

SHAME ON U.S.

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



Executive Summary



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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.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

During 2012, 252,000 abused or neglected children entered into the foster care system.⁴ 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.⁵

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

¹ 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*).

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

³ 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).

⁴ 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).

⁵ 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.⁶ 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.⁷ 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.⁸

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.”⁹ 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.¹⁰

HHS states that the first goal of the CFSR process is “ensure conformity with federal child welfare requirements.”¹¹ 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.¹² The review team, which is comprised of federal and state representatives, examines sample cases to determine federal eligibility requirements were met.¹³ 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

⁶ 42 USC § 1320a-2a.

⁷ 42 U.S.C. § 1320a-2a(b)(2).

⁸ 42 U.S.C. § 1320a-2a(b)(4).

⁹ 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).

¹⁰ See 45 C.F.R. 1355.35; 45 C.F.R. 1355.36.

¹¹ HHS, Children's Bureau, *Child and Family Services Reviews* (available at <http://www.acf.hhs.gov/programs/cb/monitoring/child-family-services-reviews>).

¹² 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>).

¹³ 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.¹⁴

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 2014.¹⁵

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,”¹⁶ 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.”¹⁷ 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.¹⁸ 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.”¹⁹ 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.”²⁰ 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.

¹⁴ 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>).

¹⁵ 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.

¹⁶ 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).

¹⁷ 42 U.S.C. § 675(4)(A).

¹⁸ 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).

¹⁹ 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).

²⁰ 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, 1991.²¹ 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.”²² 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.²³ 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.²⁴ 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.²⁵ 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.”²⁶ 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.²⁷ 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”²⁸ — **which, as of September 2014, HHS still has not yet done.**²⁹ 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.

²¹ 42 U.S.C. § 679.

²² 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).

²³ 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).

²⁴ 42 U.S.C. § 674(f)(1).

²⁵ 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>).

²⁶ 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>).

²⁷ 42 U.S.C. § 674(f)(2).

²⁸ 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.

²⁹ 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.³⁰ 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”³¹ 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.³² 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.³³

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

³⁰ 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>).

³¹ 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*).

³² 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.

³³ 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 “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. 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:³⁴

California: *Los Angeles’ Child Abuse Reporting System Underfunded & Underutilized* (Chronicle of Social Change, February 23, 2014)³⁵ — 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;³⁶ *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. 1.³⁷

Georgia: *DFCS facing \$1 million lawsuit after teen starves to death* (WSBTV, June 16, 2014)³⁸ — 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)³⁹ — 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.

³⁴ 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.

³⁵ See <https://chronicleofsocialchange.org/news/los-angeles-award-winning-child-abuse-reporting-system-underfunded-underutilized/5341>.

³⁶ See <http://www.dailybulletin.com/social-affairs/20140501/los-angeles-county-department-of-children-and-family-services-kept-foster-kids-money-audit-says>.

³⁷ See <http://www.ktvu.com/news/news/crime-law/child-welfare-records-3-year-olds-death-still-secr/ndfKC/>.

³⁸ See <http://www.wsbtv.com/news/news/local/dfcs-facing-1-million-lawsuit-after-teen-starves-d/ngMNO/>.

³⁹ 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)⁴⁰ — 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)⁴¹ — 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)⁴² — 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)⁴³ — 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.”⁴⁴ 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,⁴⁵ 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.⁴⁶

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.

⁴⁰ See http://bostonherald.com/news_opinion/local_coverage/2014/03/disturbing_practice_saw_def_select_offices_to_be_inspected.

⁴¹ See http://www.elkintribune.com/news/community-home_top-news/3091214/Lawmaker-outraged-at-DSS-examines-policy.

⁴² See <http://www.free-times.com/news/leaked-dss-documents-show-noncompliance-confusion>.

⁴³ See <http://wvtr.com/2014/02/20/department-social-services-audit-request/>.

⁴⁴ 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.

⁴⁵ *Id.*

⁴⁶ *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 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.