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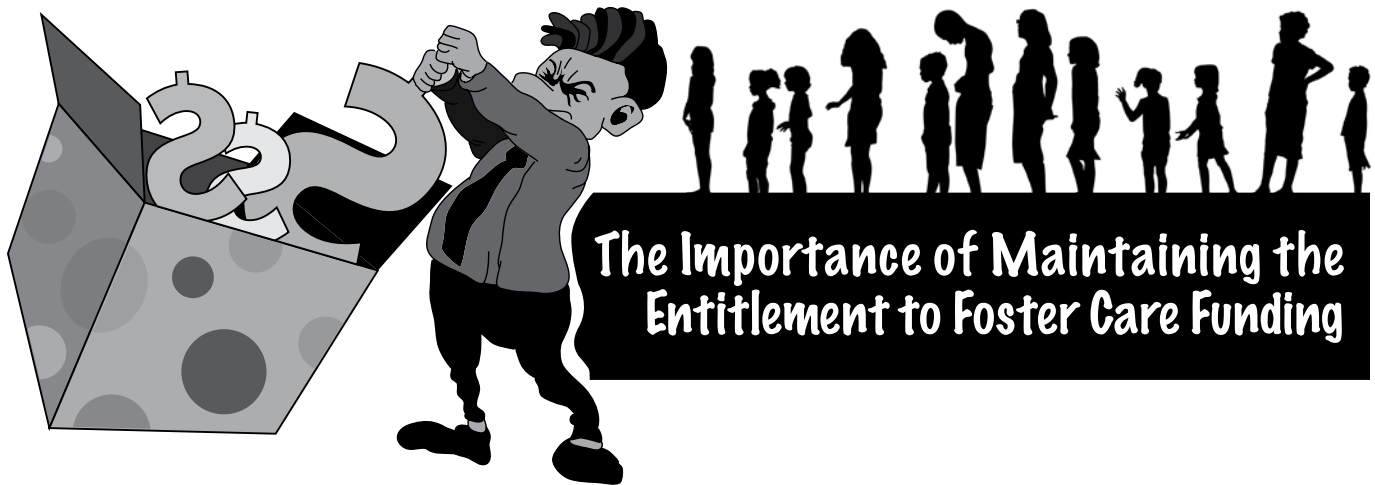
Child Welfare Financing Reform

LGBT Elders' Economic Security and Health Care



Sargent Shriver National Center on Poverty Law

Child Welfare Financing Reform



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The federal system of financing child welfare has come under attack in recent years for stifling states' innovation and flexibility in serving youths in their child welfare systems. This criticism has prompted a number of finance reform proposals—primary among these turning Title IV-E of the Social Security Act into a “capped allocation” program.¹ A “capped allocation,” akin to the block grant that replaced former entitlement programs such as Aid to Families with Dependent Children (AFDC), limits the amount of federal funding that a state or county receives in exchange for greater flexibility in how the funds may be spent. Proponents of increased flexibility argue that, by allowing states to retain the federal money they save when caseloads decline, a capped allocation encourages more innovative practices that reduce the number of children entering the child welfare system. The risk, however, is that, once a program is capped and the entitlement eliminated, states are unable, should caseloads increase, to draw down additional federal funds. This outcome reduces access to benefits and undermines support for foster care.

The debate over child welfare financing reform and the need for “flexible funding” is occurring in the face of an unprecedented fiscal crisis that has led states to make severe cuts in human service programs. In each of the last two years California's governor vetoed \$80 million in child welfare funding for vulnerable children and families. But because of the protection afforded to foster youth and adopted children under the federal foster care benefits program, a federal court reversed a similar attempt to cut group home rates.² This legal victory was possible because the federal law govern-

¹42 U.S.C. §§ 670 et seq.; see Casey Family Programs, Ensuring Safe, Nurturing and Permanent Families for Children: The Need for Federal Finance Reform (2010), <http://bit.ly/gOgMR9>; Mark E. Courtney, Chapin Hall and the School of Social Service Administration, University of Chicago, An Indexed, Formula-Based Entitlement to Child Welfare Funding (unpublished paper in Angie Schwartz's files).

²*California Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017, 1018 (9th Cir. 2009); see California Department of Social Services, *California Alliance of Child and Family Services v. John Wagner et al. Scope of Preliminary Injunction* (All-County Letter No. 09-85, Dec. 28, 2009), <http://bit.ly/gRT11K>.

ing foster care maintenance payments and adoption assistance benefits (codified under Title IV-E of the Social Security Act) is an “entitlement” program that provides a safety net for vulnerable children and their families, particularly as states and counties look for ways to reduce costs. That such legal victories would be unlikely under a capped system, combined with the lack of rigorous evaluation to support “capped allocation” proponents’ claims, raises concerns about the wisdom of a policy to curtail the IV-E entitlement.

While we do not take issue with states’ need for more resources to prevent the entry of children into foster care and to offer better support to children who have achieved permanence, we argue that experience with other safety-net programs shows that the capped allocation strategy undermines the programs’ long-term health and harms program recipients by limiting the availability of benefits and services. We cannot afford to duplicate these outcomes in the child welfare system. Here we offer an overview of the current child welfare financing system, an explanation and response to its shortcomings, and a legal analysis of the importance of maintaining Title IV-E as an entitlement.

The Current Child Welfare Financing System

A number of federal, state, and local sources fund the child welfare system, some through an *uncapped entitlement* while other funds are drawn from *capped* programs. With uncapped entitlement programs, every individual who meets the eligibility criteria has a legal claim to the benefit. In capped programs the federal government gives states a set amount of funding, regardless of how many individuals meet eligibility requirements.

The major source of *uncapped* funding for child welfare—48 percent—is Title IV-E of the Social Security Act, which provides funding for youths in foster care placements, adoptive placements, or guardianships.³ Other funds come primarily through capped programs. Of these, Title IV-B, which state governments use for prevention and family preservation work, is the only other source of funding that must be spent exclusively for child welfare services. Title IV-B “is a very attractive source of funds because it does not have the eligibility requirements of Title IV-E and because the state match is only 25%.”⁴ However, this flexibility comes with a built-in limitation, given that the annual appropriation is quite small. Indeed, “Title IV-B accounted for only 5% of child welfare spending in 2006.”⁵ We need to understand Title IV-B because it typifies the capped allocation approach that some would like to see expanded to encompass all foster care assistance.

Most of the remaining funding for child welfare services comes from Medicaid and two other block grant programs—the social services block grant and Temporary Assistance for Needy Families (TANF). These three accounted for 44 percent of federal child welfare spending in 2006.⁶ Notably, while TANF and the social services block grant are intended to serve needy children in a broad sense, neither was originally intended to serve youths in the child welfare system. And, as with Title IV-B, both TANF and social services block grant funding comes through a capped allocation. As a result, there is an inherent conflict between competing constituencies who rely on the funds for critical services and supports.

³Kerry DeVooght et al., *Child Trends, Federal, State, and Local Spending to Address Child Abuse and Neglect in SFY 2006*, at 8 (Dec. 2008), <http://bit.ly/f8mq4U>; Kasia O’Neill Murray, *The Child Welfare Financing Structure* (Aug. 2, 2004), <http://bit.ly/hoveKW>.

⁴Susan Vivian Mangold & Catherine Cerulli, *Follow the Money: Federal, State and Local Funding Strategies for Child Welfare Services and the Impact of Local Levies on Adoptions in Ohio*, 38 *CAPITAL UNIVERSITY LAW REVIEW* 349, 370 (2009).

⁵*Id.*; see also DeVooght et al., *supra* note 3.

⁶DeVooght et al., *supra* note 3, at 8.

Criticisms of the Child Welfare Financing System

The two major criticisms of the current system for financing child welfare are that funding is insufficient for preventative or reunification programs and that the only source that provides funding at adequate levels—Title IV-E—may not be used for children who are not in foster care. Some claim that these two overarching issues lead to other problems, such as stifling state innovation, creating an incentive for states to place children in foster care rather than serving them in their own homes, and placing enormous administrative burdens on states as they spend time accounting for federal dollars rather than meeting children’s needs. We take up these criticisms below.

Stifling State Innovation. Critics claim that the need to comply with federal Title IV-E requirements causes courts and child welfare agencies to spend their time checking boxes rather than serving children, thus stifling innovation.⁷ Implicit in this view is that Title IV-E requirements have no value and serve no function; in fact these requirements protect children from foster care drift, promote children’s best interests, and hold states accountable for the services they provide.⁸

Perverse Incentives. Critics claim that the current funding structure creates perverse incentives for child welfare officials to remove children from their homes in order to provide services—that the “combination of fixed funding” for prevention and support services but “open-ended”

funding for “out-of-home care creates an incentive for public agencies” to use foster care as the first response rather than offering other services to keep families intact.⁹ As a result, “[s]tates that develop effective programs diverting children from foster care receive minimal federal assistance, whereas those that place children in foster care indefinitely obtain maximum aid.”¹⁰ While this idea of a “perverse incentive” seems compelling, the facts simply do not support the claim. First, Title IV-E funding is available to promote permanence since Title IV-E is the source of funding for youths who have been adopted or who enter guardianships. Second, Title IV-E represents only half of child welfare funding; the other half comes from more flexible prevention sources. And, third, the claim of a “perverse incentive” ignores the role of social workers and the judges; the claim presumes that social workers recommend removing a child from home based on the availability of funding and that courts rubber-stamp these recommendations rather than evaluating whether removal promotes the child’s best interest.

Administrative Burden. Arguing that the system places an enormous administrative burden on states, critics contend that “each of the various funding streams has its own allocation provisions, matching rates, cost-allocation rules, and reporting and other requirements. Successfully claiming IV-E reimbursement for all eligible expenditures, as well as accessing other federal funds available for child welfare services, requires substantial administrative effort among states.”¹¹

⁷Casey Family Programs, *supra* note 1, at 8; Vivek S. Sakaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?* 41 UNIVERSITY OF MICHIGAN JOURNAL OF LAW REFORM 281, 293–94 (2007) (“State court judges, cognizant that their decisions may jeopardize federal funding, spend their limited time during court hearings carefully crafting orders, using designated words ... in an effort to ensure that federal mandates have not been violated—as opposed to focusing on the individual needs of the children before them.”).

⁸MaryLee Allen & Mary Bissell, *Safety and Stability for Foster Children: The Policy Context*, 14 THE FUTURE OF CHILDREN: CHILDREN, FAMILIES AND FOSTER CARE 49, 50 (2004), <http://bit.ly/essgxn>.

⁹Kay P. Kindred, *Of Child Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WILLIAM AND MARY JOURNAL OF WOMEN AND THE LAW 413, 451 (Spring 2003).

¹⁰Sakaran, *supra* note 7, at 300–301; see also Casey Family Programs, *supra* note 1, at 7 (“This funding structure creates a financial disincentive to improve outcomes—in effect, punishing jurisdictions financially for doing the right thing for children.”).

¹¹Murray, *supra* note 3, at 6.

If the administrative burden to establish eligibility for Title IV-E benefits is too onerous, the answer is to ease the burden, not to do away with Title IV-E. One obvious solution is to eliminate the look-back rule that requires states to determine whether a youth would have been eligible for AFDC in order to establish the youth's eligibility for federal foster care benefits. This reform alone would make many more children qualify for federal benefits and greatly ease states' administrative burden without disrupting the entitlement.

Why Focus on Title IV-E?

Each of these criticisms of the child welfare system is aimed primarily at the Title IV-E program. Critics of the child welfare financing system tend not to focus on the shortcomings of the remaining child welfare funding programs, in part because Title IV-E, though only half the total, is the largest single source of funds. However, the other reason that critics largely spare the remaining programs is that these programs have already been "reformed" by trading an open-ended entitlement for a capped annual allocation that can be spent more flexibly. That is, these programs already include the key feature that critics feel Title IV-E lacks: flexibility with regard to how funds are spent. Critics focus less attention on the steady decrease in the number of individuals served under these "flexible" capped programs since their "reform."

In the current conversation about child welfare financing reform, the considerable reduction in funding from sources that until block granting were quite robust and that supported care of children in their own homes garners little attention.¹² We suggest that the block granting of many former entitlement programs is

central to many of the problems with our current child welfare financing system. As each former entitlement program was capped, states gained flexibility at the expense of reduced funding and an increasing pool of needy individuals competing for the funding. This trade-off was significant because many of the former entitlement programs, such as AFDC, "served to complement child welfare and protection services. The AFDC program provided a foundation of economic support to poor families that was available whether parents worked or not. That support can often be critical in keeping families together."¹³ In the new era of block grants, when states make the fiscal choice to spend more flexibly funds that were previously earmarked for a certain group of individuals, they do so by "trading off other necessary services such as mental health, juvenile justice, and health care for child welfare services."¹⁴

"Flexible Funding" Waivers' Negative and Unintended Consequences

Many states are experimenting with child welfare financing reform through the use of waivers, just as they experimented with AFDC waivers before that program was abolished. Child welfare waivers were "conceived as a strategy for generating new knowledge about innovative and effective child welfare practices, [and they] grant States flexibility in the use of Federal funds for alternative services and supports that promote safety and permanency for children in the child protection and foster care systems."¹⁵ With waivers, states may spend federal Title IV-E funds for services other than maintenance payments. Nineteen states have implemented twenty-seven child welfare waiver demonstrations since 1996.¹⁶

¹²The real value of block grant funding tends to diminish over time. A study of five Reagan block grants ... found that the real value of four of them decreased from 1986 to 1995, despite a 66 percent increase in total federal grants to state and local governments during this period. A more recent analysis of 11 block grants found that from their establishment to the present, real federal funding fell by an average of 11 percent" (Kenneth Finegold et al., Urban Institute, Block Grants: Historical Overview and Lessons Learned 4 (April 2004), <http://bit.ly/hWJarf>).

¹³Kindred, *supra* note 9, at 473.

¹⁴Mangold & Cerulli, *supra* note 4, at 352.

¹⁵Administration for Children and Families, U.S. Department of Health and Human Services, History and Legislative Context for Waivers (last updated April 21, 2010), <http://1.usa.gov/i9Jglx>.

¹⁶*Id.*

Although states have used waivers to implement discrete reforms, the “flexible funding” waivers that Indiana, North Carolina, Ohio, Oregon, Florida, and California are implementing cause particular concern. These waivers operate as an adapted block grant, giving states or participating counties a capped allocation of federal funding that they can use flexibly to serve youths in and outside foster care. The theory is that, by reducing caseloads through innovative services, states save money on foster care funding and they can then reinvest the savings in other child welfare practices.¹⁷

California is in the third year of one such waiver, the Title IV-E Waiver Capped Allocation Project. California’s experience shows the issues that arise when open-ended funding is sacrificed for increased flexibility. The concerns fall into two categories: access to benefits for children in foster care and fiscal and programmatic accountability.

A policy that creates a strong financial incentive to limit benefits and services may have unintended adverse consequences. The interim evaluation of California’s Capped Allocation Project pointed to this incentive in noting that, in order to be fiscally viable, counties must “lower the number of youth entering their system, reduce the length of time youth had in contact with the system and reduce a per-case cost of operating the system.”¹⁸ The two California counties (Alameda and Los Angeles) operating capped allocations projects have documented cases where youths have difficulty accessing benefits due to, for example, (1) inappropriate diversion of relative caregivers from foster care to probate guardianship, (2) unfunded and underfunded relative

foster care placements, (3) inappropriate diversions of nonrelative caregivers away from probate court guardianships, which in California are funded by foster care payments, (4) changes in foster care placement from residential placement to lower-level placements without needed supportive services, (5) failure to maximize foster care benefits for older youths, and (6) early family reunification without necessary supportive services. Each of these circumstances has serious implications. Advocates of capped allocation argue that these cases result from bad social work practice, not a systemwide financial incentive to reduce expenditures. Whether this is correct cannot be determined due to the second troubling aspect of capped allocation in California: lack of accountability.

The evaluation of California’s capped allocation project focuses on child welfare system changes in the two demonstration counties but does not compare outcomes for children and youths in these two counties with comparable counties. Thus the evaluation cannot give conclusive information about the effects of capped allocation: “it does not allow for statements of causality. As such, changes observed in the participating counties and in outcomes for children and families cannot be directly attributed to the [Capped Allocation Project].”¹⁹ This lack of explanatory power is troubling in that it offers policymakers no way to understand the effect of this policy. For example, Los Angeles County’s caseload has decreased by 18 percent since the start of the project.²⁰ Advocates of capped allocation are quick to attribute this reduction to the project. However, undermining this claim, the interim evaluation itself notes that in Los Angeles County the

¹⁷Recent policy developments demonstrate the inherent risk of a capped allocation and highlight how a capped program can stifle innovation. The federal Fostering Connections to Success Act gives states the option of extending federal foster care benefits to children up to age 21. States or counties that operate under a capped allocation have a disincentive to take advantage of this new federal option because they would have to serve more foster children but would not receive additional funds to do so. Indeed, California’s recent legislation implementing the federal law specifies that the California Department of Social Services will attempt to negotiate with the U.S. Department of Health and Human Services to allow counties participating in the capped allocation to be reimbursed outside their capped allocations for youths who are entitled to extended foster care benefits (see CAL. WELF. & INST. CODE § 11403(h) (Deering 2011)).

¹⁸CHARLIE FERGUSON & LAUREL DUCHOWNY, STATE OF CALIFORNIA TITLE IV-E CHILD WELFARE WAIVER DEMONSTRATION CAPPED ALLOCATION PROJECT (CAP): INTERIM EVALUATION REPORT 2 (2010), <http://1.usa.gov/eiNEUG>.

¹⁹*Id.*

²⁰*Id.* at 129.

largest caseload reduction occurred between 2003 and the beginning of capped allocation in 2007.²¹ Moreover, other parts of California have had caseload reduction similar to that in Los Angeles and Alameda Counties, as has the nation as a whole.²² These statistics cast doubt on whether the caseload reduction is attributable to changes inherent in the capped allocation policy itself.

Equally troubling, California's evaluation of capped allocation fails to collect or measure any activity outside the formal child welfare system. Without this information, we cannot know the cause of seemingly positive outcomes such as caseload reductions. Are they due to a reduction in child maltreatment or to practice changes that limit access to foster care? Without measuring both the activities within the child welfare system and the experiences of the child population in general, we cannot make an informed decision about the wisdom of capped allocation and other child welfare finance reform policy experiments. Even so, this lack of conclusive evidence has not prevented advocates of capped allocation from declaring victory. Under way is an ideological campaign in which the virtues of "flexibility" and "innovation" are lauded with little evidence to support wholesale change in the state or federal child welfare financing strategy.

Vulnerable Youths Protected by Entitlement Funding Through Title IV-E

Another potential downside of increased flexibility is the deterioration in the ability to enforce a youth's entitlement to a certain level of benefits and services. Entitlement programs assure beneficiaries a level of legal protection that capped allocation programs do not, and cannot, provide. Indeed, the "flexibility" sought by proponents of capped allocations comes from waiving many of the require-

ments that states must currently follow and the protections for recipients that accompany these requirements. While there may still be a right to the service or benefit under state law, without the ability to hold a state accountable under the federal statute children are left at the mercy of the state and may lose access to critical services as the fiscal and political landscape shifts.

Entitlement programs such as Title IV-E protect children best against attempts to reduce benefits or services because entitlement programs are more likely to give an individual a "private right of action" to enforce the provision of federal law. Not every federal statute confers such a private right; rather, private citizens have the right to sue in federal court only when they are deprived of a right, privilege, or immunity guaranteed by the Constitution or by a federal law.²³ Because an individual must show a violation of a "federal right," and not merely a violation of law, the plaintiff has the burden to prove that a federal right existed and was then violated.²⁴ To determine whether a statute confers a "federal right," courts look to whether the provision (1) is intended to benefit the putative plaintiff; (2) creates a binding obligation on the governmental unit, rather than merely expressing a congressional preference for a course of action; and (3) is not so vague or amorphous as to be beyond the competence of the courts to enforce.²⁵

If a private right of action exists, an individual can enforce in federal court the individual's right to the protection or benefit that the statute offers. This ability has proven to be essential in many cases enforcing sections of Title IV-E on behalf of vulnerable youths. For example, in *ASW v. Oregon*, plaintiffs challenged Oregon's attempt to reduce adoption assistance payments by 7.5 percent across the board, with no individualized assessment of need or opportunity for an

²¹*Id.*

²²Barbara Needell et al., *Child Welfare Services Reports for California* (2011).

²³42 U.S.C. § 1983.

²⁴See *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

²⁵*Wilder v. Virginia Hospital Association*, 496 U.S. 498, 509 (1990).

administrative hearing.²⁶ The plaintiffs brought a class action asserting that the federal statute contained a right to have the amount of adoption assistance based on individualized assessments.²⁷ The Ninth Circuit found that the statute establishing adoption assistance rates evinced “a clear intent to create a federal right” because the rates “are unambiguously framed in terms of the specific individuals benefitted and contain explicit duty creating language.”²⁸ Because the Ninth Circuit agreed that adopted youths had a private right of action to enforce the statute, the court enjoined the state from reducing benefits until the adoptive parents had the opportunity to present facts concerning their child’s particular need.²⁹

More recently, two California cases gave foster children the right to enforce the Title IV-E section that governs the amount of foster care maintenance payments to which they are entitled. In the first case, group home providers challenged the foster care maintenance payment for youths in group homes.³⁰ Title IV-E requires states to grant payment sufficient to cover the cost of (and the cost of providing)

food, clothing, shelter, daily supervision, school supplies, a child’s personal incidentals, liability insurance with respect to a child, reasonable travel to the child’s home for visitation, and reasonable travel for the child

to remain in the school in which the child is enrolled at the time of placement. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.³¹

In analyzing whether this provision of federal law confers a private right of action, the district court held that the law was “explicit and detailed” with regard to how the amount of the foster care payments should be calculated and imposed an “absolute duty on the State to make foster care maintenance payments.”³² As a result, the court held that the statute “confers an individual right on plaintiff’s members for enforcement of the foster care maintenance payments.”³³

Despite finding that group home providers had a private right of action to challenge the payment rates, the district court held that the amount, which the parties agreed covered only 80 percent of the cost of care, was in “substantial compliance” with federal law.³⁴ The Ninth Circuit reversed the district court and held that “the natural meaning of ‘cover the cost’ is to pay in full, not in part.”³⁵ The court enjoined the state from implementing the California 2009 budget’s 10 percent cut in group home rates.³⁶ Following the

²⁶*ASW v. Oregon* 424 F.3d 970, 975–76 (9th Cir. 2005).

²⁷*Id.* at 973.

²⁸*Id.* at 975–76.

²⁹*Id.* at 979.

³⁰*California Alliance of Child and Family Services v. Allenby*, 589 F.3d 1017, 1018 (9th Cir. 2009).

³¹42 U.S.C. § 675(4)(a).

³²*California Alliance of Child and Family Services v. Allenby*, 459 F. Supp. 919, 925 (N.D. Cal. 2006).

³³*Id.*

³⁴*Allenby*, 589 F.3d at 1020 (discussing district court’s decision granting motion for summary judgment).

³⁵*Id.* at 1018.

³⁶The state interpreted the court’s injunction to apply only to federally eligible children and attempted to implement the cut for nonfederally eligible children (see California Department of Social Services, *California Alliance of Child and Family Services v. John Wagner et al. Preliminary Injunction Prohibiting Reductions to Group Home Rates* (All-County Letter No. 09-76, Nov. 25, 2009), <http://1.usa.gov/eWq3VO>). The district court amended its injunction to prohibit rate reductions for all children since a reduction for nonfederally eligible children would dilute funding to federally eligible children (see California Department of Social Services, *supra* note 2). This legal maneuvering underscores that, without the federal entitlement, youths in these placements are at risk of severe budget cuts with little or no recourse.

injunction, the district court ordered the state to increase group home rates to reflect the cumulative California Necessities Index increases from 1990 through 2010, resulting in a substantial increase in funding for children placed in group homes.³⁷

In a similar case, in which California foster parents challenged the rates paid to youths placed in foster family homes, the court found that these youths had an “even stronger case on the merits” than youths in group homes because “the State failed to provide evidence that the payments to individual foster care providers were ever based on the [federal statute’s] itemized list of costs, and that Foster Parents had provided uncontroverted evidence that their rates had ‘fallen further out of line with the cost of providing the enumerated items than had the institutional rates’ addressed in [the group home case].”³⁸ The state appealed, claiming that foster parents had no remedy to enforce their right to an adequate payment and thus whether the rates paid were sufficient to cover the costs of care was irrelevant.³⁹ The Ninth Circuit upheld the district court’s earlier finding that the federal statute conferred a private right of action; the Ninth Circuit allowed the decision on the merits to stand.

These three decisions highlight the importance of entitlement programs in protecting the benefits on which youths rely to maintain stable placements and access critical supports. In stark contrast, youths who receive benefits under a capped program *lack* the ability to enforce their claim to benefits, which can reach only a limited number of individuals, regardless of need. However, the inability to enforce a provision of the program has real-life consequences. Consider the example of a former foster

youth who needs financial assistance to pursue education but has no ability to enforce such a right. He might apply for funds under the John H. Chafee Foster Care Independence Program, which is funded under the capped allocation of Title IV-B. If he is close to the front of the line, he could receive a grant, but if the funding is depleted for that fiscal year or Congress reduced the appropriation, this youth will have to go without.

Another example is the inability of recipients of welfare benefits under the TANF program to enforce a right to a certain level of benefits or services. Congress, when it replaced the former AFDC program with TANF, eliminated an individual’s entitlement to specific benefits or services. States may now set any benefit level or even refuse to provide cash assistance at all and opt instead to use the funds for job training or employment-related services.⁴⁰ Because states have nearly complete discretion in the use of TANF funds, an individual has no right to a particular benefit or service under the federal statute. While one may still have the ability to enforce one’s rights under state law, as *ASW* and the two California foster rate cases make clear, without a federal statutory entitlement to a certain level of benefits and services, state legislatures can place the rights of children and families below the state’s budgetary interests.

With the elimination of entitlement programs individuals lose the ability to enforce a right to benefits and services under federal law. Accompanying the replacement of entitlement with “flexible funding,” the devolution of authority to the states also reduces the accountability of states and local agencies. In the wake of “welfare reform” came welfare programs with “little uniformity, with welfare workers playing a significant role in their

³⁷See California Department of Social Services, *California Alliance of Child and Family Services v. Cliff Allenby et al. Aid to Families with Dependent Children—Foster Care (AFDC-FC) California Necessities Index Increase in Group Home Rates* (All-County Letter No. 10-38, July 20, 2010), <http://1.usa.gov/dVePPL>.

³⁸*California State Foster Parent Association v. Wagner*, 2010 WL 3385532 (9th Cir. 2010).

³⁹*Id.*

⁴⁰42 U.S.C. § 601(a) (states have the discretion to use their grants for any activity reasonably designed to achieve the Social Security Act’s purposes).

clients' lives."⁴¹ While heightened case management has benefits, this level of individual discretion among caseworkers also raises concerns. For example, there is a heightened risk "of racial bias and discrimination" in decisions made by individual caseworkers and "[w]ith fewer federal guidelines to standardize these decisions and fewer avenues for legal redress ... poor people have fewer ways to challenge such discrimination."⁴² Further, "with increasing discretion and an absence of rules, the effectiveness of individual hearings and lawsuits to challenge unfettered discretion decreases."⁴³ An entitlement program, which imposes a system of checks and balances by defining eligibility criteria and the level of benefits and services while permitting the agency to make individualized decisions that do not arbitrarily deprive individual of those benefits or services, is one antidote to this sort of arbitrary action.

A More Sensible Child Welfare Financing Reform Proposal

The financing structure for the child welfare system should ensure sufficient resources to serve the needs of children both in and out of foster care. Further, the system should recognize that when a child is removed from the child's home, we owe a special obligation to that child and must put in place a dedicated source of funding ensuring a sufficient level of benefits and services and that the system will be held accountable if it fails to provide those supports. At present, the child

welfare financing system allocates adequate federal funding for youths in foster care, adoptions, and subsidized guardianships, but the eligibility rules are archaic and in need of reform. However, administrative burdens can be eased without eliminating the entitlement.

In contrast, the funding available for services and supports for children who are kept *out* of foster care is inadequate by any standards; states have to cobble together funding from various sources that are intended to serve a much broader population than children at risk of foster care. If the problem is a lack of resources, the solution is not to replicate a "reform" that has arguably made things worse by capping the funding available to children in foster care. Nor is the solution to force children who are in foster care, adoptions, or guardianships to compete with children who can be served in their own homes for limited funds.

A more sensible child welfare financing reform proposal should focus on Title IV-B, the social services block grant, TANF, or other sources of preventive funds that are available to the child welfare system. Although all of these sources are currently capped, there is little discussion of whether they achieve the goals that promoters of capped allocations envision or whether the funds available through the cap are sufficient to meet the needs of the diverse populations that the programs must serve.

⁴¹Risa E. Kaufman, *Bridging the Federalism Gap: Procedural Due Process and Race Discrimination in a Devolved Welfare System*, 3 HASTINGS RACE AND POVERTY LAW JOURNAL 1, 9 (2005).

⁴²*Id.*

⁴³Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS LAW REVIEW 451, 519 (2005).



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- A nonprofit
- A law school library
- None of the above

What is the size of your organization?

- 100+ staff members
- 51-99 staff members
- 26-50 staff members
- 1-25 staff members
- Not applicable

Please e-mail this form to subscriptions@povertylaw.org.

Or fax this form to Ilze Hirsh at 312.263.3846.

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