

THE SSI COALITION

FOR A RESPONSIBLE SAFETY NET

SUPPLEMENTAL SECURITY INCOME FOR LOW INCOME ELDERLY AND PEOPLE WITH DISABILITIES

OCTOBER 22, 1996

SOLE RELIANCE ON THE LISTINGS STEP OR THE LISTINGS SEVERITY LEVEL OF THE CHILDREN'S SEQUENTIAL EVALUATION IS THE WRONG APPROACH

Returning the children's SSI program to a definition that provides that a child is disabled only if she or he satisfies the Listings of Impairments step of the children's sequential evaluation is the wrong approach. A standard that requires a child to show two "marked" impairments, or a functional equivalent to the Listings would be such a regression.

A. The Listings Step

A child may be found disabled at step three in the SSI childhood disability sequence if she or he has impairment(s) that meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. § 416.924(e).

20 C.F.R. § 416.926a further provides that disability is shown at the third step in any one of three ways: meeting the listing criteria; medically equalling the listing criteria; or functionally equalling the listing criteria.

- ◆ A child is disabled if s/he has an impairment that is described in the Listings. 20 C.F.R. Part 404, Subpart P, Appendix 1.
- ◆ A child is disabled if s/he has an impairment(s) that is the medical equivalent of a listed impairment. Medical equivalence is shown in one of two ways:
 - if the child does not exhibit one or more of the medical findings specified in the listing, or the child exhibits all the medical findings, but one or more of those findings is not as severe as specified in the listing, the child is disabled if s/he has other medical findings relating to the impairment that are at least of equal medical significance; or
 - if the medical findings of a child are of at least



equal medical significance to those of a closely analogous listed impairment.

- ◆ A child is disabled if s/he has an impairment that is the functional equivalent of a listed impairment if the functional limitations resulting from his or her impairment(s) is the same as the disabling functional consequences of a listed impairment.

Sole reliance on the Listings step for the entire evaluation or for the severity level required was never intended by Congress or the President, when the children's SSI program was reformed. Thus, they cannot be adopted as the sole test for children's disability under SSI. Moreover, returning to the pre-Zebbley criteria would reinstate many of the problems that led the Supreme Court to invalidate the old approach.

B. The Listings And Their Functional Equivalents Were Consciously Written At A Highly Restrictive Level

Most of the Listings do not involve direct measurement of function, the mental impairment listings being the only notable exception. Even the mental impairment listings only attempt to measure function in the mental health area, requiring a showing of two "marked" impairments in but four mental health domains. These Listings generally are set at very high levels that are only sometimes relevant to function.

In the three instances after the Supreme Court issued Zebbley, in which the Social Security Administration (SSA) promulgated new Listings,¹ there is explicit acknowledgement that the Listings are set at a very high level. While they define when an impairment is disabling, they do not define when an impairment is not disabling. See Respiratory Listing § 103.00A; Immune System Listing § 114.00C.6; and Cardiovascular Listing § 104.00A.

C. Functional Equivalence Does Not Solve The Problem Of The High Threshold Of Severity Required To Satisfy The Listings

Similarly, the examples of functional equivalence to the Listings, set forth at 20 C.F.R. § 416.926a(d) also represent extreme and pervasive disability. Typical examples listed are:

- ◆ need for organ transplant;
- ◆ frequent need for a life-sustaining device (e.g. central

¹ See Respiratory Listings, 58 Fed. Reg. 52,346 (October 7, 1993); Immune System, Endocrine, and Multiple Body Systems, 58 Fed. Reg. 36,008 (July 2, 1993); and Cardiovascular System, 59 Fed. Reg. 6,648 (Feb. 10, 1994).

venous alimentation catheter), at home or elsewhere;

- ♦ complete inability to function independently outside one's home within age-appropriate norms;
- ♦ requirement of for 24-hour-a-day supervision for medical or behavioral reasons; and
- ♦ gastrostomy (feeding tube into stomach) in a child who has not attained age 3.

These examples in 20 C.F.R. § 416.926a(d) set very high threshold levels of disability. Although there should be no doubt that a child with frequent need for a life-sustaining device suffers from "marked and severe functional limitations," it is also true that children whose conditions are not life-threatening without such use of invasive therapy are also impaired by "marked and severe functional limitations." To use such examples as screening tools raises the disability threshold far above the statutory standard, as amended by welfare reform.

In addition, several of the examples set forth impairments that, in addition to being "marked and severe" are also pervasive--they set forth impairments that signal some degree of impairment in almost all areas of a child's functioning or body systems. A child whose impairments are so severe that she or he requires 24-hour-a-day supervision for medical or behavioral reasons has pervasive impairments. Yet, the requirement of "pervasiveness" was stricken as the children's SSI changes were being debated in Congress. See Cong. Record at p. S 13615 (Sept. 14, 1995).

D. Functional Equivalence Fails To Require Consideration Of Functioning In All Relevant Domains Of Functioning

In addition to setting forth a threshold level for disability that is far higher than envisioned under the statute as amended, the functional equivalence regulation fails to require consideration of all relevant areas of a child's functioning. The functional equivalence regulation fails to set forth, or provide guidance on assessing:

- ♦ children who suffer from a physical impairment, or a combination of physical and mental impairments that cause loss of functioning in:
 - cognition;
 - communication;
 - personal/behavioral functioning;
 - gross and fine motor functioning;
 - physical stamina; or
 - concentration, persistence, or pace; and

- ♦ children who suffer from a combination of mental impairments only that cause limitations in all relevant areas of functioning, including those set forth above.

E. The Listings Do Not Include Many Childhood Disorders

SSA has repeatedly acknowledged that the childhood Listings of impairments, like the adult Listings, are flawed as a sole test of disability because of their incompleteness. They only "evaluate the more common impairments." 42 Fed. Reg. at 147006 (1977).

There are over 5,000 known rare diseases, see Report of the National Commission On Orphan Diseases xiii (1989), and the disproportionate presence of rare disorders among children demonstrates how a Listings-only or Listings-equivalent evaluation can never fairly evaluate childhood impairments. Where chronic illness in adults "consists mainly of a relatively large number of fairly common illnesses (such as hypertension, diabetes, and osteoarthritis) and a few rare diseases, chronic illness in childhood is characterized by very few disorders that are common and by many that are quite rare." Pless & Perrin, Issues Common to a Variety of Illnesses, in Issues in the Care of Children with Chronic Illness 41, 43 (Hobbs & Perrin, eds. 1985). For example, children's skin disorders are so different from each other that SSA does not have a skin disorder listing for children.

And, as is discussed above, little, and mostly incomplete, guidance is given to decisionmakers on making equivalence determinations. This gap makes it more likely that children, with disorders that are disabling but not specifically described in the Listings, will be found not disabled.

F. The Listings Focus On Extreme Pathology And Gross Failures Of Treatment

The Listings measure severity by using proxy measurements--how often a child has been hospitalized, whether she or he uses crutches or braces, or whether she or he has become malnourished or experienced severe growth impairment. However, there are children who "avoid recurrent hospitalizations" (Juvenile Diabetes Listing), or other extreme measures of treatment because their parents put extraordinary amounts of time into monitoring their health and avoiding the need for hospitalization.

Thus, the parent of a child with severe diabetes might succeed in avoiding the need for repeated hospitalizations through constant and vigilant monitoring and treatment. See Listings §§ 109.08A & 109.A. Other parents may, with extraordinary efforts, prevent a hemophiliac from severe bleeding. See Listing 107.08A (Inherited Coagulation Disorder). Other parents will prevent, with similar efforts, a hypoglycemic child from having convulsions or lapsing into a coma. See Listing § 109.12 (Hypoglycemia).

There are a number of other Listings, see e.g. §§ 103.03D & 105.07, that refer to the growth impairment listing, § 100.00, as a measure of severity of the underlying illness. However, such an approach only measures cases in which growth is severely impaired, without looking to what extraordinary means might have been taken to avoid Listing-level growth retardation.

Receiving excellent proactive treatment does not make such a child any less disabled. Yet, the Listings do not provide guidance on how such cases should be assessed for disability.

G. SSA Will Have Great Difficulty In Getting Its Decisionmakers To Apply The Equivalence Standards In A Uniform Manner To The Variety Of Impairments, Either Alone Or In Combination, That Could Cause Marked And Severe Impairments

Although the present equivalence tests have been used since 1991, SSA statistics show that few decisionmakers rely on them to make disability determinations. The functional equivalence test was utilized in only 7.2% of all allowances. See Exhibit A.

Many decisionmakers, at the BDDS and OHA levels, have stated that they did not do functional equivalence determinations because they did not understand how SSA intended that the test be applied. Certainly, the regulation, 20 C.F.R. § 416.926a, provides little guidance. Others have stated, because it was easier to consider a child's level of functioning at the IFA step, that they skipped the functional equivalence assessment of the Listings step.

Application of the functional equivalence test is also problematic because SSA has never required its decisionmakers to document that they explicitly considered functional equivalence, or to provide some minimal articulation of their path of reasoning that a child does not functionally equal a Listing when they make a decision.

These factors dictate against sole reliance on this standard because the institutional history that it is rarely used and rarely understood will stand as a barrier to the widespread use that would be required if it is allowed to stand as the sole test in which SSA considers function in determining children's disability.

H. Raising The Disability Standard To Listings Level Is Not The Quick Fix That Its Supporters Claim

To avoid returning to the pigeon-hole approach used before Zebley, SSA must adopt a meaningful functional evaluation for children. That is what Congress has now explicitly directed. Given that few, if any, of the Listings other than those for mental impairments, utilize any functional assessment, the Listings would have to be completely rewritten, a task that SSA has avoided for 20

years.²

Merely using the functional criteria of the mental impairments would seriously disadvantage children with a variety of diverse physical impairments, such as cystic fibrosis, musculoskeletal disorders, cardiac problems, sickle cell anemia, and cancer; and children with combinations of physical and mental impairments.

² Historically, SSA has taken years even to amend the Listings, particularly the children's Listings. If Congress had intended SSA to use the Listings as the source of functional evaluations it would have done so. It cannot be gainsaid that Congress legislated a "functional limitations" test and never provided for a wholesale rewriting of the Listings.

EXHIBIT A

Stage Of Children's Sequential Evaluation In Which Children Were Found Disabled (Data From 2-11-91 To 12-31-94)³

	<u>NATION</u>
STEP THREE (MEDICAL LISTINGS)	
Met Listing:	425,808
% That Met Listing:	52.4%
Med. Equalled Listing:	70,149
% That Med. Equalled Listing:	8.6%
Func. Equalled Listing:	58,506
% That Func. Equalled Listing:	7.2%
All Step Three Allowances	495,957
% Of All Step Three Allows.	68.2%
STEP FOUR (IFA)	
IFA Allowance:	251,108
% Of IFA Allowances:	30.9%
MISCELLANEOUS	
Misc. Allowance:	6,838
% Of Misc. Allowance:	0.8%
TOTAL ALLOWANCES	812,409
% OF TOTAL ALLOWANCES	100%

³ Report to Congress of the National Commission On Childhood Disability, October 1995, App.7-D.

 Richard E. Green
11/14/96 05:10:46 PM

Record Type: Record

To: Cynthia M. Smith/OMB/EOP

cc:

Subject: DPC comments

Following is what Diana sent me. I've inserted dollar figures into her p.4 comments. I would take her first two comments, and not take her third comment. In her description of the new Option 3, I would add the phrase "not covered by Option 2" to her phrase "children with the most serious disabilities....." In her discussion of the DPC recommendation, instead of "but would provide special protections for children on the borderline," I would say "but would expand the number of children who could meet the standard." Finally, in the next to last sentence, I would at least change "would certainly" to "might" and try to change "disabled children" to "children with impairments." These are just suggestions; I don't believe I'm empowered to negotiate.

DPC revisions to children's SSI section of memo

ok
P. 3: End of paragraph beginning "Current Law": "While we will miss the November 22 deadline for publishing the regulation to implement this change, it would be preferable to announce our decision prior to that date."

P. 4: First full paragraph beginning "Note that":

- ok*
1. Phrase at end of first sentence "and that was enacted into law": we can't say this unless we think Option 3 is not legal, which we don't.
 2. Add to end of second sentence: "...which we could do by saying that we have determined that SSA has more legal latitude than we understood at the time of enactment."

not covered by option #2
P. 4: Add Option 3 (make advocates Option 4): Further ease standard by greater recognition of chronic illness and re-assessment of borderline cases. Option 3 would add to Option 2 two features that are intended to preserve benefits for the children with the most serious disabilities; additional recognition of children with chronic or episodic illnesses such as AIDS, and an added assessment of children on the borderline. Under this option, 100,000 children would be ineligible for SSI -- 90,000 fewer than under Option #1. Option 3 would cost \$4.2 billion over 1998-2002 and \$0.9 billion in 2002.

Add new paragraph after paragraph beginning "OMB recommends": "DPC staff recommends Option 3. This option would set the standard at the level that Congress is thought to have intended, but would provide special protections for children on the borderline."

1
Instead [~~but would~~ expand the # of children that would meet the standard]

SSA has had difficulty giving us a clear profile of these children, and it is difficult to be confident that SSA's rules reliably discern the most severe impairments. This option would provide extra assurance that children on the borderline will be properly evaluated. The disability community, members of Congress like Senators Daschle and Chafee, and leading editorial writers have made this a major issue, and ~~would certainly~~ see anything less than this standard as not taking advantage of our considerable latitude to assist disabled children. We should also consider the challenges that many of these low-income families will face under welfare reform."

might ? ? w/ impairments

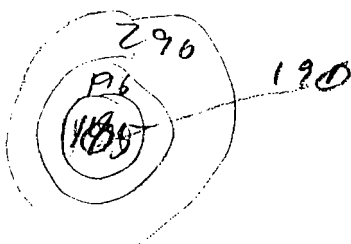


Chart 1. Sequential Disability Determination Process

Adults	Children: Pre-Zebley	Children: Post-Zebley																
1. Are you working? (Y = Deny) 2. Do you have a severe impairment? (N = Deny) Compare impairment to medical listings <table border="1"> <thead> <tr> <th>Mental</th><th>Other</th></tr> </thead> <tbody> <tr> <td>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</td><td>3a. Meet criteria in medical listings? (Y = Allow)</td></tr> <tr> <td>3b. Equal? Meet (B) and some of (A) (Y = Allow)</td><td>3b. Medically equal medical listings? (Y = Allow)</td></tr> </tbody> </table> Assess residual functional capacity (RFC) 4. Can you do past work? (Y = Deny) Consider age, education and work experience 5. Can you do any other work? (N = Allow; Y = Deny)	Mental	Other	3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)	3a. Meet criteria in medical listings? (Y = Allow)	3b. Equal? Meet (B) and some of (A) (Y = Allow)	3b. Medically equal medical listings? (Y = Allow)	1. Are you working? (Y = Deny) 2. Do you have a severe impairment? (N = Deny) Compare impairment to medical listings 3a. Meet criteria in medical listings? (Y = Allow) 3b. Medically equal medical listings * (Y = Allow; N = Deny)	1. Are you working? (Y = Deny) 2. Do you have a severe impairment? (N = Deny) Compare impairment to medical listings <table border="1"> <thead> <tr> <th>Mental **</th><th>Other</th></tr> </thead> <tbody> <tr> <td>3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)</td><td>3a. Meet medical criteria in the listings? (Y = Allow)</td></tr> <tr> <td>3b. Equal? Meet (B) and some of (A)? (Y = Allow)</td><td>3b. Medically equal medical listings? (Y = Allow)</td></tr> <tr> <td colspan="2"> 3c. Functionally equal medical listings? (Y = Allow) Do individualized functional assessment </td></tr> <tr> <td colspan="2"> 4. Given IFA, is impairment(s) of comparable severity to that which would disabled an adult? (Y = Allow; N = Deny) </td></tr> </tbody> </table>	Mental **	Other	3a. Meet both diagnostic (A) and functional (B) criteria? (Y = Allow)	3a. Meet medical criteria in the listings? (Y = Allow)	3b. Equal? Meet (B) and some of (A)? (Y = Allow)	3b. Medically equal medical listings? (Y = Allow)	3c. Functionally equal medical listings? (Y = Allow) Do individualized functional assessment		4. Given IFA, is impairment(s) of comparable severity to that which would disabled an adult? (Y = Allow; N = Deny)	
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not on list, just

using FFA criterion for mental

* Before 1990, SSA policy in SS Ruling 81-19 explicitly prohibited using an overall functional assessment to find that a claimant's impairment equalled the medical listings. A claimant with multiple impairments could meet or equal the listings only if at least one impairment, alone, met or medically equalled a specified listing.

** The childhood mental disorders listings were modified in 1990 to include functional criteria similar to those put in the adult listings in 1985.

SSA's Functional Assessment of the Severity of Disabling Conditions

Adult Mental Disorders Listings

The required level of severity is met with TWO of the following:

1. Marked restriction in activities of daily living.
2. Marked restriction in social functioning
3. Deficiencies of concentration, persistence or pace
4. Repeated episodes of decompensation in work, or work-like settings

Childhood Mental Disorders Listings

The required level of severity is met with TWO of the following:

1. Marked impairment in age-appropriate cognitive/communication function.
2. Marked impairment in age-appropriate social functioning
3. Marked impairment in personal/behavior functioning as evidenced by:
 - a. Marked restriction in age-appropriate activities of daily living; or
 - b. Persistent maladaptive behavior destructive to self, others, animals or property;
4. Deficiencies of concentration, persistence or pace.

SSA will now add motor

Childhood Individualized Functional Assessment (IFA)

"Guidelines" are ONE marked and ONE moderate limitation, or THREE moderate limitations among:

1. Cognitive function
2. Communication function
3. Motor function
4. Social function
5. Personal/behavioral function
6. Concentration, persistence or pace.

deleted by new law

EXECUTIVE OFFICE OF THE PRESIDENT

**Office of Management and Budget
Associate Director for Human Resources
260 Old Executive Office Building
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Fax #: 395-5730

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FACSIMILE COVER SHEET

DATE:

11/14

TO:

CAROL RASCO JEREMY BEN-AMI

DIANA FORTUNA

Fax Number:

Number of pages (including cover sheet):

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FROM:

KEN APFEL

REMARKS:

DRAFT OF THE WELFARE MEMO TO THE
PRESIDENT: FOR YOUR COMMENT ✓

phone #: 395-4844

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DRAFT

MEMORANDUM FOR THE PRESIDENT

FROM: Franklin D. Raines
Carol Rasco

SUBJECT: Welfare Reform Administrative Issues in Food Stamps, Supplemental Security Income (SSI) and Medicaid with Significant Budgetary Impact

One of the most difficult resource decisions you will make in the 1998 budget is how to correct the problems you identified in the enacted welfare reform bill within an aggregate spending path that leads to a balanced budget in 2002. The overarching decision is whether to spend more or less for welfare reform fixes than the \$13 billion over 5 years now in our 1998 budget planning. This reserve roughly corresponds to the savings from the bill above and beyond the Administration's proposal.

Potential Legislative Fixes. In the near future, we will discuss with you a number of legislative proposals that address the concerns you articulated when you signed the bill. While it is possible to address, in part, all the issues you raised within the \$13 billion, more expansive proposals could easily cost much more. For example, bridging the differences on immigrants and Food Stamps could cost as much as \$22 billion over five years and \$5 billion in 2002.

Additional Near-Term Administrative Issues. In addition to the broader question of aggregate welfare spending, we are raising to your attention three potential -- and time-sensitive -- administrative fixes for Food Stamps, SSI children, and Medicaid. All three would require substantial budgetary resources and reduce funding available for later legislative changes. The costs for these administrative issues range from \$1 to \$10 billion over 1998-2002. This memo seeks your decisions on the three near-term administrative issues in the context of overall funding for welfare reform fixes in your 1998 balanced budget.

Need for docs
A. NEAR TERM ADMINISTRATIVE DECISIONS

1. Food Stamp Time Limits for Childless Adults

Current Law. The welfare reform bill limited Food Stamps for childless adults to 3 months in 3 years. Individuals are exempt from the time limit if they are: under 18 or over 50 years of age; responsible for the care of a child or incapacitated household member; medically certified as physically or mentally unfit for employment; pregnant; or exempt from the Food Stamp work requirements. This provision is estimated to save approximately \$3 billion over 1998-2002. When States fully implement this provision in 1997, almost 800,000 individuals will be ineligible to receive Food Stamps each month. These individuals may only stay on the

program if they are working over 20 hours per week or participating in an intensive workfare program. We do not expect States to establish costly workfare slots for this group, given limited State resources and pressures to create jobs for the welfare population. About half of these individuals have no other income other than Food Stamps, putting their average monthly income at \$171 or 28% of the poverty level. Over 40% of this group is made up of women.

The law provides an exemption for cities, counties, or states with unemployment rates above 10%, at State request, and allows States to request waivers for any group of individuals residing in an area that "does not have a sufficient number of jobs to provide employment for the individuals." The Administration assumed a very strict interpretation of "insufficient jobs" when the bill passed, but we have the ability to define the criteria for areas with insufficient jobs more broadly as a part of implementation. The time limit goes into effect on November 22, 1996. States are already preparing their internal guidance and formulating waiver requests. Oregon, Louisiana, West Virginia, and Washington have already submitted requests. There is substantial latitude in the law for how the Administration interprets exemptions and waivers, and thus for the numbers of individuals actually denied benefits.

Option #1 -- Provide waivers only for areas with serious impediments to employment, such as a rural town with only one major employer. While employment may be below 10%, no jobs may be available if the major employer is not hiring. This option would provide relief to few areas. The baseline assumes *de minimis* use of the waiver authority, and this option roughly corresponds to the baseline (i.e., it would not have any costs over 1998-2002). Options #2 and #3 below propose waiver policies that would exempt more people and therefore add costs over 1998-2002.

Option #2 -- Limit waivers to broader geographic-based criteria, such as areas defined as "labor surplus areas" by the Department of Labor (DOL). These are areas with at least two years experience of unemployment 20% higher than the national average. This interpretation could exempt up to 30% of those subject to the time limit who are living in areas with historically high unemployment, albeit under the threshold in the bill. Geographic-based exemptions are arguably an appropriate exercise of the discretion Congress granted. This option would cost \$1 billion over 1998-2002 and \$0.18 billion in 2002.

Option #3 -- Establish broad waiver criteria in addition to geography. The Department of Agriculture (USDA) and some outside groups have proposed guidance that ranges from exempting areas heavily dependent on declining industries, such as coal mining, to providing waivers to groups of individuals who face fewer employment opportunities due to insufficient job skills, for example, persons without a high school education. The guidance would exempt an individual without a high school diploma from the time limit even though she lives in an area with 4% unemployment. Exempting entire classes of individuals goes beyond what Congress contemplated in providing exemptions to the provisions. While individuals without a complete high school education do face a tougher labor market than others, it is not reasonable to assume that they cannot find employment without regard to local economic circumstances. In

addition, some might perceive an exemption for this group to be an education disincentive. Highly preliminary estimates show that exempting persons without a high school diploma could exclude 45% of those subject to the time limit. In total, USDA's proposed guidance could exempt between 65 to 75% of those subject to the time limit and therefore cost as much as \$2 billion over 1998-2002 and \$0.33 billion in 2002. It is unlikely that all States will take full advantage of such broad exemption criteria; however, the Administration would have to defend the position that lack of a high school diploma is a qualification for Food Stamps.

How, more appropriate to reach this goal
[**Recommendation.** We recommend Option #2, which would allow States to exempt areas with historically high unemployment relative to the national average, even though it is below the threshold in the bill.]

2. SSI Childhood Disability Definition

Current Law. The welfare reform bill provided a new, tightened definition of childhood disability for the Supplemental Security Income (SSI) program, consistent with the Administration's proposal. However, the statutory language is not precise, and the Social Security Administration (SSA) has substantial discretion in drawing the eligibility line to implement the new law. The Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) scoring was based on a similar understanding of the impact of the provision at the time of enactment. The SSI childhood disability provision in the final welfare reform bill was scored at \$8.4 billion in savings over 6 years and \$1.9 billion in 2002, and was estimated to remove 190,000 children out of 1 million from the rolls by September 1997. Since enactment, advocates and some Senate moderates have argued for an implementation policy that is significantly less restrictive. We are asking for your decision on this issue soon so that SSA may begin processing the approximately 7,000 new cases a week that they have held since August. *+ Nov 22 deadline **

Option #1 -- Implement the law consistent with the scoring assumptions and understanding at time of passage. This would significantly tighten eligibility compared to the law before the enactment of welfare reform. Under this option, 190,000 of the 1 million children now on the rolls would become ineligible for SSI. This option does not add costs to the baseline.

Option #2 -- Modify the disability determination process to (a) limit the impact of tightened eligibility requirements on children with multiple physical impairments, and (b) require adjudicators to complete a standard form that will promote greater uniformity in decision making and lead to more allowances than would otherwise occur. Both of these changes can be accomplished administratively, were suggested by SSA, and make programmatic sense. Under this option, 145,000 children would be removed from the rolls by next September -- 45,000 fewer children than under Option #1.

To ameliorate the hardship for these children's families, under Option #2 we would also seek legislation to retain Medicaid eligibility for all children now on the rolls who lose SSI.

Prop version
#3

OMB estimates that, under current Medicaid law, 77% of the children who lose SSI would retain Medicaid because of other qualifying factors; new legislation would provide for those children not covered under current Medicaid law. Option #2 would cost \$2.4 billion over 1998-2002, including less than \$0.5 billion for the legislative proposal. The 2002 cost would be \$0.5 billion.

5 *Can't say that*
Note that Option #2 is a more lenient policy than the one the Administration and Congress proposed ~~and that was enacted into law~~. If we choose this option, we will have to justify changing our policy post-enactment, *altho' it's pretty much by this formula.*

→ **Option #3 -- Provide for a significantly lower severity standard in determining eligibility.** This option is supported by advocates, Senator Daschle, and some Senate moderates from both parties. The Senate moderates argue that their explicit legislative strategy during the welfare reform negotiations was to insist on a definition that was ambiguous enough to satisfy the Republican leadership but would still give SSA the latitude to use a more lenient definition. Given that SSI cash benefits link these children to Medicaid coverage, and that the welfare reform bill simultaneously makes many other changes to the welfare system that could affect these families, advocates argue that it is appropriate to err on the side of SSA using its legal discretion to keep more children on the rolls. Under this option, 45,000 children would become ineligible for SSI -- 145,000 fewer than under Option #1. *can't we keep law*

There would undoubtedly be significant negative reaction to this option from the Republican majority, and it could be represented as negotiating in bad faith. Option #3 would cost \$6.4 billion over 1998-2002 and \$1.5 billion in 2002.

[*OMB* **Recommendation.** *We* recommend Option #2, using administrative discretion to moderately soften the original policy and retain SSI eligibility for 45,000 children who would otherwise lose benefits, and at the same time seek Congressional support for retaining Medicaid for all children now on the rolls.]

3. **Extension of Waivers Granting Transitional Medicaid Benefits**

At the time you signed welfare reform bill, 20 States had waivers that included authority to extend transitional Medicaid benefits beyond the normal 12 months (in some cases up to 36 months). Six more requests are pending. Before welfare reform, the Administration's policy was to establish budget neutrality across the AFDC, Medicaid and Food Stamps programs over the lifetime of the waiver. Typically, costs from additional Medicaid and Food Stamps benefits were offset by expenditure reductions projected to result from decreases in the AFDC caseload.

Since welfare reform replaced AFDC with a block grant, we can no longer project Federal savings resulting from lower AFDC caseloads. OMB and HHS agree that past Medicaid expenditures related to welfare waivers should be forgiven. OMB and USDA also agree that all past and future Food Stamps waivers should continue to be budget neutral. At issue is whether

the future costs of extended transitional Medicaid benefits for current and pending Medicaid waivers should continue to be held to a budget neutrality standard.

Option #1 -- Require States to adhere to budget neutrality for current waivers. The Administration could require States that want to continue their waivers to establish that the extension of transitional Medicaid benefits is budget-neutral. Because there are no longer any savings to the Federal government from the block-granted AFDC program, budget neutrality would require that the Federal government pay 0% of the costs (i.e., provide no Federal match) for the extended transitional benefits.

It is likely that States will continue to provide the transitional benefits waivers only if they believe they can finance them through State savings from the new welfare reform block grant. If transitional Medicaid really has the desired effect, however, States will reap substantial benefits from lower welfare benefits costs.

States may argue that requiring them to re-establish budget neutrality is a "breach of the contract" under which their waivers were granted. However, all Federal Medicaid waivers provide for renegotiation if a change in Federal law occurs. Moreover, this policy is consistent with the consensus policy to enforce budget neutrality in the Food Stamps program after the enactment of welfare reform.

Option #2 -- Modify the budget neutrality policy for the 26 States with waivers or pending applications. The Administration wants to promote welfare-to-work initiatives, of which extended transitional Medicaid benefits policy has been a cornerstone in the past. This option would effectively grandfather all states that were trying to do this prior to welfare reform. This would increase the likelihood that the 20 states with current waivers will continue the extended transitional benefits and that another six would begin them. The Health Care Financing Administration (HCFA) actuaries have not completed their estimate of the costs of this option; however, early information suggests that this option could cost between \$160 million and \$200 million over 1998-2002.

Option #3 -- Propose legislation. Should the Administration be accused of treating waiver and non-waiver states inequitably, we could propose legislation to create a new optional Medicaid benefit to allow all states to provide extended transitional benefits. In combination with the forgiveness of budget neutrality for grandfathered states, such a legislative proposal could cost between \$1.0 billion and \$1.4 billion between 1998 and 2002.

[Recommendation. We recommend Option # 2, to grandfather the 26 states that have waivers administratively. We also recommend that you consider *all* welfare reform legislative fixes at the same time, and thus we do not at this time recommend legislation to create a new optional Medicaid benefit for extended transitional benefits.]

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B. THE OVERALL 1998 BUDGET ISSUE

In the context of a five-year balanced budget, any resources allocated to welfare reform make the task of reaching balance more difficult. Since the current plan for reaching balance by 2002 is already challenging our ability to find the necessary savings with acceptable policies, it is important to recognize that a decision to spend more than \$13 billion over five years will require further offsetting savings if our budget is to reach balance. The fact that administrative actions drive up spending in no way diminishes the need to find more offsets if we want to balance in 2002. At the same time, whether you decide to spend more or less than \$13 billion to fix the welfare bill will influence your options on the immediate administrative issues.

Option #1 -- Limit welfare resources to \$13 billion. The recommendations in this memo would spend about \$3.6 billion over five years on the three near-term administrative issues. With the \$9-10 billion remaining in the \$13 billion reserve, you would have sufficient resources to propose a repeal most of the Food Stamp and Medicaid immigrant bans (but not SSI), a legislative fix for the Food Stamp 18-to-50s provision, other changes to mitigate the deep Food Stamp cuts, and expanded contingency funding. WOW

On the other hand, if you choose the highest cost options on the administrative issues, you would spend \$10 billion before we even get to a discussion of the larger legislative fixes. This would leave about \$3 billion to address the other problems with the bill. These resources would be exhausted by an exemption for immigrant children from the Food Stamp ban and a limited relaxing of the cap on the Food Stamp shelter deduction. You would not be able to make other legislative fixes within this total.

Option #2. Do not limit resources for welfare reform fixes to \$13 billion at this time. If you choose to spend more than the \$13 billion reserve, you will sharply limit your ability to meet demands for spending in other areas. Our current outline of the 1998 budget spends \$284 billion on non-defense discretionary programs in 1998, about half of which is for your priorities. The other half is allocated to non-priority discretionary programs by cutting these programs 5% below 1997 enacted levels in aggregate. For every additional \$2 billion you choose to spend on welfare fixes over five years, we would either need to increase the non-priority cut from 5% to 6% in 1998 (and freeze that level in the out-years), or selectively reduce priority programs. The non-priorities include important government functions such as Veterans Affairs (VA) medical care, tax collection, aviation safety, and the administration of Social Security benefits. Even if we protect your highest priorities -- say, in education and the environment -- we are left with programs such as Ryan White AIDS treatment, the National Institutes of Health, and Women, Infants and Children (WIC). If we look outside discretionary spending for these offsets, we face similarly unpalatable choices in Medicare and Medicaid, farm entitlements, civil service retirement, and veterans benefits.

Option #3 -- Defer the near-term administrative decisions. You have, of course, the option to defer decisions on one or all of the administrative issues. You would then have the

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flexibility to make all of the welfare decisions together with the rest of the 1998 budget decisions this December. However, there are undesirable consequences of delaying action on these issues:

- The Food Stamp issue is the most time-sensitive because people subject to the time limit will receive notices on November 22 stating that they are subject to a 3-month clock. If we do not have a final decision very soon on areas to be exempted from the time limit, several hundred thousand people will be threatened with a loss of benefits unnecessarily.
- The transitional Medicaid issue is the next priority because pressure is growing from 26 States on waivers given enactment of welfare reform. Absent a timely decision, some States could decide to suspend their expanded transitional benefits.
- SSA's backlog of SSI cases has been growing by 7,000 a week since August. However, no new problem will be triggered if you defer a decision on this issue until December.

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C. DECISION ON OVERALL BUDGET STRATEGY

_____ Option #1. The maximum available for welfare reform fixes is \$13 billion, including the decisions below. **(Recommendation)**

_____ Option #2. Spend in accord with the administrative decisions below. Revisit the overall funding levels for welfare reform when we make final 1998 budget decisions.

_____ Option #3. Defer the near-term administrative decisions. Make these decisions in concert with 1998 budget decisions this December.

D. DECISIONS ON NEAR TERM ADMINISTRATIVE ISSUES

1. Food Stamp Waiver Guidance

_____ Option #1. Provide waivers only for areas with serious impediments to employment. No additional cost.

_____ Option #2. Limits waivers to geographic-based criteria. Cost: up to \$1 billion over 1998-2002; up to \$0.2 billion in 2002. **(Recommendation)**

_____ Option #3. In addition to exemptions for geographic-based criteria, exempt all persons without a high school education from time limits. Cost: up to \$2 billion over 1998-2002; up to \$0.3 billion in 2002.

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2. SSI Childhood Disability Definition

_____ Option #1. 1997 Administration policy. No additional cost.

_____ Option #2. Relax eligibility requirements relative to the Administration's proposals (Option #1) and propose legislation to ensure that all children currently on SSI rolls retain Medicaid coverage. Cost: \$2.4 billion over 1998-2002; \$0.5 billion in 2002. **(Recommendation)**

_____ Option #3. Significantly lower standard of severity than options 1 or 2. Cost: \$6.4 billion over 1998-2002; \$1.5 billion in 2002.

3. Transitional Medicaid Benefits

_____ Option #1. Budget neutrality for current and pending transitional Medicaid benefit waivers. No additional costs.

_____ Option #2. Modify budget neutrality policy for the 26 states with ongoing or pending waivers. Cost \$0.2 billion over 1998-2002; \$0.04 billion in 2002. **(Recommendation)**

_____ Option #3. Propose legislation to create a new optional Medicaid benefit to allow all States to provide extended transitional benefits. Cost: \$1.0-\$1.4 billion over 1998-2002; \$X billion in 2002.

1:45 pm
11-15-

DRAFT

MEMORANDUM FOR THE PRESIDENT

FROM: Franklin D. Raines
Carol Rasco

DRAFT

SUBJECT: Welfare Reform Administrative Issues in Food Stamps, Supplemental Security Income (SSI) and Medicaid with Significant Budgetary Impact

One of the most difficult resource decisions you will make in the 1998 budget is how to correct the problems you identified in the enacted welfare reform bill within an aggregate spending path that leads to a balanced budget in 2002. The overarching decision is whether to spend more or less for welfare reform fixes than the \$13 billion over 5 years now in our 1998 budget planning. This reserve roughly corresponds to the savings from the bill above and beyond the Administration's proposal.

Potential Legislative Fixes. In the near future, we will discuss with you a number of legislative proposals that address the concerns you articulated when you signed the bill. While it is possible to address, in part, all the issues you raised within the \$13 billion, more expansive proposals could easily cost much more. For example, bridging the differences on immigrants and Food Stamps could cost as much as \$22 billion over five years and \$5 billion in 2002.

Additional Near-Term Administrative Issues. In addition to the broader question of aggregate welfare spending, we are raising to your attention three potential -- and time-sensitive -- administrative fixes for Food Stamps, SSI children, and Medicaid. **[All three decisions are on a faster track because they have an immediate impact on benefits to individuals, are subject to statutory deadlines, and/or are important to the state planning process. However, a decision to implement all three at this time would require substantial budgetary resources (ranging from \$1 to \$10 billion over 1998-2002) and reduce funding available for later legislative changes. In addition to cost, there are political implications to softening the impact of the welfare bill administratively in the near-term. These decisions -- in particular a decision on SSI children -- may raise advocates' expectations for the welfare fixes the Administration will later propose through legislation, and, at the same time, jeopardize the Administration's ability to sell our future legislative proposals to Congress -- such as fixes to the immigrants provisions and welfare-to-work proposals.]** This memo seeks your decisions on the three near-term administrative issues in the context of overall funding for welfare reform fixes in your 1998 balanced budget.

A. NEAR TERM ADMINISTRATIVE DECISIONS

1. Food Stamp Time Limits for Childless Adults

Current Law. The welfare reform bill limited Food Stamps for childless adults to 3 months in 3 years. Individuals are exempt from the time limit if they are: under 18 or over 50 years of age; responsible for the care of a child or incapacitated household member; medically certified as physically or mentally unfit for employment; pregnant; or exempt from the Food Stamp work requirements. This provision is estimated to save approximately \$3 billion over 1998-2002. When States fully implement this provision in 1997, almost 800,000 individuals will be ineligible to receive Food Stamps each month. These individuals may only stay on the program if they are working over 20 hours per week or participating in an intensive workfare program. We do not expect States to establish costly workfare slots for this group, given limited State resources and pressures to create jobs for the welfare population. About half of these individuals have no other income other than Food Stamps, putting their average monthly income at \$171 or 28% of the poverty level. Over 40% of this group is made up of women.

The law provides an exemption for cities, counties, or states with unemployment rates above 10%, at State request, and allows States to request waivers for any group of individuals residing in an area that "does not have a sufficient number of jobs to provide employment for the individuals." The Administration assumed a very strict interpretation of "insufficient jobs" when the bill passed, but we have the ability to define the criteria for areas with insufficient jobs more broadly as a part of implementation. Since there is substantial latitude in the law for how the Administration interprets exemptions and waivers, the Administration can substantially reduce the numbers of individuals actually denied benefits. **[You indicated that you would work to fix this provision when you signed the legislation.]**

[The Food Stamp issue is very time-sensitive because the time limit goes into effect on November 22, 1996, at which time people subject to the time limit will receive notices stating that they are subject to a 3-month clock. If we do not have a final decision very soon on areas to be exempted from the time limit, several hundred thousand people will be threatened with a loss of benefits unnecessarily.] States are already preparing their internal guidance and formulating waiver requests. Oregon, Louisiana, West Virginia, and Washington have already submitted requests.

Option #1 -- Provide waivers only for areas with serious impediments to employment, such as a rural town with only one major employer. While employment may be below 10%, no jobs may be available if the major employer is not hiring. This option would provide relief to few areas. The baseline assumes *de minimis* use of the waiver authority, and this option roughly corresponds to the baseline (i.e., it would not have any costs over 1998-2002). Options #2 and #3 below propose waiver policies that would exempt more people and therefore add costs over 1998-2002.

Option #2 -- Limit waivers to broader geographic-based criteria, such as areas defined as “labor surplus areas” by the Department of Labor (DOL). These are areas with at least two years experience of unemployment 20% higher than the national average. This interpretation could exempt up to 30% of those subject to the time limit who are living in areas with historically high unemployment, albeit under the threshold in the bill. Geographic-based exemptions are arguably an appropriate exercise of the discretion Congress granted. This option would cost \$1 billion over 1998-2002 and \$0.18 billion in 2002.

Option #3 -- Establish broad waiver criteria in addition to geography. The Department of Agriculture (USDA) and some outside groups have proposed guidance that ranges from exempting areas heavily dependent on declining industries, such as coal mining, to providing waivers to groups of individuals who face fewer employment opportunities due to insufficient job skills, for example, persons without a high school education. **[The proposed guidance would exempt an individual without a high school diploma from the time limit if she lives in an area where the unemployment rate for people without a high school diploma exceeds 10% -- effectively exempting an individual without a high school diploma from the time limit even though she lives in an area with only 4.3% overall unemployment.]**

[Rather than an administrative decision exempting a specific group of individuals from this policy, we believe a better way to fix the provision would be through a more comprehensive legislative proposal.] Exempting entire classes of individuals goes beyond what Congress contemplated in providing exemptions to the provisions. While individuals without a complete high school education do face a tougher labor market than others, it is not reasonable to assume that they cannot find employment without regard to local economic circumstances. In addition, some might perceive an exemption for this group to be an education disincentive. Highly preliminary estimates show that exempting persons without a high school diploma could exclude 45% of those subject to the time limit. In total, USDA’s proposed guidance could exempt between 65 to 75% of those subject to the time limit and therefore cost as much as \$2 billion over 1998-2002 and \$0.33 billion in 2002. It is unlikely that all States will take full advantage of such broad exemption criteria; however, the Administration would have to defend the position that lack of a high school diploma is a qualification for Food Stamps.

[Recommendation.] We recommend Option #2, which would allow States to exempt areas with historically high unemployment relative to the national average, even though it is below the threshold in the bill.]

2. Extension of Waivers Granting Transitional Medicaid Benefits

At the time you signed welfare reform bill, 20 States had waivers that included authority to extend transitional Medicaid benefits beyond the normal 12 months (in some cases up to 36 months). Six more requests are pending. Before welfare reform, the Administration’s policy was to establish budget neutrality across the AFDC, Medicaid and Food Stamps programs over

the lifetime of the waiver. Typically, costs from additional Medicaid and Food Stamps benefits were offset by expenditure reductions projected to result from decreases in the AFDC caseload.

Since welfare reform replaced AFDC with a block grant, we can no longer project Federal savings resulting from lower AFDC caseloads. OMB and HHS agree that past Medicaid expenditures related to welfare waivers should be forgiven. OMB and USDA also agree that all past and future Food Stamps waivers should continue to be budget neutral. At issue is whether the future costs of extended transitional Medicaid benefits for current and pending Medicaid waivers should continue to be held to a budget neutrality standard. **This issue is a priority because pressure is growing from 26 States on waivers given enactment of welfare reform. Absent a timely decision, some States could decide to suspend their expanded transitional benefits.**

Option #1 -- Require States to adhere to budget neutrality for current waivers. The Administration could require States that want to continue their waivers to establish that the extension of transitional Medicaid benefits is budget-neutral. Because there are no longer any savings to the Federal government from the block-granted AFDC program, budget neutrality would require that the Federal government pay 0% of the costs (i.e., provide no Federal match) for the extended transitional benefits.

It is likely that States will continue to provide the transitional benefits waivers only if they believe they can finance them through State savings from the new welfare reform block grant. If transitional Medicaid really has the desired effect, however, States will reap substantial benefits from lower welfare benefits costs.

States may argue that requiring them to re-establish budget neutrality is a "breach of the contract" under which their waivers were granted. However, all Federal Medicaid waivers provide for renegotiation if a change in Federal law occurs. Moreover, this policy is consistent with the consensus policy to enforce budget neutrality in the Food Stamps program after the enactment of welfare reform.

Option #2 -- Modify the budget neutrality policy for the 26 States with waivers or pending applications. The Administration wants to promote welfare-to-work initiatives, of which extended transitional Medicaid benefits policy has been a cornerstone in the past. This option would effectively grandfather all states that were trying to do this prior to welfare reform. This would increase the likelihood that the 20 states with current waivers will continue the extended transitional benefits and that another six would begin them. The Health Care Financing Administration (HCFA) actuaries have not completed their estimate of the costs of this option; however, early information suggests that this option could cost between \$160 million and \$200 million over 1998-2002.

Option #3 -- Propose legislation. Should the Administration be accused of treating waiver and non-waiver states inequitably, we could propose legislation to create a new optional

Medicaid benefit to allow all states to provide extended transitional benefits. In combination with the forgiveness of budget neutrality for grandfathered states, such a legislative proposal could cost between \$1.0 billion and \$1.4 billion between 1998 and 2002, and between \$.2 and \$.3 billion in 2002.

[**Recommendation.** We recommend Option # 2, to grandfather the 26 states that have waivers administratively. We also recommend that you consider *all* welfare reform legislative fixes at the same time, and thus we do not at this time recommend legislation to create a new optional Medicaid benefit for extended transitional benefits.]

3. SSI Childhood Disability Definition

Current Law. The welfare reform bill provided a new, tightened definition of childhood disability for the Supplemental Security Income (SSI) program, consistent with the Administration's proposal. However, the statutory language is not precise, and the Social Security Administration (SSA) has substantial discretion in drawing the eligibility line to implement the new law. The Office of Management and Budget (OMB) and the Congressional Budget Office (CBO) scoring was based on a similar understanding of the impact of the provision at the time of enactment. The SSI childhood disability provision in the final welfare reform bill was scored at \$8.4 billion in savings over 6 years and \$1.9 billion in 2002, and was estimated to remove 190,000 children out of 1 million from the rolls by September 1997. Since enactment, advocates and some Senate moderates have argued for an implementation policy that is significantly less restrictive. We are asking for your decision on this issue soon so that SSA may begin processing the approximately 7,000 new cases a week that they have held since August, ~~and the statute requires that the Administration issue guidance by November 22.~~

Option #1 -- Implement the law consistent with the scoring assumptions and understanding at time of passage. This would significantly tighten eligibility compared to the law before the enactment of welfare reform. Under this option, 190,000 of the 1 million children now on the rolls would become ineligible for SSI. **[Most of the children who would lose eligibility under this option have mental impairments, including the behavioral disorders that were the impetus for the changes to the program, such as conduct disorder, learning disabilities, or ADHD. A greater number ^{also} have mental retardation. Others have a chronic physical disease that is episodic, or is fully or partially controlled by medication, such as asthma, epilepsy, or hemophilia. Still others have a condition such as cerebral palsy that, in that child's case, does not seriously impair more than one area of the child's functioning.]** This option does not add costs to the baseline.

Option #2 -- Modify the disability determination process to (a) limit the impact of tightened eligibility requirements on children with multiple physical impairments, and (b) require adjudicators to complete a standard form that will promote greater uniformity in decision making and lead to more allowances than would otherwise occur. Both of these changes can be accomplished administratively, were suggested by SSA, and make programmatic sense. Under

this option, 145,000 children would be removed from the rolls by next September -- 45,000 fewer children than under Option #1.

To ameliorate the hardship for these children's families, under Option #2 we would also seek legislation to retain Medicaid eligibility for all children now on the rolls who lose SSI. OMB estimates that, under current Medicaid law, 77% of the children who lose SSI would retain Medicaid because of other qualifying factors; new legislation would provide for those children not covered under current Medicaid law. Option #2 would cost \$2.4 billion over 1998-2002, including less than \$0.5 billion for the legislative proposal. The 2002 cost would be \$0.5 billion.

Note that Option #2 is a more lenient policy than the one the Administration and Congress proposed. If we choose this option, we will have to justify changing our policy post-enactment.

Option #3 -- Further ease standard by greater recognition of chronic illness and re-assessment of borderline cases. Option 3 would add to Option 2 two features that are intended to preserve benefits for the children with the most serious disabilities not covered by Option 2: additional recognition of children with chronic or episodic illnesses such as AIDS, and an added assessment of children on the borderline. While SSA believes adjudicators will be able to learn the new procedures, this option would be more difficult, time-consuming, and costly for SSA to implement. Under this option, 100,000 children would be ineligible for SSI -- 90,000 fewer than under Option #1. Option #3 would cost \$4.2 billion over 1998-2002 and \$0.9 billion in 2002.

Option #4 -- Provide for a significantly lower severity standard in determining eligibility. This option is supported by advocates, Senator Daschle, and some Senate moderates from both parties. The Senate moderates argue that their explicit legislative strategy during the welfare reform negotiations was to insist on a definition that was ambiguous enough to satisfy the Republican leadership but would still give SSA the latitude to use a more lenient definition. Given that SSI cash benefits link these children to Medicaid coverage, and that the welfare reform bill simultaneously makes many other changes to the welfare system that could affect these families, advocates argue that it is appropriate to err on the side of SSA using its legal discretion to keep more children on the rolls. Under this option, 45,000 children would become ineligible for SSI -- 145,000 fewer than under Option #1.

There would undoubtedly be significant negative reaction to this option from the Republican majority, and it could be represented as negotiating in bad faith. Option #3 would cost \$6.4 billion over 1998-2002 and \$1.5 billion in 2002.

Option #5 -- Defer the SSI decision and make it with other 1998 budget decisions in December. Unlike the relatively inexpensive and uncontroversial recommendations on the Food Stamps and Medicaid issues, action on the SSI proposals will have significant budgetary and political impact. Choosing a spending option now will reduce the funds

available for other welfare fixes by 20-30%, may disappoint advocates, and/or may portray the Administration as undermining the intent of the welfare bill -- thus threatening the success of future legislative changes to the welfare bill in Congress. Therefore, a decision could be delayed until the end of December when the Administration will be closer to defining an entire welfare reform fixes agenda. Within the context of a broader welfare reform package, this decision may be less vulnerable to criticism and give the Administration additional time to build Congressional support. However, there are a number of very compelling reasons to make a timely decision -- the Administration is required by statute to provide guidance on November 22, 300,000 current recipients will be notified about potential changes in eligibility this month, and 7,000 SSI applications per week will continue to go unprocessed.

[Recommendation. OMB recommends Option #2, using administrative discretion to moderately soften the original policy and retain SSI eligibility for 45,000 children who would otherwise lose benefits, and at the same time seek Congressional support for retaining Medicaid for all children now on the rolls.

DPC staff recommends Option # 3. This option would set the standard at the level that Congress is thought to have intended, expand the number of children who could meet the standard, and provide special protections for children on the borderline. SSA has had difficulty giving us a clear profile of these children, and it is difficult to be confident that SSA's rules reliably discern the most severe impairments. This option would provide extra assurance that children on the borderline will be properly evaluated. The disability community, members of Congress like Senators Daschle and Chafee, and leading editorial writers have made this a major issue, and might not even see this standard as taking adequate advantage of our latitude to assist children with impairments. We should also consider the challenges that many of these low-income families will face under welfare reform.]

B. THE OVERALL 1998 BUDGET ISSUE

In the context of a five-year balanced budget, any resources allocated to welfare reform make the task of reaching balance more difficult. Since the current plan for reaching balance by 2002 is already challenging our ability to find the necessary savings with acceptable policies, it is important to recognize that a decision to spend more than \$13 billion over five years will require further offsetting savings if our budget is to reach balance. The fact that administrative actions drive up spending in no way diminishes the need to find more offsets if we want to balance in 2002. At the same time, whether you decide to spend more or less than \$13 billion to fix the welfare bill will influence your options on the immediate administrative issues.

Option #1 -- Limit welfare resources to \$13 billion. The recommendations in this memo would spend about \$3.6 - \$5.4 billion over five years on the three near-term administrative issues. With the \$8-10 billion remaining in the \$13 billion reserve, you would have sufficient

resources to propose a repeal of most of the Food Stamp and Medicaid immigrant bans (but not SSI), a legislative fix for the Food Stamp 18-to-50s provision, other changes to mitigate the deep Food Stamp cuts, and expanded contingency funding.

On the other hand, if you choose the highest cost options on the administrative issues, you would spend \$10 billion before we even get to a discussion of the larger legislative fixes. This would leave about \$3 billion to address the other problems with the bill. These resources would be exhausted by an exemption for immigrant children from the Food Stamp ban and a limited relaxing of the cap on the Food Stamp shelter deduction. You would not be able to make other legislative fixes within this total.

Option #2. Do not limit resources for welfare reform fixes to \$13 billion at this time. If you choose to spend more than the \$13 billion reserve, you will sharply limit your ability to meet demands for spending in other areas. Our current outline of the 1998 budget spends \$284 billion on non-defense discretionary programs in 1998, about half of which is for your priorities. The other half is allocated to non-priority discretionary programs by cutting these programs 5% below 1997 enacted levels in aggregate. For every additional \$2 billion you choose to spend on welfare fixes over five years, we would either need to increase the non-priority cut from 5% to 6% in 1998 (and freeze that level in the out-years), or selectively reduce priority programs. The non-priorities include important government functions such as Veterans Affairs (VA) medical care, tax collection, aviation safety, and the administration of Social Security benefits. Even if we protect your highest priorities -- say, in education and the environment -- we are left with programs such as Ryan White AIDS treatment, the National Institutes of Health, and Women, Infants and Children (WIC). If we look outside discretionary spending for these offsets, we face similarly unpalatable choices in Medicare and Medicaid, farm entitlements, civil service retirement, and veterans benefits.

C. DECISION ON OVERALL BUDGET STRATEGY

_____ Option #1. The maximum available for welfare reform fixes is \$13 billion, including the decisions below. **(Recommendation)**

_____ Option #2. Spend in accord with the administrative decisions below. Revisit the overall funding levels for welfare reform when we make final 1998 budget decisions.

D. DECISIONS ON NEAR TERM ADMINISTRATIVE ISSUES

1. Food Stamp Waiver Guidance

_____ Option #1. Provide waivers only for areas with serious impediments to employment. No additional cost.

_____ Option #2. Limits waivers to geographic-based criteria. Cost: up to \$1 billion over 1998-2002; up to \$0.2 billion in 2002. **(Recommendation)**

_____ Option #3. In addition to exemptions for geographic-based criteria, exempt all persons without a high school education from time limits. Cost: up to \$2 billion over 1998-2002; up to \$0.3 billion in 2002.

2. Transitional Medicaid Benefits

_____ Option #1. Budget neutrality for current and pending transitional Medicaid benefit waivers. No additional costs.

_____ Option #2. Modify budget neutrality policy for the 26 states with ongoing or pending waivers. Cost \$0.2 billion over 1998-2002; \$0.04 billion in 2002. **(Recommendation)**

_____ Option #3. Propose legislation to create a new optional Medicaid benefit to allow all States to provide extended transitional benefits. Cost: \$1.0-\$1.4 billion over 1998-2002; \$0.2- \$0.3 billion in 2002.

3. SSI Childhood Disability Definition

_____ Option #1. 1997 Administration policy. No additional cost.

_____ Option #2. Relax eligibility requirements relative to the Administration's proposals (Option #1) and propose legislation to ensure that all children currently on SSI rolls retain Medicaid coverage. Cost: \$2.4 billion over 1998-2002; \$0.5 billion in 2002. **(OMB Recommendation)**

_____ Option #3. **Further ease standard by greater recognition of chronic illness and re-assessment of borderline cases than under Option # 2. Cost: \$4.2 billion over 1998-2002 and \$0.9 billion in 2002. (DPC Recommendation)**

_____ Option #4. Significantly lower standard of severity than options 1 or 2. Cost: \$6.4 billion over 1998-2002; \$1.5 billion in 2002.

_____ Option #5. **Defer SSI decision until December. No immediate cost, but 7,000 applications per week go unprocessed.**

THE SSI COALITION

FOR A RESPONSIBLE SAFETY NET

fax # 690-5672
fax to John Monahan
Fr Diana Fortuna

SUPPLEMENTAL SECURITY INCOME FOR LOW INCOME ELDERLY AND PEOPLE WITH DISABILITIES

DRAFT--SEPTEMBER 4, 1996

Proposal For A New Children's SSI Disability Standard

By Thomas Yates

Set forth below is a proposed standard for determining children's SSI disability that integrates the changes mandated by the welfare reform bill.

The standard, set forth in section C below, uses the present disability sequential evaluation, set forth at 20 C.F.R. §§ 416.924(b)-(f), as the starting point. The proposed standard keeps the current first three steps and adds a new fourth step that requires assessment of functioning in several areas, and then applies a threshold standard that is stricter than the standard embodied in the Individualized Functional Assessment ("IFA"). Specifically, the new test will deny disability to children with only moderate functional limitations. The current disability standard allowed children with only moderate functional limitations to qualify for SSI disability benefits.¹

A. The Definition of Children's Disability

1. New Statutory Definition of Childhood Disability:

Section 211 of the welfare reform bill replaces the current definition of childhood disability which read:

An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to last for a continuous period of not less than twelve months (or in the case of an individual under the age of 18, if he suffers from any medically determinable physical or mental impairment of comparable severity).

with the following:

- (i) An individual under the age of 18 shall be considered disabled for the

¹ See 20 C.F.R. § 416.924e(c)(1)(ii) & (2)(ii) (children with moderate impairments in three domains could be found disabled under the IFA).

purposes of this title if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted for a continuous period of not less than 12 months; and

(ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity (determined in accordance with regulations prescribed pursuant to subparagraph (E)) may be considered to be disabled."

2. Changes to Regulatory Childhood Disability Standard:

In addition to the change in the statutory standard, the new law requires the Commissioner to:

i) eliminate references to maladaptive behavior in the domain of personal/behavioral function in §§ 112.00C.2 and 112.02B.2.c.(2) ("B" criteria") in Appendix 1 to subpart P of part 404, Title 20 of Code of Federal Regulations; and

ii) discontinue the IFA set forth in 20 C.F.R. §§ 416.924d and 416.924e.

B. Congress Affirmed Use Of Almost All Of The SSI Regulations Governing Determination Of Children's Disability

As noted above, Congress let stand all of the SSI children's disability regulations finally adopted in 1993 except for the reference to maladaptive behavior in the personal/behavioral domain in the "B" criteria in the Listings, and the IFA test. These modest changes reflect Congress' intent to fine tune, rather than radically overhaul the SSI children's disability program.

Indeed, during the Senate's consideration of welfare reform, Senator Dole stated on the floor of the Senate that "I think that we all agree that the children's SSI needs a tune up...." and that the changes were made to respond the "allegations that some children on SSI are not truly disabled." Congressional Record ("Cong. Rec.") at p. S.13613 (Sept. 14, 1995).

Senator Dole concluded his remarks by noting that:

It is my expectation that this program will continue to serve children with severe disabilities, and that includes properly evaluating children too young to test, children with multiple impairments, and children with rare or unlisted impairments that nevertheless result in marked and severe functional

limitations.

Id.

As noted, Senator Dole describes the bill as providing a "tune up" for the program, a description falling far short of the radical overhaul that would significantly alter the evaluation process or degree of severity required to show disability under the new law. In those same remarks on the Senate floor, Senator Dole affirmed the need to have a program in which Congress can "obtain a realistic picture of how an impairment affects each child's abilities." Id. This succinct statement is a ringing affirmation that a broad functional evaluation of a child be provided and that it be personalized for each child--evaluations that the Listings or Listings-equivalence are impossible to render.

Indeed, Senator Dole's statements are consistent with the Social Security regulations left standing by the new Act, especially 416.924a (age as a factor of evaluation); 416.924b(functioning in children), 416.924c (other factors that we will consider), e.g. "... we will consider all of your mental and physical limitations that result from your impairment(s). We will evaluate the extent to which you can engage in age-appropriate activities in an independent, appropriate, and effective manner...." 20 C.F.R. § 416.924(a).

Finally, with regard to the degree of severity required to show that a child is disabled, Senator Dole additionally stated that the Senate was eschewing a much higher severity level by avoiding a statutory criterion that the functional limitations be "pervasive." Cong. Rec. at S. 13613. He made clear that the Senate chose not to use a term like "pervasive" that would imply "some degree of impairment in almost all areas of a child's functioning or body systems."

Although this statement is not totally dispositive of what the disability threshold test should be, it nonetheless clearly rejects sole reliance on Listings-level severity standard. The Social Security POMS, which provide Interpretative support to the regulations states as follows:

The Listing of Impairments describes, for each of the major body systems, examples of impairments which are considered ... severe enough to prevent a child from functioning independently, appropriately, and effectively in an age-appropriate manner.

POMS § DI 25215.010.B.

This is analogous to the threshold that Senator Dole made clear was rejected--disability based on "some degree of impairment in almost all areas of a child's functioning or body systems."

PDS vs. ALT:

Mid-1999 → 1998 if \$ to ALT's

Arthur Statute reqs cor → ALT - ben G-K

Was clearer in DA+A case that not ALT,
although debated

~~What did our bill do?~~

Plb - timing??

Reso by Friday - KA

Late a.m. - SSA pag.

Chofu -
Lawrie Rubiner

C. A Proposed New Children's SSI Disability Sequential Evaluation

As is set forth below, the Social Security Administration ("SSA") should change its present children's disability sequential evaluation by discarding the IFA and replacing it with a new fourth step that requires assessment of functional limitations caused by medical impairments and sets a disability threshold that is stricter than that embodied in the IFA. The new standard should be as follows:

1. Is the child engaging in substantial gainful activity? If yes, the claim is denied. If no, proceed to step two.²
2. Does the child have a severe impairment or combination of impairments? If no, the claim is denied. If yes, proceed to step three.³
3. Does the child have an impairment(s) that meets, or medically or functionally equals, the impairments described in the Listings of Impairments at 20 C.F.R. Part 404, Subpart P, App. 1? If yes, the child is disabled. If no, proceed to step four.⁴
4. Does the child otherwise have an Impairment(s) which results in marked and severe functional limitations? If yes, the child is disabled. If no, the child is not disabled.

In determining whether the child has marked and severe functional limitations, follow the following three steps:

- a. Assess all medical and nonmedical evidence of the child's medically determinable impairments, including assessment of the factors set forth at 20 C.F.R. § 416.924c, and pain and other symptoms as required by 20 C.F.R. § 416.929;⁵
- b. Determine if the child has deficits in development or functioning

² This step remains the same as the current first step of the children's sequential evaluation.

³ This step remains the same as the current second step of the children's sequential evaluation.

⁴ This step remains the same as the current third step of the children's sequential evaluation.

⁵ These factors must likewise be assessed at steps two and three. Their inclusion here is not meant to imply that they are not relevant at the two previous steps.

as follows:

- i. For a child from birth until attainment of age 1, determine if the child has deficits in development or functioning attributable to an impairment(s) in any of the following areas:⁶
 - A. age-appropriate cognitive functioning;
 - B. age-appropriate communicative functioning;
 - C. age-appropriate ability to sustain social interaction on an ongoing reciprocal fashion;
 - D. age-appropriate motor development;
 - E. age-appropriate physical stamina and basic physical functioning (including, but not limited to, breathing, digestion, and elimination); and
 - F. age-appropriate responsiveness to stimuli.
- ii. For a child from age 1 to attainment of age 3, determine if the child has deficits in development or functioning attributable to an impairment(s) in any of the following areas:⁷
 - A. age-appropriate cognitive functioning;
 - B. age-appropriate communicative functioning;
 - C. age-appropriate social functioning;
 - D. age-appropriate gross and fine motor development; and

⁶ These criteria are drawn from 20 C.F.R. Part 404, Subpart P, App. 1, § 112.12 with the exception of the criterion covering physical stamina and basic physical functioning.

⁷ These are drawn from the "B" criteria contained in the mental impairment listings for children age 1 to attainment of age 3, 20 C.F.R. Part 404, Subpart P, App. 1, § 112.02, with the addition of a physical impairment criterion to assess physical stamina and basic physical functions.

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- E. age-appropriate physical stamina and basic physical functioning (including, but not limited to breathing, digestion, and elimination).
 - iii. For a child from age 3 until the attainment of age 18, determine if the child has deficits in development or functioning attributable to an impairment(s) in any of the following areas:⁸
 - A. age-appropriate cognitive functioning;
 - B. age-appropriate communicative functioning;
 - C. age-appropriate social functioning;
 - D. age-appropriate personal/behavioral functioning, as evidenced by restrictions in activities of daily living;⁹
 - E. age-appropriate gross and fine motor functioning;
 - F. age-appropriate physical stamina and basic physical functioning (including, but not limited to breathing, digestion, and elimination); and
 - G. age-appropriate concentration, persistence, or pace.
 - c. A child shall be considered to have "marked and severe functional limitations" if she or he has:
 - 1. impairments that prevent the child from performing substantially any function (e.g. walking, breathing, taking care of personal needs) contained in any one of the criteria set forth above in Nos. 4(b)(i), (ii), or (iii) (depending on the

⁸ These are drawn from the "B" criteria contained in the mental impairment listings for children ages 3 to the attainment of age 18, 20 C.F.R. Part 404, Subpart P, App. 1, § 112.02B, with the addition of two criteria for assessment of physical impairments.

⁹ Maladaptive behavior can no longer be considered in assessing functional limitation in the personal/behavioral domain.

age of the child);¹⁰ or

2. a marked impairment in one of the areas in 4(b) above and a moderate impairment¹¹ in another;¹² or

¹⁰ This threshold criterion is consistent with SSA's approach in the listings that makes impairment in one area, if severe enough, disabling. Numerous listings base disability on functional impairment in one area, e.g.: Listing 101.03 (inability to walk or stand is markedly reduced); 101.03C (inability to perform age-related personal self-care activities); 102.08B3 and Disability Digest 94-6 (Communicative impairment attributed to hearing impairment in children under age 5); and 110.07D (multiple body system impairment with significant interference with communication due to speech, hearing, or visual impairments).

¹¹ "Marked" and "moderate" impairments remain the same as they are currently defined in the children's disability regulations. For children from birth to attainment of age 3, "marked" and "moderate" are defined in terms of the ratio of developmental milestone age to chronological age. 20 C.F.R. Part 404, Subpart P, App. 1, §§ 112.02(B)(1)(a)-(d); and 112.12. For children age 3 to the attainment of age 18, the terms are defined in terms of the number of activities affected and the severity of the limitations in affected activities. 20 C.F.R. Part 404, Subpart P, App. 1, § 112.00(C).

¹² Use of the one marked impairment and one moderate impairment test is consistent with Congress' goal to fine tune the SSI children's disability standard. See p. 2, *supra*. In amending the statutory standard to limit SSI payments to children with an impairment which results in a marked and severe functional limitation, Congress sought to eliminate payments to children with only moderate impairments. Here, a child cannot qualify unless she or he at least has a marked impairment in functioning.

Moreover, in amending the SSI children's disability standard, Congress approved of the use of the Listings at step three in the disability process. And the one marked impairment and one moderate impairment test is a disability severity threshold that is consistent with that used, in some instances, in individual Listings.

For example, a child can meet or equal Listing 112.05(C) with the equivalent of one marked impairment and one moderate impairment. Under Listing 112.05(C), a child is considered disabled if s/he has an IQ of 70 or less and another significant physical or mental impairment. The IQ of 70 is considered a marked impairment--the POMS provide that when standardized tests are used as the measure of a child's functional abilities, a valid score that is two standard deviations below the norm for the test (e.g. an IQ score of 70 on the WISC-R) will be considered a marked restriction. 20 C.F.R. Part 404, Subpart P, App. 1, § 12.00C & POMS § DI 25220.020.C.1.b. In addition, a child need only show another significant physical or

3. a combination of impairments in the various areas set forth in No. 4(b) above that causes substantial reduction in the child's ability to function independently outside of the home within age-appropriate norms; or causes substantial reduction in the ability to function independently, appropriately, and effectively in an age-appropriate manner.

With this proposal, children who have only moderate functional limitations are excluded from SSI eligibility, e.g. children who qualified with moderate functional limitations in three domains in the IFA test. See 20 C.F.R. § 416.924e(c)(1)(ii) & (2)(ii)(children with moderate impairments in three domains could be found disabled under the IFA).

D. This Proposed Standard Satisfies Congress' Goal Of Fine Tuning The SSI Children's Disability Standard.

1. Congress intended only to "fine tune" the children's SSI program, not completely revamp it. Moreover, the new law continues to require a functional assessment of the child in determining disability.

2. Reliance solely on the Listings does not satisfy Congress' mandate that a functional assessment is necessary in determining disability. Many of the individual listings do not include a description of the functional limitations caused by the impairments described in those listings. Without such functional limitations defined, there is no way for adequate assessment of those children who have disabling

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mental impairment, which is defined to be an impairment with at least moderate effects on the child's functioning.

See also Listings 101.03 (Walking is markedly reduced in speed or distance with deficits in musculoskeletal function (of no set severity level)); 110.07 (Marked interference with communication due to speech, hearing, or visual impairment with a serious hereditary, congenital, or acquired disorder (of no set severity level)); 111.07B (Cerebral palsy with more than slight limitation in motor dysfunction (moderate impairment), and IQ of 70 or less (marked impairment); 111.09 & Disability Digest 93-11 (Marked communication impairment (functioning at two-thirds of chronological age) and documented causally-related neurological disorder (of no set severity level)); 112.05(F)(1)(for children age 1 to attainment of age 3, marked deficit in cognitive/communicative function (two-thirds of chronological age) and other significant physical or mental limitation (moderate impairment); and 112.05(F)(2)(for children age 3 to attainment of age 18, marked impairment in age-appropriate cognitive/communicative function and other significant physical or mental impairment (moderate impairment)).

functional limitations unless there is a fourth step that requires assessment of functional limitations for all types of impairments.

3. SSA has already tightened up the disability allowance rates for children seeking SSI disability benefits. As the data below demonstrates, allowance rates are already so low that a de facto fine tuning has been achieved.

INITIAL DISABILITY DETERMINATIONS FOR SSI CHILDREN

FISCAL YEAR	ALLOWED CLAIMS	DENIALS	TOTAL	%
1991 ¹³	93,991	38,414	132,405	70.99%
1992	180,597	119,933	300,530	60.09%
1993	214,393	215,807	430,200	49.84%
1994	205,395	321,380	526,775	38.99%
1995	172,433	364,272	536,705	32.13%
1996 ¹⁴	83,004	186,932	269,936	30.75%

From statistics from SSA Office of Disability, May 1996.

Indeed, the 1996 allowance rate at the initial level, 31%, falls far below the allowance rate, 43%, in 1989,¹⁵ the year before the Supreme Court decision in Sullivan v. Zebley, which led to the creation of the IFA. Prior to Zebley, a child could only be found disabled if she or he had a listings-level disability.

The 1996 31% allowance rate, when compared to 1989 43% allowance rate, is the clearest evidence that the Social Security Administration has already fine tuned the SSI children's disability program to ensure that children with less severe disabilities are denied benefits. To now restrict disability only to those children who can show listings-level disabilities will push the allowance rate far lower, perhaps below 20%.

¹³ The data covers the period from 1/1/91 to 9/30/91.

¹⁴ The data covers the period from 10/1/95 to 4/26/96.

¹⁶ Data from the Report to Congress of the National Commission on Childhood Disability, October 1995, at p. 23.

For more information, contact Thomas Yates at the SSI Coalition For A Responsible Safety Net, 205 W. Monroe Street, Chicago, IL 60606-5013, 312-460-8402.

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AN ANALYSIS AND IMPLEMENTATION RECOMMENDATIONS FOR THE NEW SSI CHILDHOOD DISABILITY LAW

The new SSI childhood disability provision of the recently enacted welfare bill, H.R. 3734, signed into law by the President on August 22, 1996, will bring about a number of changes in the program.¹ A careful analysis of the statute and legislature history shows that harm to deserving, eligible disabled children can be minimized if implementing policies of the Social Security Administration fairly track the new law and SSA wisely uses the considerable discretion granted by Congress in this new law.

In summary the new SSI law:

1. Explicitly mandates - and for the first time ever in the Act - a functional evaluation of the impact of disabilities on children's lives.
2. The law does not call for a medical Listings-only evaluation of childhood, nor an equivalent-to-the-Listings evaluation.
3. The law anticipates a somewhat more restrictive severity test, but clearly not one set at the extremes of Listings-level, or equivalent-to-Listings level severity.
4. The law does not mandate that the new provisions be retroactive for months prior to enactment for pending claims, appeals or Zebley class rejudications.
5. The law and basic fairness requires that in the redetermination process

¹The SSI childhood provisions appear as Secs. 211-215 to H.R. 3734 and were published in Cong. Rec. H8852-54 (July 30, 1996).

families with children should be assisted by SSA, and those appealing should have benefits continue until a hearing and decision by a SSA Administrative Law Judge.

Functional Test Mandate

For the first time, and as a validation of Zebley Supreme Court decision, Congress has mandated a functional criteria test for disabled children. A child remains eligible or will be eligible in the future if the physical or mental impairment "results in marked and severe functional limitations." (Sec. 211(a)(4) amending 42 U.S.C. §1382c(a)(3)) (emphasis added).

The law "discontinues" the specific IFA functional test SSA had been utilizing along with its adjudication guidelines by rescinding 20 C.F.R. §§416.924d and .924e (Sec. 211(b)(2)), as well as rescinding "references to maladaptive behavior in the [Listings] domain of personal/behavioral functioning" of 20 C.F.R., App.1, §§112.00 C.2 and 112.02B.2.c(2). But the law significantly leaves standing in the existing SSA functional assessment regulations the sections on "functioning in children," 20 C.F.R. §416.924b, e.g. evaluating whether the child "engages in age-appropriate activities in an independent, appropriate and effective manner," §416.924b(a), and evaluating "developmental milestones," "domains of behavior," and "activities of daily living," and leaves intact the "other factors" regulation that insured a holistic, realistic evaluation, §416.924c, e.g. evaluating effects of chronic illness, structured settings ameliorating symptoms, effects of medications, etc.

Indeed, the former Senate Majority leader and key player in fashioning the final provisions enacted, Senator Bob Dole, described the new law as providing a "tune-up" of the program, a description far short of a radical overhaul of the test or new severity levels contemplated. Remarks of Senator Dole, Cong. Rec., S 1³613, (Sept. 14, 1995) (2d col.) In

this critical floor colloquy among the sponsors of the Senate SSI child provisions that became the final law, Senator Dole further affirmed the intent of Congress as insuring that the program "obtain a realistic picture of how an impairment affects each child's abilities." *Id.* (3d col.). (emphasis added). There is thus little doubt that Congress has mandated that a functional test must be provided, that it be broad and all-encompassing, and one also personalized to measure impacts on each child applying.

No Listings-Only, or Listings Equivalency Evaluation Test is Required by Congress

Congress, after multiple hearings, G.A.O. and HHS I.G. Reports, and a congressionally ordered National Commission on Childhood Disability Report, fully understands this program, including the narrow limits of a Listings-only or Listings equivalency evaluation of children--the approach fully critiqued in the original *Zebley v. Sullivan* decision, 493 U.S. 521, 531-542 (1990). The rigid, pigeon-hole scheme of the Listings could never address the personal-to-the child impacts of an impairment, children with multiple problems, or children with impairments not "listed" there. Thus Congress in the new law refused to direct in the "tune-up" anticipated that the new test revert to a pre-*Zebley* Listing or equivalency to the Listings test.

Indeed, the Conference Report in two key descriptive paragraphs refers to children who are eligible through the Listings of Impairments "and other determination" regulations or procedures, clearly implying that a test beyond the Listings is anticipated. Cong. Rec., H. 8913 (July 30, 1996) (2d and 3d cols.) (emphasis added). The only references to functional equivalency in this conference agreement are citations to this evaluation tool only as one example of a way to evaluate children too young to test and those with rare disorders. *Id.* (3d col.). The agreement never even suggests that functional equivalence be the new test for children.

A new and complete functional test beyond the Listings is clearly in order.

Severity Levels: A Somewhat More Restrictive Test is Suggested

Where Congress is very directive and specific that a revised, yet broad and fair functional test be provided children, Congress is less clear about the degree of severity to be required in a new test. Congress nowhere defines in the statute or legislature history what "marked and severe" mean, which necessarily requires SSA to use its discretion to give meaning to these terms. "Marked" degree of severity has been a term used in Listings and IFA evaluations where two marked functional limitation, primarily in the Mental Disorder Listings qualified a child, and where in the IFA test, one marked and one moderate limitation as well as three moderate limitations, could qualify a child. 20 C.F.R. §416.924e. Arguably a child with three moderate limitations may no longer be intended to qualify, but this is only a speculation given the paucity of legislative direction (as conceivably three moderates might have the impact of one marked limitation). The conference agreement only confirms the understanding that where functioning is set out "in...the Listings," then "no less than two marked limitations" is the standard. Cong. Record, H.8913 (July 30, 1996) (2d col.). But this only confirms the commonly understood Listings severity level; it plainly does not extend this Listings level severity of two marked limitations to the "other" disability determination regulations and procedures that the same conference agreement additionally contemplates beyond the Listings. Id.

And, although the new law utilizes the term "severe," which the conference agreement states means more than simply "'other than minor'", the conferees do not offer much further

guidance by stating that the term "severe" is used in "its common sense meaning." *Id.*²

Perhaps more illuminating is the Senate floor colloquy where Senator Dole acknowledged to Senator Conrad, the Democrats' chief sponsor, that the eligibility criterion of "pervasive" in the prior version of the bill, H.R.4, had been dropped for the final version leaving the enacted terms "marked and severe." The more extreme modifier of "pervasive" was dropped, according to Senator Dole, because it was a term implying "some degree of impairment in almost all areas of a child's functioning or body systems." Cong. Rec., S 13613 (Sept. 14, 1995) (2d col.). Senator Dole's statement rejects a Listings-level severity standard because Senator Dole was in effect here describing Listings-level severity where the impairments are usually so severe as to have such "pervasive" impacts as rendering the child almost or totally dysfunctional.³ Senator Dole's statement also rejects Listings-equivalency levels of severity because similarly the functional equivalency regulations also embody "pervasive" type impacts of extreme disability such as a child needing an organ transplant, ventilator dependence, or a child incapable of

²"Severe" has itself multiple meanings, including at least seven common meanings offered in the Random House Dictionary (rev.ed.). One relevant meaning of severe, "accurate or methodical," for example, would suggest that SSA be more (cont'd) precise in its functional limitations assessment, such as by using more standardized testing, a recommendation made by many including G.A.O. in reports to Congress.

³See, e.g., Hypoglycemia Listing, §109.12 (child in convulsions or a coma); Hypertensive cardiovascular disease Listing, §104.03 (requiring impaired renal function, cerebrovascular damage or congestive heart failure); Neurological Motor dysfunction Listing, §111.06 (persistent disorganization or deficit of motor function involving two extremities which interferes with major daily activities and results in disruption of fine and gross movements or gait and station); Juvenile diabetes Listing, § 109.08 (despite prescribed therapy child has recent, recurrent hospitalizations with acidosis or recent, recurrent episodes of hypoglycemia).

walking. 20 C.F.R. § 416.916a(d).

Thus Congress knew quite well how extreme the severity levels of the Listings were.⁴ And Congress refused to impose this high level of severity upon children (and by so doing also avoided an SSI test that would discriminate against and impact much more harshly upon children than adults applying for SSI). Congress left to the discretion of SSA the devising of a new severity standard that can best be described as one somewhat stricter than the current one, a change reflecting the "tune-up" Senator Dole referred to, but also one substantially less than the known extremes of the Listings and Listings equivalency.

The New Law is Not Retroactive to Months Before August 22, 1996

Congress chose not to make the new SSI child disability criteria retroactive to payments for months of eligibility before the date of August 22, 1996 when it was signed by the President. The new law only states that the new provisions "shall apply to any individual" who applies or has an unadjudicated claim on the date of enactment (Sec. 211(d)(1)(A)(i)), and that those with pending appeals or pending class action readjudications are not final adjudicated claims (Sec. 211(d)(1)(A)(ii)). Without an express mandate that the law is retroactive for months before enactment, these provisions only mean that these pending claims will receive bifurcated decisions relating to payment for months before or after date of enactment.

This interpretation is consonant with other provisions which are generally prospective in

⁴The Supreme Court had earlier observed in the most thorough analysis of the Listings ever compiled, that in the childhood Listings, the Secretary set medical criteria "at the same level of severity as that of the adult listings," and that these medical criteria always defined listed impairments "at a higher level of severity than the statutory standard." Zebley, 493 U.S. 521, 532-33 (1990).

nature such as future promulgation of regulations and continuing benefits for current beneficiaries until January 1, 1997 or date of redetermination.

Children Up for Redeterminations Should Receive Affirmative Assistance From SSA, and Benefits Continuing Until an ALJ Hearing and Decision If Timely Appeals are Requested

Congress continues to afford SSA wide discretion to protect disabled children against erroneous decisions, especially redeterminations applying very new, untested and complex criteria. SSA has a duty compelled by Due Process, the Act and sensible policy to afford children and their families assistance and procedures to avoid errors. Grave issues of life and health for vulnerable children are at stake in each decision.

Thus SSA should first do a thorough internal screening to determine if IFA children can alternatively qualify under the Listings or the new test.

SSA should also affirmatively assist families through the ready and stated availability of state Consultative Examinations and referrals to local agencies to provide additional medical and functional evidence for the new eligibility redeterminations contemplated by the law.

When an adverse redetermination decision is issued, after an opportunity to provide additional evidence, there must be information in the notice providing the name and telephone of (a) the local Legal Services/Legal Aid office; (b) the "800" number of the National Organization of Social Security Claimants' Representatives (NOSSCR) of private disability lawyers; and (c) the "800" or local number of the state's Protection and Advocacy office.

Finally, although SSA may wish to provide for reasons of efficiency a state DDS hearing as an appeal step, a step which we strongly advise, it must be SSA policy that an appeal requires benefits to continue until an ALJ hearing and decisions.

The Act currently provides that payment of benefits continue until a decision is made

after a hearing is timely requested. 42 U.S.C. §1383(a)(7)(A). It is only at the ALJ hearing where there are sufficient procedures in place, such as the subpoena power, to insure a full and fair hearing. Given the especially high risk here of error in mass reviews of tens of thousands of children under totally new criteria and procedures that have not stood the test of time, scrutiny, and, undoubtedly, SSA refinement and adjustment, due process of law demands that the ALJ hearing and decision be the minimal threshold for Goldberg v. Kelly protection.⁵ Disabled children, already determined eligible to date, deserve no less protection.

* * * * *

Questions concerning the above points may be directed to Jonathan Stein, General Counsel, (215) 981-3742.

September, 1996

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⁵Sec. 211(d)(2)(A) requires during the first year after date of enactment SSA to "redetermine the eligibility" of children whose benefits "may terminate" from the elimination of the IFA and maladaptive behavior provisions. SSA has estimated that as of April 1996 enrollment figures, 275,727 of 968,660 children on SSI would have to be reviewed.

Call Richard
call SSA
Call Marty 1230

August 23, 1996

BY FAX: (410) 965-3213

Arthur J. Fried
Chief Counsel
SSA OGC
R.611 Altmeyer Building
6401 Security Boulevard
Baltimore, MD 21235

Re: New SSI Child Disability Law

Dear Arthur:

Thank you again for getting us together yesterday with SSA staff to begin our dialogue. I am enclosing the Senate, September 1995 floor colloquy between the chief sponsors of the Senate SSI child disability amendments which largely became the amendments in the final bill signed into law by the President yesterday.

The remarks of the former Majority Leader, Senator Dole, that I referred to in our meeting are significant.

At page S.13613 (Sept. 14, 1995) (2d col.), Senator Dole describes the bill as providing a "tune up" for the program, a description falling far short of a radical overhaul that would significantly alter the evaluation or degree of severity under the new law. In the same paragraph Senator Dole affirms the need to have a program where Congress can "obtain a realistic picture of how an impairment affects each child's abilities." *Id.* (3d col.) (emphasis added). This succinct statement is a ringing affirmation that a broad functional evaluation of the child be provided and that it be personalized for each child--evaluations that Listings or Listings-equivalence are impossible to render.

Indeed, when one compares Senator Dole's statement with SSA's regulations left standing by the new Act, especially § 416.924b (functioning in children) and § 914.924c (other factors we will consider) we see striking parallels, e.g. "...we will consider all of your mental and physical limitations that result from your impairment(s). We will evaluate the extent to which you can engage in age-appropriate activities in an independent, appropriate and effective manner...." § 914.924b(a).

Arthur J. Fried
August 23, 1996
Page Two

Finally, with regard to the area of degree of severity to be intended, Senator Dole additionally stated that the Senate was eschewing a too severe standard by avoiding a statutory criterion that the functional limitations be "pervasive." S.13613 (2d col.). He made clear that the Senate did not want to use a term like "pervasive" that would imply "some degree of impairment in almost all areas of a child's functioning or body systems."

Although this statement is not totally dispositive of what the severity test should be, it nonetheless clearly in our view rejects a Listings-level severity standard because Senator Dole was in effect describing Listings-level severity where the impairments are usually so severe as to have such a "pervasive" impact rendering the child almost or totally dysfunctional, see e.g. Hypoglycemia Listing, § 109.12 (child in convulsions or a coma); Hypertensive cardiovascular disease Listing, § 104.03 (requiring impaired renal function, cerebrovascular damage or congestive heart failure); Neurological Motor dysfunction Listing, § 111.06 (persistent disorganization or deficit of motor function involving two extremities which interferes with major daily activities and results in disruption of fine and gross movements or gait and station); Juvenile diabetes Listing, § 109.08 (despite prescribed therapy child has recent, recurrent hospitalizations with acidosis or recent, recurrent episodes of hypoglycemia).

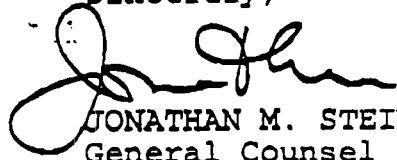
We trust these colloquy remarks will be utilized by SSA, bearing in mind that Senator Dole and his staff were the primary architects of the compromises and final version of the law that emerged.

We look forward to getting together in the third week of September. Our preferred days are September 17-19 (Tuesday - Thursday).

Arthur J. Fried
August 23, 1996
Page Three

As I do not have a complete list of attendees at our meeting on August 22, could you or John distribute this letter and enclosure to all those present.

Sincerely,



JONATHAN M. STEIN
General Counsel

JMS:jmp

Enclosure

cc: Susan Daniels, Associate Commissioner, OD
Judy Chesser, Associate Commissioner, Legislation
Randy Gains, OGC
John Watson, OGC
Marty Ford, The Arc
Rhoda Schulzinger, Bazelon Center for Mental Health Law
Ethel Zelenske, NOSSCR

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neglect will no longer be protected by CAPTA's immunity for reporting. Only good-faith reports will be protected.

Finally, we have clarified the definition of child abuse or neglect to provide additional guidance and assistance to States as they endeavor to protect children from abuse and neglect.

Let me briefly mention the other programs authorized in the 1995 CAPTA amendments: the new Community-Based Family Resource and Support Grants, represent the result of nearly a full year's effort to consolidate the Community Based Prevention Grant, Respite Care Program, and Family Resource Programs; the Family Violence Prevention and Services Act which provides assistance to States primarily for shelters; the Adoption Opportunities Act which supports aggressive efforts to strengthen the capacity of States to find permanent homes for children with special needs; the Abandoned Infants Assistance Act which provides for the needs of children who are abandoned, especially those with AIDS; the Children's Justice Act; the Missing Children's Assistance Act and section 214 of the Victims of Child Abuse Act.

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Mr. MACK. Mr. President, with regard to title V of H.R. 4, the Work Opportunity Act, I am interested in clarifying an issue regarding the applicability of the term "assistance *** for which eligibility is based on need" to various student loan programs. As I understand this legislation, eligibility for needs-based public assistance will either be subject to a deeming period or will be forbidden for a period of five years for most non-citizens. At this time, there seems to be an erroneous public perception that all student financial aid programs will be subject to these provisions. This is not the case. In the interests of responsible legislating, I think it is important to clarify that unsubsidized student loans are not needs-based and should therefore not be subject to the requirements of title V.

Mr. SIMPSON. Mr. President, Senator MACK is correct. Although the term "assistance *** for which eligibility is based on need" in title V of H.R. 4 would apply to most forms of student financial aid, the unsubsidized student loan program is indeed a financial aid program which is not based upon need. Therefore, this particular program would not be subject to the deeming period or 5-year ban established in title V of this bill.

Mr. DOLE. Mr. President, I would like to offer my support of the comments made by Senators MACK and SIMPSON on this issue.

* CHILDREN'S SSI

Mr. CONRAD. Mr. President, I have a series of clarifications concerning the children's SSI program that I would like to discuss with the majority leader.

But first, let me express my appreciation to Senator DOLE for his leadership in helping us reach a compromise on this issue. The SSI agreement is not everything I had hoped to achieve when Senator CHAFEE and I introduced the Children's SSI Eligibility Reform Act, but it is clearly an improvement over the House bill.

In addition, I believe the agreement includes a number of extremely important provisions to both address criticisms that have been leveled against the Children's SSI program and protect children with severe disabilities. I am extremely pleased we were able to reach a bipartisan compromise on this issue, and thank Senator DOLE, Senator SANTORUM, Senator DASCHLE, Senator CHAFEE, Senator SIMPSON, Senator JEFFORDS, and others who were so deeply involved.

Mr. President, I would like to clarify for the RECORD the intent surrounding several of the provisions in the amendment. First, the amendment deletes the word "pervasive" from the definition of child disability that was included in the welfare reform bill reported in May by the Finance Committee. This is an important change, and one that I fully support. Would the majority leader clarify his understanding of the intent of this change?

Mr. DOLE. I want to thank the Senator from North Dakota for his leadership and hard work on this issue. Children with disabilities are certainly among those most at risk in our society, and we want to make sure we are doing the right thing by them. He and Senator CHAFEE have worked extremely hard to bring the Senate to this point.

As for the Senator's question, I understand that the Senator from North Dakota was concerned that the term "pervasive" included in the earlier definition implied some degree of impairment in almost all areas of a child's functioning or body systems. That was not the intent of the earlier proposed change to the statute. It is expected that the children's SSI program will serve children with severe disabilities. Sometimes children will have multiple impairments; sometimes they will not.

Mr. CONRAD. I also understand that the amendment is designed to facilitate expert analysis of the SSI program for children by the National Academy of Science, to ensure that program changes, including determination of disability, are based on the best possible science.

Mr. DOLE. Yes, I think we can all agree that the children's SSI needs a tune up. The provision for a study by the National Academy of Sciences of the disability determination procedures used by the Social Security Administration will help accomplish this

goal, and help us obtain a realistic picture of how an impairment affects each child's abilities.

No doubt about it, the children's SSI program is extremely important for some children with disabilities. But as the Senator from North Dakota made mention, there have been widespread allegations that some children on SSI are not truly disabled, or money is spent in ways that do not benefit the child. I hope this study—in addition to the changes we have made in the law—will help restore confidence in this program.

Again, it is my expectation that this program will continue to serve children with severe disabilities, and that includes properly evaluating children too young to test, children with multiple impairments, and children with rare or unlisted impairments which nevertheless result in marked and severe functional limitations.

Mr. CONRAD. Is it expected that the Social Security Administration and the Congress will rely heavily on the expert advice of the National Academy of Science when engaging in future regulatory activity and deliberations regarding impairments of children in the SSI program?

Mr. DOLE. Yes. But I also hope we hear from many others as well with good information to offer, including other experts, parents, and advocates.

Mr. CHAFEE. If I might also ask the majority leader a question. The leadership amendment and the Finance Committee proposal are both silent about the purpose of children's SSI. However, unlike the House proposal, both retain the cash benefit nature of the program. This is a concept that Senator CONRAD and I thought was extremely important when we introduced the Childhood SSI Eligibility Reform Act, and I am pleased that the majority leader's proposal retains flexibility within the SSI program by retaining the cash nature of the program. It is important for the SSI program to reflect the impact a disability has on families faced with a variety of circumstances. SSI often provides important assistance to families by replacing a portion of the income that is lost when a parent must care for a disabled child. The flexible nature of SSI is indispensable for many parents who are rendered unable to work because they must stay at home to provide care and supervision to their children with disabilities. Does the majority leader share our assessment?

Mr. DOLE. No doubt about it, for some families with a severely disabled child, SSI can be a lifesaver. It allows them to care for their child at home—who might otherwise be institutionalized at much greater cost to the government—or obtain services they could not otherwise afford. If a small payment can help a disabled child stay with his family, or grow into a productive adult, it is better for the child and better for society. SSI benefits provide the greatest flexibility, and the least amount of bureaucratic redtape.

But I think there may be some difference of opinion about the purpose of the program. The SSI program was originally started to provide a small cash income to individuals who cannot work because of age or disability. But the children's SSI program had a somewhat different purpose—to help poor families with the extra costs of having a child with a disability. It seems the program has expanded without much Congressional attention. In my view, we need to revisit the purpose of the SSI program. The Finance Committee has not tackled this problem yet, but it should and I believe it will. But the Senate decision to retain the cash benefit is clearly an important difference from the House.

Mr. CONRAD. I would like to join in the comments of both of my colleagues regarding the cash benefit nature of the SSI program. This provision is critically important, and I commend the Majority Leader for including it in the amendment. If I might address one additional question to the majority leader, it is the intent of this Senator and other supporters of this amendment on both sides of the aisle that this amendment is the position of the Senate, and that it will be vigorously defended in conference with the House of Representatives. Will the majority leader insist on this provision during conference with the House?

Mr. DOLE. This is a bipartisan compromise with broad support, and in my view it should be a position to which the Senate should firmly hold in conference.

Mr. CONRAD. Based on these assurances, I am pleased to support the compromise we have developed on children's SSI. This is not everything I had hoped to achieve, but it is critically important that the Senate enter conference with a solid, unified position.

Mr. WARNER. Mr. President, I am pleased to rise as one of the original cosponsors of the Republican leadership welfare reform bill.

We have entered this historic debate because the 30-year War on Poverty remains a war, but the nation is losing. According to recent analysis, aggregate government spending on welfare programs over the last 30 years has surpassed \$5.4 trillion, an expenditure that exceeds our national debt.

Despite this spending, America's national poverty rate remains at about the same level as 1965, the year that President Johnson launched the War on Poverty.

Despite the best of intentions, we have a welfare system that "traps" children and families in a cycle of dependency, and that encourages behavior leading to indefinite reliance on welfare. It fosters a lifestyle that is in direct opposition to the motivators that propel others to get up and go to work every day.

The Republican leadership's bill emphasizes work, families, and genuine hope for the future while giving the States greater responsibility—and flexibility—for managing welfare.

This measure has been a long time coming, and I do not just mean this summer. Our distinguished colleague from Colorado, Senator HANK BROWN, did an outstanding job in 1993 and 1994 as chairman of the Republican Welfare Reform Task Force. Health Care Reform diverted the Senate, but it did not diminish the value of their work. Much of what we are considering today is built directly on the strong foundation of Senator BROWN's early proposals.

I also think back to the 1986 State of the Union Address of President Ronald Reagan. That year he proposed Welfare Reform. This was another step. The Reagan welfare reform plan, the Family Security Act of 1988, was guided to enactment by the fine hand of the then Finance Committee Chairman, Senator MOYNIHAN of New York, who is now serving with such distinction as the co-manager of this bill.

The Family Security Act of 1988 served as a laboratory for S. 1120. In 1988, we first dealt with the issues of workfare versus welfare, the dilemmas of teen pregnancy and illegitimacy, the high costs of work requirements, and the need for broad federal waiver authority. It is the State and local levels of government which administer the American welfare system, not the Department of Health and Human Services.

I am proud that under the waiver authority established by the Family Security Act, the Commonwealth of Virginia has been in the vanguard of welfare reform initiatives.

While we are struggling to come together in the Senate to pass S. 1120, my State has already enacted and is now implementing what we call the Virginia Independence Program or "VIP" for short.

VIP is the visionary welfare reform program brought to the people of Virginia under the outstanding leadership of Gov. George Allen. It was no easy task to battle a sometimes hostile state legislature, dominated by the other political party, as well as the mountain of redtape required in securing the necessary Federal waivers. He succeeded splendidly, however, in achieving his goals, and now Virginia is in the careful, watchful, early stages of actual reform.

Governor Allen, with his great courtesy, personally journeyed to Washington on September 13 to deliver a thoughtful and, in my judgment, immensely helpful letter on what he believes the Senate should accomplish in welfare reform.

Mr. President, I ask unanimous consent that my letter from Governor Allen be printed in the RECORD at this point for the benefit of all of my colleagues.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

COMMONWEALTH OF VIRGINIA.

OFFICE OF THE GOVERNOR.

September 13, 1995.

Hon. JOHN W. WARNER,
U.S. Senate,
Washington, DC.

DEAR JOHN, As the United States Senate continues to debate welfare reform this week, I believe that our experiences in the Commonwealth of Virginia can be instructive.

I hope you will consider Virginia's plan to be a model for the nation. The comprehensive Virginia plan is based upon the principles of the work ethic and personal responsibility. Our experiences support the need for an overall block grant approach, that will give States the flexibility to appropriately design programs that address the individual needs of the citizens of their State, return AFDC to a program of temporary assistance for those in need, and require work for all able-bodied recipients.

I understand that there will be attempts to amend S. 1120 by attaching new chains on the block grants to the States. As a staunch proponent of federalism and self-determination, I oppose such choke chains, whether they are "conservative" or "liberal" ones, and respectfully encourage and request that you do likewise for Virginians.

Experience shows that the States are perfectly capable of taking this responsibility and exercising it wisely for our citizens. Virginia's landmark welfare reform legislation is a prime example. Our plan applies to the entire AFDC caseload, with a work requirement for 48,000 of our 74,000 cases. It incorporates common-sense principles into the welfare system by rewarding responsible behavior and providing compassionate, but temporary, assistance for those in need.

In addition to providing opportunity and support to recipients, the program is expected to save the taxpayers more than \$130 million over the first five years. Already, we have had a significant drop in our caseload. Restrictive maintenance-of-effort requirements rob States of the ability to share in these savings and the incentives to achieve them. They should be opposed.

As you know, Virginia received a waiver to begin implementing this landmark welfare reform plan on July 1 of this year. You also should be aware that, before this waiver was granted, we spent the better part of two months fending off efforts by the Clinton Administration to completely rewrite our plan. The administration proposed literally hundreds of changes or conditions in the waiver process. Many of them involved very fundamental things; if agreed to, they would have raised the cost of the program significantly and changed essential provisions.

We had a tough fight in our state legislature—with a final bill clearing the General Assembly only in the last hour of the 1995 legislative session. At issue were questions such as whether we would have a real work requirement and a real time limit; whether there would be a child cap and strong requirements for paternity establishment; and whether we would require minor recipients to stay in school and live at home with a parent or guardian.

This spirited debate was expected, given the fundamental nature of the changes and reforms we were proposing. We did not expect, however—after the legislative process was completed at the state level and we had decided what state law and state policy were going to be—that we would have to turn around and refight all those battles with the federal bureaucracy through the waiver process. A good example was the time limit. We went to the wall with HHS over the issue of whether we in Virginia would be able to define the circumstances that would allow

neglect will no longer be protected by CAPTA's immunity for reporting. Only good-faith reports will be protected.

Finally, we have clarified the definition of child abuse or neglect to provide additional guidance and assistance to States as they endeavor to protect children from abuse and neglect.

Let me briefly mention the other programs authorized in the 1995 CAPTA amendments: the new Community-Based Family Resource and Support Grants represent the result of nearly a full year's effort to consolidate the Community Based Prevention Grant, Respite Care Program, and Family Resource Programs; the Family Violence Prevention and Services Act which provides assistance to States primarily for shelters; the Adoption Opportunities Act which supports aggressive efforts to strengthen the capacity of States to find permanent homes for children with special needs; the Abandoned Infants Assistance Act which provides for the needs of children who are abandoned, especially those with AIDS; the Children's Justice Act; the Missing Children's Assistance Act and section 214 of the Victims of Child Abuse Act.

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Mr. SIMPSON. Mr. President, Senator MACK is correct. Although the term "assistance *** for which eligibility is based on need" in title V of H.R. 4 would apply to most forms of student financial aid, the unsubsidized student loan program is indeed a financial aid program which is not based upon need. Therefore, this particular program would not be subject to the deeming period or 5-year ban established in title V of this bill.

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NDS informal bill?

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OFFICE OF THE GOVERNOR,

September 13, 1995.

Hon. JOHN W. WARNER,
U.S. Senate,
Washington, DC.

DEAR JOHN: As the United States Senate continues to debate welfare reform this week, I believe that our experiences in the Commonwealth of Virginia can be instructive.

I hope you will consider Virginia's plan to be a model for the nation. The comprehensive Virginia plan is based upon the principles of the work ethic and personal responsibility. Our experiences support the need for an overall block grant approach, that will give States the flexibility to appropriately design programs that address the individual needs of the citizens of their State, return AFDC to a program of temporary assistance for those in need, and require work for all able-bodied recipients.

I understand that there will be attempts to amend S. 1120 by attaching new chains on the block grants to the States. As a staunch proponent of federalism and self-determination, I oppose such choke chains, whether they are "conservative" or "liberal" ones, and respectfully encourage and request that you to do likewise for Virginians.

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In addition to providing opportunity and support to recipients, the program is expected to save the taxpayers more than \$130 million over the first five years. Already, we have had a significant drop in our caseload. Restrictive maintenance-of-effort requirements rob States of the ability to share in these savings and the incentives to achieve them. They should be opposed.

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This spirited debate was expected, given the fundamental nature of the changes and reforms we were proposing. We did not expect, however—after the legislative process was completed at the state level and we had decided what state law and state policy were going to be—that we would have to turn around and refight all those battles with the federal bureaucracy through the waiver process. A good example was the time limit. We went to the wall with HHS over the issue of whether we in Virginia would be able to define the circumstances that would allow



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TDD (202) 785-3411

9-6-96

Diana -

Here are some
documents (or excerpts)
that may be
useful.

Marty

a national organization on mental retardation

The
"CBO" comments
re: flexibility of
the definition

Calendar No. 125

104TH CONGRESS
1st Session

SENATE

REPORT
104-96

THE FAMILY SELF-SUFFICIENCY ACT OF 1995

JUNE 9 (legislative day, JUNE 5), 1995.—Ordered to be printed

Filed, under authority of the order of the Senate of June 8 (legislative day, June 5), 1995

Mr. PACKWOOD, from the Committee on Finance, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany H.R. 4]

The Committee on Finance, to which was referred the bill (H.R. 4) to amend the Social Security Act to replace the AFDC program with block grants for needy families with children, to replace child welfare, adoption assistance and foster care programs with a block grant for child protection, to make various reforms to the Supplemental Security Income program, to strengthen the child support enforcement program (along with various reforms to other programs under other laws), and which would restore the American family, reduce illegitimacy, control welfare spending, and reduce welfare dependence, having considered the same, reports favorable thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

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c. State Plan Requirements	6
d. Eligibility for assistance	6

C. AMENDMENTS OFFERED AND WITHDRAWN

Mr. Conrad offered an amendment to limit educational activities to not more than 50 percent of a State's work participation rates in 1996 and 1997.

Mr. Grassley offered an amendment to provide that a State operate a jobs program in accordance with Part F of the Social Security Act or another work program to be defined by the State.

V. BUDGETARY IMPACT OF THE BILL

In compliance with sections 308 and 403 of the Congressional Budget Act of 1974, and paragraph 11(a) of rule XXVI of the Standing Rules of the Senate, the following letter has been received from the Congressional Budget Office regarding the budgetary impact of the bill:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 9, 1995.

Hon. BOB PACKWOOD,
Chairman, Committee on Finance,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed estimate of H.R. 4, the Family Self-Sufficiency Act of 1995, as ordered reported by the Senate Committee on Finance on May 26, 1995.

Enactment of H.R. 4 would effect direct spending and thus would be subject to pay-as-you-go procedures under section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL, Director.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: H.R. 4.
2. Bill title: Family Self-Sufficiency Act of 1995.
3. Bill status: As ordered reported by the Committee on Finance on May 26, 1995.
4. Bill purpose: To enhance support and work opportunities for families with children, reduce welfare dependence, and control welfare spending.
5. Estimated cost to the Federal Government:

Direct spending

The bill would effect federal outlays in the following mandatory programs: Family Support Payments, Food Stamps, Supplemental Security Income, Medicaid, and Foster Care. The following table shows projected outlays for these programs under current law, the changes that would stem from the bill, and the projected outlays for each program if the bill were enacted.

[Outlays by fiscal years, in millions of dollars]

	1995	1996	1997	1998	1999	2000	2001	2002
Projected spending under current law:								
Family Support Payments	18,223	18,544	19,048	19,534	20,132	20,793	21,477	22,184
Food Stamp Program	25,120	25,930	27,400	28,900	30,390	32,030	33,600	35,100
Supplemental Security Income	24,322	24,497	29,894	32,967	36,109	42,749	39,481	46,807
Medicaid	89,216	99,292	110,021	122,060	134,830	148,116	162,600	177,800
Foster Care	3,540	4,146	4,508	4,930	5,356	5,809	6,290	6,798
Total	160,421	172,409	190,871	208,391	226,817	249,497	263,448	288,689
Proposed changes:								
Family Support Payments ¹	0	-729	-1,192	-1,603	-2,207	-2,559	-3,234	-3,842
Food Stamps	0	238	745	993	1,274	1,511	1,818	2,155
Supplemental Security Income	0	-441	-3,554	-4,482	-4,674	-5,218	-4,646	-5,441
Medicaid	0	-22	-375	-545	-606	-662	-771	-777
Foster Care	0	0	0	0	10	25	35	45
Total	0	-954	-4,376	-5,637	-6,203	-6,903	-6,738	-7,750
Projected spending under H.R. 4:								
Family Support Payments	18,223	17,815	17,856	17,931	17,925	18,234	18,243	18,342
Food Stamps	25,120	26,168	28,145	29,893	31,664	33,541	35,418	37,255
Supplemental Security Income	24,322	24,056	26,340	28,485	31,435	37,531	34,835	41,476
Medicaid	89,216	99,270	109,646	121,515	134,224	147,454	161,889	177,023
Foster Care	3,540	4,146	4,508	4,930	5,366	5,834	6,325	6,843
Total	160,421	171,455	186,495	202,754	220,614	242,594	256,710	280,939

¹Under current law, Family Support Payments includes spending on Aid to Families with Dependent Children (AFDC), AFDC-related child care, administrative costs for child support enforcement, net federal savings from child support collections, and the Job Opportunities and Basic Skills Training program (JOBS). Under proposed law, Family Support Payments would include spending on the Temporary Assistance for Needy Families Block Grant, administrative costs for child support enforcement, and net federal savings from child support collections.

H.R. 4 would create a new Temporary Assistance for Needy Families block grant and specifies funding levels through fiscal year 2000. CBO's estimates for 2001 and 2002 assume that the level of the block grant will remain the same as in 2000.

Note.—Details may not add to totals because of rounding.

The direct spending costs of this bill fall within budget functions 500, 550, and 600.

Authorizations of appropriations

The bill would increase the administrative costs of the Supplemental Security Income (SSI) program, which are funded by an annual appropriation. Those extra costs stem from provisions of Title III that would require program administrators to verify the citizenship of all SSI recipients and conduct reviews of some disabled recipients.

6. Basis of estimate: CBO estimates the enactment of H.R. 4, as amended by the Committee on Finance, would reduce outlays for direct spending programs by \$1.0 billion in 1996 and \$7.8 billion in 2002. The bill would also increase the administrative costs of the Supplemental Security Income (SSI) program, which are funded by an annual appropriation. These estimates incorporate the economic and technical assumptions from CBO's March 1995 baseline and assume an enactment date of October 1, 1995. The remainder of this section outlines the methodology used for the estimates. The attached tables detail the estimates for each title of the bill.

eligible for foster care benefit into the foster care program. AFDC administrative data for 1993 suggest that roughly 500,000 children (5 percent of all children on AFDC) fall into this category because they live in a household without a parent. CBO assumes a number of legal and financial barriers would prevent states from transferring a large share of such children and estimates states would collect an additional \$10 million in foster care payments in 1996, rising to \$45 million in 2002.

→ Title III: Supplemental security income

Title III of H.R. 4 would reduce spending in the Supplemental Security Income program for three distinct groups of participants: legal aliens, drug addicts and alcoholics, and disable children. Net savings are estimated to equal \$5.1 billion in 2002 (see Table 2).

Legal aliens.—In general, legal aliens are now eligible for SSI and other benefits administered by the federal government. Most aliens, other than refugees, do not collect benefits during the first few years in the U.S., because administrators must deem a portion of a sponsor's income to the alien during the period when determining the alien's eligibility. H.R. 4 would eliminate SSI benefits altogether for most legal aliens. Exceptions would be made for groups that make up about one-fifth of aliens on the SSI rolls: refugees who have been in the country for less than five years, aliens who receive a Social Security benefit based on their own earnings, and veterans of the U.S. military. All other legal aliens now on SSI would be removed from the rolls on January 1, 1997.

CBO bases its estimate of savings on administrative records for the SSI program. Those data suggested that there were about 700,000 non-citizen beneficiaries in 1994, or 12 percent of all recipients of federal SSI payments in that year, and that their numbers might be expected to continue to grow in the absence of a change in policy. The administrative records, though, are of uncertain quality. They are not likely to reflect changes in citizenship status (such as naturalization) that may have occurred since the recipient first began collecting benefits. It has not been important for agencies to keep citizenship status up-to-date so long as they have verified that the recipient is, in fact, legally eligible. That problem is thought to be particularly acute for SSI, where some beneficiaries identified as aliens have been on the program for many years. Recognizing this problem, CBO assumes that about one-fifth of SSI beneficiaries coded as aliens are in fact naturalized citizens.

CBO estimates the number of noncitizen recipients who would be removed from the SSI rolls by projecting the future caseload in the absence of policy change and subtracting the three groups (certain refugees, Social Security recipients, and veterans) exempted under the bill. CBO also assumes that some of the remainder will be spurred to become naturalized. The rest, estimated by CBO at approximately one-half million legal aliens, would be cut from the SSI rolls. Multiplying by the average benefits paid to such aliens—assumed to equal 1994 levels plus subsequent cost-of-living adjustments, or about \$4,700 per alien in 1997—yields annual federal budgetary savings of between \$2 billion and \$3 billion a year.

Removing these aliens from the SSI rolls has indirect effects on two other programs: Medicaid and food stamps. In most states,

Medicaid is automatically available to anyone on SSI. Although H.R. 4 does not explicitly bar legal aliens from Medicaid, some aliens who lose SSI would thereby lose their only route onto the Medicaid program. CBO assumes that most aliens who lose SSI disability benefits could keep Medicaid eligibility under other terms of the program, only about half of those aliens who lose SSI old-age benefits, however, would be able to requalify as medically needy. Savings in Medicaid of \$0.2 billion to \$0.3 billion a year would result. H.R. 4 is silent about legal aliens' eligibility for food stamps, a program that is outside the jurisdiction of the Finance Committee. Under current law, legal aliens who lose cash income and who also get food stamps would automatically receive larger benefits under that program. CBO assumes that only a fraction of the SSI loss would be made up at the state and local level through general assistance programs. For aliens participating in food stamps, food stamp benefits are estimated to increase by about 33 cents for each dollar of cash income lost. Extra food stamp costs would be approximately \$300 million a year.

These estimates, and other CBO estimates concerning legal aliens, are rife with uncertainties. First, administrative data in all programs are of uncertain quality. Citizenship status is not recorded at all for about 8 percent of SSI recipients, and—as previously noted—some persons coded as aliens are certainly naturalized citizens by now. Second, it is hard to judge how many noncitizens would react to the legislation by becoming citizens. At least 80 percent of legal aliens now on the SSI rolls are eligible to become citizens; the fact that they have not been naturalized may be attributable, in part, to the lack of a strong financial incentive. Heretofore, all legal immigrants have not been barred from most jobs, from eligibility for benefits, or from most other privileges except voting. Because the naturalization process takes time and effort, CBO assumes that only about one-third of those whose benefits would otherwise be eliminated will become citizens by the year 2000.

Drug addicts and alcoholics.—For many years, the Social Security Administration (SSA) has been required to identify certain drug addicts and alcoholics (DA&As) in the SSI program, when the substance abuse is a material contributing factor to the finding of disability. Special provisions apply to those recipients: they must comply with treatment if available, they must have representative payees, as (as a result of legislation enacted last year) they can receive a maximum of 36 months' benefits. About 100,000 recipients classified as drug addicts and alcoholics received benefits in December 1994.

CBO assumes that, under current law, the DA&A caseload would grow to about 190,000 by 1997, fall in 1998 (as the first wave of terminations under last year's legislation occurs), then resume climbing gradually. Under H.R. 4, awards to DA&As would stop immediately, and those already receiving benefits would be removed from the rolls on January 1, 1997, unless they had another seriously disabling condition.

Estimating the number of DA&As who already have or will soon develop another disabling condition is a thorny issue. A sample of 1994 awards with a primary diagnosis of substance abuse found

that two-thirds identified a secondary disabling condition (predominantly mental rather than physical). That fact must be interpreted with caution. In order to be worth noting, the secondary condition must be quite severe—but not necessarily disabling in its own right. On the other hand, there is no requirement to record secondary conditions; some of the one-third for whom none was recorded undoubtedly had them. And the health of many DA&A recipients certainly deteriorates over time, with or without continued substance abuse. Thus, CBO assumes that only about one-quarter of DA&A recipients would be permanently terminated from the program; the rest could requalify by documenting that they have another sufficiently disabling condition. Multiplying the number of recipients terminated times an average benefit yields savings of \$200 million to \$300 million a year in SSI benefits.

Besides saving on benefits, the Social Security Administration would also be freed from the requirement to maintain contracts with referral and monitoring agencies (RMAs) for its SSI recipients. Those agencies monitor addicts' and alcoholics' treatment status and often serve as representative payees. Savings are estimated at about \$150 million to \$200 million a year in 1997 through 2002. Savings in 1996, however, are uncertain, as SSA will likely have to pay cancellation penalties on the contracts to be terminated.

The legislation would also eliminate Medicaid coverage for DA&As terminated from the SSI program, resulting in another \$100 million a year or so in savings. And because former SSI recipients would experience a reduction in their cash income, food stamp costs under correct law would increase slightly—by approximately \$30 million a year.

Disabled children.—H.R. 4 would restructure the SSI program for disabled children. Under current law, low-income children can qualify for the SSI program and its federal cash benefits of up to \$458 a month in two ways. They may match one of the medical listings (a catalogue of specific impairments, with accompanying clinical findings), or they may be evaluated under an individualized functional assessment (IFA) that determines whether an unlisted impairment seriously limits a child from performing activities normal for his or her age. Both methods are spelled out in regulation. Until the Supreme Court's decision in the *Zebley* case in 1990, the medical listings were the sole path to eligibility for children. Adults, in contrast, could receive an assessment of their functional and vocational capacities even if they did not meet their own set of listings. The court ruled that sole reliance on the listings did not comport with the law's requirement to gauge whether children's disorders were of "comparable severity" to impairments that would disable adults.

H.R. 4 would eliminate childhood IFAs and their statutory underpinning, the "comparable severity" rule, as a basis for receipt. Many children on the rolls as a result of an IFA (roughly a quarter of children now on SSI) would be terminated, and future awards based on an IFA would be barred. Thus, the program would be restricted to those who met or equaled the listings. The bill would also remove the reference to maladaptive behavior—behavior that is destructive to oneself, others, property, or animals—from the

personal/behavioral domain of the medical listings, the only place where it appears as a basis for award.

Even as it repealed the "comparable severity" language, the bill would create a new statutory definition of childhood disability. It states that a child would be considered disabled if he or she has "a medically determinable physical or mental impairment which results in marked, pervasive and severe functional limitations [and can be expected to last 12 months or lead to death]." That language appears to be intended to preserve SSI eligibility for some of the most severely impaired children who now qualify by way of an IFA. The exact implications of this language would remain to be clarified through regulation (and perhaps court interpretation) and are difficult for CBO to estimate definitively.

CBO estimated the savings from these changes by judging how many present and future children would likely qualify under the new criteria. CBO relied extensively on SSA program data and on analyses conducted by the General Accounting Office and the Inspector General of the Department of Health and Human Services. Approximately 900,000 children now collect SSI benefits, and CBO projects that the number would reach 1.35 million in 2002 if policies were unchanged. CBO assumed that more than half of children who qualify through an IFA would be rendered ineligible under the proposed criteria—specifically, those who fail to rate a "marked" or "extreme" impairment in at least two areas of functioning. CBO chose that assumption because the bill's key phrase—marked, pervasive and severe functional impairments—might reasonably be interpreted to mean limitations in several different areas of functioning, a tighter standard than the one that now allows some children with "moderate" limitations onto the program. CBO also assumes that the provisions on maladaptive behavior would bar a small percentage of children from eligibility for benefits. Overall, approximately 21 percent of children who would be eligible under current law would be rendered ineligible. Because of the room for regulatory interpretation, however, that figure is uncertain. A tight interpretation might bar up to 28 percent of children; a loose one might trim the rolls by about 10 percent or even less.

CBO estimates the savings in cash benefits relative to current law by multiplying the number of children assumed to lose benefits by the average benefit. That average benefit was about \$430 a month in December 1994 and would grow with inflation thereafter. Children already on the rolls would be reviewed under the new criteria but could keep their benefits through December 1996 even if found ineligible. CBO assumes that children who do not meet the new criteria could be removed from the rolls even if their medical condition has not improved since award—as is clearly intended by the bill—even though current law generally requires that SSA document such progress before it terminates a beneficiary. New awards would be affected immediately. Total savings in cash benefits would equal \$0.2 billion in 1996 and \$2.1 billion in 2002.

H.R. 4 would make several other changes to the SSI program for disabled children, notably by stepping up requirements for continuing disability reviews (CDRs). Savings from that requirement are embedded in CBO's estimate. The bill also requires that representative payees (usually parents) develop a treatment plan for the

child and demonstrate to SSA's satisfaction that they followed that plan. Noncompliance would lead to appointment of another representative payee, not to termination of benefits. The bill also mandates several studies of disability issues.

The proposed cutbacks in children's SSI benefits would affect spending in other programs. Food stamp outlays would increase, under current law, to replace a portion of the cash income lost by the children's families. Effects on two other programs, however, are omitted from CBO's estimate. Under current law, approximately half of the disabled children losing SSI benefits would be likely to end up on the AFDC programs; but because that program would be abolished in Title I and replaced by a fixed block grant to the states, no extra spending would result. The cutback in children's SSI benefits would have only negligible effects on the Medicaid program. Most children removed from SSI would still qualify for Medicaid—either through their eligibility for the program of temporary assistance to needy families (the successor to the AFDC program) or their poverty status.

Administrative costs.—Several provisions of Title III would affect the administrative costs of the SSI program. Those costs are funded out of an overall discretionary appropriation that limits administrative expenses of the Social Security Administration. The most significant burdens would be those involved in checking citizenship status and conducting continuing disability reviews (CDRs). Title III would presumably require SSA to check the citizenship status of all SSI beneficiaries—those coded as citizens as well as those identified as aliens—to verify their continued eligibility for benefits. CBO estimates the one-time cost of that effort at about \$50 million; some savings would materialize in later years, though, as SSA would need to sift through fewer applications from legal aliens. The disability-related provisions would, in CBO's judgment, involve approximately \$300 million in nonrecurring costs (principally in 1996) as SSA reviews drug addicts and alcoholics and disabled children for continued eligibility, and about \$100 million a year thereafter because of the permanent requirement for additional CDRs. SSA would save small amounts of money (less than \$5 million a year) from processing fewer benefit checks. Extra administrative costs are expected to total \$0.3 billion in 1996 and \$0.1 billion a year thereafter.

Title IV: Child support enforcement

Title IV would change many aspects of the operation and financing of the federal and state child support enforcement system. CBO estimates that the change in spending relative to current law would fluctuate between net costs or net savings of \$100 million annually over the seven-year estimation period (see Table 3). The key provisions of Title IV would mandate the use of new enforcement techniques with a potential to increase collections, eliminate a current \$50 payment to welfare recipients for whom child support is collected, allow former public assistance recipients to keep a greater share of their child support collections, and authorize new spending on automated systems. Similar to current law, the bill would require that states share with the federal government child

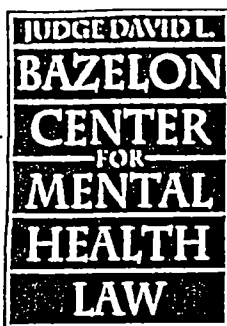
support collected on behalf of families who receive cash assistance through the Temporary Assistance for Needy Families Block Grant.

New enforcement techniques.—Using reports on the performance of various enforcement strategies at the state level, CBO estimates that child support collections received by families on cash assistance in 2000 would increase under the bill by roughly 12 percent over current projections (from \$3.5 billion to \$3.9 billion). Most of the improvement would result from the creation of a new-hire registry (designed to speed the receipt of earnings information on noncustodial parents) and provisions that would expedite the process by which states seize the assets of noncustodial parents who are delinquent in their child support payments. Some states have already applied the proposed enforcement techniques, thereby reducing the potential of improving collections further. CBO projects that the additional collections would result in savings of roughly \$0.2 billion in 2000 to the federal government through shared child support collections, as well as reduced spending in food stamps and Medicaid.

Elimination of the \$50 passthrough.—Additional federal savings would be generated by eliminating the current \$50 passthrough. Under current law, amounts up to the first \$50 in monthly child support collected are paid to the family receiving cash assistance without affecting the level of the welfare benefit. Thus, families for whom noncustodial parents contribute child support get as much as \$50 more a month than do otherwise identical families for whom such contributions are not made. Eliminating the \$50 child support payment beginning in 1996 would save the federal government between \$0.1 billion and \$0.2 billion annually.

Distributing additional child support to former AFDC recipients.—H.R. 4 would require states to share more child support collections with former recipients of public assistance, reducing federal and state recoupment of prior benefit payments. When someone ceases to receive public assistance, states continue to collect and enforce the family's child support order. All amounts of child support collected on time are sent directly to the family. If a state collects past-due child support, however, it may either send the amount to the family or to use the collection to reimburse itself and the federal government for past AFDC payments. The proposal, which would take effect in fiscal year 2000, would require states to send a larger share of arrearage collections to families, which would reduce recoupment by federal and state governments. Based on a survey of child support directors, CBO estimates that this provision would cost the federal government \$0.3 billion in 2000 and \$0.4 billion in 2001 and 2002.

Additional provisions with budgetary implications.—A number of other provisions would increase federal outlays. First, H.R. 4 would fund further improvements in states' automated systems at an estimated annual cost of \$0.1 billion. Second, the bill would provide about \$50 million annually to provide about \$50 million annually to provide technical assistance to states and to operate a computer system designed to locate non-custodial parents. Third, the bill would change federal cost sharing in enforcing child support. Although individual states would see their share of federal funds



Civil Rights and Human Dignity

The Impact of Children's SSI Program Changes in Welfare Reform

The children's Supplemental Security Income (SSI) program will be dramatically redesigned and children's eligibility significantly reduced as a result of the welfare reform bill passed by Congress, soon to be signed by the President.

The program will be cut by \$8.2 billion and, over the next six years, 315,000 low-income children with disabilities will lose or be denied access to benefits. The Congressional Budget Office (CBO) estimates that 15% of those who lose or are denied access to SSI will also lose eligibility for Medicaid.

In FY 1995, the children's SSI program served more than 950,000 qualifying low-income children with severe disabilities. Children with mental retardation were the largest single group, representing about 42% of all children enrolled, while another 33% have physical disabilities and 25% have mental disorders.

Described below are key provisions and their impact on children with disabilities and their families.

1. Children will have to qualify on the basis of a more narrow definition of childhood disability.

The bill will repeal the current statutory language on "comparable severity"—the basis of the U.S. Supreme Court's 1990 *Zebley* decision, requiring the Social Security Administration (SSA) to use an evaluation process for children comparable to the one it uses for adults claiming disability benefits. The Supreme Court directed SSA to supplement its listing of medical impairments with an individualized assessment of how a child's impairments affects his or her ability to function.

The welfare reform legislation establishes a new definition requiring that a child have a "medically determinable physical or mental impairment which results in marked and severe functional limitations" of substantial duration.

IMPACT

The new definition may limit eligibility for children with very significant physical or mental functional limitations. It is possible, for example, that children who have a combination of impairments will have more difficulty qualifying if no single condition matches a medical impairment on SSA's listing.

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2. Children will no longer be able to qualify through an Individualized Functional Assessment (IFA).

The welfare reform legislation eliminates the Individualized Functional Assessment (IFA), established after the *Zebley* decision, as of the date of enactment. In an IFA, a state disability examiner determines eligibility by comparing a child's limitations in various areas of daily activity to the activities of children the same age who do not have a disability. In many states, up to one third of eligible children qualified through the IFA.

Children can now qualify only through the more restrictive medical listings. SSA will re-evaluate each child who qualified through an IFA to determine if he or she will remain eligible through the medical listings.

SSA has one year from the date of enactment to accomplish these redeterminations. The legislation allocates additional administrative funding for SSA to complete them and conduct continuing-disability reviews (see item 5a below). Current recipients will continue receiving benefits until either July 1, 1997 or the date of redetermination, if it is later.

IMPACT

Elimination of the IFA has major consequences for children with serious mental, emotional and behavioral disorders. Among children who now qualify through the functional assessment, 44% have a mental illness or serious emotional disorder. SSA data indicate the percentage of children, within diagnoses, who will lose access to SSI by elimination of the IFA:

- 49% of the children who qualify because of mood disorders;
- 38% of those with pulmonary tuberculosis;
- 33% of those with mental retardation;
- 29% of those with burns;
- 25% of those with intracranial injuries;
- 22% of those with schizophrenia; and
- 22% of those with arthritis.

The IFA generated much of the controversy about the program because critics alleged that parents coach their children to fake mental disorders. These allegations prompted several examinations of the program by SSA, the HHS Office of Inspector General and the General Accounting Office. While they criticized some aspects of the program, none of the investigators were able to substantiate allegations of widespread fraud.

CBO estimates that 267,000 children will lose access to benefits over the next six years as a result of the IFA's elimination.

3. The medical listings will be modified to eliminate references to "maladaptive behavior" when evaluating personal/behavioral functioning for children with mental impairments.

Under the mental impairment listings, maladaptive behavior may be counted both in the domain of social functioning and in the domain of personal/behavioral functioning. Contrary to anecdotal reports, the current

disability evaluation process has not allowed children to qualify solely on the basis of a mental diagnosis and evidence of maladaptive behavior. However, despite advocacy on this issue, the legislation eliminates use of such evidence in one part of the mental impairment listings.

IMPACT

CBO estimates that, over the next six years, another 48,000 children will lose access to benefits as a result of this change in the mental impairment listings.

4. Up to 50,000 children will lose access to health care through the Medicaid program.

Children who lose their SSI benefits will continue to receive Medicaid if they can remain eligible on other grounds, such as their age and their family's low income. Coverage of low-income children through age 13 is now guaranteed and mandatory coverage of older children is being phased in through 2002.

IMPACT

Children with severe disabilities who lose their Medicaid eligibility will face tremendous uncertainty. Many families will simply not have the resources to care for them at home. Many will have to turn to state and local governments for assistance.

Especially tragic is the likelihood that more families will be forced to surrender custody to get care for their children, either through the foster care system or in state institutions—at far higher cost to taxpayers. And without the federal dollars that parents now spend on their children's behalf, states' costs to serve children with severe disabilities will escalate.

5. Other changes

a. More frequent reviews of disability

The legislation mandates continuing-disability reviews every three years for all children except those whose conditions are not expected to improve. The child's representative payee will have to show evidence, at the time of the review, that the child is receiving treatment to the extent medically necessary and available for the qualifying condition. For children who qualify because of their low birthweight, it requires reviews 12 months after birth. And within one year after a child's 18th birthday, it requires review under adult eligibility criteria.

b. Dedicated savings account

The legislation requires the parent to establish an account for any back benefits that exceed six times the maximum monthly payment. This money may be used only to cover specific expenses, including education or job-skills

training, personal-needs assistance, special equipment or housing modifications, medical treatment, therapy or rehabilitation, and other items or services that SSA has determined appropriate.

c. Reduced benefits for hospitalized children with private insurance

The legislation requires that children who are hospitalized, whose medical care is covered by private insurance, receive no more than the \$30 monthly SSI benefit paid to children whose medical bills are covered by Medicaid.

d. New regulations

The legislation requires SSA to develop new regulations for the children's SSI program within three months after enactment.

e. Annual reports

The legislation requires SSA to provide an annual report on the SSI program to the President and Congress, including historical data on prior enrollment by public assistance recipients.

f. GAO study

The legislation requires a study by the General Accounting Office on the impact of the new children's SSI provisions and the extra expenses incurred by families of children receiving benefits that are not covered by other federal, state or local programs.

Current Status

The children's SSI program now provides eligible children up to \$470 a month and, in most states, access to health care through Medicaid. The money helps many families meet their child's need for special food, clothing, equipment, transportation, unreimbursed medical expenses and child care—including care by a parent who cuts back on work to provide it.

At various times during the welfare reform debate, families faced the threat of losing this cash assistance—either through its replacement by vouchers for state-provided services or by a 25% reduction in benefits for certain children. Fortunately, the children who remain eligible will continue to receive the critical support of cash assistance.

Recently, the allowance rate for children applying for SSI benefits has declined to a rate lower than it was before the *Zebley* decision. Data from the Social Security Administration show that the allowance rate, which was 43% prior to the *Zebley* decision, had fallen to 32% in 1995 and continued its drop during the first four months of 1996, to 31%.

August 7, 1996

For more information, call Rhoda Schulzinger, Bazelon Center for Mental Health Law, 202/467-5730; e-mail (with her name in the subject line): hnl660@handsnet.org.

State-by-State Analysis of Changes in Children's SSI Program

State	# Children Receiving Benefits 4/96	# Children to be Reviewed under New Standard
Alabama	28,490	7,487
Alaska	780	256
Arizona	11,480	2,923
Arkansas	19,020	5,988
California	73,680	15,908
Colorado	9,270	2,011
Connecticut	5,170	1,282
Delaware	2,750	678
District of Columbia	2,910	663
Florida	58,350	15,649
Georgia	28,610	5,539
Hawaii	1,010	102
Idaho	3,710	1,334
Illinois	49,350	14,434
Indiana	19,930	5,739
Iowa	7,080	1,989
Kansas	8,430	2,814
Kentucky	22,480	8,017
Louisiana	40,080	12,890
Maine	2,570	432
Maryland	13,020	3,411
Massachusetts	16,350	4,733
Michigan	40,640	15,033
Minnesota	10,650	3,444
Mississippi	24,990	6,636
Missouri	21,180	6,339
Montana	2,170	533

Nebraska	4,420	923
Nevada	2,690	633
New Hampshire	1,890	305
New Jersey	22,260	5,717
New Mexico	7,030	1,553
New York	81,790	26,258
North Carolina	30,040	11,410
North Dakota	1,380	318
Ohio	52,830	16,809
Oklahoma	11,680	1,895
Oregon	6,780	1,525
Pennsylvania	43,800	14,374
Rhode Island	3,140	821
South Carolina	18,090	4,229
South Dakota	2,960	571
Tennessee	25,360	6,049
Texas	57,230	12,728
Utah	4,480	1,098
Vermont	1,610	429
Virginia	22,660	8,610
Washington	11,280	3,338
West Virginia	8,560	2,409
Wisconsin	21,350	7,067
Wyoming	1,200	394
TOTAL	968,660	275,727

Data reflect approvals by state disability agencies for children who are under age 18 before January 1, 1997. Approximately 25,000 additional children have received benefits since 1990 after an administrative hearing; these cases will also have to be screened to see if a redetermination is required.

Data provided by Social Security Administration
Chart produced by Bazelon Center for Mental Health Law
August 1996

DRAFT

SUBJECT: Determination of Childhood Disability in the Supplemental Security Income Program under Welfare Reform

ISSUE: The welfare reform law provided a new general definition of childhood disability for the Supplemental Security Income (SSI) program intended to tighten eligibility requirements. Both the Congress and the Administration proposed tightening the requirements with virtually identical language. However, the statutory language is not precise and the Office of General Counsel at the Social Security Administration (SSA) believes that SSA has substantial discretion in drawing the eligibility line.

The President's FY 1997 Budget Request proposed the new childhood disability provision as part of a larger welfare reform bill with estimated savings of \$8.4 billion over the six-year period from FY1997-FY2002 and \$1.9 billion in FY 2002. These savings were based on a clear ~~understanding~~ *assumption* at that time of where SSA would draw the line in tightening the eligibility requirements. *interpret?*

Add: advice felt + we knew org legally chg be easier SSA also advised CBO and other Congressional staff of their intentions. When the legislation was enacted, the provision was scored at these levels. This paper provides four options for drawing the eligibility line that differ considerably in terms of how many children will lose benefits. Option 1 represents the position on which the official scoring was based. Thus, from a budgetary perspective, choosing any of the other three options, each of which represents looser eligibility requirements than Option 1, has costs over the six-year period and in 2002, the target year for balancing the budget. Attachment 1 is a chart summarizing the impacts of each of the four options.

The decision will affect both current recipients and new applicants. Under any of these options, current recipients would not begin to lose benefits before July 1997. However, soon after a decision is made, SSA can begin to process new claims. Approximately 1,500 cases per day have been held since enactment in August, pending a resolution of this issue. In addition, there is a statutory deadline of November 20, 1996, for SSA to promulgate rules codifying the new definition, although implementation can begin prior to such codification. The first three options we have identified can be implemented immediately. The fourth can, in part, be implemented immediately, but also would require legislation.

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BACKGROUND: Under SSI, an individual under the age of eighteen with physical or mental impairments of sufficient severity may be determined disabled for purposes of receiving means-tested cash benefits. Prior to enactment of welfare reform, a child was considered disabled under the law if he or she had an impairment of "comparable severity" with that of an adult -- not a very clear definition. Further, in response to a 1990 Supreme Court decision (*Sullivan v. Zebley*), SSA established an additional step (known as the Individualized Functional Assessment or IFA) to the disability determination process that allowed for a determination of disability at a lower level of severity than was in place prior to that decision.

Prior to the establishment of the IFA in 1991, there were 300,000 children on the rolls. Today, approximately one million children are receiving benefits. The growth has been attributed mainly to a combination of the effect of the *Zebley* decision and an expected expansion in the number of children with mental impairments on the rolls as a result of changes to SSA regulations. If there had been no change in the law, SSA estimates that the rolls would have grown to 1.3 million by FY 2002.

Since the IFA was put in place, there has been a growing perception^{by?} that the standard of severity had been lowered too far. This perception has been reflected, in part, by media reports on children receiving "crazy checks," i.e., SSI payments for exhibiting behavioral problems significant enough to qualify for benefits under these lower standards. Although neither SSA nor GAO has found any evidence of unqualified children being found eligible, the appropriate threshold for eligibility clearly became an issue. Under the new law, a child is disabled if he or she has an impairment which results in "marked and severe functional limitations." The new law also explicitly eliminated the IFA. By this action, Congress most clearly signaled its intention that the eligibility standards should be tightened. *taking*

To understand the options better, a rudimentary understanding of the determination process is helpful. The specialized terms used in the options have become familiar enough to Congressional staff to allow them to appear in letters sent to you by a number of Senators. Attachment 2 provides a brief description of the disability determination process and the terms used in describing standards of severity.

OPTIONS: Below is a brief description of each option.

Option 1 -- Significantly tighten eligibility -- eliminate the IFA and make no other changes. An estimated 190,000 children currently on the rolls would lose benefits by September 1997. This option is consistent with the assumptions in the FY 1997 President's Budget and, therefore, has no cost in FY 2002 or over the six-year period from 1997-2002.

SSA would clarify the current procedures and regulations related to the determination process and eliminate the IFA as required by the new law. Except for elimination of the IFA, determination procedures would be essentially unchanged. The level of severity would be what is known as "Listing level" or "two marked" (see Attachment 2).

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Option 2 -- Tighten eligibility by eliminating the IFA, but modifying current process. An estimated 145,000 children currently on the rolls would lose benefits by September 1997. This option would cost \$0.6 billion in FY 2002 and \$2.0 billion from FY 1997-2002.

After eliminating the IFA, SSA would modify the current process by adding a fifth "domain" to the four mental disorder-oriented domains currently used for the "functional equivalence" evaluation described in Attachment 2. The fifth "domain" would be a "motor domain." The addition of this physical disorder-oriented domain would ensure greater consideration of limitations caused by combinations of physical impairments. The level of severity would be "Listing level" or "two marked," with the "motor domain" essentially providing an additional opportunity to have a "marked" limitation in a second domain. In addition, SSA would put in place a standard form that adjudicators would be required to fill out when making their determinations. SSA believes that this form would promote greater uniformity in decision making and lead to more allowances than would otherwise occur.

Option 3 -- Tighten eligibility some by eliminate the IFA, modifying the current process, and adding a new additional step with a lower severity standard. An estimated 45,000 children currently on the rolls would lose benefits by September 1997. This option would cost \$1.5 billion in FY 2002 and \$6.6 billion from FY 1997-2002.

After eliminating the IFA, a new additional step at a "lower-than-listing level" of severity would be included in the determination process. SSA's General Counsel believes that the legislative history can be read to allow for such a new step. In order to distinguish this option from the process prior to the new law, the severity standard would be higher than the IFA standard. The standard proposed by the advocates of "one marked and one moderate limitation" accomplishes this purpose in a manner that can be immediately implemented.

Option 4 -- Tighten eligibility as in Option 2 and propose ^{out of} legislation to phase in the new rules for current recipients. An estimated 65,000 children currently on the rolls would lose benefits by 2002 as a result of continuing disability reviews. This option would cost \$0.6 billion in FY 2002 and \$3.9 billion from FY 1997-2002. ?

Under the new law, current recipients who are on the rolls as a result of the IFA are to be reviewed under the new definition no later than one year after enactment (August 1997). No child currently on the rolls would begin to lose benefits before July 1997. Under Option 4, the eligibility rules would be tightened as in Option 2 and legislation would be proposed to phase in the new rules for current recipients, such that those children on the rolls as a result of the IFA would not be subject to immediate review. These children would be reviewed under the new rules at the time of their regularly scheduled continuing disability reviews.

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Option 4A — Tighten eligibility as in Option 2 and propose legislation to “grandfather” current recipients from coverage under the new rules. No children currently on the rolls would lose benefits. This option would cost \$1.1 billion in FY 2002 and \$5.5 billion from FY 1997-2002.

As a variation on Option 4, the eligibility rules would be tightened as in Option 2 and legislation would be proposed to “grandfather” current recipients, such that those children on the rolls as a result of the IFA would never be subject to the new rules, also eliminating any requirement for immediate review.

ANALYSIS: Option 1 is arguably closest to Congressional intent, as shown by the amount of savings scored by CBO and OMB during the debate on this issue and at the time of enactment. It is also the option with the largest impact and does not take advantage of SSA's existing regulatory authority to make changes to the disability determination process independent of the welfare reform bill.

Option 2 adds a “motor domain” and promotes the greater discipline and uniformity in the process that would result from the standard form would be consistent with the policy to tighten eligibility and help ensure that a significant number of severely disabled children are found eligible without lowering the standard of severity below that explicitly identified in the Conference Report as appropriate. Independent of the passage of the welfare reform legislation, these are changes that make programmatic sense, at the same time that they have the effect of reducing the number of children who would lose benefits compared to Option 1. >>?

Option 3 would put SSA in the position of defending a much lower threshold than was anticipated by either the Administration or the Congressional conference committee at the time of enactment. However, SSA believes it would be legally defensible to create a more lenient test that would drop fewer children from the rolls. Given that SSI cash benefits link these children to Medicaid coverage, and that the welfare reform bill simultaneously makes many other changes to the welfare system that could affect these families, it could be argued that it is appropriate to err on the side of SSA using its legal discretion to keep more children on the rolls. At the same time, Option 3 risks going so far that it might revive the “crazy check” stories that appeared in the media. To that extent, there is much less risk to Option 2 in terms of criticism from Congress. Not Send's

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The number of children affected differs significantly between Options 2 and 3. Despite repeated efforts, SSA has been unable to identify an option that could be developed and implemented immediately that falls between these two in terms of the effect on children currently on the rolls.

Option 4 could serve as a compromise solution in terms of the number of children currently on the rolls who would eventually lose benefits. Option 4A would be even more protective of children currently receiving benefits. But Legislative!

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In this memorandum and the first two attachments, the options have been discussed in terms of the number of children who could lose benefits and the costs of the options in relation to savings anticipated at the time the bill was enacted. Attachment 3 provides a brief summary of which interested parties might provide support or opposition for each option.

Attachments (3)

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Attachment 1

COMPARISON OF OPTIONS FOR DETERMINING SSI CHILDHOOD DISABILITY UNDER WELFARE REFORM

	SEVERITY STANDARD FOR DISABILITY	REDUCTIONS IN NUMBER OF CHILDREN RECEIVING SSI PAYMENTS		SSI AND MEDICAID COSTS FROM 1997-2002	EFFECT OF OPTIONS ON OUTLAYS IN 2002	
		CURRENT RECIPIENTS REMOVED FROM ROLLS BY SEPTEMBER 1997 (down from 1.0 million before welfare reform)	IN 2002 (down from 1.3 million before welfare reform)		Additional Eligible Children	Additional SSI and Medicaid Costs
Option 1	Significantly Tighten Eligibility	190,000	250,000	0	0	0
Option 2	Tighten Eligibility; Modify Determination Process	145,000	185,000	\$2.0 billion	65,000	\$0.5 billion
Option 3	Add New Step with Lower Standard than Options 1 or 2	45,000	50,000	\$6.6 billion	200,000	\$1.5 billion
Option 4	Same as Option 2, but Slow Phase-in of Current Recipients	0	175,000	\$3.9 billion	75,000	\$0.6 billion
Option 4A	Same as Option 2, but "Grandfather" Current Recipients	<i>almost like 2</i> 0	110,000	\$5.5 billion	140,000	\$1.1 billion

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Attachment 2 DISABILITY DETERMINATION PROCESS

Comment

The disability determination process involves first identifying whether a child's impairment can be found to "meet or equal" the numerous impairments in SSA's 100-page tabulation of medical impairments (known as the "Listing of Impairments"). If a child's specific impairment (1) is not found in the Listing and (2) is not found by an evaluating physician or psychologist to "medically equal" an impairment in the Listing, the individual may still be determined to be "disabled."

In this third step, he or she can be found to have an impairment that is "equivalent" to the listing by an evaluation of the functional limitations caused by the impairment in a number of "domains" (or functional areas). These four "domains" include personal behavior, social behavior, cognition/communication, and concentration. In these cases, the disability determination hinges on the level of severity of the functional limitation. Individuals are found to have impairments "equivalent" to the Listing if they have "marked" limitations in at least two of the four "domains"-- the "two marked" criteria has become known as "Listing level severity." The IFA essentially added an additional step similar to the step above, but allowing for eligibility if a child had "one marked and one moderate limitation" or "three moderate limitations."

It has proven very difficult to generalize about the children who do or do not qualify at different levels of severity. The most meaningful distinction appears to be from the perspective of the decision maker determining whether or not the child meets the eligibility requirements. The decision maker is typically a State employee working on a claim in a State Disability Determination Service office or an SSA Administrative Law Judge adjudicating an appeal. The attached table identifies some of the key differences between "moderate" and "marked" limitations.

The key point of the table is to illustrate the difficulty of the decision as to whether a child's limitation in a given domain is "moderate" or "marked." The core question is whether a particular problem or limitation is "occasional" or "occurs sometimes" (and therefore is "moderate") or whether the problem is "frequent" or "persistent" or "constant" (and therefore "marked"). The broad range of judgment involved in the determination that a given limitation is "moderate" leads to the vast difference between the estimated effects of Option 2 and Option 3.

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Attachment 2 – Table

Examples of Moderate and Marked Functional Limitations

CHILD #1 – MENTAL IMPAIRMENT 14-year old boy with mild mental retardation who does not have specific medical findings to meet listings	CHILD #2 – PHYSICAL IMPAIRMENT 12-year old girl with juvenile rheumatoid arthritis who does not have specific medical findings to meet listings
Example of Moderate in Personal Domain: can be on his own only in familiar places; can only handle small amounts of money; has to be reminded of personal care at home Example of Moderate in Social Domain: has only occasional difficulty maintaining relationships with children his own age	Example of Moderate in Motor Domain: occasional pain and stiffness in knees and ankles limits walking when pain occurs; unable to run; is sometimes symptom-free; sometimes has general malaise from illness and medication Example of Moderate in Personal Domain: pain and stiffness in wrist are less frequent and severe; when they occur, cause some difficulty in self-care activities such as eating, dressing, toileting Example of Moderate in Social Domain: when symptoms are present, tends to be irritable and avoids interacting with people.
Example of Marked in Personal Domain: gets lost when on his own; can't handle money; requires close supervision at home for bathing and dressing Example of Marked in Social Domain: has serious difficulty maintaining relationships with children his age	Example of Marked in Motor Domain: frequent pain and stiffness in knees and ankles requires cane to walk; unable to run; is rarely symptom-free; frequent general malaise from illness and medication Example of Marked in Personal Domain: frequent pain and stiffness in wrists causes serious difficulty eating, dressing, toileting, etc.; is rarely symptom free Example of Marked in Social Domain: Because of frequent illness and symptoms, is depressed, irritable, and socially withdrawn

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Attachment 3 IMPLICATIONS OF OPTIONS

Option 1 -- The tightest definition of childhood disability is consistent with assumptions made by both the Congressional Budget Office and the Office of Management and Budget when scoring this provision of the welfare reform bill. It represents the position we believe the majority of the Republican conferees would say was intended by the change in the law. This position is reflected in the language of the conference report.

Option 2 -- The modifications to the regulation envisioned by this option represent the Social Security Administration's best efforts to identify an option that moderates the effects of the legislation without significantly reducing the standard of severity for eligibility childhood disability benefits. The expectation is that a majority of Republicans would not see this proposal as contrary to the spirit of the conference agreement, while advocacy groups would see it as an effort to at least recognize the problems of severely disabled children with multiple physical impairments who would not otherwise qualify for the rolls. *This would compromise + disab advocates*

Option 3 -- The loosest definition is favored by various advocacy groups. It is also being championed by at least five Senators (Daschle, Conrad, Chaffee, Cohen, and Moseley-Braun). The rationale for this option comes from the position of advocates and some members of Congress that the Congress did not intend to establish a high severity standard, even after eliminating the IFA. While this position relies more on what the conference report does not say than on what it does say, it is not inconsistent with the SSA General Counsel's position that this option is within SSA's regulatory discretion. There would undoubtedly be significant negative reaction to this option from the Republican majority and it could be represented as negotiating in bad faith.

Options 4 and 4A -- Proposing legislation either to slow the phase-in for or to "grandfather" current recipients has not been discussed outside of the Executive Office of the President. The formulation for how long children currently on the rolls who might be found no longer eligible would continue to receive benefits was the last item of negotiation between the Administration and the Republican majority in this title of the welfare reform bill. These proposals would represent an effort to undo that part of the negotiations. To be satisfied with either of these proposals, advocates would have to perceive it as the best they could get under the circumstances. From SSA's perspective, passage of legislation would eliminate one of the thorniest of the implementation issues -- reviewing a large number of children in a relatively short period of time.