Child Welfare: Foster Care and Adoption Assistance Provisions in the Deficit Reduction Act of 2005 (P.L. 109-171)

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Summary

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 into law (P.L. 109-171). As enacted, the Deficit Reduction Act includes two child welfare provisions intended to reduce federal foster care spending under Title IV-E of the Social Security Act. Those provisions, sometimes called the *Rosales* provision and candidates provision, respectively, would 1) clarify individual eligibility for federal foster care and adoption assistance programs (Title IV-E of the Social Security Act); and 2) limit certain kinds of state claims for federal reimbursement of administrative costs under the federal foster care program. The Congressional Budget Office (CBO) estimated that together, these changes will reduce federal spending under the foster care program by $554 million over five years, and by almost $1.3 billion over 10 years.

As enacted, the Deficit Reduction Act also includes several child welfare provisions that will increase federal child welfare spending and make other limited changes to federal child welfare policy. These provisions were added during conference negotiations and were not included in either of the earlier Senate or House versions of the budget reconciliation bill (S. 1932) that passed in November 2005. Those provisions 1) increase the FY2006 mandatory funding authorization under the Promoting Safe and Stable Families program (Title IV-B, Subpart 2 of the Social Security Act) to $345 million (from current $305 million); 2) appropriate $100 million in mandatory funds over five years (FY2006-FY2010) to improve state courts' handling of child welfare proceedings; 3) require court and child welfare agency collaboration; and 4) clarify confidentiality rules with regard to open child welfare court proceedings. CBO estimated that the first two of these provisions will increase federal budget authority for child welfare purposes by $300 million over five years.

As enacted, the Deficit Reduction Act also includes provisions related to federal reimbursement of costs for "targeted case management" (TCM) under the Medicaid program (Title XIX of the Social Security Act). These provisions were included in both the House and Senate reconciliation bills (as they were passed in November 2005), and may limit the ability of state child welfare agencies to use Medicaid TCM for children in foster care. CBO estimated the net federal savings for this change, all of which would be to Medicaid (and not all of which would affect financing of services for children in foster care), at $760 million over five years and $2.1 billion over 10 years.

Finally, as enacted, the Deficit Reduction Act *does not* include House and Senate proposals that would have 1) extended the authority of the U.S. Department of Health and Human Services (HHS) to grant child welfare waivers; 2) amended the Higher Education Act to improve higher education access for youth leaving foster care; and 3) authorized a discretionary student loan forgiveness program available to child welfare workers. This report discusses child welfare provisions in the enacted version of the budget reconciliation bill (P.L. 109-171), and will not be updated.

Contents

Contacts

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 (P.L. 109-171). The bill was cleared for the President's signature earlier that month after the House voted to accept the changes made by the Senate (in December 2005) to a previously agreed-upon conference agreement (H.Rept. 109-362).

A primary purpose of budget reconciliation is to make statutory changes that reduce direct (or mandatory) spending out of the federal treasury.[1] The largest child welfare programs receive mandatory federal funding, and certain changes to these programs would be made by the Deficit Reduction Act of 2005. Some of these were initially provided for only in the House version of the reconciliation bill, and some were in neither the initial Senate nor House version of the reconciliation legislation (S. 1932) as it was passed in November 2005. These were added during the December 2005 conference agreement negotiations.

The federal foster care and adoption assistance programs are open-ended entitlement programs. This means that the statutory language (contained in Title IV-E of the Social Security Act) commits the federal government to reimbursing states for every eligible claim submitted on behalf of an eligible child receiving foster care maintenance payments or an adoption assistance subsidy. Because of the open-ended nature of this mandatory spending, any statutory changes that redefine who is eligible to receive foster care or adoption assistance—or what kind of costs a state may submit as eligible for reimbursement—should have a direct effect on the level of federal spending in the program. In FY2004 (the most recent data available), federal spending on the foster care and adoption assistance programs combined was approximately $6.1 billion.

The federal Promoting Safe and Stable Families program (Title IV-B, Subpart 2 of the Social Security Act) provides capped mandatory funds (and also authorizes discretionary funds) for states to offer services aimed at maintaining or reuniting families and promoting and supporting adoption. A set-aside from the program's funding is used for grants intended to help state courts assess and improve their handling of child welfare proceedings. For FY2005, mandatory funding of $305 million for the Safe and Stable program was increased by discretionary funding of $98.6 million, for total program funding of $404 million.

The *Rosales* Provision or Clarifying Eligibility for Federal Foster Care and Adoption Assistance

As proposed by the President in his FY2006 budget request and included in the House reconciliation bill (H.R. 4241)[2], the Deficit Reduction Act of 2005 (P.L. 109-171), as enacted, rewrites the eligibility provisions for federal foster care under Title IV-E of the Social Security Act; it also made related changes to the adoption assistance eligibility provisions (also contained in Title IV-E). This change is sometimes called the *Rosales* provision because, as intended, it makes moot a 9th Circuit U.S. Court of Appeals decision, *Rosales v. Thompson* (321 F. 3d. 835). The Congressional Budget Office (CBO) estimates that this provision will reduce federal outlays

[1] For more information on the budget reconciliation process, see CRS Report RL33132, *Budget Reconciliation Legislation in 2005-2006 Under the FY2006 Budget Resolution*, by (name redacted).

[2] Throughout this report the version of the reconciliation bill as it passed the House on November 18, 2005 is referred to as H.R. 4241. This is done as an easy way to distinguish that bill from the budget reconciliation legislation that passed the Senate on November 3, 2005 and was number S. 1932. Technically, however, as part of preparing for the conference on these bills, the House adopted the provisions of H.R. 4241 in their own version of S. 1932 and thus the conference report refers to an agreement on differing versions of S. 1932.

to the foster care program by $380 million over five years (FY2006-FY2010) and $863 million over 10 years (FY2006-FY2015).[3]

The Senate did not include the *Rosales* provision in the reconciliation legislation it approved in early November. However, after an effort on the Senate floor by Senator Conrad to strike this language from the final conference agreement failed, the provision remained in the conference agreement approved in both chambers, and was enacted in P.L. 109-171.[4]

Explanation of the Change

This provision of P.L. 109-171 restates eligibility for federal foster care in a manner intended to clarify the longstanding interpretation of those provisions by the U.S. Department of Health and Human Services (HHS), and thus to effectively overturn a 2003 court decision that disagreed with that interpretation. Changes to the adoption assistance eligibility criteria were made to conform with those foster care changes and to somewhat simplify the eligibility test. As included in the enacted legislation, the change does not prohibit payment of foster care maintenance payments to foster children living with grandparents. However, it may make it less likely that children who lived with a non-parent relative before they were formally brought into foster care (and who are in one of the 9th Circuit states), will be eligible for federal foster care assistance.

Eligibility for Title IV-E foster care and adoption assistance is multifaceted but, with limited exceptions for adoption assistance, includes a link to the income, deprivation, and resources tests as they were included in a state's Aid to Families with Dependent Children (AFDC) program, as that program existed on July 16, 1996. (Congress repealed the AFDC program as part of the 1996 welfare reform legislation that became P.L. 104-193.) HHS has historically maintained that the AFDC income, deprivation, and resource tests must determine whether or not a foster child was or would have been considered needy if that child had still been living in the home from which he or she was removed for safety reasons (generally the home of the biological parent(s)). However, this HHS interpretation of how to apply the AFDC eligibility tests was challenged in California, and in March 2003, the 9th Circuit Court of Appeals (*Rosales v. Thompson,* 321 F. 3d. 835) ruled against HHS. The 9th Circuit court interpreted the law to permit, in some instances, a state to determine whether a foster child would have met the AFDC tests while living in the home of a relative instead of in the home of the parent (e.g., a grandmother or aunt who informally cared for the child because the parents were unfit or unwilling).

Under AFDC program rules, a child living with a non-parent relative is virtually always considered needy because the AFDC income, resource and other tests are applied only to the child. This means that whether the non-parent relative is very wealthy or very poor is not a

[3] Outlays measure the amount of money the federal government is expected to pay out in the given year(s)—whether the obligation to make the payment was incurred in the current or a previous fiscal year. The CBO may also estimate budget authority—or the amount of money the law authorizes to be spent on a given program in the current or a future fiscal year. The CBO budget authority savings estimate for this provision is $410 million over five years and $895 million over 10 years.

[4] *Congressional Record,* December 21, 2005, p. S140202-S140206. Senator Conrad sought to use a provision of the Congressional Budget Act, commonly called the "Bryd Rule," which allows a Senator to use a "point of order" to seek to remove any "extraneous provisions" in a reconciliation bill. Such extraneous provisions may include those that produce a change in federal spending that is "merely incidental" to non-budgetary aspects of the provision. In this particular case, the Senate parliamentarian apparently found that the budgetary impact of the *Rosales* provision was more than "merely incidental" to the legislative change. See Congressional Budget Act, Section 313(b)(1)(D).

consideration in determining a child's eligibility for federal foster care assistance; only the child's personal income is considered. Therefore, this reading of the law permits expanded eligibility for federal (Title IV-E) foster care assistance if a child lived with a non-parent relative before being formally placed in foster care (provided the child lives in a 9th Circuit state).[5]

HHS chose not to appeal the decision of the 9th Circuit. Instead, it notified the nine states in the 9th Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) that they should amend their Title IV-E state plans to follow the eligibility logic of the *Rosales* decision. At the same time, HHS notified all other states that they must continue to determine Title IV-E foster care eligibility based on the traditional HHS reading of the law. Finally, the Department sought a statutory change to bolster its longstanding interpretation of Title IV-E (foster care and adoption assistance) eligibility rules, and to restore their uniform application in all states.

Effect of Provision

All states in the 9th Circuit have amended their state Title IV-E plans to provide for expanded Title IV-E foster care eligibility (as permitted by the *Rosales* decision). Enactment of the statutory eligibility clarifications in the Deficit Reduction Act, however, means that states will have to redo those plans again, because children entering foster care in the 9th Circuit states are again required to meet the eligibility criteria currently used in all states outside the 9th Circuit.[6] In June 2006, HHS issued an Information Memorandum that permits 9th Circuit states to continue to make Title IV-E foster claims for children who were federally eligible *solely* because of the *Rosales* definition of eligibility *only until the annual re-determination of that child's Title IV-E foster care eligibility*. In addition, those states may no longer apply the *Rosales* eligibility criteria for children entering foster care. Instead, all children must now qualify under the more narrow eligibility criteria.[7] Accordingly, states in the 9th Circuit may see a decline in the share of children in their caseloads for whom they may receive federal reimbursement for foster care costs. These states would then need to support a larger share of foster care children using state dollars only (or possibly some other capped source of federal funding such as the Temporary Assistance to Needy Families—or TANF—block grant). The exact effect of this provision in each of the 9th Circuit states is unknown.[8]

Finally, the provisions included in the final budget reconciliation bill (P.L. 109-171) restate certain adoption assistance eligibility requirements to conform with the foster care eligibility clarifications, and somewhat simplify the eligibility determination process for adoption

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[5] Subsequently, the U.S. District Court for the Northern District of Georgia, in a ruling that cited the *Rosales* decision (*Harris v. Martin*, 2004 U.S. Dist. LEXIS 17384*)*, held that the HHS interpretation of how the AFDC test should be applied was also too restrictive for determining adoption assistance eligibility.

[6] See U.S. Department of Health and Human Services, Administration for Children and Families, ACYF-PI-06-06, "Deficit Reduction Act - State Plan Amendments," August 23, 2006 http://www.acf.dhhs.gov/programs/cb/laws_policies/policy/pi/pi0606.htm

[7] U.S. Department of Health and Human Services, Administration for Children and Families, ACYF-IM-06-02 "Deficit Reduction Act, Rosales ..." June 9, 2006 http://www.acf.dhhs.gov/programs/cb/laws_policies/policy/im/im0602.htm.

[8] California is the only state where retroactive claims under this decision were permitted. The state submitted additional *Rosales*-related claims for 1998-2003 that totaled $9.7 million in federal expenditures. Other than these retroactive claims, additional claims made eligible under the *Rosales* decision are not reported separately by the affected states. For a discussion of estimated effects of the *Rosales* provision on states in the 9th Circuit request CRS Congressional Distribution Memorandum, "Estimated Effect of the *Rosales* Provision, by State," by (name redacted).

assistance. Prior policy provided that, in cases where adoption assistance eligibility rests in some part on AFDC eligibility, the AFDC eligibility criteria must have been met at two points: 1) when the child was removed from his or her home and placed in foster care, and 2) when adoption proceedings were initiated. P.L. 109-71, as had previously been passed by the House (H.R. 4241), would eliminate the second AFDC test. This change was expected to simplify adoption assistance eligibility determination while having little to no effect on the number of children found eligible.

The "Candidates" Provision or Limiting Eligibility for Federal Matching of Foster Care Administrative Costs

As enacted, the Deficit Reduction Act (P.L. 109-171) will also limit the ability of states to claim federal reimbursement of certain costs related to administering their Title IV-E foster care programs. In January 2005, the Administration published a Notice of Proposed Rulemaking (NPRM) that proposed regulations similar to the statutory changes included in P.L. 109-171.[9] Those statutory changes were included in the House budget reconciliation bill (H.R. 4241), but were not a part of the reconciliation bill that passed the Senate in November.

In sum, this provision puts in statute a definition of "candidate for foster care" that is more narrow than previous HHS policy, and which consequently limits the ability of states to receive federal reimbursement for foster care administrative costs made on behalf of certain children. CBO estimated that these provisions will reduce federal outlays for the Title IV-E foster care program by $174 million over five years (FY2006-FY2010) and $405 million over 10 years (FY2006-FY2015).

Explanation of the Change

Under current law, states are permitted to seek federal reimbursement (a 50% match) for any eligible administrative costs necessary for the "proper and efficient" operation of their foster care programs. Among other things, Title IV-E administrative costs are defined to include payment for time spent by a social worker finding and making a foster care placement, as well as ensuring that the child's placement setting and permanency goal (e.g., reuniting with family or adoption) are reviewed at federally specified intervals, and that other federal case review protections are afforded each child in foster care.

In general, these administrative costs may only be reimbursed if the child on whose behalf the costs are incurred meets the federal Title IV-E eligibility requirements for foster care maintenance payments. Those eligibility requirements include a stipulation that the foster child must be living in a family home or other eligible child care institution that is *licensed* by the state to provide foster care. However, some states previously made Title IV-E *administrative* claims (only) for costs incurred on behalf of children who meet all of the Title IV-E foster care eligibility requirements *except* that they are placed in an *unlicensed* setting. This kind of administrative

[9] U.S. Department of Health and Human Services, Administration for Children and Families, "Administrative Costs for Children in Title IV-E Foster Care," 70 *Federal Register* 4803, January 31, 2005. A number of these proposed changes were originally made by the Administration as part of a "policy announcement" (ACYF-CB-PA-01-02, issued July 3, 2001). After many states objected to the characterization of the changes as a "clarification," arguing that instead they represented a reversal of current policy, the Administration delayed the implementation of the most controversial policies included in that announcement and said that it would use the formal regulatory process to achieve the same end.

claim was specifically permitted by a 1993 memorandum from HHS, which suggests that these children could be considered "candidates" for *Title IV-E* foster care because the possibility existed that they might be moved to an eligible setting.[10] More recently, however, HHS argued that the 1993 memorandum was too broadly interpreted and that parts of it are inconsistent with the statute. Specifically, HHS asserted that a child already placed in foster care may *never* be considered a candidate for foster care.

In the January 2005 NPRM, however, the Administration conceded that a complete prohibition on Title IV-E administrative claims for placement of otherwise eligible foster children in homes of unlicensed relatives might be contrary to the federal law/policy that encourages states to place a foster child with relatives. Further, in recognition of the fact that states cannot be expected to have a ready pool of relatives licensed to provide foster care, HHS proposed to allow continued Title IV-E administrative claims for otherwise eligible children placed in unlicensed *relatives'* homes *but only for the length of time it normally takes the state to license a foster family home*. As enacted, the Deficit Reduction Act of 2005 adopts this language (except that it provides that states may make such claims only for as long as the length of time it normally takes a state to license a home, or up to 12 months—whichever is shorter). Like the NPRM, the statutory language included in P.L. 109-171 also stipulates one additional instance in which a state may continue to make Title IV-E administrative claims (but not Title IV-E maintenance payments) on behalf of an otherwise eligible foster care child placed in an ineligible setting. These administrative claims may be made on behalf of a child placed temporarily in a setting such as a juvenile detention home or certain psychiatric hospitals (ineligible settings under Title IV-E)—but only for one calendar month and only if the child is subsequently moved back to an eligible setting.

Finally, the changes included in P.L. 109-171 restate current Title IV-E administrative claims policy—which permits states to make claims on behalf of children who are not yet in foster care but who are considered at imminent risk of removal from their homes. Such children are now considered by HHS as "true" candidates for foster care, and in need of pre-placement services (required under Title IV-E) to prevent their removal from their homes. However, the new law (as proposed in H.R. 4241 and the NPRM) newly provides that in order to make these Title IV-E administrative claims, the state must redetermine, no less often than every six months, a child's status as a candidate for foster care.[11]

Effect of the Provision

The primary federal savings from this change are expected to come from a state's reduced ability to make administrative claims for children placed in unlicensed relatives' homes. States that previously made such claims on an indefinite basis now need to use state funds to meet these administrative costs, or to license relatives' homes—in which case they will be able to continue to claim federal matching funds for administrative costs and will also be able to claim federal matching funds for their foster care maintenance payments.

[10] The 1993 memorandum is briefly discussed in ACYF-CB-PA-01-02, issued July 3, 2001.

[11] Some states have sought to make Title IV-E administrative claims for a more general population of children who were not yet placed in foster care. However, over the past number of years, HHS has moved to disallow this kind of Title IV-E claim and, in this instance, the Department's view of "true" candidates has prevailed. See, for instance, HHS Departmental Appeals Board, Appellate Division, Decision No. 1899 (November 25, 2003), regarding disallowance of Title IV-E administrative claims made by the Missouri Department of Social Services.

States and some child welfare advocates argue that many relatives do not wish to subject themselves to the governmental intrusion necessary to receive a foster care license. All foster family home licensing requirements are established and maintained by state authorities, and typically include requirements related to the physical and family environment of a home, as well as training requirements. Under current federal child welfare policy, states are required to apply the same licensing standards to both relative and non-relative foster homes. However, they are permitted—but only on a case-by-case basis—to waive a given licensing requirement if doing so will not endanger the child (e.g., a state may waive a requirement that a bedroom be of a certain size or that a foster child have his or her own bedroom).

The exact number of states affected by this new statutory provision is not known; however, the degree of impact is expected to vary widely by state. In a survey of the states conducted by the HHS Administration for Children and Families (ACF), close to half of the states (24) indicated that such a policy would have an annual financial impact ranging from $200,000 at the low end to $79 million at the highest; 15 states indicated there would be little or no financial impact and 2 states were uncertain if there would be any impact. Information was not available from the remaining states. A total of 16 states responded to a survey by the American Public Human Services Association (APHSA). Eight states estimated an annual financial impact of $80,000 to $20 million; two states estimated that the impact could range as high as $21 million to $100 million annually; five reported no anticipated impact, and one reported uncertain impact.[12]

Increase Mandatory Funding for the Promoting Safe and Stable Families Program

The Deficit Reduction Act of 2005 (P.L. 109-171) increased the FY2006 mandatory funding authorization level for the Promoting Safe and Stable Families program to $345 million from the previous level of $305 million. If Congress appropriates the full mandatory funding level for the program now authorized for FY2006, this money, combined with the $89 million in discretionary funds appropriated for the program in FY2006, would bring the program's total FY2006 funding to $434 million.[13] Neither the House nor the Senate version of reconciliation legislation proposed this funding increase.

While the Deficit Reduction Act increased the mandatory funding authorization for FY2006 only, under CBO budget scoring rules this higher level of mandatory funding authority is assumed in future baselines. Thus the five-year cost of this provision totaled $200 million. Further, if Congress chooses to reauthorize the Promoting Safe and Stable program before its FY2006 expiration, mandatory funding of $345 million would be available for the program (in each fiscal year) without scoring additional costs.[14]

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[12] These surveys are cited at 70 *Federal Register*, 4806, January 31, 2005. Also, at the time of the July 2001 policy announcement, which would have made changes similar to those included in H.R. 4241, 14 states submitted a formal objection to HHS, including a legal analysis of the proposed policies. Those states, AZ, CA, IL, IA, KS, LA, MI, MN, MO, OH, SD, VA, WA, and WI, might be among those that expect to experience loss of federal funds if this legislative change were enacted.

[13] P.L. 109-149 appropriated $90 million in discretionary funds for the Safe and Stable program and $305 million in mandatory funds. However, the discretionary amount will be reduced to an estimated $89.1 million by the 1% across-the-board cut in discretionary accounts required by P.L. 109-148. The provisions regarding FY2006 Safe and Stable funding in the Deficit Reduction Act do not change the FY2006 *discretionary* funding available for the program.

[14] For more information on this program and reauthorization issues, see CRS Report RL33354, *The Promoting Safe and* (continued...)

Grants to Strengthen Court Handling of Child Welfare Proceedings

The Deficit Reduction Act also amended the Court Improvement Project (authorized under Section 438 of the Social Security Act) to provide funding for two new grant programs aimed at strengthening the performance of courts on behalf of children who have been abused and neglected. These provisions were not included in the House or Senate version of the reconciliation bill. However, grant programs with similar or related purposes were proposed by the bipartisan Pew Commission on Children in Foster Care in its May 2004 report and in legislation introduced earlier in 2005 (S. 1679 by Senators DeWine and Rockefeller and H.R. 3756 by Representative Schiff). The statutory language appropriates $100 million for these grants, out of which $10 million is available for each of the two new CIP grants in each of FY2006-FY2010.

Purposes of the grants

The Court Improvement Program (CIP) previously allowed state highest courts to receive grants to assess and improve their handling of child welfare proceedings generally. This grant program is authorized through FY2006, and the Deficit Reduction Act (P.L. 109-171) does not extend this authorization.[15] However, under the provisions of P.L. 109-171, for FY2006-FY2010, state highest courts may also choose to apply for separate CIP grants aimed at 1) improving their timely and complete action on behalf of foster children (via improved data collection), and 2) providing training to judges, attorneys, and other legal personnel in child welfare proceedings.

Applications

Under the enacted provisions of the Deficit Reduction Act, state highest courts are required to apply separately for one or more of these grants and need to meet both general and specific application requirements. An application for any of the three grant programs must demonstrate "meaningful and ongoing collaboration" between the courts, the state child welfare agency (or any other agency under contract with the state child welfare agency to administer child welfare programs authorized under the Social Security Act), and Indian tribes (where applicable). Further, as is required for receipt of current CIP funds, in each of the grant applications, a state highest court must supply any additional information or assurances that HHS chooses to require.

Separately, in order to receive funding specifically related to improving timely and complete actions on behalf of children, a state highest court must include a description of how the court and the child welfare agencies on the local and state levels jointly plan for the collection and sharing of all relevant data and information. And, finally, state highest courts seeking training funds under the Court Improvement Program must submit an application demonstrating that at least part of the grant funding would be used for cross-training initiatives jointly planned and carried out with the state child welfare agency, or an agency under contract with the state agency to administer child welfare program(s).

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Stable Families Program: Reauthorization in the 109th Congress, by (name redacted).

[15] However, Congress may choose to reauthorize funding for this grant in this session. For more information, see CRS Report RL33350, *Child Welfare: The Court Improvement Program*, by (name redacted).

Funding and state match

In addition to the Court Improvement Program funding contained in prior law (a set-aside out of regular Promoting Safe and Stable Families funds)[16] the conference agreement to the Deficit Reduction Act provides $100 million in mandatory funds for Court Improvement over five years (FY2006-FY2010). The two new grants would each be funded at $10 million in each of those years. And, has been the case with CIP grants in the past, the state highest court is required to supply at least 25% of the funds used for the purpose of each grant.

Formula and entitlement

Under prior law, each state highest court with an approved application under the CIP grant program was entitled to receive a minimum grant of $85,000 and a portion of any of the remaining set-aside funds that was equal to its state's share of individuals under 21 years of age (compared to all states with an approved application for the grant). The conference agreement to the Deficit Reduction Act maintains this formula for the prior grant and also applies it to each of the new grants under the CIP. Thus, if a state highest court successfully applies for all three grants in FY2006, it would receive three minimum allotments of $85,000 and a share of the remaining funds for each grant program based the size of its population under 21 years of age (relative to all states whose highest court has an approved applications for each of the grants).

Requirement to Demonstrate Collaboration Between Courts and Agencies in Child Welfare Programs

The Deficit Reduction Act of 2005 (P.L. 109-171) requires (as a condition of eligibility for funding under the Child Welfare Services program, Title IV-B, Subpart 1 of the Social Security Act) that a state demonstrate "substantial, ongoing, and meaningful collaboration" with state courts in developing and implementing the state plan for Child Welfare Services, the state plan for the Promoting Safe and Stable Families Program (Title IV-B, Subpart 2 of the Social Security Act), the state Adoption Assistance and Foster Care plan (under Title IV-E of the Social Security Act), and any Program Improvement Plan[17] that may be required. This provision was not initially included in either the House or Senate versions of the reconciliation legislation, but was proposed by the bipartisan Pew Commission on Children in Foster Care in its May 2004 report. Further legislation introduced in 2005 (S. 1679 by Senators DeWine and Rockefeller) sought similar legislative changes.

Use of Child Welfare Records in Court Proceedings

The Deficit Reduction Act also amends the state plan requirements for foster care and adoption assistance (Section 471 in Title IV-E of the Social Security Act) to clarify that required

[16] Current law authorizes, through FY2006, a Court Improvement set-aside of $10 million out of the mandatory Safe and Stable funding plus 3.3% of any discretionary funds appropriated for that program. In FY2005 a little more than $13 million was made available for the Court Improvement Program.

[17] A Program Improvement Plan (PIP) must be developed and implemented by a state if a federal review of that state's child welfare practice (via the Child and Family Services Review, CFSR) indicates that the state is "not in substantial conformity" with all of federal child welfare policy.

confidentiality provisions related to information about the children served do not limit the ability of a state to determine its policies regarding public access to court proceedings on child abuse and neglect or other child welfare related court proceedings (except that the policies must, at a minimum, ensure the safety and well-being of the child, parents, and family). This provision was not included in either the Senate or House version of the reconciliation bill but it is consistent with similar clarifying language added to the Child Abuse Prevention and Treatment Act (CAPTA) in 2003[18] and is substantively identical to language introduced this year in the Senate (S. 1679 by Senators DeWine and Rockefeller).

Targeted Case Management Services under Medicaid

The Deficit Reduction Act of 2005 (P.L. 109-171) includes statutory language (previously included in both the House and Senate versions of the reconciliation bill) that intends to clarify when states may make Medicaid claims related to optional targeted case management (TCM) services. The statutory clarification extends to claims made on behalf of any Medicaid-eligible individual who may also be served by another federal or state program (e.g., juvenile justice, foster care, or special education), but it provides special details regarding unallowable claims on behalf of Medicaid-eligible foster care children. The newly enacted law further provides that HHS must issue formal regulations to implement this clarification. (Neither the House nor Senate version of the reconciliation bill required HHS to issue regulations.)

The Administration called for clarification with regard to TCM claims in its FY2006 Budget request and in legislative language it later sent to Congress for consideration. However, the language included in the P.L. 109-171 is significantly different from that offered by the Administration, and it appears to be less restrictive to state TCM claims. CBO estimated that the changes will shift some costs to the federal foster care program—increasing federal Title IV-E foster care spending by $350 million over five years (FY2006-FY2010) and $940 million over 10 years (FY2006-FY2015). This increased foster care spending would offset savings to the Medicaid program; the net federal savings are consequently estimated at $760 million over the same five years (FY2006-FY2010) and $2.1 billion over 10 years (FY2006-FY2015).[19]

What is Medicaid TCM?

Medicaid (Title XIX of the Social Security Act) is an open-ended entitlement to states. States may seek federal matching payments for medical assistance offered to Medicaid-eligible individuals. Children who are eligible for federal foster care (Title IV-E eligible) are automatically deemed eligible for Medicaid, and most other foster children (non-Title IV-E eligible) are presumed to qualify for Medicaid under other (low-income and/or disability-related) Medicaid eligibility criteria. Further, under Medicaid law, case management is an optional benefit that states may offer Medicaid beneficiaries, and it includes services to assist them in gaining access to needed medical, social, education, and other services. The term "targeted case management," or TCM, refers to situations in which these case management services are not provided statewide to all

[18] The amendment was made by the Keeping Children and Families Safe Act (P.L. 108-36).

[19] The Administration estimated savings to Medicaid of $2.0 billion over five years for its proposal to limit TCM claims. In addition, it estimated savings of $1 billion over five years from a proposed reduction in the federal matching rate for TCM services. (This matching rate reduction was not included in either the House or Senate reconciliation bill and is not in the conference agreement.)

Medicaid beneficiaries, but rather are provided only to specific classes of individuals or "target" groups (e.g., people with AIDS or those with developmental disabilities, children who are abused or neglected, or children in foster care).

For FY2002, across all states the estimated total federal share of TCM expenditures for all targeted groups was $1.3 billion, of which $171.5 million was reimbursed on behalf of costs incurred for 165,265 foster care children.[20] States varied widely in the use of TCM services for children in foster care. Nine states (including the District of Columbia) showed no TCM claims for foster care children in FY2002. Among the states that did submit Medicaid TCM claims for foster care children, the estimated federal share was under $1,000 in two states, more than $1,000 but less then $100,000 in 11 states, and more than $100,000 but less than $1 million in 10 states. Among the remaining 19 states, the federal share of TCM claims for foster care children ranged from $1.1 million in West Virginia to $38.9 million in Texas.[21]

Explanation of Change

The prior law definition of TCM was broadly written, and there have been conflicting policy directives in regard to how TCM claims may be made on behalf of Medicaid-eligible individuals, particularly if an individual might also be able to receive related/same services under another state or federal program. The provisions included in the Deficit Reduction Act were intended to enact policies outlined in a January 19, 2001 letter to state Medicaid directors and which was co-signed by federal Medicaid and Child Welfare administrators. The policy letter, which explicitly addressed only the issue of *Title IV-E* eligible foster care children and allowable TCM claims, has now been written into statute by P.L. 109-171 in a way that would address TCM claims for a variety of populations (including non-Title IV-E eligible foster care children). The provisions, however, continue to give special attention to foster care-related claims generally.

The Deficit Reduction Act (P.L. 109-171) provides a more detailed definition of TCM that includes assessing a person's need for services, developing a care plan, referring individuals to services, and monitoring and followup of service use. It reiterates that TCM services *do not* include reimbursement for any of the underlying services costs (e.g., mental health counseling), and further that in the specific case of foster care, TCM does not include services that are part of the "direct delivery" of foster care. The legislation (like the policy letter it codifies) provides illustrative examples of these foster care services (research gathering and completion of documentation required by the foster care program, assessing adoption placements, recruiting or interviewing potential foster parents, serving legal papers, conducting home investigations, providing transportation, administering foster care subsidies, and making placement arrangements). Additionally, the provisions assert that Medicaid can be billed only for case management or TCM where "there are no other third parties liable to pay for such services, including as reimbursement under a medical, social, education, or other program." Finally, the statutory language in the enacted legislation (P.L. 109-171) stipulates that states may use accepted federal cost allocation methods to ensure costs are appropriately billed to the proper program.

Under the Bush Administration, CMS had backed away from the TCM policies in the January 2001 letter, and increasingly suggested—via denials of state plan amendments seeking to provide

[20] FY2002 Medicaid Statistical Information System (MSIS). The definition of "foster care children" for MSIS includes children in foster care and those receiving adoption assistance.

[21] Ibid.

TCM services to foster care children (or abused and neglected children broadly)—that the kinds of services provided by Medicaid TCM are *integral* to the foster care program and therefore the financial responsibility of the child welfare agency rather then Medicaid.

Effect of this Provision

This provision of the Deficit Reduction Act asserts that states may allocate costs of Medicaid TCM services to children in foster care. This is contrary to current CMS policy (as provided in the *State Medicaid Manual*), which does not allow states to use cost allocation when making claims related to Medicaid *services,* but is in keeping with the January 2001 policy letter on TCM claims for Title IV-E eligible foster care children. In this sense, the newly enacted language seems to clarify conflicting policy statements in a way that supports rather than limits TCM claims for foster care children.

At the same time, the new statutory provision asserts that Medicaid may not be billed for TCM services if there is another party liable for the cost of such services, including as reimbursement under a "medical, social, education, or other program." Exactly how this "third-party liability" language would be implemented—which primarily restates general third-party liability provisions under current Medicaid law—is unclear. In his brief statement regarding a proposed (but failed) amendment to strike the TCM provisions from the budget reconciliation bill that passed the Senate in November 2005, Senator Reed expressed the concern that the language would "force" payment for TCM services by "third parties, States or others," resulting in reduced services and increased costs to states. In response, Senator Grassley said that the legislative proposal simply sought to codify a policy originally proposed by the Clinton Administration.[22] The final bill did not significantly alter the third party liability language included in the earlier House or Senate bills.[23]

The CBO estimate of savings for this provision is based on the assumption that states—with regard to foster care and other programs (e.g., juvenile justice)—have too broadly billed the provision of TCM services to Medicaid. This is in keeping with the Administration's assertion that states have been shifting costs from foster care, and certain criminal justice and education programs to Medicaid. In particular, CBO believes that some states will move some of the claims they previously or currently bill as Medicaid TCM to foster care administrative claims under Title IV-E. However, as CBO also estimates *net* savings to the federal treasury ($760 million over five years ; $1.3 billion over 10 years), it apparently does not believe that all of these claims may be made under Title IV-E. In sum, the effect of this new provision is uncertain, but is believed—as is suggested by net CBO savings—to reduce access to Medicaid TCM claims for a range of populations, including particularly Medicaid-eligible foster care children.

Proposals Not Included in the Final Legislation

Reconciliation legislation, passed initially in the Senate (S. 1932) and the House (H.R. 4241) also included several other provisions relevant to child welfare, and for which no significant budget

[22] See discussion of Amendment No. 2409 in the *Congressional Record*, Nov. 3, 2005, p. S12321.

[23] However, unlike either the House or Senate versions of the reconciliation bill, the conference agreement stipulates that the new language does not affect the prior law application of third party liability with regard to programs or activities of the Indian Health Services Act or those carried out under Title XXVI of the Public Health Services Act.

effect (savings or cost) was estimated or expected. These provisions, which would have extended the authority of HHS to issue waivers of federal child welfare policy through FY2010 (House bill only), authorized a federal student loan forgiveness program for child welfare workers and others (House bill only)," and amended the Higher Education Act in ways intended to encourage greater access to youth aging out of foster care (primarily included in the Senate bill) were not included in the final conference agreement. A brief summary of the deleted provisions follows.

Extend Child Welfare Waiver Authority

The authority of HHS to approve new waivers of some federal child welfare program requirements (included in Title IV-B or Title IV-E of the Social Security Act) expired with March 31, 2006. This is not expected to affect previously approved and/or implemented waivers, but means that HHS is no longer authorized to approve additional waivers. Waivers are intended to allow states to demonstrate innovative programs for the delivery of foster care and other child welfare services. Congress previously temporarily extended this waiver authority numerous times as part of short-term reauthorizations of the Temporary Assistance to Needy Families (TANF) block grant, including most recently in P.L. 109-161 (signed by the President on December 30, 2005). However, while the Deficit Reduction Act reauthorized the basic TANF block grant through FY2010, it did not similarly extend child welfare waiver authority past March 2006.[24]

As initially passed, the House reconciliation bill (H.R. 4241) would have extended (through FY2010) HHS authority to grant child welfare waivers, would have removed the limit on the total number of demonstration programs HHS may approve in any given year (set at 10 by current law) and would have made other changes related to the approval of waiver projects and availability of information about the projects.[25] These provisions were not in the Senate reconciliation legislation nor the conference agreement, and were thus not a part of the Deficit Reduction Act as enacted (P.L. 109-171).

Student Loan Forgiveness for Child Welfare Workers

H.R. 4241 would have authorized the Department of Education to repay up to $5,000 in student loan debt if an individual has worked full-time for five years in one of several "areas of national need"—defined to include child welfare workers.[26] This provision was not in the Senate reconciliation legislation and was not included in the enacted Deficit Reduction Act of 2005.[27]

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[24] These temporary reauthorizations have also been used to continue mandatory funding of the national random sample study of child welfare (Section 429A of the Social Security Act). The study has been implemented by HHS as the National Survey of Child and Adolescent Well-Being (NSCAW). As enacted, the Deficit Reduction Act appropriated funds for the national random sample study of child welfare through FY2010.

[25] The child welfare waiver provisions of H.R. 4241 were identical to those included in H.R. 240, omnibus welfare reform legislation proposed in the House earlier this session and incorporated into H.R. 4241. Earlier this year, the Senate Finance Committee reported welfare reform legislation (S. 667) that would extend through FY2010 HHS authority to grant child welfare waivers but would make no other changes to this waiver authority.

[26] Several other bills introduced in this Congress would provide separate loan forgiveness programs for child welfare workers and/or for attorneys practicing in the field of child and family law. These include H.R. 127, S. 1431, S. 1679, and H.R. 3758.

[27] In late March 2006, the House again passed this same student loan provision as a part of the College Opportunity and Access Act (H.R. 609). That legislation, which would reauthorize the Higher Education Act, is pending in the Senate.

Education-Related Services and Aid for Foster Children and Those Aging Out of Foster Care

Both the House and Senate reconciliation bills (using slightly different language) would have amended the Higher Education Act to clarify that youth in foster care (or formerly in foster care) on his/her 18th birthday are included in the definition of "independent student." (The definition is used for purposes of determining eligibility for federal student financial aid.) This clarifying change was not included in the Deficit Reduction Act as it was finally enacted.[28]

Proposed TRIO Program Amendments

The Higher Education Act authorizes a range of grant programs, collectively called the Federal TRIO programs. These programs are designed to identify potential post-secondary students from disadvantaged backgrounds, to prepare these individuals for post-secondary education, to provide certain support services to them while they are in post-secondary education—and to train individuals who provide these services. Collectively, the programs are authorized to provide a wide range of services, such as tutoring, financial aid, personal or career counseling, mentoring, exposure to cultural activities and educational institutions, academic advising, and financial literacy training. The Senate reconciliation bill would have amended a number of these programs to help ensure that youth in foster care and those leaving the foster care system because of their age (typically the 18th birthday) are served by these programs. These changes were not included in the Deficit Reduction Act as it was finally enacted.

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[28] The House has subsequently re-passed its provision regarding the definition of independent student as a part of the College Opportunity and Access Act (H.R. 609). That legislation, which would reauthorize the Higher Education Act, is pending in the Senate.