island | 6/1/11 | 6/1/13 | FFY 2018 |
| South Carolina | 2/1/11 | 2/1/13 | FFY 2017 |
| South Dakota | 7/1/10 | 7/1/12 | FFY 2016 |
| Tennessee | 4/1/10 | 4/1/12 | FFY 2017 |
| Texas | 4/1/10 | 4/1/12 | FFY 2016 |
| Utah | 10/1/11 | 10/1/13 | FFY 2018 |
| Vermont | 10/1/08 | 10/1/10 | FFY 2015 |
| Virginia | 10/1/10 | 10/1/12 | FFY 2017 |
| Washington | 10/1/11 | 10/1/13 | FFY 2018 |
| West Virginia | 7/1/10 | 7/1/12 | FFY 2017 |
| Wisconsin | 1/10/11 | 1/10/13 | FFY 2018 |
| Wyoming | 7/1/10 | 7/1/12 | FFY 2016 |

As noted above, HHS spent the last several years studying ways to improve the CFSR process.⁴³ Child advocates welcomed this review, envisioning a more robust and intensive process that would be more effective in actually ensuring state conformity with title IV-B and IV-E child welfare requirements — the underlying goal of the CFSR process and one which HHS has never achieved, even for a single state. However, the changes that HHS proposed in 2014 for Round Three all appear to be geared at “reduc[ing] states’ burden” with regard to the CFSR process and “creat[ing] additional efficiencies and flexibility for states when possible.”⁴⁴ None of the proposed changes suggest a new fervor on the part of HHS to ensure state conformity with title IV-B and IV-E child welfare requirements.

2. IV-E Eligibility Reviews

a) Background and Purpose

The IV-E Eligibility Reviews focus on determining whether children in foster care meet the federal eligibility requirements for foster care maintenance payments.⁴⁵ The review team, which is comprised of federal and state representatives, examines sample cases for federal eligibility requirements, such as the following:

- A court order confirming the need to remove the child from the home;
- A court order confirming the state’s reasonable efforts to preserve the family, when it is safe to do so, and to finalize a permanency plan;
- A valid agreement for the child voluntarily placed in foster care and a court order authorizing continued placement;
- Completed criminal background checks on prospective foster and adoptive parent;
- Compliance with safety requirements for child-care institutions;
- Licensed foster care providers;
- Needs-based test to confirm the child’s eligibility; and
- State responsibility for placement and care of the child.⁴⁶

A payment disallowance is imposed for all cases that fail to meet federal eligibility requirements. If a state fails in more than a specific percentage of cases, it is considered not in substantial compliance with the federal foster care program requirements. States that do not achieve substantial compliance will develop and implement Program Improvement Plans, after which a secondary review is conducted. After the secondary

⁴³ See 76 FR 18677 (Apr. 5, 2011) (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_fedreg_notice.pdf).

⁴⁴ HHS, Children’s Bureau, *Technical Bulletin #7* (March 20, 2014) at 2 (available at http://www.acf.hhs.gov/sites/default/files/cb/cfsr_tb7.pdf).

⁴⁵ HHS Children’s Bureau, *Children’s Bureau Program Assessment for Child and Family Services Reviews and Title IV-E Foster Care Eligibility Reviews* (available at <http://www.acf.hhs.gov/programs/cb/resource/cfsr-title-iv-e-fact-sheet>).

⁴⁶ HHS Children’s Bureau, *Children’s Bureau Program Assessment for Child and Family Services Reviews and Title IV-E Foster Care Eligibility Reviews* (available at <http://www.acf.hhs.gov/programs/cb/resource/cfsr-title-iv-e-fact-sheet>).

review, if the state is still not in substantial compliance, a larger disallowance is assessed on the basis of the state's total foster care population during the period under review.⁴⁷

b) **Problems with the IV-E Eligibility Review Process**

The primary failing of the IV-E eligibility review process is one attributable to Congress, not HHS. By continuing to tie federal foster care maintenance payment eligibility to whether a child could have met the AFDC eligibility requirements of 1996, with no indexing for inflation, Congress is slowly but surely relieving the federal government of financial responsibility for foster care maintenance payments, since the percentage of children capable of meeting the 1996 eligibility rules diminishes each year — it dropped from 55% in 1998 to 44% in 2010, and is no doubt even lower in 2014.⁴⁸

However, one failing that is directly attributable to HHS pertains to the narrow scope of “eligibility requirements” that it considers when conducting these reviews. Although one of the stated goals of the IV-E reviews is to help determine whether federal funds are spent “in accordance with federal statute, regulation, and policy,”⁴⁹ HHS focuses its examination on whether a few selected criteria were met with regard to children for whom federal reimbursement was sought by states. As the Children’s Bureau puts it, “[t]he regulatory reviews of the title IV-E Foster Care program determine whether children in foster care meet the federal eligibility requirements for foster care maintenance payments” and such reviews are conducted by examining “child and provider case records, as well as payment documentation, to validate the accuracy of a state’s reimbursement claims of foster care payments.”⁵⁰

In other words, HHS chooses not to use the IV-E eligibility review process to determine whether IV-E agencies are in compliance with a broader scope of federal statutes, regulations and policies that also must be complied with in order for a state to be eligible for federal reimbursement. For example, HHS could utilize this process to ensure that IV-E agencies are in conformity with the federal requirement that foster care maintenance payments are adequate to “cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, and reasonable travel to the child’s home for visitation.”⁵¹ Thus, while HHS could use this review process to determine if states are doing everything they are mandated to do in order to be eligible for federal child welfare funding, it chooses not to do so.

3. **Partial Reviews**

a) **Background and Purpose**

As explained above, HHS uses the CFRS process to ensure that state plans and state practice conform to some (but not all) requirements of titles IV-B and IV-E. HHS acknowledges that the CFRS process does not constitute an exhaustive analysis of states’ conformity with all state plan requirements set forth in federal child welfare law.⁵² Thus, HHS is supposed to use the partial review process “to determine conformity with State Plan requirements outside the scope of the child and family services reviews.”⁵³

⁴⁷ HHS Children’s Bureau, *Children’s Bureau Program Assessment for Child and Family Services Reviews and Title IV-E Foster Care Eligibility Reviews* (available at <http://www.acf.hhs.gov/programs/cb/resource/cfsr-title-iv-e-fact-sheet>).

⁴⁸ Christina James Brown, CWLA, *Look Back Anniversary Is a Time to Call for New Direction*, Huffington Post (July 19, 2012) (available at <http://www.huffingtonpost.com/christine-jamesbrown/look-back-anniversary-is-b-1676640.html>). See section II.B.3, *supra*, for more discussion.

⁴⁹ HHS Children’s Bureau, *Title IV-E Foster Care Eligibility Review Guide* (Dec. 2012) at 4 (available at http://www.acf.hhs.gov/sites/default/files/cb/title_iv_e_review_guide.pdf).

⁵⁰ HHS, Children’s Bureau, *Title IV-E Reviews* webpage (available at <http://www.acf.hhs.gov/programs/cb/monitoring/title-ive-reviews>).

⁵¹ 42 U.S.C. § 675(4)(A).

⁵² See, e.g., HHS, Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 1 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

⁵³ Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 1 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

The discretion to initiate a partial review lies mostly with the review staff of ACF's ten regional offices.⁵⁴ However, before a partial review can be executed, ACF must have reason to believe that a state is not in compliance with its state plan or applicable federal law — and again HHS has adopted a passive approach with regard to this monitoring tool. Federal regulations provide that the agency will institute a partial review “[w]hen ACF becomes aware of a title IV-B or title IV-E compliance issue that is outside the scope of the child and family services review process.”⁵⁵ Upon receipt of information indicating noncompliance, ACF inquires with state level agencies, often informally, to determine if there is any need to proceed with an actual review.⁵⁶ What happens at this stage in the process is not enunciated in either the Code of Federal Regulations or the Child Welfare Policy Manual. Interviews with a number of ACF monitoring staff reveal that the inquiry process is largely unstructured and consists of reciprocal communication between ACF regional staff and the relevant state agencies.⁵⁷ After this inquiry, if it appears that a state is not in conformity, ACF initiates the partial review process, the results of which may be enforced by withholding federal funds.⁵⁸

b) Problems with the Partial Review Process

Little information is available on any HHS website about the use of the partial review process in the realm of child welfare; a broader inquiry produced evidence of only one partial review conducted by ACF in the past several years (an HHS Departmental Appeals Board ruling in which Illinois contested ACF's withholding of federal funds due to the state's inappropriate allocation of Title IV-E funds).⁵⁹ The underutilization of the partial review is of particular concern due to the many aspects of federal child welfare law that are not addressed through either the CFSR or IV-E eligibility reviews. For example, neither review discussed above includes HHS' evaluation of a state's foster care maintenance payments to ensure that they are in compliance with federal requirements — and it appears that HHS has never utilized the partial review process to conduct any such investigation either. This is but one example of the many aspects of federal child welfare law that have been systematically excluded from any oversight by HHS.

The underutilization of the partial review is of particular concern due to the many aspects of federal child welfare law that are not addressed through either the CFSR or IV-E eligibility reviews.

Part of the problem lies in the passivity of the inquiry and partial review mechanism itself, as noted above. In a telephone interview, ACF's Child and Family Services Review lead in Washington, D.C., acknowledged the passive nature of the inquiry and partial review process.⁶⁰ When asked what might constitute a red flag requiring further agency inquiry, she stated that the agency monitors major news sources, state legislative behavior, advocacy group publications and current class action suits.⁶¹

However, over the past few years, advocacy organizations have released report after report documenting states' noncompliance with various aspects of federal child welfare laws, and numerous private lawsuits have been filed seeking state compliance with these laws, and yet no notable increase in HHS partial review activity

⁵⁴ 45 C.F.R. 1355.33(a)(2); 45 C.F.R. 1355.33(c).

⁵⁵ 45 C.F.R. 1355.32(d).

⁵⁶ *Id.*

⁵⁷ Telephone interview with Miranda Lynch-Thomas, CFSR Lead, Administration for Children and Families, Dept. of Health and Human Services (Oct. 13, 2011); telephone interview with Debra Samples, California contact for ACF Region 9, Administration for Children and Families, Dept. of Health and Human Services.

⁵⁸ 45 C.F.R. 1533.32(d)(4); *see also* HHS, Child Welfare Policy Manual, § 5.1, *Monitoring, Child and Family Services Review*, Question 1 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=122).

⁵⁹ *See* Ill. Dept. of Children & Family Services, D.A.B. No. 2062 (Jan. 2007) (available at <http://www.hhs.gov/dab/decisions/dab2062.pdf>). While ACF employees have asserted that it is possible other partial reviews have been conducted, upon inquiry, this Illinois case remains the only instance for which they were able to provide documented proof. Telephone interview with Miranda Lynch-Thomas, CFSR Lead, Administration for Children and Families, Department of Health and Human Services (Oct. 13, 2011); telephone interview with Debra Samples, ACF Region 9 Contact for California, Administration for Children and Families, Department of Health and Human Services (Oct. 11, 2011).

⁶⁰ Telephone interview with Miranda Lynch-Thomas, CFSR Lead, Administration for Children and Families, Department of Health and Human Services (Oct. 13, 2011).

⁶¹ *Id.*

has been identified. The gap between the prevalence of these red flags and the practically nonexistent exercise of partial review inquiries is revealing. ACF's failure to make independent inquiries with regard to compliance or to follow up on leads provided from other sources, combined with an unwillingness to follow through with CFSR penalties, indicate executive branch nonfeasance in performing its basic branch functions.

Further concerns about how ACF perceives its role came to light after the authors of this report requested information pursuant to the Freedom of Information Act (FOIA) from the agency regarding its enforcement and oversight activities. One of the authors' requests sought, among other things, documents reflecting the extent to which ACF utilized the partial review process to conduct an inquiry with a state regarding "inadequate or underfunded foster care maintenance payments, the sufficiency of foster care caseworker training, caseworker turnover rates or caseworker caseloads." As is illustrated in Appendices B and C, these are issues that have been the subject of numerous privately brought lawsuits around the country. Time after time, courts have found state violations of federal law—logically indicating that these are areas where stronger executive branch oversight and enforcement would be appropriate. However, HHS' response was as follows:

"The Administration for Children and Families has performed a thorough search and recognized the topics mentioned are ones over which States have discretion in operating their title IV-B and IV-E programs. Therefore, those matters are not ones for which ACF would or could find a State not in conformity with State plan requirements under titles IV-B of the Social Security Act. As a result, ACF have no records to provide in response to your request."⁶²

4. State Plan Review, Approval, and Oversight

a) Background and Purpose

Another way that HHS may enforce state compliance with federal child welfare laws is through the review, approval and oversight of state plans, such as the Child and Family Services Plan. In order for a state to be eligible for funding through certain federal programs, it must submit a state plan to the HHS Secretary explaining how the state will comply with applicable federal requirements (see Appendix A for examples of issues that must be addressed in state plans for selected programs). If these plans do not comply with the relevant statutory provisions, the HHS Secretary is not authorized to approve it. And if the Secretary finds that a state plan that had been approved no longer complies with the relevant provisions, or that in the administration of the plan there is a substantial failure to comply with the provisions of the plan, federal law mandates the Secretary to inform the state that further payments will not be made to the state, or that payments will be reduced as the Secretary deems appropriate, until the Secretary is satisfied that there is no longer any such failure to comply, and "until he is so satisfied he *shall* make no further payments to the State, or *shall* reduce such payments by the amount specified in his notification to the State."⁶³

b) Problems with the State Plan Review, Approval, and Oversight Process

Congress clearly envisioned that HHS would use its state plan review, approval and oversight authority to ensure state compliance with federal child welfare laws. The responsibility given to HHS by Congress goes far beyond reviewing and approving paperwork on a regular basis — it entails active, independent oversight with regard to how states are in fact implementing the provisions contained in their state plans, as well as the imposition of fair but serious consequences where states are not in compliance with federal law. Such active and independent oversight by HHS is especially critical for the many aspects of federal child welfare law that are not examined as part of the CFSR and Title IV-E reviews noted above.

Unfortunately, however, much of the Agency's oversight with regard to state plans involves state self-certification their state plans and programs adhere to federal requirements. For example, with regard to the

⁶² Response from Martha Hudson, ACF FOIA Officer, to CAI FOIA request (Feb. 14, 2012), on file with the Children's Advocacy Institute.

⁶³ See, e.g., 42 U.S.C. 671(b) (emphasis added).

Foster Care Independence Act (FCIA), the U.S. Government Accountability Office (GAO) reported as follows:

“While ACF officials stated that the plans and annual reports served as the primary method the agency used to monitor states’ use of the Chafee Program funds, ACF did not require states to use a uniform reporting format, set specific baselines for measuring progress, or report on youths’ outcomes.... ***ACF officials said that they recognize the limitations of these documents as tools to monitor states’ use of independent living program funds, but explained that they rely on states’ to self-certify that their independent living programs adhere to FCIA requirements.*** Staff in ACF’s 10 regional offices conduct direct oversight of the program by reviewing the plans and reports, interpreting guidance, and communicating with the states. However, officials in three offices reported during our 2004 review that their review of the documents was cursory and that the plans and annual reports do not serve as effective monitoring tools.”⁶⁴

Congress clearly envisioned that HHS would use its state plan review, approval and oversight authority to ensure state compliance with federal child welfare laws. The responsibility given to HHS by Congress goes far beyond reviewing and approving paperwork on a regular basis — it entails active, independent oversight with regard to how states are implementing the provisions contained in their state plans, as well as the imposition of fair but serious consequences where states are not in compliance with federal law.

With regard to CAPTA, HHS appears to rely almost exclusively on the self-certification state plan format and does not independently review states for compliance. HHS has decided that because federal law requires the submission of a state plan with assurances in the form of certifications by the state’s Chief Executive Officer that certain provisions, procedures, or programs are in place in the state, “the primary responsibility for review of state statutes and policies rests with the states” —HHS does not intend to conduct its own even *de minimus* reviews of state statutes and policies to determine whether states are in fact meeting the eligibility requirements for CAPTA funding.⁶⁵ HHS’ Child Welfare Policy Manual clearly indicates the passive role that HHS has adopted with regard to monitoring states for compliance with CAPTA:

“If there are instances in which ACYF ***is presented with evidence*** of potential deficiencies (*e.g.*, through the...child and family services program reviews being conducted by the Children’s Bureau or other sources), action will be taken to verify whether a problem actually exists.”⁶⁶

In the area of facilitating the efficacy of the Interstate Compact on the Placement of Children (ICPC), and with the specific intent of holding states accountable for the safe and timely placement of children across state lines, Congress enacted legislation in 2006 that explicitly requires state plans to provide that within 60 days after the state receives from another state a request to conduct a study of a home environment for purposes of assessing the safety and suitability of placing a child in the home, the state shall conduct and complete the study and return to the other state a report on the results of the study, which shall address the extent to which placement in the home would meet the needs of the child.⁶⁷ The HHS Secretary is obligated to not only approve state plans, but to ensure that states’ programs are in substantial conformity with the relevant approved state plans (as well as with the state plan requirements of Parts B and E and implementing regulations of HHS).⁶⁸ Despite this being one of the few avenues for the federal government to play a direct

⁶⁴ U.S. Government Accountability Office, *Child Welfare: HHS Actions Would Help States Prepare Youth in the Foster Care System for Independent Living* (Washington, D.C.; July 2007) at 18–19 (available at <http://www.gao.gov/assets/120/117294.pdf>) (emphasis added).

⁶⁵ HHS, Administration for Children and Families, Children’s Bureau, *Child Welfare Policy Manual*, § 2.1, CAPTA, Assurances and Requirements, Question 2 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=64).

⁶⁶ HHS, Administration for Children and Families, Children’s Bureau, *Child Welfare Policy Manual*, § 2.1, CAPTA, Assurances and Requirements, Question 2 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=64) (emphasis added).

⁶⁷ 42 U.S.C. § 671(a)(26).

⁶⁸ 42 U.S.C. § 1320a-2a.

role in ensuring the safe and expedited placement of children into safe, permanent homes across states lines, HHS makes no apparent effort to ensure that state programs are in fact in substantial conformity with this ICPC-related provision.

And most recently, with regard to the Fostering Connections Act, the GAO reported in May 2014 as follows:

“To date, HHS’s main oversight of state implementation of the Fostering Connections Act has consisted of reviewing states’ title IV-E plans to ensure they comply with federal requirements; however, the agency has not yet systematically reviewed actual state implementation of the act.... According to officials in HHS regional offices that we interviewed, HHS’s other oversight activities include reviewing quarterly expenditure data and ongoing discussions with state child welfare officials through conference calls, site visits, technical assistance, and joint planning with state officials around their plans for delivering and improving child welfare services....Additionally, HHS officials in one regional office told us that they may follow up on specific issues brought to their attention by advocates. While these oversight activities allow HHS to have some knowledge about state implementation of the Fostering Connections Act, at the time of our interviews, officials at all four HHS regional offices we spoke to told us that since the Fostering Connections Act was enacted, they have not comprehensively evaluated compliance with title IV-E plans within states after they have been approved.”⁶⁹

5. Adoption and Foster Care Analysis and Reporting System and Assessment Reviews

a) Background and Purpose

In 1986, Congress directed the HHS Secretary to devise a system for the collection of data relating to adoption and foster care in the U.S., and directed that the system be fully implemented by October 1, 1991.⁷⁰ Effective January 21, 1994, the Secretary adopted federal regulations at 45 CFR 1355.40 to implement this mandate, creating the Adoption and Foster Care Analysis and Reporting System (AFCARS) Assessment Review process “to assure the accuracy and reliability of the foster care and adoption data.”⁷¹ During these reviews, a federal review team assesses the efficiency and effectiveness of states’ data collection, extraction, and reporting processes, and provides technical assistance to state staff responsible for those processes.⁷² AFCARS collects case level information on all children in foster care for whom state and Tribal title IV-E agencies have responsibility for placement, care or supervision and on children who are adopted under the auspices of the state and Tribal title IV-E agency. Some of the information reported in AFCARS includes demographic information on the foster child as well as the foster and adoptive parents, the number of removal episodes a child has experienced, the number of placements in the current removal episode, as well as the current placement setting. Title IV-E agencies are required to submit AFCARS data semi-annually to the Children’s Bureau.⁷³

Through the AFCARS Assessment Review (AAR), the CB evaluates each state’s information system’s capability to collect, extract, and transmit the AFCARS data accurately to the Children’s Bureau; a second focus of the AAR is to assess the accuracy of the collection and documentation of information related to the foster care and/or adoption case of a child.

⁶⁹ U.S. Government Accountability Office, *Foster Care — HHS Needs to Improve Oversight of Fostering Connections Act Implementation* (May 2014) at 21 (available at <http://www.gao.gov/assets/670/663655.pdf>).

⁷⁰ 42 U.S.C. § 679.

⁷¹ HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf).

⁷² HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf).

⁷³ HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at 2 (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf).

According to ACF, it uses AFCARS data for several different purposes, including

- determining awards for the Adoption Incentives program;
- preparing the Child Welfare Outcomes report;
- conducting the Child and Family Services Reviews;
- conducting title IV-E foster care eligibility reviews;
- determining the allotment of funds for the Chafee Foster Care Independence program;
- conducting trend analyses and short- and long-term planning efforts;
- targeting areas for initial or increased technical assistance efforts, discretionary service grants, research and evaluation, and regulatory change; and
- responding to request for data from federal, state, tribal, and private agencies.⁷⁴

With so many critical processes relying on the information generated by AFCARS, it is imperative that states provide reliable, consistent, and complete data as required by federal law. And when the Secretary finds that a state is not in substantial compliance with AFCARS data reporting responsibilities, federal law requires the Secretary to notify the state of the failure and that payments to the state under 42 USCS §§ 670 et seq. will be reduced if the state fails to submit the data, as so required, within six months after the date the data was originally due to be so submitted.⁷⁵ Yet this does not play out in reality. There is no meaningful oversight and the states know it.

b) Problems with the AFCARS System and Assessment Reviews

States were required to report the first AFCARS data to ACF for FY 1995. However, it was not until FY 1998, when ACF implemented AFCARS financial penalties for a state not submitting data or submitting data of poor quality that the data became stable enough for ACF and others to use for a wide variety of purposes.⁷⁶ Unfortunately, after several states appealed their AFCARS penalties, ACF declared in 2002 that it “will not assess penalties for States determined not to be in substantial compliance with the AFCARS standards.”⁷⁷ Following that pronouncement, Congress enacted the Adoption Promotion Act of 2003 (Public Law 108-145), in which it expressly stated that if the Secretary finds that the state has failed to submit the data, as so required, by the end of the six-month period, he/she is *mandated* to reduce the amounts otherwise payable to the state under 42 USCS §§ 670 et seq., for each quarter ending in the six-month period (and each quarter ending in each subsequent consecutively occurring six-month period until the Secretary finds that the State has submitted the data, as so required), by specified amounts.⁷⁸

However, in 2004 ACF declared that it “is not assessing AFCARS penalties at this time...and will not take penalties until new, final AFCARS regulations are issued implementing...the Adoption Promotion Act of 2003”⁷⁹ — **which,**

*However, in 2004 ACF declared that it “is not assessing AFCARS penalties at this time...and will not take penalties until new, final AFCARS regulations are issued implementing...the Adoption Promotion Act of 2003” — **which, as of October 2014, HHS still has not yet done.***

⁷⁴ HHS, ACF, Children’s Bureau, *About AFCARS* (available at <http://www.acf.hhs.gov/programs/cb/resource/about-afcars>).

⁷⁵ 42 U.S.C. § 674(f)(1).

⁷⁶ ACF, Notice of Proposed Rulemaking, Docket # ACF-2007-0125-0 (Jan. 11, 2008) (available at <http://www.regulations.gov/#/documentsDetail;D=ACF-2007-0125-0001>).

⁷⁷ HHS, Administration for Children and Families, *Informational Memorandum ACYF-CB-IM-02-03* (April 8, 2002) (available at <http://www.acf.hhs.gov/programs/cb/resource/im0203>).

⁷⁸ 42 U.S.C. § 674(f)(2).

⁷⁹ HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf) at 1, fn. 2.

as of October 2014, HHS still has not yet done.⁸⁰ Thus, for the past decade, ACF has openly flouted a direct and express Congressional mandate. And by refusing to impose financial penalties on states that fail to comply with federal data reporting requirements, ACF has ignored one of the most incentivizing tools it has to ensure states' submission of reliable, consistent, and complete data — information that could have meaningfully contributed to the improvement of the adoption and foster care processes.

ACF's refusal to impose penalties could perhaps be overlooked if states were routinely found to be in compliance with AFCARS requirements. However, since FFY 2001,⁸¹ ACF has not found a single state to be in substantial compliance with the AFCARS standards during the state's AAR.

Further, according to ACF, "the AFCARS reviews are not designed to be done on an on-going basis. However, if information regarding the quality of a title IV-E agency's data is identified through another means, such as a CFSR or an audit by an outside organization..., then it is possible that another AAR will be conducted."⁸² However, documents provided by HHS to this report's authors in response to a Freedom of Information Act request indicate that as of June 12, 2012, HHS revisited no less than eleven states' data reporting, and found all eleven states to *again* be out of compliance with AFCARS standards — indicating that perhaps on-going AFCARS reviews are indeed called for.

Another shortcoming regarding AFCARS pertains to HHS' failure to timely update its information collection requirements to reflect new legislative enactments and/or amendments. In 2014, six years after the enactment of the Fostering Connections Act, the GAO reported that HHS still has not updated AFCARS to include data that is necessary to effectively monitor aspects of the Act, and concluded that "[t]his lack of data further hinders HHS's ability to evaluate implementation of the Fostering Connections Act."⁸³

6. Shortcomings of HHS' Data Collection / Monitoring Activities

Above and beyond the shortcomings of HHS' data collection and monitoring activities mentioned above, is an ever greater shortcoming that is rarely discussed — the extent to which the data collected by HHS is insufficient to show the true well-being of children in care and those who have exited care. Examples of some of the many data points which should be collected by HHS but, unfortunately, are not include:

- The number of prior referrals (regardless of whether such referrals were substantiated, unsubstantiated, or evaluated out) that had been made about each child or family who becomes a part of the child welfare system.
- The number of children with prior referrals for themselves or a sibling (regardless of whether such referrals were substantiated, unsubstantiated, or evaluated out) who are subsequently placed in out-of-home care.
- The number of prior referrals (regardless of whether such referrals were substantiated, unsubstantiated, or evaluated out) that had been made about every child who dies due to child abuse or neglect.
- The number of children with prior referrals for themselves or a sibling (regardless of whether such referrals were substantiated, unsubstantiated, or evaluated out) who subsequently die due to child abuse or neglect.

⁸⁰ For more information on HHS' resistance to adopting implementing regulations for federal child welfare programs, see section III.B., *infra*.

⁸¹ HHS, ACF, Children's Bureau, *AFCARS Assessment Reviews* (available at <http://www.acf.hhs.gov/programs/cb/monitoring/afcars-assessment-reviews>).

⁸² HHS, ACF, Children's Bureau, *Adoption and Foster Care Analysis and Reporting System (AFCARS) — Guide to an AFCARS Assessment Review* (Dec. 2012) at 9 (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf).

⁸³ U.S. Government Accountability Office, *Foster Care — HHS Needs to Improve Oversight of Fostering Connections Act Implementation* (May 2014) at 23 (available at <http://www.gao.gov/assets/670/663655.pdf>).

- The number of prior referrals (regardless of whether such referrals were substantiated, unsubstantiated, or evaluated out) that had been made about every child who suffers a near-fatal injury due to child abuse or neglect.
- The number of children with prior referrals for themselves or a sibling (regardless of whether such referrals were substantiated, unsubstantiated, or evaluated out) who subsequently suffer near-fatal injuries due to child abuse or neglect.
- The number of parents of children in foster care who were, themselves, in the foster care system.
- The number of adults receiving TANF who were in the foster care system.
- The number of incarcerated adults who were in the foster care system.

B. HHS Failure to Properly Interpret and/or Implement Federal Child Welfare Laws

Generally, Congress sets broad guidelines to allow states the flexibility to appropriately structure their own programs that best serve their particularly unique demographic. In turn, it is the duty of HHS to craft regulations, rules, and guidance that provide states with clear and unambiguous parameters for those programs and which are consistent with legislative intent. When HHS is silent on the regulatory front, states are at times legitimately confused about their obligations, may knowingly take advantage of the lack of specific guidance to do as little as possible in return for federal funding, and may, in the worst cases, use legislative ambiguity and regulatory omissions to contravene what the money is intended for. Each of these scenarios is harmful to children and illustrates the need for HHS to establish clear, minimum levels of performance, where appropriate, via the regulatory process.

However, HHS has been derelict in its duty to interpret or implement child welfare laws via formal rulemaking. Case examples provided in Appendix D illustrate how our federal judiciary must compensate for HHS' failure to provide adequate guidance, in the form of clear regulations, and adequate enforcement of any guidance that does exist, to help implement Congressional intent.

HHS has been derelict in its duty to interpret or implement child welfare laws via formal rulemaking.

In a series of telephone interviews, ACF personnel involved in the monitoring and review process conveyed their belief that Titles IV-B and IV-E and correlating regulations do not impose specific standards on state agencies with regard to caseworker management or foster care maintenance payments.⁸⁴ This claim is only partially true. Title IV-E, for example, does not attach minimum dollar amount requirements to foster care maintenance payments; such micromanaging would be inappropriate given the range of variables that affect the cost of living from state to state.

However, several minimum and enforceable standards do exist in federal statute. The logical, textual reading of the provisions illuminates applicable intent. Consider, for example, the following two legislative provisions:

⁸⁴ Telephone interview with Debra Samples, California contact for ACF Region 9, Administration for Children and Families, Dept. of Health and Human Services.

42 U.S.C. § 671(a): **“In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which—(1) provides for foster care maintenance payments in accordance with [42 U.S.C. §672].”**

42 U.S.C. § 675(4)(A): **“The term ‘foster care maintenance payments’ means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement.”**

Reading these provisions together, Congress has clearly mandated that in order for a state to be eligible for Title IV payments, it must have a plan approved by the Secretary which provides for payments to cover the cost of (and cost of providing) food, clothing, shelter, supervision, school supplies, the child’s incidentals, liability insurance and travel costs.⁸⁵

Thus, if a state’s plan does not provide for payments that are sufficient to cover those enumerated items by at least the most conservative estimates, the state would be out of compliance with the eligibility requirements of the Child Welfare Act. This is not simply a hypothetical scenario; in separate lawsuits, the Ninth Circuit and an Indiana District Court have found states to be out of compliance with this federal mandate.⁸⁶ HHS was nowhere to be seen when it came to enforcing this requirement. Instead, advocates had to turn to the courts for enforcement. **Efforts to obtain state compliance took several years of litigation, with substantial delay and millions of dollars of attorneys’ fees — money that could have been used to increase the numbers of families able to care for foster kids, giving more kids personal parents, keeping more siblings together, and leading to more stability and more adoptions.** It requires exponentially less money to properly regulate and oversee our laws than it does to litigate them after the fact because appropriate rulemaking was not done in the first place.

Making the case for ACF to directly enforce other standards is more difficult where explicitly mandated considerations are not directly incorporated into federal statute (as they are in the area of foster care maintenance payments). HHS may be concerned that it lacks the delegated authority to enforce specific standards, *e.g.*, those that might be relevant to social worker caseloads. However, the language of Titles IV-B and IV-E gives the HHS Secretary the authority — **and the obligation** — to determine whether a state plan meets the requirements of the Child Welfare Act (CWA),⁸⁷ and recent amendments to the CWA suggest that Congress intended certain minimum standards to be within the purview of the CWA when it can be shown that those standards are reasonably needed to achieve the CWA’s purpose.⁸⁸ For example, Congress was spurred to action in 2006 by reports from the Government Accountability Office and HHS showing that caseworker turnover rates and infrequent caseworker visits might be impeding the safety and permanency goals established in the CWA.⁸⁹ Congress amended Title IV-B to explicitly require states to report their visitation figures and to meet minimum monthly visitation rates for children under state supervision or face penalties.⁹⁰ HHS’ refusal to flesh out the CWA in regulation to establish minimum levels of state performance in this area essentially forced Congress to do so itself.

Further examples of HHS’ refusal to adopt regulations in a timely manner and its refusal to provide clear, binding guidance for states that accurately or fully implement Congressional intent include the following:

⁸⁵ See 42 U.S.C. §§ 671(a) and 675(4)(a).

⁸⁶ *Cal. Alliance of Child and Family Svcs. v. Allenby*, 589 F.3d 1017, 1022 (9th Cir. 2009); *Cal. Foster Parents Assoc. v. Wagner*, 624 F.3d 974 (9th Cir. 2010); *C.H. v. Payne*, 683 F. Supp 2d 865, 878-881 (S.D. Ind. 2010).

⁸⁷ 42 U.S.C. § 622(a); 42 U.S.C § 671(a).

⁸⁸ See H.R. Rep. no. 109-555 (2006), 109 h rpt 555 (Lexis).

⁸⁹ *Id.*

⁹⁰ *Id.*; also see 42 U.S.C. § 624(f). As of October 1, 2011, states must ensure that 90% of the children in their foster care programs are visited at least once a month by their caseworkers or face penalties.

- Leading up to the most recent reauthorization of the Child Abuse Prevention and Treatment Act (CAPTA), which occurred in 2010,⁹¹ CAI and First Star, along with the many organizations belonging to the National Child Abuse Coalition, urged policymakers to strengthen and clarify CAPTA’s provisions regarding child fatality and near fatality public disclosure. It is precisely through this disclosure that states and advocates can detect the fatal flaws that plague child welfare systems and address those flaws in a thoughtful, well-informed, systemic and effective manner before more children die or are seriously harmed due to abuse or neglect. Although the statutory CAPTA language was not so amended in the 2010 reauthorization, the Senate Health, Education, Labor and Pension (HELP) Committee Report to HHS acknowledged what CAI and First Star’s 2008 *State Secrecy* report⁹² had already made clear—that many states are not in compliance with CAPTA’s public disclosure requirements and that states must do better. In calling upon HHS to take action to remedy this situation, the HELP Committee adopted the following Report language:

The committee believes that the duty of child protective services, required in CAPTA Sec. 106(b)(2)(x), to provide for the mandatory public disclosure of information about a case of child abuse or neglect which has resulted in a child fatality or near fatality ensures improved accountability of protective services and can drive appropriate and effective systemic reform. However, the committee is aware that not all States are in compliance with these CAPTA requirements. **The committee calls upon the Secretary of Health and Human Services to develop clear guidelines in the form of regulations instructing the States of the responsibilities under CAPTA to release public information in cases of child maltreatment fatalities and near fatalities**, and to provide technical assistance to States in developing the appropriate procedures for full disclosure of information and findings in these cases.⁹³

No such regulations have been issued by HHS, nor has there been any visible movement in that direction.⁹⁴ This was an unambiguous order from Congress to HHS to adopt regulations to strengthen and clarify this provision, which in turn would bring more states into compliance and ultimately protect more children from harm. The fact that HHS has failed to do so indicates a basic disregard for Congressional authority, an indifference to the purpose and mandates of CAPTA, or both. The advocacy community must continue to work with HHS to ensure the issuance of these regulations and to hold it accountable for its actions and inactions.

- The Fostering Connections to Success and Increasing Adoptions Act of 2008 (“Fostering Connections Act”) provided yet another opportunity for HHS to produce appropriate regulations to assure state compliance with Congressional intent. This Act, among other things, gives states the option to allow youth to stay in foster care until age 21. However, studies have revealed that in order for this important piece of legislation to meet its lofty goals, it must be carefully and properly implemented with appropriate regulatory guidance — otherwise the negative outcomes currently visited upon many former foster youth will only be delayed, not avoided.⁹⁵ To date, the HHS

⁹¹ Public Law 111-320.

⁹² Children’s Advocacy Institute and First Star, *State Secrecy and Child Deaths in the U.S.: An evaluation of public disclosure practices about abuse or neglect fatalities or near fatalities, with state rankings* (April 2008) (available at http://www.caichildlaw.org/Misc/State_Secrecy_Final_Report_Apr24.pdf).

⁹³ U.S. Senate, Sen. Rep. 111-378 (Dec. 18, 2010) (available at <http://www.gpo.gov/fdsys/pkg/CRPT-111srpt378/pdf/CRPT-111srpt378.pdf>) (emphasis added).

⁹⁴ In fact, the only actions taken by HHS in this area were several questionable amendments to the Child Welfare Policy Manual regarding states’ duty to provide public disclosure of child abuse or neglect fatalities and near fatalities. Although one positive change does provide more detail about the type of information that states are required to provide (“[s]tates must develop procedures for the release of information including, but not limited to: the cause of and circumstances regarding the fatality or near fatality; the age and gender of the child; information describing any previous reports or child abuse or neglect investigations that are pertinent to the child abuse or neglect that led to the fatality or near fatality; the result of any such investigations; and the services provided by and actions of the State on behalf of the child that are pertinent to the child abuse or neglect that led to the fatality or near fatality”), other changes actually weakened what limited guidance the Manual had provided up to that point with regard to this CAPTA mandate. See HHS, Children’s Bureau, *Child Welfare Policy Manual* at section 2.1A.4 (available at http://www.acf.hhs.gov/cwpm/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=68).

⁹⁵ Amy Dworsky and Mark Courtney, Chapin Hall Issue Brief, *Assessing the Impact of Extending Care Beyond Age 18 on Homelessness: Emerging Findings from the Midwest Study* (March 2010) (available at http://www.chapinhall.org/sites/default/files/publications/Midwest_IB2_Homelessness.pdf). For

Secretary has failed to adopt *any* implementing regulations for this Act, despite explicit Congressional directive to do so.

- The Fostering Connections Act also made additional children eligible for federal adoption assistance payments, thereby potentially freeing up state funds previously used for this purpose. According to the U.S. Government Accountability Office, although states are required to spend any resulting savings on child welfare services, only 21 states reported calculating these savings for fiscal year 2012, and 20 states reported difficulties performing the calculations. According to the GAO, HHS has not provided states guidance in this area, and without it states may continue to struggle with the calculations, leading to potential lost program funding.⁹⁶
- Another example of HHS failing to fully implement Congressional intent stems from CAPTA. To better understand the scope of child maltreatment, including child fatalities, and inform efforts to address and prevent it, the 1988 amendments to CAPTA required HHS to establish a national data collection and analysis program for child maltreatment data. HHS responded to this mandate by establishing and maintaining NCANDS, a voluntary data-reporting system.⁹⁷ It is hard to imagine that Congress envisioned the national data collection and analysis program to be *voluntary*, given the critical nature of the information it directed HHS to collect and the momentous impact that complete, consistent, and reliable data could have on preventing child maltreatment.
- In 1999, Congress created the John H. Chafee Foster Care Independence Program, providing states with flexible funding to carry out programs that assist youth in making the transition from foster care to self-sufficiency. The law requires ACF to develop a data collection system to track the independent living services states provide to youth and develop outcome measures that may be used to assess states' performance in operating their independent living programs, and it requires ACF to impose a penalty of between one and five percent of the state's annual allotment on any state that fails to comply with the reporting requirements. ACF did not publish a proposed rule to implement this mandate until July 2006; it did not adopt a final rule until February 2008; and it did not require states to start reporting data to its new Youth in Transition Database until May 2011 — over a decade after it was legislatively mandated to do so.
- As noted above, in the Adoption Promotion Act of 2003 (Public Law 108-145), Congress expressly stated that if the Secretary finds that a state has failed to submit specified data relating to adoption and foster care in the U.S, the Secretary is *mandated* to reduce the amounts otherwise payable to the state under 42 USCS §§ 670 et seq., for each quarter ending in the six-month period (and each quarter ending in each subsequent consecutively occurring six-month period until the Secretary finds that the State has submitted the data, as so required), by specified amounts.⁹⁸ However, in 2004 ACF declared that it “is not assessing AFCARS penalties at this time...and will not take penalties until new, final AFCARS regulations are issued implementing...the Adoption Promotion Act of 2003”⁹⁹ — **which, as of this writing in August 2014, HHS still has not yet done.**¹⁰⁰ Thus, for the past decade, ACF has openly flouted a direct and express Congressional mandate. And by refusing to

example, such programs must ensure that these youth have access to age- and maturity level-appropriate living arrangements, mentoring, personal attention, and financial help — the same advantages other young adults receive and most of us take for granted.

⁹⁶ U.S. Government Accountability Office, *Foster Care — HHS Needs to Improve Oversight of Fostering Connections Act Implementation* (May 2014) at 1 (available at <http://www.gao.gov/assets/670/663655.pdf>).

⁹⁷ U.S. Government Accountability Office, *Child Maltreatment — Strengthening National Data on Child Fatalities Could Aid in Prevention* (July 2011) at 1–2 (available at <http://www.gao.gov/assets/330/320774.pdf>).

⁹⁸ 42 U.S.C. § 674(f)(2).

⁹⁹ HHS, Administration for Children and Families, *Adoption and Foster Care Analysis and Reporting System (AFCARS), Guide to an AFCARS Assessment Review*, 5th Edition (Washington, D.C.; Dec. 2012) at preface (available at http://www.acf.hhs.gov/sites/default/files/cb/afcars_assessment_review_guide.pdf) at 1, fn. 2.

¹⁰⁰ On Jan. 11, 2008, ACF published a Notice of Proposed Rulemaking to amend the AFCARS regulations to, among other things, implement the penalty requirements of the Adoption Promotion Act of 2003 (see docket number ACF-2007-0125, available at <http://www.regulations.gov/#!documentDetail;D=ACF-2007-0125-0001>).

impose financial penalties on states that fail to comply with federal data reporting requirements, ACF has ignored one of the most incentivizing tools it has to ensure states' submission of reliable, consistent, and complete data — information that could have meaningfully contributed to the improvement of the adoption and foster care processes.

In enacting federal child welfare laws, Congress did not intend to give the states *carte blanche* as to how federal funding is used to provide services in their child welfare programs.¹⁰¹ Although states are given great discretion in how they structure those programs, the federal government has a legitimate interest in attaching conditions to states' receipt of federal funds in order to, as the Act's purpose states, "ensure all children are raised in safe, loving families..."¹⁰² Whether the concern be one of foster care maintenance payments or caseload standards, it is clear that there must be some articulated floor below which states are considered to be in violation of the Act, with standards enforceable by HHS directly. Further, states must actually believe that there are real, undesirable consequences for not fulfilling their end of the bargain that comes with their acceptance of federal child welfare dollars.

C. External Factors Potentially Impeding HHS Performance

A review of HHS/ACF performance properly considers external factors which may impede the agency's accomplishments. These obstacles can include (a) lack of budget to assign personnel to the necessary tasks, (b) respect for state sovereignty in accomplishing federal goals, (c) fears about depriving states of funds they need for important child services; (d) structural flaws (e.g., lack of authority, limits on penalty imposition, federal law ambiguity, conflicts with other federal laws and agencies), and (e) larger contexts — such as overall public funding decline. Many of these barriers may be legitimate. Most of them are partly reflective of the relative political impotence of abused children.

These children are not organized politically and they have little political capital as a constituency that neither votes nor pays taxes. One recent study has found that all child advocacy groups combined spend under \$1 million per year in lobbying in Washington, D.C., while the American Association of Retired Persons, just one of the many groups advocating on behalf of the elderly, averages about \$25 million per year on such lobbying.¹⁰³ There are professional groups, such as social worker associations, that may contribute to reform — but groups providing services to children or with some interest in their welfare tend to address the group's own respective prerogatives. The representation may not be entirely driven by the individual hearts of members, but by the needs of the trade organization. So, while an individual social worker may be outraged by a child abuse death and want it to be the focus of national news, the group orientation is often to oppose disclosure of this information because of a fear of exposure of worker errors—which could lead to excessive blame and overreaction.

Children, and particularly abused children in foster care, are kept largely concealed, and lack substantial legal resources. They lack the political power to demand legal representation, public funding, statutory change, and priority—at the federal and at the state level.

1. Scope of Duties and Budget Limitations

ACF administers more than 60 programs with a budget of approximately \$50 billion, making it the second largest agency in HHS. One of the programs administered by ACF is the Administration for Children, Youth and Families (ACYF) (which contains the Children's Bureau). The table below presents the

¹⁰¹ See, e.g., *Cal. Alliance of Child and Family Svcs. v. Allenby*, 589 F.3d 1017, 1022 (9th Cir. 2009); *Cal. Foster Parents Assoc. v. Wagner*, 624 F.3d 974 (9th Cir. 2010); *C.H. v. Payne*, 683 F. Supp 2d 865, 878-881 (S.D. Ind. 2010). Also see H.R. Rep. no. 109-555 (2006), 109 h rpt 555 (Lexis).

¹⁰² 42 U.S.C. § 621.

¹⁰³ Charles H. Bruner, PhD., *Philanthropy, Advocacy, Vulnerable Children, and Federal Policy, Working Paper*, National Center for Service Integration, NCSI Clearinghouse and the Child and Family Policy Center (2009) at 66–67.

total ACF budget, the mandatory (pre-appropriated and entitlement) and discretionary breakdown, and the full-time employee (FTE) figures within ACF.

The ACF has many complex demands on its budget and staff time. However, just over 1,400 positions should allow it to focus adequate attention on the enforcement of the federal child welfare laws as intended by Congress. This is especially true when much of the time-consuming work required to research and document violations is being done by private litigants, nonprofit child advocacy organizations, private researchers, and news organizations.

| Year | Total ACF Budget | ACF FTE |
|------|---|---------|
| 2014 | \$51.9 billion \$34.2b mandatory/\$17.7b discretionary | 1,429 |
| 2013 | \$50.5 billion \$34.0b mandatory / \$16.5b discretionary | 1,379 |
| 2012 | \$49.7 billion \$33.4b mandatory / \$16.3b discretionary | 1,302 |

Although regional offices conduct reviews of certain state operations, as discussed above, does ACF staff track and follow up on any of the successful litigation brought by others — lawsuits that clearly established federal violations of law by states and counties? Have any of the 1,429 full-time ACF employees read any of the academic reports published in the last five years or so, documenting state non-compliance with federal law?¹⁰⁴ What is preventing such assignment and the proper bargaining power that flows from billions in federal monies that are properly subject to some conditions for their receipt? Although ACF may warrant additional resources, and the scope of this study does not include close measurement of its resources vs. demands, it is clear that it has the resources to pursue a very different approach — one that will more effectively protect abused children.

2. State Sovereignty Respect and Federalism

Another factor limiting HHS enforcement might be deference to state discretion and methods. Certainly respect for a federalist system of sovereign states is traditional and expected, and HHS has a system of waivers in effect for this purpose. HHS is supposed to properly monitor performance under waivers to see if a state has a beneficial approach that should perhaps inform other states, or even become a part of a nationwide federal floor. But such waivers and respect for varying state approaches properly have limitations. The federal specifications in statute are minimal elements to achieve Congressional intent — a common and reasonably expected floor. States may vary in their approaches taken to meet the floor, **but the floor must be met.**

3. Fears about Imposing Fiscal Consequences for State Noncompliance with Federal Child Welfare Laws

ACF policy as of late appears to emphasize cooperation with and leniency toward states, even after witnessing years of blanket non-compliance with federal child welfare laws — often using the mantra that fiscally penalizing states for non-compliance with child welfare laws might ultimately hurt the persons ACF is supposed to protect. However, for the past decade, ACF's efforts have failed to bring a single state into

¹⁰⁴ See, e.g., Children's Advocacy Institute and First Star: *State Secrecy and Child Deaths in the U.S.*, 2nd Edition (2012) (available at www.caichildlaw.org/Misc/StateSecrecy2ndEd.pdf); *A Child's Right to Counsel*, 3rd Edition (2012) (available at www.caichildlaw.org/Misc/3rd_Ed_Childs_Right_to_Counsel.pdf); *The Fleeing of Foster Children* (2011) (available at www.caichildlaw.org/Misc/Fleeing_Report_Final_HR.pdf); see also Univ. of Maryland School of Social Work, et al., *Hitting the M.A.R.C.: Establishing Foster Care Minimum Adequate Rates* (Oct. 2007) (available at www.childrensrights.org/policy-projects/foster-care/hitting-the-marc-foster-care-reimbursement-rates/).

substantial conformity with the minimum federal standards meant to protect the health and well-being of abused and neglected children. The ongoing failure by every single state to substantially conform to federal child welfare standards — and HHS’ facilitation of that failure through its lack of rulemaking and enforcement — **definitely** harms the children who are supposed to be protected.

While it is possible that some amounts of federal child welfare funding may be temporarily unavailable to states during a process of federal agency enforcement for non-compliance, that does not mean that programs and services cease to be offered, and the record suggests that long-term and even medium-term outcome is closer state compliance to minimum federal standards (*see* Appendix C). There are various reasons for this. First, most states routinely replicate federal statutes involving federal monies into state law. This is done to further assure state eligibility for funding. It applies to the Medicaid and PRA (TANF) statutes, as well as the Child Welfare Act. Virtually every state, for example, replicates the “reasonable efforts not to remove” and “reasonable efforts to reunify” standards in federal law. And other minimums in the federal statutes, for example, the obligation to visit foster children at least once a month in placement are also in state statute. This means that a penalty imposed on federal monies may not necessarily impact children where the state is obligated to provide services under state law independently — as is often the case. The immediate threat to the state in many cases of penalty is not the deprivation of children, but an increased demand on state funding which can prompt the state to come into compliance — without interruption in services for children.

Second, the political fact is that the loss of federal money because of performance deficiency — especially in programs serving foster children — is an acute source of embarrassment for state officials. No taxpayer likes to see federal monies left on the table because their own state officials failed to obey the law. Children in foster care are seized and now parented by the state. “Family values” means that we have the legal and moral obligation to care for them — wherever we sit on the political spectrum.

Further, several state officials have confided that the threat of losing federal dollars is one of the few things that could produce legislative, budgetary and/or policy changes in their states — **but only if policymakers believe such a threat to be real**. In many other contexts, where the threat of sanction or penalty is perceived by states to be real, potential or actual punitive action by a federal agency has in fact brought about the desired actions by the state (*see* Appendix C). Congress has created many programs to achieve results in the national public interest; in many of them, federal financial contributions to state

*...several state officials have confided that the threat of losing federal dollars is one of the few things that could produce legislative, budgetary and/or policy changes in their states — **but only if policymakers believe such a threat to be real.***

programs are offered to states that participate in the programs. Congress may place conditions upon state receipt of grants so long as the conditions are expressly stated.¹⁰⁵ Each federal agency from whose budget these state incentive payments are drawn undertakes enforcement activities, investigating whether the states receiving the agency’s money are actually implementing the programs to be eligible for the federal funding, or are in fact achieving the results required to be eligible.¹⁰⁶ When a participating state does not comply with requirements or fails to achieve required results, the federal agency is expected to warn the state that it is out of compliance and is at risk of losing future funding.

These procedures seek to balance the tension between three principles: (1) respect for state sovereignty and deference as to how federal mandates are to be met, (2) the obligation of the states to abide by the express requirements tied to their acceptance of federal money, and (3) the obligation of the executive branch to carry out Congressional intent (including the assurance that federal monies are distributed consistent with funding purposes). Accordingly, it has been longstanding practice that after informing the state of a deficiency

¹⁰⁵ *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981).

¹⁰⁶ Such federal investigations can arise from complaints of state non-compliance, from academic studies indicating violation, or from the expected review of federal court findings of such violations (or of state consent that such violations have occurred). Negotiations with states may also originate from a federal agency’s own *sua sponte* monitoring of state performance — a function which is implicitly part of the executive branch duty to assure compliance with Congressional intent.

in an area of federal funding, the applicable federal agency will investigate, gather appropriate evidence, take into account the equities and specify deficiencies needing correction—if any.¹⁰⁷ Even under this structure, the relevant federal agency can grant state waivers to allow for differences between states, and to encourage a measure of experimentation that might produce a superior methodology for other states to replicate, or which might inform Congressional decisions to alter federal standards more broadly. But waiver or no waiver, states should not have a blank check to collect federal funds and then fail to meet the required federal standards. The applicable federal agency must set forth time limits for compliance and identify the amount of possible federal penalty. If the state continues to violate federal mandates, the federal agency is expected to impose appropriate penalties or sanctions.

Interestingly, ACF itself has noted that only through the imposition of financial penalties were states induced to start complying with one federal child welfare requirement. With regard to states' data reporting duties pursuant to the AFCARS system noted above, ACF stated the following:

States were required to report the first AFCARS data to us for FY 1995. However, it was not until FY 1998, when we implemented AFCARS financial penalties for a State not submitting data or submitting data of poor quality that the data became stable enough for ACF and others to use for a wide variety of purposes.¹⁰⁸

Indeed, the sampling of agency use of penalties in Appendix C provides many examples of effective penalty use and/or imposition by federal agencies, including ACF itself. When it comes to imposing financial penalties for noncompliance with federal law, the “we mean business” approach by federal agencies can be extremely effective. Unfortunately, it is rare for such approach to be taken on behalf of children.

4. Structural Flaws and Questionable Priority-Setting

ACF confronts a number of strange requirements in federal statute that are arguably outmoded, and are perhaps not appropriate for discretionary enforcement. For example, eligibility for federal reimbursement for foster care funding benefits through Title IV-E funding is linked to the now abolished Aid to Families with Dependent Children (AFDC) income requirements as they existed in 1996. If a child does not meet the 1996 eligibility criteria (often referred to as the look-back provision), federal Title IV-E funds are not available to reimburse the state. According to one source, 53% of children in foster care were eligible for federal support in 1998, but by 2005 the percentage had declined to 46% — and the number was projected to decline by approximately 5,000 children each year thereafter. As long as the federal eligibility remains linked to the 1996 AFDC income requirements, the financial burden on states and counties will continue to grow. Child welfare agencies are in desperate need of more funds, and state budgets have suffered gravely for the past several years. Due to the arcane and nonsensical AFDC look back, the federal child welfare funding contribution has become anemic and will continue to shrink.

Ironically, one area where ACF appears to be adept at ensuring state compliance encompasses this irrational and outdated provision (along with other provisions that are in fact child welfare-oriented). In this area — IV-E eligibility review — active and effective ACF oversight and enforcement regularly results in the imposition of penalties and deductions for state noncompliance, and such oversight and enforcement activity

¹⁰⁷ Throughout this process, publicity about states' potential or actual non-compliance — and the threat of federal penalty or sanction—is common. Such public awareness of the possible loss of federal funds arguably provides additional motivation for state officials to come into compliance with federal law. To illustrate how various federal agencies use their enforcement powers to enforce federal law, this report's authors conducted a search for newspaper articles within the last 25 years reporting on federal agency threats to withhold money from states due to the states' non-compliance with federal program funding requirements (using the “U.S. Newspapers and Wires” database of www.Lexis.com, which contains stories from over 725 newspapers and wire services across the U.S. and its territories). Some selected examples are discussed at Appendix C.

¹⁰⁸ ACF, Notice of Proposed Rulemaking, Docket # ACF-2007-0125-0 (Jan. 11, 2008) (available at <http://www.regulations.gov/#/documentsDetail;D=ACF-2007-0125-0001>). Unfortunately, due to a settlement of several states' appeals of AFCARS penalties, ACF discontinued withholding federal funds for a state's failure to comply with AFCARS requirements in January 2002 (see ACYF-CB-IM-02-03). In 2003 the President signed the Adoption Promotion Act of 2003 (Pub. L. 108-145), which required ACF to institute specific financial penalties for a state's noncompliance with AFCARS requirements. However, ACF notified States in ACYF-CB-IM-04-04 issued on Feb. 17, 2004, that it will not assess penalties until it issues revised final AFCARS regulations — which at this writing ACF still has not done (see section III.B. for further discussion).

arguably reduces the incidence and likelihood of noncompliance in the future. Here, there seems to be no hesitancy on the federal agency's part to take child welfare money away from agencies serving abused and neglected children.

To be sure, ACF is simply enforcing the law with regard to title IV-E eligibility. But why does it appear to feel so comfortable penalizing and withholding funds from states for noncompliance with title IV-E eligibility requirements, but not with regard to other areas of state noncompliance — where such noncompliance and deficiencies inarguably place children at risk of substantial harm?

Another structural flaw to HHS enforcement is the balkanized nature of federal child welfare statutes. The recent 9th Circuit case of *Henry A. v. Willden*, discussed below, underlines the limitation on withholding federal funds from one program because of a refusal to join in another program. In the child welfare arena, Congress has enacted a mix of statutes involving federal contribution from a variety of funds for separate programs. For example, the Child Abuse Prevention and Treatment Act (CAPTA) provides only a relatively small sum to the states in the form of grants. This creates an initial problem of minimal threat. Perhaps a state would be willing to forego \$2–\$5 million in grants rather than comply with a requirement at a cost likely to be higher. But in fact, historically states have been more influenced by a federal penalty than the amount would indicate. Politically, losing federal dollars to other states because of state officials' non-compliance with federal law creates a political problem more powerful than the amounts indicate. Regardless, HHS' expressed concern about the limited available sanctions for violating CAPTA are not without merit—particularly for areas of the nation now politically hostile to the federal administration.

Accentuating this legitimate concern are the many critical requirements included within this lightly-funded CAPTA statute, as discussed above. The intent of these requirements underlies all of the federal monies expended for child welfare. For example, public disclosure of child deaths and near deaths from abuse or neglect assists prevention and lessens the expenditures from other accounts that accrue after abuse and removal. But it would facilitate HHS enforcement if the requirements that serve child protection are all buttressed by the federal monies contributing to it—without arbitrary groupings. Hence, the Congress should make clear the connection between CAPTA and other federal child welfare statutory floors and all monies, including Title IV-B and IV-E funds.

5. Macroeconomic Considerations (Public Sector Spending Cut Pressure)

The downturn in the nation's economy that began in 2008 included a decline in employment and an increase in demand for costly public programs — all while states suffered tax revenue losses. State budgets received some federal stimulus funding from 2008 to 2010, but that source of subsidy is now declining, while many states have deficit and public employee cut-backs. These circumstances may increase public and federal agency sympathy for the agencies caught in this bind. But public budgets are often subject to pressure. Millions are expended every year for all sorts of purposes. Billions are spent in unexamined tax expenditures (deductions, exclusions, credits) at the federal and at state levels. Just as this report was being drafted, an important section in a child welfare bill was removed in Congressional Committee because it had a cost of \$1 million per year but no offset, while at the same said Committee meeting, six permanent tax extensions for big business were approved at a whopping cost of **\$310 billion** over ten years — with no off-set required.

The formula for deciding who gets more scarce resources has to do substantially with political power—who is organized horizontally. Who has hired former legislators and staff to lobby? Who makes sizeable contributions to campaigns? What constituency can round up the most votes? Who is seen at the capitol?

Children have occasional media attention in many states—limited by confidentiality for youth in foster care—and they have a federal agency that has been instructed by Congressional enactment to apply the law as intended. Indeed, the federal agency is inarguably the single most potent source of state budget influence available to abused and neglected children in state custody. If these children, legally parented by state judges (and every American taxpayer), warrant high priority, one approach might be to follow the law in providing

the statutorily mandated floor for their protection, and then start the allocations and reductions for those corporations and other entities in less dire straits.

D. Social Security Administration and Foster Youth

1. Background and Purpose of OASDI and SSI Benefits for Children

The Old Age, Survivors and Disability Insurance Benefits program (OASDI) is a federal insurance plan which provides financial benefits for elderly and disabled workers, their survivors and dependents.¹⁰⁹ A child is entitled to OASDI benefits if the child is unmarried, younger than 18, and had (1) a parent who is disabled or retired and entitled to Social Security benefits or (2) a parent who died after having worked long enough in a job where he or she paid Social Security taxes.¹¹⁰ Foster children, though often not living with their parents, are still considered dependent on their parents and qualify for OASDI. The purpose of providing OASDI benefits to a child is to replace lost financial support due to a parent's disability or death.¹¹¹ As is discussed in more detail below, the financial support provided by average private parents to their children — the very support that OASDI is intended to replace — does not end when their children reach age 18, and typically continues for many more years. OASDI benefits, however, typically terminate when a youth turns 18.¹¹²

Supplemental Security Income for Aged, Blind and Disabled (SSI) is income provided by the federal government to individuals found to be unable to work due to their age, blindness or disability.¹¹³ Children under the age of 18 are considered disabled and entitled to SSI if the child has a physical or mental impairment which severely limits their ability to function and will last for more than 12 months.¹¹⁴ As it pertains to children, the basic purpose of SSI is to provide a minimum level of income to children who would not have sufficient income and resources to treat their disability and maintain a standard of living at the established federal minimum income level.¹¹⁵ However, legislative history provides support for a broader purpose of child SSI benefits — to serve the special needs of disabled and impoverished children with a goal of promoting their successful transition to economic independence as adults.¹¹⁶

Estimates of the number of foster children receiving OASDI and/or SSI benefits vary. The Congressional Research Service has estimated that 30,000 (or 6%) of the nation's foster children receive SSI or other Social Security benefits.¹¹⁷ However, with regard to SSI specifically, the number of foster youth receiving benefits appears to be substantially lower than the number of foster youth eligible for such benefits.¹¹⁸ For example, California estimates that 15–20% percent of youth aging out of its foster youth system are eligible for SSI benefits.¹¹⁹

¹⁰⁹ 42 U.S.C. §401 *et seq.*

¹¹⁰ 42 U.S.C. §402(d). See also Social Security Online, *Electronic Fact Sheet: Benefits for Children*, SSA Publication No. 05-10085 (Sept. 2009), available at <http://www.socialsecurity.gov/pubs/10085.html>.

¹¹¹ *Mathews v. Lucas*, 427 U.S. 495, 507 (1976).

¹¹² 20 C.F.R. 404.352(b).

¹¹³ 42 U.S.C. §1382 *et seq.*

¹¹⁴ 42 U.S.C. §1382(c)(C) (2004).

¹¹⁵ *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 390 (2003) (quoting 20 C.F.R. § 416.110).

¹¹⁶ Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 CARDOZO L. REV. 1797, 1804 (2006), citing H.R. Rep. No. 92-231, at 5133-34 (1971), reprinted in 1972 U.S.C.C.A.N. 4989, 5133 (“It is your committee’s belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society”); Frank S. Bloch, *Three Steps and You’re Out: The Misuse of the Sequential Evaluation Process in Child SSI Disability Determinations*, 37 U. MICH. J.L. REFORM 39, 48-51 (2003) (discussing history and purposes of child SSI benefits).

¹¹⁷ Adrienne Fernandes, Scott Szymendera, Emilie Stoltzfus, *Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care*, Congressional Research Service (Feb. 2007) at 15, available at http://assets.opencrs.com/rpts/RL33855_20070201.pdf.

¹¹⁸ See, e.g., National Survey of Child and Adolescent Well-Being, *No. 12: Estimates of Supplemental Security Income Eligibility for Children in Out-of-Home Placements* (Aug. 2009) at 3, available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/.

¹¹⁹ California Department of Social Services, *Continuous Supplemental Security Income (SSI) Benefits for Disabled Foster Youth*, available at http://www.childsworld.ca.gov/res/FactSheets/SSI_FactSheet_wLetterhead.pdf.

2. Representative Payees Serving Minor Beneficiaries

Generally a person under the age of 18 receiving OASDI or SSI benefits is required to have a representative payee appointed by the Social Security Administration (SSA) to manage his/her funds.¹²⁰ Federal law specifies who may be a representative payee, and clearly states that a representative payee must use the funds to serve the best interests of the beneficiary.¹²¹ A duly appointed representative payee serves in a fiduciary capacity to the beneficiary — and SSA claims to “ensure that the payee understands the fiduciary nature of the relationship, that benefits belong to the beneficiary and are not the property of the payee.”¹²²

For most child beneficiaries, SSA appoints the child’s parent or guardian to serve as representative payee. However, for children in the foster care system, such an appointment is not often possible or appropriate. At least on paper, SSA is conscious of the vulnerable position that foster children are in:

[p]ayments made to children in foster care are among the most sensitive payments SSA makes. According to SSA policy, it is essential that the Agency do all it can to protect the rights of children who may not be able to rely on their parents to do so. SSA policy further states that it is extremely important that SSA follow all legal requirements including conducting a complete investigation of the representative payee applicant; using the representative payee preference list appropriately to identify when other potential representative payees should be considered; and providing due process to the child’s parent and/or legal guardian.¹²³

As this statement indicates, federal law sets forth a representative payee preference list. For beneficiaries under age 18, the preference is as follows:¹²⁴

- (1) A natural or adoptive parent who has custody of the beneficiary, or a guardian;
- (2) A natural or adoptive parent who does not have custody of the beneficiary, but is contributing toward the beneficiary’s support and is demonstrating strong concern for the beneficiary’s well being;
- (3) A natural or adoptive parent who does not have custody of the beneficiary and is not contributing toward his or her support but is demonstrating strong concern for the beneficiary’s well being;
- (4) A relative or stepparent who has custody of the beneficiary;
- (5) A relative who does not have custody of the beneficiary but is contributing toward the beneficiary’s support and is demonstrating concern for the beneficiary’s well being;
- (6) A relative or close friend who does not have custody of the beneficiary but is demonstrating concern for the beneficiary’s well being; and
- (7) An **authorized social agency** or custodial institution.

These lists are meant to help SSA select the representative payee who will best serve the beneficiary’s interests.¹²⁵ Although the lists provide guidelines that are meant to be flexible, SSA ranks foster care agencies last — arguably indicating its determination that they be the “representative payee of last resort”¹²⁶ in most cases.¹²⁷ And even when a foster care agency applies to be a child’s representative payee, SSA employees are

¹²⁰ 20 C.F.R. §416.610(b), 20 C.F.R. §404.2010(b).

¹²¹ 20 C.F.R. §404.2035, 20 C.F.R. §416.635.

¹²² Social Security Online, *Frequently Asked Questions: What to Do When Someone is Unable to Handle Their Benefits* (updated 12/28/2010), available at http://ssa-custhelp.ssa.gov/app/answers/detail/a_id/256.

¹²³ Office of the Inspector General, Social Security Administration, *Benefit Payments Managed by Representative Payees of Children in Foster Care, Evaluation Report* (June 2010), No. A-13-01-17137 at 3, citing SSA, Program Operations Manual System (POMS), GN 00502.159.

¹²⁴ See 20 CFR 416.621 (applicable to SSI payments) and 404.2021 (applicable to OASDI payments). See also Social Security Administration, Programs Administration Manual System, POMS § GN 00502.105 (Payee Preference Lists) (Effective Dates: 06/25/2010-Present) (emphasis added).

¹²⁵ *Id.* (emphasis added).

¹²⁶ Daniel L. Hatcher, *Foster Children Paying for Foster Care*, 27 *Cardozo L. Rev.* 1797, 1813 (2006).

¹²⁷ Although a foster care agency that had been expressly appointed by the court as a foster child’s legal guardian would have a higher standing on the payee preference list, such a scenario is unusual in many jurisdictions.

required to “use the payee preference list as an aid to identify and develop potential payees *who would better serve the interests of the child.*”¹²⁸

Some of the duties of a representative payee include:¹²⁹

- Determining the beneficiary’s total needs and using the benefits received in the best interests of the beneficiary;
- maintaining a continuing awareness of the beneficiary’s needs and condition, if the beneficiary does not live with the representative payee, by contact such as visiting the beneficiary and consultations with custodians;
- applying the benefit payments only for the beneficiary’s use and benefit;
- notifying SSA of any change in his or her circumstances that would affect performance of the payee’s responsibilities; and
- reporting to SSA any event that will affect the amount of benefits the beneficiary receives and to give SSA written reports accounting for the use of the benefits.

3. SSA’s Appointment of Foster Care Agencies as Representative Payees for Foster Youth

As noted above, when a foster care agency applies to be appointed as representative payee for a foster child, SSA is legally mandated to take affirmative action to identify and develop alternate potential payees who would better serve the interests of the child. Yet in every state in the country, state child welfare agencies serve as the *de facto* representative payees for the foster children in their custody. And they appoint themselves as such with no effort to locate a more appropriate representative, no accounting back to SSA, and worse yet, without utilizing the money in the best interest of the child. Indications of this shameful reality abound, and include the following:

- Youth Law News has reported that “[a]lthough in theory SSA conducts an individualized investigation to select the representative payee, . . . in practice it generally relies on the agency’s statement that no other payee is available or suitable to protect the child’s interests. Indeed, in many jurisdictions, the assignment of the responsible child welfare agency as representative payee for a disabled foster child is practically automatic.”¹³⁰
- One leading expert recently wrote about the “kiddie loop” — a computerized shortcut used by the SSA to process applications in batches when a single applicant files to be the representative payee for multiple beneficiaries.¹³¹ The same expert noted that from 1994 to 1996, the Illinois foster care agency submitted 3,588 requests to be appointed representative payee for children in its custody, and that “not a single one of those applications was denied in favor of some other payee despite the agency’s least-preferred status and the duty of the Social Security Administration to try to locate any other more preferred payee.”¹³²

¹²⁸ Social Security Administration, Programs Administration Manual System, POMS § GN 00502.159 (Additional Considerations When Foster Care Agency is Involved) (Effective Dates: 06/25/2007-Present) (emphasis added).

¹²⁹ Office of the Inspector General, Social Security Administration, Responsibilities of a Representative Payee (available at <http://oig.ssa.gov/what-abuse-fraud-and-waste/misuse-benefits-representative-payee>).

¹³⁰ Bruce Boyer and Martha Mathews, *Should Agencies Apply for and Receive SSI on Behalf of Foster Children?* YOUTH LAW NEWS, Vol. XX No. 6 (Nov-Dec, 1999).

¹³¹ *Supra* note 124 at 1831. The existence of the “kiddie loop” is confirmed in SSA’s POMS Section GN 00502.110, which instructs SSA personnel to “[u]se the ‘kiddie loop’ shortcut function . . . when one applicant files to be payee for more than one beneficiary. You can use this shortcut even if the beneficiaries are entitled on different account numbers.” Social Security Administration, Programs Administration Manual System, POMS Section GN 00502.110 (Taking Applications in the RPS), Effective Dates 2/11/2009 – Present.

¹³² *Id.*

- In *Keffeler* (discussed below), the U.S. Supreme Court noted that of the 1,480 children in Washington’s foster care system who were receiving Social Security benefits, the foster care agency acted as representative payee for 1,411.¹³³ Thus, the entity that the Court held out as being “last in the line of eligibility for appointment as representative payee” and which SSA “appoints...only when no one else will do” was in fact serving in that capacity for over 95% of Washington’s foster children.¹³⁴
- The American Bar Association’s Commission on Youth at Risk and Commission on Homelessness and Poverty found that “child welfare agencies are often currently automatically assigned as the representative payee for children in foster care....SSA currently does not perform adequate investigations to determine whether a more suitable payee is available....Agencies that receive a poor review by SSA or fail to submit payee accounting reports to SSA continue to serve as payees.”¹³⁵
- An *amici curiae* brief submitted by 39 states to the U.S. Supreme Court acknowledges that “[s]tates are mindful of the possibility that children in foster care may qualify for social security benefits. To varying degrees, States investigate this possibility, and, where a child appears to qualify for [Social Security] benefits, States may complete the detailed application process on the child's behalf and apply to be the child's representative payee. The Commissioner regularly grants those applications and designates the appropriate state agency as the child’s representative payee.”¹³⁶

Further evidence that SSA appears to be appointing foster care agencies to serve as representative payees for foster youth without conducting the proper investigation or considering the impact that the selection has on the child beneficiaries comes from SSA itself:

- SSA policy states that “[f]oster care agencies have traditionally been among SSA’s most dependable payees”.¹³⁷ Such a perspective perhaps reflects SSA’s lessened burden with regard to contacting, interacting with, and receiving required reports from foster care agencies vis-à-vis individual payees or other organizational payees — but it is no surprise that a representative payee that is allowed to use a beneficiaries’ funds to relieve itself of a legal obligation to provide for the beneficiaries’ support and maintenance would make itself available and “dependable” to SSA. With foster care agencies serving as their representative payees, the only thing that child beneficiaries can depend on is not seeing those funds used for additional, specialized services or treatments or conserved for their future use.
- SSA has gone so far as to remove payees it acknowledged were “suitable” only to replace them with the foster care agency. For example,

SSA appears to be appointing foster care agencies to serve as representative payees for foster youth without conducting the proper investigation or considering the impact that the selection has on the child beneficiaries....

¹³³ *Washington State Department of Social and Health Services v. Keffeler* (2003) 537 U.S. 371, 379 [123 S. Ct. 1017, 154 L. Ed. 2d 972] at fn. 3.

¹³⁴ *Id.* at 391.

¹³⁵ American Bar Association, Commission on Youth at Risk / Commission on Homelessness and Poverty, *Transitional Services Report* (undated) at 17–18, available at <http://www.abanet.org/child/education/Transitional%5fServices%5fReport.doc>.

¹³⁶ See Brief of the States of Alabama, Alaska, Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming, and the Commonwealth of Puerto Rico, and the Territories of the Virgin Islands and American Samoa, as *Amici Curiae* in Support of Petitioners in *Washington State Dep’t of Social and Health Services v. Keffeler*, 2001 U.S. Briefs 1420 [2002 U.S. S. Ct. Briefs LEXIS 380] (2002).

¹³⁷ SSA, POMS, GN 00502.159 A and B.2 (effective June 25, 2007), available at <https://secure.ssa.gov/apps10/poms.nsf/lrx/0200502159>.

- In Indiana, SSA determined that two beneficiaries were being served by “suitable” payees, but it nonetheless replaced those payees with the Indiana Department of Child Services as the new payee, finding that the Agency was “best suited to serve as payees for these children.”¹³⁸
- In Michigan, SSA concluded that two children had “suitable” payees, but per SSA policy, it replaced the payees with others SSA decided were “better suited” to be the children’s payees — one of which was the Michigan Department of Human Services.¹³⁹
- In SSA’s determination, “the foster care agency would be preferred as payee over the foster parent because the agency is responsible for the child.”¹⁴⁰ SSA apparently believes that foster parents can be entrusted with the child — but not the child’s funds. In fact, it is hard to imagine a prospective payee who would be in a **better** position to “meet with the beneficiary on a regular basis to ascertain his or her **current and foreseeable** needs,”¹⁴¹ and to use the funds to serve that child’s unique and particular best interest with regard to those current and foreseeable needs, than the person in whose care we have entrusted the well-being of the child.

The U.S. Government Accountability Office recently reported that SSA “struggles to effectively administer its Representative Payee Program” and “faces challenges monitoring payees’ use of beneficiaries’ SSA funds.”¹⁴² Faced with those challenges, it appears that with regard to one of its “most sensitive” populations — foster youth in need of representative payees — SSA is perhaps taking the easy way out instead of conducting the meaningful, proactive investigation with regard to the person or entity who would best serve the beneficiaries’ interests.

4. SSA Allows Representative Payees to Violate the Position’s Fiduciary Duties to Foster Youth Beneficiaries

If SSA did comply with the mandate to identify other possible payees, finding one who would serve the “best interests” of the child better than a foster care agency does not seem to be a difficult chore, especially in states where foster care agencies **routinely and automatically** divert foster children’s SSI and OASDI money to pay for the cost of foster care —without first determining the best use of the funds for each particular beneficiary (as a representative payee is legally obligated to do). No less than 40 states have openly admitted to — and actually defend — the practice of taking and using foster children’s Social Security benefits to pay for child welfare services that these children are entitled to receive as a matter of right.¹⁴³ And those states have declared on the record that to their knowledge, “all states” engage in this practice.¹⁴⁴

It is difficult to understand how it is in a child’s best interests to use that child’s own money to reimburse the state for services that the child is under no obligation to pay for in the first place. As one commentator noted:

The notion that state confiscation of SSI beneficiary monies as reimbursement for public-assistance expenditures is in the “best interests” of beneficiary children fails under the most summary review.

¹³⁸ Office of the Inspector General, SSA, *Benefit Payments Managed by Representative Payees of Children in Foster Care in the Social Security Administration’s Chicago Region*, A-13-11-21105 (June 2012) at 7.

¹³⁹ *Id.* at 6.

¹⁴⁰ SSA, POMS, GN 00502.159, *Additional Considerations When Foster Care Agency is Involved at A and B.2* (effective June 25, 2007) (available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502159>).

¹⁴¹ SSA, POMS, GN 00502.114, *Payee Responsibilities and Duties* (available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200502114>) (emphasis added).

¹⁴² U.S. Government Accountability Office, *SSA REPRESENTATIVE PAYEE PROGRAM—Long-Term Strategy Needed to Address Challenges*, GAO-13-673T (June 5, 2013).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

While the concept of beneficiary “best interests” may be nebulous, the notion that it encompasses state reimbursement for foster-care expenses is both unfathomable and unreasonable.¹⁴⁵

That a state or county confiscates a foster child’s own funds to pay for the state or county’s financial obligation is perverse enough to many people — but what is even more shocking is the often automatic nature of that confiscation. While a representative payee is legally obligated to determine the best use of a beneficiary’s funds on an individualized, case-by-case basis, it appears that many states have pre-determined that for all the foster children for whom they serve as representative payee, such funds will first and foremost be used for state reimbursement. For example, a Washington regulation states that its state foster care agency “**must use income not exempted to cover the child’s cost of care.**”¹⁴⁶ This mandate provides no discretion whatsoever to the child’s representative payee to consider the individual child’s needs or best interests.¹⁴⁷ A one-size-fits-all approach to the expenditure of these benefits for children with such unique and critical needs cannot possibly be justified. And yet SSA regularly appoints the Washington Department of Social and Health Services to serve as the representative payee for foster youth — despite the fact that the Department is legally bound to ignore its fiduciary duties to the youth and its obligations as representative payee.

Regrettably, states justify this practice of self-reimbursement by citing *Washington State Dep’t of Social and Health Services v. Keffeler*,¹⁴⁸ a 2003 U.S. Supreme Court opinion holding that a foster care agency serving as a foster child’s representative payee did not violate federal law protecting Social Security benefits from execution, levy, attachment, garnishment, or other legal process when using the child’s benefits to reimburse itself for the cost of the child beneficiary’s foster care placement. While *Keffeler* did hold that such use of a foster child’s benefits does not violate the Social Security Act’s anti-attachment provision, it did not excuse foster care agencies serving as representative payees from their affirmative fiduciary duties to **ensure that**

such use best serves the unique interests of each child beneficiary, a determination that must be made on an individualized, case-by-case basis following a meaningful examination of each child’s circumstances, special needs, age, etc. And *Keffeler* did not exempt a state agency serving as representative payee from the obligation to perform an accounting and reporting of the money received on behalf of a foster child.

While Keffeler did hold that such use of a foster child’s benefits does not violate the Social Security Act’s anti-attachment provision, it did not excuse foster care agencies serving as representative payees from their affirmative fiduciary duties to ensure that such use best serves the unique interests of each child beneficiary, a determination that must be made on an individualized, case-by-case basis following a meaningful examination of each child’s circumstances, special needs, age, etc.

Where a representative payee lives with the child, that payee has firsthand knowledge of the long- and short-term needs of the child, and knows how the child’s funds are being used to meet those needs. However, when governments act as representative payee for foster children, not only do they fail to make an individualized determination as to what use is in the beneficiary’s best interest, but also they often dump multiple beneficiaries’ benefits into the same account — which in turn is billed for services by someone who often has not even met the child and has no direct knowledge of the best interest needs of the child. SSA’s Office of the Inspector General (OIG) has found that states often do not have any oversight mechanisms in place to ensure that a foster child’s benefits are spent on that specific child and that any unspent funds were saved for the child’s use at a later date. With so many government agencies acting as representative payees for foster children nationwide, OIG’s audits reveal a system that takes abused and neglected children and

¹⁴⁵ Katherine M. Krause, *Issues of State Use of Social Security Insurance Beneficiary Funds for Reimbursement of Foster-Care Costs*, American Bar Association, 41 FAM. L. .Q. 165 (2007) at 171.

¹⁴⁶ WAC § 388-25-0210 (2010) (emphasis added).

¹⁴⁷ Brief for Respondents in *Washington State Dep’t of Social and Health Services v. Keffeler*, 2001 U.S. Briefs 1420 [2002 U.S. S. Ct. Briefs LEXIS 574] (2002) at *26.

¹⁴⁸ *Washington State Department of Social and Health Services v. Keffeler* (2003) 537 U.S. 371 [123 S. Ct. 1017, 154 L. Ed. 2d 972].

subjects them to further abuse — this time by a fiduciary. Without individualized, dedicated accounts for each child, it is nearly impossible for a foster care agency to track foster youth income and expenditures and conserve unused funds — *i.e.*, to comply with the most basic aspects of the fiduciary relationship.

When *Keffeler* was pending before the U.S. Supreme Court, some commenters opined that if states are not allowed to serve as a foster child’s representative payee and use the child’s SSI benefits to pay for the cost of the child’s care, the state would have no incentive to pursue such benefits on behalf of the child while the child is in care, and benefits might not be in place when the youth ages out of care.¹⁴⁹ Although many of these commenters have since revised their position on this issue,¹⁵⁰ it is important to view this concern from the child’s perspective. Of course it is beneficial to have the foster care agency assist in getting SSI benefits in place where appropriate; however, that goal could be accomplished simply by requiring foster care agencies to screen children in care for SSI and OASDI eligibility and apply where appropriate — **much as any decent parent would do in the normal course on behalf of his/her child**. And if benefits are in place prior to the youth’s exit from care, it would similarly benefit the youth to have required the foster care agency serving as his/her representative payee to conserve some or all of the youth’s own funds for use after he/she exits the foster care system. With regard to OASDI benefits, which typically end when a child reaches age 18, the only time to capture and conserve any part of these benefits for use during the difficult transitional years is while the youth is still in care. Allowing a state or county acting as representative payee to completely exhaust the youth’s own funds to pay for an obligation not owed by the child demonstrates a complete breach of the payee’s fiduciary duty to that child. It also demonstrates an unfortunate myopia. If foster youth leave care with no resources to draw upon as they set out into the world on their own, they are extremely likely to end up dependent on the public dime shortly after leaving care. The state saves exponentially by preserving their assets now and saving on public benefits later.

5. SSI Income Caps Impede Foster Youth’s Transition to Self-Sufficiency

Most parents encourage their kids to save money that comes their way, perhaps from part-time employment, bequests, gifts, etc. Saving for the future is a basic value that all responsible parents imbue in their children. It is difficult to imagine a responsible parent telling his or her child, “OK, that’s it. You’ve hit the limit — you are not allowed to save any more money for your future.” And yet that is exactly the message that we send to our foster children in a variety of ways. For example, foster youth who are eligible for SSI benefits because of a qualifying disability are not allowed to accumulate resources that exceed \$2,000 — **a figure that has been in place since 1989 and is not indexed for inflation**. While the SSI cap applies to all SSI beneficiaries, its impact is arguably more severe for disabled children who lack a familial support system and will be expected to support themselves after leaving care. While some mechanisms allow for the accumulation of assets beyond the \$2,000 cap, those vehicles carry their own restrictions and can be burdensome for foster youth to create and maintain.

6. Remedies to Address SSA Issues

When a public entity seeks certification as a foster child’s representative payee, SSA must be compelled to comply with the statutory directive that it conduct an investigation, prior to the certification of the representative payee, in order to ensure there is adequate evidence that such certification is in the interest of the child beneficiary.¹⁵¹ SSA must also follow its own duly adopted regulations in order to ensure that it selects the payee who will best serve the beneficiary’s interest.¹⁵² Congress must mandate that prior to

¹⁴⁹ See, *e.g.*, Brief of Children’s Defense Fund, Catholic Charities USA, Child Welfare League of America, and Alliance for Children and Families, as *Amici Curiae* in Support of Petitioners, in *Washington State Dep’t of Social and Health Services v. Keffeler*, 2001 U.S. Briefs 1420 [2002 U.S. S. Ct. Briefs LEXIS 384] (2002).

¹⁵⁰ See, *e.g.*, Child Welfare League of America, *Hope for America’s Children, Youth and Families: Briefing and Recommendations to President-Elect Barack Obama* (Nov. 7, 2008) at 47 (“Under [proposed legislation], states would determine when a child or young person is eligible for Social Security or SSI benefits and then reserve those benefits in an account for that young person...Such a change could be of significant assistance to eligible young people leaving foster care”).

¹⁵¹ 42 U.S.C. § 405(j).

¹⁵² 20 CFR 404.2021.

certifying any representative payee for a foster child, notice must be provided by the Commissioner of Social Security not only to the legal guardian or legal representative of the child, but also to the child's attorney, CAPTA-mandated guardian ad litem, foster parent (if applicable), and the foster youth (if he/she is over the age of 12), so that they can assist the Commissioner in identifying prospective representative payees who may be more appropriate than the public entity.

SSA must prohibit a public entity from serving as a foster child's representative payee wherever it appears more likely than not that the entity is not taking the unique and personal needs of each child beneficiary into consideration prior to determining what use of the funds would best serve the beneficiary's interest. For example, the Washington regulation cited above is *prima facie* evidence that no case-by-case, individualized determinations are being made in that state with regard to the use of foster children's Social Security benefits. In such instances, which are the norm across the country, it would seem that the money is most certainly going to serve the state's interest rather than the child's.

SSA has already opined that it would be a misuse of benefits for a private representative payee to use a child's Social Security benefits to satisfy the representative payee's personal financial obligations toward the child. In its Program Operations Manual System, SSA describes a case where a father serving as representative payee for his own two children continued to receive the children's benefits even after the children's mother moved out of the family home and took their two children with her. In determining that the father could not use the children's Social Security benefits to satisfy his court-ordered child support obligation, SSA noted that the "benefits belong to the children and may not be used by [the father] for his personal use, in this case to satisfy his personal legal obligation." SSA added that allowing such use of the children's benefits "is akin to a conversion of the children's property to pay a debt owed to the children."¹⁵³ SSA's stance should be no different when a state takes jurisdiction over and assumes the legal obligations for a child, and then attempts to use the child's benefits to relieve the state from its financial obligation to support the child. When a state assumes jurisdiction over a child, it is legally obligated to provide the child's current maintenance, subject to possible reimbursement from the child's parents (if they are so able) — but *never* from the child. Congress and SSA should revise the statutory and regulatory definitions of the term "misuse of benefits" to expressly provide that it is a misuse of benefits for *any* representative payee to use a beneficiary's benefits to pay for the beneficiary's current maintenance in order to relieve a separate source that is legally obligated to provide for the beneficiary's current maintenance from its legal obligations.

Congress and SSA must also revise statutory and regulatory law to clarify that when another person or entity is already legally obligated to provide for a beneficiary's current maintenance, the beneficiary's funds must be used to meet other, additional and/or specialized needs or conserved for future use. Foster youth are typically in need of funds during the difficult transition out of foster care, as they lack the financial safety net that families typically provide for their young adult children. Such a financial commitment to conserving funds for the transition would properly benefit the parental role we have assumed *vis-à-vis* all foster children and would make good economic sense in the long run as well.

IV. The Judicial Branch

A. Systemic Flaws Encountered When Using Private Litigation to Enforce Child Welfare Law Compliance

When HHS fails to adequately — or even minimally — police state and local child welfare agencies for compliance with federal law, private litigation becomes the only available means to bring states into

¹⁵³ Social Security Administration, Programs Administration Manual System, POMS Section PR 07210.001, Effective Dates 8/4/2008 – Present, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/1507210001>.

compliance with federal requirements for services to abused and neglected children. As discussed below, advocates for foster children and their caretakers have sought relief numerous times from the federal court system. Some of these cases have resulted in judgments for the plaintiffs while most have been resolved through settlement processes and eventual consent decrees — often after initial attempts at dismissal have failed in court.¹⁵⁴

The risks, disadvantages and limitations of litigation are well known to anyone who has been involved in a lawsuit—and they are not ameliorated in child welfare litigation. Child advocacy organizations bringing such lawsuits commonly operate on shoestring budgets, leading plaintiffs to pursue every other option before deciding to escalate their efforts into the “major, multi-year commitment of [an] organization’s time and resources”¹⁵⁵ for litigation.

The disadvantages faced in child welfare reform litigation include a lack of access to the judiciary, remedy and standing barriers that often preclude court redress by the victims, practical difficulties in finding factually compelling petitioners who are able and willing to stay the course for an extended period of litigation, high costs, delays, and a final product of court orders that are often limited in scope and time.

1. Lack of Access to Federal Judicial Branch

When states violate federal child welfare laws, the individuals who are personally impacted the most (foster youth, foster parents, etc.) are usually not even aware that a judicial remedy is available. For those who are so aware, the prospect of litigation is intimidating.¹⁵⁶ A lawsuit inherently requires a proactive effort brought on behalf of the injured party, typically with the assistance of those more familiar with the legal system and remedies available, such as the two child advocacy law firms who have been most active in child welfare litigation over the past two decades—Children’s Rights, based in New York, and the National Center for Youth Law, based in San Francisco. The cases these groups have pursued account for many of the judicial findings of state violations, and for the court orders that do exist. This is a highly specialized field of law that requires incredible investments of time for each case, especially as many cases result in extended consent decrees that must be monitored and revisited at regular intervals. In spite of the impressive records of success and skilled staffs of these organizations, there simply are not enough attorneys or resources available to pursue all of the legitimate claims of state violations of federal law that exist around the country.¹⁵⁷

Of perhaps greater concern is the Ninth Circuit’s dangerous holding in *E.T. v. Tani Cantil-Sakauye*,¹⁵⁸ that federal courts should abstain from (refuse to hear categorically) challenges to dependency court practices. The concept behind abstention is deference to judicial processes underway in state court. But *E.T.* challenged an *administrative* decision of the California Supreme Court’s Administrative Office of the Court (AOC) that has jurisdiction over contracts with attorneys representing children involved in dependency court cases in Sacramento County. AOC-sanctioned arrangements allowed for caseloads of up to 388 children per attorney. The child petitioners sought a declaratory relief order that this number was excessive, in violation of the California state statutory right to counsel and the GAL obligations of federal law. Unfortunately, the federal court would not have taken action even if the caseload were one attorney for 4,000 children, because the court held that any review of state courts for this practice would be “intrusive.” Since juvenile dependency court integrates the courts into the foster care system in a substantial way, it is unclear where the lines are that would allow federal court oversight. While the very purpose of the federal courts is to provide a check on unconstitutional or unlawful “state action,” the *E.T.* holding reflects strong judicial empathy not with the

¹⁵⁴ E.g., Child Welfare League of America, *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005* (2005) (available at <http://thehill.com/images/stories/whitepapers/pdf/consentdecrees.pdf>).

¹⁵⁵ Marcia Robinson Lowry, *A Powerful Route to Reform or When to Pull the Trigger: The Decision to Litigate*, For the Welfare of Children: Lessons Learned from Class Action Litigation, Center for the Study of Social Policy (Jan. 2012) at 2 (hereinafter *The Decision to Litigate*).

¹⁵⁶ Telephone interview with Regina Deihl, Director, Legal Advocates for Permanent Planning (Oct. 13, 2011).

¹⁵⁷ See *The Decision to Litigate*, *supra* note 155, at 1: “[L]itigation must be done carefully and responsibly. Child welfare reform litigation that attempts to reform an entire child welfare system requires a large commitment of resources by the organization that chooses to bring the lawsuit, costing several million dollars in staff time, expert and other related expenses, and it also can easily cost the state a similar amount to defend.”

¹⁵⁸ 682 F.3d 1121 (9th Cir. 2012); see also http://www.cachildlaw.org/Misc/ET_Opinion_10-15248.pdf.

victims of those violations, but for their colleagues on the state court bench — to whom they have here categorically deferred.

2. Remedy and Standing Issues

The law allowing remedy for state violations of federal law suffers from difficulties beyond the barrier erected by *E.T.* In *Suter v. Artist M.*,¹⁵⁹ the U.S. Supreme Court held that private individuals do not have standing to enforce the Adoption Assistance and Child Welfare Act of 1980 (CWA). The Seventh Circuit had ruled that such violations created an implied right of action for victims under 42 U.S.C. § 1983. The Supreme Court reversed, holding that no such enforceable right exists in federal court. Some of the applicable federal law was altered after 1992 to create a “*Suter* fix.” But that clarification apparently extends only to parts of the CWA; CAPTA and other statutes might suffer from an effective bar to private federal court enforcement.

This standing barrier was underlined by two 2012 judicial opinions: *Henry A. v. Willden*,¹⁶⁰ which held that the leading case for criteria guiding a federal 42 U.S.C. § 1983 action to enforce federal standards did not apply to the two mandates included within CAPTA at issue in the case (*guardians ad litem* and early intervention services under the Individuals with Disabilities Education Act (IDEA)); and an opinion issued recently by the Eight Circuit Court of Appeals in *Midwest Foster Care and Adoption Ass’n v. Kincade*,¹⁶¹ which — disregarding the majority of precedent on point — held that the Child Welfare Act does not create an

...the federal courts have, to a large extent, walked away from any role as a check on state compliance with the Constitution or federal law applicable to these children.

enforceable right under § 1983 to foster care maintenance payments. Such rulings put into doubt the availability of any federal court remedy for state violations of federal child welfare laws. Indeed, the federal courts have, to a large extent, walked away from any role as a check on state compliance with the Constitution or federal law applicable to these children.

Similarly, a series of decisions on Medicaid and other federal programs creating floors for beneficiaries have been steadily raising barriers to judicial remedies.¹⁶² Other decisions limiting class actions have arisen over the last five years. And even the child protection obligations of the states have been confined by the leading Supreme Court decision on federal tort liability for child beatings, which held that there is no state duty to protect children not actually in state custody—even children who have been reported as abused and been released negligently by the state back to violently abusive parents who have violated the conditions of that release.¹⁶³

The mindset of the federal courts confronted with abstention and remedy/standing arguments is revealed when they observe the more desirable remedy of executive branch enforcement through its Congressional/executive allocation of federal monies. The recent decision of *National Federation of Independent Business, et al. v. Sebelius*¹⁶⁴ held that the Congress is limited in its withdrawal of existing federal funds (*e.g.*, for the longstanding, underlying Medicaid system) based on state refusal to accept a massive new program. But that does not apply to state noncompliance with the conditions for the very monies received. Federal judges are well aware that there are alternative remedies to enforcement of federal standards from the bench. Indeed, the alternative most often cited is the federal executive branch role as monitor of federal monies paid to the states purportedly consistent with Congressional intent.

¹⁵⁹ 503 U.S. 347 (1992).

¹⁶⁰ 678 F.3d 991 (9th Cir. 2012).

¹⁶¹ 712 F.3d 1190, 1195 (8th Cir. 2013).

¹⁶² See *e.g.*, *Oklahoma Chapter of the American Academy of Pediatrics v. Fogarty*, 472 F.3d 1208 (10th Cir. 2007).

¹⁶³ See *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

¹⁶⁴ ___ U.S. ___, 132 S. Ct. 2566, 2604, 183 L. Ed. 2d 450 (2012).

3. Willing Plaintiffs

A judicial challenge to state practices requires petitioners or plaintiffs willing to challenge existing state officials. Juvenile dependency courts work closely in tandem with counties, social workers and government agencies' counsel. It is not an environment of fertile ground for challenges to current county or state practices. For example, the *E.T.* case noted above required children's counsel willing to concede that their caseloads made their adequate performance as counsel impossible. This is not an easy posture for plaintiffs or for their counsel to assume. Other cases involve similar difficulties based on the interdependent structure of child protection agencies with county government which is most often the alleged violator.

4. Inconsistencies

Individual courtroom victories may be piecemeal steps to achieve national foster care reform. There are several barriers that prevent most civil suits from achieving conformity across jurisdictions. First, and perhaps most notably, state governments have in the past been more likely to settle claims rather than deal with the cost and time involved in lengthy litigation.¹⁶⁵ Court-approved consent decrees or settlements, while powerful tools for achieving state level reform, lack the potential to leave an imprint on case law and thus offer no legal authority with which to bolster similar suits in other states.

Claims resolved by a court judgment are not necessarily more promising in the larger scheme of reform either. Cases that are partially or fully resolved in the summary judgment phase may offer child advocates some foundation on which to argue cases in other jurisdictions, but that is still far from any guarantee of success within a particular circuit, much less between circuits that often split on interpretations of law. For example, as discussed briefly above, courts across the country are split on even the preliminary question of whether certain provisions of the Child Welfare Act create a privately enforceable right for the purposes of a § 1983 claim (which is the vehicle that usually provides necessary federal court jurisdiction).¹⁶⁶

5. Cost

Lawsuits, especially ones brought as class actions, are notoriously expensive, complex, and lengthy. They often demand access to significant resources, as the potential for losing can pose a considerable financial risk. Attorneys' fees and costs in the case of *Missouri Child Care v. Martin*, which was resolved on a summary judgment motion, were estimated at over \$250,000.¹⁶⁷ Plaintiffs' attorneys in *California Alliance of Child and Family Services v. Allenby* and *California Alliance of Child and Family Services v. Wagner*, the cases which forced California to comply with federal law regarding its foster care maintenance rates, estimated their combined billable hours and litigation expenses at over \$1 million,¹⁶⁸ and a third lawsuit aimed at increasing the rates paid to a third kind of foster care provider has just begun. In *Kenny A. v. Perdue*, plaintiffs' counsel filed an application for an award of attorneys' fees and expenses of litigation, based on having worked 29,908.73 hours on the case.¹⁶⁹ Ultimately, the district court "made an across-the-board 15% reduction in the number of non-travel related hours claimed by plaintiff's counsel," "conclude[d] that the requested hourly rates [were]

¹⁶⁵ See, e.g., *Cal. Alliance of Child and Family Svcs. v. Allenby*, 589 F.3d 1017 (9th Cir. 2009) (judgment); *Missouri Child Care Assn. v. Martin*, 241 F.Supp.2d 1032 (W.D. MS.); *C.H. v. Payne*, 683 F.Supp.2d 865, (S.D. Ind. 2010); *Kenny A. v. Perdue*, 454 F.Supp.2d 1260 (N.D. GA. 2003); Child Welfare League of America, *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005* (2005) (available at <http://thehill.com/images/stories/whitepapers/pdf/consentdecrees.pdf>).

¹⁶⁶ See *Foreman v. Heineman*, 240 F.R.D. 456 (D. Neb. 2007); *D.G. v. Henry*, 594 F. Supp. 2d 1273 (N.D. Okla. 2009).

¹⁶⁷ Order at 1, 8, *Missouri Child Care Assn. v. Martin*, No. 01-4045-CV-C-NKL (W.D. Mo. 2004), ECF No. 145.

¹⁶⁸ Mem. & Order Re: Pl.'s Mot. For Att'y Fees at 10, *Cal. Alliance of Child and Family Services v. Allenby*, No. C 06-4095-MHP (N.D. Cal. 2010), EFC No. 113; Mem. & Order Re: Att'y Fees at 2-5, *Cal. Alliance of Child and Family Services v. Wagner*, Nos. 09-17649, 10-1559 (N.D. Cal 2011), DCF No. 93.

¹⁶⁹ 454 F.Supp.2d 1260, 1270 (N.D. Ga, 2006). One cause of the substantial hours and fees was noted by the court: "State Defendants vigorously fought plaintiffs' claims for almost three years, filing both motions to dismiss and for summary judgment, as well as seeking repeatedly to limit plaintiffs' discovery efforts. This strategy of resistance undoubtedly prolonged this litigation and substantially increased the amount of fees and expenses that plaintiffs were required to incur." *Id.* at 1266.

fair and reasonable,” and calculated plaintiffs’ non-enhanced lodestar fee (actual market level) to be \$6,012,802.90.¹⁷⁰

Plaintiffs are not the only ones to consider on the “cost” scale. In response to Georgia’s insistence that plaintiffs’ attorneys’ fees were outrageous, the district court in *Kenny A.* noted the state defendants’ legal fees matched those of the plaintiffs:

Evidence submitted by plaintiffs shows that through June 30, 2005, the State paid its two outside counsel in this case...a total of approximately \$2.4 million....This figure does not take into account the fact that outside counsel working for the State are paid at significantly lower hourly rates than they would charge private clients. Nor does it include 5,237.12 hours that attorneys within the State Law Department spent on this case. Adjusting outside counsel’s fees upward to account for their reduced hourly rates, and applying a modest \$250 blended hourly rate to the hours spent on this case by Law Department professionals, indicates that State Defendants would have incurred legal fees in excess of \$6 million if they had been required to pay for their legal services in this case at standard hourly rates in the private marketplace....¹⁷¹

Attorneys’ fees and expenses are only a part of the financial cost. Such cases also include the costs for judges, clerks, reporters, bailiffs, and other costs related to the court system. There are high social worker costs involved in litigation, which tends to be dominated by the presentation of evidence from county child protection workers. There are expenses for parents’ counsel and for attorneys representing the county or state child welfare agencies. There are costs in enforcing the orders. For all of the improvements to child welfare systems the class action mechanism has wrought, the cost of each is considerable.

6. Delay

Except in rare cases where a suit is intended to head-off state implementation of a new detrimental policy, as was the case in *C.H. v. Payne*¹⁷² and *E.C. v. Sherman*,¹⁷³ civil suits have the disadvantage of functioning mostly as a reaction. Lawsuits filed in response to and in an attempt to correct deficiencies or failures of state or county child welfare agencies often come only after abused and neglected children have been injured by the system established to protect them. As described above, it is often years after local child advocates initially report problems experienced by children in foster care that a lawsuit is filed.¹⁷⁴

The delay in obtaining critical relief is not only between the time federal or state law violations are detected and/or reported and the time court intervention is sought through the filing of a lawsuit, but continues, sometimes for decades, throughout the course of the litigation. Many state agencies file motions to dismiss the plaintiffs’ cases or file motions for summary judgment shortly after pleadings close, only to enter into lengthy settlement negotiations (the outcomes of which are the states agreeing to extensive improvements to and modifications of their practices) after courts deny the motions. For example, it was three years after filing the initial complaint in *Kenny A. v. Perdue* that the parties reached a settlement agreement in July of 2005, which the court signed and entered as a Consent Decree in October of that year.¹⁷⁵ After a court rules in plaintiffs’ favor, and orders the requested relief, state agencies often appeal. Appendix D details some of the appeals state agencies have filed. These appeals delay implementation of the reforms that have been court-ordered or, even worse, promised by the state agencies.

¹⁷⁰ *Id.* at 1286. The court also awarded plaintiffs \$739,958.67 in expenses. *Id.* at 1296.

¹⁷¹ *Id.* at 1287–1288.

¹⁷² 683 F.Supp 2d 865 (S.D. Ind. 2010).

¹⁷³ Not reported in F.Supp. (W.D. Mo., August 4, 2006), available at http://www.childrensrights.org/wp-content/uploads/2008/06/2006-08-04_ec_amended_short_order.pdf.

¹⁷⁴ See *The Decision to Litigate*, *supra* note 155 at 2, explaining that Children’s Rights often spends a year (and sometimes longer) investigating system deficiencies and informally advocating for reform before filing suit.

¹⁷⁵ *Kenny A. v. Perdue*, 454 F.Supp 2d. 1260, 1266-1269 (N.D. GA. 2006).

Even in cases that are not beleaguered by extensive (and frequently fruitless) dispositive motions and appeals, the relief for foster children is slow in coming. Consent decrees usually incorporate some provision for a monitor who will periodically report to the court on the state agencies' compliance with the requirements of the settlement/court order, and those monitors' reports commonly indicate that progress is not being made on the time-table or to the level of performance (child-outcome-focused measurements) to which the parties agreed. As Appendix D indicates, in many cases it takes years — or even decades — for courts to get states to bring their child welfare systems into compliance with federal law. Many cases, although resolved by settlement within a few years of filing, have remained open and in court monitoring for between 10 and 29 years. As long as these lawsuits are open, there are abused and neglected children in the covered jurisdictions who are not receiving the care, services, or permanency to which they are entitled.

7. Limited Coverage

The jurisdiction of the federal court is necessarily limited by the reach of the plaintiffs/petitioners, the authority of the defendants/respondents, and the list of claims made. Hence, the important *Kenny A.* case establishing right to counsel for foster children and caseloads of no more than 100 applies, after years of litigation, to only two of the 159 counties in Georgia.¹⁷⁶ Other court orders now in place apply co-extensively with violations of federal minimums not part of the adjudication. Even the statewide orders cover relatively few states concerning practices that extend through many more. Appendices D and E, which present information on a sampling of the many privately-brought lawsuits challenging states' compliance with federal child welfare laws, illustrate how advocates must litigate the same issues over and over, state by state, in the absence of the global reach that appropriate executive branch oversight and enforcement could and should provide.

The limitations on coverage apply to groupings of parties as well as to geographic jurisdiction. As described above, the challenge to insufficient foster care maintenance rates in California was initially brought by the group homes, and the initial judgment gave an increase to cost levels only to group homes. A second case had to be brought for foster family homes, and the judgment in that case gave an increase to (near) cost levels only to foster care families. And now a third case is underway to increase the family foster agency rates. From the time the first case was filed until the time the third case is resolved, it is likely that a full decade will expire — and even then, the state may well attempt to separate out payments to other types of placements, requiring additional lawsuits by each of those groups caring for abused and neglected foster children.

And to drill down one more level, this coverage limitation might even apply within the cases brought. For example, the third California lawsuit brought to challenge foster care maintenance rates is being pursued not by family homes actually providing care to foster children, but by family foster agencies — private charities or religious groups, et al., that organize the homes and provide overarching services. If successful, will the rate increase benefit the actual providers of care, or just the supervising agencies? If the plaintiffs consist of agencies (as they do), how will the court apply the minimum cost recompense right to the actual homes providing care? They are not directly before the court. All of these examples illuminate a common problem in most adjudications — limitations of scope and application driven by the passive nature of courts.

Limitations extend not only to the territory and parties at issue, but also include temporal limits. Most of the orders are not effective until a specified date — itself subject to litigation. The delay aspect is discussed above, but there are also time limitations on the duration of an order. After that expiration, an entirely new case de novo will be required to reprove what may be a renewed violation of the same standard previously violated.

¹⁷⁶ Other examples include *Jeanine B. v. Walker*, which concerns only Milwaukee County, Wisconsin, *G.L. v. Sherman*, which concerned only Jackson County, Missouri, *Sheila A. v. Finney*, which concerned only Shawnee County, Kansas and *Clark K. v. Willden*, as continued by *Henry A. v. Willden*, which concerns only Clark County, Nevada.

B. Despite Limitations, Advocates Have No Choice but to Seek Judicial Relief for State Violations of Federal Child Welfare Laws

1. The Only Option When All Else Fails

In spite of the numerous limitations involved in resorting to the judicial branch for relief when states violate federal child welfare laws, HHS' failure to adequately monitor and/or enforce those laws has compelled private parties to file numerous lawsuits over the past few decades—litigation seeking to compel state compliance with federal child welfare laws.

As Appendices D and E indicate, many of the private lawsuits address similar state deficiencies, such as the failure to ensure that social workers have manageable caseloads and receive adequate training and supervision; timely investigate and address reported abuse and neglect incidents (both within natural families and within foster care placements); properly license and train foster parents; place children in adequate and safe foster family and group homes; ensure adequate parent-child or sibling visitation; provide children and families with adequate case planning and review; and provide needed medical, dental and mental health services to foster children.¹⁷⁷

Over 100 separate lawsuits have been filed by advocates over the last few decades against states and counties for failure to comply with these particular elements of federal law affecting children in foster care.¹⁷⁸ As detailed above, these cases suffer serious limitations in their efficacy to achieve state compliance with federal statutes. They are difficult to bring, challenged by judicial barriers, standing difficulties, and limited access by aggrieved foster children to court remedy. Where the court allows remedy, the violations are reduced (yet rarely wholly eliminated) only after great expense, substantial delay, and with an effective order often covering only a small fraction of the children affected (e.g., one small state or even one county), notwithstanding much broader illegal behavior. The court orders that may result from these suits allow enforcement only in the limited geographic area of an issuing court's jurisdiction and with time-limited enforceability.

In spite of the numerous limitations involved in resorting to the judicial branch for relief when states violate federal child welfare laws, HHS' failure to adequately monitor and/or enforce those laws has compelled private parties to file numerous lawsuits over the past few decades—litigation seeking to compel state compliance with federal child welfare laws.

These lawsuits do not appear to address trivial situations, and are rarely filed without prolonged attempts to resolve child welfare systems' failures through direct advocacy instead of litigation. As explained by the Executive Director of one of the leading organizations renowned for handling these cases:

We never begin a lawsuit without a thorough investigation that usually lasts six to twelve months. Such an investigation begins with a review of as much available information as exists. Such sources include available public data from federal sources (e.g., [Child and Family Service Reviews, Program Improvement Plans, Adoption and Foster Care Analysis and Reporting System, National Child

¹⁷⁷ Child Welfare League of America and the American Bar Association, *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005* (October 2005) at 5.

¹⁷⁸ Comparing lists of cases included on the National Center for Youth Law Foster Care Reform Docket (http://www.youthlaw.org/publications/fc_docket/alpha/?&type=98), the website of Children's Rights listing the class actions in which it has been counsel (<http://www.childrensrights.org/reform-campaigns/legal-cases/>), in *Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions from 1995 to 2005*, Child Welfare League of America and the American Bar Association (Oct. 2005), two cases filed by Children's Advocacy Institute (CAI) (*California State Foster Parent Association, et al. v. Wagner* and *E.T. v. Cantil-Sakanye*), and four other cases (two in California, one in Missouri and one in Indiana) regarding foster care reimbursement rates for group homes and foster family agency homes, CAI is aware of 111 unique cases that have been filed since 1977. There are likely even more, as the Child Welfare League of America report discusses 18 cases not listed by the National Center for Youth Law, Children's Rights' website reflects two cases not listed by CWLA and CAI knows of four cases not listed by NCYL.

Abuse and Neglect Data System] and periodic reports such as Child Maltreatment and the [National Incidence Study]), state sources (*e.g.*, state policy and procedure manuals), and organizations concerned with child welfare in the state (*e.g.*, advocacy group reports, Citizen Review Boards and [Court Appointed Special Advocates]). We also rely on investigations of the child welfare system conducted by a commission or task force, or on a newspaper series that focused on system deficits or heinous cases, etc. At the same time, we give consideration to a new administration that has developed clearly articulated reform plans but that administration may have just assumed office, or to a state that is making significant positive strides through its own initiatives or with technical assistance from an outside source. If the state or city, in spite of these efforts, still looks as if it needs reform that is not otherwise underway, then we take the next steps.¹⁷⁹

Some cases are filed after an even longer period of investigation and informal attempts at resolution of the documented violations. In Tennessee, Children’s Rights began investigating local child advocates’ reports of system-wide failures to protect children two years before ultimately filing suit.¹⁸⁰ In New Jersey, it began investigating the state’s child welfare system in 1996 at the request of local advocates but waited until after the governor’s Blue Ribbon Panel issued its report and recommendations, and until after the governor’s plan (supposedly in response to the Panel’s report) failed to address the most fundamental and urgent problems facing the state’s Division of Youth and Family Services. In 1999, after three years of attempts to so lobby the state, it filed suit.¹⁸¹

2. Sample Violations and Reform Outcomes Achieved through Litigation

a) Caseload Violations

Appendix D outlines a representative sample of 26 of the cases filed by private parties across the country for a variety of violations of federal law pertaining to children in foster care.¹⁸² Well over half of those lawsuits alleged that the state or county defendants violated federal law as to social worker caseloads and training and/or failure to visit the children at least once per month.¹⁸³

The following examples of caseload violations are typical: Before Children’s Rights filed suit, Michigan’s foster care caseworker caseloads exceeded Child Welfare League of America (CWLA) standards (of 12 to 15 children per caseworker), in some cases reaching 40 children per worker or more.¹⁸⁴ In Mississippi, social workers “had some of the highest caseloads Children’s Rights has seen across the country.... [T]he statewide average caseload per worker was 48 children.... In some counties, caseloads were found to exceed 100 children per worker.”¹⁸⁵ In Oklahoma, the Department of Human Services routinely assigned caseworkers more than 50 children each, and some carried caseloads of more than 100 children. Due to excessive caseloads, caseworkers routinely failed to visit children in foster placements for as long as six months at a time.¹⁸⁶ In New Jersey, according to a 2005 review of 336 cases, 60.1% of children in foster care were not being visited at least once per month by a caseworker.¹⁸⁷

The results from these, and other, cases are illuminating. In Washington, D.C., after the District’s child welfare system was placed into receivership and removed from the control of the District’s government, reformed and later returned to the control of the District, caseloads dramatically decreased from an average

¹⁷⁹ See *The Decision to Litigate*, *supra* note 155, at 2.

¹⁸⁰ *Id.* at 5; also see “Fact Sheet” at http://www.childrensrights.org/wp-content/uploads/2010/02/2009-11-13_tn_brian_a_fact_sheet_final.pdf.

¹⁸¹ *Id.*; also see “Fact Sheet” at <http://www.childrensrights.org/wp-content/uploads/2012/07/2012-07-23-Updated-Web-Fact-Sheet.pdf>.

¹⁸² Most of these cases were selected due to the wealth of information about them provided by the website of Children’s Rights (see www.childrensrights.org/reform-campaigns/legal-cases/) and due to CAP’s familiarity with the details of others.

¹⁸³ See Appendix D.

¹⁸⁴ See “Fact Sheet” at http://www.childrensrights.org/wp-content/uploads/2011/08/2011-08-25_mi_dwayne_fact_sheet.pdf.

¹⁸⁵ See “Fact Sheet” at <http://www.childrensrights.org/wp-content/uploads/2013/01/2012-08-29-Olivia-Y-Fact-Sheet-FINAL.pdf>.

¹⁸⁶ See “Overview” at <http://www.childrensrights.org/reform-campaigns/legal-cases/oklahoma/>.

¹⁸⁷ See “Fact Sheet” at <http://www.childrensrights.org/wp-content/uploads/2012/07/2012-07-23-Updated-Web-Fact-Sheet.pdf>.

of 100 cases per worker to 17.¹⁸⁸ In Milwaukee County, Wisconsin, 9 years after suit was filed, the state entered into a settlement agreement approved by the court and after three years, “caseloads that used to top 100 children were down to an average of 17 children per caseworker by December 2005.”¹⁸⁹ In 2000, only 10% of children in foster care had documented monthly face-to-face visits with their caseworkers; in 2010, 96% of children were visited as mandated by federal law.¹⁹⁰

b) Foster Care Maintenance Payment Rates

As noted above, Appendix D presents a representative sample of 26 of the cases filed by private parties for violations of federal law pertaining to children in foster care.¹⁹¹ At least 6 of those 26 suits directly alleged that the state or county defendants paid rates that did not meet federally-mandated cost recompense standards for foster care providers. And at least 12 of the 26 suits alleged that the state or county’s failure to develop an adequate supply of foster family homes led to the unnecessary and inappropriate (and ironically more expensive) placement of children in group homes or institutions.¹⁹²

Federal class action findings and/or concessions that foster care providers are illegally underpaid are not uncommon. For example:

- *Missouri Child Care Association v. Martin* (2003): A federal district court in Missouri found that although the Child Welfare Act does not dictate how states should calculate foster care maintenance rates, Missouri had violated the Act by failing to use a calculation that considered the specific requirements set forth in 42 U.S.C. §675(4)(A).¹⁹³
- *Kenny A. v. Perdue* (2004): Facing federal litigation alleging failures to conform to Title IV-B and IV-E requirements, state and county officials in Georgia signed a consent decree mandating a plethora of reforms including caseload caps, improvements in training and retention of caseworkers as well as an adequate method for calculating foster care maintenance payments.¹⁹⁴
- *California Alliance v. Allenby* (2006): The federal district court, affirmed by the Ninth Circuit Court of Appeals, found that California had violated the requirements of its own state plan and the Child Welfare Act by failing to adjust foster care maintenance payments for inflation and increased cost of living.¹⁹⁵
- *California Foster Parents Association v. Wagner* (2007): The federal district court, affirmed by the Ninth Circuit Court of Appeals, found that California had not complied with the Child Welfare Act with regard to the compensation of foster care families, had not even inquired into or gathered relevant information in order to comply in over more than a decade, and had paid more than 30% below the average out-of-pocket cost, resulting in a serious diminution in the number of families to care for foster children.¹⁹⁶

¹⁸⁸ See “Fact Sheet” at http://www.childrensrights.org/wp-content/uploads/2011/08/2011-08-24_dc_lashawn_fact_sheet.pdf.

¹⁸⁹ See “Fact Sheet” at http://www.childrensrights.org/wp-content/uploads/2011/08/2011-08-29_wi_jeanine_b_fact_sheet.pdf.

¹⁹⁰ *Id.*

¹⁹¹ Most of these cases were selected due to the wealth of information about them provided by the website of Children’s Rights (see www.childrensrights.org/reform-campaigns/legal-cases/ and the materials linked from that page) and due to CAP’s familiarity with the details of others.

¹⁹² See Appendix D.

¹⁹³ *Missouri Child Care Assn. v. Martin*, 241 F. Supp 2d 1032 (W.D. Mo. 2003).

¹⁹⁴ First Amended Complaint, 80-110, *Kenny A. v. Perdue*, 454 F. Supp 2d. 1260 (N.D. Ga. 2003) (No. 1:02-cv-01686-MHS), 2003 WL 25682412; see Consent Decree, *Kenny A. v. Perdue*, 454 F. Supp 2d. 1260 (N.D. Ga. 2003), judgment on consent, No. 1:02-cv-01686-MHS).

¹⁹⁵ See *Cal. Alliance of Child and Family Svcs. v. Allenby*, 589 F.3d 1017 (9th Cir. 2009).

¹⁹⁶ See *Cal. Foster Parents Assoc. v. Wagner*, 624 F.3d 974 (9th Cir. 2010); see related documents at http://www.caichildlaw.org/FC_Litig.htm.

- *C.H. v. Payne* (2010): Pending class action litigation alleging that a change to Indiana’s rate-setting practices would violate the Child Welfare Act, a federal district court issued a preliminary injunction preventing the state from reducing foster care rates. The state later stipulated to refrain from the reduction.¹⁹⁷

However, the most recent federal appellate opinion on point is the 2013 case of *Midwest Foster Care & Adoption Ass’n v. Kincaid*, where the providers contended that 42 U.S.C.S. § 672 provided them an individually enforceable federal right to payments sufficient to cover every element of care in 42 U.S.C.S. § 675(4)(A); they sought to enforce this right through § 1983 by seeking a declaration that the State violated the Child Welfare Act through inadequate foster care maintenance payments. The Eighth Circuit held that § 672(a) and § 675(4)(A) did not confer individually enforceable federal rights, and thus that there was no § 1983 cause of action.¹⁹⁸

Case Study: The Efficacy and Availability of Private Lawsuits to Challenge Foster Care Reimbursement Rate Violations

When the state removes children from their homes, it assumes a momentous obligation. Ideally, it either reunifies the children with their own parents (if fit) or it finds others who will adopt them. If not, it strives to achieve a personal, permanent parent, maybe a relative or other guardian, maybe a foster family (the placement that leads to most adoptions). While some children may need to be in institutional group homes due to extraordinary special needs, that option is not appropriate for most youth, as it lacks the critical element of a personal parent dedicated to the child and the security of a permanent family. It is critical that there be a large supply of families who will provide personal care, keep siblings together, and prevent a child’s unnecessary movement between families or away from friends and schools. That supply depends upon compensation that will allow families to foster children without having to sacrifice their own savings and pensions. In recognizing this need, Congress mandated in the Child Welfare Act that states pay foster parents a rate that is sufficient to reimburse at least 8 out-of-pocket costs: food, clothing, shelter, daily supervision, school supplies, personal incidentals, liability insurance, and reasonable travel expenses for visitation.¹⁹⁹

*When foster home payments do not cover these basic costs, families are unable to afford caring for foster children and in many instances are forced to bow out of service. The supply contracts,²⁰⁰ resulting in more children being placed with family foster agencies and group homes. That means fewer adoptions, less permanence in placement, and—ironically—higher costs to the state because of the much higher rates paid to those alternative placements. Those higher rates may be partly the result of their higher costs or that many of them are privately run, and also may be influenced by the relatively organized status of agencies and group homes and much more extensive lobbying and political influence in state capitols than dispersed and unorganized family providers have. Despite Congress’ clear mandate that **state rates cover specified costs**, despite the personal impact suffered by a child forced into a group home placement when the more appropriate family placement is not available, and despite the increased cost to the state associated with more group home placements, a 2007 report revealed that most states were openly violating this Child Welfare Act provision.²⁰¹*

*A typical example was California, where rates stayed relatively static since 1991 while costs rose steadily with inflation. By 2008, the foster family rate had fallen almost 40% below the federal required out-of-pocket floor. Because HHS had taken no action to compel California’s compliance with the federal mandate, it was up to private parties to pursue expensive, time-consuming litigation. And because California has three separate foster care rate structures—one for group homes, one for foster family homes, and one for foster family agencies—not one but **three separate lawsuits** have been necessary in order to bring California closer to compliance with federal law. First, the California Alliance of Child and Family Services brought suit for inadequate payments for group homes in California (*California Alliance v. Allenby*); that group’s success caused group home rates to increase by over 20% (now exceeding \$5,000 per child per month). While some observers hoped that this lawsuit would either prompt state officials to bring family foster home and family foster agency rates into compliance with federal law, or prompt HHS to take action to compel such compliance, neither event happened. Accordingly, the Children’s Advocacy Institute, joined by pro bono attorneys at Morrison and Foerster, successfully litigated *California Foster Parents Association v. Wagner*, which*

¹⁹⁷ See *C.H. v. Payne*, 683 F. Supp 2d 865 (S. D. Ind. 2010).

¹⁹⁸ 712 F.3d 1190 (8th Cir. 2013).

¹⁹⁹ 42 U.S.C. § 671(a)(1) creates the obligation for states to provide the payments and 42 U.S.C. § 675(4)(A) clarifies the statutory definition of “foster care maintenance payments.” Under Title IV-E, state plans must provide for maintenance payments which “cover the cost of and the cost of providing” these eight elements.

²⁰⁰ See e.g., Marisa Kendall, *Shortage of Foster Parents Seen as U.S. Trend*, USA TODAY (September 22, 2010); Dan Nasako, *Foster Families in Decline*, HONOLULU STAR ADVERTISER (Jan. 2, 2011); Mary Reinhart, *CPS Squeeze: More Children in Need, Fewer Foster Homes*, THE ARIZONA REPUBLIC (Sept. 9, 2011).

²⁰¹ University of Maryland School of Social Work, et al., *Hitting the M.A.R.C.: Establishing Foster Care Minimum Adequate Rates* (Oct. 2007) (available at www.childrensrights.org/policy-projects/foster-care/hitting-the-marc-foster-care-reimbursement-rates/).

found that California had not complied with federal law on the compensation of foster family homes, had not even inquired into or gathered relevant information in order to comply in over more than a decade, and had paid more than 30% below the average out-of-pocket cost, resulting in a serious diminution in the number of families to care for foster children. The third lawsuit (California Alliance of Child and Family Services v. Lightbourne and Rose) prompted the California Legislature to increase the rates provided to foster family agencies. Despite three lawsuits to ensure that California paid its foster care providers appropriate rates, many children in the state's foster care system reside in foster care providers who still do not receive adequate reimbursement rates — relatives of the child. Through a recent push by advocates within the state, counties will have the option to pay relatives at a rate commensurate with California's foster care maintenance payment — but it remains to be seen how many counties will opt into this option.

Hence, at least three cases subsuming probably a decade will be necessary to obtain state compliance with a federal floor that benefits children subject to state custody and which will cost the state less overall due to fewer children in group homes and more children being adopted—which family placements stimulate. While rate-by-rate, state-by-state private enforcement is problematic for the many reasons noted above, at least the judicial branch offered some remedy to counterbalance HHS' refusal to enforce this Child Welfare Act provision. However, further private enforcement in this area via the federal judiciary is in jeopardy given the 8th Circuit Court of Appeals' 2013 decision in Midwest Foster Care and Adoption Ass'n v. Kincaid,²⁰² disregarding the majority of precedent on point, including the 9th Circuit Court of Appeals' 2010 Wagner opinion noted above, the 8th Circuit held that the Child Welfare Act does not create a privately enforceable right under 42 U.S.C. § 1983 to foster care maintenance payments.

V. Examples of Child Welfare Law Requirements Meriting Federal Oversight and Enforcement

The record of private court enforcement discussed above necessarily reflects the extremely limited resources of the several child advocacy organizations undertaking them, and the barriers that those bringing a federal court case must surmount. And where brought, those cases are limited in their reach, often covering a widespread violation in only a small state or one of several counties. The court obstacles discussed above do not apply to HHS enforcement. Courts cannot act as quickly, or as broadly, as HHS — nor do they have the leverage of allowing or withholding federal funds. A typical court progenitor cannot compare to the speed or breadth of HHS enforcement of the law. One exception could be an epic Supreme Court decision for foster children. However, the Supreme Court accepts and decides such cases rarely — at a rate of two or three per decade after 1990. Nor are the access, standing, and legal finances facts of life amenable to a jurisdiction that will commonly decide a case 5 to 7 years after it has been initially filed. Further, recent appellate court decisions discussed above effectively bar the courts from entertaining cases and preclude any appeal or writ that might reach the U.S. Supreme Court for the large-scale resolution needed. Indeed, the federal courts have, to a large extent, walked away from any role as a check on state compliance with the Constitution or federal law applicable to these children. That leaves the federal executive branch as not only the most potent and effective check — but now the only check.

The accumulated body of private child welfare litigation provides the executive branch with relative “gimmies” with regard to areas of the law where it needs to step up enforcement. Each produces either dispositive judicial findings of violation or a consent decree concession by the respondent state. It is relatively easy to take a specific finding or concession and then apply it to the neighboring counties and states that similarly underperform. Such an extension of specific standards is relatively easy, is unlikely to produce meritorious defenses, and enhances consistent application of the law — itself a hallmark of justice. After all, should a youth in foster care be protected merely because of the jurisdiction in which he or she lives?

Regrettably, this low-hanging fruit does not consistently exhaust all of the important areas where states are failing to comply with minimum federal requirements. Substantively, prior litigation has focused on primarily (a) social worker caseloads and training and (b) foster care compensation (see Appendix D). Those breaches are important and the cases won significant, but as noted above, have yet to be used to effectuate

²⁰² 712 F.3d 1190 (8th Cir. 2013)

broader compliance or redress violations beyond their limited scope. And there are major areas of non-compliance that have not brought private litigation at all, either because of the practical difficulties or the continuing contraction of federal court jurisdiction. These include areas where the only effective enforcement mechanism is the executive branch. Several particular examples where states' violations of federal child welfare law have been well documented include (a) states' refusal to provide public disclosure of findings and information regarding child abuse or neglect fatalities and near fatalities; (b) the failure of many states to provide *guardians ad litem* (GALs) (let alone independent counsel) for abused and neglected children in dependency court proceedings, and (c) actual state takings from the meager assets of foster children.

Ideally HHS would not entirely rely on scholarly reports or other empirical evidence, but gather its own. And it can require state reporting of any data it needs to gather to assure compliance. Indeed, CAPTA itself provides that the HHS Secretary "shall...through a national data collection and analysis program and in consultation with appropriate State and local agencies and experts in the field, collect, compile, and make available State child abuse and neglect reporting information which, to the extent practical, shall be universal and case specific and integrated with other case-based foster care and adoption data collected by the Secretary."²⁰³ HHS has responded to this mandate by establishing the National Child Abuse and Neglect Data System (NCANDS) — a **voluntary** national reporting system with rational state officials unsurprisingly not particularly anxious to report their own non-compliance with the law. Nevertheless, the existing record of outside research and limited state disclosures HHS has received provide it with ample material to demand states comply with minimum required standards for the children they have seized and are now subject to state care. We present three examples of data gathered that document such violations.

A. CAPTA's Public Disclosure Mandate Regarding Child Abuse and Neglect Fatalities and Near Fatalities

Child abuse or neglect leads to the death of at least 1,770 children every year — many of whom had been the subject of abuse or neglect reports made to child protective services prior to incidents that led to their deaths. In fact, a study of child abuse death information in California (during a period when it was available) by the Children's Advocacy Institute found that in the approximately 23 weeks between July 21 and December 31, 2006, of the 53 fatalities caused by child abuse, 41 (82%) had a child protective services history and 28 (53%) had a child protective services history which was substantially related to the fatality. Of another 30 cases of near fatalities, 19 (63%) had a child protective services history and 11 (37%) had a child protective services history which were substantially related to the near fatality cause.²⁰⁴

CAPTA acknowledges that while child abuse and neglect records have a confidentiality element, cases involving fatalities or near fatalities fall into a very different category. Where child abuse or neglect leads or contributes to a fatality or near fatality, the facts and background regarding prior CPS contacts (or lack thereof) must be made public in order to enact meaningful systemic reform. Thus, CAPTA requires that in order to receive CAPTA funding, states must have policies that allow for public disclosure of the findings or information regarding this narrow class of cases — child abuse or neglect fatalities and near fatalities.

As of 2014, all 50 states and the District of Columbia accept CAPTA funds. It should follow that all states provide for public disclosure of information about cases of fatal and near-fatal child abuse and neglect in a manner that furthers the intent and purpose of the CAPTA statute. As discussed below, that is not the case.

²⁰³ 42 USCS § 5104(c)(1)(D).

²⁰⁴ Riehl, Christina, Children's Advocacy's Institute, *Child Fatalities and Near Fatalities – Do We Need the Details?* (April 2012) (available at http://caichildlaw.blogspot.com/2012/04/child-fatalities-and-near-fatalities-do_17.html).

1. HHS Ignores Evidence that States Violate CAPTA's Public Disclosure Mandate

In 2008 and 2012, the Children's Advocacy Institute (CAI) and First Star released the first and second editions of *State Secrecy and Child Deaths in the U.S.*, a report grading all fifty states and the District of Columbia on their laws and regulations pertaining to public disclosure of child abuse or neglect fatalities and near fatalities — disclosure expressly mandated by CAPTA. The 2008 *State Secrecy* report explained how numerous states were in blatant noncompliance with CAPTA's public disclosure requirement — some states had no such identifiable policies at all, some states had policies that covered only fatalities, many states imposed restrictions and conditions on disclosure that in effect allowed the state to avoid disclosure entirely, etc. The 2008 report received tremendous media attention, and advocates and policymakers in several states took swift action to bring their states into compliance with this CAPTA provision. However, and in direct violation of federal law, the 2012 report identified several states that still had no identifiable public disclosure policy covering near deaths, and identified even more states with policies that fell far short of Congressional intent with regard to transparency and disclosure.

In addition to these two national reports released over the last five years, other major and notable events have drawn attention to the fact that several states are not in compliance with the CAPTA public disclosure mandate—with some states having obvious deficiencies. Such additional events include the following:

- During the process to reauthorize CAPTA in 2010, the Senate Health, Education, Labor and Pension (HELP) Committee acknowledged that not all states are in compliance with CAPTA's public disclosure mandate and called upon the HHS Secretary to take action to adopt regulations mandating state responsibilities consistent with Congressional intent under CAPTA. Instead of complying with this mandate, HHS in fact moved in the opposite direction by watering down its Child Welfare Policy Manual (CWPM) to essentially nullify states' public disclosure obligations, as discussed below.
- In 2010, the child advocacy group Every Child Matters formed the National Coalition to End Child Abuse Deaths, a non-partisan coalition of five organizations working to enlist Congress, the Administration, and the media to bring attention to child abuse deaths and recommend ways to reduce the number of child abuse fatalities each year. In 2010, the Coalition hosted a Summit to End Child Abuse and Neglect Deaths in America to release its recommendations and released the second edition of its report, *We Can Do Better: Child Abuse and Neglect Deaths in America*. In 2011, the Coalition held a congressional briefing and provided witnesses and testimony for the Human Resources Subcommittee of the Committee on Ways and Means on the issue of how to reduce child abuse fatalities.
- In July 2011, the U.S. Government Accountability Office (GAO) released a report entitled, *Child Maltreatment—Strengthening National Data on Child Fatalities Could Aid in Prevention*. The Report recognized the critical role that consistent and accurate data plays in identifying systemic flaws and implementing effective reform and provided empirical evidence and analyses supporting a

Despite such evidence that states are not complying with the CAPTA public disclosure mandate, HHS has taken no visible steps to assure compliance. Nor, as explained below, has it adopted regulations to implement the public disclosure elements of CAPTA, notwithstanding the Senate HELP Committee report demanding such adoption — and in fact HHS has adopted CWPM language that is contrary to the spirit and letter of the CAPTA public disclosure mandate and which renders the CAPTA provision meaningless.

federal floor to implement the CAPTA requirement of disclosure for child abuse related deaths and near deaths.

- On Jan. 14, 2012, President Obama signed into law the Protect Our Kids Act of 2012 (P.L. 112-275), to create the Commission to Eliminate Child Abuse and Neglect Fatalities. The twelve-member Commission, which met publicly for the first time on Feb. 24, 2014, will evaluate current programs and prevention efforts, and recommend a comprehensive national strategy to reduce and prevent child abuse and neglect fatalities.

Despite such evidence that states are not complying with the CAPTA public disclosure mandate, HHS has taken no visible steps to assure compliance. Nor, as explained below, has it adopted regulations to implement the public disclosure elements of CAPTA, notwithstanding the Senate HELP Committee report demanding such adoption — and in fact HHS has adopted CWPM language that is contrary to the spirit and letter of the CAPTA public disclosure mandate and which renders the CAPTA provision meaningless.

2. HHS Must Repeal Recent CWPM Changes that Undermine CAPTA’s Public Disclosure Requirement

The particular nature of the CAPTA public disclosure provisions commends an external enforcement of those obligations. Within each state are child protective service agencies, headed by political appointees. It is unsurprising that these officials — charged with CAPTA compliance — do not favor making CAPTA-required disclosures that may reveal that some children had long suffered abuse prior to their deaths, and that such abuse was the subject of prior reports made to their offices. To be sure, hindsight is 20-20 and there will be errors in child removal, in both directions, but the CAPTA-mandated public disclosure of information about such tragic events is the one major check on the side of child protection. However, given the natural instinct for self-protection, state officials generally view disclosure as a possible political liability — and perhaps for that reason, this mandate merits a heightened level of federal oversight and enforcement.

As discussed above, enforcement of CAPTA’s public disclosure mandate by the federal judiciary is unlikely. That leaves one option—enforcement of this provision by HHS. Until recently, HHS activity on this issue was basically limited to the adoption of CWPM provisions that gave marginally helpful — albeit entirely inadequate — “guidance” to states as to what their responsibilities are with regard to the public disclosure mandate. Those provisions, which were in effect until September 2012, furthered the Congressional intent behind the limited exception to the general confidentiality of child abuse and neglect records by declaring that in these specific and limited instances, states have no discretion to withhold information — they must provide public disclosure about child abuse or neglect deaths and near deaths. However, the CWPM provisions regrettably lacked specificity or guidance with regard to what types of information states must release.

During the 2010 CAPTA reauthorization process, the Senate Health, Education, Labor and Pension (HELP) Committee appeared to recognize the need to provide better instruction to the states, and called upon the HHS Secretary to take action to adopt regulations mandating state responsibilities consistent with Congressional intent under CAPTA. Instead of complying with the Committee’s directive to adopt binding regulations, HHS chose to simply modify the guidelines set forth in its Manual instead. But in an even more disturbing development, HHS modified the Manual provisions in a way that gives states two alternative “get-out-of-disclosure-free” cards.

First, HHS deleted the language noted above regarding states’ lack of discretion to withhold information, and adopted a diametrically opposed position — namely that a state can withhold information to ensure the safety and well-being of the child, parents and family. This CWPM provision is contrary to the intent of the CAPTA provision, as well as contrary to the clear directive provided by the HELP Committee. This new language arguably renders the CAPTA provision moot, and it must be repealed immediately.

Congress already engaged in the balancing test between a child and family’s right to privacy and the public’s right to know how the child welfare system is functioning, and it determined that with regard to the specific, limited and extreme cases of child abuse or neglect death or near death, the value of disclosure outweighs any relevant privacy concerns. There is no indication that Congress intended to allow states to pick and choose the cases of child abuse or neglect fatalities and near fatalities for which they will provide public disclosure — something that HHS’ regrettable amendments to the CWPM now appears to do.

Second, while HHS did commendably amend its Manual to provide some level of instruction to states about the types of information they are to disclose to the public, it inserted language providing that such information is to be disclosed only when the state determines it to be “pertinent to” the child abuse or neglect that led to the fatality or near fatality. HHS’ failure to provide guidance regarding what information is in fact “pertinent to” the abuse or neglect that led to the fatality or near fatality has already created widespread confusion — and has already served as the basis for at least one state to refuse disclosure of findings or information about child abuse or neglect fatalities and near fatalities.²⁰⁵

3. Congress Must Clarify and Strengthen CAPTA’s Public Disclosure Mandate

Congress must amend CAPTA to provide more explicit direction to HHS about the underlying purpose and goal of the public disclosure mandate; make IV-E funding contingent upon meeting IV-E and CAPTA standards (assuming the state is receiving funding from both sources); and clarify for the courts that there is a private remedy with regard to CAPTA and all child welfare laws.

B. Constitutionally- and CAPTA-Mandated Representation for Abused and Neglected Children

Historically, children were viewed as chattel (property), and it was assumed that the legal interests of a child were represented by the parent or, in the case of abuse and neglect proceedings, by the state. Over time, courts began to recognize that children have basic constitutional and statutory rights to be heard and represented by counsel and certainly by some adult *guardian ad litem* where basic issues of custody and care were to be decided by the state. After all, foster care is state custody, as are mental health facilities and correctional facilities.

In April 2007, First Star published the first edition of *A Child’s Right to Counsel: A National Report Card on Legal Representation for Children*, a report analyzing the laws of all 50 states and the District of Columbia with regard to their provision of attorneys to abused and neglected children in dependency cases, in relation to their compliance with CAPTA’s GAL mandate (discussed below). The report has become a reference tool used by legislators and advocates in the field. The second edition of the *A Child’s Right to Counsel* was published by First Star and CAI in 2009, revealing that much had changed since the First Edition and reflecting some state progress. As noted above, in 2011 the ABA adopted the *Model Act on the Representation of Children in Abuse, Neglect and Dependency Proceedings*; however, the third edition of *A Child’s Right to Counsel*, published by First Star and CAI in May 2012, found that no state had as of then significantly altered its laws to conform to the Model Act.

1. Courts Must Recognize a Child’s Constitutional Right to Counsel in Dependency Proceedings

*In re Gault*²⁰⁶ affirmed a child’s constitutional right to counsel in juvenile court criminal cases, recognizing that the risk of being placed into state custody (jail) jeopardizes a fundamental right that requires

²⁰⁵ *Tennessee Fights Transparency for Child Welfare Agency; Media, State Lawyers Argue over DCS Disclosures*, Crossville Chronicle (Jan. 14, 2013).

²⁰⁶ 387 U.S.1 (1966).

the assistance of client-directed counsel. Dependency proceedings also involve fundamental interests, including a child's liberty interest to live with his or her parents or instead, to be placed elsewhere — sometimes in state custody. As much as delinquents, dependents of the court have every detail of their lives decided by the state, through the offices of state court judges serving as their legal parents. Advocates contend that the rights recognized in *Gault* can and should extend beyond juvenile delinquency cases to include dependency proceedings.

Every U.S. state already has laws authorizing the appointment of counsel for some or all children in dependency cases. And general consensus in the legal community has been reached that a child's right to counsel in these cases is a foregone conclusion. In August 2011, the American Bar Association (ABA) adopted the *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings*, stating that the “court shall appoint a child's lawyer for each child who is the subject of a petition in an abuse and neglect proceeding.”²⁰⁷

Some courts have also found that children in dependency proceedings have a due process right to legal counsel. For example, in February 2005, the U.S. District Court for the Northern District of Georgia found that abused and neglected children not only have a Georgia state constitutional right to an attorney, but also to adequate legal representation, at every major stage of their life in state custody. Specifically, the court found that “children have fundamental liberty interests at stake in deprivation and [termination of parental rights] proceedings.” Furthermore, a child's liberty interests continue to be at stake even after the child is placed in state custody at which point a special relationship is created that gives rise to rights to reasonably safe living conditions and services necessary to ensure protection from physical, psychological, and emotional harm.²⁰⁸

After this ruling, two Georgia counties (Fulton and DeKalb) in the Atlanta area entered into settlement agreements that guaranteed every child the right to effective legal representation throughout their involvement with the child welfare system. Since then, DeKalb County's Child Advocate Attorneys each carry caseloads of no more than 90 children per attorney. Unfortunately, no branch of the federal government has done anything to expand this right to counsel beyond the two Georgia counties where they are now applied — either to the rest of the state of Georgia, or to any other state.

2. Congress Must Strengthen CAPTA's Child Representation Mandate

In addition to a child's Constitutional right to counsel in dependency proceedings, Congress has specifically mandated that a *guardian ad litem* (which may or may not be an attorney) be appointed for children involved in dependency court proceedings. Specifically, CAPTA specifies that

“in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a *guardian ad litem*, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings —

- (I) to obtain first-hand, a clear understanding of the situation and needs of the child; and
- (II) to make recommendations to the court concerning the best interests of the child....”²⁰⁹

In light of the momentous decisions being made on behalf of abused and neglected children in dependency court proceedings, Congress must revise the CAPTA mandate to require the appointment of independent legal counsel, with training appropriate to the role, to represent each child involved in these proceedings and in any appeals therefrom. The rationale for the mandated appointment of counsel received some empirical support from a 2008 study by the Chapin Hall Center for Children of Palm Beach County,

²⁰⁷ American Bar Association, *Model Act Governing the Representation of Children in Abuse, Neglect, and Dependency Proceedings* (Aug. 2011) at Section 3 (available at http://www.cachildlaw.org/Misc/ABA_Resolution.pdf).

²⁰⁸ *Kenny A. v. Sonny Purdue* 358 F.Supp 2d 1353 (2005).

²⁰⁹ 42 U.S.C. § 5106a(b)(2)(B)(xiii).

Florida. In this report, children with effective counsel in dependency cases were moved to permanency at about twice the rate of unrepresented children. Shortened court cases and reduced time in foster care benefit children by hastening the time to permanency and benefit society by reducing court and foster care costs.²¹⁰

And quite apart from the mere appointment of legal counsel is the issue of caseloads. Those representing children in these momentous state proceedings where the futures of these children will be decided have common caseloads of 200, 300, 400 children and sometimes more. No person can represent the individual interests of a child in court—attorney or not—when that obligation extends to another 200 or more children. The American Bar Association and the National Association of Counsel for Children each recommend that a full-time attorney represent no more than 100 individual child clients at a time. The *Kenny A.* case also posited a maximum constitutional caseload of 100 children per attorney GAL. This limit generally assumes a caseload that includes clients at various stages of cases, recognizing that some clients may be part of the same sibling group, and averages to 20 hours per case in a 2000-hour work-year. In mandating the appointment of independent legal counsel for each child, Congress must specify reasonable caseload limits in line with what has become the national consensus on this point.

3. HHS Must Stop Ignoring Signs of Probable State Violation of CAPTA’s Child Representation Mandate and Take Appropriate Action

While HHS may opine that the federal Constitution does not require counsel as GAL for these children, it has no defensible basis to ignore CAPTA’s general mandate that a GAL (attorney or not) be appointed for each child involved in dependency proceedings. In addition to the three editions of *A Child’s Right to Counsel* report discussed above, other evidence clearly indicate that many states contravene Congressional intent in providing even non-attorney GAL representation for abused and neglected children. For example, it has been reported that

- In Florida, only 80% of abused and neglected children received a CAPTA-mandated GAL.²¹¹
- In Ohio, 40% of the GALs never even met with the children they represented.²¹²
- In New Hampshire, hundreds of children go without the services of a CASA *guardian ad litem* every year.²¹³
- In one North Carolina county, 25% of the children who have been abused or neglected are going to court without advocates.²¹⁴

In addition, **HHS itself** has produced evidence of states’ possible noncompliance with the federal GAL mandate. In the past several issues of its annual *Child Maltreatment* report, HHS has acknowledged that less than 20% of child maltreatment victims received court-appointed representatives of any kind. The most recent issue of *Child Maltreatment* states as follows:

States were less able to report on the number of victims with court-appointed representatives. Thirty-five States reported that 17.1 percent of victims received court-appointed representatives. These numbers are likely to be an undercount given the statutory requirement in

But instead of conducting an inquiry to determine whether states are in fact violating federal law, HHS continues to write off this anomaly as “likely” undercounting for the last several years — and for the last six years it has blindly repeated verbatim the quote that “many States are working to improve the reporting of the court-appointed representative data element.”

²¹⁰ Andrew Zinn and Jack Slowriver, *Expediting Permanency: Legal Representation for Foster Children in Palm Beach County*, Chapin Hall (available at <http://www.chapinhall.org/research/report/expediting-permanency>).

²¹¹ Christine Stapleton, *Will Child Killings Stop?*, Palm Beach Post (March 9, 2014) at 1A.

²¹² Jessie Balmert, *Ohio AG Recommends Better Foster Care*, Mansfield News Journal (Dec. 12, 2014) at A3.

²¹³ *CASA of NH celebrating 25 years of child advocacy; Organization seeks more volunteers to continue efforts*, The Telegraph (Apr. 20, 2014).

²¹⁴ Staff writer, *Abused, neglected children in Jackson County need advocates*, The Sylva Herald & Ruralite (Mar. 27, 2013).

CAPTA, ‘in every case involving an abused or neglected child which results in a judicial proceeding, a Guardian ad Litem...who may be an attorney or a court-appointed special advocate...shall be appointed to represent the child in such proceedings...’ Many states are working to improve the reporting of the court-appointed representative data element.²¹⁵

HHS may be correct that some states are undercounting the number of abused and neglected children involved in judicial proceedings who have court-appointed representation. However, another reasonable explanation is that states are in fact violating the CAPTA mandate that the court appoint a GAL for each abused and neglected child involved in a judicial proceeding. But instead of conducting an inquiry to determine whether states are in fact violating federal law, HHS continues to write off this anomaly as “likely” undercounting for the last several years — and for the last six years it has blindly repeated verbatim the quote that “many States are working to improve the reporting of the court-appointed representative data element.”²¹⁶ All of this concerns nothing more than a duty to report a number, not to comply with any minimum standard — and even here we find states flouting the federal requirement and HHS essentially ignoring what could be extremely obvious and documented violations of federal law.

To date, HHS has failed to take appropriate action to enforce state compliance with CAPTA’s GAL mandate. And as noted above, ensuring that states are complying with the GAL appointment mandate would not even be enough; HHS must ensure that states are appointing GALs who have training appropriate to the role, and that each GAL has a reasonable caseload. But HHS has not adopted regulations regarding GAL training, competence, caseloads, *et al.* The extent of guidance provided by HHS to states regarding their responsibilities in this area consists of two “question and answer” entries in the Child Welfare Policy Manual, both of which merely repeat the language of CAPTA and provide no further insight or instruction as to any type of minimum floor that states must meet.

To its credit, in 2009 HHS awarded a five-year, \$5 million grant to the University of Michigan Law School’s Child Advocacy Clinic. The grant establishes a National Quality Improvement Center (QIC) to generate and disseminate knowledge on the representation of children and youth in the child welfare system. This important grant and resulting study will lend critical insight into what the relative benefits and drawbacks are to different models of legal representation for children in dependency cases, but it will not answer the foundational question of what the benefits are to children in dependency cases when they have attorney rather than non-attorney representation. While the gravity of dependency proceedings for the involved children warrants study into that question as well, HHS is currently using the QIC project’s pendency as a pretext for not conducting a parallel study into the attorney versus non-attorney question.

C. Improving Outcomes for Former Foster Youth²¹⁷

Each year, about 30,000 of the nation’s 500,000 foster children “age out” of foster care. The rates of homelessness, incarceration, chronic physical and mental problems, educational failure and unemployment among these foster alumni far outstrip rates for other youths. In 2011, CAI and First Star released a national report entitled, *The Fleecing of Foster Children*, documenting several ways in which federal and state laws and policies not only impede these youth from achieving self-sufficiency or independence upon aging out of foster care, but which also contribute directly to the negative outcomes that are regrettably typical for these youth. Among other things, that report concluded that because these youth lack the post-18 safety net and

²¹⁵ *Child Maltreatment 2012*, *supra* note 1, at 77. Interestingly, some of the states’ confusion in responding to HHS’ question about the appointment of representation might be related to whether states are supposed to report on the percentage of all child maltreatment victims who received court-appointed representation, or just those victims whose cases resulted in a judicial action. This comment by HHS in its *Child Maltreatment* report implies that the latter interpretation is correct.

²¹⁶ See, e.g., U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, *Child Maltreatment 2011* (2012) at 83; *Child Maltreatment 2010* (2011) at 90; *Child Maltreatment 2009* (2010) at 85; *Child Maltreatment 2008* (2009) at 79; *Child Maltreatment 2007* (2008) at 80; *Child Maltreatment 2006* (2007) at 85 (all available at <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment>).

²¹⁷ See Children’s Advocacy Institute and First Star, *The Fleecing of Foster Children* (March 2011), available at http://www.caichildlaw.org/Misc/Fleecing_Report_Final_HR.pdf.

financial assistance that families typically provide for their young adult children, it is imperative that we adopt and promote policies and practices that encourage the accumulation and conservation of funds belonging to these youth for their use during the difficult post-care transition years.

1. SSA Must Ensure that Representative Payees for Foster Child Beneficiaries Expend and/or Conserve Benefits Consistent with Each Child's Best Interests

As detailed above, thousands of children in foster care are eligible for benefits from the OASDI and/or SSI program. Each foster child beneficiary must rely on his/her representative payee (appointed by SSA) to manage his/her funds, and to ensure that the funds are used to serve his/her unique and specific best interests.

SSA is failing these children in two regards. First, it rather automatically appoints states and/or foster care agencies to act as representative payees for children in foster care, without taking appropriate steps to identify and select a higher priority representative payee for these children who might be a more appropriate choice and who might fulfill the fiduciary duties inherent to the position. It then allows these states and/or agencies to breach their fiduciary duties to these children by expending funds without first considering the individualized circumstances particular to each involved child and determining the best use of each child's funds.

SSA's actions directly contribute to the hardships faced by youth aging out of the foster care system. Having been denied proper representative payees who would meaningfully consider their unique needs and perhaps determine that conservation of all or at least a portion of the child's benefits was in their best interests, these youth exit the system with nothing. This is tragic enough for youth whose SSI benefits were consumed by the state, and who now must try to demonstrate continued eligibility for SSI under the adult

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standards. However, it is especially tragic for youth who were receiving benefits due to the death of one or both of their parents, since those benefits end at age 18. Not only will these youth face the difficult transitional years without the support and guidance of their parents and family, they will not have even a penny of what was in many cases the only legacy their parents left for them.

2. Congress Must Require that States Screen Foster Youth for Benefit Eligibility and Assist SSI-Eligible Youth in Maintaining Coverage Post-18

The discussion above explains the need to ensure the best use—and when appropriate, conservation—of certain types of government benefits that some foster children receive while in care. Unfortunately, however, many foster children are entitled to government benefits that they are not receiving—benefits that a child's parent would typically apply for on behalf of the child. For example, among 25 states responding to a recent survey of state child welfare agencies, 7 indicated that SSI (disability) eligibility screening for children in foster care was not routine.²¹⁸ This is particularly troubling because these are youth who, through no fault of their own and by institutional design, have only the government to act on their behalf as their parent.

It is imperative for states to screen all children in foster care for potential eligibility for OASDI and SSI benefits. These screenings, while the children are still under the helpful guidance of their adult caretakers, is the first step toward giving them a stronger footing as they emerge into adulthood. If, for example, a child is

²¹⁸ Adrienne Fernandes, Scott Szymendera, Emilie Stoltzfus, *Child Welfare: Social Security and Supplemental Security Income (SSI) Benefits for Children in Foster Care*, Congressional Research Service (Feb. 2007) at 15–16, available at http://assets.opencrs.com/rpts/RI_33855_20070201.pdf.

eligible for OASDI benefits, the child should be screened for, and should receive those benefits so that, if it is in the child's best interest, they develop their own safety net in the form of a nest egg as they venture out on their own as an adult. Similarly, if a child is eligible for SSI benefits, it is imperative to screen the child early to see if they can receive special payments to ensure full treatment and care required for their particular disability. Then, as adulthood approaches, the agency should assist the youth in applying for the appropriate adult SSI benefits, which is a complex and lengthy process. While the continuation of SSI benefits from childhood to adulthood is not automatic, the receipt of these benefits could in some cases provide transitional financial support between foster care and independent living that could serve to prevent homelessness and other undesirable outcomes that burden state public systems. However, if proper screening is not done while the child still has the assistance of the adults who are supposed to support her into adulthood, the task of accessing these services becomes much more arduous and much less likely. It is therefore much more likely that these young people will ultimately require costly public assistance of one form or another.

To their credit, a few members of Congress have tried to address some of the issues discussed above. In 2010, then Representative Pete Stark (D-CA) and current Representative Jim Langevin (D-RI) introduced H.R. 6192, the Foster Children Self-Support Act, which would have ensured that foster children be allowed to use their Social Security and Supplemental Security Income benefits to address their needs and improve their lives. Among other things, the bill would have required states to use Social Security benefits for the current and future needs of the foster child, and not as a generic revenue source; ensure that all eligible foster youth are assisted in applying for Social Security benefits; and create individual accounts for each eligible child, to be used by foster youth when they leave care to help defray the cost of things such as education, health care, and housing, among other things.

3. Congress Must Amend Federal Laws that Inhibit Foster Youth Savings

As discussed above in section III(D), many federal programs have income and/or asset caps that must be met as part of the eligibility requirements. Such restrictions impose a special hardship on foster youth who lack a familial support system and are expected to support themselves when they reach the age of majority. Because these youth age out of care with little or no safety net or support, many have to resort to public programs such as Temporary Assistance for Needy Families, Medicaid, and Supplemental Nutrition Assistance Program (Food Stamps) for support after they age out of foster care. In light of that, it is irresponsible and short-sighted of our policymakers not to let foster youth save as much as they can for the future.

4. HHS Must Ensure States Repair Foster Youth Credit Issues Prior to Aging Out of Care

Until recently, the child welfare agencies in most states were under no obligation to do credit checks and assure emancipating foster youth that their credit has not been compromised by relatives and others—a regrettably common problem for these youth. However, the Child and Family Services Improvement and Innovation Act (P.L. 112-34), signed by President Barack Obama in September 2011, now requires that each child age 16 and older in foster care (1) receive a copy of any consumer credit report annually until discharged from foster care and (2) be assisted in interpreting the credit report and resolving any inaccuracies.

On May 8, 2012, HHS issued Program Instruction Log No. ACYF-CB-PI-12-07 to provide guidance on the steps child welfare agencies must take to address inaccuracies in a foster youth's credit report and to require that agencies submit a Title IV-E plan amendment to show compliance with this new requirement by August 13, 2012. While this is a promising start, HHS' involvement cannot be limited to ensuring that states self-certify compliance with this important new protection; it must use its oversight and enforcement powers to review the states' actual performance to determine whether the programs are in substantial conformity with the state plan requirements, and take appropriate corrective action when it finds such conformity to be lacking. Furthermore, although the new law made a major step forward in recognizing this problem and

requiring that steps be taken for foster youth age 16 and over, the problem often starts well before this time, so the law must ultimately be extended to detect fraud and assist youth at a much earlier age.

VI. The Status Quo is Hurting Our Children

Combine weak, inconsistent, underfunded, and piecemeal laws from the legislative branch with ineffective executive branch implementation, oversight, and enforcement, and add a judicial branch that is increasingly willing to reject private efforts to protect children's rights and interests, and you have the U.S. child welfare system. How this plays out in the states for our children is a national disgrace. Recent headlines from across the country reveal how children are faring under the current system:²¹⁹

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Arizona: *Child-Welfare Analyst: Arizona's High Foster-Care Rates Not Getting Any Better* (Phoenix New Times, March 14, 2014)²²⁰ — Bryan Samuels, the former commissioner of the federal Administration on Children, Youth and Families, and the former head of Illinois' child-welfare agency, explained the many ways in which other states do things differently. And from every angle, Arizona's system isn't looking up.

California: *Los Angeles' Child Abuse Reporting System Underfunded & Underutilized* (Chronicle of Social Change, February 23, 2014)²²¹ — Better information sharing between law enforcement and child welfare topped a list of recommendations made to Los Angeles' Board of Supervisors by a blue ribbon commission created to reform the county's child protective services; *Los Angeles County Department of Children and Family Services kept foster kids' money, audit says* (Los Angeles Daily News, May 01, 2014) — The county Department of Children and Family Services failed to provide about \$1.8 million in child support and other payments owed to foster kids after they reached adulthood and left the system, according to a new audit released Thursday;²²² *Child welfare records in 3-year-old's death still secret* (KTVU, February 05, 2014) — Napa County Child Welfare officials say a juvenile court judge denied their request to release more information about previous contact with Kayleigh Slusher before the child was found dead on Feb. 1.²²³

Florida: *Child abuse on the rise in South Florida — much of it attributed to overwhelmed parents* (Westside Gazette, March 13, 2014)²²⁴ — All across the country there has been a significant uptick in the number of child abuse cases being reported to authorities with Palm Beach County being no exception.

Georgia: *Report: Georgia foster care investigations lacking* (Find Law, July 21, 2014)²²⁵ — The report spurred sharp criticism from child welfare advocates who stressed that these children have been wronged again and again. They were mistreated by their parents, so the state removed them into foster care, and then they suffered similarly at the hands of their foster parents.

²¹⁹ All of these headlines and article summaries were featured in recent issues of *Child Welfare in the News*, an email service of the Child Welfare Information Gateway Library.

²²⁰ See http://blogs.phoenixnewtimes.com/valleyfever/2014/03/child-welfare_analyst_arizonas.php.

²²¹ See <https://chronicleofsocialchange.org/news/los-angeles-award-winning-child-abuse-reporting-system-underfunded-underutilized/5341>.

²²² See <http://www.dailybulletin.com/social-affairs/20140501/los-angeles-county-department-of-children-and-family-services-kept-foster-kids-money-audit-says>.

²²³ See <http://www.ktvu.com/news/news/crime-law/child-welfare-records-3-year-olds-death-still-secret/ndFKC/>.

²²⁴ See <http://thewestsidegazette.com/child-abuse-on-the-rise-in-south-florida-much-of-it-attributed-to-overwhelmed-parents/>.

²²⁵ See <http://legalnews.findlaw.com/article/1e7e1cedcf4f5a644e0d4fa9feb22>.

Illinois: *2 Investigators: Clerical Error Keeps Sisters Stuck In Abusive Foster Care For Years* (CBS Chicago, March 10, 2014)²²⁶ — Their aunt, Stephanie Crockett-McLean, says she quickly learned about their situation but couldn't get them out of the foster-care system because of a clerical error. She hired lawyers and fought DCFS for six years, all the way to the Illinois Supreme Court, to get custody.

Maine: *Panel to probe DHHS inaction on child-abuse reports* (Morning Sentinel, February 28, 2014)²²⁷ — The Legislature's Government Oversight Committee voted unanimously Friday to investigate the Department of Health and Human Services' child care licensing division, in which managers have been accused of letting reports of abuse and neglect languish for months or years without acting.

Massachusetts: *Children's Rights lawyer, in 5th year of lawsuit against DCF, says state has long failed to correct system* (Worcester Telegram, March 10, 2014)²²⁸ — Sara M. Bartosz, the lead attorney for Children's Rights representing foster children in a federal class action lawsuit filed years ago against the state, said the Patrick administration was well aware of changes needed within Department of Children and Families to ensure youngsters are cared for long before 5-year-old Jeremiah Oliver of Leominster disappeared. However, officials did not follow through with making those changes, she said.

Massachusetts: *'Disturbing' practice saw DCF select offices to be inspected* (Boston Herald, March 9, 2014)²²⁹ — The embattled state child welfare agency skirted state oversight for decades by directing investigators to hand-picked DCF offices, court documents show, in a maneuver one fed-up lawmaker called "disturbing."

Nebraska: *What happens when state-ordered reports aren't written? Not much* (Omaha World-Herald, March 9, 2014)²³⁰ — In black-and-white letters, deep in the state law book, is a statute that requires the state probation office to submit a report on officer caseloads in every even-numbered year. The report, it was discovered recently, hadn't been filed.

Nevada: *Child Welfare Agency Contacted 2 Times Before Child's Death* (KLAS-TV (CBS News), March 11, 2014)²³¹ — The county's child welfare agency had been contacted about 3-year-old Noah Allen two times before he died of an apparent drowning. The Department of Family Services has opened an investigation and is working with police on the case.

New Mexico: *53 child abuse, neglect cases reported in 58 days* (KOAT, February 28, 2014)²³² — the number of child abuse and neglect cases being filed just in Bernalillo County is about 130 cases filed each year. In 2013, it spiked to 176. This year there's been about 53 cases in the last 58 days.

North Carolina: *Lawmaker outraged at DSS, examines policy* (Elkin Tribune, February 20, 2014)²³³ — A state lawmaker expressed outraged after learning of a report that minors, already victims of a sexual abuse case in Wilkes County, were allegedly subjected to additional sexual abuse in Yadkin County, after being placed by social workers in the home of a convicted child abuser.

Pennsylvania: *Franklin County report shows child abuse referrals continue to rise* (Chambersburg Public Opinion, March 16, 2014)²³⁴ — Child abuse referrals continued to increase over the last five years, despite a small decrease between 2012 and 2013, according to the Franklin County Children and Youth Annual Report for 2013.

²²⁶ See <http://chicago.cbslocal.com/2014/03/10/2-investigators-sisters-were-stuck-in-abusive-foster-care-for-years-family-claims/>.

²²⁷ See http://www.onlinesentinel.com/news/Maine_oversight_committee_orders_probe_of_DHHS_day_care_operations_.html.

²²⁸ See <http://www.telegram.com/article/20140310/NEWS/303109959/1160/SPECIALSECTIONS04&source=rss>.

²²⁹ See http://bostonherald.com/news_opinion/local_coverage/2014/03/disturbing_practice_saw_dcf_select_offices_to_be_inspected.

²³⁰ See <http://www.omaha.com/article/20140309/NEWS/140308775>.

²³¹ See <http://www.8newsnow.com/story/24945235/previous-complaints-filed-against-family-of-dead-child>.

²³² See <http://www.koat.com/news/new-mexico/albuquerque/53-child-abuse-neglect-cases-reported-in-58-days/24747432?absolute=true>.

²³³ See http://www.elkintribune.com/news/community-home_top-news/3091214/Lawmaker-outraged-at-DSS-examines-policy.

²³⁴ See http://www.publicopiniononline.com/local/ci_25356026/franklin-county-report-shows-child-abuse-referrals-continue.

South Carolina: *Leaked DSS documents show noncompliance, confusion* (Free Times, March 5, 2014)²³⁵ — Internal documents from the South Carolina Department of Social Services obtained by Free Times show the agency’s Child Protective Services division to be consistently in violation of laws meant to shield children from neglect and abuse and staffed by workers with little understanding of important agency policies and practices.

Texas: *CPS safety net has failed in a big way (Opinion)* (My San Antonio, March 12, 2014)²³⁶ — It’s particularly troubling then that 20 percent of Texas and Bexar County kids who received services from the agency in 2008 were revictimized over the next five years. Because of the five-year window, those are the most recent statistics available.

Virginia: *New Richmond DSS head asks auditor to investigate department* (WTVR, February 20, 2014)²³⁷ — David Hicks asked Richmond City Auditor Umesh Dalal to conduct an audit of the Administration and Finance, Economic Support and Independence, and the Comprehensive Services Act. Specifically, Hicks asked Dalal to look into DSS’s finances, the efficiency and effectiveness of programs, and the agency’s compliance with federal, state and local laws and regulations.

Wisconsin: *Child deaths from suspected abuse hit 5-year high* (Green Bay Press Gazette, Sept. 08, 2014)²³⁸ — Brown County officials are investigating the deaths of five children suspected to be caused by abuse from their caregivers so far in 2014.

Case Study in Federal and State Abdication: Los Angeles County

That the federal government is failing to hold states accountable for how federal child welfare funds (taxpayer dollars) are spent is best evidenced by the astonishing federal non-response to the ongoing scandal in Los Angeles County.

Los Angeles County is home to more foster children than any other county in the nation, by far. Since 2007, the County has operated under a special Title IV-E Waiver Capped Allocation Demonstration Project (CAP), granted to it and California by the federal Department of Health and Human Services. Under the CAP, Los Angeles County does not see a reduction in federal money if there are fewer children in foster care. Nor does the County receive more money if the population rises. The County receives the same amount each year. If the number of children in care goes up, there is less money for the County. If the number goes down, there is more.

It is obvious where the County’s financial incentives lie under this arrangement: keep the number of children in foster care low. One way to do that is by leaving at-risk children in potentially dangerous homes while offering services to families to try and keep them together. Keeping families together is a laudable goal — so long as it does not conflict with child safety.

How is Los Angeles County performing? Consider just these few snippets from published reports:

- Dozens of children have died of abuse or neglect in recent years despite being under the oversight of social workers from the County’s Department of Children and Family Services.²³⁹
- More than 700 changes to the County’s child protective system have been recommended by various experts and panels since 2008.²⁴⁰
- A recent report from the Los Angeles County Blue Ribbon Commission on Child Protection declares that the system has fallen into a “state of emergency,” and concluded that “[n]othing short

²³⁵ See <http://www.free-times.com/news/leaked-dss-documents-show-noncompliance-confusion>.

²³⁶ See <http://m.mysanantonio.com/opinion/editorials/article/CPS-safety-net-has-failed-in-a-big-way-5311529.php>.

²³⁷ See <http://wtvr.com/2014/02/20/departement-social-services-audit-request/>.

²³⁸ See <http://www.greenbaypressgazette.com/story/news/local/2014/09/07/child-deaths-suspected-abuse-hit-year-high/15211523/>.

²³⁹ Garrett Therolf, LOS ANGELES TIMES, *Blueprint proposed to boost oversight on child welfare* (Jan. 24, 2014)

²⁴⁰ *Id.*

of a complete rethinking about how the county ensures safe and supportive care for abused and at-risk children will lead to the seamless and comprehensive child welfare system that the county has needed for decades.”²⁴¹

- The Commission further noted that “[o]n our watch, many of Los Angeles County’s most vulnerable children are unseen, unheard and unsafe...In eight months of hearing hundreds of hours of testimony, the commission never heard a single person defend the current child safety system.”²⁴²
- The Commission was created after the March 2013 death of 8-year-old Gabriel Fernandez. The boy was found with a cracked skull, three broken ribs, bruised and burned skin, and BB pellets embedded in his lung and groin; County social workers had investigated six reports of abuse but allowed Gabriel to stay with his mother and her boyfriend.²⁴³
- A mother enrolled in a program established to help her retain custody of her children while learning to be a better parent fatally beat her two-year-old baby to death. The County had allowed the mother to enter the program for low-risk families even though she had lost six older children to the foster care system; she had also been the subject of five previous child abuse complaints, including one substantiated allegation that she had severely neglected her own biological child in 2002. Currently, over 13,000 children are enrolled in this program, compared to about 8,000 ten years ago.²⁴⁴
- The County has an extensive practice of contracting with private agencies to place foster children. At least four children in the County died as a result of abuse or neglect over the past five years in homes overseen by private agencies.²⁴⁵ No children died in government-run homes during that time.²⁴⁶ Agencies have allowed convicted criminals as foster parents.²⁴⁷ The state supposedly overseeing the program has granted waivers to at least 5,300 people convicted of crimes, some of whom later maimed or killed children.²⁴⁸
- During 2013, the *Los Angeles Times* reported on a convicted forger who auditors said mishandled tens of thousands of taxpayer dollars as a chief executive of a private, nonprofit foster care agency²⁴⁹; a convicted thief who later was found guilty of murdering a foster child²⁵⁰; and a woman convicted of fraud who was later convicted of criminal charges for causing debilitating burns to a girl in her care.²⁵¹ Each had received a special waiver from the California Department of Social Services to enter the foster care system.²⁵²
- The County’s reliance on private foster care agencies has become “as bottom of the barrel as you can imagine,” the co-director of the Center for Child and Youth Policy at UC Berkeley was quoted as saying; “[t]hey are clearly not keeping track of quality issues. It’s really quite surprising we don’t have more tragedies.”²⁵³ The current head of the County’s child welfare system has conceded that the County’s computer tool for assessing a child’s risk of being abused is “inadequate,” with a replacement years off.²⁵⁴
- The County field office responsible for the County’s most difficult cases has the highest caseloads and least experienced workers.²⁵⁵

²⁴¹ Los Angeles County, *The Road to Safety for Our Children — Final Report of the Los Angeles County Blue Ribbon Commission on Child Protection* (Apr. 18, 2014) (available at http://ceo.lacounty.gov/pdf/brc/BRCCP_Final_Report_April_18_2014.pdf).

²⁴² *Id.*

²⁴³ Garrett Therolf, LOS ANGELES TIMES, *County Misses Signs of Boy’s Abuse* (May 31, 2013).

²⁴⁴ Garrett Therolf, LOS ANGELES TIMES, *Plight of 2 toddlers puts spotlight on L.A. County family program* (Mar. 11, 2014).

²⁴⁵ Garrett Therolf, LOS ANGELES TIMES, *The Child Mill* (Dec. 18, 2013).

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ Garrett Therolf, LOS ANGELES TIMES, *Social workers can now check if parents have criminal pasts* (Aug. 21, 2014).

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ Garrett Therolf, LOS ANGELES TIMES, *The Child Mill* (Dec. 18, 2013).

²⁵⁴ Garrett Therolf, LOS ANGELES TIMES, *Plight of 2 toddlers puts spotlight on L.A. County family program* (Mar. 11, 2014).

²⁵⁵ *Id.*

- Los Angeles County Supervisor Gloria Molina has announced that a “crisis” had developed in the County’s child welfare holding room inside an office building and that it was being used as a “dumping ground” to house difficult-to-place foster children; among other serious concerns, the Supervisor reported that older children were openly using drugs in the office.²⁵⁶

These facts and stories are not secret. Each was widely reported in the mainstream press in the media capital of the world — Los Angeles. It is incontestable that the Los Angeles County child welfare system is a catastrophe and has been for years. County thought-leaders actually and laudably concede this.

Current efforts to try to reform this system are not being made because the federal government has ordered the California Department of Social Services (CDSS) to bring California into compliance with federal standards. Nor are they being made because CDSS took the initiative to insist that the County come into such compliance. Any such efforts to identify and address the systemic failings that have led to the death and suffering of so many children in the nation’s most populous county have instead resulted from the herculean efforts of the press to bring to light what the federal government and the accountable state agency have been ignoring. Only because of relentless media attention are any reform proposals currently being pursued in Los Angeles County.

And even now, from the federal government that is paying for this fiasco, we hear ... crickets.

VII. Findings and Recommendations

A. Findings

Much of the discussion above echoes the findings contained in a report issued by the HHS’ Office of Inspector General (OIG) on what it perceived to be shortcomings of ACF’s review process and its performance in enforcing child welfare laws. The OIG report concluded that “[f]ederal oversight has not recently prompted States to improve and address new and complex problems in child welfare” and that “[s]everal State officials mentioned that they had a hard time convincing their legislatures of the need for a change without Federal dollars being at risk.”²⁵⁷ The report also mentioned that ACF had repeatedly failed to detect and act on state child welfare failures which had been the subject of federal adjudication,²⁵⁸ implying that the agency’s failure to appropriately monitor and enforce state compliance with federal child welfare laws left federal courts with the task of addressing claims stemming from these violations, which in many cases resulted in settlements or judgments against states.²⁵⁹

In a democracy, these are our children – not in just a rhetorical sense, but as a matter of law. We, the electorate, choose and pay their judicial parents and foster providers. How we perform in that role, one that we have assumed unto ourselves, is ultimately the real measure of our nation’s values.

The most remarkable aspect of this particular OIG report is not its factual findings or recommendations per se but rather the realization that the report was published in June 1994. Twenty years later, we have reached the same conclusions. Regrettably, however, the situation is worse today in that federal courts have turned their backs on private attempts to enforce federal child welfare law and Congress has shown little interest in advancing the law itself or addressing the failings of the other two branches.

²⁵⁶ Garrett Therolf, LOS ANGELES TIMES, *Veteran Social Worker Fired* (May 10, 2014).

²⁵⁷ Office of Inspector General, U.S. Dept. of Health and Human Services, *Oversight of State Child Welfare Programs*, OE1-01-92-00770, at 8 (June 1994) at 8–9.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

HHS is substantially moribund in its enforcement of federal law and standards, allowing non-compliance to run rampant with little consequence for states that run afoul of the law. This failure is accentuated by three contextual factors: (a) HHS possesses perhaps determinative authority to drive state compliance—the ability to reduce federal monies where expended inconsistent with applicable federal law; (b) current enforcement is largely relegated to the meager offices of non-profit child advocacy groups, who themselves now face judicial barriers to securing compliance, as discussed above; and (c) child protection performance by the states is largely concealed from public accountability by its ubiquitous “confidentiality” status.

Federal statutes and funding intersect with many of these failures, and the executive branch charged with the task of monitoring this is increasingly the only possible guarantor of state compliance. America’s abused and neglected children do not have PACs, contribute nothing to campaigns, and are without direct organization or powerful lobbyists. They cannot vote. But they have a claim to priority and attention borne of their status as the legal children of state courts. In a democracy, these are our children – not in just a rhetorical sense, *but as a matter of law*. We, the electorate, choose and pay their judicial parents and foster providers. How we perform in that role, one that we have assumed unto ourselves, is ultimately the real measure of our nation’s values.

The findings and recommendations of this Report are not intended as a contribution to any politically motivated ambition. Many child advocates are deeply disappointed by the limited enforcement of federal law by today’s HHS. But it is a failure that covers both Democratic and Republican administrations and reaches back more than three decades. It is not a reflection of any particular party’s hypocrisy. Indeed, this is an area seemingly most amenable to bipartisanship. For the beneficiaries of the minimum requirements and of the federal funds here discussed appeals to the core values of both parties: These children were victimized and need the public’s help, and they now have our state court judges as their legal parents. They are part of our family in more than an ethereal sense. But they suffer from an impotence that stretches across both parties and all three branches of government.

In order to change the status quo, all three branches of federal government must attach real consequences to noncompliance with federal child welfare laws, and directly target specific failed practices, so that state legislators will not only be prompted to act but will know more precisely what they must do and by when.

In order to change the status quo, all three branches of federal government must attach real consequences to noncompliance with federal child welfare laws, and directly target specific failed practices, so that state legislators will not only be prompted to act but will know more precisely what they must do and by when.

The nature of more defined standards buttressed by the withholding of federal funding presents child advocates with a serious dilemma. On one hand, the threat of denying states access to critical federal funds might significantly motivate lawmakers to adopt changes that will ultimately improve child welfare. On the other, following through with penalties may reduce the capacity of the states to fund the very services in dire need of improvement. Some stakeholders argue that, especially given the current financial crisis, withholding funds might serve to punish the children who depend on those funds as much — or more — as it would urge states to comply. Nevertheless, it is plainly apparent that for decades, state legislatures and policymakers have been calling HHS’s bluff on the threat of real enforcement and in a time of sweeping spending cutbacks, defending expanded federal funding of state child welfare programs may become more and more difficult when program supporters can cite limited measurable improvements. Moreover, it is clear from the record of funding deprivation threats in area after area outside of child welfare that it decisively and consistently achieves compliance. And much small sums of federal matching funds have quickly driven compliance with everything from child care to child support collection. It is not employed in child welfare because of the political weakness of involved children, not on the merits.

B. Recommendations

Ensuring that this country has an efficient and effective child welfare system is the duty of all three branches of government. In order to provide for appropriate agency oversight and enforcement of clear and express legislative directives, with the opportunity to obtain judicial intervention when warranted, the following actions are recommended.

Legislative Branch

- LB-1. Congress must provide clear private remedies for children within *all* federal child welfare statutes.
- LB-2. Congress must repeal or revise current law to ensure that all foster children are treated equally, that states comply with all aspects of all child welfare laws or suffer real consequences, and that HHS plays an active and vigilant role in ensuring state compliance via monitoring and enforcement activities. Such amendments must include eliminating the look back provision that makes a child's eligibility for federal foster care funds dependent on whether the child's family would have qualified for AFDC in 1996; tying each state's receipt of any child welfare funding contingent on its substantial compliance with the requirements set forth in all child welfare laws; expressly mandating HHS to engage in enforcement and rulemaking activities with regard to all child welfare provisions, and imposing consequences on HHS for failing to follow through with such oversight and enforcement; and clarifying the statutory mandate that HHS impose financial penalties on states for non-compliance with child welfare laws.
- LB-3. Congress must fund child welfare programs at levels that ensure a robust and effective child welfare system, and it must enact comprehensive child welfare finance reform to address a wide range of problems — such as a complex mix of mandatory and discretionary funding that results in haphazard payments to states; the widely condemned arcane and nonsensical look back provision to determine Title IV eligibility; swaths of uncoordinated funding from disparate sources with inconsistent mandates; a host of unfunded mandates; and a dearth of accountability for the money spent on the part of the states.
- LB-4. Ideally, Congress would unify federal child welfare laws into a comprehensive and cohesive framework that ensures adequate incentives for state compliance. Congressional enactment of a comprehensive, cohesive body of child welfare law that provides clear direction to HHS, states, and child advocates is essential to resolving many of the problems discussed in this report.
- LB-5. In order to give states more incentive to comply with all child welfare laws, Congress must make states' receipt of *any* child welfare funding contingent on their substantial compliance with the requirements set forth in *all* child welfare laws.
- LB-6. Congress must expressly mandate HHS to *actively* engage in enforcement and rulemaking activities with regard to all child welfare provisions, and impose consequences on HHS for failing to follow through with such oversight and enforcement.
- LB-7. Congress must clarify and strengthen the statutory mandate that HHS impose financial penalties on states for non-compliance with child welfare laws and/or with the terms of approved state plans, requiring that such penalties be applied quickly, without loopholes or exceptions.
- LB-8. When statutorily mandating that HHS adopt regulations to implement child welfare laws, Congress must set a deadline for such adoption and provide a private enforcement mechanism in the event HHS does not meet the deadline.

- LB-9. Congress must establish a formal process for members of the public to request that HHS initiate a Partial Review regarding a specific area of suspected state non-conformity with federal child welfare standards. The process must set timelines for HHS response to such requests, and require that if HHS decides not to engage in a requested Partial Review, it must provide a written response to the requestor explaining the basis of its decision.
- LB-10. Congress must clarify and strengthen CAPTA's mandate requiring the public disclosure of information about child abuse and neglect fatalities and near fatalities and explicitly direct HHS to engage in active monitoring, regulatory and enforcement activities that ensure state compliance with congressional intent.
- LB-11. Congress must strengthen and clarify CAPTA's child representation mandate to require client-directed representation by appropriately trained and competent attorneys for all children at all stages of a dependency case, and to set maximum caseloads of child clients per attorney.
- LB-12. Congress must revise federal law to require the conservation of a fair and appropriate amount of a foster child's OASDI and/or SSI benefits for his/her use after leaving the foster care system, as long as the child's current maintenance, support, and special needs are being provided.
- LB-13. Congress must revise federal law to require SSA to notify a foster child's attorney and/or *guardian ad litem*, as well as to the child (if the child is over the age of 12) and the child's foster parent, if applicable, whenever a foster care agency applies to serve and/or is appointed to serve as representative payee for a foster child.
- LB-14. Congress must revise federal law to require that SSA, when in receipt of a foster care agency's application to serve as representative payee for a foster child, to document (1) what affirmative action SSA took to identify and develop alternate potential payees; (2) the identities of all persons and/or entities that SSA investigated as a possible representative payee for that child; (3) the length of SSA's investigation into alternate potential payees, (4), if SSA appoints the foster care agency to serve as representative payee, why SSA selected the agency instead of any other identified potential payees, and (5) how the agency plans to utilize the funds for either provision of special needs services to the child beyond general maintenance or how it may conserve/preserve some funds in an IDA.
- LB-15. Congress must revise the statutory definition of the term "misuse of benefits" to expressly provide that it is a misuse of benefits for *any* representative payee to use a beneficiary's benefits to pay for the beneficiary's current maintenance when another person or entity is already legally obligated to provide for the beneficiary's current maintenance.
- LB-16. Congress must revise statutory law to clarify that when another person or entity is legally obligated to provide for a beneficiary's current maintenance, the beneficiary's funds must be used to meet other, additional and/or specialized needs or conserved for future use and how those funds must be preserved in a special account that will be exempt from arbitrary and counterintuitive asset caps.
- LB-17. Congress must statutorily mandate states to screen all foster children for Social Security benefit eligibility and assist SSI-eligible youth in establishing and/or maintaining eligibility post-18.
- LB-18. Congress must raise or eliminate the asset cap for current and former foster youth through age 26.

Judicial Branch

- JB-1. The federal judicial branch must acknowledge its role as a check and balance to lax executive branch enforcement of child welfare laws, and any ambiguity as to whether a particular child welfare statute contains a private right of action to seek such enforcement should be decided in favor of recognizing that right.
- JB-2. The federal judiciary must be extremely cautious in its use of the abstention doctrine so as not to deny private litigants any and all judicial recourse when seeking child welfare improvements from a state judicial branch.
- JB-3. The federal judicial branch must ensure that states entering into consent decrees bring their child welfare systems into compliance with federal law in a more timely manner than is currently the case.

Executive Branch: HHS

- EB-1. HHS' oversight and enforcement activities must independently and actively evaluate states' conformity with *all* federal child welfare standards and state plan requirements, including active, independent oversight to ensure that each state operates its child welfare programs in a manner that is consistent with federal law and the approved state plan and the imposition of fair but serious consequences where states' implementation falls below minimum federal standards.
- EB-2. HHS must revise any "performance improvement plan" processes to require that states come into substantial conformity with *all* applicable federal mandates in order to avoid penalties for nonconformity—and not a compromised set of lowered expectations.
- EB-3. HHS must utilize its rulemaking authority in a more robust manner with regard to the interpretation of federal child welfare laws, and must immediately commence rulemaking to interpret and implement CAPTA, the Fostering Connections to Success and Increasing Adoptions Act of 2008, the Adoptions Promotion Act of 2003, and all other laws where Congress has expressly directed HHS to engage in such rulemaking.
- EB-4. HHS must revise any "performance improvement plan" processes to immediately impose penalties after one year of a state's plan implementation if the state has not achieved substantial conformity with at least half of the items where it was previously found not to be in such conformity.
- EB-5. HHS must immediately re-commence imposition of financial penalties for state noncompliance with AFCARS reporting requirements and must subject states to AFCARS Assessment Reviews on a regular basis of no less than once every five years.
- EB-6. HHS must utilize its rulemaking authority in a more robust manner with regard to the interpretation of federal child welfare laws, and must immediately commence rulemaking to interpret and implement CAPTA, the Fostering Connections to Success and Increasing Adoptions Act of 2008, the Adoptions Promotion Act of 2003, and all other laws where Congress has expressly directed HHS to engage in such rulemaking.
- EB-7. HHS must immediately review all court opinions and/or consent decrees entered in the last 25 years that indicate that states or localities were failing to comply with federal child welfare laws; determine whether its oversight, monitoring and enforcement activities are appropriately encompassing the issues litigated; and revise its activities as needed to ensure that all jurisdictions are in substantial conformity with federal standards and requirements involved.

EB-8. HHS must expand its monitoring, regulatory, and enforcement activities to encompass issues that to date have been mostly ignored by the Agency, such as states' blatant noncompliance with the CAPTA public disclosure requirement regarding the release of findings or information about child abuse or neglect deaths and near deaths, where HHS must

- comply with the HELP Committee's request to adopt regulations mandating state responsibilities consistent with CAPTA;
- withhold states' CAPTA funding where noncompliance is documented; and
- repeal Child Welfare Policy Manual changes that undermine CAPTA's public disclosure requirement and issue replacement language that clarifies and strengthens such language until HHS adopts new regulations that do the same.

EB-9. HHS must stop ignoring signs of probable state noncompliance with the current obligation to provide appropriate *guardians ad litem* for abused or neglected children, and take appropriate steps.

EB-10. HHS must ensure that states are properly assisting foster youth in repairing credit issues prior the youth aging out of care.

Executive Branch: SSA

EB-11. SSA must adopt a representative payee preference list specific to foster children, expressly stating the general rule that a foster parent who has custody of a child, a close relative, or a close friend of the family is to be given higher preference than a foster care agency and expressing under what circumstances and with what limitations the state may serve as representative payee of last resort.

EB-12. SSA must comply with federal law by conducting complete investigations of any representative payee applicant, including active inquiry into the existence of other potential representative payees.

EB-13. SSA must comply with federal law by ensuring that foster care agencies who are serving as representative payees are in fact engaging in mandated individualized determinations with regard to each child beneficiary in order to determine the beneficiary's total needs (current *and* future) and using or conserving the child's benefits in a manner appropriate to the best use in light of the child's circumstances. SSA must require foster care agencies to document the specific amount and use of any funds spent on behalf of child beneficiaries and submit such accounting on a regular basis.

EB-14. SSA must prohibit a foster care agency from serving as representative payee for a foster child wherever it appears more likely than not that the entity is not taking the unique and personal needs of each child beneficiary into consideration prior to determining what use of the funds would best serve the beneficiary's interests (*e.g.*, where the state mandates via statute, rule or policy that a public agency use a dependent child's income to cover the child's cost of care).

EB-15. SSA must revise the regulatory definition of the term "misuse of benefits" to expressly provide that it is a misuse of benefits for *any* representative payee to use a beneficiary's benefits to pay for the beneficiary's current maintenance when another person or entity is already legally obligated to provide for the beneficiary's current maintenance.

EB-16. SSA must revise regulatory law to clarify that when another person or entity is already legally obligated to provide for a beneficiary's current maintenance, the beneficiary's funds must be used to meet other, additional and/or specialized needs or conserved for future use and how those funds must be preserved in a special account that will be exempt from arbitrary and counterintuitive asset caps.

Appendix A

Overview of Major Federal Child Welfare Laws

Many laws have been passed by the U.S. Congress that impact children and families and the agencies that serve them, establishing programs aimed at protecting children from maltreatment and providing support, resources, services and assistance to those who have been abused or neglected. Such programs set minimum requirements and authorize funding for states that meet or exceed those minimal expectations. The following chart sets forth details about some of the major federal child welfare statutes:

| Program | 2014 Funding | Examples of Minimum State Requirements |
|---|-----------------|--|
| <p>Foster Care Program (Title IV-E)</p> <p>The purpose is to enable each state to provide, in appropriate cases, foster care and transitional independent living programs for eligible children and adoption assistance for children with special needs.</p> | \$4.279 billion | <p>Pursuant to 42 U.S.C. §671(a), a state must have a plan addressing 33 itemized requirements, including:</p> <ul style="list-style-type: none"> ▪ standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights; ▪ periodic review of the amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness; 42 U.S.C. §675(4)(A) defines “foster care maintenance payments” as “payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child to remain in the school in which the child is enrolled at the time of placement”; and ▪ standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children. |
| <p>Child Welfare Services Program (Title IV-B, Subpart 1-CWS)</p> <p>The purpose is to promote state flexibility in the development and expansion of a coordinated child and family services program that utilizes community-based agencies and ensures all children are raised in safe, loving families by protecting and promoting the welfare of all children; preventing the neglect, abuse, or exploitation of children; supporting at-risk families through services which allow children, where appropriate, to remain safely with their families or return to their families in a timely manner; promoting the safety, permanence, and well-being of children in foster care and adoptive families; and providing training, professional development and support to ensure a well-qualified child welfare workforce.</p> | \$281 million | <p>Pursuant to 42 U.S.C. §622(a), (b), a state must have a plan with 19 itemized requirements, including:</p> <ul style="list-style-type: none"> ▪ child welfare services staff development & training plans; ▪ diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed; ▪ services to help children at risk of foster care placement remain safely with their families, help children return to families from which they have been removed, and help children be placed for adoption, with a legal guardian, or in some other planned, permanent living arrangement; ▪ coordination of health care services for any child in a foster care placement, to identify and respond to the health care needs of children in foster care placements, including mental health and dental health; and ▪ at a minimum, ensure that the children are visited on a monthly basis and that caseworker visits are well-planned and focused on issues pertinent to case planning and service delivery to ensure the safety, permanency, and well-being of the children. |

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| <p>Promoting Safe and Stable Families Program (Title IV-B, Subpart 2-PSSF) Mandatory</p> <p>The purpose of this program is to enable states to develop and establish, or expand, and to operate coordinated programs of community-based family support services, family preservation services, time-limited family reunification services, and adoption promotion and support services to prevent child maltreatment among families at risk through the provision of supportive family services; assure children’s safety within the home and preserve intact families in which children have been maltreated, when the family’s problems can be addressed effectively; address the problems of families whose children have been placed in foster care so that reunification may occur in a safe and stable manner; and support adoptive families by providing support services as necessary so that they can make a lifetime commitment to their children.</p> | <p>\$345 million</p> | <p>Pursuant to 42 U.S.C. §629b(a), a state must have a plan with 10 itemized requirements (many with subparts), including:</p> <ul style="list-style-type: none"> ▪ coordination, to the extent feasible and appropriate, of the provision of services under the plan and the provision of services or benefits under other Federal or federally assisted programs serving the same populations; ▪ not more than 10 percent of expenditures shall be for administrative costs, and . . . the remaining expenditures shall be for programs of family preservation services, community-based family support services, time-limited family reunification services, and adoption promotion and support services, with significant portions of such expenditures for each such program; and ▪ in administering and conducting service programs under the plan, the safety of the children to be served shall be of paramount concern. |
| <p>Promoting Safe and Stable Families Program (Title IV-B, Subpart 2-PSSF) Discretionary</p> <p>The purpose of this subsection is to authorize the Secretary to make competitive grants to regional partnerships to provide, through interagency collaboration and integration of programs and services, services and activities that are designed to increase the well-being of, improve permanency outcomes for, and enhance the safety of children who are in an out-of-home placement or are at risk of being placed in an out-of-home placement as a result of a parent’s or caretaker’s substance abuse.</p> | <p>\$63 million</p> | <p>As provided in 42 U.S.C. §629g(f)(4), a state must enter into a “regional partnership” and submit an application addressing 6 itemized requirements (some with subparts), including:</p> <ul style="list-style-type: none"> ▪ a description of the goals and outcomes to be achieved during the funding period for the grant that will enhance the well-being of children receiving services or taking part in activities conducted with funds provided under the grant; lead to safety and permanence for such children; and decrease the number of out-of-home placements for children, or the number of children who are at risk of being placed in an out-of-home placement, in the partnership region; and ▪ a description of the strategies for integrating programs and services determined to be appropriate for the child and where appropriate, the child’s family. |
| <p>Adoption Assistance Program (Title IV- E)</p> <p>The purpose is to provide funds to states to facilitate the timely placement of children, whose special needs or circumstances would otherwise make it difficult to place, with adoptive families.</p> | <p>\$2.5 billion</p> | <p>Funding is contingent upon an approved State plan to administer or supervise the administration of the program. Pursuant to 42 U.S.C. §671(a), in order to receive this sub-category of funds for a particular child, a state must enter into an adoption assistance agreement with the adoptive parents of a child with special needs who would otherwise have remained in a foster family home and received a foster care maintenance payment.</p> |

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| <p>Kinship Guardianship (Title IV-E)</p> <p>The purpose is to provide guardianship assistance payments for the care of children by relatives who have assumed legal guardianship of eligible children for whom they previously cared as foster parents.</p> | <p>\$124 million</p> | <p>State funding is contingent upon an approved Title IV-E plan to administer or supervise the administration of the program. Pursuant to 42 U.S.C. §673(d), in order to receive this sub-category of funds for a particular child, a state must enter into a written, binding kinship guardianship assistance agreement with the prospective relative guardian of a child who would otherwise have remained in a foster family home and received a foster care maintenance payment.</p> |
| <p>CAPTA Child Protective Services State Grant Program</p> <p>The purpose is to assist states in developing, establishing, and operating programs designed to improve the assessment and investigation of suspected child abuse and neglect cases, including cases of suspected child sexual abuse and exploitation, in a manner that limits additional trauma to the child and the child's family; the assessment and investigation of cases of suspected child abuse-related fatalities and suspected child neglect-related fatalities; the investigation and prosecution of cases of child abuse and neglect, including child sexual abuse and exploitation; and the assessment and investigation of cases involving children with disabilities or serious health-related problems who are suspected victims of child abuse or neglect.</p> | <p>\$26 million</p> | <p>Pursuant to 42 U.S.C. §5106c(b), in order to receive a grant under this program, a state must meet the requirements for existing statewide programs listed in 42 U.S.C. §5106a(b) (highlighted below), and</p> <ul style="list-style-type: none"> ▪ establish a state multidisciplinary task force on children's justice; ▪ periodically undertake studies to review and evaluate state investigative, administrative and judicial handling of cases of child abuse and neglect; and ▪ submit annual reports and applications for further funding to DHHS. |
| <p>CAPTA Discretionary and Research Grants Program</p> <p>The purpose is to assist states in improving the child protective services system in fourteen respects, including the intake, assessment, screening, and investigation of reports of child abuse or neglect; case management, including ongoing case monitoring, and delivery of services and treatment provided to children and their families; enhancing the general child protective system by developing, improving, and implementing risk and safety assessment tools and protocols, including the use of differential response; and developing, facilitating the use of, and implementing research-based strategies and training protocols for individuals mandated to report child abuse and neglect.</p> | <p>\$26 million</p> | <p>Pursuant to 42 U.S.C. §5106a(b), to be eligible to receive a grant, a state must submit to the DHHS Secretary a state plan that describes the activities the state will carry out using amounts received under the grant, including (among other things):</p> <ul style="list-style-type: none"> ▪ procedures for immediate steps to be taken to ensure and protect the safety of a victim of child abuse or neglect and of any other child under the same care who may also be in danger of child abuse or neglect and ensuring their placement in a safe environment; ▪ methods to preserve the confidentiality of all records in order to protect the rights of the child and of the child's parents or guardians; ▪ provisions which allow for public disclosure of the findings or information about the case of child abuse or neglect which has resulted in a child fatality or near fatality; ▪ provisions and procedures requiring that in every case involving a victim of child abuse or neglect which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, including training in early childhood, child, and adolescent development, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings; and ▪ provisions and procedures for improving the training, retention, and supervision of caseworkers. |

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| <p>CAPTA Community-Based Grants for Prevention of Child Abuse and Neglect</p> <p>The purpose of this program is to support community-based efforts to develop, operate, expand, enhance, and coordinate initiatives, programs, and activities to prevent child abuse and neglect and to support the coordination of resources and activities, to better strengthen and support families to reduce the likelihood of child abuse and neglect; and to foster an understanding, appreciation, and knowledge of diverse populations in order to be effective in preventing and treating child abuse and neglect.</p> | <p>\$42 million</p> | <p>Pursuant to 42 U.S.C. § 5116, a state’s designated lead entity must use these funds for:</p> <ul style="list-style-type: none"> ▪ developing, operating, expanding, and enhancing community-based and prevention-focused programs and activities designed to strengthen and support families to prevent child abuse and neglect that are accessible, effective, culturally appropriate, and build upon existing strengths; ▪ fostering the development of a continuum of preventive services for children and families, including unaccompanied homeless youth, through state and community-based collaborations and partnerships both public and private; ▪ financing the start-up, maintenance, expansion, or redesign of specific community-based child abuse and neglect prevention program services (such as respite care services, child abuse and neglect prevention activities, disability services, mental health services, substance abuse treatment services, domestic violence services, housing services, transportation, adult education, home visiting and other similar services) identified as an unmet need, and integrated with the network of community-based child abuse and neglect prevention programs to the extent practicable given funding levels and community priorities; ▪ maximizing funding through leveraging of funds for the financing, planning, community mobilization, collaboration, assessment, information and referral, startup, training and technical assistance, information management and reporting, reporting and evaluation costs for establishing, operating, or expanding community-based and prevention-focused programs and activities designed to strengthen and support families to prevent child abuse and neglect; and ▪ financing public information activities that focus on the healthy and positive development of parents and children and the promotion of child abuse and neglect prevention activities. |
| <p>Social Services Block Grant (Title XX)</p> <p>The purpose of these funds is for states to furnish services directed at the goals of achieving or maintaining economic self-support to prevent, reduce, or eliminate dependency; achieving or maintaining self-sufficiency, including reduction or prevention of dependency; preventing or remedying neglect, abuse, or exploitation of children and adults unable to protect their own interests, or preserving, rehabilitating or reuniting families; preventing or reducing inappropriate institutional care by providing for community-based care, home-based care, or other forms of less intensive care; and securing referral or admission for institutional care when other forms of care are not appropriate, or providing services to individuals in institutions.</p> | <p>\$1.7 billion</p> | <p>Pursuant to 42 U.S.C. §1397a, a state is entitled to receive this funding if it submits a report on the intended use of the payments the state is to receive, which must be used for child care services, protective services for children and adults, services for children and adults in foster care, services related to the management and maintenance of the home, day care services for adults, transportation services, family planning services, training and related services, employment services, information, referral, and counseling services, the preparation and delivery of meals, health support services and appropriate combinations of services designed to meet the special needs of children, the aged, the mentally retarded, the blind, the emotionally disturbed, the physically handicapped, and alcoholics and drug addicts.</p> |

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| <p>Foster Care Independence Act / Independent Living Program (Title IV- E)</p> <p>The purpose is to identify children who are likely to age out of foster care and help them make the transition to self-sufficiency by providing services such as assistance in obtaining a high school diploma, career exploration, vocational training, job placement and retention, training in daily living skills, training in budgeting and financial management skills, substance abuse prevention, and preventive health activities; help them receive the education, training, and services necessary to obtain employment; help them prepare for and enter postsecondary training and education institutions; provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults; and provide financial, housing, counseling, employment, education, and other appropriate support and services to former foster care recipients between 18 and 21 years of age to complement their own efforts to achieve self-sufficiency and to assure that program participants recognize and accept their personal responsibility for preparing for and then making the transition from adolescence to adulthood.</p> | <p>\$140 million</p> | <p>Pursuant to 42 U.S.C. §677(b)(2), among other things, each state must submit a plan describing how the state will</p> <ul style="list-style-type: none"> ▪ design and deliver programs to achieve the purposes of the program; ▪ ensure that the programs serve children of various ages and at various stages of achieving independence; ▪ involve the public and private sectors in helping adolescents in foster care achieve independence; and ▪ cooperate in national evaluations of the effects of the state’s program in achieving the purposes of the federal program. |
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Appendix B

CFSR Results: Rounds 1 and 2

| Outcomes and Systemic Factors (and corresponding items) | # of states found to be in substantial conformity, Round 1 | # of states found to be in substantial conformity, Round 2 |
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| Safety Outcome 1: Children are, first and foremost, protected from abuse and neglect Item 1: Timeliness of Initiating Investigations of Reports of Child Maltreatment Item 2: Repeat Maltreatment | 6 | 0 |
| Safety Outcome 2: Children are safely maintained in their homes whenever possible and appropriate Item 3: Services to Family to Protect Child in Home and Prevent Removal or Re-Entry Into Foster Care Item 4: Risk Assessment and Safety Management | 6 | 0 |
| Permanency Outcome 1: Children have permanency and stability in their living situations Item 5: Foster Care Re-Entries Item 6: Stability of Foster Care Placement Item 7: Permanency Goal for Child Item 8: Reunification, Guardianship, or Permanent Placement with Relatives Item 9: Adoption Item 10: Other Planned Permanent Living Arrangement (OPPLA) | 0 | 0 |
| Permanency Outcome 2: The continuity of family relationships and connections is preserved for children Item 11: Proximity of Foster Care Placement Item 12: Placement With Siblings Item 13: Visiting Parents and Siblings in Foster Care Item 14: Preserving Connections Item 15: Relative Placement Item 16: Relationship of Child in Care With Parents | 7 | 0 |
| Well-Being Outcome 1: Families have enhanced capacity to provide for their children's needs Item 17: Needs and Services of Child, Parents, Foster Parents Item 18: Child and Family Involvement in Case Planning Item 19: Caseworker Visits With Child Item 20: Caseworker Visits With Parents | 0 | 0 |
| Well-Being Outcome 2: Children receive appropriate services to meet their educational needs Item 21: Educational Needs of the Child | 16 | 10 |
| Well-Being Outcome 3: Children receive adequate services to meet their physical and mental health needs Item 22: Physical Health of the Child Item 23: Mental/Behavioral Health of the Child | 1 | 0 |
| Systemic Factor 1: Statewide Information System Item 24: Statewide Information System | 45 | 40 |
| Systemic Factor 2: Case Review System Item 25: Written Case Plan Item 26: Periodic Reviews Item 27: Permanency Hearings Item 28: Termination of Parental Rights Item 29: Notice of Hearings and Reviews to Caregivers | 13 | 2 |
| Systemic Factor 3: Quality Assurance System Item 30: Standards Ensuring Quality Services Item 31: Quality Assurance System | 35 | 40 |
| Systemic Factor 4: Staff and Provider Training Item 32: Initial Staff Training Item 33: Ongoing Staff Training Item 34: Foster and Adoptive Parent Training | 34 | 36 |
| Systemic Factor 5: Service Array and Resource Development Item 35: Array of Services Item 36: Service Accessibility Item 37: Individualizing Services | 23 | 10 |
| Systemic Factor 6: Agency Responsiveness to the Community Item 38: State Engagement in Consultation with Stakeholders Item 39: Agency Annual Reports Pursuant to CFSP Item 40: Coordination of CFSP Services With Other Federal Programs | 48 | 50 |
| Systemic Factor 7: Foster and Adoptive Parent Licensing, Recruitment, and Retention Item 41: Standards for Foster Homes and Institutions Item 42: Standards Applied Equally Item 43: Requirements for Criminal Background Clearances Item 44: Diligent Recruitment of Foster and Adoptive Homes Item 45: State Use of Cross-Jurisdictional Resources for Permanent Placements | 42 | 38 |

Appendix C

Examples of Federal Agency Use of Penalty/Sanction Authority to Enforce Federal Laws

Nationwide, many agencies are engaging in enforcement activities that appear to bring about the required results—states' compliance with federal law. Some selected examples are:

- Health Care Financing Administration – threatens to (and in some cases, does) cut off Medicare/Medicaid funding to hospitals not in compliance (AR,¹ CA,² D.C.,³ IL,⁴ IN,⁵ KY,⁶ MN,⁷ NE,⁸ NM,⁹ TX,¹⁰ and others)
- Environmental Protection Agency – threatens to cut off road project funds when air quality standards are not met (MI,¹¹ KY,¹² NM¹³)
- Justice Department – threatens to cut off funding for failures to comply with ADA structural requirements (TN¹⁴)
- Departments of Interior and Justice, EPA and Army Corps of Engineers – threaten to cut habitat restoration funds for failure to reduce pollution into the Everglades (FL¹⁵) and Chesapeake Bay (PA¹⁶)
- Dept. of Housing & Urban Development – threatens to cut funds for failure to comply with anti-discrimination requirements (NE,¹⁷ PA¹⁸)
- Justice Department – threatens to cut off funding for failures to comply with voting system standards (NY¹⁹)
- Federal Transit Administration – threatens to withhold federal stimulus funds for BART's failure to study Oakland Airport Connector's impact on minority communities (CA²⁰) and failure to comply with "Buy American" rule in light rail car purchase (TX²¹)
- Environmental Protection Agency – threatens to withhold federal stimulus funds for failure to comply with "Buy American" rules in purchases of construction materials for wastewater treatment plant (IL²²)

In the overwhelming majority of situations (Medicare/Medicaid being the significant exception), there is no later news report of the federal agency ultimately withholding money because the state brought itself into compliance with federal

¹ Jay Meisel, *Comply by June 3 or Lose Medicaid, Nursing Home Told*, ARKANSAS DEMOCRAT-GAZETTE (May 17, 1996) at 4B.

² Robert Hollis, *U.S. Threatens Cuts to Alameda Medical Center; In a move that could shut the county's largest trauma unit, a federal agency sets Nov. 10 deadline for the facility to correct its problems*, LOS ANGELES TIMES (October 10, 2004) at B4; Charles Ornstein, Steve Hymon and Susannah Rosenblatt, *The State; King/ Drew Fallout Is Keenly Felt; As supervisors discuss impending funding cuts, UCLA says it will pull some of its students*, LOS ANGELES TIMES (September 26, 2006) at A1.

³ Michael Abramowitz, *Federal Inspectors Advise St. Elizabeth's to Shape Up; Problems Threaten Medicare Funding*, THE WASHINGTON POST (April 2, 1988) at A7.

⁴ Mitchell Locin, *U.S. Threatens to Halt County Hospital Funds*, CHICAGO TRIBUNE (July 7, 1989) at 1C.

⁵ Charles Ornstein and Tracy Weber, *The Nation; 3 heart transplant programs warned; Hospitals in Texas, Indiana and Minnesota could lose funds in federal crackdown on substandard performers*, LOS ANGELES TIMES (July 3, 2007) at A10.

⁶ Dick Kaukas, *Baptist East threatened; Couple sued, filed federal complaint*, THE COURIER-JOURNAL (November 12, 2000) at 01B.

⁷ *Supra* note 5.

⁸ Nancy Hicks, *Center could lose \$28.6M*, LINCOLN JOURNAL STAR (March 7, 2008) at A1.

⁹ David Miles, *State Still Planning Bed Tax*, ALBUQUERQUE JOURNAL (June 19, 2004) at E3.

¹⁰ Gary Jacobsen, *Feds remove 'immediate jeopardy' finding, but Methodist Dallas hospital still could lose funding*, THE DALLAS MORNING NEWS (October 14, 2011) at Business and Financial News.

¹¹ Jeff Gerritt, *Air-quality rule change may hinder road plans*, DETROIT FREE PRESS (January 6, 2000) at 2B.

¹² James Bruggers and Joe Follick, *EPA warns Louisville over plan to end VET*, THE COURIER-JOURNAL (October 29, 2003) at 1A.

¹³ Andrea Schoellkopf, *Panel May Ask for Montañó Unstripping; Neighbors Threaten Millions in Losses*, ALBUQUERQUE JOURNAL (December 20, 2005) at 1.

¹⁴ Kate Miller, *Metro gets 5 years to comply with ADA; City won't lose federal funds while making buildings accessible*, THE TENNESSEAN (July 13, 2000) at 1B.

¹⁵ Cory Reiss, *Funds for Everglades hinge on compliance*, THE LEDGER (June 19, 2003) at A5.

¹⁶ Eric Veronikis, *Harrisburg debt crisis threatens sewer, stormwater projects*, THE PATRIOT-NEWS (August 11, 2011) at Business and Financial News.

¹⁷ Leslie Reed, *Housing law threatens funds Chambers vows to change LB 625, which could cost the Nebraska Equal Opportunity Commission \$500,000 a year*, OMAHA WORLD-HERALD (October 6, 2004) at 05B.

¹⁸ Patrick Cloonan, McKeesport, *HUD report progress in compliance accord*, PITTSBURGH TRIBUNE REVIEW (July 14, 2011).

¹⁹ James M. Odato, *Feds warn state over vote systems; New York threatened with lawsuit for failing to meet deadlines for new standards*, THE TIMES UNION (January 13, 2006) at A3.

²⁰ Michael Cabanatuan, *Feds pull funding for BART connector*, THE SAN FRANCISCO CHRONICLE (February 13, 2010) at A1.

²¹ Mike Snyder, *Metro signed Spanish deal despite feds; Files show transit officials felt they had a way around 'Buy America' rule; With no waiver, crucial funding in doubt*, THE HOUSTON CHRONICLE (May 7, 2010) at 1.

²² Elizabeth Mistretta, *Itasca's \$10 million mistake?*, CHICAGO DAILY HERALD (April 5, 2012) at 13.

law—modifying its practices to conform to the federal requirements by the deadline.²³

There have even been some federal agency enforcement and threats to withhold money related to certain issues affecting children:

- Department of Education sanctions for failures relevant to the special education funding formula (NY²⁴), educational progress of the state's poorest students (FL²⁵), No Child Left Behind compliance (UT²⁶), grant program requirements (Guam²⁷) and Head Start and Early Head Start programs (CA,²⁸ NV²⁹);
- Environmental Protection Agency sanctions under the lead paint removal program (MS³⁰); and
- Department of Health and Human Services' Substance Abuse and Mental Health Administration sanctions for tobacco sales to minors (D.C.,³¹ DE,³² IA,³³ MN,³⁴ MO,³⁵ NE,³⁶ OR,³⁷ RI,³⁸ WI,³⁹ WV,⁴⁰ WY⁴¹).

Three more examples involve direct enforcement by the primary federal agency relevant to this report: the U.S. Department of Health and Human Services:

- 1) The first was a showdown between HHS and the State of New York, when the state legislature failed to adopt a new state statute by 1998 to achieve state compliance with the (then recently-enacted) federal Adoption and Safe Families Act of 1997. Lawmakers missed three deadlines set by HHS and in February 1999 stood to lose \$450 million.⁴² New York was the only state in the nation to miss its federal deadline, although 21 other states were given later deadlines in 1999 because their legislatures did not meet to consider the issue in 1998.⁴³ After many months of political posturing, the legislature passed an ASFA-compliant law before the final HHS deadline, with no loss of funding for children in foster care.
- 2) The Multiethnic Placement Act of 1994 sought to end discrimination in foster and adoption placement practices; findings of an individual violation of the Act can lead to a financial penalty for the state agency responsible for administering federal Title IV-E funding. Ohio was the first state to be financially penalized for violations of the Act, and was required to pay back a portion of its Title IV-E budget as a result of HHS' Office for Civil Rights' findings that there were individual county violations. It was reported in 2005 that the counties in question were making all necessary revisions to policies and practices related to foster care and adoption as required by HHS and the Office for Civil Rights.⁴⁴
- 3) Child support collection enforcement stands as the most important child-related example. That effort a decade ago (and conducted during both Democratic and Republican administrations), involved extensive and decisive

²³ In some situations, states are able to reach an agreement with the federal agency and obtain a "waiver," allowing the state to in some respects be out of compliance but still receive the federal funding.

²⁴ Jessica Kowal, *Special Ed Aid Called Imperiled/Legislator Says Change Must Wait*, NEWSDAY (June 4, 1998) at A32.

²⁵ Zenida A. Gonzalez, *Report threatens school funding*, FLORIDA TODAY (April 2, 2002) at 3.

²⁶ Sheena McFarland, *Low marks for Utah schools may prove costly; Federal funding: The state superintendent will form a team to focus on compliance; Utah schools could lose federal funds*, THE SALT LAKE TRIBUNE (April 2, 2006) at A1.

²⁷ Brett Kelman, *GPSS federal funds at risk*, PACIFIC DAILY NEWS (June 19, 2008) at 1A.

²⁸ Carla Rivera, *Head Start programs could face disruptions in funding, operations; Federal reforms to address quality and accountability concerns are forcing more than 130 Head Start agencies, including one overseeing L.A. County, to compete for funding*, LOS ANGELES TIMES (January 10, 2012).

²⁹ Juliet V. Casey, *Another EOB official steps down*, LAS VEGAS REVIEW-JOURNAL (April 1, 2004) at 1B.

³⁰ James V. Walker, *EPA deadline looms in lead paint issue*, THE CLARION-LEDGER (December 9, 2002) at 1A.

³¹ Virginia Young, *Cigarette sales to minors imperil state grant; Missouri could lose funds because many retailers break the law; one-third flunked sting operation*, ST. LOUIS DISPATCH (September 23, 1999) at A1.

³² *Id.*

³³ *Id.*

³⁴ Conrad deFiebre, *Teen smoking may cost state; Feds may pull \$8 million in funding if tobacco sales to minors aren't cut*, STAR TRIBUNE (August 20, 1999) at 1A.

³⁵ *Supra*, note 31; this article also listed Delaware, Iowa, Minnesota, Oregon, Rhode Island, Wyoming and the District of Columbia as having been threatened with the loss of drug treatment money from the federal government because they had not sufficiently cut underage smoking.

³⁶ Paul Hammel, *Nelson Wants Feds to Butt Out, Let States Curb Teen Smoking*, OMAHA WORLD HERALD (Aug. 17, 1995) at 19SF.

³⁷ *Supra*, note 31.

³⁸ *Id.*

³⁹ Kawanza Griffin, *Cigarette sales to minors may cost state; U.S. could cut funds for poor enforcement*, MILWAUKEE JOURNAL SENTINEL (November 10, 2001) at 01A.

⁴⁰ Kristen Svingen, *Bill Would Toughen Tobacco Sales Law*, CHARLESTON GAZETTE (February 24, 1994) at P5A.

⁴¹ Virginia Young, *Cigarette sales to minors imperil state grant; Missouri could lose funds because many retailers break the law; one-third flunked sting operation*, ST. LOUIS DISPATCH (September 23, 1999) at A1.

⁴² Lara Jakes, *Missed deadlines endanger funding*, THE TIMES UNION (February 2, 1999) at B2.

⁴³ *Id.*

⁴⁴ Rachael Lord, *Children, Families, and the Courts — Ohio Bulletin*, *The Effect of MEPA-IEP Legislation in Ohio: A Guide to the Multiethnic Placement Act of 1994 as amended by the Interethnic Adoption Provisions of 1996* (Winter 2005) Vol. 2, No. 2 (available at <https://www.supremecourtofOhio.gov/jcs/cfc/resources/bulletin/winter2005.pdf>).

review of state compliance. It threatened to withhold many millions in federal funds. The enforcing agency was the Office of Child Support Enforcement within HHS' ACF.

The Family Support Act of 1988 required all states to implement *a statewide, automated computer system for child support tracking and collection*. Enforcement deadlines were set for October 1, 1995 and then extended to October 1, 1997.⁴⁵ The Office of Child Support Enforcement within ACF aggressively investigated compliance with general Congressional intent, starting in the mid-1990s. By September of 1999, 39 states and 2 territories had been certified as in compliance. This impressive performance was driven by two factors: (a) the federal contribution to the computer systems would fall from 90% to 66% after the 1995 deadline, and (b) unless waived by the federal agency, penalties based partly on state population and increasing over time would be imposed. In fact, the penalty prospect included the loss of some or all of federal child support funding. And then to follow up – a second level of funding withdrawal of federal welfare (TANF block grant funds) were possible. The incentive element of more federal money led many states to comply quickly. Others were motivated by the prospect of penalties.

Congress gave the Office of Child Support Enforcement wide discretion in making penalty decisions. If the state were willing to work under federal oversight and under a corrective compliance plan, it could delay, waive or substantially reduce the penalties. And the Office was savvy enough to place penalties in abeyance while certification was pending. Further, compliance could lead to the rebate of some assessed penalties, particularly while DHHS reviewed the certification application. The mix of incentives and penalties—in potentially large amounts as with Title-E and IV-B funds underlying child welfare (see Appendix A)—accomplished almost universal compliance, commonly before agency set deadlines. As of 2000, all states were in compliance except for ten: California, Indiana, Kansas, Michigan, Nebraska, Nevada, North Dakota, Ohio, Alaska and California. By 2007, only two states were in noncompliance: South Carolina⁴⁶ and California.

California was the major hold-out. Its plan was rejected in 1999 and it faced a \$12 million penalty.⁴⁷ But the amount would increase the following year and thereafter, and could accumulate to \$400 million by 2002. After that, it would cost the state 30% of its federal share for child support administration—more than \$100 million annually. The state served as an illuminating case study in the power of federal penalties. For a major problem blocked state compliance: Child support administration was conducted by the state's 58 county district attorneys. They wanted to keep their respective computer systems. They could not agree on a single statewide system and eventually proposed four regional systems so Los Angeles, Bay Area and other offices could keep preferred providers. DHHS rejected that balkanized proposal. The state was in a quandary: The district attorney is a potent agency with court familiarity and strong credibility from recalcitrant child support debtors. And the political power of the 58 elected local law enforcement officials was substantial. Most of them wanted to continue their jurisdiction collecting these substantial sums of money. But the legislature faced the federal penalty. Moreover, the political counterweight here is the ignominy of state taxpayers contributing to the federal treasury which would then allocate large sums to other states. Accordingly, it acted in 2003 to divest all offices of district attorney of jurisdiction over collection. It created a state department to engage in collections, removing all employees from the district attorney for whom they worked. This then removed the “territorial” obstacles to a statewide computer system, and the state then created one such system and an entirely new enforcement regime. This politically difficult takeaway from one of the most powerful interests in the state occurred because of a federal agency decision to reject a solution not adequately complying with Congressional intent, and with the hammer of substantial penalties in lost federal contribution.⁴⁸

⁴⁵ Meanwhile, federal law was altered as a part of the “contract with America” revision of public welfare in 1996, primarily by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. The new Act replaced the federal entitlement with matching funds of Aid to Families with Dependent Children (AFDC) with specified federal block grants under a different Temporary Aid to Needy Families (TANF) system. This new statute was amended in the 1997 Budget Act, and then the following year by the Child Support Performance and Incentive Act of 1998. For a detailed description, see Paula Roberts, Guidance from the Federal Government on Implementation of ...Child Support Related Provisions..., Center for Law and Social Policy (Washington D.C., 1999) at 1-86, available at www.clasp.org. Part of the rationale behind new obligations in state child support collection was the private responsibility of absent parents to provide support for children who would now be subject to new public safety-net limitation by the 1996 statute.

⁴⁶ South Carolina was assessed \$55 million in federal penalties over the 1998–2007 period and faced another \$20 million, with continued assessment in prospect. On the positive side, it could gain a partial rebate of imposed penalties if it complied—which it did by deploying its system in June 2010. See South Carolina Department of Social Services, Response to Budget Proviso 13.27 (August 31, 2007).

⁴⁷ See Riccardi and Krikorian, *State's Child Support Computer Plan Rejected*, LOS ANGELES TIMES (April 10, 1999).

⁴⁸ See Cal. Welf. & Inst. Code §§ 10080–10093. The Children's Advocacy Institute was a co-sponsor of this bill. Section 10080 spells out findings that outline the penalty prospect motivation for the statute.

Appendix D

Selected Private Lawsuits Seeking Enforcement of Federal Child Welfare Laws in Lieu of Executive Branch Enforcement

| Jurisdiction/ Case Name | Allegations | Date filed | Year of settlement/order | Total years case open/status | Other details |
|--|---|------------|--|--|---|
| California (1) <i>Ca. Alliance of Child & Family Services v. Allenby</i> | <ul style="list-style-type: none"> Failure to provide adequate foster care maintenance payments to group homes | 6/30/2006 | Permanent injunction granted 2/24/2010; appeal affirmed on 4/5/2011 | 5 years | Associations filed suit on behalf of all 1,732 facilities serving 12,500 foster children; 9 th Cir. affirmed district court's permanent injunction increasing rates to group homes. |
| California (2) <i>Ca. State Foster Parent Association v. Wagner [Lightbourne]</i> | <ul style="list-style-type: none"> Failure to provide adequate foster care maintenance payments to foster family homes (leading to children unnecessarily being placed in congregate care solely due to lack of foster family homes) | 10/3/2007 | 10/21/2008 order granting Plaintiff's motion for summary judgment; 5/27/2011 order compelling state immediately to raise rates to specific amounts | 3.5 years | Associations filed suit on behalf of all foster care families, serving approximately 8,000 children; 9 th Cir. affirmed district court's order; later proceedings were required to compel state to increase rates. |
| California (3) <i>California Alliance of Child & Family Services v. Lightbourne</i> | <ul style="list-style-type: none"> Failure to provide adequate foster care maintenance payments to foster family agencies | 3/6/2012 | Stipulation of dismissal of complaint without prejudice filed 2/4/13 | 1 year | Association filed suit on behalf of 250 FFAs serving approximately 25,000 children |
| California (4) <i>E.T. v. Cantil-Sakauye</i> | <ul style="list-style-type: none"> High caseloads of attorneys representing children in dependency court | 7/16/2009 | Petition for writ of certiorari denied by U.S. Supreme Court 10/12/2012 | 3 years | Class action on behalf of 5,100 children in dependency court system in Sacramento County (1 of 58 counties); district court abstained; 9 th Cir. panel affirmed; 9 th Cir. en banc affirmed; petition for writ of cert to United States Supreme Court denied |
| Connecticut <i>Juan F. v. Malloy*</i> | <ul style="list-style-type: none"> Slow response time to complaints of abuse/neglect Caseworkers poorly trained, carrying high caseloads, and with high turnover Children in foster care denied essential treatment and supportive services, especially mental health services Services to allow children to remain with their families or to be safely reunited were rarely provided Foster children not receiving services to find permanent homes | 12/19/1989 | 1/7/1991 | 25 years; still being monitored (most recent monitoring report issued 1/2014) | Consent decree appealed to the 2nd Cir., affirmed in 1994; monitors continually report the state's failure to comply with Transition/Exit plan; contempt proceedings initiated against the state twice. |
| District of Columbia <i>LaShawn A. v. Gray*</i> | <ul style="list-style-type: none"> Children placed in emergency shelters for prolonged periods (even years) due to lack of foster family homes Placement instability Caseworkers poorly trained and carry high caseloads, and fail to visit children Failure to provide reunification services or develop adoptive homes for children Children denied medical and mental health care and psychotropic medications administered to "control" children Abuse reports not investigated | 6/20/1989 | Court ruled D.C. foster care system violated federal law, District law and U.S. Constitution in 1991, Remedial Order entered 11/1993 (negotiated settlement post-appeal) | 25 years; still being monitored (most recent monitoring report issued 1/24/2014) | District appealed trial court's findings of violation and 2 years later the U.S. Court of Appeals for the District of Columbia affirmed. In May 1995 the district court placed the District's child welfare system into receivership and removed control from the District's government for 6 years. The District has been found in contempt twice. |
| Georgia <i>Kenny A. v. Perdue*</i> | <ul style="list-style-type: none"> Children languished in emergency shelters without receiving treatment or services, and were exposed to violence, | 6/6/2002 | 7/5/2005 | 12 years; still being monitored (most recent monitoring period report issued 2/1/2014) | Limited to only 2 of 159 counties in Georgia (3,000 children) (DeKalb and Fulton Counties, in the Atlanta |

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| | <ul style="list-style-type: none"> sexual assault and illegal drug activity Caseworkers poorly trained and with high caseloads, and fail to visit children Placement instability Children placed in institutional settings due to lack of foster family homes Children not provided with adequate educational and health care services Failure to provide foster parents adequate payments Attorneys representing children carried caseloads of 400-500 children per attorney | | | | metro area); in Feb. 2005, in denying counties' motion for summary judgment, District Court ruled children have constitutional and statutory right to attorney and adequate legal representation at every major stage of their experience in state custody. |
| Kansas <i>Sheila A. v. Finney</i> | Not adequately caring for abused children | 9/1/1990 | Settlement Agreement entered 5/12/1993 | At least 3 years to settlement, with post-settlement court supervision time unknown | State court case filed in Shawnee County; after the settlement, the state privatized its child welfare services in 1996. |
| Louisiana <i>Del A. v. Edwards</i> | <ul style="list-style-type: none"> Failure to make reasonable efforts to prevent separation Failure to provide children with adequate case plans and reviews Failure to maintain a reliable information system tracking the number of children in foster care and their placements | 2/25/1986 | Trial occurred in 1989 | 3 years | Suit was filed on behalf of thousands of children in foster care or at risk of being placed in foster care in Louisiana; litigation resulted in decision for defendants; defendants admitted the violations presented at trial and improved the state child welfare system with increased funding and more staff. |
| Massachusetts <i>Connor B. v. Patrick*</i> | <ul style="list-style-type: none"> Abuse of children while in foster care (4th worst rate nationally) Placement instability Children with permanency plans of adoption are not adopted Children age out with no permanent home and are inadequately prepared to live independently as adults 1 in 6 children reunified with their families re-enter foster care due to further abuse/neglect | Complaint filed 4/15/2010 Appeal filed 3/24/2014 | Court issued findings and rulings on 11/22/2013, granting defendants' motion for judgment on the record | 4 years; still pending (on appeal) | Class action on behalf of 8,500 abused and neglected children statewide; 900 per year "age out" with no permanent home. |
| Michigan <i>Dwayne B. v. Snyder*</i> | <ul style="list-style-type: none"> Placement instability Failure to provide foster parents adequate payments leads to lack of foster family homes Caseworkers have high caseloads Children don't receive health and mental health services Children are reunified with their families at extremely slow pace | 8/8/2006 | Settlement Agreement signed 7/3/2008, entered as court-enforceable Consent Decree 10/24/2008 Modified Consent Decree entered 7/18/2011 | 8 years; still in Monitoring (most recent monitoring report issued 3/10/2014) | 7 th largest foster care system in the nation, with 17,000-19,000 children in foster care. |
| Mississippi <i>Olivia Y. v. Barbour*</i> | <ul style="list-style-type: none"> Children placed in institutional settings due to lack of foster family homes Caseworkers poorly trained and carry high caseloads Children not provided with reunification services and appropriate adoptive homes not developed for children in foster care Failure to investigate reports of abuse/neglect or failure to provide services for confirmed cases of abuse/neglect | 3/30/2004 | Stipulated settlement entered by court 6/15/2007 Final settlement agreement and reform plan entered by court 1/4/2008 Modified settlement and reform plan approved 7/9/2012 | 10 years; still in Monitoring (most recent monitor's report issued 5/8/2014) | 3,300-3,500 children in foster care; after 3 years of litigation, parties settled 6 weeks before trial, with state agreeing to no longer contest that it was violating the substantive due process rights of the plaintiff foster children; in May 2014 the parties were in negotiations on a third settlement as the state has failed to meet the terms of the two previous settlements |

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| <p>Missouri (1) <i>G.L. v. Sherman*</i></p> | <ul style="list-style-type: none"> • Children placed in foster homes that were licensed and maintained without adequate investigation and supervision • High rates of abuse/neglect of children in foster homes • Children denied proper medical and psychological care • Placement instability | 7/25/1980 | Consent Decree entered 3/21/1983; amended Consent Decree entered 1/30/2001; case dismissed and court oversight ended 2/1/2006, upon condition that state maintain reforms through 2009. | 29 years | Class action on behalf of all children in foster care in Jackson County (Kansas City, MO); 9 years after consent decree, state was held in contempt for years of failure to comply with Consent Decree's terms. |
| <p>Missouri (2) <i>E.C. v. Sherman*</i></p> | <ul style="list-style-type: none"> • State bill would cut or eliminate critical adoption subsidies for thousands of special needs foster children who had already been adopted • State bill would disqualify thousands of special needs children in foster from receiving adoption subsidies, damaging their chances for finding a permanent adoptive home | 8/15/2005 | 8/4/2006 Permanent Injunction issued, which remains in place | 1 year | Adoption subsidy provisions in Missouri Senate Bill 539 violated federal rights of abused and neglected, special needs foster children and federal judge forever prohibited implementation of the adoption subsidy provisions of the bill. State appealed preliminary injunction, which the 8 th Circuit later dismissed as moot after full trial and entry of permanent injunction. |
| <p>Nevada (1) <i>Clark K. v. Willden</i></p> | <ul style="list-style-type: none"> • Severely overcrowded and unsafe conditions at an unlicensed facility, which failed to meet the mental health and other medical needs of the children housed there • High caseloads and inadequate caseworker training • Inadequate investigations of abuse/neglect reports • Abuse/neglect of children in foster care and failure to respond to complaints of abuse/neglect by foster parents • Insufficient foster parent recruitment efforts, inappropriate placements, lack of foster parent training and little or no support or monitoring of foster parents • Lack of representation of children in dependency court proceedings • Failure to provide appropriate educational services | 8/30/2006 | 10/27/2009 | 3 years, without resolution on the merits; the case's allegations were resumed in a later suit, which is still ongoing 8 years after <i>Clark K.</i> began | Class action on behalf of 3,600 children in the legal custody of Clark County (Las Vegas), but court denied class certification; Plaintiffs later dismissed the case when they all had either aged out of the system or had been adopted. <i>Henry A. v. Clark</i> (see below) was filed shortly thereafter to resume the claims on behalf of the children in Clark County's foster care. |
| <p>Nevada (2) <i>Henry A. v. Willden</i></p> | <ul style="list-style-type: none"> • Failure to provide foster parents information about children's health and behavioral background • Failure to provide medical and mental health services to children in foster care • Failure to investigate relatives before placement and failure to monitor relative placements • Abuse/neglect of children in foster care and failure to respond to complaints of abuse/neglect by foster parents • Failure to comply with law and policies regarding transferring foster children to out-of-state placements • Failure to develop case plans for each child in foster care • Failure to provide all children in dependency court proceedings with a <i>guardian ad litem</i> • Failure to provide foster children with early intervention services | 4/13/2010 | | 4 years and still pending as to some of the original claims | Class action on behalf of 3,600 children in the legal custody of Clark County (Las Vegas); district court dismissed case on sovereign immunity grounds on 10/26/2010, but 9 th Cir. reversed as to some of the claims and reinstated the case as of 5/4/2012 |

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| <p>New Jersey <i>Charlie and Nadine H. v. Christie*</i></p> | <ul style="list-style-type: none"> • Children placed in emergency shelter for prolonged periods due to lack of foster family homes • Caseworkers poorly trained and carry high caseloads, and fail to visit children • High rate of abuse/neglect of children in foster care • 1 in 4 children leaving foster care re-enter at a later date • Children in foster care not receiving medical or mental health treatment | <p>8/4/1999</p> | <p>Settlement reached 6/23/2003; entered as court-enforceable order 9/2/2003; Modified Settlement Agreement entered by court 7/18/2006</p> | <p>15 years; implementation and monitoring still ongoing (most recent monitoring report issued 10/1/2013)</p> | <p>11,000 children in foster care and 48,000 children known to DYFS through reports of abuse/neglect.</p> |
| <p>New Mexico <i>Joseph A. v. Bolson*</i></p> | <ul style="list-style-type: none"> • Caseworkers poorly trained, preventing them from making better permanency planning decisions for children • Children languished for years in foster care due to failures to create permanency plans and facilitate children's exit from foster care • Children were not timely freed for adoption and matched with adoptive homes | <p>1980</p> | <p>Consent Decree entered 9/23/1983; new Consent Decree entered 2/6/1998; further new consent decree entered 9/27/2003; case finally closed 2/24/2005</p> | <p>29 years</p> | <p>Class action lawsuit concerned the 2,000 children in foster care, but focused on "those children needing adoption but for whom little effort was made to secure permanent adoptive homes"; the district court granted the state's motion to dismiss in 1995 (based on alleged substantial compliance with the Consent Decree), but the 10th Cir. vacated and reinstated the case; the case was again later dismissed and reinstated.</p> |
| <p>New York <i>Marisol v. Giuliani*</i></p> | <ul style="list-style-type: none"> • Inadequate caseworker training, support and supervision • High caseworker caseloads and frequent turnover • Children in inappropriate placements due to shortage of foster family homes • High rates of abuse/neglect of children in foster care due to poor foster home oversight and investigation • Failure to provide children medical, mental health and educational services • Failure to investigate reports of abuse/neglect, even from credible sources such as doctors or teachers | <p>12/13/1995</p> | <p>Separate settlement agreements with the City and State were entered by the court on 3/31/1999 and the court officially closed the case on that date, but monitoring continued</p> | <p>13 years (the City case closed earlier but the State case monitoring continued through 7/1/2008)</p> | <p>Class action filed against New York City and the State of New York on behalf of the nearly 100,000 children living in the City's child welfare system; 2nd Cir. affirmed class certification; City also appealed to 2nd Cir. to prevent court-ordered Case Review Team's reports from being made public; 2nd Cir. affirmed district court's approval of Settlement Agreements; the court twice found the State out of compliance with the State Settlement Agreement.</p> |
| <p>Oklahoma <i>D.G. v. Henry*</i></p> | <ul style="list-style-type: none"> • Caseworkers poorly trained and carry high caseloads, and fail to visit children • Failure to recruit, retain and adequately reimburse foster parents • Rates of abuse/neglect of children in foster care is the worst in the nation • Placement instability • Children placed in overcrowded emergency shelters for prolonged periods | <p>2/13/2008</p> | <p>1/4/2012</p> | <p>4 years; in active monitoring by court (most recent compromise and settlement agreement filed 4/2014)</p> | <p>10,000 children in foster care statewide; case settled 6 weeks before trial.</p> |
| <p>Rhode Island <i>Cassie M. v. Chafee*</i></p> | <ul style="list-style-type: none"> • Abuse of children while in foster care • Children placed in large, orphanage-like settings due to lack of foster family homes • Failures to achieve permanency • Failures to provide children mental health, medical and dental services • 15% of children reunified with their families re-enter foster care due to further abuse/neglect • Caseworkers have dangerously high caseloads and fail to visit children • Children placed in unlicensed foster homes | <p>6/28/2007</p> | <p>Supplemental complaint filed 7/1/2011; state filed motion for summary judgment with respect to one plaintiff on 7/17/2013</p> | <p>7 years; still pending</p> | <p>Class action on behalf of over 3,000 children in foster care statewide; motion to dismiss was granted April, 2009 but reversed on appeal (1st Cir.) and reinstated June, 2010.</p> |

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| <p>Tennessee <i>Brian A. v. Haslam*</i></p> | <ul style="list-style-type: none"> • Children placed in overcrowded emergency shelters for prolonged periods due to lack of foster family homes • Placement instability • Caseworkers poorly trained and carry high caseloads, and fail to visit children • Failure to provide reunification services or develop adoptive homes for children • Children placed in large, institutional settings (up to 250 beds in one facility) due to lack of foster family homes | <p>5/10/2000</p> | <p>Settlement Agreement entered 5/2001; court approved and adopted Settlement Agreement 7/20/2001</p> | <p>14 years; still being monitored (most recent monitoring report issued 5/31/2014)</p> | <p>9,000 children in foster care statewide</p> |
| <p>Texas <i>M.D. v. Perry*</i></p> | <ul style="list-style-type: none"> • Placement instability • Children placed in institutional settings due to lack of foster family homes • Failures to achieve permanency • Youth in group homes and institutions at higher risk of abuse and neglect while in state custody than youth in other placements | <p>3/29/2011</p> | <p>Order granting class certification entered 8/27/2013</p> | <p>3 years, still pending</p> | <p>Class action filed on behalf of children in foster care for at least one year, alleging that state is failing to meet its legal obligation to ensure the safety, permanency and well-being of all children in its custody</p> |
| <p>Utah <i>David C. v. Huntsman</i></p> | <p>The complaint addressed nearly all aspects of the state's child welfare services system, including:</p> <ul style="list-style-type: none"> • abuse and neglect investigations and child protective services • quality and safety of out-of-home placement • health care and mental health care for foster children • caseloads and staff training • case planning, case review, and permanency planning | <p>2/25/1993</p> | <p>1993 Settlement Agreement entered; further Stipulation and Order entered 2003; case closed 12/31/2008</p> | <p>15.75 years</p> | <p>Class action on behalf of all children reported as abused / neglected and all children in foster care in Utah; 1998 order finding Utah in violation of Settlement Agreement and requiring specific remedial actions appealed to and affirmed by 10th Cir.</p> |
| <p>Washington <i>Braam v. State of Washington</i></p> | <ul style="list-style-type: none"> • Placement instability • Failure to adequately train, inform, support, supervise, and oversee foster parents • Failure to provide sufficient numbers of reasonably safe and adequate foster care placements, homes, and programs • Failure to provide a sufficient number of adequately trained staff to visit and supervise foster homes and placements • Failure to provide children in foster care with mental health services • Unnecessary and inappropriate separation of siblings in foster care | <p>11/3/1998; Amended Complaint adding class claims filed 3/2000</p> | <p>7/2004 Settlement Agreement approved by court; Revised Exit and Settlement Agreement entered in 11/2011</p> | <p>13.5 years; still in monitoring until 12/31/2013</p> | <p>Class action filed in state court (Whatcom County) on behalf of all children in foster care who had been moved to three or more placements while in the state's custody; a 2001 jury trial resulted in a verdict for the plaintiffs; on appeal, the Washington Supreme Court reversed and the case remanded for a non-jury trial; a comprehensive settlement agreement was reached in 2004 and renegotiated in 2011.</p> |
| <p>Wisconsin <i>Jeanine B. v. Walker*</i></p> | <ul style="list-style-type: none"> • High rates of abuse/neglect in foster homes, and untimely investigation of reports of abuse/neglect in foster homes • Children placed in emergency shelters for prolonged periods due to lack of foster family homes • Placement instability • Caseworkers poorly trained and carry high caseloads, and fail to visit children • Frequent caseworker turnover | <p>6/1/1993; supplemental complaints filed 6/2/1999 & 12/1/2000</p> | <p>Settlement Agreement approved by court 12/ 1/2002</p> | <p>19 years; still in monitoring (most recent settlement agreement report issued 3/28/2014)</p> | <p>Complaint only concerned Milwaukee County, with about 5000 children receiving child welfare services; settlement entered a few months before 2003 trial date.</p> |

* Case information obtained from Children's Rights, *Class Actions* webpage (available at <http://www.childrensrights.org/reform-campaigns/legal-cases/>).

Appendix E

Examples of Private Lawsuits Addressing Similar State Deficiencies

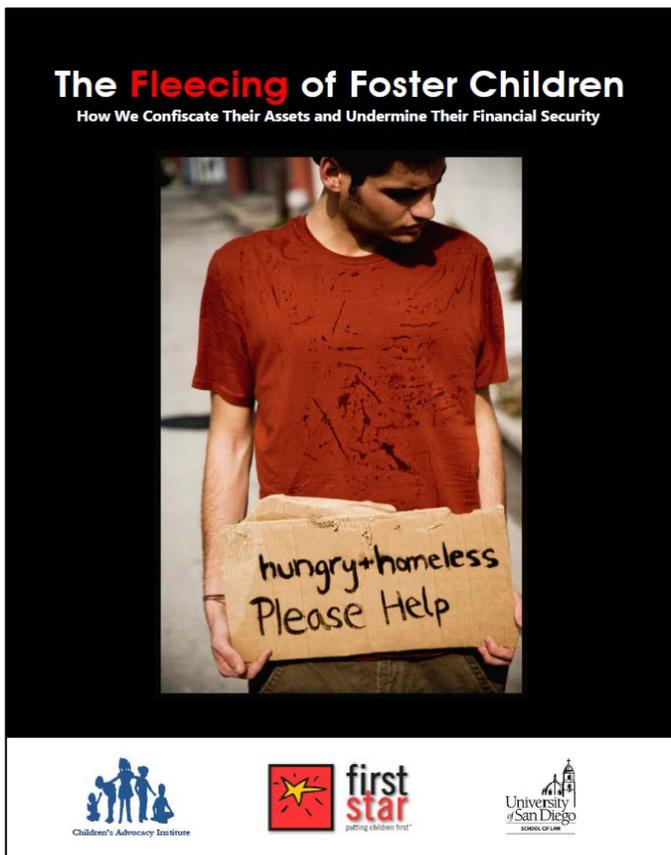
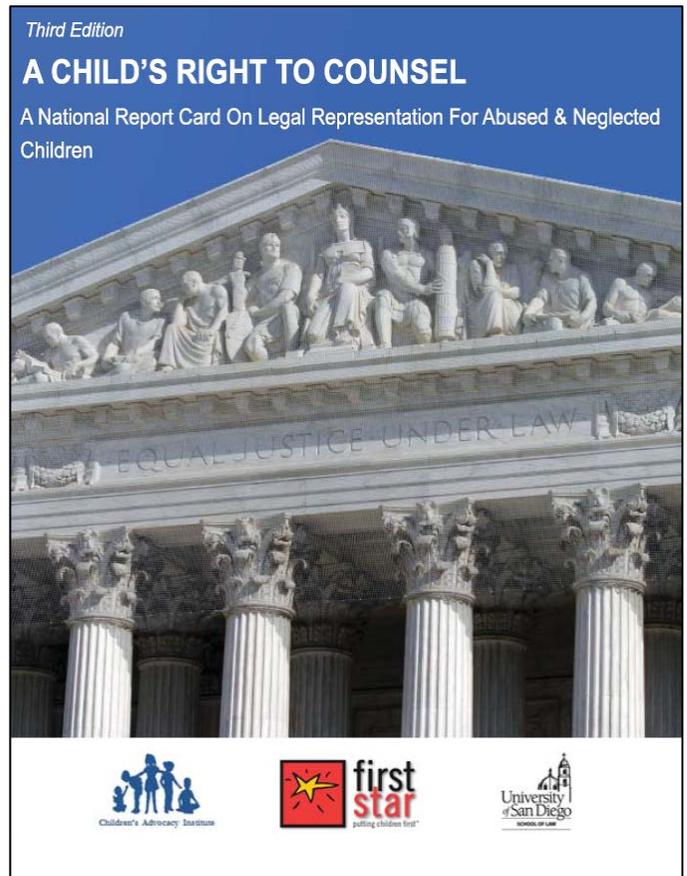
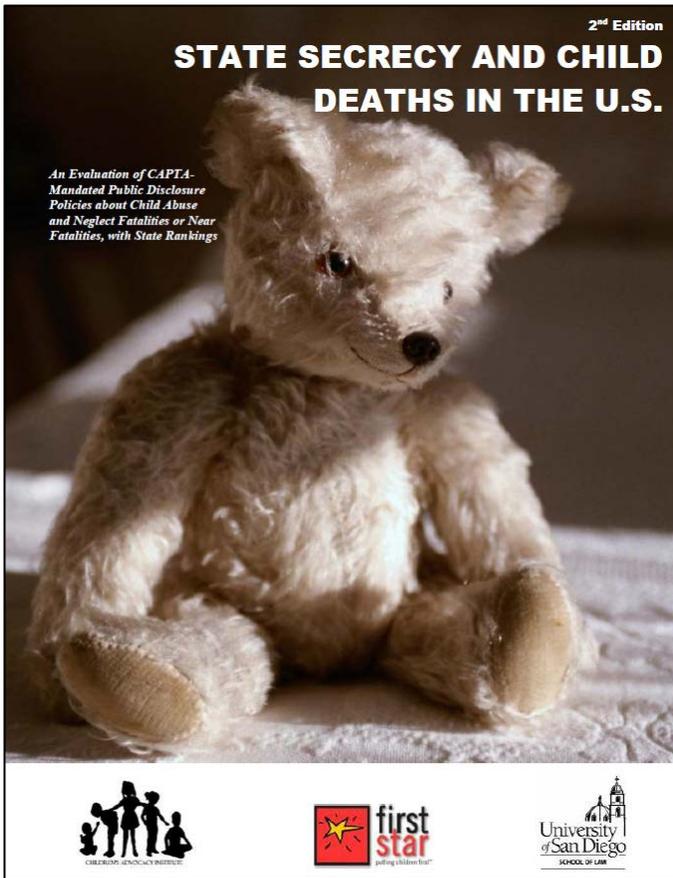
(See Appendix D for more information on the lawsuits)

| State | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 |
|----------------------|---|---|---|---|---|---|---|---|---|----|----|----|----|
| California (1) | | | | | | | | | | | | X | |
| California (2) | | | | X | | | | | | | | X | |
| California (3) | | | | | | | | | | | | | X |
| California (4) | | | | | | | | | X | | | | |
| Connecticut | | | | | X | X | | X | | X | X | | |
| District of Columbia | | X | | X | X | X | | X | | X | X | | |
| Georgia | | X | | X | X | X | | X | X | | X | X | |
| Kansas | | | | | | | | | | | | | X |
| Louisiana | | | | | | | | X | | | X | | X |
| Massachusetts | X | X | X | | | | | | | | X | | |
| Michigan | | X | | | X | X | | | | | | X | X |
| Mississippi | | | | X | | X | | X | | X | X | | |
| Missouri (1) | X | X | | | X | X | X | | | | | | |
| Missouri (2) | | | | | | | | | | | | | X |
| Nevada (1) and (2) | X | | | X | X | X | X | | X | X | | | X |
| New Jersey | X | | X | X | X | X | | | | | | | |
| New Mexico | | | | | | X | | | | | X | | |
| New York | X | | | X | X | X | | | | X | | | |
| Oklahoma | X | X | | X | | X | | | | | | X | |
| Rhode Island | X | | X | X | X | X | X | | | | X | | |
| Tennessee | | X | | X | | X | | X | | | | | |
| Texas | X | X | | X | | | | | | | X | | |
| Utah | | | | X | X | X | | X | | X | X | | X |
| Washington | | X | | X | X | X | | | | | | | X |
| Wisconsin | X | X | | X | | X | | | | X | | | |

State Deficiencies

1. *Abuse or neglect of children in foster care*
2. *Placement instability*
3. *Children reunified with families soon re-enter foster care*
4. *Lack of foster family homes, leading to group/ institutional placements*
5. *Failure to provide medical, mental health and/ or dental services and/ or educational services*
6. *High caseloads, high turnover, poorly trained caseworkers and/ or failure to visit children in care*
7. *Children placed in unlicensed foster homes*
8. *Failure to provide family maintenance and/ or reunification services*
9. *High caseloads of attorneys for children, or failure to provide GAL in dependency court proceedings*
10. *Failure to investigate allegations of abuse or neglect*
11. *Lack of permanency planning and/ or adoptive home development*
12. *Inadequate foster care provider compensation*
13. *Other*

Other National Reports by the Children's Advocacy Institute and First Star:



For copies of any of these reports, please visit
www.caichildlaw.org or www.firststar.org
or email info@caichildlaw.org.



Shame on U.S.

January 2015