accordance with an agreement between the individual and the State. Disputes about plan revisions would be subject to the same review procedures as disputes over the initial plan.

Individuals whose employability plan reflects a need for substance abuse treatment could be required to participate in such treatment. Such individuals could be subject to JOBS sanctions for failure or refusal to accept treatment (whether or not they otherwise qualify for deferral status) and would be so advised.

Within 90 days prior to the end of his or her time limit, the State agency must schedule a meeting with the individual for a progress evaluation, an assessment regarding eligibility for an extension, discussion of job search requirements, and provision of information on registering for the WORK program. JOBS re-assessments within 6 months prior to the end of the time limit could be used to meet this requirement.

No less than 45 days prior to the end of the time limit (and, at State option, as much as 3 months prior), the State must require an individual to participate in job search to the extent consistent with the individual's employability plan. Job search participation would be a prerequisite for receiving a WORK assignment.

References in section 482 to applicants or to actions occurring at the time of application (or the time from which payment is made) would be construed to refer to recipients at the time of redetermination occurring after the effective date in their State.

SEC. 103. AMENDMENTS PERTAINING TO SERVICES AND ACTIVITIES UNDER JOBS PROGRAM.

Subsection (a) repeals a JOBS provision pertaining to informing JOBS participants which is now redundant.

Subsection (b) revises section 482(d) of the Act to require States to include a job search component in their programs.

Subsection (c) revises the definition of the educational activities that States must include in their JOBS programs to emphasize education related to employment.

Subsection (d) adds "programs to prepare for self-employment or to enable individuals to establish a microenterprise" as a new optional JOBS component.

Subsection (e) requires that State JOBS plans describe whether and how their programs will provide training for individuals to become child care providers. The plans must also describe the steps that the State will take to encourage training and placement of participants in non-traditional fields of employment and to advise them of such opportunities.

Subsection (f) extends the maximum period for work supplementation placements from 9 to 12 months and makes a conforming change.

Subsection (g) makes amendments to current job search provisions to: 1) make job search a mandatory component of JOBS; 2) provide for mandatory job search by individuals, upon approval of their AFDC application, unless they lack a high school diploma (or its equivalent) or minimal work experience; 3) extend the maximum allowed period of job search for applicants; and 4) revise the provision on total amount of job search allowed in a year. Under the latter revision, the period of applicant job search would be considered in the general limit, the 8-week per year general limit would be extended to 4 months, and job search in conjunction with other activities would not be counted.

Subsection (h) gives States the option to use a conciliation process or another procedure which affords the individual an advance notice and a ten-day period for dispute resolution prior to providing an opportunity for a hearing.

Subsection (i) adds adult and vocational education to the list of programs with which JOBS must be coordinated.

Subsection (j) replaces the existing provisions regarding protection for JOBS participants with provisions governing participants in both JOBS and WORK.

First, it makes slight modifications to the JOBS provisions regarding appropriateness of assignments (in light of the individual and family circumstances), reasonable distance, and discrimination and then extends those provisions to the WORK program.

In terms of nondisplacement provisions, for both the JOBS and WORK programs, it would preclude placements which displace (or partially displace) any currently employed workers, infringe upon their promotional opportunities, or impair existing contracts or collective bargaining agreements. It also would preclude employment or filling of a position: 1) vacant because of layoff, strike or lockout; 2) for which another person has recall rights; or 3) from which an individual has been terminated or laid off with the effect of filling the vacancy so created. For positions in State or local agencies, it would preclude the filling of a budgeted vacancy unless the State has been unable to fill it for at least 60 days. For work performed under contract, no participant could be assigned during the first 90 days if the same or similar work was performed by an employee covered by a collective bargaining agreement under a contract with another employer in the immediately preceding period. For positions in private, nonprofit agencies, it would preclude assignments in activities equivalent to ones regularly carried out by State or local government agencies under any of the above conditions.

If applicable, participants would receive State workers' compensation benefits. Otherwise, they must be provided medical and accident protection for on-site injuries.

Health and safety standards which apply to employees under Federal and State law would extend to program participants.

States must establish grievance procedures for resolving complaints of regular employees or their representatives that the requirements of this section regarding nondisplacement, wages, benefits or working conditions have been violated. Hearings on such grievances must be conducted within 30 days, and a decision reached within 60 days. All grievances must be made within 45 days.

Decisions and failures to make a decision within 60 days could be appealed or submitted to binding arbitration. Arbitrations would be conducted by qualified arbitrators who would be jointly selected and independent. Where agreement is not reached on an arbitrator within 20 days, the parties would select an arbitrator from a list provided by the Federal Mediation and Conciliation Service or the American Arbitration Association. Arbitrations must be held within 45 days of being requested (or within 30 days of the appointment of an arbitrator), and decisions must be made within 30 days of an arbitration proceeding.

In general, costs of arbitration would be evenly divided between the parties. However, if a grievant prevails, the party in violation would pay the full cost (including attorney fees).

Suits to enforce arbitration awards could be filed in district court without regard to money amounts or citizenship.

Potential remedies for violations could include suspension or termination of payments to employers, prohibitions of placements, reinstatement, back pay and benefits, or other actions to correct a violation or make a displaced employee whole.

(For first-time versus subsequent placements) local labor organizations representing employees engaged in similar work would be notified at least 30 days prior to the date when an employer expects to bring on a participant. These organizations could object that program protections have been violated and may file a complaint for an expedited grievance procedure. The expedited procedures would be similar to the binding arbitration procedures, except: 1) request for arbitration must be filed within 30 days of the receipt of notice; 2) the arbitrator must be selected within 10 days (or 15 days where initial agreement cannot be reached); 3) the proceeding must be held and a decision reached within 30 days. Any placement would be stayed pending a decision.

JOBS participants would retain other existing protections in current law, related to reasonableness of conditions, consideration of their proficiency and child care and supportive services needs, and other factors.

Assignments to WORK positions would be subject to the following additional rules: 1) all WORK registrants must be eligible for such assignments; 2) participation in WORK must not result in the loss of income to any family below AFDC levels (unless sanctioned or working less than the assigned hours); 3) families of all participants would be considered AFDC recipients for Medicaid purposes; 4) where a labor organization represents a substantial number of employees in work similar to expected WORK assignments, that organization would be provided an opportunity to comment on the WORK proposal; and 5) WORK participants must be paid according to applicable law, but no less than the highest of: a) Federal minimum wage; b) applicable State or local minimum wage; and c) the prevailing wage rate for similar work by employees of similar tenure.

WORK participants would generally enjoy the same benefits, working conditions and rights as other employees in the same type of work and with similar tenure. They would also enjoy the same health benefits unless the State agency concludes that such a requirement would impose an undue financial burden on both the employer and the State.

JOBS and WORK funds could not be used to assist, promote or deter union organizing.

Provisions of this section would also apply to work-related programs authorized in connection with the AFDC program under section 1115 of the Act.

SEC. 104. TWENTY-FOUR MONTH LIMIT.

This section moves the existing section 417 (related to the designation of the Assistant Secretary for Family Support) to section 419 and creates a new section 417 to set forth the rules governing time limits for AFDC benefits.

Subsection (a) specifies that, for individuals subject to the time limit and their children living at home, AFDC would not

UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue, N.W.
Room S-1325
Washington, DC 20210

Confirmation: 202/219-6141

January 21, 1997

TO: ABIGAIL NICHOLS, JOHN MONIHAN, DIANA FORTUNA, BONNY O'NEIL

DEPARTMENT/COMPANY:

FACSIMILE NUMBER:

FROM: NANCY KIRSHNER

NUMBER OF PAGES INCLUDING COVER: 8

FACSIMILE REPLIES:

CONGRESSIONAL AFFAIRS	202/219-5120
INTERGOVERNMENTAL AFFAIRS	202/219-5736
IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY	202/219-5288

MESSAGE: As a request of Ray Uhalde, please find attached the OPM directive on contracting out services where merit system employee are involved.

United States
Office of Personnel Management

Office of the General Counsel
Washington, DC 20415-0001

In Reply Refer To: Your Reference:

MAR 30 1995

Charles D. Raymond
Associate Solicitor for
Employment and Training
Legal Services
Office of the Solicitor
U.S. Department of Labor
Washington, D.C. 20210

Dear Mr. Raymond:

In your letter of August 31, 1994, you requested my opinion whether an agency of the State of Michigan, consistent with the merit system requirement of Social Security Act (SSA) section 303(a)(1), 42 U.S.C. § 503(a)(1), may contract out certain automatic data processing (ADP) functions to the private sector instead of retaining this service for performance by employees of the Michigan state agency. Under 42 U.S.C. § 4728(a)(2)(B), OPM has the statutory responsibility to interpret the requirement in SSA § 303(a) (1) requiring that States receiving certain federal assistance establish and maintain personnel standards on a "merit basis."[1] By letter dated November 21, 1994, I responded to your inquiry, concluding that the State of Michigan may, consistent with 42 U.S.C. § 503(a)(1), contract out ADP functions as long as you conclude that the contract in question does not contract for personal services, which would be a circumvention of merit principles since it would create an employer-employee relationship without following appropriate civil service selection procedures.

By letter dated January 26, 1995, you posed a follow-up inquiry. You inquired whether federal law criteria or state law criteria should be applied to determine whether an employer-employee relationship exists when a state contracts out a function. You suggest that there are arguments that could justify either position. On the one hand, since the contract is a <u>state</u> contract, this fact suggests that state law should govern the question of whether an employer-employee relationship exists. On the other hand, you posit that since the federal government is to determine the existence of such a relationship pursuant to a federal law requirement, then it would appear that federal law should govern. Finally, you suggest that OPM has the authority to make such a

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[1]The "merit basis" language was added to the statute by Pub.L. No. 76-379, 53 Stat. 1378 (1938). It appeared originally in the Senate bill, and was acceded to by the House in conference. The legislative history of this addition, H.R. Rep. Nos. 728 and 1461, 76th Cong. 1st Sess., and S. Rep. No. 734, 76th Cong. 1st Sess., does not address the question raised in your letter.

determination as to the governing law under 42 U.S.C. §4728(a)(2)(B).

I concur that pursuant to 42 U.S.C. § 4728(a)(2)(B), OPM possesses the authority to interpret 42 U.S.C. § 503(a)(1). This conclusion is supported both by the language of § 4728 and by its purpose to promote uniformity of application among various federal agencies.

With regard to your substantive question, I conclude that federal law governs the determination whether an employer-employee relationship exists in state ADP contract. In similar situations involving the interpretation of other federal statutes either setting requirements or granting rights, the interpretation has been determined to be governed by federal law. In St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985), the Supreme Court held that the substantive law governing relationships under the Federal Employees' Liability Act is federal. Similarly, in Brandes v. United States, 783 F.2d 895 (9th Cir. 1986), the court held that federal law governs the determination of whether an employment relationship exists for the purposes of the Federal Tort Claims Act. In Teneyuca v. Bexar Co., 767 F.2d 148 (5th Cir. 1985) the Court held that federal law governs the definition of "employee" for Title VII purposes. See also: Fox Valley & Vicinity Const. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir. 1990), cert. den. 498 U.S. 820 (1990) (federal law governs ERISA actions); Paige v. Henry J. Kaiser Co., 826 F.2d 857 (9th Cir. 1987), cert. den. 486 U.S. 1054 (1988) (interpretation of collective bargaining agreement governed by federal law).

Based on this precedent, it follows that the question of whether an employer-employee relationship exists where a State contracts out ADP functions in connection with implementing a federal program, must be interpreted under federal, rather than state law.

I hope this letter gives you sufficient guidance to answer your questions. If you need further information, please contact James Wright of my staff at (202) 606-1980.

Sincerely,

Lorraine Lewis

Lorraine Lewis
General Counsel

United States
**Office of
Personnel Management**

Office of the General Counsel
Washington, D.C. 20415-0001

NOV 21 1994

In Reply Refer To: Your Reference:

Charles D. Raymond
Associate Solicitor for
Employment and Training
Legal Services
Office of the Solicitor
U. S. Department of Labor
Washington, D.C. 20210

Dear Mr. Raymond:

In your letter of August 31, 1994, you asked me to provide an opinion on whether an agency of the State of Michigan, consistent with the merit system requirement of Social Security Act (SSA) section 303(a)(1), 42 U.S.C. § 503(a)(1), may contract out certain automatic data processing (ADP) functions to the private sector instead of retaining this service for performance by employees of the Michigan State agency. Under 42 U.S.C. § 4728(a)(2)(B), OPM has the statutory responsibility to interpret the requirement in SSA § 303(a)(1) which provides that States receiving certain Federal assistance establish and maintain personnel standards on a merit basis.

Neither your August 31 letter to me nor its attachment describes the nature and extent of the proposed contracting out, nor do I have a copy of it. Thus, I cannot tell if the Michigan agency currently uses State employees to perform the same work, nor can I tell whether the work is irregular, seasonal, or of a short or temporary duration. Thus, I am constrained to give only general guidance at this time.

OPM has set forth the merit system personnel standards applicable to States under SSA § 303(a)(1) in 5 C.F.R. Part 900, Subpart F.[1] These regulations are similar to the merit system standards applicable to the Federal Government that are set forth in 5 U.S.C. § 2301.[2] The merit system standards applicable to States, however, are less comprehensive and less stringent than those applicable to the Federal Government. Applying less stringent standards to State and local governments is consistent with the following policy statement in 5 C.F.R. § 900.601(a):

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[1]5 C.F.R. Part 900, Appendix A (1994).

[2]*Compare* 5 C.F.R. § 900.603 *with* 5 U.S.C. § 2301(b) (1988 & Supp. V 1993).

> The purpose of these regulations is to implement provisions of . . . the Intergovernmental Personnel Act of 1970 . . . in a manner that recognizes fully the rights, powers, and responsibilities of State and local governments and encourages innovation and allows for diversity among State and local governments in the design, execution, and management of their systems of personnel administration. . . .

Thus, if the Federal Government may engage in a practice or activity without violating any of the merit principles in 5 U.S.C. § 2301(b), then States may engage in a similar practice or activity without violating the merit standards in 5 C.F.R. § 900.603.

The Federal Government, under Office of Management and Budget (OMB) Circular A-76 (Revised) ("A-76"), may contract for support services in some circumstances. First, the activity to be contracted out cannot be an inherently governmental function. Inherently governmental functions are for performance by government employees.[3] If a Federal agency attempted to contract out such services, it would circumvent the requirements for a personnel system governed by the merit standards in 5 U.S.C. § 2301.

On the other hand, a Federal agency may contract out an activity that is a commercial activity.[4] In the past, this agency has found such contracts for nonpersonal services to be permissible,[5] but this agency has refused to approve such contracts when an agency has created a contract for personal services or administers a contract in a manner that makes it, in effect, one for personal services.[6] Contracts for personal services generally bypass the appointment process under the civil service laws and create the potential for circumvention or erosion of a personnel system based upon merit principles.

As concerns the question of whether the Michigan agency in question can contract out its ADP functions or work, ADP services are not an

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[3] *Matter of Collection of User Fees in National Forests by Contractor Personnel*, B-207731, 64 Comp. Gen. 408 (1985).

[4] OMB Cir. A-76, ¶ 5.

[5] *See, e.g., Lodge 1858, American Federation of Government Employees v. Webb*, 580 F.2d 496 (D.C. Cir. 1978).

[6] *See* Opinion of the General Counsel, United States Civil Service Commission (December 12, 1967) (Attachment 1) (this opinion is commonly known as the Pellerzi opinion and contains the Pellerzi standards mentioned in *Lodge 1858*, *supra* note 5, at 500); FPM Letters No. 300-8 (Dec. 12, 1967) and No. 300-12 (Aug. 20, 1968).

inherently governmental function under A-76 and, therefore, may be contracted out by the Federal Government.

> A Governmental function is a function which is so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government. . . . Governmental functions normally fall into two categories:
>
> (1) The act of governing; . . .
>
> (2) Monetary transactions and entitlements . . . .[7]

Under the circular, activities are commercial activities if they are not governmental functions and could be provided by a commercial source.[8] Attachment A to A-76 lists examples of commercial activities. The list includes automatic data processing, including ADP services, programming and systems analysis, design, development, and simulation, and systems engineering and installation; management support services, including financial and payroll services; and office and administrative services, including management information systems, products, and distribution.

One unpublished Comptroller General decision suggests that ADP services are not inherently governmental in nature. In *Interlog, Inc.; Williams, Adley & Co.*,[9] the claimants sought to recover money from the United States under the theory of *quantum meruit*. The Government objected, arguing that the contracted services could not have been the subject of a permissible personal services contract because the work constituted performance of inherently governmental functions by a private contractor. Some of the work included technical services in support of software development.[10] The Comptroller General determined that the work was not inherently governmental and authorized recovery by the contractors on a *quantum meruit* basis.

Because the merit system standards applicable to the Michigan agency are less stringent than those applicable to the Federal

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[7]OMB Cir. A-76 ¶ 6(e).

[8]OMB Cir. A-76 ¶ 6(a).

[9]B-252778, 1993 WL 325111, West's Government Contracts CD-ROM Library, Disc 1, *364 (Aug. 19, 1993).

[10]Under the Brooks Act, 40 U.S.C. § 4759, computer-related services constitute automatic data processing.

Government and because the Federal Government can contract out for ADP services without violating more comprehensive merit system standards, it is our determination that Michigan can contract out for ADP services unless the contracts are for personal services or are used as if they are for personal services. Because I am not familiar with the details of the proposed contract or contracts, I can only give general guidance on whether a contract would create an improper employer-employee relationship and, thus, would circumvent the merit system requirement of SSA § 303(a)(1).

A Federal agency creates a master-servant, or employer-employee, relationship when 1) the person is engaged in the performance of a Federal function under authority of the Constitution, laws, or executive orders of the United States, 2) the person's performance of those duties is subject to the supervision of a Federal officer or employee[11], and 3) the person is appointed in civil service by a Federal officer or employee.[12] The most important of these tests in determining whether there is an employee-employee relationship is the exercise of supervision and control by officers or employees, but no one test is determinative of the question.[13] Because these tests

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[11]To determine whether Michigan would be supervising and controlling the conduct of the contractor and its employees, I recommend that you apply the six tests in the October 1967 opinion of this office.

[12]Opinion of the General Counsel, United States Civil Service Commission, 18-19 (December 12, 1967).

[13]*Id.* at 19, 21; Opinion of the General Counsel, Civil Service Commission, 1 (July 8, 1968) (Attachment 2). *But see Lodge 1858, American Federation of Government Employees* v. *Webb*, 580 F.2d 496 (D.C. Cir. 1978). In *Lodge 1858*, the Circuit Court for the District of Columbia, interpreting a Federal statute, concluded that all three of these tests had to be satisfied before a Federal employer-employee relationship existed. This requirement, however, could enable agencies to circumvent the law if construed to require formal appointment and or if construed to apply only to officers or employees performing inherently governmental functions. The test for whether a person has been appointed should not be strictly construed to prohibit an employer-employee relationship in the Federal Government where no officer or employee formally appointed a person to office because then Federal officers could avoid the creation of an employer-employee relationship whenever they wanted. Additionally, the second test cannot be limited to situations where the person would be performing an inherently governmental function. In many instances, Federal employees perform activities available commercially but have -- and should have -- positions fully protected by civil service laws and merit staffing requirements.

arose from the common law principles of master and servant,[14] very similar criteria may be used to determine whether a State has created an employer-employee relationship by awarding a personal services contract or administering a contract as if it were for personal services.

If the application of these tests to the proposed contracts causes you to conclude that the contract will be for personal services, then you should conclude that the Michigan agency is circumventing the merit system requirements of SSA § 303(a)(1) and you should take appropriate action. You also should question the propriety of any ADP services contract if it permanently replaces civil servants with contractor employees or appears to avoid Michigan's civil service laws and staffing restrictions.[15] In such circumstances, the agency may be trying to circumvent the merit personnel requirement by obtaining services from persons over which it wants to exercise extensive control without following the appropriate civil service selection procedures and without guaranteeing them fair and equitable pay, merit selection and promotion, or any of the other merit standards that States must follow under the Part 900 regulations. You should also ascertain whether the decision to contract out has been motivated by some improper purpose that would violate merit staffing requirements, such as racism or sexism or to avoid training requirements.[16]

I hope this letter gives you sufficient guidance to answer your questions. If you need further information, please contact Stephen Lee of my staff at (202) 606-1980.

Sincerely,

Lorraine Lewis

Lorraine Lewis
General Counsel

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[14] Opinion of the General Counsel, Civil Service Commission 19 (Oct. 1967).

[15] *See* FPM Letters No. 300-8 and No. 300-12; *see also* B-155365 (Oct. 28, 1964); B-103199, 30 Comp. Gen. 495 (1951), B-89959, 28 Comp. Gen. 670 (1949), B-73100, 27 Comp. Gen. 503 (1948).

[16] *See* 5 C.F.R. § 900.603.

United States Department of Agriculture

Food and Consumer Service

3101 Park Center Drive
Alexandria, VA
22302-1500

FOOD STAMP PROGRAM

DATAFAX COVER SHEET

DATE: Dec 23, 1996

TO: Diana Fortuna

OFFICE:

PHONE:

FROM: Yvette Jackson

OFFICE:

PHONE:

SUBJECT: For your review — Response to Texas on Privatization

REMARKS: Page 1 is background — Page 2 is our proposed response. We have been coordinating with HHS.

NO. OF PAGES INCLUDING COVER SHEET: 3

DRAFT

Response to the Texas Integrated Enrollment System (TIES)/ Request for Offers (RFO)

Merit System of Personnel Administration

Under section 11(e)(6) of the Food Stamp Act of 1977, as amended, the State agency is responsible for the certification of applicant food stamp households. Further, the law specifies that the State agency personnel utilized for completing certification actions must be employed in accordance with the current standards for a Merit System of Personnel Administration.

The Food and Consumer Service (FCS) and the Texas Health and Human Services Commission (HHSC) have had numerous conversations to clarify who would be responsibility for the certification of food stamp households under TIES. The HHSC's draft RFO initially indicated that certification would remain a State responsibility although this was not consistent with the description of the potential suppliers' responsibilities. The HHSC subsequently clarified, as specified in the current RFO submitted for Federal approval, that the State would remain responsible for the "final decision making authority on eligibility determinations."

The HHSC asserts that section 11(e)(6) of the Food Stamp Act allows for the State to certify applicant households with State employees (who must be employed under a system of merit personnel) or to certify applicant households under contract agreements. HHSC further notes that a broad interpretation may be exercised in this area because "certification" has never been defined. Therefore, the HHSC has indicated that computerized confirmations of the eligibility decision could constitute the State's final determination.

We do not believe that the legislative history to the Food Stamp Act of 1977 supports the views of the HHSC. The legislative history to the Act does not discuss the possibility of contract agreements (other that issuance) and emphasizes that Congress intended the State agency to be responsible for certification actions, which include the required interview and subsequent determination of eligibility and benefit level. Further, the certification process would include the responsibility of the State agency to provide a fair hearing to any household aggrieved by any action of the Sate agency which affects the participation of the household in the Food Stamp Program.

It is clear that Congress continues to support the current requirements surrounding certification and merit personnel because the statutory provisions were not amended by the recent enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Public Law 104-193). In fact, this commitment is further reflected by action Congress took in Conference to restore the merit personnel provisions that had been deleted in a bill passed by the Senate version of H.R. 4.

12/11/96

DRAFT

The following is our proposed response to the HHSC concerning the Merit System of Personnel Administration. This language has been developed in conjunction with our Office of General Counsel.

Under section 11(e)(6) of the Food Stamp Act of 1977, as amended, the State agency is responsible for the certification of applicant food stamp households. Further, State agency personnel utilized for completing certification actions must be employed in accordance with the current standards for a Merit System of Personnel Administration.

To ensure that the prospective bidder understands and is able to submit a proposal that would be in compliance with the standards under the Merit System of Personnel Administration, the RFO must be revised to incorporate clear guidelines that specify that the certification of applicant food stamp households (including the interview and final decision of eligibility) is a State responsibility that must be conducted by a State employee who is employed under a system of merit personnel. A computer system designed and operated by State employees would not suffice as meeting the merit personnel standards.

?? So what does contractor do?

Also, the RFO must be amended to incorporate this clarification in each section of the RFO which addresses food stamp certification. For instance, Appendix A, Section B.6, identifies the potential bidder's responsibilities in the administration and operation of the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). The HHSC has indicated that it intends to require WIC office staff to conduct eligibility determinations for other health and human service programs, including food stamp eligibility determinations. If this is the intent, the RFO must clarify what, if any, food stamp certification functions would be required by the potential bidder in WIC offices and must clarify that food stamp certification actions must be completed by State employees who are hired under a system of merit personnel.

12/11/96

United States Department of Agriculture

Food and Consumer Service

3101 Park Center Drive
Alexandria, VA
22302-1500

FOOD STAMP PROGRAM

DATAFAX COVER SHEET

DATE: Dec 23, 1996

TO: ~~Keith Fontenot~~ Diana Fortuna

OFFICE:

PHONE:

FROM: Yvette Jackson

OFFICE:

PHONE:

SUBJECT: Paper on Privatization from OMB

REMARKS:

NO. OF PAGES INCLUDING COVER SHEET: 15

FAX COVER

Date/Time:

Income Maintenance Branch

Executive Office of the President
Office of Management and Budget
Washington, DC 20503

TO: Yvette Jackson

FROM: Keith Fontenot

Fax Destination 3052454

Organization:

Fax Number:

Number of Attached Pages: Cover +

cc: Abigail
Art
Barry

Notes:
We'd like to get your thoughts on the attached materials, ~~[illegible]~~ by Mon. I'll call you ~~[illegible]~~ to discuss.

KF

Income Maintenance Fax Number: 202/395-0851
Voice Confirmation: 202/395-4686

Food Stamp, Medicaid, and Employment Service Privatization

The applicable section of law governing medicaid administration (42 USC §1396a(a)(4)(A)) authorizes the Secretary to require "the establishment of personnel standards on a merit basis...as are found by the Secretary to be necessary for the proper and efficient operation of the plan..." This language connotes discretion and may be the source of agency claims that the merit system requirement is waivable. For example, the Secretary may find that merit personnel standards are not necessary for "proper operation." On the other hand, the Secretary clearly has the discretion to require merit standards. More importantly, the Secretary's authority under these sections was expressly transferred to the Director of OPM in 1979. The IPA at 42 USC §4728 states that OPM has "all functions, powers, and duties" conferred on the Secretary in the above referenced section of law. Therefore, the Secretary of HHS does not have authority to waive merit standards; that authority resides with OPM.

OPM's IPA implementing regulations (5 CFR Part 900, Subpart F) "apply to those State and local governments that are required to operate merit personnel systems as a condition of eligibility for Federal assistance or participation in an intergovernmental program." (§900.602) Although the regulations do not expressly state that private sector organizations cannot be considered to have merit based personnel systems, there is a very strong implication to that effect. Appendix A to Subpart F of the OPM regulation lists the programs that "have a statutory requirement for the establishment and maintenance of personnel standards on a merit basis." Food Stamps, medicaid and Employment Security (Unemployment Insurance and Employment Services) are expressly listed as programs subject to a requirement for a merit system.

The language in the Food Stamp Act is stronger than the medicaid law regarding the requirement for merit personnel standards (7 USC §2020 (e)(6)(b)). The Food Stamps Act law states that "the State agency personnel utilized in undertaking such [Food Stamp eligibility] certification shall be employed in accordance with the current standards for a Merit System of Personnel Administration or any standards later prescribed by the Director of the Office of Personnal Management pursuant to section 4728 of Title 42..." The IPA also transferred USDA's authority regarding merit personnel systems to OPM.

For the above reasons, merit based standards are a non-waivable bar to privatization. Although the HHS Secretary may have had authority to waive the standards prior to the revision of the IPA in 1979, she does not have such authority now. Only OPM can change its own regulations and they must go through a notice and comment period in accordance with the Administrative Procedures Act (APA) prior to doing so. The APA requires that agency regulations not be changed arbitrarily.

OPM's AUTHORITY UNDER THE INTER-GOVERNMENTAL PERSONNEL ACT

42 USC §4728 delegates the power of the Secretaries of Labor, Agriculture, and HHS to require the establishment of personnel standards on a merit basis to the U. S. Office of Personnel Management.

The statutory references to §4728(a) that are relevant to our discussion are to the following:

- 4728(a)(1): "2019(e)(2) of Title 7" is a reference to the Food Stamp Law prior to 1977 amendments. The provisions formerly contained in 2019(e)(2) are now covered by § 2020(e)(6) of Title 7.

- 4728(a)(2)(A): "the Act of June 6, 1933, as amended (29 USC 49)" is the Wagner-Peyser Act governing employment services; and

- 4728(a)(3)(D): "1396a(a)(4)(A) of this title" is the federal statute authorizing Medicaid

Appendix A to the implementing OPM regulations expressly state that the Food Stamp, Employment Service, and Medicaid Programs "have a statutory requirement for the establishment and maintenance of personnel standards on a merit basis."

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SEARCH

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§ 4727. Interstate compacts

The consent of the Congress is hereby given to any two or more States to enter into compacts or other agreements, not in conflict with any law of the United States, for cooperative efforts and mutual assistance (including the establishment of appropriate agencies) in connection with the development and administration of personnel and training programs for employees and officials of State and local governments.

(Pub.L. 91-648, Title II, § 207, Jan. 5, 1971, 84 Stat. 1915.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1971 Acts. House Report No. 91-1733, see 1970 U.S. Code Cong. and Adm. News, p. 5879.

LIBRARY REFERENCES

American Digest System

Compacts and agreements between states in general, see States ⟹6.

Encyclopedias

Compacts and agreements between states in general, see C.J.S. States §§ 31, 32, [illegible] 143.

WESTLAW ELECTRONIC RESEARCH

States cases: 360k[add key number].

See, also, WESTLAW guide following the Explanation pages of this volume.

§ 4728. Transfer of functions

(a) Prescription of personnel standards on a merit basis

There are hereby transferred to the Office all functions, powers, and duties of—

(1) the Secretary of Agriculture under section 2019(e)(2) of title 7;

(2) the Secretary of Labor under—

(A) the Act of June 6, 1933, as amended (29 U.S.C. 49 et seq.); and

(B) section 503(a)(1) of this title;

(3) the Secretary of Health and Human Services under—

(A) sections 2674(a)(6) and 2684(a)(6) of this title;

(B) section 3023(a)(6) of this title;

(C) sections 246(a)(2)(F) and (d)(2)(F) and 291d(a)(8) of this title; and

(D) sections 302(a)(5)(A), 602(a)(5)(A), 705(a)(3)(A), 1202(a)(5)(A), 1352(a)(5)(A), 1382(a)(5)(A), and 1396a(a)(4)(A) of this title; and

(4) any other department, agency, office, or officer (other than the President) under any other provision of law or regulation applicable to a program of grant-in-aid that specifically requires the establishment and maintenance of personnel standards on a merit basis with respect to the program;

insofar as the functions, powers, and duties relate to the prescription of personnel standards on a merit basis.

(b) Standards for systems of personnel administration

In accordance with regulations of the Office of Personnel Management, Federal agencies may require as a condition of participation in assistance programs, systems of personnel administration consistent with personnel standards prescribed by the Office for positions engaged in carrying out such programs. The standards shall—

(1) include the merit principles in section 4701 of this title;

(2) be prescribed in such a manner as to minimize Federal intervention in State and local personnel administration.

(c) Powers and duties of Office

The Office shall—

(1) provide consultation and technical advice and assistance to State and local governments to aid them in complying with standards prescribed by the Office under subsection (a) of this section; and

(2) advise Federal agencies administering programs of grants or financial assistance as to the application of required personnel administration standards, and recommend and coordinate the taking of such actions by the Federal agencies as the Office considers will most effectively carry out the purpose of this subchapter.

(d) Transfer of personnel, property, records, and funds; time of transfer

So much of the personnel, property, records, and unexpended balances of appropriations, allocations, and other funds of any Federal agency employed, used, held, available, or to be made available in connection with the functions, powers, and duties vested in the Office by this section as the Director of the Management and Budget shall determine shall be transferred to the Office at such time or times as the Director shall direct.

(e) Modification or

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sistance under a program for failure to comply with the requirements, are superseded to the extent that discrimination is prohibited by this subpart, except that nothing in this subpart relieves a person of an obligation assumed or imposed under a superseded regulation, order, instruction, or like direction, before the effective date of this subpart. This subpart does not supersede any of the following (including future amendments thereof): (1) Executive Order 11246 (3 CFR, 1965 Supp.) and regulations issued thereunder or (2) any other orders, regulations, or instructions, insofar as these orders, regulations, or instructions prohibit discrimination on the ground of race, color, or national origin in a program or situation to which this subpart is inapplicable, or prohibit discrimination on any other ground.

(b) *Forms and instructions.* OPM shall issue and promptly make available to all interested persons forms and detailed instructions and procedures for effectuating this subpart as applied to programs to which this subpart applies, and for which it is responsible.

(c) *Supervision and coordination.* The Director, Office of Personnel Management may from time to time assign to officials of OPM, or to officials of other departments or agencies of the Government with the consent of the departments or agencies, responsibilities in connection with the effectuation of the purposes of title VI and this subpart (other than responsibilities for final decision as provided in §900.410), including the achievement of effective coordination and maximum uniformity within OPM and within the executive branch in the application of title VI and this subpart to similar programs and in similar situations. An action taken, determination made, or requirement imposed by an official of another department or agency acting pursuant to an assignment of responsibility under this paragraph shall have the same effect as though the action had been taken by OPM.

Appendix A to Subpart D—Activities to Which This Subpart Applies

1. Personnel mobility assignments of OPM personnel pursuant to title 5, U.S.C. chapter 33 and 5 CFR part 334 (38 FR 6488).

[38 FR 17920, July 5, 1973, as amended at 48 FR 6311, Feb. 11, 1983]

Appendix B to Subpart D—Activities to Which This Subpart Applies When a Primary Objective of the Federal Assistance Is To Provide Employment

1. None at this time.

Appendix C to Subpart D—Application of Subpart D, Part 900, to Programs Receiving Federal Financial Assistance of the Office of Personnel Management

Nondiscrimination in Federally assisted programs or projects:

Examples. The following examples without being exhaustive illustrate the application of the nondiscrimination provisions of the Civil Rights Act of 1964 of this subpart in programs receiving financial assistance under programs of the Office of Personnel Management.

(1) Recipients of IPA financial assistance for training programs or fellowships may not differentiate between employees who are eligible for training or fellowships on the ground of race, color, or national origin.

(2) Recipients of IPA financial assistance for training programs may not provide facilities for training with the purpose or effect of separating employees on the ground of race, color, or national origin.

Subpart E—[Reserved]

Subpart F—Standards for a Merit System of Personnel Administration

AUTHORITY: 42 U.S.C. 4728, 4763; E.O. 11589, 3 CFR part 557 (1971-1975 Compilation).

SOURCE: 48 FR 9210, Mar. 4, 1983, unless otherwise noted.

§ 900.601 Purpose.

(a) The purpose of these regulations is to implement provisions of title II of the Intergovernmental Personnel Act of 1970, as amended, relating to Feder-

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Discussion Draft
December 16, 1996

COVERAGE OF WELFARE-TO-WORK PARTICIPANTS UNDER THE FAIR LABOR STANDARDS ACT

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 replaced the Aid to Families with Dependent Children program with a new "Temporary Assistance for Needy Families" (TANF) block grant program to the states, and imposed strict requirements that TANF recipients work as a condition of receiving TANF funds. Under the new law, states must demonstrate that 25 percent of TANF recipients are engaged in work for at least 20 hours per week, or 35 hours in two-parent households.[1] Permissible "work activities" include: (1) unsubsizided employment; (2) subsidized private sector employment; (3) subsidized public sector employment; (4) work experience; (5) on-the-job training; (6) job search and job readiness assistance; (7) community service programs; (8) vocational educational training; (9) job skills training directly related to employment; (10) education directly related to employment; (11) attendance at secondary school or GED program; and (12) provision of child care to an individual participating in a community service program.

A number of the above-listed "work activities" contemplated by TANF are just that -- work. Others are more education or training oriented. However, because many of the categories of "work activities" permitted under TANF are vague and undefined, evaluation of Fair Labor Standards Act coverage cannot be done on a categorical basis, but rather will depend on the substance of the "work activities" being performed, analyzed under DOL's traditional tests. The TANF law does not exempt TANF recipients performing work from FLSA coverage. Exemptions by implication are disfavored under the FLSA. Thus, when TANF recipients engage in "work activities" that meet the traditional tests for FLSA coverage, they will be entitled to the FLSA's protection.

Our experience to date with workfare programs makes clear that the activities to which workfare participants typically are assigned (e.g., cleaning parks, janitorial services, clerical work) are jobs that unquestionably qualify as work under the FLSA. We believe, therefore, that substantial numbers of TANF recipients will be performing work, and will be entitled to the Fair Labor Standards Act's minimum wage and other protections.

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[1] The percentage of TANF recipients who must be engaged in work increases by 5 percent each year until it reaches 50 percent in the year 2002. In addition, the number of required work hours increases to 25 in fiscal year 1999 and 30 hours in fiscal year 2000.

The FLSA's Purposes and Coverage

The Fair Labor Standards Act was enacted to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" and the unfair competition caused by such practices. 29 U.S.C. § 202(a). The Act's coverage is extremely broad, and protects all workers whom an employer "suffer[s] or permit[s] to work." 29 U.S.C. § 203(g). As the Supreme Court has observed, "a broader or more comprehensive coverage of employees within the stated categories would be difficult to frame." U.S. v. Rosenwasser, 323 U.S. 360, 362 (1945). Senator Hugo Black, the FLSA's principal sponsor, characterized the FLSA's term as "the broadest definition that has ever been included in any one act." Id., citing 81 Cong. Rec. 7657 (1937).

Unlike other statutes, where common law tests of employment are utilized, the "economic realities" of a situation govern whether an employment relationship exists for purposes of coverage under the FLSA. This bedrock principle was set forth by the U.S. Supreme Court in Goldberg v. Whitaker House Cooperative, Inc., 366 U.S. 28 (1961), and has been consistently utilized since.[2] Under social welfare legislation such as the FLSA, "employees are those who as a matter of economic reality are dependent upon the business to which they render service." Bartles v. Birmingham, 332 U.S. 126, 130 (1947). The determination depends "upon the circumstances of the whole activity." Rutherford Food Corp. v. McComb, 331 U.S. 722 (1947). Relevant factors include, but are not limited to: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." Bonnette v. California Health and Welfare Agency, 704 F.2d 1465, 1470 (9th Cir. 1983).

Although broad, the FLSA's definition is not all-encompassing. "An individual who, 'without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit," is not an employee. Walling v. Portland Terminal Co., 330 U.S. 148, 152 (1947). Still, the overriding consideration is the economic realities of the situation,

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[2] Indeed, in Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992), although reverting to the common law test for interpreting the term "employee" for purposes of ERISA, the Supreme Court expressly distinguished the FLSA and noted that the FLSA's "striking breadth . . . stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." 503 U.S. at 326.

under which an employment relationship may be found even where no cash payments are made and the participants themselves do not consider themselves employees. Tony and Susan Alamo Foundation v. Sec'y of Labor, 471 U.S. 290 (1985).

Proposed Guidance for Evaluating FLSA Coverage for TANF Recipients

Based on experience to date with workfare programs, and the strong emphasis in the new welfare law on work, we believe that substantial numbers of workfare participants under TANF will be employees performing work and will be entitled to coverage under the FLSA. A fact-based analysis of the "economic realities" of the situation will make the employment nature of the relationship clear. We suggest that the Department of Labor articulate guidance, based on existing tests, for determining FLSA coverage under TANF work programs, and that DOL include such guidance in its Field Operations Handbook and other appropriate sources. The following principles, gleaned from current law, should be included in DOL's guidance as to whether an employment relationship, and FLSA coverage, exists.

1. "Striking Breadth" of FLSA's Coverage. Congress intended the FLSA to have broad coverage in order to achieve its remedial purposes of protecting a minimum standard of living and eliminating unfair competition caused by sub-standard wages. Courts have consistently affirmed the FLSA's "striking breadth." See, e.g., Darden, 503 U.S. 318; Tony and Susan Alamo Foundation, 471 U.S. at 296. DOL should promote this principle of broad FLSA coverage in its analysis of welfare-to-work programs.

2. Economic Realities Test. DOL's guidance should emphasize the applicability of the "economic realities" test in analyzing FLSA coverage under workfare programs. The test is not mentioned in DOL's current guidance. Field Operations Handbook (Oct. 20, 1993) at 10b40(a). Inclusion of the "economic realities" test is important to reinforce the point that as in all FLSA cases, the economic realities of the workfare situation should be analyzed to determine whether an employment relationship exists. The absence of the economic realities test in DOL's guidance could result in a mistaken view that TANF work arrangements should follow a different analysis from other types of work.

We believe the economic realities test will be satisfied in the vast majority of cases, given that TANF recipients "as a matter of economic reality are dependent upon the business to which they render service" for their subsistence income. Bartles v. Birmingham, 332 U.S. 126, 130 (1947).

3. Employer as Beneficiary of Services. A relevant factor in determining whether an employment relationship exists is whether the services being performed primarily benefit the employer or the individual. Employers may argue that work being performed by workfare participants benefits the participant and not the employer, because the participant is performing the activity as a condition of receiving government benefits aimed at building economic self-sufficiency. They may also argue that workfare is akin to rehabilitation programs sponsored by the Salvation Army and others, which some courts have found to be "solely rehabilitative," and outside the purview of the FLSA. See Williams v. Strickland, 87 F.3d 1064 (9th Cir. 1996). However, a better approach is to focus on whether the employer is primarily benefitting from the work participant's activities. In this regard, a relevant consideration should be whether the employer has assigned the TANF recipient to perform work or produce products similar to the employer's other employees.

4. Expectation of Compensation. Courts have found the issue of whether the employee has an expectation of compensation for his/her services relevant to the question of FLSA coverage. TANF participants will fully expect compensation, i.e., at least their TANF payment, for the services they perform, providing strong evidence of their status as employees.

5. Tax Considerations. DOL should consider whether an employer has availed itself of the Targetted Jobs Tax Credit (or similar benefits) for the TANF recipient or similarly-situated workers. These programs typically reward employers for employing hard to place individuals, including, in the case of the federal law, welfare recipients. Employers should not be permitted to claim tax breaks based on employer status but avoid employer status for purposes of paying the minimum wage.

6. Functions vs. Labels. As previously noted, the "work activities" permitted under TANF are broad in scope, ranging from vocational education to community service and employment. The categories of work activities contained in the law are not defined and are not useful in distinguishing between activities that do and do not constitute work for purposes of the FLSA. Accordingly, the focus should be on the functions a TANF recipient performs, and not the label that the state or employer attaches to those activities.

7. Training vs. Work. The stated purpose of the new welfare law is to help individuals make the transition from government assistance to self-sufficiency. Equipping TANF recipients with the knowledge and skills needed for good jobs at good wages will in many cases require extensive training and education. To the extent TANF training programs meet DOL's traditional criteria for excluding such programs from

FLSA coverage, DOL's standard rules should govern. However, DOL should be vigilant in not permitting employers to use "training programs" as a subterfuge for engaging TANF recipients to perform work without the protections of the FLSA.

Under DOL's traditional test for distinguishing between training and employment, trainees are not employees if all six of the following factors are met:

1. The training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees, but work under close observation (Note: TANF does not permit employers to displace current employees with TANF recipients)
4. The employer that provides the training derives no immediate advantage from the activities of the trainees and on occasion his operations may actually be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period; and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.[3]

When confronted with employer arguments that TANF recipients are trainees and not employees, DOL should review the nature of the activity being performed and consider whether such an activity typically is considered work. In addition, DOL should consider the typical duration of training for such work. Given past experience with workfare programs, it is likely that in most cases, TANF recipients will be placed in low-level, entry-level work, and training will be of a limited nature and duration. Thus, the nature and duration of TANF worker training will differ markedly from the training DOL has excluded from FLSA coverage.

8. Who is the Employer? The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). In determining who is the TANF worker's employer, the traditional indicia of employer control should factor into the analysis, including:

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[3] Similar criteria were recently set forth by DOL for purposes of distinguishing when activities under the recent School-to-Work Act count as work vs. schooling. Courts often utilize the above criteria as guidance, but do not necessarily find them determinative. Reich v. Parker Fire Protection District, 992 F.2d 1023 (10th Cir. 1993); McLaughlin v. Ensley, 877 F.2d 1207 (4th Cir. 1989).

a. Whether the employer has the ability to hire, discipline or fire the employee;

b. Whether the employer determines the rate or method of payment;

c. Whether the employer has the right to supervise and control the employees' work schedule, conditions of employment, or type or manner of work being performed;

d. Whether the employer maintains employment records for the employee

Bonnette, 704 F.2d at 1470.

In reviewing the above factors, DOL should bear in mind that in some cases, a joint employer relationship may exist between the state agency supplying TANF payments and the entity for which the participant is working. Under FLSA joint employer doctrine, a determination of whether a joint employer situation exists depends on "all the facts in the particular case." 29 CFR § 791.2(a). The joint employer analysis will obviously be influenced by how a state elects to structure its program. While we do not know a great deal at this point about how states will be structuring their workfare programs under TANF, e.g., will states utilize employment agencies to place workfare participants, will states divert TANF checks to an employer or continue to make TANF payments on their own, etc., it is quite possible that a joint employment situation will exist. The state agency will, at a minimum, be responsible for the payment of "wages" in the form of a TANF grant, and may in many cases have a level of involvement and control over a TANF work participants' assignment. The employing entity will have control over the work to be performed and the conditions under which it is performed. Thus, both the state and the other employer may be jointly and severally liable for payment of the minimum wage.

Conclusion

DOL should prepare and circulate guidance stating that the economic realities test will be used to determine whether a TANF recipient is engaged in a "work activity" that meets the definition of work under the FLSA. This guidance should be incorporated into the Field Operations Handbook and other appropriate sources.

"REGULAR" MINIMUM WAGE WORKER	WOULD MOST LIKELY QUALIFY FOR:	BECAUSE INCOME BELOW:
Single parent with 2 kids employed 40 hrs/wk at minimum wage makes income < 100% of poverty $5.15/hour x 40 hrs week x 52/wks = $10,712 100% of poverty in 1996 for family of 3 = $12,980	o Food Stamps	130% of poverty
	o Medicaid for: • kids under 6 • kids born after 9/1983	 133% of poverty 100% of poverty
	o Earned Income Tax Credit	$11,610/year
	o Some subsidized child care	State-set formulas
	o Free school lunches for kids	130% of poverty
	o WIC supplemental food for kids < 5	185% of poverty
	o Home heating aid	150% of poverty
	o Housing/rental assistance	50% of median income in metropolitan area
	o Job training thru JTPA Title II-A	100% of poverty or 70% of BLS living standard
	o Unemployment Insurance	Because wages and hours worked would qualify in most states
	o Workers Comp	Because an "employee"

Note: Since the automatic link between AFDC and Medicaid eligibility has been broken, Medicaid coverage could be available to the single working parent as well as the children if eligibility meets state-set standards that were in place 7/16/96. The median of all states in 1996 was gross income of $8,640 or less. Therefore, the single parent working 30 hours a week at minimum wage for 52 weeks a year ($8,034) would most likely qualify for coverage in most states, regardless of whether they receive TANF or not.

"TANF WORKER"	WOULD MOST LIKELY QUALIFY FOR:	IF GROSS INCOME BELOW:
	o Food Stamps	130% of poverty
Single parent with 2 kids employed in workfare situation Assuming income = < 100% poverty	o Medicaid for: - kids under 6 - kids born after 9/1983	 133% of poverty 100% of poverty
	o Earned Income Tax Credit	$11,610/year
	o Some subsidized child care	State-set formulas
	o Possibly transportation expenses	State-set formulas
	o Free school lunches for kids	130% of poverty
	o WIC supplemental food for kids < 5	185% of poverty
	o Home heating aid	150% of poverty
	o Housing/rental assistance	50% of median income in metropolitan area
	o Job training thru JTPA Title II-A	100% of poverty or 70% of BLS living standard
	o Unemployment Insurance	If wages and hours worked would qualify in most states
	o Workers Comp	Because an "employee"

Note: Since the automatic link between AFDC and Medicaid eligibility has been broken, Medicaid coverage could be available to the single working parent as well as the children if eligibility meets state-set standards that were in place 7/16/96. The median of all states in 1996 was gross income of $8,640 or less. Therefore, the single parent working 30 hours a week at minimum wage for 52 weeks a year ($8,034) would most likely qualify for coverage in most states, regardless of whether they receive TANF or not.

New York Times, 2/9/97

City Labor Head Backs Effort to Organize Workfare Participants

By STEVEN GREENHOUSE

In an important boost to the metropolitan area's most ambitious unionization drive in years, Stanley Hill, head of New York City's largest union of municipal workers, said yesterday that he would back efforts to organize the city's 35,000 welfare recipients who are required to work for their benefits.

Mr. Hill, executive director of District Council 37, which has 125,000 members, said that in an effort to see how his powerful union can help, he will meet next week with a community group that has gotten more than 4,000 city workfare laborers to sign authorization cards pledging their support for a union. The workers are looking to the labor movement for help as they increasingly complain about working conditions under the city's fast-growing workfare program, by far the nation's largest.

"I think it's a good idea," Mr. Hill said in an interview. "These people should have collective bargaining rights. They should have the same rights as other workers. Workfare must not be allowed to become synonymous with indentured servitude."

But Mr. Hill acknowledged that the drive to unionize welfare laborers faces a major obstacle: New York City is not required to recognize or bargain with such workers, even if a majority backs a union, because under state law they are not considered traditional workers, but rather welfare recipients.

"The law is that they're not defined as employees, but we're going to try to get that changed possibly down in Washington or at the state level," he said.

Union officials acknowledge, however, that it will not be easy to persuade the Republican Congress in Washington or the Republican State Senate in Albany to pass legislation that would enable workfare laborers to form unions. Such legislation could be expected to make welfare programs more expensive at a time when Federal and state governments are eager to reduce welfare spending and budget deficits.

In New York City, welfare recipients are sweeping streets, cleaning parks and working as hospital aides, receiving as little as $68.50 in cash and $60 in food stamps every two weeks for their 26 hours of work a week.

With the new Federal welfare law requiring states and cities to put hundreds of thousands of welfare recipients into workfare jobs, the nation's labor movement fears that such workers not only will be used to replace unionized workers but will put downward pressure on wages. Mr. Hill's parent union, the American Federation of State, County and Municipal Employees, and several other large unions are focusing on this fast-growing pool of laborers as ripe for unionization.

Sheila Duncan, a welfare recipient who has worked in recent months as a Sanitation Department sweeper, said she is eager to join a union for workfare laborers. "We

Effort to Organize Workfare Participants Gets Backing of Powerful City Labor Leader

think a union will help get us permanent jobs and better working conditions," she said. "And most important a union might make them treat us with respect. For 24 years, I worked in procurement in the Transit Authority before I was laid off, and we don't deserve to be treated this way."

On Thursday afternoon, Ms. Duncan joined more than 100 other participants in the Work Experience Program, known as WEP, at a demonstration at Sanitation Department headquarters near City Hall to demand that department officials recognize them as a union and discuss grievances.

Many workers at the demonstration complained that the department does not give them gloves, coats or boots and does not allow them to use the bathrooms in the Sanitation Department garages where they are based. Several also complained that when they sweep streets, they have to keep their lunch bags tied to the garbage cans they push around because they have nowhere else to store their lunches. And when they sit down to eat lunch, they said, they have no place to wash their hands.

"It would be great if the union could get the city to promise to turn

Nancy Siesel/The New York Times

Workfare laborers demonstrated across the street from the Sanitation Department on Thursday to press for better conditions and equipment.

the workfare jobs into permanent jobs," said Robert Jones, a Sanitation Department sweeper in Coney Island.

Richard Schwartz, a senior adviser to the Mayor, said, "The fact is that welfare recipients participating in work programs in exchange for their benefits do not have the right to unionize. Further, the Federal welfare reform that President Clinton signed mandates workfare at a level of 25 percent of all recipients in the coming year."

Mr. Schwartz said that since March 1995, the city's welfare rolls have declined to 925,000, a 235,000 drop that he said was the largest ever recorded by any city.

City officials say workfare assignments are not jobs, but rather an opportunity for people who are able-bodied to give something back to the community in exchange for their benefits.

"Many of these people have been out of work for a long time, and this is exactly the preparation they need to get work," Mr. Schwartz said.

Officials have also said that they have heeded the workers' needs for suitable work clothes. "The city has purchased thousands of coats, gloves, hats and boots and has gone to considerable expense and effort to insure that they're distributed to all the W.E.P.'s in the system," Mr. Schwartz said.

Since early December, the Association of Community Organizations for Reform Now, a group of community organizers known as Acorn, has been working to help New York's workfare laborers form a union. With more than 4,000 authorization cards already signed, the group's leaders say they hope to collect more than 15,000 cards by this spring and present them to Mayor Giuliani to pressure him to recognize and bargain with the workers, even if state law does not require him to do so.

"If we have 15,000 to 20,000 cards

Workfare laborers are not defined as employees by law.

and can move a lot of people into the streets and get the rest of organized labor behind us, we'll have a real chance of getting the city to recognize us," said John Kest, who is Acorn's director of organizing.

Independent of Acorn, a second community group, W.E.P. Workers Together, is trying to organize the workfare laborers not so much into a union, but into an organization that will pressure the city into sitting down with them to discuss grievances and work rules.

"Legally, we think it's difficult how to pursue formal unionization," said Benjamin Dulchin, an organizer with W.E.P. Workers Together. "Still, there's no question that W.E.P. workers need to have a voice to make their work less abusive."

In recent weeks, the workfare laborers have turned up the pressure on the city. Last Sunday, they heckled Parks Commissioner Henry J. Stern at a Groundhog Day ceremony in Queens. Two weeks ago, workers sat in at Mr. Stern's office to demand that he meet with them to discuss grievances. Also last month, workfare laborers took over 10 of the Parks Department's district offices to demand coats and gloves.

Mr. Hill said that Gerald W. McEntee, president of the American Federation of State, County and Municipal Employees, has urged him to support organizing the workfare laborers. Such an effort might create tensions with Mr. Giuliani, a man with whom Mr. Hill has maintained warm relations even though they have opposed each other in negotiations.

"Mayor Giuliani has never said to me, 'Don't organize people,'" Mr. Hill said.

Last September, Mr. Hill called for a moratorium on expanding the city's workfare program, saying he was concerned that the program provided little training and did not hold out the hope of permanent jobs for participants. A few days later, Mr. Hill lifted his call for a moratorium after Mr. Giuliani agreed to regular meetings to monitor the program and discuss how it might lead to permanent jobs. Mr. Hill said 250 workfare laborers have moved into permanent hospital, parks and school lunchroom jobs thanks to these meetings.

F: Privatization ~~Texas~~

medical child support order with respect to any participant or beneficiary shall be deemed to apply to each group health plan which has received such order, from which the participant or beneficiary is eligible to receive benefits, and with respect to which the requirements of paragraph (4) are met.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to medical child support orders issued on or after the date of the enactment of this Act.

Subtitle G—Increase in Public Debt Limit

SEC. 5701. INCREASE IN PUBLIC DEBT LIMIT.

Subsection (b) of section 3101 of title 31, United States Code, is amended by striking the dollar amount contained therein and inserting "$5,950,000,000,000".

Subtitle H—Miscellaneous

SEC. 5801. AUTHORITY OF STATES TO CONSOLIDATE AND AUTOMATE THE ADMINISTRATION OF CERTAIN ASSISTANCE PROGRAMS, AND TO CONTRACT COMPETITIVELY FOR THE ADMINISTRATION OF SUCH PROGRAMS TO REDUCE FEDERAL AND STATE PROGRAM COSTS.

(a) IN GENERAL.—Notwithstanding any other provision of law, a State may administer or provide for the administration of 1 or more programs described in subsection (d) in accordance with a qualified plan approved as provided in subsection (c)(2), and any eligibility determination made by a nongovernmental entity or employee in accordance with such a qualified plan shall be considered to be made by the State and a State agency. No provison of law shall be construed as preventing any State from allowing eligibility determinations described in this section to be conducted, using Federal funding and porcesses established by the State, by an entity which meets such qualifications as the State determines and is not a State or local government, or by an individual who is not an employee of a State or local government.

(b) QUALIFIED PLAN DEFINED.—As used in subsection (a), the term "qualified plan" means a plan which covers 1 or more programs described in subsection (d) and which—

(1) provides for increased automation of the processing of eligibility determinations under the program to promote efficiency and allow a reduction of the total number of persons assigned to perform the determinations;

(2) provides for integration of eligibility determinations under the programs covered by the plan, including the consolidation of State agencies to allow for a further reduction of the total number of persons assigned to perform the determinations;

(3) provides for competitive bidding for the right to collect and process data used to make eligibility determinations under the programs covered by the plan, under State regulations to ensure that States rely on the most efficient and innovative provider of such services and minimize State and Federal costs; and

(4) provides assurances that the plan does not affect—

(A) any condition for eligibility for benefits under a program covered by the plan;

(B) any right to challenge any determination regarding eligibility for, or any right to, benefits under any such program;

(C) any determination regarding quality control or error rates under any such program; or

(D) any safeguard of the privacy, confidentiality, or protection of any individual eligible for, or receiving any benefit under any such program.

(c) ADMINISTRATIVE PROVISIONS.—

(1) SUBMISSION OF PLANS.—A State desiring to administer or provide for the administration of 1 or more programs described in subsection (d) in accordance with a qualified plan may submit a plan for such administration to the appropriate Federal official with respect to any program covered by the plan. Notwithstanding any other pro-

vision of law, review of a plan under this section by the appropriate Federal official as defined in subsection (e) to whom the plan is submitted is the sole requirement necessary prior to implementation by a State.

(2) APPROVAL OF PLANS.—

(A) IN GENERAL.—The appropriate Federal official to whom a plan is submitted pursuant to paragraph (1) shall approve the plan if the appropriate Federal official determines that the plan contains all of the elements specified in subsection (b), and shall disapprove the plan if the appropriate Federal official determines that the plan does not contain all of the elements specified in subsection (b). In order to disapprove the plan, the appropriate Federal official shall inform the State in writing, within 10 days after receipt of the plan, of the specific elements of the plan that are not present as required for the plan to be approved.

(B) DEFAULT APPROVAL.—If, by the end of the 10-day period that begins with the date a plan is submitted pursuant to paragraph (1) to an appropriate Federal official, the appropriate Federal official has not disapproved the plan, the plan is deemed to be approved.

(C) CONSULTATIONS.—In determining whether to approve a plan that covers more than 1 program described in subsection (d), the appropriate Federal official to whom the plan is submitted shall consult with the appropriate Federal official or officials with respect to the other program or programs covered by the plan.

(d) PROGRAMS DESCRIBED.—The programs described in this subsection are the following:

(1) The special supplemental nutrition program for women, infants, and children (WIC) established under section 17 of the Child Nutrition Act of 1966 (42 U.S.C. 1786).

(2) The food stamp program under the Food Stamp Act of 1977.

(3) A medical assistance program operated under a State plan approved under title XIX of the Social Security Act.

(e) APPROPRIATE FEDERAL OFFICIAL.—As used in this section, the term "appropriate Federal official" means—

(1) in the case of the programs described in paragraphs (1) and (2) of subsection (d), the Secretary of Agriculture; and

(2) in the case of the program described in subsection (d)(3), the Secretary of Health and Human Services.

(f) PAYMENTS TO STATES.—

(1) IN GENERAL.—Within 60 days after the date a State plan submitted pursuant to subsection (e)(1) is approved, the appropriate Federal official to whom the plan was submitted shall pay the State $5,000,000 from sums in the Treasury of the United States not otherwise appropriated, which amount be used only to cover the costs of conducting competitive bidding in accordance with the plan and to cover the other initial costs incurred in developing the plan.

(2) LIMITATION.—A State may not receive more than 1 payment under paragraph (1).

Subtitle H—Miscellaneous

SEC. 5801. AUTHORITY OF STATES TO CONSOLIDATE AND AUTOMATE THE ADMINISTRATION OF CERTAIN ASSISTANCE PROGRAMS, AND TO CONTRACT COMPETITIVELY FOR THE ADMINISTRATION OF SUCH PROGRAMS TO REDUCE FEDERAL AND STATE PROGRAM COSTS.

(a) IN GENERAL.—Notwithstanding any other provision of law, a ______________ may administer or provide for the administration of 1 or more programs described in subsection (d) in accordance with a qualified plan approved as provided in subsection (c)(2), and any eligibility determination made by a nongovernmental entity or employee in accordance with such a qualified plan shall be considered to be made by the State and a State agency. No provison of law shall be construed as preventing the State from allowing eligibility determinations described in this section to be conducted, using Federal funding and porcesses established by the State, by an entity which meets such qualifications as the State determines and is not a State or local government, or by an individual who is not an employee of the State government or of local government in the State.

(b) QUALIFIED PLAN DEFINED.—As used in subsection (a), the term "qualified plan" means a plan which

~~No children~~
~~No food dist~~
~~notice~~

covers 1 or more programs described in subsection (d) and which—

(1) provides for increased automation of the processing of eligibility determinations under the program to promote efficiency and allow a reduction of the total number of persons assigned to perform the determinations;

(2) provides for integration of eligibility determinations under the programs covered by the plan, including the consolidation of State agencies to allow for a further reduction of the total number of persons assigned to perform the determinations;

(3) provides for competitive bidding for the right to collect and process data used to make eligibility determinations under the programs covered by the plan, under State regulations to ensure that the State relies on the most efficient and innovative provider of such services and minimize State and Federal costs;

(4) provides assurances that the plan does not affect—

(A) any condition for eligibility for benefits under a program covered by the plan;

(B) any right to challenge any determination regarding eligibility for, or any right to, benefits under any such program;

(C) any determination regarding quality control or error rates under any such program; or

(D) any safeguard of the privacy, confidentiality, or protection of any individual eligible for, or receiving any benefit under any such program; and

(5) applies to not more than 50 percent of the recipients of benefits under any program described in subsection (d).

(c) ADMINISTRATIVE PROVISIONS.—

(1) SUBMISSION OF PLANS.—A State desiring to administer or provide for the administration of 1 or more programs described in subsection (d) in accordance with a qualified plan may submit a plan for such administration to the appropriate Federal official with respect to any program covered by the plan. Notwithstanding any other provision of law, review of a plan under this section by the appropriate Federal official as defined in subsection (e) to whom the plan is submitted is the sole requirement necessary prior to implementation by the State.

(2) APPROVAL OF PLANS.—

(A) IN GENERAL.—The appropriate Federal official to whom a plan is submitted pursuant to paragraph (1) shall approve the plan if the appropriate Federal official determines that the plan contains all of the elements specified in subsection (b), and shall disapprove the plan if the appropriate Federal official determines that the plan does not contain all of the elements specified in subsection (b). In order to disapprove the plan, the appropriate Federal official shall inform the State in writing, within 10 days after receipt of the plan, of the specific elements of the plan that are not present as required for the plan to be approved.

(B) DEFAULT APPROVAL.—If, by the end of the 10-day period that begins with the date a plan is submitted pursuant to paragraph (1) to an appropriate Federal official, the appropriate Federal official has not disapproved the plan, the plan is deemed to be approved.

(C) CONSULTATIONS.—In determining whether to approve a plan that covers more than 1 program described in subsection (d), the appropriate Federal official to whom the plan is submitted shall consult with the appropriate Federal official or officials with respect to the other program or programs covered by the plan.

(d) PROGRAMS DESCRIBED.—The programs described in this subsection are the following:

(1) The special supplemental nutrition program for women, infants, and children (WIC) established under section 17 of the Child Nutrition Act of 1966 (42 U.S.C. 1786).

(2) The food stamp program under the Food Stamp Act of 1977.

(3) A medical assistance program operated under a State plan approved under title XIX of the Social Security Act.

(e) APPROPRIATE FEDERAL OFFICIAL.—As used in this section, the term "appropriate Federal official" means—

(1) in the case of the programs described in paragraphs (1) and (2) of subsection (d), the Secretary of Agriculture; and

(2) in the case of the program described in subsection (d)(3), the Secretary of Health and Human Services.

(f) PAYMENTS TO STATES.—

(1) IN GENERAL.—Within 60 days after the date a State plan submitted pursuant to subsection (e)(1) is approved, the appropriate Federal official to whom the plan was submitted shall pay the State $___________ from sums in the Treasury of the United States not otherwise appropriated, which amount be used only to cover the costs of conducting competitive bidding in accordance with the plan and to cover the other initial costs incurred in developing the plan.

(2) LIMITATION.—A State may not receive more than 1 payment under paragraph (1).

F: Privatization

April 4, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: DONNA SHALALA
DAN GLICKMAN
BRUCE REED

SUBJECT: TEXAS WELFARE PLAN

As you know, Texas has asked for federal permission to issue a "request for offers" for a private company to operate an integrated enrollment system for Medicaid, Food Stamps, Temporary Assistance for Needy Families, and potentially other nutrition and workforce programs.

We believe we must give Texas an answer immediately. The state has engaged in good faith discussions with various agencies for more than 9 months, and state officials are now publicly criticizing the Administration for the delay.

We believe we have a compromise proposal which will break the stalemate -- a proposal based on existing Medicaid laws and regulations, that will allow the state to explore innovative ways to deliver public services while ensuring beneficiaries' rights to assistance and maintaining many public sector jobs. As shown in the chart below, our plan would allow Texas to use private contractors to obtain information from applicants and assist them in completing their applications for benefits. However, the determination of eligibility would be conducted by public sector employees.

Allows Private Contractors to:	Texas Proposal	Union Proposal	Our Compromise
Assist Individuals in Completing Applications	Yes	No	Yes
Determine Eligibility	Yes	No	No
Consider Appeals	No	No	No
Conduct Quality Control	No	No	No

Our plan would:

- Protect beneficiaries by ensuring that only public sector civil service employees determine benefit eligibility, consider appeals, and conduct quality control operations, and ensuring that the contract does not contain incentives that would lead to inappropriate denial of program benefits.

- Maintain public sector jobs associated with the determination of eligibility for benefits.

- Allow Texas to achieve program efficiencies through a bidding process. The Texas legislature, in authorizing the project in 1995, required that any savings fund additional health and human services programs. The Bush Administration has not committed to how these savings would be reinvested, but estimates the state could save enough to expand health care coverage to up to 150,000 needy children.

We would allow the state of Texas to release a request for offers based on these principles. Once the state chooses among the bids, the state would be required to submit to HHS and USDA the proposed contract for approval. The Administration would refuse the contract if it did not meet our standards.

Background on the Texas Proposal

The new welfare law explicitly allows states to contract with private entities to administer Temporary Assistance for Needy Families (TANF). Because of this new authority in TANF, a few states are seeking new contracting authority for Medicaid and Food Stamps as well, so they can operate privately-run, one-stop eligibility centers. In addition to the Texas proposal, Wisconsin has submitted a proposal which would allow 10% of its welfare caseload to be served by private entities (this percentage could significantly increase in later years). We will continue to meet to consider Wisconsin's proposal.

Federal agencies and the state of Texas have been negotiating since June 1996 over the state's proposal to privatize the administration of TANF, Medicaid, Food Stamps, and certain other federally-funded nutrition programs. Last spring, the state legislature passed a welfare reform plan with bipartisan support, with endorsements from Lt. Gov. Bob Bullock and other leading Democrats. This legislation did not specifically call for privatization but authorized the state to conduct a bidding process. Under the potential proposal, private contractors could collect information about applicants and make eligibility determinations. The State would retain control over the appeals and quality control processes.

Texas argues that it cannot proceed with plans to contract out TANF (as the welfare law allows) unless the Administration permits private contracting for Food Stamps and Medicaid, because maintaining separate eligibility systems for these programs would create administrative difficulties. To take the most obvious problem, a dual system would require many individuals to go to one location to apply for TANF and another location to apply for Food Stamps and Medicaid.

As you know, labor leaders would like us to refuse the Texas request entirely. They see even limited privatization as a dangerous precedent and have made clear that they view this decision as critically important to public employee unions.

Recommendation

All the relevant agencies and White House offices agree that the Administration should adopt a compromise position which would give Texas the opportunity to seek a partially privatized integrated system. This position would draw the line on the basis of our existing Medicaid law and practice, which would allow privatization of some but not all administrative functions. Under this approach, the application, interview, and other information-gathering could be done by private employees; the eligibility determination itself, as well as appeals and quality control, would remain in the hands of public employees. In addition, the Administration should require that any contract Texas enters into protects applicants' and beneficiaries' privacy rights and does not include incentives that would lead to inappropriate denials -- or, as OMB notes, inappropriate issuances -- of program benefits.

The Medicaid program already allows private hospital workers to do intake and eligibility work, up to the point of actually determining eligibility. For the Food Stamp program this approach would require the granting of administrative waivers.

Allowing privatization of these functions, conditioned on appropriate contract incentives and safeguards, strikes the right balance between allowing states to explore innovative ways to deliver public services and ensuring that applicants' and beneficiaries' rights are protected. It is true that this approach will allow the state to displace some state workers. But the potential for displacement is much lower than under the state's own proposal. In any event, we have crossed this bridge already in Medicaid and other contexts -- for example, the Department of Labor has granted a waiver to Massachusetts to contract out all employment services and is prepared to do the same for other states as well.

In line with this view, we recommend that we inform Texas of the principles we will apply in reviewing any privatization contract and give formal permission to the State to issue its RFO. Once the State accepts a bid, the Administration will review whether the contract appropriately accords with our principles, and bar the state from proceeding if it does not.

Approve ________

Disapprove _______

F: Privatization

FACSIMILE TRANSMISSION
Office of the Assistant Secretary
The Administration for Children and Families

DATE:

TO: Cynthia Rice

Telephone:

Fax: 4567028

Number of Pages (excluding cover): 4

FROM: Margaret Pugh

Telephone: (202)401-6944
Fax: (202)401-4678

MESSAGE: As requested, two TIES documents:
① the Medicaid language sent over earlier
② this language transposed into a draft letter from Kevin to McKinney
We're assuming that you'll take care of circulating this to necessary DPC/OMB/NEC people. Let me know your comments. Thx.

DRAFT 3/26/97

The State of Texas has asked that HHS and USDA provide final guidance under which Texas could release the request for offers (RFO) for its Texas Integrated Enrollment Services (TIES) project, if it so chooses.

At this time, HHS will approve Federal matching funds for project planning activities for the costs incurred through the release of the RFO. We will consider HHS funding for the actual project itself, at such time as the State submits an Implementation Advance Planning Document (IAPD) for approval by the federal agencies.

As Texas moves forward with this process, HHS recommends that the State bear in mind provisions of Section 1902 of the Social Security Act which reflect the principle that certain activities included in the eligibility determination process be performed by public agencies. In general, these provisions require public agencies to evaluate the sufficiency of individuals' applications for public assistance and to make the essential eligibility determination decision.

In many respects, we believe this principle mirrors current practice in the Medicaid program. Typically, under Medicaid, some (but not all) phases of the eligibility determination process for federal public assistance programs may be performed by outside contractors. Contractors (i.e., persons who are not employees of the State) can perform "initial processing" functions further described below.

Permitted contractor-performed functions can include, for example, taking applications, assisting applicants in completing applications, providing information and referrals, obtaining required documentation, assuring that information contained in applications is complete, and conducting any necessary interviews.

Contractors are specifically precluded from evaluating the information contained in the application and supporting documentation, making a determination of eligibility or ineligibility, certifying a determination of eligibility, and notifying applicants of the results of the eligibility determination and informing them of their appeal rights. These functions must be performed by a State employee authorized to make eligibility determinations for the State Medicaid agency.

HHS appreciates that Texas is committed to exploring innovative ways to deliver public services. In examining offers, we encourage Texas to consider contract terms which assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data to measure successful contractor performance.

DRAFT 3/26/97

March XX, 1997

Michael D. McKinney, M.D.
Commissioner
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

Dear Commissioner McKinney:

I am writing to follow up on our most recent conversations and to respond to your March 5, 1997 letter to me concerning the Texas Integrated Enrollment Services (TIES) project. In that letter, you asked that we provide final guidance under which Texas could release the TIES request for offers (RFO), if it so chooses, with the U.S. Department of Health and Human Services' (HHS) approval.

This letter provides that guidance, approves your request for planning funds, and outlines several considerations which we encourage Texas to take into account when contracting with outside parties for the delivery of services. Assuming that the RFO which you intend to release to the public reflects the substance of our staff discussions and the guidelines described below, we see no problem with your proceeding at this time.

Let me take this opportunity to briefly summarize where we are in the process. Over the past several months, our staff have been working together very closely to resolve many systems issues related to the development of the TIES program. As you know, our approval of the release of the RFO is a first step in the process for approving use of federal funds for the development and implementation of a state's computerized eligibility determination systems for Medicaid. (Funding for systems development under TANF does not require federal approval.)

In order for HHS to consider approving and funding a contract which may result from release of the RFO, the State must submit an implementation advanced planning document (IAPD) for HHS' prior approval following the solicitation process, in accordance with the rules at 45 CFR Part 95, Subpart F. The IAPD must meet the requirements specified in the cited rules and provide a rigorous and positive cost benefit analysis for the project. The State may want to advise potential offerors to make use of HHS' cost benefit analysis guidance for State systems, which I have included for your review.

At this time, HHS will approve Federal matching funds for project planning activities for the costs incurred through the release of the RFO. We will consider

HHS funding for the actual project itself, at such time as the State submits and IAPD for approval by the federal agencies. We understand that you plan to move forward with this process.

As you proceed, we recommend that you bear in mind provisions of Section 1902 of the Social Security Act which reflect the principle that certain activities included in the eligibility determination process be performed by public agencies. In general, these provisions require public agencies to evaluate the sufficiency of individuals' applications for public assistance and to make the essential eligibility determination decision.

In many respects, we believe this principle mirrors current practice in the Medicaid program. Typically, under Medicaid, some (but not all) phases of the eligibility determination process for Federal public assistance programs may be performed by outside contractors. Contractors (i.e., persons who are not employees of the State) can perform "initial processing" functions further described below.

Permitted contractor-performed functions can include, for example, taking applications, assisting applicants in completing applications, providing information and referrals, obtaining required documentation, assuring that information contained in applications is complete, and conducting any necessary interviews.

Contractors are specifically precluded from evaluating the information contained in the application and supporting documentation, making a determination of eligibility or ineligibility, certifying a determination of eligibility, and notifying applicants of the results of the eligibility determination and informing them of their appeal rights. These functions must be performed by a State employee authorized to make eligibility determinations for the State Medicaid agency.

We appreciate that Texas is committed to exploring innovative ways to deliver public services. In examining offers, we encourage you to consider contract terms which assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data to measure successful contractor performance.

Our staff also would like to continue their ongoing discussions with your office in order to better understand TIES in the context of Texas' implementation of the new welfare law. Mark Ragan, Director of the Office of State Systems, or his staff will be in contact with your office shortly to further discuss these issues and to confirm several other administrative matters.

I hope that you find this additional guidance helpful in your decision-making. Again, I want to express my appreciation for your understanding of the complex issues raised by our consideration of the TIES project. I appreciate all of the time and effort you and your staff have contributed towards moving these issues to resolution. If you should have any questions concerning the content of this letter, please do not hesitate to call me or Mark Ragan at (202) 401-6960.

Sincerely,

Kevin Thurm

April 2, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: DONNA SHALALA
BRUCE REED

SUBJECT: WELFARE--TEXAS INTEGRATED ENROLLMENT PROJECT

As you know, Texas has asked for federal permission to issue a "request for offers" for a private company to operate an integrated enrollment system for Medicaid, Food Stamps, and Temporary Assistance for Needy Families.

We believe we must give Texas an answer immediately. The state has engaged in good faith discussions with various agencies for 9 months, and state officials are now publicly criticizing the Administration for the delay.

We believe we have a proposal which will break the stalemate -- a proposal based on existing Medicaid practice that allows the state to explore innovative ways to deliver public services while ensuring beneficiaries' rights to assistance and maintaining many public sector jobs. As shown in the chart below, our plan would allow Texas to use private contractors to obtain information from applicants and assist them in completing their applications for benefits. However, the final determination or "certification" of eligibility would be conducted by public sector employees.

Allows Private Contractors to:	Texas Proposal	Union Proposal	Our Proposal
Assist Individuals in Completing Applications	Yes	No	Yes
Determine or Certify Eligibility	Yes	No	No
Consider Appeals	No	No	No
Conduct Quality Control	No	No	No

Our plan would:

- Protect beneficiaries by ensuring that only public sector civil service employees, who are not subject to monetary incentives or political pressures, determine benefit eligibility, consider appeals, and conduct quality control operations.

- Maintain all public sector jobs associated with the determination and certification of eligibility for benefits.

- Allow Texas to achieve program efficiencies through a bidding process. The Texas legislature, in authorizing the project in 1995, required that any savings fund additional health and human services programs. The state estimates the savings will provide health care coverage for an additional 150,000 needy children.

We would allow the state of Texas to release a request for offers based on these principles. Once the state chooses among the bids, the state would be required to submit to us the proposed contract for approval. If the contract does not accord with these principles, we would reject it. Finally, we would emphasize that Texas is an experiment -- and that we will wait to see how partial privatization works there before granting any similar statewide privatization requests.

Background on the Texas Proposal

The new welfare law explicitly allows states to contract with private entities to administer Temporary Assistance for Needy Families (TANF). Because of this new authority in TANF, a few states are seeking new contracting authority for Medicaid and Food Stamps as well, so they can operate privately-run, one-stop eligibility centers. In addition to the Texas proposal, Wisconsin has submitted a proposal which would allow 10% of its welfare offices to be operated by private entities.

Federal agencies and the state of Texas have been negotiating since June 1996 over the state's proposal to privatize the administration of TANF, Medicaid, Food Stamps, and certain other federally-funded nutrition programs. The state legislature passed the plan with bipartisan support, with endorsements from Lt. Gov. Bob Bullock and other leading Democrats. Under the Texas proposal, private contractors would collect information about and make eligibility determinations. The State would retain control over the appeals and quality control processes.

Texas argues that it cannot proceed with plans to contract out TANF (as the welfare law allows) unless the Administration permits private contracting for Food Stamps and Medicaid, because maintaining separate eligibility systems for these programs would create administrative difficulties. To take the most obvious problem, a dual system would require many individuals to go to one location to apply for TANF and another location to apply for Food Stamps and Medicaid.

As you know, labor leaders would like us to refuse the Texas request entirely.

They see even limited privatization as a dangerous precedent and have made clear that they view this decision as critically important to public employee unions.
Recommendation

All the relevant agencies and White House offices agree that the Administration should adopt a compromise position, giving Texas something but much less than it asked for. This compromise position would draw the line on the basis of our existing Medicaid policy, which allows privatization of some but not all administrative functions. Under this approach, the application, interview, and other information-gathering can be done by private employees; the eligibility determination itself, as well as appeals and quality control, must remain in the hands of public employees. In addition, the Administration should require that any contract Texas enters into protects against the possibility that private firms will use procedures that lead to inappropriate denials -- or, as OMB notes, inappropriate issuance -- of program benefits.

This general approach has both strong precedent and good sense behind it. The Medicaid program already allows private hospital workers to do intake and eligibility work, up to the point of actually determining eligibility. Allowing privatization of these functions, conditioned on appropriate contract incentives and safeguards, strikes the right balance between allowing states to explore innovative ways to deliver public services and ensuring that beneficiaries' rights are protected. It is true that this approach will displace some state workers (though many fewer than Texas' proposal). But we have crossed this bridge already in Medicaid and other contexts; for example, the Department of Labor has granted a waiver to Massachusetts to contract out all employment services and is prepared to do the same for other states as well.

In line with this view, we recommend that we inform Texas of the principles we will apply in reviewing any privatization contract and give formal permission to the State to issue its RFO. Once the State accepts a bid, we will review whether the contract appropriately accords with our principles. Throughout the process, we will make clear that Texas is an experiment and that we do not intend to allow other statewide partial privatization initiatives until we have some further justification of how this approach is working.

Approve ________

Disapprove ________

cc Emily Bromberg
— Diana

DRAFT 3/26/97

The State of Texas has asked that HHS and USDA provide final guidance under which Texas could release the request for offers (RFO) for its Texas Integrated Enrollment Services (TIES) project, if it so chooses.

At this time, HHS will approve Federal matching funds for project planning activities for the costs incurred through the release of the RFO. We will consider HHS funding for the actual project itself, at such time as the State submits an Implementation Advance Planning Document (IAPD) for approval by the federal agencies.

As Texas moves forward with this process, HHS recommends that the State bear in mind provisions of Section 1902 of the Social Security Act which reflect the principle that certain activities included in the eligibility determination process be performed by public agencies. In general, these provisions require public agencies to evaluate the sufficiency of individuals' applications for public assistance and to make the essential eligibility determination decision.

In many respects, we believe this principle mirrors current practice in the Medicaid program. Typically, under Medicaid, some (but not all) phases of the eligibility determination process for federal public assistance programs may be performed by outside contractors. Contractors (i.e., persons who are not employees of the State) can perform "initial processing" functions further described below.

Permitted contractor-performed functions can include, for example, taking applications, assisting applicants in completing applications, providing information and referrals, obtaining required documentation, assuring that information contained in applications is complete, and conducting any necessary interviews.

Contractors are specifically precluded from evaluating the information contained in the application and supporting documentation, making a determination of eligibility or ineligibility, certifying a determination of eligibility, and notifying applicants of the results of the eligibility determination and informing them of their appeal rights. These functions must be performed by a State employee authorized to make eligibility determinations for the State Medicaid agency.

HHS appreciates that Texas is committed to exploring innovative ways to deliver public services. In examining offers, we encourage Texas to consider contract terms which assure program integrity, provide incentives for enrolling all eligible persons, and call for the collection of adequate data to measure successful contractor performance.

Copy to Elena + Cynthia From Stacy Dean - Diana

Combining Food Stamp and TANF Benefits for the Purposes of Work Requirements

Issue -- A legislative fix may be necessary if minimum wage requirements are applied to TANF workfare: Under the new welfare law States are required to move large portions of their TANF caseload into work activities. By FY02, States must place 50% of their caseload in activities which last at least 30 hours per week[1]. (In FY's 97-98, only 20 hours are required.) Many States will try to meet these work requirements by placing recipients in workfare slots. If it is determined that the Fair Labor Standards Act applies to these workfare positions, then States cannot require individuals to work more hours each month than the individual's monthly benefit divided by the minimum wage. Almost no State's TANF benefit is high enough to meet this requirement.[2]

One way for States to mitigate this problem would be to count the value of a household's food stamp benefit towards the total benefit which recipients must work off as a part of their work requirement. The Food Stamp Act (FSA) allows States to require TANF recipients to perform workfare for the value of the food stamp benefit, but work requirements for the two programs are not consistent. Specifically, the FSA contains a prohibition against requiring individuals with children under age 6 to participate in work activities. Approximately, 62% of the AFDC families had children under age six in 1994. This barrier would create significant obstacles for States who wish to meet the work requirements by creating workfare slots without raising TANF benefits. For the purposes of wage supplementation, there are no barriers to combining Food Stamps to the underlying TANF benefit because there are no specific exemptions from workfare.

Administrative Fixes: States could request a Food Stamp demonstration waiver from this prohibition. However, there are a couple of complications with using demonstration waivers as a solution. First, the demonstration waiver authority is intended for time limited welfare experiments which apply to limited portion of the State caseload and require an evaluation. It is likely States would consider these requirements as burdensome and problematic with regards to meeting their requirements. Second, the exemption for households with children under six exists in two places in the FSA. One is within the food stamp work requirements and the other is in the workfare provisions. USDA is prohibited under statute from waiving the food stamp work requirement exemption. Some might interpret a waiver of the workfare requirements as undermining Congressional intent. Finally, States may have some flexibility under a Food Stamp Simplifed Program. However, USDA staff do not believe this is true. Even if it is, many States may not want to adopt a Simplied Program, and its requirements are significantly more burdensome than a demonstration waiver.

Legislative Fixes: The Administration could formally propose, or could informally propose as a part of the technicals bill discussion, an amendment to the food stamp act which would eliminate the exemption from work requirements and workfare for individuals working to fulfill an TANF

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[1]Of these 30 hours, 10 may be education or job training while the rest must be in work.

[2]Using July 1996 AFDC benefit levels, only Alaska and Hawaii's maximum benefit for a three person family is in excess of the minimum wage when divided by 30 hours per week.

requirement. This would not be inconsistent with the Administration's previous position on the Food Stamp work requirement child care exemption -- the Administration would have lowered the exemption age to 1 as long as child care was available. Also, it would assist States in meeting their TANF work requirements and it would continue to provide an exemption for non-TANF households who may not have the necessary child care to fulfill the requirement.

Recommendation: If a policy is announced which would indicate that the FLSA applies to TANF workfare slots, information should be provided on the food stamp issue. Food Stamps could be combined with TANF for the purposes of wage supplementation and for workfare as long as the household does not have children under six. The Administration should proposal a technical amendment to fix the problem for households with children under six. In the interim, the Adminstration should state that it would provide waivers to States that feel they need them immediately to meet the 20 hour per week requirement.

(ii) The Secretary may suspend the termination of payments under subparagraph (C)(i) for such period as the Secretary determines appropriate, and instead withhold payments provided for under subsection (a), in whole or in part, until the Secretary is satisfied that there will no longer be any failure to comply with the requirements of subparagraphs (A) and (B) and subsection (b)(1)(A), at which time such withheld payments shall be paid.

(iii) Upon a finding under subparagraph (C)(i) of a substantial failure to comply with any of the requirements of subparagraphs (A) and (B) and subsection (b)(1)(A), the Secretary may, in addition to or in lieu of any action taken under subparagraphs (C)(i) and (C)(ii), refer the matter to the Attorney General with a request that injunctive relief be sought to require compliance by the Commonwealth of Puerto Rico, and upon suit by the Attorney General in an appropriate district court of the United States and a showing that noncompliance has occurred, appropriate injunctive relief shall issue.

(c)(1) The Secretary, shall provide for the review of the programs for the provision of the assistance described in subsection (a)(1)(A) for which payments are made under this Act.

(2) The Secretary is authorized as the Secretary deems practicable to provide technical assistance with respect to the programs for the provision of the assistance described in subsection (a)(1)(A).

(d) Whoever knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery, any funds, assets, or property provided or financed under this section shall be fined not more than $10,000 or imprisoned for not more than five years, or both, but if the value of the funds, assets or property involved is not over $200, the penalty shall be a fine of not more than $1,000 or imprisonment for not more than one year, or both.

WORKFARE

SEC. 20. [2029] (a)(1) The Secretary shall permit any political subdivision, in any State, that applies and submits a plan to the Secretary in compliance with guidelines promulgated by the Secretary to operate a workfare program pursuant to which every member of a household participating in the food stamp program who is not exempt by virtue of the provisions of subsection (b) of this section shall accept an offer from such subdivision to perform work on its behalf, or may seek an offer to perform work, in return for compensation consisting of the allotment to which the household is entitled under section 8(a) of this Act, with each hour of such work entitling that household to a portion of its allotment equal in value to 100 per centum of the higher of the applicable State minimum wage or the Federal minimum hourly rate under the Fair Labor Standards Act of 1938 [(29 U.S.C. 201 et seq.)].

(2)(A) The Secretary shall promulgate guidelines pursuant to paragraph (1) which, to the maximum extent practicable, enable a political subdivision to design and operate a workfare program under this section which is compatible and consistent with similar workfare programs operated by the subdivision.

(B) A political subdivision may comply with the requirements of this section by ~~operating—~~

~~(i) a workfare program pursuant to title IV of the Social Security Act (42 U.S.C. 601 et seq.); or~~

~~(ii) any other~~ *operating any*[20-1] workfare program which the Secretary determines meets the provisions and protections provided under this section.

~~(b)(1) A household~~ *(b) A household*[20-2] member shall be exempt from workfare requirements imposed under this section if such member is—

~~(A)~~[20-3] *(1)* exempt from section 6(d)(1) as the result of clause (B), (C), (D), (E), or (F) of section 6(d)(2);

~~(B)~~ *(2)* at the option of the operating agency, subject to and currently actively and satisfactorily participating at least 20 hours a week in a work ~~training program~~ *activity*[20-4] required under title IV of the Social Security Act (42 U.S.C. 601 et seq.);

has a child aged 0-5

~~(C)~~ *(3)* mentally or physically unfit;

~~(D)~~ *(4)* under sixteen years of age;

~~(E)~~ *(5)* sixty years of age or older; or

~~(F)~~ *(6)* a parent or other caretaker of a child in a household in which another member is subject to the requirements of this section or is employed fulltime.

~~(2)~~[20-5]~~(A) Subject to subparagraphs (B) and (C), in the case of a household that is exempt from work requirements imposed under this Act as the result of participation in a community work experience program established under section 409 of the Social Security Act (42 U.S.C. 609), the maximum number of hours in a month for which all members of such household may be required to participate in such program shall equal the result obtained by dividing—~~

~~(i) the amount of assistance paid to such household for such month under title IV of such Act, together with the value of the food stamp allotment of such household for such month, by~~

~~(ii) the higher of the Federal or State minimum wage in effect for such month.~~

~~(B) In no event may any such member be required to participate in such program more than 120 hours per month.~~

~~(C) For the purpose of subparagraph (A)(i), the value of the food stamp allotment of a household for a month shall be determined in accordance with regulations governing the issuance of an allotment to a household that contains more members than the number of members in an assistance unit established under title IV of such Act.~~

(c) No operating agency shall require any participating member to work in any workfare position to the extent that such work exceeds in value the allotment to which the household is otherwise entitled or that such work, when added to any other hours worked during such week by such member for compensation (in cash or in kind) in any other capacity, exceeds thirty hours a week.

(d) The operating agency shall—

[20-1] Effective July 1, 1997, section 109(e)(1) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends subpara. (B) by striking "operating—" and all that follows through "(ii) any other" and inserting "operating any".

[20-2] Effective July 1, 1997, section 109(e)(2)(A)(i) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends para. (1) by striking "(b)(1) A household" and inserting "(b) A household".

[20-3] Effective July 1, 1997, section 109(e)(2)(C) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) redesignates subparas. (A) through (F) as paras. (1) through (6), respectively.

[20-4] Effective July 1, 1997, section 109(e)(2)(A)(ii) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) amends subpara. (B) by striking "training program" and inserting "activity".

[20-5] Effective July 1, 1997, section 109(e)(2)(B) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104–193) strikes para. (2).

(1) not provide any work that has the effect of replacing or preventing the employment of an individual not participating in the workfare program;

(2) provide the same benefits and working conditions that are provided at the job site to employees performing comparable work for comparable hours; and

(3) reimburse participants for actual costs of transportation and other actual costs all of which are reasonably necessary and directly related to participation in the program but not to exceed $25 in the aggregate per month.

(e) The operating agency may allow a job search period, prior to making workfare assignments, of up to thirty days following a determination of eligibility.

(f) DISQUALIFICATION.—An individual or a household may become ineligible under section 6(d)(1) to participate in the food stamp program for failing to comply with this section.

(g)(1) The Secretary shall pay to each operating agency 50 per centum of all administrative expenses incurred by such agency in operating a workfare program, including reimbursements to participants for work-related expenses as described in subsection (d)(3) of this section.

(2)(A) From 50 per centum of the funds saved from employment related to a workfare program operated under this section, the Secretary shall pay to each operating agency an amount not to exceed the administrative expenses described in paragraph (1) for which no reimbursement is provided under such paragraph.

(B) For purposes of subparagraph (A), the term "funds saved from employment related to a workfare program operated under this section" means an amount equal to three times the dollar value of the decrease in allotments issued to households, to the extent that such decrease results from wages received by members of such households for the first month of employment beginning after the date such members commence such employment if such employment commences—

(i) while such members are participating for the first time in a workfare program operated under this section; or

(ii) in the thirty-day period beginning on the date such first participation is terminated.

(3) The Secretary may suspend or cancel some or all of these payments, or may withdraw approval from a political subdivision to operate a workfare program, upon a finding that the subdivision has failed to comply with the workfare requirements.

SEC. 21. [2030] DEMONSTRATION OF FAMILY INDEPENDENCE PROGRAM.

(a) IN GENERAL.—Upon written application of the State of Washington (in this section referred to as the "State") and after the approval of such application by the Secretary, the State may conduct a Family Independence Demonstration Project (in this section referred to as the "Project") in all or in part of the State in accordance with this section to determine whether the Project, as an alternative to providing benefits under the food stamp program, would more effectively break the cycle of poverty and would provide families with opportunities for economic independence and strengthened family functioning.

(b) NATURE OF PROJECT.—In an application submitted under subsection (a), the State shall provide the following:

tification period unless there is a change in the composition of the household.

(vi) CHANGE IN HEAD OF HOUSEHOLD.—If the head of a household leaves the household during a period in which the household is ineligible to participate in the food stamp program under subparagraph (B)—

(I) the household shall, if otherwise eligible, become eligible to participate in the food stamp program; and

(II) if the head of the household becomes the head of another household, the household that becomes headed by the individual shall become ineligible to participate in the food stamp program for the remaining period of ineligibility.

6(d)(2)(B)

(2) A person who otherwise would be required to comply with the requirements of paragraph (1) of this subsection shall be exempt from such requirements if he or she is (A) currently subject to and complying with a work registration requirement under title IV of the Social Security Act, as amended (42 U.S.C. 602), or the Federal-State unemployment compensation system, in which case, failure by such person to comply with any work requirement to which such person is subject shall be the same as failure to comply with that requirement of paragraph (1); (B) a parent or other member of a household with responsibility for the care of a dependent child under age six or of an incapacitated person; (C) a bona fide student enrolled at least half time in any recognized school, training program, or institution of higher education (except that any such person enrolled in an institution of higher education shall be ineligible to participate in the food stamp program unless he or she meets the requirements of subsection (e) of this section); (D) a regular participant in a drug addiction or alcoholic treatment and rehabilitation program; (E) employed a minimum of thirty hours per week or receiving weekly earnings which equal the minimum hourly rate under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(a)(1)), multiplied by thirty hours; or (F) a person between the ages of sixteen and eighteen who is not a head of a household or who is attending school, or enrolled in an employment training program, on at least a half-time basis. A State that requested a waiver to lower the age specified in subparagraph (B) and had the waiver denied by the Secretary as of August 1, 1996, may, for a period of not more than 3 years, lower the age of a dependent child that qualifies a parent or other member of a household for an exemption under subparagraph (B) to between 1 and 6 years of age.

(3) Notwithstanding any other provision of law, a household shall not participate in the food stamp program at any time that any member of such household, not exempt from the work registration requirements of paragraph (1) of this subsection, is on strike as defined in section 501(2) of the Labor Management Relations Act, 1947, [(29 U.S.C. 142(2))]because of a labor dispute (other than a lockout) as defined in section 2(9) of the National Labor Relations Act [(29 U.S.C. 152(9))]: *Provided,* That a household shall not lose its eligibility to participate in the food stamp program as a result of one of its members going on strike if the household was eligible for food stamps immediately prior to such strike, however, such household shall not receive an increased allotment as the result of a decrease in the income of the striking member or members of the