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WELFARE REFORM AND THE 1973 NEW MEXICO LEGISLATION

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Welfare reform has become one of those issues so beclouded with rhetoric and catchphrases as to be virtually incapable of rational analysis.[1] Faced with the undeniable burgeoning of both the welfare

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1. Any doubts as to the irrational depths to which debate over welfare reform has fallen are removed by brief perusal of the Senate floor debates over the Nixon welfare reform proposals, H.R. 1. Senator Jordan, in opposing any extension of benefits, quoted from an employment advertisement in a North Carolina newspaper and stated:

> Mr. President, these plants are begging for help. That is an advertisement from just one. Many others have plenty of room for other workers. It is true all over my State. It is certainly true in Washington, D.C. I know that. Just go out and try to hire anyone to do some work around your house.

118 Cong. Rec. S.16829 (daily ed. October 4, 1972) (remarks of Senator Jordan). Senator Jordan clearly articulated one of the dominant rhetorical themes in opposition to extension of welfare benefits: "You can't get any good help these days." See Cong. Rec. S.16831-32 (daily ed. Oct. 4, 1972) (remarks of Senator Stennis). That the rhetoric had become so metaphorical as to seriously impair intelligent and rational debate was evidenced by Senator Chiles' remarks:

> Mr. President, I have been on the floor for about two and a half hours now trying to corner everyone I could corner, the staffs of committees, the staff of the Senator from Illinois, and everyone else I could find, to try to understand what the amendment of the Senator from Illinois does, what the amendment of the Senator from Oklahoma is, and where we stand on this particular bill.
>
> I can tell you, Mr. President, that I do not understand it now. I do not know whether anyone else in here understands it either. But I know that every other Senator who is off the floor does not understand it. What we are talking about and what the Senate thinks is whether we will adopt a pilot plan and, if so, what kind of pilot plan will we adopt.
>
> ....
>
> Mr. President, I will bet that 80 percent of Senators do not understand that, and they do not understand what we are talking about and what you have been talking about, and what I have been trying to listen to. I wonder how many Senators on the floor right now understand it. Your staffs do not. I have been trying to talk to those to try to find out whether they understand it, what we are dealing with here, we are dealing with a major question of reform, but we are dealing with it in the 11th hour of this session, and we are dealing

rolls and costs,[2] it is understandable that welfare advocates and administrators should be concerned. Indeed, there is a remarkable unanimity of criticism of the present welfare system. Virtually the entire spectrum of social attitude has gone on record as opposed to the present system. Unanimity breaks down, unfortunately, when positive suggestions for improvement are offered. Dissatisfaction with the present system—not some common ideology or goal—unites the critics.

It is the purpose of this article to set forth and criticize, against the backdrop of federal and state reforms, the recent changes of certain welfare programs in New Mexico. The article first discusses the history of the federal intervention in and experience with income assistance programs. Then the state experience with the administration of these programs is discussed. In that historical context, the new legislative developments are discussed and criticized.

TRENDS IN WELFARE REFORM

A. The Federal Experience

The business of providing income relief to the poor on any meaningful scale in the United States is of relatively recent origin. From colonial times to the turn of the twentieth century, welfare relief followed the scheme of the "Elizabethan Poor Laws,"[3] which relegated the responsibility for providing relief, if any were to be provided at all, to local and regional governments.[4] Relief programs during this regime were characterized by poor farms and work houses and by heavy reliance on private charity. Strongly influenced by historical and ethical notions favoring self-reliance and the work

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> with it when we are talking and we cannot get anyone on the floor to understand it. . . .
>
> . . . .
>
> Mr. President, this is a heck of a way to do business. This is a heck of a way to say that we are making headway with major reform in welfare. . . .
>
> . . . .
>
> Senators will walk in that door and feel that they are voting either on a motion to table or this pending motion. They are no more going to understand the provisions in that than anything in the world . . . .
>
> . . . .

118 Cong. Rec. S.16857-58 (daily ed. Oct. 4, 1972) (remarks of Senator Chiles).

2. The growth of welfare rolls and costs on the national level has been astronomical. Thus, the rolls have grown from some 3.7 million persons in 1970 to 14.8 million persons in 1972. The concomitant costs rose from $6.5 billion to approximately $18.0 billion. 5 Nat'l J. Rep. 1315 (1973).

3. 43 Eliz. I, c. 2 (1601).

4. *See* Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 Calif. L. Rev. 175 (1955).

ethic, these programs systematically avoided any direct financial relief to the poor–especially the able-bodied poor. It was not incidental or unintended that a system of relief which avoided direct money stipends to the poor, which congregated any poor receiving relief in work farms or work houses, and which provided at best only marginal assistance, served as a potent and efficient device for regulation of the labor market.[5]

It was not until the beginning of this century that the concept of direct financial relief–in terms of money payments to the poor–was given any serious consideration. As a direct result of the 1911 White House Conference On Dependent Children, several states began experimenting with "Mothers' Pension" programs.[6] These programs differed from previous relief programs in two important ways. First, the state government, rather than local or county governments, assumed the responsibility of providing assistance. Second, the form of assistance was direct money payments. Of course, not all indigents were deemed "worthy" of assistance under these new programs. Eligibility was limited to mothers with dependent children. Although most states eventually adopted some type of "Mothers' Pension" program within twenty years of the White House Conference, few funded the program to any meaningful degree.[7] These programs were administered, in the words of Piven and Cloward, "to ensure that as few of the poor as possible received as little as possible from it."[8] Thus, until the time of the Great Depression and the New Deal, relief programs were administered and financed by state and local governments, sporadically maintained, and heavily reliant on private charity, with direct money payments limited to the "worthy" poor. The federal government pointedly disavowed any responsibility in the area.

As with many other areas of social endeavor, the Great Depression and New Deal were a watershed experience in the area of relief to the poor. With as much as twenty-five percent of the workforce unemployed, indigency and destitution came to the middle classes.[9] Critics could no longer associate poverty exclusively with the slothful, dysfunctional, and deviant classes in society. This major social dislocation had two important results on the development of income relief programs. The first was the growing recognition that piecemeal

5. *See* Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 Calif. L. Rev. 511 (1966).
6. *See* W. Bell, Aid to Dependent Children 6 (1965).
7. *See* F. Piven & R. Cloward, Regulating the Poor 47-48 (1971).
8. *Id.* at 37.
9. *See Id.* at 48-57; *cf.* Friedman, *Public Housing and the Poor: An Overview*, 54 Calif. L. Rev. 642 (1966).

state and local responses to indigency were not sufficient to relieve the effects of the Depression. The second result was that a massive program for relief to the indigent was made politically feasible for the first time in the nation's history. The confluence of these factors with the philosophy of social innovation manifested by the New Deal made the time ripe for a major change in the provision of assistance to the poor.

This major change was embodied in the Social Security Act of 1935.[10] In addition to providing the massive "social insurance" program for the aged (which soon came to be called "social security"), the statute created four "categorical assistance" programs which would provide income assistance to certain categories of poor persons: (1) the aged (OAA);[11] (2) the blind (AB);[12] (3) the disabled (AD);[13] and (4) "dependent children" (AFDC).[14] Under the statute, the federal and state governments embarked on a scheme of "cooperative federalism"[15] to provide income relief to these indigents. Under this scheme, the federal government assumed the responsibility for providing a major share of the financing of the income assistance programs. The states would administer the programs, but in consideration for the federal monies received, the states agreed to do so in conformity with broad federal guidelines.

The scheme of "cooperative federalism" created by the Social Security Act became the major theoretical characteristic of income assistance programs for the next thirty-five years. While it was originally anticipated that the categorical assistance programs in the Social Security Act would wither away,[16] these programs, and the underlying poverty which necessitated them, stubbornly persisted. Indeed, the three and one half decades since the inception of the act have witnessed a slow, halting, but irreversible extension and expansion of these programs.

The years between 1940 and 1960 have been characterized as years of stability in the administration of income assistance programs.[17] The theory of cooperative federalism which placed supervisory responsibilities on the federal government in the administration of the programs was neglected in practice. The federal govern-

10. 42 U.S.C. § § 301 et. seq. (1970).
11. 42 U.S.C. § § 301 et. seq. (1970).
12. 42 U.S.C. § § 1201 et. seq. (1970).
13. 42 U.S.C. § § 1351 et. seq. (1970).
14. 42 U.S.C. § § 601 et. seq. (1970).
15. *See* King v. Smith, 392 U.S. 309, 316 (1968).
16. *See* F. Piven & R. Cloward, *supra*, note 7 at 80-117; R. Stevens, Statutory History of the United States: Income Security 10 (1970).
17. *See* F. Piven & R. Cloward, *supra* note 7, at Part II.

ment; during this period, provided little or no supervision or guidance to the state agencies administering the program. Little supervision was found in the state courts, and virtually no supervision came from the federal courts. The result was that the states were as free as they had been prior to 1935 in the administration of these programs. Many states, as a consequence, utilized these programs to advance ends which were extraneous to, and in many instances inconsistent with, the legislative goals of the Social Security Act. Large classes of persons who were eligible for assistance under the federal guidelines were systematically excluded from the welfare rolls by the state and local administrators. Eligibility requirements were tailored at the state and local levels to fit only those persons deemed "worthy" of assistance.[18] Initial and continued eligibility requirements were fashioned and administered in such a manner as to socialize recipients according to the mores of the dominant culture.[19] What occurred in the interim between 1940 and 1960 was not stability in the administration of these programs, but the creation of a wide divergence between the programs as they existed in theory and as they were actually administered by the states.

Thus, the intervention of the federal government into the area of income assistance programs to the poor did not bring about an immediate realization of federal government responsibility in the administration of its programs. The federal government, in the interim years between 1940 and 1960, was content to restrict its participation to financial contributions. No federal philosophy of income maintenance evolved; there appeared to be no comprehensive or cohesive approach to the problems of indigency by the federal government. The only manifest federal interest in these programs during that interim period was a piecemeal extension of the classes of persons eligible for the categorical assistance programs under the Social Security Act.[20] It was not until the early 1960's that the federal government interested itself again in the structure and administration of these programs.

By the beginning of the 1960's both Congress and the public were expressing concern at the rising welfare rolls and what has come to

18. The most restrictive administrative practices were effected in southern states and were directed against Blacks. *See* F. Piven & R. Cloward, *supra* note 7, at 115-17.

19. *See* Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L. J. 1245, 1251-52 (1965).

20. Thus, the original 1935 act created only three categorical assistance programs. The fourth program—Aid to the Permanently and Totally Disabled—was created in 1950. *See* 64 Stat. 555 (1950). Further, eligibility for AFDC was extended over a thirty-five year period from children up to sixteen years to children up to twenty-one years. *Compare* 49 Stat. 629 (1935) *with* 42 U.S.C. § 606(a) (1970).

be called the "cycle of dependency":[21] the occurrence of several generations of the same family on the welfare rolls. It was becoming apparent to both the administration and Congress that the income assistance programs embodied in the Social Security Act, and the underlying poverty which necessitated them, were not going to wither away and that some more affirmative action would be necessary to break the "cycle of dependency." The theory of the Social Security Act categorical assistance programs was to provide a response to the symptoms of poverty. There were certain classes of persons who were without the resources to maintain minimum subsistence. The categorical assistance programs met subsistence requirements by providing money. It must be remembered that these programs were fashioned and enacted during the Great Depression, an extraordinary social and economic dislocation in our society. These were programs fashioned to meet the needs of what was perceived to be an extraordinary situation. It was assumed that if enough money was provided these classes to get them through the extraordinary situation of the depression, the natural expansion of the economy and economic growth would ultimately take care of the root problem of underlying poverty.[22] Of course, the experience of the twenty-five years following passage of the statute proved this premise to be invalid. The federal government slowly became aware that some initiative had to be made at the underlying problem: the causes of poverty.

The response of the federal government to this new perception was the 1962 amendments to the Social Security Act.[23] These amendments manifested the first substantial innovation in the philosophy and structure of income maintenance programs in a generation. The amendments embodied a comprehensive scheme of "social services" designed to encourage and facilitate the recipients of income assistance programs in acquiring the wherewithal to remove themselves from the relief rolls and become self-reliant.[24] These "social services" included family and birth control planning, job training, and work incentives. Two important changes in the philosphy and structure of income maintenance programs should be noted in these amendments. The amendments reflected, first, an effort to address some of the causes of poverty, as well as its symptoms, and second, an awakening federal concern in the administration of these programs.

21. *See* Moynihan, *Annals of Politics (Family Assistance Plan I)*, The New Yorker, Jan. 13, 1973, at 36.

22. *See* R. Stevens, *supra* note 16, at 11.

23. 76 Stat. 172 (1962).

24. *See* R. Stevens, *supra* note 16, at 628-659.

The Kennedy administration initiated the "social services" approach manifested by the 1962 amendments to the Social Security Act. Although the initiative was not met with universal enthusiasm, Congress was persuaded to enact the amendments partly on the explicit and implicit promises by the administration that the "social services" approach would solve the problems of expanding welfare rolls and costs.[25] The next five years saw the implementation of the "social services" approach. The late 1960's, however, also witnessed two important developments concerning the administration of income assistance programs. The first was the intervention of the federal and state courts in reviewing the administration of these programs. The second was the growing disenchantment of the Congress with the "social services" approach, in particular, and the entire structure of the income assistance programs in general. While these two developments are necessarily interrelated, for purposes of analysis they will be discussed separately.

As described above, the state and federal courts exercised little or no supervision of the state administration of income assistance programs. Combined with the laissez-faire attitude of the federal administrative agencies, this lack of supervision left the states pretty much free to administer these programs as they liked. The result was a wide divergence between theory and reality in the administration of these programs. The creation, in the mid-1960's, of the "War on Poverty" and the O.E.O. legal services program resulted in the establishment of a large corps of lawyers available to poor persons for the first time. It was natural that, among other vital concerns, the primary focus of attention would be the income assistance programs which provided the most substantial single source of income to poor persons. These new "lawyers for the poor" turned to the federal and state courts to resolve the differences they perceived between the rights that were theoretically established by the Social Security Act but which were not being granted in the state administration of the programs. The federal and state courts responded to this litigation by casting aside, as either unconstitutional[26] or in violation of federal Social Security Act[27] requirements, longstanding state practices. The courts made it abundantly clear to both the federal and state governments that the practice of allowing the states to administer these programs as they saw fit was not consistent with the scheme of "cooperative federalism" established by the Social Security Act. These court decisions resulted in a "federalizing" of the administration of these programs:

25. *Id.*
26. *See, e.g.*, Shapiro v. Thompsen, 394 U.S. 618 (1969).
27. *See, e.g.*, King v. Smith, 392 U.S. 309 (1968).

the states would have to conform their administration of these programs to the federal requirements.[28] This process severely restricted the states' latitude in administering these programs, and concomitantly imposed new responsibilities on federal agencies.[29]

The federalization of the administration of these programs, invoking the more liberal federal eligibility criteria and striking down the more restrictive state eligibility criteria, resulted in an astronomical increase in welfare rolls and costs. Congress, however, was reluctant to view the increase in welfare rolls and costs as a consequence of court invocation of Social Security Act rights which had consistently been disregarded by the states in their unfettered administration of the programs. Rather, Congress appeared to view the burgeoning costs as a failure of the "social services" approach to the administration of the programs. The disenchantment of Congress with the "social services" approach and the perception of many of the advent of "welfare statism" led Congress in the late 1960's to implement more restrictive amendments to the Social Security Act. The 1967 amendments to the statute manifested an antagonistic Congressional attitude to the administration of these programs and to the increase in welfare rolls and costs.[30] Congress responded to these perceived defects in the administration of the program by enacting legislation which would put a ceiling on federal monies expended in income assistance programs[31] and by enacting coercive work requirements for recipients of these programs.[32] While the failure in practice of these restrictive amendments is well documented,[33] the point of these amendments worthy of note is that they reflected a new atti-

28. Thus, King v. Smith establishes that, at least in the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. Townsend v. Swank, 404 U.S. 282, 286 (1971).

29. It is probably not coincidental that it was not until after the *King v. Smith* decision that the federal Department of Health, Education and Welfare started promulgating its regulations in a formal manner in the Code of Federal Regulations, rather than leaving them as they had been in the more informal Handbook of Public Assistance Administration. A further indicator of increased federal activity is the conformity hearing, by which the federal agency makes formal inquiry into whether a state is administering public assistance programs in conformity with federal requirements. This potent tool for enforcing state compliance was substantially dormant until the *King v. Smith* decision, but after that decision saw a flurry of activity. *See* 1 C.C.H. Pov. L. Rep. ¶ 1850 and annotations.

30. *See* R. Stevens, *supra* note 16, at 804, 825.

31. *See* Pub. L. 90-248 § 208, 81 Stat. 894 (1967) repealed.

32. *See* Pub. L. 90-248 § 204, 81 Stat. 884 (1967).

33. *See* Comment, *The Failure of the Work Incentive (WIN) Programs,* 119 U. Pa. L. Rev. 484 (1970).

tude by the Congress, antagonistic to the structure and administration of the income assistance programs.

The 1967 amendments reflected only the beginning of the dissatisfaction with the programs. A new national administration, firmly committed to fundamental changes in the income assistance programs joined in the Congressional discontent.[34] These two critics were joined by a new force: the welfare recipients themselves, who were achieving some cohesiveness and were vociferously manifesting their discontent with the existing programs. The opportunity was at hand for a major review of existing programs and proposals for fundamental changes in them. These proposals were forthcoming in the form of the "Nixon Welfare Reform" proposals.

The "Nixon Welfare Reform" proposals, sent to Congress in 1970,[35] marked the most substantial departure from the existing philosophy and structure of income assistance programs in the thirty-five years since the enactment of the Social Security Act. Debate and rhetoric have surrounded these reform proposals.[36] Both the advocates of welfare recipients and conservatives traditionally antagonistic to income assistance programs immediately and consistently opposed the proposals. This article is not the place for a detailed analysis of the merits or demerits of the proposals. What should be noted here about them, however, is that they required a substantial increase in the federalization of the income assistance programs. The Nixon proposals would finance a uniform, nationwide, minimum level of assistance.[37] If individual states desired to provide assistance above the level, they could, but without substantial federal assistance.[38] In addition, the federal government would substantially assumed the administration of the programs.[39]

The Nixon reform proposals marked the culmination of the steady trend toward the federalization of income assistance programs. Under these proposals, the primary responsibility for providing income assistance shifted from the state to the federal government.

34. *See* Moynihan, *supra* note 21, at 34-35; R. Stevens, *supra* note 16, at 884-88 (quoting Presidential Address to the Nation on Welfare Reform, Aug. 8, 1969).

35. H.R. 16311, 91st Cong., 2nd Sess. (1970). (Commonly called the Family Assistance Plan [FAP] proposal.) With the defeat of the "FAP" proposal in the 91st Congress, the Nixon administration made substantial modifications in its proposals and reintroduced them to the 92nd Congress as H.R. 1. (Commonly referred to as Family Assistance Plan/Opportunities for Families [FAP/OFF].)

36. *See* Moynihan, *Annals of Politics (Family Assistance Plan,* New Yorker, Jan. 13, 1973, at 34 (Part I); Jan. 20, 1973, at 60 (Part II); Jan. 27, 1973, at 57 (Part III).

37. *See* H.R. 1, 92nd Cong., 2nd Sess. § 401 [New Social Security Act § § 2101, 2113, 2131, 2152] (1971).

38. *Id.* [New Social Security Act § 2156].

39. *See id.* § 507.

However, the proposals could not withstand the criticism leveled at them from both the "right" and the "left"; and Congress twice rejected the Nixon reforms. In their stead, Congress separated the four existing categorical assistance programs into two groups. As to the Aid to Families with Dependent Children (AFDC) program–which accounts for more than 75% of the monies expended in income assistance programs–Congress left the program to be administered in much the same way as it had been for the past thirty-five years. As to the other three categorical assistance programs–Aid to the Blind (AB); Old Age Assistance (OAA); and Aid to the Disabled (AD)–Congress grouped them into one categorical program (AABD) and adopted the Nixon reform approach to its administration.[40] As of January 1, 1974, these programs will be almost totally federalized. The federal government will set a uniform, nationwide floor on the level of assistance; the cost of which it will assume, and it will assume the great part of the administration of the program.

The Nixon reform proposals may have manifested the high water mark in the trend toward federalization. Their ultimate rejection and the retention of the state administration of the AFDC program manifest a Congressional will that the states retain some administrative latitude in the largest single income assistance program. Since there is little likelihood that there will be any substantial reform of the AFDC program emanating from either the administration or the Congress, any reform of the AFDC program must be sought at the state level.

B. The New Mexico Experience

The New Mexico Department of Health and Social Services (HSSD), charged with the administration of income assistance programs in this State,[41] has felt the impact of the shifting mores of welfare administration over the past fifteen years. The trend toward federalization of these programs, as described in the previous section, has caused a steady attrition, in New Mexico as well as in other states, of administrative discretion. Thus, there had to be made many changes in administrative practices, where it was determined that the state practices were in violation of requirements found in the federal statute or regulations.[42] Unlike welfare agencies in other states, however, HSSD has found its administrative practices coming under increasing attack as contrary to governing state statutes. To best under-

40. *See* Pub. L. 92-603 § 301 (Oct. 30, 1972).
41. N.M. Stat. Ann. § 13-1-4 (Repl. 1968).
42. *See, e.g.*, Saiz v. Hernandez, 340 F. Supp. 165 (D.N.M. 1972).

stand this new development, one must be familiar with some of the mechanics of welfare administration.

The determination of whether an individual applicant is eligible for assistance may be broken down into two areas: (1) the determination of "non-need" eligibility; and (2) the determination of "need" eligibility. The former describes the determination of whether the applicant falls within that "category" of poor persons intended to be aided by the program applied for. The Social Security Act income assistance programs are called "categorical assistance programs" because it was the intention of Congress that not all indigents be assisted under the programs, but only certain categories of indigents, namely, the aged, the blind, the disabled and dependent children. On the other hand, a single adult who does not suffer some disability, and who is not aged, would not be eligible for assistance under any of the four Social Security programs. It is in the area of "non-need" eligibility determination that the recent "federalizing" of administration of income assistance programs has had its greatest impact. It has become fairly well established that the federal definitions of the category of indigents to be assisted through a particular program are exclusive and cannot be varied by the states, unless there is a clear manifestation in the federal statute that Congress intended the states to have some discretion.[43]

The area of "need" eligibility involves determining whether a particular applicant is sufficiently indigent to warrant assistance through the program applied for. This determination basically involves a comparison between the applicant's resources and income against what the state determines a person in the applicant's situation needs. If the applicant's income and resources are insufficient to meet his or her needs, as determined by the State, then the applicant is sufficiently "needy" to warrant assistance. While the "federalizing" of the administration of these programs has severely limited the discretion of state administration in the "non-need" area of eligibility determination, the states' discretion in the "need" area is left substantially unchallenged:

> There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.[44]

Yet, it is this area of "need" eligibility that HSSD has found itself under attack, as acting contrary to state statutes.

43. *See* Townsend v. Swank, 404 U.S. 282 (1971).
44. King v. Smith, 392 U.S. at 318-19; *see* Dandridge v. Williams, 397 U.S. 471 (1969).

Until July 1, 1973, the state statutory provision governing "need" eligibility for the income assistance programs offered by HSSD provided in pertinent part:

> Public assistance–Qualifications.–Public assistance shall be granted under this act to any needy person who:
> (a) Has not sufficient income or other resources to provide a reasonable subsistence compatible with decency and health.[45]

One must turn to applicable HSSD regulations to determine how this statutory standard was being implemented. Under HSSD regulations, the eligibility determination was made through a four-step process. First, the agency determined the applicant's "needs" by looking to a regulatory determination of the cost of providing current requirements for a person in the applicant's circumstances.[46] The basic requirements that the agency considered were food, shelter, clothing and personal incidentals.[47] Next, the agency determined the applicant's resources and income.[48] Third, the agency made a determination as to whether these resources and income were "available" to meet the applicant's needs.[49] Finally, the available income and resources were compared against the determined needs of the applicant: if the available resources and income were less than the determined needs, the applicant met the eligibility requirement, and vice versa.

Two points should be noted about this process. First, the determination of what a particular applicant needs in order to provide for current requirements (other than shelter expenses) is a presumptive standard. Rather than conduct an investigation into what a particular applicant in fact needs, the department has published regulations that set forth as a conclusive presumption what an individual in any given set of circumstances needs per month for current requirements. Thus, for example, if a mother with two children, applies for assistance under the AFDC program, rather than looking to what it would actually cost the mother to provide for requirements of food, clothing and personal incidentals each month, the administrator looks to the regulations which give a dollar figure presumptively necessary to provide for those needs. On the other hand, the administrator determines the income and resources of an applicant through case-by-case investigation. Given this practice of comparing actual

45. N.M. Stat. Ann. § 13-1-11 (Repl. 1968) (since repealed).
46. *See, e.g.*, N.M. Dep't of Health & Soc. Serv. Manual (hereinafter cited as HSSD Manual) § 231.82.
47. *See, e.g., id.*
48. *See, e.g., id.* § 231.83.
49. *See, e.g., id.* § 231.831(i)(C).

resources and income against presumptive needs, it could be anticipated that a rigid application of these regulatory formulae might run afoul of the statutory standard that assistance must be provided to a person who "has not sufficient income or other resources to provide a reasonable subsistence compatible with decency and health."[50]

The case of Joaquin Baca[51] illustrates the point. Mr. Baca had been receiving income assistance pursuant to the state's old age assistance program. His sole source of income, other than the state income assistance program, was his Social Security benefits.[52] Prior to June 1, 1971, Mr. Baca's Social Security benefits amounted to $105.80 a month. Since the regulatory standard of need under the state's old age assistance program for a person in Mr. Baca's circumstances was $116.00 a month, Mr. Baca was considered eligible for assistance under the program. As a result, Mr. Baca was granted a check of $10.20 a month. Mr. Baca was also eligible for assistance under the State's Medicaid program,[53] eligibility for which was conditioned soley on whether the person was eligible for assistance under one of the state's categorical income assistance programs. This Medicaid assistance was very important to Mr. Baca since he was in his seventies and required a heart pacemaker in order to counteract a serious heart disease.

In June 1971, Mr. Baca's Social Security benefits were increased to $116.40 a month. This seemingly charitable act on the part of Congress worked a disastrous effect on Mr. Baca. Mr. Baca's income was now forty cents more than the regulatory standard of need for a person in his circumstances.[54] He was determined no longer eligible

50. N.M. Stat. Ann. § 13-1-11 (Repl. 1968) (since repealed).

51. Baca v. N.M. Health & Soc. Serv. Dep't, 83 N.M. 703, 496 P.2d 1099 (Ct. App.), *cert. denied*, 83 N.M. 699, 496 P.2d 1095 (1972).

52. These were benefits pursuant to the Federal Old Age, Services and Disability Insurance (OASDI) Program, commonly referred to as "social security." *See* 42 U.S.C. § § 401 et seq. (1964).

53. *See* text accompanying footnotes 75 through 80, *infra.*

54. The problem faced by Mr. Baca is one caused by the interplay of the various government programs designed to provide income maintenance and security. While OASDI is not generally considered to be a "welfare" program, there is a substantial overlap between recipients of the OASDI benefits and recipients of benefits from the categorical assistance program. Since the amount of assistance granted to a beneficiary of one of the categorical assistance programs is determined, in part, by the amount of income available to the recipient, fluctuations in OASDI benefits will normally result in changes in the categorical assistance benefits. Thus, when Congress raises OASDI benefits the Congressional intent must be, at least in part, that OASDI beneficiaries should have more income to spend. Yet, if the OASDI beneficiary is also a beneficiary of a categorical assistance program, his or her categorical assistance grant will be reduced by an amount equal to the increase in OASDI benefit, thus leaving the recipient in no better position. Often, as in Mr. Baca's case, the recipient will be in a worse position, where the OASDI benefit increase puts the beneficiary's available income above the categorical program's standard of need. This apparent

for old age assistance. As a result, he lost his eligibility for the State Medicaid program which had provided him with substantial and vitally necessary benefits. First, it paid the $5.60 a month premiums for the federal Medicare program. In addition, the state Medicaid program provided assistance for the twenty percent excess in medical costs that were not borne by the federal Medicare program. Since Mr. Baca had a serious heart problem and continuing medical bills, eligibility for the state Medicaid program had provided substantial assistance to him.

Before proceeding further with Mr. Baca's case, we should look more closely at Mr. Baca's problem. Before the June 1971 increase in Social Security benefits, Mr. Baca's monthly needs were considered to be $116.00 for food, shelter, clothing and personal incidentals; $5.60 for federal Medicare premiums; (and assuming for purposes of discussion that Mr. Baca had $50.00 a month expenses for medical care and medication) $10.00 for the twenty percent excess in medical expenses that federal Medicare did not cover. Thus, his total monthly needs amounted to $131.60. His resources to meet these needs broke down as follows: $105.80 a month from Social Security benefits; $10.20 a month from state old age assistance; and $15.60 a month from state Medicaid assistance. Mr. Baca's needs and his resources balanced. However, after the 1971 increase in Social Secu-

anomaly has been deplored over the past several years by various interest groups. Their attack has been on two points: (1) The result frustrates the manifest intent of Congress in raising OASDI benefits; and (2) the result is fundamentally unfair, in that it creates different results among two classes of persons similarly situated; in that OASDI beneficiaries who are not recipients of categorical assistance programs have more spendable income, while OASDI beneficiaries who are also categorical assistance beneficiaries have not.

These arguments are not self-evident, however. The first point begs the question. While it is reasonably inferable that in raising OASDI benefits, Congress had the intent that the class of OASDI beneficiaries should have more spendable income, it must be assumed that Congress was aware, in raising such benefits, of the mechanics of the categorical assistance programs (programs Congress itself created) and what the result of such OASDI benefit raises would be for joint beneficiaries of both programs. Thus, at best, any intent of Congress is ambiguous. As to the second point, any resultant unfairness is also not axiomatic. The comparison between joint OASDI/categorical assistance beneficiaries and just OASDI beneficiaries demonstrates what appears to be an unjust difference in treatment. However, if the focus of comparison is changed to joint OASDI/categorical assistance beneficiaries and just categorical assistance beneficiaries, not only is there no apparent difference in treatment, but also, to work the opposite result and not to reduce categorical assistance benefits to reflect the increase in OASDI benefits works an apparent unfair difference in treatment between these two classes. In such a situation, the joint OASDI/categorical assistance beneficiaries will end up with more spendable income than the beneficiaries of just the categorical assistance program.

Despite the apparent Hobson's dilemma, Congress appears to have selected the latter alternative as the least evil. In recent legislation increasing OASDI benefits, Congress has explicitly directed that such increases are not to be considered available income for computing categorical assistance benefits. *See* Pub. L. 92-603 § 301 (New Social Security Act § 306) (Oct. 30, 1972).

rity benefits, a striking imbalance occurred. His monthly needs remained the same at $131.60. However, his monthly income showed a drastic decrease. He received only $116.40 from Social Security benefits. Since he was no longer eligible for old age assistance, he received no assistance from that program; and since his eligibility for state Medicaid assistance was keyed to his eligibility for old age assistance, he was no longer eligible for state Medicaid benefits. By some fiscal legerdemain, the increase in Mr. Baca's Social Security benefits resulted in a decrease of more than ten percent in his total monthly resources. A ten percent decrease in income for any individual is bad enough. Where that individual derives his income soley from federal and state assistance programs (thereby insuring that his income is geared to providing only the most basic and minimum provisions for subsistence, such a decrease is disastrous. Moreover, the fifteen dollar decrease in Mr. Baca's monthly income had formerly provided for his medical needs, necessary to maintain his health.

Despite this anomalous result, the state administrators, HSSD, declared Mr. Baca ineligible for old age assistance and thereby state Medicaid assistance. Represented by legal services attorneys, Mr. Baca appealed this determination to the state administrative Appeals Review Committee. From an unfavorable determination from this committee, Mr. Baca appealed to the Court of Appeals of New Mexico.

The Court of Appeals was more sympathetic to Mr. Baca's problem than was HSSD. The court noted the imbalance in his income and needs and further noted that continued medical treatment was necessary in order for Mr. Baca to live. Applying the statutory standard that assistance was to be provided to a person who "has not sufficient income or other resources to provide a reasonable subsistence compatible with decency and health,"[55] the Court of Appeals found the decision that Baca was not eligible for assistance to be contrary to the legislative mandate:

> Current needs prior to the Social Security benefits increase were established at $116.00. Additionally the Department paid the Medicare insurance premiums and the 20% not covered by insurance. The Department had determined Baca needed $56.00 per month for the common requirement and utilities (Regulation 231.81(A)(2) and $60.00 per month is allotted for the basic requirements (Regulation 231.81(A)(1), thus making a total of $116.00 for "...subsistence compatible with decency and health." However, in order to subsist (live) he must continue his medical treatment. The cost of the pre-

55. N.M. Stat. Ann. § 13-1-11 (Repl. 1968) (since repealed).

> mium reduces his availabale resouces below his determined need. Baca does not in fact have "resources available" to meet his monthly needs as determined by the Department. Regulation 231.83; Regulation 231.81 (B).[56]

It is hard to quarrel with the court's result in this case. The opinion, however, is not a model of clarity. The court did not state specifically whether it was the administrative regulations, in themselves, which were contrary to the controlling legislation or whether the application of those regulations to Mr. Baca's situation was done in some wrong manner. Additionally, the Court of Appeals' did not point to specific regulations which were invalid either on their face or in their application. Essentially, the defect in the Court of Appeals' decision in this case was its failure to note the interrelationship between "need" and "income and resources" in making an eligibility determination.

The Court of Appeals clearly recognized and appreciated the overall picture of Mr. Baca's situation. They saw and noted that prior to the 1971 increase in Social Security benefits Mr. Baca had resources available to him (through the federal Social Security benefits; state old age assistance benefits; and state Medicaid benefits) to meet his food, clothing, shelter, personal incidentals and medical needs. Yet after the Social Security benefit increase and with the declared ineligibility for state old age and Medicaid assistance, he would not have sufficient resources available to meet those same needs. It was this imbalance which the court found incompatible with the legislative mandate. The reasoning which led to this conclusion, however, is not free from ambiguity.

The court noted that the only needs comprehended by the standard of need for old age assistance were food, shelter, clothing and personal incidentals. The court appeared to accept that it was not mandatory that the standard of need comprehend medical needs. The court appeared to reason, however, that where it was evident that medical needs had to be provided for, in order to maintain life or health, the money necessary to maintain those medical needs was not "available" to meet the needs of food, clothing, shelter and personal incidentals included in the old age assistance standard of need. Since Mr. Baca was required to divert approximately fifteen dollars a month to meet these medical needs, they were not available for the other needs. Hence, Mr. Baca's available resources were not $116.40 a month, but approximately $101.00 a month. Therefore, his available resources were less than his needs and he was eligible for old age assistance.

56. 83 N.M. at 705.

It is hard to understand why the Court of Appeals in *Baca* did not simply find that the legislative standard expressly mandated that an individual's medical needs be comprehended in the regulatory standard of need formulated for the income assistance programs administered under the statute. And, that since the regulatory standard of need for old age assistance did not account for medical needs, it was in conflict with the controlling legislation and therefore was illegal. This line of reasoning would have served to reach the same result the court reached in *Baca* and would have done it in a more expeditious manner. In any event, even if the Court of Appeals' reasoning that the old age assistance regulatory standard of need does not comprehend medical needs is accepted, it is clear that a necessary corollary of the *Baca* decision is that medical needs are comprehended in the *statutory* standard of need, evidenced by Section 13-1-11 of the New Mexico statutes, and that income diverted to meet this need cannot be considered available to meet the needs itemized in the regulations.

A hypothetical situation best illustrates this point. If Mr. Baca had purchased a new television set on time payments and thereby contracted to pay fifteen dollars a month to the television merchant, one could confidently assume that neither the administrative agency nor the courts would look favorably on his claim that this fifteen dollars a month was not available to meet his needs of food, clothing, shelter and personal incidentals, comprehended by the old age assistance regulations. Yet, he is legally bound to make the payments for the television and therefore does not have that money available to meet the needs of food, shelter, clothing and personal incidentals. What is the difference between this situation and the diversion of resources to meet medical needs? The obvious difference lies in the fact that the statutory standard is expressed in terms of health and decency. Medical needs are clearly related to that standard while entertainment needs (a television) may not be. Thus, the only manner in which the courts can differentiate between various diversions of resources to determine whether such diversions should be found to mean that income is not available to meet the needs itemized in the regulations, is to test the diversion to see if it is meeting a need comprehended in the statute. If the diversion of resources is necessary to meet a need comprehended by the statute, then that money cannot be considered available to meet different needs itemized in the regulatory standard; if the diversion is utilized to meet a need not comprehended by the statute, then it can still be considered available to meet the needs itemized in the regulatory standard.

If Mr. Baca's situation were an isolated instance, one might be tempted to consider it the product not of administrative policy, but

rather of careless or overzealous administration. Unfortunately, that is not the case. Another case, *Chavez v. New Mexico Health and Soc. Serv. Dept.*,[57] substantially identical to the *Baca* situation, arose within a year of the *Baca* decision. Again HSSD terminated assistance and again the case came before the Court of Appeals. The court reversed the agency determination and held that income necessarily diverted for needed medical expenses could not be considered "available" to meet the needs comprehended by the regulatory standard. The reasoning adopted by the Court of Appeals in the second decision was no more helpful than the reasoning in the *Baca* decision in clearing up the ambiguities. What is more important in the *Chavez* case, however, is the apparent disregard the HSSD officials had for the *Baca* decision. Not only did they not feel compelled to follow the *Baca* mandate in making the administrative decision, but when the case was appealed to the Court of Appeals, the HSSD officials totally ignored the previous *Baca* decision in making their arguments to the Court of Appeals.

The court did not accept this apparent slight lightly. In a concurring opinion, one of the Appeals Court Judges made it a point to specifically note the "refractoriness" of the administrative agency:

> In this state of the record, I would have caused contempt citations to be issued by this court directed to the attorneys and high administrative officials identified of record to require an explanation of why HSS has systematically avoided acknowledging the existence of a decision to which HSS was a party, which decision was final prior to pertinent events in this case. Alternatively, I would have reversed the HSS decision in this case because of violation of Rules of Appellate Procedure. . . .[58]

While one can sympathize with an appellate court judge on what he perceives to be contumacious conduct of the department in ignoring a previous decision of that very court, one is more troubled by the effect the attitude of the administrative agency has on the applicants for and recipients of assistance.

Thus, by the time of the 1973 New Mexico legislative session, state welfare administration was in the throes of a crisis. Its administrative discretion severely limited, on the one hand, by the increasing federalization of non-need eligibility requirements and its administrative practices in need eligibility determinations under attack by the state courts, HSSD was fighting the battle on two fronts. It is not

57. 84 N.M. 734, 507 P.2d 795 (Ct. App.), *aff'd as moot*, 12 Adv. Sh. 403 (1973) (semble).

58. *Id.* at 736.

59. Laws of New Mexico, Ch. 376 (1973).

surprising that welfare administration would be of primary concern to the legislature.

THE NEW MEXICO LEGISLATION

The New Mexico legislature enacted two major pieces of welfare legislation in 1973. One—a series of amendments[59] to the "Public Assistance Act"[60]—revised the statutory framework for the income assistance programs administered by HSSD. The other—the "Special Medical Needs Act"[61]—created a new program to provide medical assistance to certain classes of needy persons.

Since New Mexico has no formal processes for determining legislative history, it is impossible to determine authoritatively the legislative purposes and goals underlying those new statutes. However, one can feel reasonably confident that the growing trend toward federalization of the social security categorical assistance programs—especially the proposed federal takeover of the AABD programs—was one important factor. Further, it is fairly clear that the mounting resistance of the state courts to the HSSD administration was not lost on the legislature. Finally, the passage, in the 1972 legislative session, of the state Equal Rights Amendment created an opportunity to reconsider welfare administration.[62] The remainder of this article will discuss the two pieces of welfare legislation passed in 1973. The statutes will be discussed separately; first setting forth the general statutory scheme, then discussing in detail the significant provisions of the statutes with a view towards uncovering any administrative or litigational problems that might be posed by the changes.

A. The 1973 Amendments to the "Public Assistance Act"

Senate Bill 374, as amended, made substantial changes in the existing statutory framework for the administration of public assistance programs in New Mexico. In attempting to read the act, one encounters difficulty in determining the mechanical scheme of administration, for perhaps the primary characteristic of this new statute is its disjointed and haphazard structure. Thus, in order to read the statute intelligently, one must piece together from various sections the fabric of administration.

Aside from strictly "housekeeping" provisions, the 1973 amendments to the Public Assistance Act may be divided into five separate

60. N.M. Stat. Ann. § § 13-1-1 *et seq.* (Repl. 1968).
61. Laws of New Mexico, Ch. 311 (1973).
62. *See* Goldberg and Hale, *The Equal Rights Amendment and the Administration of Income Assistance Programs in New Mexico*, 3 N.M. L. Rev. 84 (1973).

areas. These are: (1) statutory authorization for programs;[63] (2) standards for non-need eligibility determinations;[64] (3) standards for need eligibility determinations;[65] (4) the mechanics of determining how much assistance will be granted;[66] and (5) miscellaneous matters in the administration of the programs.[67]

1. Authorized Programs

The 1973 amendments authorize the Department of Health and Social Services to engage in seven different assistance programs. These are: (1) Aid to families with Dependent children (AFDC);[68] (2) Aid to the Blind (AB);[69] (3) Aid to the Disabled (AD);[70] (4) Old Age Assistance (OAA);[71] (5) General Assistance (GA);[72] (6) Food Stamps;[73] and (7) Medical Assistance (Medicaid).[74] The first five of these programs are income maintenance programs, whereby the state provides cash payments to eligible recipients. The last two programs—Food Stamps and Medicaid—do not provide cash, but rather provide, respectively, coupons which may be used to purchase food and medical services. Medical services are provided by private practitioners who are paid directly by the state. Programs (1) through (4) and (6) and (7) are co-operative federal-state programs. The federal government contributes to the funding of the program and the state agrees to administer the program within federal guidelines. Program (5)—the General Assistance Program—is a wholly state funded program for providing income assistance to needy persons not eligible for the other income assistance programs.

One might suppose that the statutory authorizations for programs would pose no problems either in substance or in draftsmanship. Unfortunately, however, this is not the case with the 1973 amendments; they are fraught with uncertainties, ambiguities and downright problems. Take, for example, the Medical Assistance Programs. Under the federal Social Security Act, two separate medical assistance programs are available to the states for adoption. Under both of these programs, the federal government provides substantial finan-

63. Laws of New Mexico, Ch. 376 § § 6, 7, 8, 9, 10, 14, 16 (1973).
64. *Id.* § § 4(c)-(f), 6, 7, 8, 9, 10.
65. *Id.* § § 3, 4(a)-(b).
66. *Id.* § § 5, 11.
67. *Id.* § § 12, 13, 15, 17, 18.
68. *Id.* § 9.
69. *Id.* § 8.
70. *Id.* § 7.
71. *Id.* § 6.
72. *Id.* § 10.
73. *Id.* § 14.
74. *Id.* § 16.

cial support. One—called the "Categorically Needy" Medicaid program—keys eligibility for medical assistance to eligibility for one of the Social Security Act categorical assistance programs.[75] Thus, under this program, if a person is eligible for AFDC, AB, AD, or OAA, he or she is automatically eligible for Medicaid benefits. The other program—called the "Medically Needy" Medicaid program—keys eligibility to an income determination that the individual does not have sufficient resources to meet his or her medical needs.[76]

The 1973 amendments authorize HSSD to engage in a program to "provide medical assistance to persons eligible for public assistance programs under the federal act."[77] Quite simply, this provision authorizes HSSD to operate only the "Categorically Needy" Medicaid program under the Public Assistance Act. The Department is not authorized to adopt the "Medically Needy" Medicaid program. This, in itself, is perfectly all right, since there is no requirement that states adopt the "Medically Needy" program.[78] However, the other piece of welfare legislation passed in the 1973 legislative session creates a "Special Medical Needs" program,[79] also to be administered by HSSD. Yet, not only is there no mention of this other program in the 1973 amendments to the Public Assistance Act, but the statute is written in such a way as to apparently limit the authority of the Department, in engaging in medical assistance programs, to the "Categorically Needy" Medicaid program.

Can this apparent conflict be resolved? Certainly, it can be argued that the 1973 amendments to the Public Assistance Act could not comprehend the "Special Medical Needs" programs, since the legislation creating that program was being considered simultaneously with the 1973 amendments to the Public Assistance Act. Therefore, the absence of any mention of this program in the 1973 amendments to the Public Assistance Act should not be construed to deprive the Department of authority to operate the program. This, however, does not assist in determining the relationship of the "Special Medical Needs" program to the "Categorically Needy" Medicaid program or to the Social Security Act. While the "Special Medical Needs" program will be discussed in detail later, it should be noted that the legislative framework for the program is somewhat similar to a "Medically Needy" Medicaid program under the Social Security Act. However, the enabling legislation for the "Special Medical Needs"

75. *See* 42 U.S.C. § 1396a(a)(10) (1970).
76. *See* 42 U.S.C. § 1396a(10(B) (1970).
77. Laws of New Mexico, Ch. 376 § 16 (1973).
78. *See* Fullington v. Shea, 320 F. Supp. 500 (D. Colo. 1970), *aff'd* 404 U.S. 963 (1971).
79. Laws of New Mexico, Ch. 311 (1973).

program apparently contemplates the program to be wholly state-funded, and makes no reference to authorizing HSSD to cooperate with the federal government in establishing and administering it. While the Public Assistance Act does authorize HSSD to cooperate with the federal government in establishing and administering programs,[80] the 1973 amendments specifically—and one might presume, pointedly—omitted any authorization for a "Medically Needy" Medicaid program.[81] It is certainly not clear why the legislature would specifically refuse to cooperate in the "Medically Needy" Medicaid program, where substantial federal financial support was available, and then set up a substantially identical program to be funded exclusively with state monies. Yet, apparently that is precisely what occurred. One may only speculate that the right legislative hand did not know what the left legislative hand was doing. In any event, this peculiar legislative lacuna seriously calls into question the legitimacy of any attempt by HSSD to obtain federal funding for the "Special Medical Needs" program or a "Medically Needy" Medicaid program under the Social Security Act. This entire problem, of course, could have been avoided quite simply by drafting the 1973 amendments to the Public Assistance Act in such a way as to authorize HSSD to operate medical assistance programs, without specifically limiting the authority to the "Categorically Needy" Medicaid program. It is suggested that the next legislative session clear up any such confusion by making such an amendment.

A similar, but substantially more critical problem arises in connection with the authorization for the Department to operate the AD, AB and OAA programs. Each of the statutory authorizations for these programs continues: "Until January 1, 1974 . . ."[82] The obvious impact of these provisions is that after January 1, 1974, the Department is no longer authorized to operate or administer the AD, AB and OAA programs.

The reason why the legislature limited authorizations for these programs to January 1, 1974, is perfectly clear. In the fall preceding the 1973 legislative session, the federal Congress enacted amendments to the Social Security Act promising a federal takeover of the funding and administration of these three categorical assistance programs.[83] Obviously, the drafters of the 1973 amendments to the Public Assistance Act, in writing these provisions, and the legislature, in passing them, were relying on the promised federal takeover of

80. *See* N.M. Stat. Ann. § 13-1-4(e) (Repl. 1968).
81. *See* Laws of New Mexico, Ch. 376, § 16 (1973).
82. *Id.* § § 6, 7, 8.
83. Pub. L. 92-603 § 301 (Oct. 30, 1972).

those programs. Anyone experienced with the federal administration of welfare programs would not have been so quick to rely on such promises. And, as could have been predicted, such reliance was misplaced. In July 1973, Congress passed legislation requiring the states to supplement the benefits paid by the federal government to OAA, AD, and AB recipients after the federal takeover in January 1974.[84]

The July, 1973, federal legislation poses a critical problem for the State. The 1973 amendments to the Public Assistance Act clearly state that HSSD has no authority to administer or fund the AD, AB and OAA programs after January 1, 1974. Yet the federal legislation clearly calls for further funding by the state after January 1, 1974. Moreover, if the state does not come forward with the supplemental funding, it will be cut off from its federal contribution for the "Categorically Needy" Medicaid program.[85] Since the continued federal contribution to the funding of the medicaid program is an immensely attractive incentive, one can suspect that HSSD will attempt to set up the supplemental benefits for the AD, AB and OAA recipients after January 1, 1974, despite the lack of any statutory authorization for such funding. To do this, however, will require an apparent disregard for state law on the part of both HSSD and the federal Department of Health, Education and Welfare. If this feat can be accomplished, one suspects that HSSD officials will be holding their collective breaths hoping no one challenges the arrangement.

Regardless of the outcome, these developments point out quite poignantly the lack of wisdom with which these provisions of the 1973 amendments to the Public Assistance Act were drafted. Any problems—and anxieties—could easily have been avoided by omitting the language in the statute limiting authorization for the AD, AB and OAA programs to January 1, 1974. It would have been better to have drafted these provisions authorizing HSSD to operate such programs as long as necessary. Certainly, if the promised federal takeover were to occur, HSSD would discontinue operations of any such programs, since there would no longer be a need for them. Why the legislature felt this need to hamstring the administrative agency with this limiting language is open to question.

2. Non-Need Eligibility.

The provisions of the 1973 amendments to the Public Assistance Act concerning non-need eligibility for the various programs pose little change in substance from the pre-existing law. The legislative scheme, however, is somewhat confusing. Section 4 (C-F) of the

84. Pub. L. 93-66 § 212 (July 9, 1973).
85. *Id.*

statute apparently sets forth non-need eligibility requirements common to all programs. Further, Sections 6 through 10 set forth non-need eligibility requirements peculiar to specific programs. As to the four categorical assistance programs–AB, AD, OAA and AFDC–eligibility requirements track the federal requirements. Such tracking, of course, reflects the trend toward federalization of all eligibility requirements.

There is an interesting dichotomy, however, between the drafting of the eligibility provisions for the four categorical assistance programs[86] and General Assistance[87] and the provisions concerning Food Stamps[88] and medical assistance.[89] As to the former, the statute sets forth the eligibility requirements in specific detail. As to the latter, no non-need eligibility criteria are set forth, but rather are left to be developed by HSSD by regulation. Why there is this inconsistency in the statute is unclear. It would have been preferable, however, if the statute had not sought to set forth eligibility criteria in detail for any program, but, instead, had delegated that task to the administrative agency to accomplish by way of regulation. The desirability of this latter course is obvious. Over the past five years there have been many changes in the interpretation of federal eligibility requirements.[90] If the state requirements are set forth by regulation, it is an easy matter to conform the state requirements to the changing federal requirements. Where, however, the state requirements are embodied in statute, any changes in the federal requirements necessitates the onerous procedure of legislative amendment to conform the state requirements to the federal.[91]

A further criticism may be made that the drafters went into much greater detail than is necessary or desirable. Thus, one of the non-need eligibility criteria common to all programs is that the recipient "not [be] an inmate of any public non-medical institution at the time of receiving assistance. . . ."[92] One can only wonder what important public policy necessitated this provision. First, it is not likely

86. Laws of New Mexico, Ch. 376, § § 6, 7, 8, 9 (1973).
87. *Id.* § 10.
88. *Id.* § 14.
89. *Id.* § 16.
90. *See, e.g.*, Carleson v. Remillard, 406 U.S. 598 (1972).
91. Section 17 of the 1973 amendments to the Public Assistance Act, Laws of New Mexico, Ch. 376, § 17, apparently anticipates this problem by providing that where a conflict exists between any section of the Public Assistance Act and federal statutes or regulations, the operation of the state statutory provision will be suspended upon certification of the State Attorney-General. This provision may be sufficient, as a temporary measure, where the controlling federal law acts to prohibit an established state practice. It is unclear, however, that this provision would be helpful, even as a temporary measure, where the federal law mandates the state to do something not otherwise authorized.
92. *Id.* § 4(e).

that the situation will arise very often. It is difficult to imagine a situation where an inmate at a public institution would meet the other eligibility criteria set forth. Second, this eligibility criterion may be inconsistent with controlling federal criteria for the AFDC program. A number of federal courts have recently held that pregnant women are eligible for AFDC benefits prior to the birth of the infant.[93] If such a pregnant woman met the other "non-need" and "need" eligibility criteria, it is arguable under these decisions that the state may not deprive her of eligibility merely because she is an inmate at a public non-medical institution–such as a juvenile home or "run-away" detention center.

3. Need Eligibility.

Sections 3 and 4 of the 1973 amendments to the Public Assistance Act deal with determining "need" eligibility for the program administered by the Department. Since there are no specific "need" eligibility criteria set forth in other provisions peculiar to individual programs, it is apparent that the criteria set forth in Sections 3 and 4 are common to all the programs. Pursuant to Section 4(A) of the statute, an individual meets the "need" eligibility criteria if his or her "non-exempt income is less than the applicable standard of need." Thus, this provision does not deviate from the pre-existing method of determining need eligibility. As classified above, however, the crucial considerations in this area concern the determination of the standard of need and "available" income. It is Section 3 of the new act which addresses these concerns. Since it was the area of standard of need and "available" income in which HSSD encountered the most difficulty in the courts, and since the 1973 amendments effected substantial change in the statutory language, Section 3 is set forth in full:

> Section 3. STANDARD OF NEED–INCOME DETERMINATION.–
>
> A. Consistent with the federal act and subject to the availability of federal and state funds, the board shall adopt a standard of need which shall establish a reasonable level of subsistence.
>
> B. Consistent with the federal act, the board shall define by regulation exempt and non-exempt income and resources. Medical expenses shall not be excluded from non-exempt income or from non-exempt resources.

Several things should be noted concerning these provisions. First, the substance of these provisions is concerned with the same matter formerly dealt with under Section 13-1-11, N.M.S.A., repealed pur-

93. *See, e.g.*, Wilson v. Weaver, 358 F. Supp. 1147 (N.D. In. 1972). *But see* Parks v. Harden, 354 F. Supp. 620 (N.D. Ga. 1973).

suant to the 1973 amendments. Second, there is a significant change in statutory wording. The previous statutory language mandated a standard of need providing "reasonable subsistence compatible with decency and health" whereas the new language requires a standard of need "which shall establish a reasonable level of subsistence." The possible purpose and effect of this change in language will be discussed shortly. Finally, it can be surmised confidently that the statutory change was made in response to recent state court decisions construing the previous statutory language.[94]

The two subsections will be treated in reverse order. Section 3(B) is an object lesson in how legislation should not be drafted. In its first sentence, the section delegates to the agency the power to define "exempt" and "non-exempt" income. After thus determining that this matter is best left to the agency, the next sentence reflects that the legislature had some second thoughts on allowing the agency to handle the matter and seeks to direct some limitation.

Exactly what the second sentence of Section 3(B) imparts is somewhat of a mystery. First, one can only wonder at what impelled the draftsmen to utilize four negatives in one sentence. By the time one finishes jumping four negative hurdles, he or she is so intellectually exhausted that any ascertainment of the correct meaning of the sentence is sheer luck. The convolutions in the wording posed too much of an obstacle even for the New Mexico Legislative Council Service. In its official interpretation, the Council stated that the provision "directs that medical expenses be allowed as a deduction in determining net non-exempt income of the applicant or recipient for the purpose of meeting eligibility conditions."[95] While it is virtually impossible to make sense of this sentence, a close reading reflects that it cannot mean that medical expenses will be deducted from income. If anything, the sentence most likely means the exact opposite.

The problem—aside from the unfortunate quadruple negative—is that seeking to deduct or include "expenses" with "income" is an exercise in futility; they are apples and oranges. "Income" speaks to resources available to a person. "Expenses" speaks to what one utilizes those resources for. They are not on the same side of the ledger.

Despite the syntax of the sentence, a close inspection leads to the conclusion that the legislative intent was that income devoted to medical needs would be included in the income considered available

94. *See* text accompanying notes 51 through 58, *supra.*

95. New Mexico Legislative Council Service, Highlights of the Thirty-first Legislature 22 (1973).

to the applicant or recipient in determining need eligibility. As such, it seems clear that the purpose underlying this section was to effect a legislative overruling of the *Baca* and *Chavez* decisions discussed above.

Such a legislative intent makes explicable the change in statutory language effected by Section 3(A). As noted above, Section 3(A) substitutes "reasonable level of subsistence" for "reasonable subsistence compatible with decency and health" as a standard by which to test the standard of need arrived at administratively. The elimination of the "decency and health" language may be viewed as a part of the legislative attempt to overturn the *Chavez*[96] and *Baca*[97] decisions.

There are, however, two problems with reading Section 3 of the 1973 amendments as an attempt to overturn the prior case-law. First, there is a practical problem. Even though the "decency and health" language is eliminated, "a reasonable level of subsistence" must mean something. In both *Baca* and *Chavez*, the records were clear and uncontested that without aid, the individuals involved would die. Just as those situations were found to be incompatible with "decency and health," so they would also have to be found inconsistent with "a reasonable level of subsistence." Certainly death cannot be considered "a reasonable level of subsistence." Thus, the change in the language in Section 3(A) cannot be considered to overturn the results in *Baca* and *Chavez*. At the very most, the change in language can be viewed as only addressed to some of the broader ramifications of *Baca* and *Chavez*.

There is, however, a more serious problem with reading Section 3 as overturning the prior case law. At least as to the AFDC program, there is some serious doubt whether these cases can not be overruled consistent with the federal Social Security Act requirements. Under the Social Security Act, once an item is computed into the standard of need for the AFDC program, it may not be eliminated—either legislatively or administratively—without a demonstration that the item is no longer "a reality of existence" for welfare recipients.[98] What this means is that before a state can eliminate an item from the standard of need it must be able to demonstrate statistically that the substantial majority of welfary recipients in the state no longer have need for that item.[99] Thus, if the *Chavez* and *Baca* decisions are read to interpret Section 13-1-11 as including medical needs in the

96. *See* note 57, *supra*.
97. *See* note 51, *supra*.
98. *See* Rosado v. Wyamn, 397 U.S. 397, 419 (1970).
99. *See* Rosado v. Wyman, 322 F. Supp. 1173 (E.D. N.Y. 1970).

standard of need, then the legislative attempt to eliminate that item from the standard would be ineffective without a demonstration that most welfare recipients no longer have medical needs—a supposition so unlikely as to warrant disregard.

As discussed above,[100] while the *Baca* decision is not a model of clarity, a logical analysis of the decision indicates that at the very least, the court was interpreting Section 13-1-11 as a legislative standard of need which did comprehend medical needs, although the administration standard did not. If this analysis of the case law is persuasive, then Section 3 of the 1973 amendments cannot be construed as effectively changing the standard of need.

4. Level of Assistance.

The statutory requirements governing the mechanics of determining the level of assistance granted and the procedure whereby such assistance is to be granted are found in Sections 5 and 11 of the 1973 amendments to the Public Assistance Act. Section 5(A) of the 1973 amendments provides:

> A. The amount of an eligible person's maximum grant of public assistance is determined by deducting the total amount of his non-exempt income from the applicable standard of need. However, if the amount of federal and state funds available for public assistance is insufficient to provide the grants for all eligible persons, the amount of grants to eligible persons may be reduced as necessary.

It is clear from this statutory wording that the process by which the amount of grant to an individual recipient is to be determined does not deviate from pre-existing practice. The amount of income available to the recipient is deducted from the applicable standard of need. The product of this subtraction constitutes the "maximum grant" which will be given to the recipient. The description of the grant as "maximum" in the first sentence together with the second sentence of Section 5(A) indicates that the Department may set grant levels at less than 100% of need.

The question then becomes what limits are set on the administrative discretion of the Department to set the level of assistance at less than the "maximum grant" or 100% of need. A close reading of Section 5(A) reveals clear limits on administrative discretion. It is submitted that the first sentence of the section sets the norm for the grant level: the difference between available income and the standard of need. It is only the second sentence of the section which con-

100. *See* text accompanying note 56, *supra.*

templates a reduction of the grant level from 100% of need. This sentence, however, expressly limits such a reduction to circumstances where "the amount of federal and state funds available for public assistance is insufficient to provide the [maximum] grant to eligible persons. . . ." Thus, read as a whole, Section 5(A) indicates that before the Department may reduce grant levels from 100% of need, there must be a determination made that there are insufficient funds. A necessary corollary of this is that any reduction so taken must be limited to the amount necessitated by the insufficiency of the available federal and state funding. Thus, if the available federal and state funding were insufficient to make grant awards at 100% of need, but would be sufficient for grants at 95% of need, the Department could reduce grant levels only to 95% of need and could *not* reduce grant levels to 90% or 80% of need.

The critical importance of this provision is that the Department is presently awarding grants at 94% of need. If the above interpretation of this statutory provision is correct, the Department must revert to 100% of need, until it can demonstrate that there is insufficient funding available to support grants at that level. Further, any reduction from 100% of need could come only after such a determination was made consistent with administrative due process.

Section 5(B) of the 1973 amendments poses further ambiguities and uncertainties. Section 5(B) provides: "The [Health and Social Services] board may set individual and family maximum grant levels for each program." There was no similar provision concerning the ability of the Department to impose maximum grant limitations on recipients in the previous law. The term "maximum grant levels" is a term of art in the welfare area.[101] When a state is faced with the problem of insufficiency of funds available to award grants of 100% of need to all recipients, there are two basic vehicles whereby the state may reduce grants. One is the "ratable reduction" whereby the state awards a uniform percentage of need to all recipients. Section 5(A) apparently authorizes the Department to utilize "ratable reductions" in certain circumstances. The other method by which a state may award grants of less than 100% of need is to employ "maximum grant levels." Pursuant to this method, the state awards 100% of need in its grants up to a certain level, but will award nothing beyond that level. As an example, the state might impose a "family maximum" of up to $320 per month for a family. Pursuant to this maximum, after income is subtracted from the standard of need, the state will pay 100% of the difference, up to $320, but will not pay

101. *See* Lampton v. Bonin, 304 F. Supp. 1384, 1388 (E.D. La. 1969).

any more than $320, regardless of how much the deficit is or the size of the family.

As may be seen from the above example, one of the key features of the "maximum grant level" is the standard to which the maximum is related. Thus, in the above example, the reference standard for the maximum grant level was family unit. The state would not award more than $320 per month per family unit. It is obvious that maximum levels may be referenced to any number of different standards. Thus, there may be maximum levels referenced to families or individuals or particular individuals or to certain items in the standard of need. Section 5(B) of the 1973 amendments, however, authorizes the Department to employ maximum grant levels referenced to only two standards: family or individuals. It would appear, therefore, that the Department would not have the authority to employ maximum grant levels referenced to other standards.

This is an important limitation, since the one major maximum which HSSD presently employs is a maximum referenced to an item in the standard of need: rental expenses. Thus, pursuant to regulation, HSSD will consider rental costs only up to $37 a month for a unit of 1-3 rooms, and $47 a month for a unit of 4-5 rooms and $57 a month for a unit of more than 5 rooms.[102] It can well be argued that this "rental maximum" presently employed by HSSD is in violation of Section 5(B) of the 1973 amendments.

From the above discussion, it can be seen that by means of the two subsections of Section 5 of the 1973 amendments, the legislature has authorized the Department to employ, in certain limited circumstances, two different methods to reduce grants from 100% of need: (1) the "ratable reduction" and (2) "maximum grant levels." There is some serious doubt, however, whether the Department could employ both these methods at once, consistent with federal law. Several years ago the United States Supreme Court interpreted Section 402(A)(23) of the Social Security Act as an effort by Congress to discourage states from employing maximum grant levels as a means of conforming assistance grants to budgetary requirements.[103] Since the Supreme Court's statement, several lower federal courts have interpreted Section 402(A)(23) as prohibiting the utilization of both maximum grant levels and ratable reductions.[104]

102. *E.g.* HSSD Manual § 221.822 (B(i)(a).

103. *See* Rosado v. Wyman, 397 U.S. at 413.

104. We believe, however, in light of *Rosado* that a percentage reduction of the level of payments is under section 402 permissible only when the level of payments is calculated on the basis of a percentage-of-need formula, and not when level of payments is determined on the basis of maximums. . . .
Utah WRO v. Lindsay, 315 F. Supp. 294, 300 (D. Utah 1970).

The states may utilize one or the other, but not both. Under this rationale, therefore, Section 5 should be read as authorizing the HSSD to employ either ratable reductions or family or individual maxima to conform grant awards to budgetary exigencies.

B. Special Medical Needs Act

In addition to the amendments to the Public Assistance Act, the 1973 legislature created a new program for the provision of medical assistance to indigent persons. The Special Medical Needs Act[105] authorizes HSSD to operate the program,[106] sets up the statutory criteria for eligibility[107] and appropriates $250,000 to fund the program.[108]

It seems clear that the creation of the Special Medical Needs program was in response to the *Chavez* and *Baca* cases. In both *Chavez* and *Baca*, the Department argued that a finding of eligibility would require the establishment of a new medical assistance program. The Court of Appeals, in both cases rejected the argument, emphasizing that the decision in each case was only that the individual was eligible to assistance under the AD program and would not require the establishment of a new medical assistance program.[109] In any event, regardless whether the *Chavez* and *Baca* decisions required the creation of a new program, by authorizing and funding a Special Medical Needs program the legislature made manifest an intent that persons in the *Baca* and *Chavez* situations should be provided assistance.

As in the other public assistance programs, eligibility criteria for assistance under the Special Medical Needs program are divided into "need" and "non-need" factors. Pursuant to Section 4 of the Act, the Department is authorized to set up regulatory standards for defining the standard of need and available income and resources. Need eligibility is established if an individual's available income and resources are less than the established standard of need.

The non-need eligibility criteria may be categorized into two areas: (1) medical need criteria; and (2) incidental criteria. The incidental non-need criteria are substantially identical to the non-need eligibility criteria common to all public assistance programs administered pursuant to the Public Assistance Act. Thus, an applicant (1)

105. Laws of New Mexico, Ch. 311 (1973).
106. *Id.* § 3.
107. *Id.* §§ 3, 4, 5.
108. *Id.* § 6.
109. *See* Chavez v. N.M. Health & Soc. Serv. Dep't, 84 N.M. 734, 507 P.2d 795 (C. App.), *Aff'd* as *moot* 12 Adv. Sh. 403 (1973) (semble).

must be a resident of New Mexico,[110] (2) must not be an inmate of a public non-medical institution,[111] (3) must not be receiving assistance under any other public assistance program other than the food stamp program,[112] and (4) must not have made a fraudulent transfer of his property in order to meet the need eligibility requirements.[113]

The medical need eligibility requirement is set forth in Section 3 of the Act. This Section apparently limits eligibility to those persons "who have a serious medical condition which will as a reasonable medical probability lead to death in the near future." Aside from aesthetic considerations of withholding assistance until one has reached the deathbed, this legislative standard poses substantial problems. First, one may seriously question whether the state of the medical art is such as to be able to provide the predictions of death which the standard apparently calls for. Equally important is the problem of the temporal proximity of death contemplated by the standard. Will a person whose condition will probably lead to demise, but only after a long and protracted illness, meet the standard? If not, does one have to wait until death is imminent? Why the "near future" requirement was put into the standard is questionable. It may be that the legislature recognized that death comes to everyone sooner or later and wanted to reserve assistance to those to whom death may come sooner. It is submitted that a better, more humane and more workable standard would have been created if it were written in terms of whether the medical condition, if left untreated or uncorrected, would be a proximate cause of death. The legislature should consider amending the statute to that effect.

Some of the administrative problems concerning the standard, however, are ameliorated in subsection B of Section 3. Subsection B provides:

> B. Such medical condition will be certified by an individual licensed under state law to practice medicine or osteopathy. The medical care shall be reviewed and approved according to regulations of the board.

From the wording of this provision it is reasonably clear that the determination of when a medical condition "will as a reasonable medical probability lead to death in the near future" is left, at least in the first instance, to individual medical practitioners. A reasonable

110. Laws of New Mexico, Ch. 311 § 5(A)(6).
111. *Id.* § 5(A)(5).
112. *Id.* § 5(B). Section 3(A) seems to further limit eligibility to aged, blind, or disabled.
113. *Id.* § 5(A)(4).

interpretation of this is that once a medical practitioner certifies an individual as having the requisite medical condition, that person is eligible (assuming he or she meets the other need and non-need criteria) immediately and must commence receiving assistance immediately. If the Department desires to create some administrative mechanism for reviewing such certifications by individual practitioners, any such review must not serve to delay the provision of assistance. Thus, upon certification, the individual would be granted assistance, subject to possible termination if upon review, some defect is found in the certification. Such a reading of the statute is supported by the standard which limits eligibility to those to whom death is proximate.

Procedures for reviewing certification can often take a substantial period of time. To interpose such a period of time between the certification that death is proximate and the provision of assistance would be an unreasonable reading of the statute, clearly inconsistent with the legislative goal of providing assistance to persons who have conditions which make death imminent.

The wording of the statute gives no assistance in resolving the relationship of the Special Medical Needs Program to other programs administered by HSSD pursuant to the Public Assistance Act. As discussed above, the Department already administers a "Categorically Needy" Medicaid program pursuant to the Public Assistance Act;[114] and the 1973 Amendments appear to preclude the Department from administering a "Medically Needy" Medicaid program.[115] Although there are similarities between the Special Medical Needs program and the "Medically Needy" Medicaid program, there are also substantial dissimilarities which would preclude the program from qualifying as a "Medically Needy" program under the Social Security Act. First, the category of persons eligible for the program under the state statute is not as broad as required for a "Medically Needy" Medicaid program under the federal statute. Thus, the federal requirements are that the program must be available to at least those classes of persons who would be eligible for the four categorical assistance programs, except for need.[116] The state statute limits eligibility to persons who would be eligible for the AD, AB and OAA programs, but excludes persons eligible for the AFDC program.[117] Another major conflict between the state program and the federal requirements is that under the federal requirements, income expended for needed

114. *See* text accompanying notes 75 through 80, *supra.*
115. *See* text accompanying notes 77 through 79, *supra.*
116. 42 U.S.C. § 1396a(a)(10)(B) (1970).
117. Laws of New Mexico, Ch. 311 § 3(A) (1973).

medical expenses is not to be considered income available for purposes of determining need eligibility.[118] The state program, on the contrary, appears to mandate that such income be included in income available for purposes of establishing need.[119] Since any state program, in order to be eligible for federal contributions, must meet the federal requirements, it would appear that the New Mexico Special Medical Needs program would not qualify as a "Medically Needy" Medicare program. For HSSD to represent it to the federal government as such, and for the federal government to so accept it, would require a flagrant disregard for both federal and state law.

Since the federal contribution to Medicaid programs runs from 50% to 83%[120] of the cost of operation, one reasonably could assume that there would be a substantial advantage to the state in opting for a "Medically Needy" Medicaid program rather than operating a similar program wholly out of state funds. The next legislature should consider amendments to both the Public Assistance Act and Special Medical Needs Act that would allow HSSD to cooperate with the federal government in administering the program as a "Medically Needy" Medicaid program.

CONCLUSION

The recent trend toward federalization of the administration of income assistance programs has most likely reached its apex for the foreseeable future. As of January 1, 1974, state administration of the AABD programs will be effectively ended. The states will retain administration of the AFDC program, the food stamp program, the Medicaid programs and whatever programs a state may choose to fund on its own. With the exception of the latter programs, however, the federalization process has effectively removed administrative discretion in the area of non-need eligibility. Thus, it is in the areas of need eligibility and level of assistance that the states have retained any real discretion in the administration of the programs.

In the area of need eligibility, however, in the State of New Mexico, HSSD has found its administrative discretion substantially limited. The developing case law in New Mexico apparently has found that the ability of the Department to include or disregard

118. 42 U.S.C. § 1396a(a)(17). *See* Fullington v. Shea, 320 F. Supp. 500, 504 (D. Colo. 1970).

119. Laws of New Mexico, Ch. 311 § 4(B) (1973).

120. 42 U.S.C. §§ 1396(b), 1396(d)(b) (1970). *See* Silver and Edelstein, *Medicaid: Title XIX of the Social Security Act–A Review and Analysis,* 4 Clearinghouse Rev. 239, 239-240 (1970).

certain items from the standard of need or the definition of available income is circumscribed by relevant state law. Thus, the decision of the Department to disregard consideration of medical expenses in making need eligibility determinations was inconsistent with the legislative standard of need.

The result of the recent federal and state trends, with regard to the New Mexico administrative agency, has been to eliminate substantially the agency's discretion. Thus, in disputing any specific practice or decision of the Department, one finds that the argument refers more often than not, to relevant federal and state statutory requirements than to the sound discretion of the agency. In other words, the argument is framed in terms of "You are *not allowed* to do that," rather than in terms of "You *should not* do that."

It was in this context that the 1973 state welfare legislation was drafted. In what manner did the 1973 New Mexico Legislation respond to that trend? It is submitted that the new legislation, whether consciously or unconsciously, enhanced that trend by further removing discretion from the administrative agency. Virtually all of the criticisms made in this article of the new legislation result from attempts by the legislature to circumscribe the discretion of the agency in administering the programs. Thus, the problems that arise from the federal takeover of the AABD programs and the possible state supplementation thereto, result from the statutory language limiting the life of those programs to January 1, 1974. There was no reason to include such language. Yet the legislature felt impelled to put such language in, apparently to make sure that the agency did not carry those programs beyond the date of the federal takeover. Such a purpose can only manifest some distrust of the agency.

The statutes are replete with such examples where the legislature is attempting to administer rather than to legislate. The result, of course, is to point out the obvious; legislatures should not attempt to administer. They have neither the technical expertise, the experience in intricate and difficult administration, nor the flexibility that administrative agencies have. The more desirable course of action would have been for the legislature to identify the problem areas; authorize the administrative agency to deal with those problems; set forth broad standards for the administrative agency to use in developing its regulations and administration; and then let the administrative agency do its job.

The 1973 legislation may be criticized justifiably as both ill-conceived and badly drafted. The result has been to cast a cloud over

possible action of the agency in meeting immediate needs and problems. The legislature has the opportunity to reconsider the legislation in its 1974 session. It ought to do so. The problems of welfare administration remain critical and pressing and one should not expect substantial reform to come from the federal level. The responsibility now rests with the states.