

## POOR ENOUGH TO BE ELIGIBLE? CHILD ABUSE, NEGLECT, AND THE POVERTY REQUIREMENT

SUSAN VIVIAN MANGOLD<sup>†</sup>

An abused or neglected child must be poor to be eligible for federal funds for foster care maintenance payments.<sup>1</sup> The income eligibility criteria forces agency workers to focus on the poverty status of a child's family. The agency should instead focus exclusively on the child and family's safety and service needs. The income eligibility assessment results in billions of dollars of irrelevant administrative determinations regarding the income and assets of abused and neglected children and their families. Ending the income eligibility for foster care maintenance payments, even if federal funding was not increased, could reallocate funds now wasted on income determinations to the shelter, clothing, and food needs of children in foster care. It would also formally disentangle child welfare from poverty and the now-defunct Aid to Families with Dependent Children ("AFDC") standards.

While no state law includes income eligibility in its definition of child abuse or neglect,<sup>2</sup> the federal law mandates welfare-

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<sup>†</sup> Vice Dean for Academics and Professor of Law, University at Buffalo Law School. The author wishes to thank Professor Theresa Hughes for organizing *Race, Culture, Class, and Crisis in Child Welfare: Theory into Practice* in November 2006 and for inviting me to participate. The author also wishes to acknowledge the thorough research of Sheila Dickinson, Esq., on the Flemming Amendment and the overall research assistance of Doug Johnston in preparing this article. Thanks to the Baldy Center for Law and Social Policy for support in researching and presenting this paper to a multidisciplinary audience as part of the *Women, Families and Economic Inequality: Critical Perspectives* series at the University at Buffalo.

<sup>1</sup> See 42 U.S.C. §§ 670, 672–73 (2000) (regarding eligibility for foster care, adoption assistance, and income eligibility based on July 1996 standards); 45 C.F.R. § 1356.71(d) (2007) ("Requirements subject to review. States will be reviewed against the requirements of title IV-E of the Act regarding . . . (v) eligibility for AFDC under such state plan as it was in effect on July 16, 1996.").

<sup>2</sup> See ALA. CODE § 26-14-1(1)–(3) (2006); ALASKA STAT. § 47.17.290 (2007); ARIZ. REV. STAT. ANN. §§ 8-201, 13-3623 (2006) (physical abuse); ARK. CODE ANN. § 12-12-503 (2006); CAL. PENAL CODE §§ 11165.1–6 (West 2006); COLO. REV. STAT. § 19-1-

eligibility for federal reimbursement of foster care and adoption subsidies for children adopted out of foster care.<sup>3</sup> Foster care and adoption assistance subsidies are uncapped entitlement programs under title IV-E of the Social Security Act and are often referred to as "title IV-E programs." The November 2006 conference *Race, Culture, Class, and Crisis in Child Welfare: Theory into Practice* at St. John's School of Law assembled child advocates from practice and academics to address, in part, the issue of class in child welfare law. Does income eligibility lead to an undue focus on poor families as only they are eligible for valuable federal funds? Does it enter into the risk assessment in improper ways? Is poverty an overwhelming risk for child abuse and neglect? Does the child protection system overwhelmingly focus on poor families and their children to the detriment of these families and of children from non-impooverished families who may

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103 (2006); CONN. GEN. STAT. § 46b-120 (2004); DEL. CODE ANN. tit. 16, § 902 (2006); D.C. CODE § 16-2301 (2001); FLA. STAT. § 39.01 (2003); GA. CODE ANN. § 19-7-5(b) (2006); HAW. REV. STAT. § 350-1 (2004); IDAHO CODE ANN. § 16-1602 (2006); 325 ILL. COMP. STAT. 5/3 (2001); IND. CODE §§ 31-9-2-0.5, 31-34-1-1 to -5, -9 to -11 (1999); IOWA CODE § 232.68 (2006); KAN. STAT. ANN. § 38-1502 (2000); KY. REV. STAT. ANN. § 600.020 (West 2006); LA. CHILD. CODE ANN. art. 603 (2004); ME. REV. STAT. ANN. tit. 22, § 4002 (2006); MD. CODE ANN., FAM. LAW § 5-701 (LexisNexis 2007); MASS. GEN. LAWS ch. 119, § 51A (2007); MICH. COMP. LAWS § 722.622 (2005); MINN. STAT. §§ 260C.007, 626.556 (2003); MISS. CODE ANN. § 43-21-105 (2006); MO. REV. STAT. § 211.110 (2004); MONT. CODE ANN. § 41-3-102 (2005); NEB. REV. STAT. § 28-710 (1995); NEV. REV. STAT. §§ 432B.020, .070, .090, .100, .110, .140, .150 (2006); N.H. REV. STAT. ANN. § 169-C:3 (2007); N.J. STAT. ANN. §§ 9:6-8.9, -8.21 (West 2007); N.M. STAT. §§ 30-6-1, 32A-4-2 (2003); N.Y. SOC. SERV. LAW § 371 (McKinney 2006); N.Y. SOC. SERV. LAW § 384-b (McKinney 2006) (abandonment definition); N.Y. FAM. CT. ACT § 1012 (McKinney 2006) (emotional abuse definition); N.C. GEN. STAT. § 7B-101 (2006); N.D. CENT. CODE §§ 27-20-02, 50-25.1-02 (2006) (neglect and abandonment); OHIO REV. CODE ANN. §§ 2151.03(A), 2151.031 (LexisNexis 2006) (neglect); OHIO REV. CODE ANN. § 2151.011 (LexisNexis 2006) (emotional abuse); OHIO REV. CODE ANN. § 2907.01 (LexisNexis 2006) (sexual offenses); OHIO REV. CODE ANN. § 2919.22 (LexisNexis 2006) (sexual abuse); OKLA. STAT. tit. 10, § 7102 (2006); OR. REV. STAT. § 419B.005 (2005); 23 PA. CONS. STAT. § 6102 (2001); R.I. GEN. LAWS § 40-11-2 (2007); S.C. CODE ANN. § 20-7-490 (2006); S.D. CODIFIED LAWS § 26-8A-2 (2006); TENN. CODE ANN. §§ 37-1-102, -602 (2006) (emotional and sexual abuse); TEX. FAM. CODE ANN. § 261.001 (Vernon 2005); UTAH CODE ANN. § 62A-4a-402 (2006); VT. STAT. ANN. tit. 33, § 4912 (2006); VA. CODE ANN. § 63.2-100 (2006); WASH. REV. CODE §§ 26.44.020, .030 (2005); W. VA. CODE § 49-1-3 (2004); WIS. STAT. §§ 48.02, 48.981 (2003) (neglect); WYO. STAT. ANN. § 14-3-202 (2006).

<sup>3</sup> See 42 U.S.C. §§ 670, 672-73 (2000) (regarding eligibility for foster care, adoption assistance, and income eligibility); 45 C.F.R. § 1356.71(d). This article focuses on the interrelationship between public assistance and foster care, see 42 U.S.C. § 672, but the income eligibility requirements are the same for adoption assistance, see 42 U.S.C. § 673.

not get the attention and services they need? Is the child welfare system in a crisis, due in part to its overemphasis on the poor?

This article provides background to these difficult empirical questions and to the debate on class in the child welfare system by describing the historical and current entanglement between public assistance and federal foster care mandates and funding: You must be eligible for public assistance to be eligible for foster care maintenance payments. The article points out the lack of analysis at the origin of the interrelationship between public assistance and foster care. The importance of federal funding for foster care through the public assistance program was minimized and buried in other public assistance amendments that elicited much greater attention and discussion. The article also exposes the administrative and resource waste caused by the continuation of the entanglement. The article proposes that all questions regarding welfare eligibility be eliminated from eligibility determinations for abused and neglected children and that all administrative assessments exclusively focus on the needs of the abused or neglected child and the child's family, not on their income or financial assets.

Part One of the article first provides background to understand current funding of the foster care system and then reveals the historical origin of the placement of foster care and other programmatic funding for abused and neglected children within the public assistance program. While the interrelationship between public assistance and services to abused and neglected children can be traced to the Progressive Era, the 1960's brought the formal codification of foster care funding mandates into the Social Security Act's income maintenance program. As an end-of-administration change in January 1961,<sup>4</sup> it was not thoroughly considered, and the extent of the federal involvement was wildly underestimated.<sup>5</sup>

Part Two considers current eligibility requirements for foster care funding in the Social Security Act. Eligibility for foster care, independent living, and adoption assistance funding for abused

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<sup>4</sup> As explained in Part I, federal foster care funding was originally introduced and tied to income eligibility in January 1961 under Department of Health, Education, and Welfare Secretary Flemming of the Eisenhower administration, before Secretary Ribicoff of the Kennedy administration assumed office and continued the initiative. *See infra* Part I.

<sup>5</sup> Original estimates of the total cost of federal funds for foster care were \$3 to \$4 million. *See* H.R. REP. NO. 87-307, at 1722 (1961) (Conf. Rep.).

and neglected children remains tied to income eligibility requirements related to public benefits in other social security act provisions.<sup>6</sup> Part One argues that this connection never made sense. Part Two continues this argument since today the connection is particularly absurd. The current income assessment is tied to standards for determining eligibility as of 1996 when Aid to Families with Dependent Children ("AFDC") was still in place. Today, the AFDC program is defunct, replaced in part by Temporary Assistance to Needy Families ("TANF"). Yet the funding eligibility for abused and neglected children is still tied to the decade-old eligibility requirements.<sup>7</sup> That archaic determination is neither scaled for a cost-of-living increase nor adjusted in any way to accommodate the circumstances of abused and neglected children, especially abandoned children, who are distinct from general income maintenance recipients and for whom families' assets cannot be determined.

Part Three examines the administrative costs expended in making income eligibility determinations. Increasingly, states are outsourcing their eligibility determinations to maximize the penetration rate. States aspire to qualify all eligible children for federal reimbursement, and the assessment and documentation of this qualification is extensive. Because of the importance in dollars and cents to capturing as much federal funding as possible, states increasingly outsource their income and compliance determinations to maximize their reimbursement rate. An outside company contracted to do this work then receives a payment from the money that is collected from the federal government. This is seen as a win/win contract since the company receives a lucrative state contract but is paid from money that otherwise would not have been drawn down from the federal government to the state since the state is not as successful in making eligibility determinations for abused and neglected children. The losers in this arrangement are the abused and neglected children and their families who are receiving less direct services since money is instead spent in administrative costs tied to income eligibility determinations.

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<sup>6</sup> See *supra* note 1.

<sup>7</sup> See 42 U.S.C. §§ 606, 670, 672–673 (2000) (regarding eligibility for foster care, adoption assistance, and income eligibility based on July 1996 standards); 45 C.F.R. § 1356.71(d).

In the Conclusion, the argument is made to disentangle eligibility for foster care, independent living, and adoption assistance funding from child abuse and neglect service eligibility determinations. Eligibility should be based on proper determinations of abuse and neglect and the need for services. By making all abused and neglected children, not just poor children, eligible for federal reimbursement funds, the focus on the poverty of the family would move from an eligibility determination—"Are you poor enough to be eligible?"—to a service-based determination. The question of family income would not be irrelevant since it may be a necessary inquiry for the agency to best meet the resource needs of the family, but in-depth questions relating to items such as assets would not be the first priority to determine eligibility. The federal money flowing from the federal government to the states and local child welfare agencies would not necessarily increase in total since the federal government could adjust the percentages of reimbursement to compensate for the larger pool of eligible children once income was eliminated as a requirement. But, even if the funding did not increase, the extensive drain of administrative costs to determine income eligibility would be eliminated.

## I. BACKGROUND

### A. *Background on Current Reimbursement*

Inquiry into the federal reimbursement for foster care is necessary to understand the workings of the child welfare system in every state. State agencies try to maximize the federal dollars flowing into their states. In its 2005 survey, the Urban Institute reports that "[f]ederal funds were a little less than half of all expenditures for child welfare activities. Based on analysis of forty-seven states, federal funds accounted for 49 percent of total spending, state funds for 39 percent, and local funds for 12 percent."<sup>8</sup> The total federal spending for foster care maintenance payments was \$1.8 billion with an additional \$2.1 billion for administrative expenses.<sup>9</sup> More resources are poured into

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<sup>8</sup> CYNTHIA ANDREWS SCARCELLA ET AL., THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 9 (2006), available at <http://www.urban.org/url.cfm?ID=311314>.

<sup>9</sup> *Id.* at 15.

administration—much of it for income determinations and then compliance reports on the income determinations—than on services.

The reimbursement rate varies from state to state based upon the state per capita income. Poorer states are reimbursed as much as 77 cents on the dollar, while states with the highest income per capita are reimbursed at the rate of 50 cents on the dollar for foster care maintenance payments.<sup>10</sup>

If a child is abused or neglected, the state must provide the necessary services, including foster care, whether or not the child qualifies for federal maintenance payments. This means that for a qualified child, the state may pay only 23 cents of state funds for every dollar of placement services; but, for a non-qualified child, the state must pay 100 percent of the cost with no federal reimbursement. The percentage of children in out-of-home placements who receive federal maintenance reimbursements under title IV-E of the Social Security Act is called the state *penetration rate*.

The key for states to increase the flow of federal money into their child welfare programs and thereby save state dollars is to increase the penetration rate by increasing the number of eligible children who are administratively qualified for reimbursement. States cannot affect whether a child is income-eligible, but they can improve their administrative operations to ensure that all eligible children are properly qualified for reimbursement. The more children who receive federal foster care maintenance payments, the higher the penetration rate. In State Fiscal Year (“SFY”) 2004, the federal reimbursements to states for foster care maintenance payments totaled \$1.8 billion.<sup>11</sup> These payments “cover shelter, food, and clothing costs for eligible children in care.”<sup>12</sup> The states make up the remaining costs for eligible children based on the reimbursement rate. They also pay 100% of the costs for non-eligible children.

To decrease the state funding exposure, states can either increase the penetration rate or attempt to limit the number of non-eligible children served by foster care. Eligibility requires successfully meeting criteria set out in Title IV-E of the Social Security Act: income eligibility, a voluntary placement

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<sup>10</sup> *See id.* at 9.

<sup>11</sup> *Id.* at 11.

<sup>12</sup> *Id.* at 14.

agreement or judicial determination, a qualified placement, and a placement under the responsibility of the public agency.<sup>13</sup>

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<sup>13</sup> 42 U.S.C.S. § 672, which provides for foster care maintenance payments program, reads:

(a) In general.

(1) Eligibility. Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative specified in section 406(a) [42 USCS § 606(a)] (as in effect on July 16, 1996) into foster care if—

(A) the removal and foster care placement met, and the placement continues to meet, the requirements of paragraph (2); and

(B) the child, while in the home, would have met the AFDC eligibility requirement of paragraph (3).

(2) Removal and foster care placement requirements. The removal and foster care placement of a child meet the requirements of this paragraph if—

(A) the removal and foster care placement are in accordance with—

(i) a voluntary placement agreement entered into by a parent or legal guardian of the child who is the relative referred to in paragraph (1); or

(ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 471(a)(15) [42 USCS § 671(a)(15)] for a child have been made;

(B) the child's placement and care are the responsibility of—

(i) the State agency administering the State plan approved under section 471 [42 USCS § 671]; or

(ii) any other public agency with which the State agency administering or supervising the administration of the State plan has made an agreement which is in effect; and

(C) the child has been placed in a foster family home or child-care institution.

(3) AFDC eligibility requirement.

(A) In general. A child in the home referred to in paragraph (1) would have met the AFDC eligibility requirement of this paragraph if the child—

(i) would have received aid under the State plan approved under section 402 [42 USCS § 602] (as in effect on July 16, 1996) in the home, in or for the month in which the agreement was entered into or court proceedings leading to the determination referred to in paragraph (2)(A)(ii) of this subsection were initiated; or

(ii) (I) would have received the aid in the home, in or for the month referred to in clause (i), if application had been made therefor; or

(II) had been living in the home within 6 months before the month in which the agreement was entered into or the proceedings were initiated, and would have received the aid

This article focuses on the AFDC eligibility requirement mandated in 42 U.S.C. § 672(a)(3). The article argues for elimination of this income and asset eligibility. The income eligibility requirement serves no historic or current purpose but costs billions in administrative costs annually and results in focused attention on public assistance-eligible children and a disincentive to serve the less-financially needy. If this requirement were eliminated, states would be relieved from tremendous administrative expenses as detailed in Parts Two and Three, and more money could be used for foster care maintenance payments from the administrative savings. There

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in or for such month, if, in such month, the child had been living in the home with the relative referred to in paragraph (1) and application for the aid had been made.

(B) Resources determination. For purposes of subparagraph (A), in determining whether a child would have received aid under a State plan approved under section 402 [42 USCS § 602] (as in effect on July 16, 1996), a child whose resources (determined pursuant to section 402(a)(7)(B) [42 USCS § 602(a)(7)(B)], as so in effect) have a combined value of not more than \$10,000 shall be considered a child whose resources have a combined value of not more than \$1,000 (or such lower amount as the State may determine for purposes of section 402(a)(7)(B) [42 USCS § 602(a)(7)(B)]).

(4) Eligibility of certain alien children. Subject to title IV of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, if the child is an alien disqualified under section 245A(h) or 210(f) of the Immigration and Nationality Act [8 USCS § 1255a(h) or 1160(f)] from receiving aid under the State plan approved under section 402 [42 USCS § 602] in or for the month in which the agreement described in paragraph (2)(A)(i) was entered into or court proceedings leading to the determination described in paragraph (2)(A)(ii) were initiated, the child shall be considered to satisfy the requirements of paragraph (3), with respect to the month, if the child would have satisfied the requirements but for the disqualification.

(b) Additional qualifications. Foster care maintenance payments may be made under this part [42 USCS §§ 670 et seq.] only on behalf of a child described in subsection (a) of this section who is—

(1) in the foster family home of an individual, whether the payments therefor are made to such individual or to a public or private child-placement or child-agency, or

(2) in a child-care institution, whether the payments therefor are made to such institution or to a public or private child-placement or child-care agency, which payments shall be limited so as to include in such payments only those items which are included in the term “foster care maintenance payments” (as defined in section 475(4) [42 USCS § 675(4)]).

42 U.S.C.S. § 672 (LexisNexis 2007).

would still remain eligibility requirements for federal reimbursement: judicial determinations or voluntary placement agreements; agency supervision; and qualified placements; but these three requirements protect the child and family.

*B. Historical Background to the Foster Care/Public Assistance Entanglement*

Child neglect and the generally-used term of “child abuse and neglect” have been closely linked to poverty throughout our history, dating back as early as colonial times and Progressive Era interventions.<sup>14</sup> The entanglement with public assistance can directly be drawn from 1908 when President Theodore Roosevelt convened the White House Conference on Dependent Children. The conference was concerned, in part, with the plight of newly-widowed women and their children. Thought of as guiltless in their single parenthood and worthy of public support for their mothering, the conference considered ways of partially assisting these women so their children could be raised by them at home. The suggestion of Mother’s Pensions emerged.

States began to introduce Mother’s Pensions in 1911 as a mechanism to keep children at home instead of placing them away from their widowed or single mothers and forcing the mothers to work long full-time hours. The pensions were not enough for a family to rely upon exclusively, but could augment a partial income. States used varying eligibility requirements, and the pensions were not offered uniformly within or between states. By 1935, all but two states had some form of Mother’s Pensions available.<sup>15</sup>

In 1935, Aid to Dependent Children was initiated as a federal program operated by states to provide income assistance to poor children in the model of Mother’s Pensions. From the outset, states set the eligibility criteria for their programs. Income eligibility and other criteria varied between states, and some states denied assistance to children whose homes were not

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<sup>14</sup> See Susan Vivian Mangold, *Challenging the Parent-Child-State Triangle in Public Family Law: The Importance of Private Providers in the Dependency System*, 47 BUFF. L. REV. 1397, 1412–29 (1999).

<sup>15</sup> See Jo Anne B. Ross, *Fifty Years of Service to Children and Their Families*, 48 SOC. SECURITY BULL. 5, 6 (1985). See generally MATTHEW A. CRENSON, *BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM* (1998).

deemed "suitable." The suitability determination was left to the discretion of individual states, local offices, and individual workers. It could be a consideration based on the appearance of the home environment or any other factors that the state codes or individual caseworker deemed worthy of judgment. The determination was often in regard to the "moral environment" of the home. This translated into whether or not the mother was living with a man who was not her husband or had a child out of wedlock. The notions of worthiness for motherhood and for public assistance remained an integral part of eligibility determinations.

By 1960, twenty-four states had reference to "suitable homes" in their ADC programs.<sup>16</sup> Of those, sixteen states made the reference as part of their guidelines for agency plans to remediate the conditions in the child's best interest and continue payment while the remedial plan was being implemented.

Eight states used the "suitability" determination as an eligibility requirement and denied aid to children who were in homes that were not deemed suitable.<sup>17</sup> Once this determination was made, the children could be left in the homes but aid would be terminated. There was no requirement that a plan be implemented or even developed to improve the conditions in the home. The Department of Health, Education, and Welfare took note of these practices and criticized them in their publications.<sup>18</sup>

Before the National Biennial Round Table Conference of the American Public Welfare Association, Secretary Flemming stated:

There is the issue of illegitimacy as it relates to the aid for dependent children program. Personally, I am completely out of sympathy with efforts to deal with this problem by denying aid to the illegitimate child. I could never reconcile myself to a program that puts itself in a position of turning its back on the needs of a child because of the sins of the parents. Not only am I convinced this would be wrong, but I am also convinced that it would make no contribution to the basic problem.<sup>19</sup>

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<sup>16</sup> Statement of Secretary Abraham Ribicoff, 1961 HEW ANN. REP. 62-63.

<sup>17</sup> *See id.*

<sup>18</sup> Kathryn D. Goodwin, *Twenty-Five Years of Public Assistance*, 23 SOC. SECURITY BULL. 31, 35 (1960).

<sup>19</sup> *Address by the Secretary of Health, Education, and Welfare, The Honorable Arthur S. Fleming*, 18 PUB. WELFARE 4, 5 (1960).

Despite these criticisms from professional groups and administrative officials, discretion in eligibility standards, including suitability determinations, remained with the states.

In 1960, Louisiana enacted legislation to terminate approximately 23,000 children from the ADC rolls because their homes did not meet the suitability requirement. In this process, suitability was determined based on the mother's "moral behavior" and not on such conditions as the home setting or upbringing of her children.

In this instance, State legislation denied assistance to children if the adult caretaker was living with, but not legally married to, a mate; or if the mother had an illegitimate child at any time since first receiving assistance, unless she could prove to a parish welfare board that she had ceased illicit relationships and was maintaining a suitable home for her children.<sup>20</sup>

There was a strong reaction to the termination of assistance to so many needy children. Many welfare professional organizations and citizen groups demanded a response from the federal agency, citing the children's needs and the clear racial overtones to the cessation of aid. In the Fall of 1960, toward the end of the Eisenhower administration, Secretary of Health, Education, and Welfare Arthur Flemming held a hearing to determine whether Louisiana's ADC plan was being administered in a manner consistent with the requirements of the Social Security Act in light of these large-scale terminations of benefits. Again, national organizations participated and submitted testimony and resolutions arguing against the suitability requirements.

The suitability of the home for the proper care of a child should not be an eligibility factor in the ADC program. The standards of suitability should be no different for families assisted through ADC than they are for the general community. If any home is unsuitable regardless of the financial circumstances of the family, the community through its established social and law enforcement agencies has a responsibility to take steps to improve conditions and protect the children.<sup>21</sup>

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<sup>20</sup> 1961 STATEMENT OF SECRETARY ABRAHAM RIBICOFF, U.S. DEP'T HEALTH, EDUC. AND WELFARE ANN. REP., at 62-63.

<sup>21</sup> See, e.g., *Public Welfare Services and Aid to Dependent Children: A Statement of Program Objectives: Hearing on H.R. before the Comm. on Ways & Means*, 87th Cong. 1st Sess. 218-19 (Feb. 1961) (statement of the Board of Directors of the American Public Welfare Association).

In the wake of this public outcry, Louisiana revised its state plan, and the Secretary approved it for continued federal reimbursement under the ADC program. Also in January 1961, in the waning hours of his administration, Secretary Flemming issued an Executive Order, effective June 30, 1961, stating that federal grants under the ADC program would not be made to states terminating assistance to children in unsuitable homes unless the states provided out-of-home placement for those children. If the states provided such placement as an alternative to in-home ADC funding, the federal government would reimburse states for those costs under ADC grant allotments.<sup>22</sup> The other alternative was to leave the child at home and maintain the income assistance to the family while providing remedial services, if appropriate, to make the homes suitable for children.

Federal funding for foster care was formally connected to the public assistance program by this executive order that was issued in immediate response to the actions of the Louisiana legislature. The broader context of the executive order was not a debate on the link between poverty and abuse or neglect or any other thoughtful discussion. Instead, the order was issued to change the practices of eight states operating under suitability requirements. The discussions around this order considered the problems for children in enforcing suitability requirements, not the importance of the initiative to provide new federal funds for out-of-home placements and link foster care to public assistance.

In the Spring of 1961, Congress passed legislation to codify the executive order as amendments to the Social Security Act. Secretary Flemming's successor, Abraham Ribicoff, echoed Flemming's concerns regarding suitability requirements when he assumed office: "The problem of the child or the community is not solved by denying assistance while leaving the child in endangering conditions."<sup>23</sup> Still, there was little debate and certainly no comprehensive examination of the implications of linking ADC to foster care. Instead, the focus of the legislative debates in both houses was on other amendments allowing ADC payments to families with unemployed parents, thus eliminating

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<sup>22</sup> See S. REP. NO. 87-165, at 6 (1961).

<sup>23</sup> 1960 U.S. DEP'T HEALTH, EDUC. AND WELFARE ANN. REP. (quoting *A Report of the Advisory Counsel on Public Assistance* (Dec. 1959)).

the requirement that children had to live with a single parent to be eligible for ADC.<sup>24</sup>

The limited debate of the foster care provision that took place was not substantive but instead focused on the ability of the impacted states that still had suitability requirements to amend their provisions. There was concern expressed that these states, some of which had legislatures that only convened biannually, needed an effective date of the amendments that gave them adequate time to amend their laws and change their state plans to comply with the new directives.

The legislation was passed in May 1961, but the effective date was postponed from July 1, 1961 to allow five states to amend their state plans and thereby provide for continued assistance to the children's homes or removal of the children. Two states had legislation in place that prohibited them from removing the suitability requirements, so they were given additional time for their legislatures to pass the necessary changes to put them in compliance with the new federal mandate.<sup>25</sup> The amendments were initially limited to fourteen months, and this short-term allotment further minimized the impact of the change.

Secretary Ribicoff announced the new legislation in the Social Security Bulletin of July, 1961:

Among the children receiving public assistance, as among all children, there are some living in homes where they are not receiving proper care and protection. Under the new law, from May 1, 1961, to June 30, 1962, these children may continue to receive aid to dependent children, with the Federal Government sharing in the cost, even though they are removed from their homes by court order and placed in foster-family homes.

Under the new law the Federal Government will participate in payments for foster-family care for a dependent child under the following conditions: (1) He would otherwise meet the existing definition of dependent child except for his removal after April 30, 1961, from his home by a court that has found that it is contrary to the child's welfare to continue living there; (2) the assistance agency is responsible for his placement and care; (3) he is placed in a foster-family home as a result of the judicial

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<sup>24</sup> See S. REP. NO. 87-165, at 6; H.R. REP. NO. 87-307, at 1-3 (1961) (Conf. Rep.).

<sup>25</sup> See S. REP. NO. 87-165, at 6; 1961 STATEMENT OF SEC'Y ABRAHAM RIBICOFF, U.S. DEP'T HEALTH, EDUC. AND WELFARE ANN. REP., at 62-63.

determination; and (4) he received aid to dependent children in or for the month in which the court action was initiated.<sup>26</sup>

The lack of attention and consideration given to the new provisions was further exemplified by the minimization of the financial cost of the amendments allowing ADC money to be used for foster care payments. The Conference Report on the bill estimated that the new foster care allotments would cost between \$3 million and \$4 million. The conference report on the bill (H. Rep. 307) was filed April 25, 1961.

It was estimated that \$200 million would be the cost of extending aid to dependent children benefits to families of the unemployed for the 14-month period.

Additional costs of \$15 million were expected from other provisions of the bill, including \$10 million for increased federal payments for medical aid to public assistance recipients and \$3–\$4 million for aid for children placed in foster homes.<sup>27</sup>

The Public Welfare Association echoed the cost estimates of Congress in minimizing the impact of the foster care provisions:

Most of the children who will now receive ADC while in foster-care would have remained in their own homes as ADC recipients, had this legislation not been passed. Therefore, it is not expected to add substantial numbers of children to the public assistance rolls. The additional federal costs will probably range between three and four million dollars for the 14-month period of operation. The expenditures will be little, but the results will be extremely rewarding, in terms of the new security and opportunity provided to children threatened by unfortunate home environments.<sup>28</sup>

While projecting that the foster care amendments would impact a small number of cases and cost little, there were important requirements imposed on these cases. These were the first federal mandates for foster care and included a judicial determination of the necessity of the placement or a voluntary agreement and ongoing casework by the ADC worker who had to maintain responsibility for the qualified placement. These mandates prompted some to view the amendments as an

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<sup>26</sup> Div. of Program Standards and Dev., *Amendments to the Public Assistant Provisions of the Social Security Act*, 24 SOC. SECURITY BULL. 18, 18–19 (1961).

<sup>27</sup> *Major Legislation—Education and Welfare*, Almanac, 17 CONG. Q. 282 (87th Cong. 1st sess. 1961).

<sup>28</sup> Wilbur J. Cohen, *Public Welfare Legislative Progress: 1961*, 19 J. AM. PUB. WELFARE ASS'N 123 (1961).

opportunity to impact the foster care system by legislating mandates in a small number of cases that would then serve as casework models. Judicial orders necessitating placement would discourage unnecessary placements. Caseworker oversight would prevent children from “getting lost in the system” and ensure the proper provision of services to families.

Though the foster-care legislation for ADC children is limited, it is expected to stimulate and assist the states in protecting and caring for children under proper safeguards—that is, under the continuing watchfulness of the public welfare agencies. Moreover, the new law will further stimulate the use of professionally trained staff who are skilled and experienced in the placement and supervision of children outside their own homes.<sup>29</sup>

The codification of federal foster care reimbursement and the accompanying mandates within the income maintenance provisions of the Social Security Act may have had little foresight at the outset, but have, nonetheless, continued to the present. The eligibility criteria for foster care still refers back to the income eligibility guidelines for public assistance over a decade ago. This maintains the entanglement between the foster care system and the income maintenance provisions. It not only requires that children be abused and neglected, but they also must be poor to be eligible for federal reimbursement for foster care.

## II. CURRENT ELIGIBILITY REQUIREMENTS FOR FEDERAL REIMBURSEMENT FOR FOSTER CARE

The entitlement to public assistance originally enacted under the Aid to Dependent Children program and later the Aid to Families with Dependent Children program was terminated in 1996 under the Personal Responsibility and Work Opportunity Reconciliation Act.<sup>30</sup> This law changed public assistance to provide only time-limited income maintenance to poor families under the Temporary Assistance to Needy Families program.<sup>31</sup> The eligibility for foster care funding was not changed as a result of these amendments. Instead, the current “qualifying children”

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<sup>29</sup> *Id.*

<sup>30</sup> Pub. L. No. 104–93, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

<sup>31</sup> 42 U.S.C. §§ 601–619 (2000).

standards refer back to the eligibility criteria as they were in effect on July 16, 1996, under the entitlement to the Aid to Families with Dependent Children program.<sup>32</sup>

The income eligibility requirements under the current Social Security Act foster care provisions continue the historical mandate that an abused or neglected child must be poor to be eligible for federal foster care funds:

§ 672. Foster care maintenance payments program

(a) In general.

(1) Eligibility.

Each State with a plan approved under this part shall make foster care maintenance payments on behalf of each child who has been removed from the home of a relative specified in section 406(a) [42 USCS § 606(a)] (as in effect on July 16, 1996) into foster care if—

....

(B) the child, while in the home, would have met the AFDC eligibility requirement of paragraph (3).

....

(3) AFDC eligibility requirement.

(A) In general.

A child in the home referred to in paragraph (1) would have met the AFDC eligibility requirement of this paragraph if the child—

(i) would have received aid under the State plan approved under section 402 [42 USCS § 602] of this title (as in effect on July 16, 1996) . . . .<sup>33</sup>

As explained by the Urban Institute:

PRWORA eliminated the Aid to Families with Dependent Children ("AFDC") program, also an uncapped entitlement program. However, states are still required to determine eligibility for title IV-E Foster Care and Adoption Assistance based on a child's eligibility for AFDC as it existed in their state's plan on July 16, 1996. Therefore, states must base a child's eligibility for title IV-E on a program and need standards that no longer exist in practice and are not adjusted for inflation.<sup>34</sup>

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<sup>32</sup> 42 U.S.C.S. § 672(a)(3) (LexisNexis 2007).

<sup>33</sup> 42 U.S.C.S. § 672 (LexisNexis 2007).

<sup>34</sup> SCARCELLA ET AL., *supra* note 8, at 1–2.

The Social Security Act contains additional eligibility provisions beyond the AFDC eligibility requirement. States cannot change the income and assets of the child's family. The state can work more competently to qualify all income eligible children, but it cannot actually change their family's income eligibility. On the other hand, the state can directly impact the other Social Security Act requirements under 42 U.S.C. § 672:

(2) Removal and foster care placement requirements.

The removal and foster care placement of a child meet the requirements of this paragraph if—

(A) the removal and foster care placement are in accordance with—

(i) a voluntary placement agreement entered into by a parent or legal guardian of the child who is the relative referred to in paragraph (1); or

(ii) a judicial determination to the effect that continuation in the home from which removed would be contrary to the welfare of the child and that reasonable efforts of the type described in section 471(a)(15) [42 USCS § 671(a)(15)] for a child have been made;

(B) the child's placement and care are the responsibility of—

(i) the State agency administering the State plan approved under section 471 [42 USCS § 671]; or

(ii) any other public agency with which the State agency administering or supervising the administration of the State plan has made an agreement which is in effect; and

(C) the child has been placed in a foster family home or child-care institution.<sup>35</sup>

The requirements under paragraph (2) referred to above still maintain the “model” provisions from 1961 requiring a judicial determination or voluntary placement agreement, oversight by the public agency, and qualified foster care setting.<sup>36</sup> The strategy is to be sure that all income-eligible children meet these mandates so that they can receive foster care reimbursement. Non-AFDC-eligible children who fail to meet the requirements of 42 U.S.C. § 472(a)(1) & (3) cannot receive Title IV-E funds even if they meet the requirements of 42 U.S.C. § 672(a)(2). Attempting to maximize federal dollars flowing into their states, thus

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<sup>35</sup> 42 U.S.C.S. § 672(a)(2) (LexisNexis 2007).

<sup>36</sup> *Id.*

increasing their penetration rates, public agencies may alter their practice to meet the federal mandates. For instance, a non-AFDC eligible child may be placed with a relative in a non-qualified out-of-home placement since this is deemed the best placement for the child. Since the child cannot receive federal foster care maintenance funds since they are not AFDC-eligible, the fact that they also fail to meet the requirement of a qualified placement is irrelevant. On the other hand, a public agency has a fiscal incentive to place an eligible child *only* in a qualified foster care setting, even if a non-foster care relative caretaker setting is best for the child, so that the agency can receive up to 77 cents on the dollar for the costs of the placement from the federal government. Thus, income eligibility can drive caseworker determinations. This is not always in the best interest of individual children. The Urban Institute, reporting on their 2005 Child Welfare survey, explains:

The average penetration rate in SFY 2004 was 52 percent (based on 46 states). Between SFYs 2002 and 2004, the penetration rate in 11 states increased while the penetration rate in 22 states declined. Analysis of 36 states that provided information on their penetration rate for SFYs 2000, 2002, and 2004 shows the foster care penetration rate consistently declining, from 58 to 55 to 54 percent. To ensure that all income-eligible children are determined eligible and to help counter the negative effect of the link to AFDC, many states improved the eligibility determination process by refining the court's role in eligibility determinations, creating specific eligibility units to help regiment the process, and even shifting their policies away from the use of noneligible placements such as unlicensed relatives.<sup>37</sup>

As penetration rates gradually decline and states struggle to collect the information necessary to qualify more children under the income eligibility requirements, the "model requirements" have been altered to streamline the qualification process. As described above, courts may be given a more limited role such as completing a form with a check mark rather than recording a full determination of the need for placement on the record. This may be detrimental later in a case when the court record does not explain all the reasons for placement and the justification for termination is then harder to assess. It may, however, be more

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<sup>37</sup> SCARCELLA ET AL., *supra* note 8, at vi.

reliable in assuring an AFDC-eligible child meets the judicial determination criteria under 42 U.S.C. § 672. The other eligibility criteria are generally in the best interests of the child, but the drive for the best penetration rate leads to adherence only for poor children even when they are not executed in the best interest of the individual child.

The same type of funding considerations can influence placement determinations. If a relative is the best placement for a child but does not qualify as a foster parent placement, the agency must choose between competing concerns. Should the agency choose placement with the relative or place the child in a foster home that will qualify for federal reimbursement? Should the agency move the child out of the protection system entirely and leave it to the relative caregiver to provide necessary protection for the child? These decisions can be made in the best interest of the child and family or as a result of funding concerns for an AFDC-eligible child.

The requirements further demand a poverty assessment by a mandated determination of assets as required under the income maintenance provisions of the Social Security Act. 42 U.S.C. § 672(a)(3) requires:

(B) Resources determination. For purposes of subparagraph (A), in determining whether a child would have received aid under a State plan approved under section 402 [42 USCS § 602] (as in effect on July 16, 1996), a child whose resources (determined pursuant to section 402(a)(7)(B) [42 USCS § 602(a)(7)(B)], as so in effect) have a combined value of not more than \$10,000 shall be considered a child whose resources have a combined value of not more than \$1,000 (or such lower amount as the State may determine for purposes of section 402(a)(7)(B) [42 USCS § 602(a)(7)(B)]).<sup>38</sup>

Dating the income eligibility to 1996 standards and requiring an asset determination causes several problems for abused and neglected children. First, freezing the eligibility as of July 1996 holds income at decade-old levels. The cost of living increase varies by state, but inflation over ten years makes the 1996 AFDC eligibility levels require that families be *poorer* in 2007 in order to qualify in 2007 since there has been no adjustment of the levels for inflation since 1996. This makes it more difficult for children to qualify for the foster care

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<sup>38</sup> 42 U.S.C.S. § 672(a)(3)(B) (LexisNexis 2007).

reimbursement and results in fewer federal dollars flowing into states for foster care services.

This concern was raised and answered directly in the U.S. Department of Health and Human Services Administration for Children and Families' *Child Welfare Policy Manual*. The question was posed, "May States adjust the 1996 standard of need to reflect cost of living adjustments?"<sup>39</sup> Citing the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the response was a resounding, "No."<sup>40</sup> The Department of Health and Human Services ("HHS") went on to explain:

The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") did not include any allowance for cost of living or adjustments for inflation in setting the July 16, 1996 look-back date. States may not adjust the 1996 standard of need to reflect cost of living adjustments, since the statutory look-back date is set at a specific point in time.<sup>41</sup>

Requiring an income and asset determination of the family poses unique problems for abused and neglected children. One paradigmatic child in the child protection system in need of foster care is an abandoned child. If a child was left on the doorstep of the public agency with no identifying information, that child could not be qualified for federal reimbursement for foster care since it would be impossible to determine the income and asset eligibility of the child's family. HHS confronted this paradox in responding to states' questions in its policy manual, "How does a State determine title IV-E eligibility for an abandoned child whose parents are unknown?"

**Answer:** It is unlikely that a State would be able to determine title IV-E eligibility for an abandoned child whose parents are unknown. This situation differs from one in which a parent leaves a child with a friend or relative and is unreachable, but the identity of the parent is known. In either scenario, all of the title IV-E eligibility requirements must be met for a child on whose behalf title IV-E foster care or adoption assistance is claimed. This includes the requirement that the child meet the Aid to Families with Dependent Children (AFDC) eligibility requirements as outlined at section[s] [sic] 472(a)(3) and

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<sup>39</sup> ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT OF HEALTH AND HUMAN SERVS., CHILD WELFARE POLICY MANUAL § 8.4A, Q/A #16 (2007), available at [http://www.acf.hhs.gov/j2ee/programs/cb/laws\\_policies/laws/cwpm/policy\\_dsp\\_pf.jsp](http://www.acf.hhs.gov/j2ee/programs/cb/laws_policies/laws/cwpm/policy_dsp_pf.jsp).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

473(a)(2) of the Social Security Act. As such, the State must be able to establish and verify financial need and deprivation of parental support based on the home from which the child was removed. Determining a child's financial need requires a State to examine the parents' income and resources. In the case in which the identity of the parents is unknown, including when a child has been abandoned, the State will not have any financial information on which to make an AFDC eligibility determination. A State must document that a child meets all AFDC eligibility requirements; a State cannot presume that a child would meet the eligibility requirements simply because the child has been abandoned.<sup>42</sup>

In its *Children's Foster Care Manual*, the State of Michigan makes clear, under the Title IV-E Eligibility Requirements, that "[c]hildren, whose parents or other relatives cannot be identified" and "[c]hildren whose parents will not cooperate in the eligibility determination" are not "ADC eligible as there are no facts upon which to base former ADC program eligibility."<sup>43</sup>

If a child is found by a court to be an abused or neglected child under the state statutes and is further found to be in need of placement, even if that child is placed in an eligible foster care setting, the state cannot be reimbursed for the costs of that child's shelter, food, and clothing unless the child's family would have qualified for AFDC under the 1996 standard. The child must be poor enough to be eligible.

### III. ADMINISTRATIVE COSTS FOR ELIGIBILITY DETERMINATIONS

In order to meet federal requirements, a child must have been eligible for AFDC under the July 1996 standard to be eligible for foster care reimbursement today.<sup>44</sup> This is a complicated, time-consuming assessment. For example, the state of Iowa provides a 143-page manual to assist with *Determining Title IV-E Eligibility*.<sup>45</sup> The introduction explains:

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<sup>42</sup> *Id.* at Q/A #19.

<sup>43</sup> STATE OF MICH. DEPT OF HUMAN SERVS., CHILDREN'S FOSTER CARE MANUAL, CFF 902-2, at 4-5 (2006), available at <http://www.mfia.state.mi.us/olmweb/ex/cff/902-2.pdf>.

<sup>44</sup> See 42 U.S.C.S. § 672(a)(3) (LexisNexis 2007).

<sup>45</sup> IOWA DEPT OF HUMAN SERVS., EMPLOYEES' MANUAL, DETERMINING TITLE IV-E ELIGIBILITY (2004), available at [www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual\\_Documents/Master/13-b.pdf](http://www.dhs.state.ia.us/policyanalysis/PolicyManualPages/Manual_Documents/Master/13-b.pdf).

The Title IV-E Foster Care Assistance program's purpose is to help states provide proper care for children who need temporary placement outside their homes in a foster family home or group care facility. This program is an open-ended entitlement program that provides funds to assist states with the costs of foster care maintenance for eligible children.

.....  
The Title IV-E program also provides funds to support staff training and administrative costs. Claims for administrative costs under Title IV-E help to pay for staff salaries, supplies, and related expenses. Programs for the training of new workers, continuous education of current workers, training for foster families, and training of staff in foster care facilities all benefit from funds provided through Title IV-E.<sup>46</sup>

The Manual goes on to explain the importance of the federal funds for state funding of the child welfare system generally:

If a child or DHS does not meet the requirements to claim IV-E funds, the child can receive the same foster care or adoption services. However, it means that less money is available to serve all children and families in Iowa. Federal financial participation in state expenditures is provided: [a]t the Medicaid match rate of approximately 60% for foster care maintenance and . . . [a]t a 50% match rate for related state administrative expenditures, such as time spent for case management and eligibility determination. . . . For every five children in foster care who qualify for matching funds under title IV-E, enough state funds are saved to pay the expenses for three more children in the same type setting.<sup>47</sup>

Using data from 2004, the Urban Institute reports, "52 percent of children in out-of-home placements were receiving title IV-E maintenance payments. . . . Nationally, the penetration rate continues to decline."<sup>48</sup> Officials from ten states were interviewed by the Urban Institute to understand this decline. The findings are clear: "All of the administrators in the ten interviewed states pointed to the link to AFDC as the primary reason why children are not eligible for title IV-E."<sup>49</sup> States have increased their administrative costs, in part, to ensure that all

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<sup>46</sup> *Id.* at 1.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> SCARCELLA ET AL., *supra* note 8, at 15. The study shows that the penetration rate in 36 analyzed states dropped from 58 percent to 55 percent to 54 percent in SFY's 2000, 2002, and 2004, respectively. *Id.*

<sup>49</sup> *Id.* at 16.

eligible children receive federal foster care reimbursement. States cannot impact whether or not a child is income eligible, but they can improve their administrative practices for determining eligibility to increase their penetration rate and thereby increase the flow of federal dollars into their state.

States can work to improve the flow of cases through the judicial system to ensure that the necessary findings are made in each case where placement is made. States can also diminish or altogether eliminate the use of non-eligible placements by placing all children in licensed foster homes, requiring that even relatives acquire the proper licensing or be disqualified as placements. Finally, states can document the oversight provided for each placement by the public agency. These steps may be necessary to meet the eligibility requirements for federal reimbursement under title IV-E.<sup>50</sup> States must still meet the requirements of income eligibility for each child to claim federal reimbursement for that child's out-of-home care.

In 2004, title IV-E foster care funds distributed to states totaled \$3.9 billion.<sup>51</sup> Of that total, \$1.8 billion was spent on maintenance payments (shelter, food, and clothing) for eligible children in out-of-home care. The remaining \$2.1 billion was spent on administrative costs and training and the automated information service. While both maintenance payments and administrative payments increased approximately 2% from 2002 to 2004, the spending for administration continues to exceed the spending for actual service delivery maintenance payments.<sup>52</sup>

Across the states, funding for administrative expenses ranges from just over \$300 million to just under \$500 million.<sup>53</sup> While this is a wide margin of variation, the clearer picture emerges when the ratio of administration to maintenance payments is examined. States spend a low of 3 cents on administration for every dollar spent on maintenance payments to a high of \$7.59 for administration for every dollar spent on maintenance.<sup>54</sup> Much of this variation in the ratio of administration to maintenance costs is attributed to what is put into the category of "administrative costs." Some states include a

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<sup>50</sup> See 42 U.S.C.S. § 672(a)(2) (LexisNexis 2007).

<sup>51</sup> SCARCELLA ET AL., *supra* note 8, at 15.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 17.

<sup>54</sup> *Id.*

much broader range of activity in this category than others. In sum, more money is spent on administration than on services, and a significant portion of these administrative expenses are due to income eligibility determinations and then the compliance reports to prove they made these determinations.

To maximize their penetration rate, states have begun to outsource their income eligibility determinations. Companies such as Maximus, Inc., contract with states to increase their penetration and compliance rates and in turn receive a percentage of the funds collected. This private subcontracting has a long history in the child welfare system,<sup>55</sup> but in the past private entities were performing agency activities that directly impacted children and families. Today, states are increasingly subcontracting to fulfill purely administrative eligibility determinations to meet federal requirements with no benefit to the children in the system or to their families.

The motto for Maximus, Inc., the most active of the subcontractors of administrative eligibility determinations, is "Helping Government Serve the People."<sup>56</sup> In Wisconsin, Maximus received nine percent of the funds it collected under a contract in 2002–2003 for a total of \$1,004,700. During 2003–2004, under a reallocation plan, \$714,400 was encumbered to operate a title IV-E eligibility determination unit on a statewide basis under contract with Maximus.<sup>57</sup> Additionally, the state contracted with Maximus to improve the state's compliance in anticipation of its next review for title IV-E compliance.<sup>58</sup> The Child Welfare Division of Maximus' clients include the State of Florida, Commonwealth of Pennsylvania, State of Indiana, State of Illinois, and State of Connecticut.<sup>59</sup> Each of these states benefits from the management services of Maximus in maximizing their penetration rate. Much of this reimbursed funding is in turn spent on income eligibility determinations to

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<sup>55</sup> See Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1309–13 (1999).

<sup>56</sup> Maximus, Child Welfare Program Management Services, <http://www.maximus.com/corporate/pages/childwelfarepgmmgmtsvs.asp> (last visited Feb. 6, 2007).

<sup>57</sup> Memorandum from Bob Lang, Dir., State of Wis. Legislative Fiscal Bureau Joint Comm. on Finance, to Comm. Members 4 (Nov. 10, 2003), [http://www.legis.wisconsin.gov/lfb/Section1310/111003\\_DHFS\\_6.pdf](http://www.legis.wisconsin.gov/lfb/Section1310/111003_DHFS_6.pdf).

<sup>58</sup> *Id.* at 5.

<sup>59</sup> Maximus, *supra* note 56.

prove to the federal government that children are poor enough to be eligible for foster care maintenance payments.

#### CONCLUSION

The November 2006 conference, *Race, Culture, Class, and Crisis in Child Welfare: Theory into Practice* at St. John's School of Law critically challenged the existing make-up of the child welfare system in terms of race, culture, and class. To understand the class dynamics of the system, this article explores the historical linkage of AFDC to federal foster care reimbursement. The historical story that emerges is of an end-of-administration executive order prompted by discriminatory practices in the state of Louisiana in 1960. Neither the executive order providing federal foster care funds *tied to ADC eligibility* nor the subsequent federal legislation amending the Social Security Act to provide the federal reimbursement for foster care critically examined the public assistance-child welfare connection.

That connection persists today despite the repeal of AFDC. The eligibility criteria remain on the Social Security Act books simply for foster care and other child welfare system eligibility determinations. The administrative costs of making these determinations are unconscionable, especially given the limited resources appropriated for foster care services.

Foster care should be disentangled from public assistance by eliminating the eligibility calculations. This would take poverty out of the eligibility criteria and leave resource calculations solely for service-planning purposes. In this way, all determinations would be to benefit the child, not merely to classify the child. Poverty would not be formally equated with abuse and neglect. While there may be many reasons why poor children make up a large percentage of abused and neglected children in state care, elimination of federal income eligibility requirements would begin to remove improper incentives and disincentives based on poverty and not on service needs. Medicaid and Title XX eligibility define abused and neglected children into the programs regardless of income. The same could be true for all children determined to need foster care services: The state would receive federal reimbursement for their foster care services irrespective of income and assets.

Eliminating the wasteful costs of income eligibility determinations would free more public money for service delivery. States could better serve children if they were freed from the federally mandated question: Are you poor enough to be eligible?