* Hettie - LP
* Jack re bn overview

cc Cynthia

SOCIAL SECURITY

Office of the Commissioner

October 7, 1997

Richard C?

TO: Diana Fortuna
Keith Fontenot
Jack Smalligan

FR: Brian Coyne BDC

RE: Childhood Disability

Attached, please find copies of correspondence from Rep. McCrery (R-LA) and Sen. Conrad (D-ND) regarding the interpretation of the childhood disability statute. Sen. Conrad's comments are similar to those he made at Ken Apfel's confirmation hearing, in that it appears while he believes congressional intent was to have a less severe standard, the final conference report language (which he blames on staff) required an interpretation similar to what SSA announced in February.

FYI.

JIM McCRERY
4TH DISTRICT, LOUISIANA

COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON HEALTH
SUBCOMMITTEE ON HUMAN RESOURCES

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September 23, 1997

The Honorable Kent Conrad
530 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Conrad:

It has come to my attention that, during the recent confirmation hearing for Mr. Ken Apfel, the President's designee to head the Social Security Administration, you made a number of unfavorable comments about the extensive reforms of the Supplemental Security Income program for children enacted last year. The general tenor of your remarks, as reported in the Washington Post and conveyed to me by members of my staff present for the hearing, was that the SSI reforms were irresponsible and disastrous and even that they were largely staff-driven and had received something less than full consideration by Congress.

My purpose in writing is to correct the record about these inaccurate claims.

Reform of the SSI children's program was carefully drafted, was subjected to intense scrutiny during both numerous hearings and markup sessions, was passed several times by both the House and Senate, and enjoyed widespread bipartisan support.[1] In fact, this reform is almost identical to proposals made in Democrat-sponsored bills in the House and Senate and in the President's own 1996 welfare reform bill. By tightening eligibility standards, the reforms also resemble proposals you made in your own 1995 SSI children's benefits reform bill.

The record should also reflect that the Social Security Administration is doing an exemplary job of implementing these reforms in keeping with the intent of the law as passed, and that the policy and its implementation are producing excellent results for the nation. After Mr. Apfel's confirmation, Chairman Clay Shaw of the Human Resources Subcommittee and I intend to meet with Mr. Apfel so he understands that the majority of the members of Congress strongly support the children's SSI reforms and expect the Social Security Administration to continue its fine work in implementing the new law.

The Need for Reform

Reforms of the children's SSI program were originally proposed in response to concerns about its rapid growth and especially charges that the program had become open to abuse. These concerns were substantiated in the General Accounting Office March 1995 report *Social Security: New Functional Assessments for Children Raise Eligibility Questions*, which stated:

We found fundamental flaws in the IFA process. Specifically, each step of the process

[1]The conference report on H.R. 3734, the welfare reform law which included the SSI children's reforms, was approved by a Senate vote of 78 to 21 and by a House vote of 328 to 101. In terms of Member support, this legislation received more support than the legislation creating the Medicare program in 1965.

relies heavily on adjudicators' judgments, rather than objective criteria from SSA, to assess the age-appropriateness of children's behavior. As a result, the subjectivity of the process calls into question SSA's ability to ensure reasonable consistency in administering the SSI program, particularly for children with behavioral and learning disorders.

Not only did such abuses allow children onto the SSI rolls who should never have qualified for federal disability benefits averaging $5,000 per year, but the cumulative effect of the diminished eligibility standards was to triple the number of children on SSI between 1989 and 1994 from 300,000 to 900,000. In testimony before Congress in early 1995, GAO estimated that the children's SSI caseload would more than double again, to 1.9 million by the year 2000, unless changes were made.

Perhaps the worst effect of this dramatic growth was to undermine public confidence in the SSI program, supported by numerous print and broadcast media stories implying that the SSI children's program was out of control and wasting tax dollars.

Extensive Congressional Debate on Reform

In response to these and other concerns, SSI reforms were originally introduced in January of 1995 as part of H.R. 4, the House welfare reform bill. After intense scrutiny and extensive debate, the bill passed the Subcommittee on Human Resources in February and the full Ways and Means Committee in March of 1995. The bill was then approved by the House on March 24, 1995. Changes were made throughout the legislation's progress to final passage in August 1996, and Senate negotiators played a key role in developing the final reforms.

I am less familiar with the course of this legislation in the Senate, or with the extent to which the children's SSI provisions were closely considered by Members of the Senate during committee and floor debate. However, the record shows that the Senate Finance Committee and the full Senate repeatedly approved essentially the same SSI children's program changes to which you are now objecting. In fact, during the 104th Congress you voted for SSI reform as part of welfare reform bills three of the six times the issue was before the Senate, including on Senate passage of both H.R. 3734 and the conference report on the final welfare reform law.

I review this history for two reasons. First, seldom has any bill received more attention from Congress, nor been more exposed to elaborate media coverage, than the various welfare reform bills proposing reforms of the children's SSI program. Further, as a conferee in the House-Senate conferences on welfare reform, I can assure you that the children's SSI provisions were the subject of spirited debate and, as a result of that debate, were substantially modified -- especially at the insistence of Senate negotiators -- in conference. Second, I want to note that on several occasions you voted in favor of the SSI reforms for children of which you are now so critical.

Several other points are worth mentioning. First, during House debate on the original welfare reform bill, H.R. 4, in March of 1995, Democrats brought to the floor their own welfare reform bill, known as the "Deal Substitute." This bill contained SSI children's reforms that were very similar to those you now criticize. You might be interested to know that every Democrat in the House voted in favor of these reforms.

Second, although some members of the Clinton Administration had harshly criticized the children's SSI reforms in 1995, we found it interesting that the President's 1996 welfare reform proposal contained SSI reforms that were nearly identical to those in the vetoed bills. Thus, by early 1996, the House, the Senate, and the Administration had all taken official actions endorsing similar reforms of the children's SSI program. In this sense, enactment of the final welfare reform bill in August of 1996 merely endorsed actions on children's SSI that were already widely supported.

Given this background, I would be interested in hearing your justification for the public statement that these reforms were staff-driven and received less than full attention from Congress. The fact is, in addition to all the media reports, GAO studies, and public attention, the full Committee on Ways and Means held a series of hearings on the children's SSI provisions. During these hearings, we granted ample time to hear from individuals and organizations that opposed the reforms. Indeed, during one of these hearings, a well-known national organization brought a severely disabled child in a wheelchair into our hearing room and claimed that this child was an example of the children we were trying to throw off the rolls. Both before and after that hearing, we took great care in drafting the legislation, consulting with experts, and requesting aid from SSA to ensure that children with serious disabilities would not lose eligibility. Your introduction of an SSI reform proposal (which would have tightened eligibility for children's benefits) supports the contention that many Members were involved in the debate leading to reforms that by August 1996 had gained near-universal support.

Third, the consensus about both the need for reform and the appropriateness of the reforms approved by Congress and the Administration is supported by the constructive way the issue has been addressed thus far in 1997. SSA, after early delays in releasing regulations, has proceeded in constructively implementing reforms and Congress and the Administration quickly agreed on needed technical changes. It is significant to note that, in a budget agreement in which the President claimed to have "fixed" the 1996 welfare reform bill, no substantive changes to the children's SSI program were proposed or ultimately made in the Balanced Budget Act that the President has now signed into law.

<u>Goals of Reform</u>

Now a word is in order concerning the substance of the reforms. Although the legislation reforming the children's SSI program contains several major provisions, the most important is the termination of the Individualized Functional Assessment process. Speaking quite literally now, this process assessed children's behavioral capacity in several areas (such as mental functioning and social ability) and found them to be disabled if their behavior departed from age norms. Here is the heart of the matter: Should the public pay nearly $500 per month and give free medical coverage to the family of a child that behaves in age inappropriate ways? More specifically, is it a wise use of taxpayer dollars to give cash payments to families whose children, for example, act up in school or don't pay attention in the classroom?

My purpose in writing the original SSI reforms and in defending these reforms over the past three years has been to definitively answer this question: No, families of children with mild impairments or who display age-inappropriate behavior should not be given guaranteed cash payments. Only families with seriously disabled children, especially families that must alter their lifestyle or that incur exceptional costs because of their child's disability should receive cash benefits. Indeed, if Congress were to rethink this program and examine the evidence we now have about how families use these public funds, I believe a majority of members would vote to provide either free programs to deal specifically with the disability and related problems or vouchers that could be used to purchase such services. In this way, we could be certain that the public funds were used for their intended purpose of helping children live with and if possible overcome their disabilities.

Social Security Implementation is Fair and Correct

Congress and the President strongly supported our legislation and SSA is now attempting to implement Congressional intent. Given the delicacy of the issues involved, the numerous possibilities for demagoguery, and the number of people inside and outside Congress willing to commit demagoguery, I have tried to support SSA as it develops the policies and procedures needed to implement the new law. Having met several times with SSA officials, and having supervised my staff and Committee staff as they worked with SSA to implement the law, I give the Administration high marks for the seriousness of their effort and, so far, for the quality and appropriateness of results.

In this regard, I am enclosing a document that will provide you with a concrete idea of the kinds of children who are being removed from the SSI rolls and the kinds of children who continue to receive cash benefits. SSA selected, more or less at random, 40 cases of each type. Please read through these cases and determine for yourself whether there are children who lost benefits that you think should be retained on SSI. I would greatly value hearing from you about these cases and would be very happy to consider whether the statutory or regulatory provisions need to be altered to be certain deserving children and families do not lose benefits.

I noticed that during the Apfel hearing you brought to public attention two cases of seriously disabled children who lost benefits. I applaud you for calling public attention to these cases and to any other cases like these. But let me raise two issues about these cases.

First, SSA is a huge bureaucracy with huge responsibilities. Our SSI reforms added substantially to SSA's burden because the agency must now review about 288,000 children's cases. In pursuing this immense responsibility, I doubt that any organization could complete the task without making a few mistakes. The key is to discover these mistakes quickly and to correct them. Having reviewed the elaborate procedures now being followed by SSA, and especially the numerous chances for reviews of individual cases, I believe there will be very few errors and that those few will have ample opportunity to be corrected. Fortunately, we have a well organized and vigilant advocacy community that will ensure that botched cases get lots of public attention.

Second, and I would like to leave you and other critics of the SSI reforms with this thought: The action of removing children from any public program is inherently delicate. Based on my mail, on direct contact with constituents, on media stories, and on testimony before our committee over the past several years, I know that citizens expect us to protect the public purse and to be aggressive in rooting out fraud and malfeasance in welfare programs. I trust your experience is similar. However, in doing so, those who defend public programs and who want to see as many children as possible receive public benefits are presented with many opportunities to raise emotional objections to perfectly legitimate program reforms. To put the matter bluntly, Congress and the Administration determined that very few of the children now being removed from the SSI rolls deserve guaranteed cash benefits based on disability. Yet when they are removed from the rolls, especially when a mistake is made, anyone so inclined can make emotional public statements and even hurl charges of insensitivity and worse at those supporting the reform process.

By raising ill-founded charges about the history and motivation of the SSI children's reforms, and by calling into question the entire policy approved so overwhelmingly by Congress and the President, I believe you are approaching the line that separates constructive criticism from demagoguery. Perhaps I am mistaken in this view. If so, I would welcome clarification from you and a clear statement about the actions you think we should take to correct the problem as you see it.

Until that time, for the sake of achieving the proper balance between the rights of those who pay for public programs and those who utilize them, I hope any future criticism of the SSI children's reforms will be characterized by more equanimity than has been shown in this episode.

Sincerely yours,

JIM McCRERY
Member of Congress

cc: Members of the Senate Finance Committee
Ken Apfel
John Callahan

Enclosure

KENT CONRAD
NORTH DAKOTA
202-224-2043

COMMITTEES
AGRICULTURE, NUTRITION AND FORESTRY
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United States Senate

WASHINGTON, DC 20510-3403

September 28, 1997

The Honorable Jim McCrery
2104 Rayburn House Office Building
Washington, D.C. 20515-1805

Dear Congressman McCrery:

Thank you for your letter of September 23, 1997, regarding the Supplemental Security Income (SSI) program for children.

Unfortunately, your staff appears to have misinformed you of the substance of my remarks at the Finance Committee's confirmation hearing for Mr. Apfel. I never suggested that the legislative provisions on children's SSI were staff driven; rather, my comments were directed at staff actions that significantly affected the interpretation of these provisions. I would not have said that the legislation was staff driven because I and several of my Senate colleagues were very directly and personally involved in crafting these provisions. Thus, the vast bulk of your letter -- regarding the need for reform, the congressional debate, and the goals of reform -- has little to do with my remarks at Mr. Apfel's hearing, which were directed at SSA's implementation of the SSI provisions

Before discussing these concerns, let me first briefly apprise you of my involvement in this issue and the role of staff in affecting implementation of the legislative changes. As you note, in 1995 there was widespread agreement in the Congress that abuses of children's SSI were undermining support for this valuable program. Accordingly, the Senate set out to remove those who are not truly disabled from SSI while ensuring that disabled children continued to receive assistance. Extensive discussion among members on how to strike this balance resulted in the Senate bill language. I discussed this compromise on the floor of the Senate in a colloquy with then-Majority Leader Dole, who agreed that it was not intended to produce radical changes to the program but was instead only a "tune-up."

As you know, this provision ultimately was included in the final welfare reform bill enacted last year. The intent of this language, with its reference to "marked and severe" functional limitations, was that children with truly disabling conditions, including those with one marked and one moderate condition, would retain SSI coverage. However, in conference on the final version of welfare reform, committee staff inserted report language into the conference report that changed the interpretation from that understood by the parties to the original compromise and disrupted the delicate balance referenced above. As a result, SSA adopted a more severe eligibility standard than intended. This action by staff, in my view, contributed to the problems with implementation of the new eligibility criteria that were at the heart of my remarks at the confirmation hearing.

There is no question that there have been mistakes in implementing this change. For example, as I noted at the hearing, SSA ruled that an eight year old North Carolina boy who uses a wheelchair and has an IQ of 45 was no longer eligible for SSI. In another example that I cited at the hearing, a 13 year old girl with a severe psychotic disorder was ruled ineligible, even though she had been hospitalized in a psychiatric ward for more than a week shortly before her review. Other examples that I did not have time to cite at the hearing abound. For example, an 11 year old boy with mental retardation and selective mutism who cannot read, tell time or dress himself lost benefits. A 12 year old girl with an orthopedic condition that has required 15 surgeries and a speech impairment lost benefits.

I do not think that Congress ever intended for these children to lose SSI benefits as a result of welfare reform. Do you?

If not, I'm sure you will agree that the eligibility review process needs to be carefully examined. This is especially true because the problem goes beyond the few examples I have cited. Termination rates range from around 30% in some states to more than 80% in others, even though no one has ever produced evidence that children are more disabled in some states than in others. And two out of three appeals of SSI terminations have been successful -- an extraordinarily high rate of success at the appeals level. The stories SSA has assembled to show that 80 of its cases were handled correctly should not be allowed to obscure these clear indicators of problems with how SSA is implementing this change in law.

I fully share your goal of protecting taxpayers from abuses of Federal programs; that is why I supported changes in eligibility for SSI for children. But these troubling statistics indicate to me that we need to have SSA take a second look at its process to be sure that low-income, disabled children -- the most vulnerable of the most vulnerable in our society -- do not suffer from bureaucratic misunderstandings or incorrect interpretations of the law. That is why I asked Mr. Apfel to review the implementation of this provision and ensure that SSA's actions accord fully with congressional intent. If that, in your view, borders on demagoguery, then your insistence -- in the face of facts such as those I have cited -- that SSA is doing an "exemplary" job of implementing this change borders on callous disregard for the well-being of disabled children.

Since I am sure that you would view that as an unfair characterization, I am confident that you will rescind your veiled charges of demagoguery and join me in supporting Mr. Apfel's decision to review this issue and report back to Congress.

Sincerely,

Kent Conrad

KENT CONRAD
United States Senate

KC:wtom
cc: Members of Finance Committee
Ken Apfel, John Callahan, SSA

THE WHITE HOUSE

Office of the Press Secretary

Embargoed For Release
Until 10:06 A.M. EDT
Saturday, July 13, 1996

RADIO ADDRESS OF THE PRESIDENT TO THE NATION

Roosevelt Room

THE PRESIDENT: Good morning. As we prepare to meet the demands of the 21st century, I believe our goal must be to offer opportunity to all Americans, to demand responsibility from all Americans, and to come together as a community -- to strengthen our shared values and to build a better future together. That is how we will meet our challenges.

This past week, those values were at work on Capitol Hill. Democrats and Republicans produced a bipartisan breakthrough for those Americans working hard to make the most of their own lives. On Tuesday, the Senate voted to pass a 90-cent increase in the minimum wage.

It's about time. You can't raise a family on $4.25 an hour, and if we don't raise it, the minimum wage will fall to a 40-year low this year in terms of what it will buy. So I congratulate the Republican members of Congress who joined with the Democrats to honor work and family, opportunity and responsibility, by voting to give minimum wage workers a raise. They should send me the final legislation quickly, without delay. That will be a victory for both parties, and more important, for all working Americans.

The passage of the minimum wage shows what can happen when we're united, when we reach across party lines, when we work together. This can signify a new spirit of cooperation coming from Capitol Hill. If we continue this spirit, we can meet our other challenges as well.

MORE

No challenge is more important than replacing our broken welfare system. Throughout my presidency I've been determined to enact reform that requires welfare recipients to work, provides child care, imposes time limits, strengthens child support enforcement by cracking down on deadbeat parents, requires teen mothers to stay in school as a condition of welfare. When necessary, I've acted without Congress. Our administration has approved 67 separate welfare reform experiments in 40 states to move people from welfare to work.

Fully three-quarters of all welfare recipients are living under new rules right now. The New York Times has called it, a quiet revolution in welfare. Today, 1.3 million fewer people are on welfare than the day I took office, and child support collections are up 40 percent.

For three and a half years I've worked with Congress to craft legislation that replaces welfare with work. For months, the Republicans insisted that welfare reform be attached to a plan I strongly feel is misguided -- to repeal Medicaid's guarantee of quality health care for elderly Americans, poor children, pregnant women and people with disabilities. I'm determined to make welfare reform the law of the land, but I've also made it clear that I will not allow Medicaid to be destroyed, and I don't care what bill it's attached to.

This week the Republican leaders in Congress announced that they are ready to work with me to pass a straightforward welfare reform bill that I can sign into law, instead of sending me legislation they know I'll veto. This can be a real breakthrough, a genuine turning point. We are very close to replacing a broken welfare system with one that requires work, offers opportunity, and demands responsibility. If we work hard and work together we should now be able to pass real welfare reform, and do it very soon.

Already bipartisan legislation has been proposed in the Senate by Democrat John Breaux and Republican John Chafee, and in the House by Republican Mike Castle and Democrat John Tanner. These are good, strong bills. They would end welfare as we know it. They should be the basis for quick agreement between the parties. And I look forward to having a bipartisan welfare reform bill within the next month.

We should also extend this same spirit to our other pressing challenges as well. We should pass the Kassebaum-Kennedy health insurance reform bill, which could benefit 25 million Americans by saying that you don't lose your health insurance when you change jobs or just because someone in your family has been sick. In its strongest form, this bill passed the Senate unanimously. But for months it slowed to a crawl as Republicans insisted on an untested and unlimited proposal for so-called medical savings accounts that have nothing to do with the fundamental purposes of Kennedy-Kassebaum reforms. So I urge them to reject the political games and let's come to a quick agreement.

MORE

We should also reform our illegal immigration laws. I support legislation that builds on our efforts to restore the rule of law to our borders, ensures that American jobs are reserved for legal workers, and boosts deportation of criminal aliens. But some insist on kicking the children of illegal immigrants out of school. Every major law enforcement organization says this could lead to more crime. So let's put aside this punitive measure and reform our illegal immigration laws now.

It's no secret that this is a political year. And there will be plenty of time to discuss our differences in the months to come. But our nation faces challenges that cannot wait until November -- real welfare reform, a minimum wage increase, access to health insurance, stronger immigration laws. We can achieve all these things now if we work together.

I look forward to working with Majority Leader Lott, Speaker Gingrich and the Democratic leaders of Congress to do the people's business in the coming weeks. If we're willing to put our differences aside for the sake of the American people, we can make this a time of genuine achievement for our nation. It would not only be good for both parties, it would be very good for America.

Thanks for listening.

END

WISCONSIN WAIVER REQUEST

General Approach

- Base judgements on:
  (1) Principles in Administration legislative proposals and previous waiver approvals, or
  (2) National legislation Administration would be willing to support.

Major Policy Issues

- Entitlement and Due Process -- Options
  (1) Jobs and assistance at contractors discretion. Waive 402(a)(10)(A).
  (2) Require best efforts to give jobs to eligible families. Waive 402(a)(10)(A).
  (3) Guarantee jobs but streamline due process. Partially waive 402(a)(10)(A).
  (4) Waive some due process, but do not waive 402 (a)(10)(A).

- Time Limits -- Options
  -- Grant request -- extension at contractor discretion.
  -- Grant terms used in "Work, Not Welfare" demonstration (based on local conditions). Still discretionary but stronger than Option 1.
  -- Grant terms similar to "Work, Not Welfare" -- require extension for those "playing by the rules."

- Medicaid
  -- Block grant-like structure and eligibility. Address on separate track; cost neutrality problems.

Other Issues

- Residency Requirement -- Options
  -- Deny request for 60-day residency requirement
  -- Approve request -- state must design Constitutional system

- Labor Issues -- Mixed
  -- Anti-displacement: cannot be waived
  -- Minimum wage: can be somewhat favorably resolved
  -- Contracting program out/merit system protections: grant waiver, expect opposition

- Benefit Reductions -- Approve and expect concerns
  -- Flat grant
  -- Child care co-payments
  -- SSI children's benefit: reduce grant to families where parents are SSI recipients

- Welfare Cost Control
  -- Wisconsin request costs $100 million + a year. Work with State to develop adequate cost methodology after waiver approval.

July 11, 1996 (5:55pm)

Wisconsin Waiver

Status of Waiver

Administration Action On May 29, Gov. Thompson delivered a 400-page request for waivers of 69 AFDC, 18 Medicaid, and 5 Food Stamp provisions. The Adminstration is prepared to grant many of the requested waivers and have been working closely with the State to work out mutually agreeable alternatives in some problem areas. However, a number of critical issues remain unresolved. Changes made by the State since its original waiver request raised some additional concerns. Some waiver requests the Executive Branch cannot legally grant -- such as more stringent Food Stamp sanctions, changes to Foster Care, minimum wage and other labor issues in work programs, and receiving AFDC funds without providing State matching funds.

Last week, Dole stopped in Wisconsin to attack the Administration for not completing its review of the waiver. However, the earliest the waiver can be approved without legal challenge is July 11 -- which marks the end of the required 30-day period for public comment.

Congressional Action Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute in a relatively close vote. The Senate is less likely to move similar legislation because of the range of procedural options available to Senate Democrats. It is also not clear how the Senate's legislation would look. CBO would likely advise the Senate that it would score the House's bill at over $.5 billion. In addition, Gov. Thompson publicly disavowed parts of the waiver request having to do with worker displacement.

Public Comments The Administration received comments on this demonstration from an extremely large number of organizations representing program recipients; providers of social services including child care; state and national labor organizations; local officials including the Mayor of Milwaukee; the Catholic archbishop of Milwaukee and representatives of other religious groups; members of the state legislature and members of the State's congressional delegation. In addition, thousands of private citizens participated in letter campaigns or signed a petition to the department regarding this waiver application. With few exceptions, the individuals and organizations urged denial or modifications of the waivers. The objections focused especially on the lack of guarantees of services and jobs, on various provisions that make families worse off, and on privatization, displacement and the minimum wage.

Key Elements of AFDC Waivers

Work Program Wisconsin's waiver would replace AFDC's cash welfare system with a program that provides temporary jobs slots (generally up to five years). The State would pay private sector or local government contractors fixed amounts to provide job slots to those applicants the contractor deems eligible. After a two-week job search, an applicant would be placed in one of four programs -- an unsubsidized work or job search (where some child care assistance would be available), a trial subsidized job, or one of two types of community service jobs.

Wisconsin projects this plan would cut welfare caseloads in half. As an incentive to reduce welfare caseloads, contractors could retain funds from higher-than-expected caseload reductions, and generally would have to pay the costs of lower-than-budgeted caseload reductions.

Benefits Assistance would be based solely on the hours of work -- no work, no money. Accordingly, benefits would not be adjusted based on family size. Since families would be required to provide co-payments for using child care services, benefits could decline with larger family size.

Protections and Contingencies Only issues related to financial eligibility could be appealed to the State. All other eligibility, job placement, and sanction decisions would be at the contractor's discretion, with no right to appeal to the State. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. The State could set up rights to appeal to the State, but has not proposed to do so. It is unclear whether any housing vouchers for children would be available after the time limit.

Key Elements of Medicaid Waivers

The waiver would end the Federal entitlement to Medicaid for poor families with children. In its place, families below 165% of poverty would pay a premium for more limited coverage than is available under Medicaid. Those who fail to pay premiums, those who drop out of the program, and most of those with access to employer-sponsored coverage would be ineligible.

MAJOR POLICY ISSUES

There are two ways of approaching the major remaining policy issues in the Wisconsin plan.

- One approach is to base policy judgements on the principles that the Administration has consistently articulated in its own legislative proposals, and that have provided the basis for previous approvals of waiver demonstrations. For example, we would ask whether the provisions are consistent with the protections for children advocated by the Administration. We could also use the standard of consistency with the principle of assuring jobs, health care and child care that both the President and Governor Thompson have articulated in describing the Wisconsin waiver.

- An alternative approach is to base policy judgements on what would be allowed under national legislation that the Administration has indicated it would be willing to accept -- such as the Administration-endorsed Breaux-Chafee welfare bill. Under this approach, if the Administration has indicated it would be willing to see a policy become the law of the land, it would be willing to let Wisconsin test it under this waiver.

The first approach would deny some provisions of the Wisconsin waiver that the State would be allowed to implement under the Breaux-Chafee welfare bill. The second approach would anger some important constituencies and set a new standard for waivers. Many States that have received waivers would want to renegotiate the existing protections for workers and children, and future requests would undoubtedly seek to go even further than Wisconsin.

Entitlement and Due Process

Background.

The toughest issue in the entire waiver is how best to make sure that recipients get jobs and child care, without handing Thompson the chance to claim we vetoed his waiver by insisting upon an individual entitlement to welfare, which we have not done in the congressional debate. (We have, however, pressed Congress for much stronger due process protections than Wisconsin proposes.) The stated intent of the Wisconsin plan is to provide enough work and child care to go around, and to use savings from caseload reduction toward that purpose, but there is no explicit guarantee. The Wisconsin statue specifically denies that any individual is entitled to a job slot. The problem is how to structure a response and hold them to their stated intent. There is not a simple mechanism for doing this.

The central question is whether to waive paragraph 402(a)(10)(A) of the Social Security Act, which is the basis of the entitlement to assistance. That paragraph reads:

> "[The State plan for aid and services to needy families with children must] provide that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals"

This paragraph is the basis for equal protections that ensure that individuals are not treated arbitrarily, or wait-listed because the contractor is running short of funds. It is also the basis of the Goldberg v. Kelly due process requirements that the State requests not apply to their demonstration. A wide variety of groups oppose a waiver of the "entitlement" provision, including among others, the Archbishop of Milwaukee, other religious groups, Democratic Congressmen and labor organizations. Governor Thompson and other Republicans in Congress are likely to strongly criticize the Administration if this provision is not waived.

Wisconsin Request

The Wisconsin legislature enacted a specific non-entitlement provision that also limits due process. While the State did not explain, there are two likely reasons for the provision. First, the major national welfare reform bills end the entitlement. Second, the State wanted to avoid the due-process constraints of Goldberg v. Kelly, a 1970 Supreme Court case which requires states to give recipients notice and an evidentiary hearing (including the opportunity submit evidence, cross-examine opposing witnesses, and retain a lawyer) before reducing or terminating any benefits to which the recipient has a statutory entitlement. Wisconsin argues that requiring a full evidentiary hearing before reducing or terminating benefits would make it easier for recipients to get around work requirements, and would keep the system looking more like a welfare program than the real world of work. Due process procedures similar to Goldberg would also make more of the contractors' decisions appealable to the State.

To ensure there is no appearance of entitlement, Wisconsin seeks almost full contractor discretion in providing assistance. A contractor could effectively refuse to provide assistance by placing individuals in permanent unsubsidized job search. Applicants and (former) recipients would have the right to appeal to State only on matters of income eligibility. They would not have the right to appeal to the State the denial or termination of a job opportunity for any other reason. (The State could set up such appeal procedures, but Wisconsin has not proposed to do so.)

The Administration has sought much stronger due process provisions in welfare bills. Both Castle-Tanner and Chafee-Breaux are much stronger than Wisconsin; the Republican bills are not much stronger. The Administration has argued that States should be required to set specific rules for providing assistance and follow them, and that applicants and beneficiaries should be able to appeal to the State who wrote the rules, not just to a contractor that has incentives to deny assistance.

Options and discussion

The basic options are:

1) Grant the State's request to provide jobs and assistance at the discretion of the contractor [waive 402(a)(10)(A)].

2) Make the new program discretionary, but require that the State make its best efforts to provide jobs to eligible families [waive 402(a)(10)(A)].

3) Guarantee a job (as opposed to a welfare check) to eligible families, with some level of due process and appeals to the State [partially waive 402(a)(10)(A)].

4) Keep current guarantee but apply it to a job opportunity. Waive due process requirements required by Goldberg [do not waive 402(a)(10)(A)].

Under option 1, assistance would be at the discretion of the contractor. Individual protections and appeal rights would be at the discretion of the State. The option affords needy individuals virtually no protection from arbitrary decisions by contractors with financial incentives to reduce the welfare rolls. The Governor will object publicly to any other option. Advocacy groups, religious groups, and the vast majority of the commenters will object most strenuously to this option. If granted, this will become the new standard for waivers. Over time, this could lead to waiver of the entitlement in any State that would do so under a block grant.

A second approach would be to grant the request to waive the entitlement, but require the State to make "best efforts" to ensure that all those eligible receive job slots. This language would confine, but not completely eliminate the State's discretion. (Similar provisions could require the

State to use "good faith" in attempting to provide job slots to all eligible individuals or to show a "substantial reason" for failing to do so. Each of these formulations may have certain advantages and disadvantages, but they all accomplish the same basic thing.) Because some discretion remains, the State almost certainly could avoid the due process protections of Goldberg: recipients would get the process proposed by the State, but not a full evidentiary hearing prior to sanction. If the State failed to meet this best efforts standard, HHS would have the authority to revoke the waiver. The standard also might be enforceable through private action.

Option three would write into the waiver the Governor's public statements -- that the State would guarantee poor families timely child care and jobs -- rather than grant the waiver that was requested. Paragraph 402(a)(10) would be rewritten rather than completely waived. If the contractor decided to terminate the job or substantially reduce benefits that the job offers, the full panoply of procedures required by Goldberg would apply. But HHS could allow the State to avoid procedures currently required by regulation, but not by Goldberg. In addition, it is possible that minor benefit reductions could be accomplished without affording Goldberg procedures. This option does not set a major precedent for future waivers, since there would be an entitlement to assistance, though not to a cash grant. It would also be consistent with the Administration's emphasis on work and protections for families.

The fourth option, at a rhetorical level, would not make clear the fundamental difference between the guarantee to the opportunity to work and the entitlement to a welfare check. Practically, this option differs from option three in that any sanction -- including a reduction in benefits for failure to work -- would be subject to Goldberg. This option wold probably be the most objectionable to Gov. Thompson, but would clearly be the strong preference of advocacy groups, religious groups, and the vast majority of the commenters.

The decision on the entitlement -- and related equal treatment and due process procedures -- should be made taking into consideration the financial incentive the waiver creates for contractors. Contractors will be paid based on the number of people they remove from the welfare rolls. If fewer people leave the rolls than the State budgeted, the contractor would have to pay the added costs (unless it were due to increasing local unemployment rates). If not prevented by rights to appeal to the State, financially strapped contractors may inappropriately deny or terminate job slots to reduce costs.

Time Limits

Background

Wisconsin proposes to limit participation in any one job component of W-2 to two years, with a five year time limit on overall participation. Some individuals might effectively have less than a five year overall time limit. Contractors could provide extensions at their discretion, but generally would have to pay the costs themselves. These optional extensions would be based in part on the contractors' assessment of an individual's ability to get a job in the local market. A parent whose request for an extension was denied would not have the right to appeal the decision to the State.

When HHS granted Wisconsin's current time limit waiver ("Work, Not Welfare"), it intended that those who play by the rules but cannot find work would get an extension. Wisconsin interpreted the waiver differently, and has drafted procedures making the extensions discretionary. The rules have not yet been tested, since no one has reached the time limit. The waiver also calls for child vouchers for housing "if a child will be made homeless as a result of the termination of benefits". It is not clear whether the State intends to continue the vouchers under W-2.

The Administration's legislative position has emphasized vouchers for children whose parents reach the time limit more than extensions for parents who play by the rules but do not find jobs. "Work, Not Welfare" provides less in vouchers than the Administration has sought in legislation. It cannot be compared directly to the Castle-Tanner and Chafee-Breaux proposals; they require vouchers in all cases where the time limit is less than five years.

Options and discussion

The three basic options are:

1) Grant the State's request for extensions to the time limits to be at the discretion of the contractor.
2) Grant terms identical to those used in the existing "Work, Not Welfare" demonstration
3) Use terms similar to "Work, Not Welfare", but specify that extensions will be granted to those who play by the State's rules and still cannot find work.

Option 1's main advantages are that the Governor and congressional majority will be pleased with the decision. However, those who play by the rules would not be protected. Extensions would effectively be paid for by the contractors, not the State, so their financial incentive would be to deny as many requests as possible. This approach would become the new standard for waivers, and a dozen or more States would likely request to have the extension rules deleted from their waivers. This approach was also strongly opposed by most commenters.

Under option 2, the Administration could deflect the Governor's criticisms by saying he had accepted identical terms once before. There would be some more extensions available to those who played by the rules than under option 1. However, the administrative structure would mean that there were fewer extensions than under the current waiver. Now, the counties are using State funds when approving an extension. Under W-2, contractors would effectively use their own. Since this approach would offer fewer protections for those reaching the time limits than existing waivers, it also would set a new precedent for waivers.

Option three would provide the greatest protections for those who play by the rules, as it would counter the financial incentives contractors had to deny extensions. It also would refrain from setting new precedents for other States. Public commenters would more satisfied with this approach. However, the Governor could be expected to object more strongly to this option than to others.

Medicaid

Wisconsin has submitted a welfare waiver with significant implications for Medicaid financing, benefits, and eligibility. Similar to the current Republican reconciliation package, Wisconsin requested the elimination of the Federal Medicaid entitlement and a block grant financing structure.

In addition, the Wisconsin waiver is structured to produce savings by removing from the Medicaid program some people who currently receive Medicaid coverage. This design is contrary to the Administration's policy to retain the coverage guarantee for **all** current eligibles. Under the Wisconsin waiver, current recipients could lose Medicaid eligibility due to non-payment of premiums, or if they have access to employer-sponsored health insurance (even non-subsidized insurance) after 12 months of employment. In addition, recipients would not be eligible for Medicaid if they had employer-subsidized insurance (at 50% or greater) for any one month during the past 18 months or currently. The Wisconsin plan would also limit several benefits that are now mandatory, including treatment services for children under the EPSDT requirements and skilled nursing and home care services.

Moreover, it is unlikely that the Wisconsin waiver meets Federal budget-neutrality requirements even if the State is allowed to restrict coverage for current eligibles (see further discussion of Medicaid budget neutrality, below).

There are two options for dealing with the Medicaid waiver, neither of which waive the Federal Medicaid entitlement. First, the Administration could choose to address a Medicaid waiver on a separate and somewhat slower track than the welfare waiver. Second, the Administration could approve the acceptable portions of the Medicaid waiver immediately (i.e., such as allowing managed care), and negotiate the remaining items, subject to existing budget neutrality standards.

OTHER ISSUES

Residency Requirement

One constitutional issue will require a White House decision. The State asked for a 60-day residency requirement before an individual could apply for assistance. DOJ believes that under Shapiro v. Thompson, a 1969 decision in which the Supreme Court held a one-year residency requirement to violate the constitutional "right to travel," any residency requirement must meet the most stringent kind of Supreme Court review, requiring assertion of a "compelling state interest." DOJ also notes that, so far, the State has failed to advance such an interest.

Lawyers have explored whether a 30-day residency requirement could be substituted in place of the longer period requested by Wisconsin, but they have determined that the length of the residency requirement is not the issue. Demonstration of a "compelling state interest" is the determining factor.

There are two options here. The first is to deny the request on the basis that Wisconsin's stated reason for instituting a residency requirement -- to deter people from moving into the State to receive welfare benefits -- does not meet the constitutional standards, and, in fact, was found by the Shapiro court to be impermissible.

The second option is to grant the request for a period up to sixty days for which the State can demonstrate an interest satisfying constitutional standards. This approach would authorize the State to institute a 60-day residency requirement if such action is constitutional, leaving the issue of constitutionality to the courts. This would allow the Administration to grant the State's request, but it would place the burden on the State to defend its provision in court. DOJ does not see any problems with this approach.

A drawback to this option is that it could represent an abdication to the courts of a decision that could properly be made by the Administration. This approach could set a dangerous precedent for the future making it difficult to deny waivers for projects we believe to be unconstitutional if the State presents any colorable argument supporting it. Benefits to this approach are that it is fully legal and it resolves a tricky issue by both giving the State what it wants and not approving anything we feel improper. A decision to hand this question to the courts may be especially appropriate in this context because the law is uncertain: a great many constitutional commentators believe that the current Court is looking for an opportunity to reverse or severely curtail Shapiro.

Labor Issues

Labor organizations, including the AFL-CIO, AFSCME, and SEIU at the international and state levels, have expressed deep concerns about W-2. In addition to supporting retention of the entitlement, due process standards, and time limit extension protections, unions have raised three labor-specific issues, two of which can be worked out to the satisfaction of the unions:

First, they have opposed Wisconsin's proposal to waive anti-displacement language in the current AFDC statute which protects public employees from losing their positions to welfare recipients serving work assignments. This issue can be resolved to address the unions' concerns. After public criticism, Governor Thompson withdrew all but one of his requests to waive anti-displacement provisions. Since HHS does not have the legal authority to waive any anti-displacement language and has taken that position in denying states' requests for similar waivers, labor organizations will expect the Administration to deny Wisconsin's remaining wavier request relating to displacement.

Second, they have expressed concerns that W-2 wage levels will violate Federal minimum wage protections. This issue can also be worked out to substantially satisfy labor's concerns. HHS proposes to require Wisconsin to pay the equivalent of the minimum wage (including any future increases) to W-2 participants for time spent at work. Labor organizations will appreciate this proposed minimum wage protection (which HHS has insisted upon for other states). They will continue to be concerned, however, that the Administration is allowing Wisconsin to require W-2 recipients to engage in non-work activities (such as job search, education, and training) as a condition of participation in W-2 for which they will receive no remuneration.

Third, labor opposes Wisconsin's proposal to permit private entities to compete for and operate W-2 agencies. While the W-2 proposal does provide a right of first refusal for counties which meet the state's contract performance criteria, labor organizations will perceive the contracting process as stacked against them. In supporting their position, unions have argued that public sector accountability and civil service protections are important to maintain in the operating of any public assistance program. Wisconsin currently runs a county-based AFDC program, and AFSCME represents the workers in every county agency in the state. While they will oppose the decision, there is not a reasonable option to deny this waiver.

Benefit Reductions

The State has proposed benefit reductions in three areas which the Administration would accept. We should expect opposition from a number of advocacy groups.

First, Wisconsin would switch to a system of flat grants to families based on participation in work activities. Large families would face a benefit reduction, but small families would receive a grant increase. This change is central to the W-2 proposal, and must be approved for Wisconsin to test its approach. Approval is, however, likely to provoke significant negative criticism.

Second, Wisconsin would require participants to make co-payments for subsidized child care. Recipients would have to make these payments from their W-2 grant, thereby reducing the overall benefit. Under the proposal, a family's co-payment increases with the number of children in care, and the cost of care. As a result, benefits effectively go down as family size increases.

Third, the State would reduce the benefits to families in which the parents are disabled SSI recipients. Benefits to children in these families would be reduced from $248 to $135.

Cost Neutrality

<u>AFDC and Food Stamps</u> Welfare waivers normally include provisions that limit total Federal spending to the amount that would have been spent absent a waiver. In all but two cases, this has been based on random assignment with experimental and control groups. Wisconsin's request does not contain a cost-neutrality provision. To assure budget control, the Administration would be required to alter its current methodology. Preliminary estimates are that Wisconsin's request would increase Federal spending by more than $100 million annually. This increase is comprised of:

- An AFDC block grant that is increased to the 1994 level. (Wisconsin, like many States, has declining spending and caseload)
- Increases in Food Stamp spending to the 1994 level that would result from Food Stamp expansions and cuts in AFDC benefits. (Food Stamp spending is also going down.)

The Administration cannot legally waive the State's matching requirements, as the State requests. Wisconsin is likely to criticize the Administration for any decision that does not give the State significant increases in Federal funding. Wisconsin in essence seeks financial credit for past caseload decreases, much of which is due to the State's low unemployment rate and healthy economy. If Wisconsin is provided historical funding levels, most other States are likely to request it as well.

The current plan is to work with the State to develop an adequate formula for determining what costs would have been under current law. Wisconsin seems amenable to this approach. This is a favorable approach because there is plenty of time to develop the formula and the Administration could not be attacked for short-funding the State.

Medicaid The Administration's Medicaid budget neutrality policy requires that estimated spending absent the waiver is equal to or greater than estimated spending with the waiver. Wisconsin's Medicaid waiver could be budget-neutral only if the State uses a new methodology that would set a very costly precedent. Even if this precedent were allowed, the new methodology would not cover the costs of the Wisconsin plan, and the State would have to achieve further savings by removing current eligibles who cannot afford the premiums or have access to employer-sponsored insurance. Allowing these new eligibility restrictions would contradict the Administration's position in the Federal Medicaid debate to maintain the Federal entitlement -- and is still unlikely to achieve budget neutrality.

`(b) CONTENTS OF STATE PLANS- A plan meets the requirements of this subsection if the plan includes the following:

`(1) OUTLINE OF FAMILY ASSISTANCE PROGRAM-

`(A) GENERAL PROVISIONS- A written document that outlines how the State will do the following:

`(i) Conduct a program, designed to serve all political subdivisions in the State, that provides assistance to needy families with (or expecting) children and provides parents with job preparation, work, and support services to enable them to leave the program and become self-sufficient.

`(ii) Determine, on an objective and equitable basis, the needs of and the amount of assistance to be provided to needy families, and treat families of similar needs and circumstances similarly, subject to subparagraph (B).

`(v) Grant an opportunity for a fair hearing before the State agency to any individual to whom assistance under the program is denied, reduced, or terminated, or whose request for such assistance is not acted on with reasonable promptness.

2-15-96 NY TIMES

Clinton Wavers After Backing Welfare Plan

By ROBERT PEAR

WASHINGTON, June 14 — Four weeks after President Clinton endorsed Wisconsin's radical proposal to abolish welfare, citing it as an example of the "quiet revolution" in social policy occurring across America, Administration officials say they now have doubts and concerns about some of its most important provisions.

The officials said they still believed that the Federal Government and the State of Wisconsin could ultimately reach an agreement permitting the state to transform its cash assistance program into an elaborate job program for poor people.

But Federal officials said they would not approve the proposal until their concerns were addressed. A basic premise of the plan, known as Wisconsin Works, is that aid should be provided only in return for work.

But the plan would not guarantee jobs for anyone and would eliminate the right to a "fair hearing" for many families denied Medicaid or welfare benefits.

The measure was approved by the Wisconsin Legislature on March 14 and signed on April 25 by Gov. Tommy G. Thompson, a Republican.

President Clinton gave it his blessing in a radio address to the nation on May 18, calling it "a solid, bold welfare reform plan." His remarks were widely seen as an effort to preempt a speech on welfare policy delivered three days later in Wisconsin by Bob Dole, his likely Republican

Continued on Page 7, Column 1

Administration Backs Off Support of Wisconsin Welfare Plan

Continued From Page 1

opponent in this year's Presidential election. But Administration officials are backing away from the initial suggestion that the entire plan could be quickly approved.

The Administration's second thoughts are the latest shift in its course on welfare policy. As a candidate in 1992, Mr. Clinton promised to "end welfare as we know it," and in September 1995 he signaled his support for a welfare bill passed by the Senate. But after liberal groups rose up in opposition, Mr. Clinton vetoed a later version of the bill, saying it was harsh to children, contained "deep budget cuts" and did too little to move people from welfare to work.

In February, Mr. Clinton praised a plan from the National Governors' Association to overhaul welfare and Medicaid. But since then, Administration officials have harshly criticized the governors' proposals at Congressional hearings.

Pummeled by Republicans for these shifts, Mr. Clinton has defended himself by pointing to waivers his Administration has granted to 39 states, allowing them to forge ahead with innovative welfare programs. Mr. Dole says states should not have to "play the so-called waiver game — trekking to Washington, D.C., hat in hand, to beg for approval to fix a failed system."

Wisconsin needs Federal waivers because its welfare plan would violate many Federal laws and rules intended to protect poor people. Melissa T. Skolfield, an Assistant Secretary of Health and Human Services, said today, "This is the most complicated waiver request we have received to date." On important questions, she said, it contains unclear statements and contradictions that must be resolved.

Some elements of the Wisconsin plan, like a five-year limit on benefits, are already being tried in other states with waivers granted by the Clinton Administration.

When asked about Wisconsin's waiver requests on May 21, Michael D. McCurry, the President's spokesman, said, "We don't see any problem with them and can't imagine that there will be any problem approving them." But Administration officials had read only a small part of the Wisconsin plan at that time. The rest was submitted on May 29.

After examining the proposal more closely, Federal officials said in interviews this week that they had serious concerns about these parts of the Wisconsin plan:

¶While Governor Thompson says he will spend more money on child care and health care for low-income people, the Wisconsin law does not actually guarantee jobs, child care or health care for anyone. The new state law says that even a person who meets all the eligibility requirements "is not entitled to services or benefits." President Clinton has fought to preserve the entitlement to health care for welfare recipients and others on Medicaid, and no state has received a waiver to eliminate this guarantee.

¶Wisconsin would eliminate the right to a fair hearing for most families denied Medicaid or welfare benefits. The Supreme Court ruled in 1970 that welfare recipients had a constitutional right to such hearings because their benefits were "a matter of statutory entitlement," like property rights. But Wisconsin officials say there is no right to court appeals under their plan because people will no longer have an entitlement to welfare or health care.

¶Poor people will not become eligible for cash assistance or state-subsidized jobs until they have lived in Wisconsin for 60 days. The Supreme Court has struck down such residence requirements on the ground that they interfere with the freedom to travel and improperly discriminate between old and new residents.

¶Wisconsin residents may, in some cases, be forced to work for less than the minimum wage. Federal officials do not have the authority to waive Federal law on this issue.

J. Jean Rogers, the Wisconsin welfare director, asserted that the minimum wage law should not apply to community service jobs or other "practice jobs" that prepare unskilled, inexperienced workers for regular employment. The money paid to these workers should be viewed as "grants for training opportunities," not as wages, she said in an interview today.

When Mr. Clinton praised the Wisconsin plan on May 18, an aide to the President said categorically that the state's waiver requests "will be approved." But Administration officials now say that some elements of the Wisconsin plan were unknown to the President at that time.

In its application, the state says that the longstanding Federal guarantee of cash assistance for destitute children is "one of the primary causes of the breakdown of low-income families," because welfare is "a much better provider than many fathers." Under the Wisconsin plan, payments would not vary with family size, as they do now (from $440 a month for a two-person family to $879 for a family of eight).

Under the plan, families would receive flat monthly grants of $555 or $518, regardless of family size. From those amounts, families would have to pay premiums for health insurance and make co-payments for child care.

Cindy Mann, a health policy analyst at the Center on Budget and Policy Priorities, a research and advocacy group, said these premiums and co-payments "could impose heavy burdens on families with very modest earnings."

Monthly health insurance premiums, for example, would range from $20 for a family of three with annual income less than $20,000 to $143 for a family of the same size with annual income of $25,180 or more.

Representative Thomas M. Barrett, Democrat of Wisconsin, expressed alarm about parts of Wisconsin's waiver request, including a provision under which welfare recipients would have been allowed to displace existing workers. Administration officials also raised questions about this provision.

Wisconsin still wants to be able to fill vacancies with welfare recipients required to work for their benefits. But state officials revised their waiver application this week to make clear that welfare recipients would not take jobs or promotional opportunities away from people now working.

The New York Times

6/15/96

July 11, 1996 (5:02pm)

Wisconsin Waiver

Status of Waiver

Administration Action On May 29, Gov. Thompson delivered a 400-page request for waivers of 69 AFDC, 18 Medicaid, and 5 Food Stamp provisions. The Adminstration is prepared to grant many of the requested waivers and have been working closely with the State to work out mutually agreeable alternatives in some problem areas. However, a number of critical issues remain unresolved. Changes made by the State since its original waiver request raised some additional concerns. Some waiver requests the Executive Branch cannot legally grant -- such as more stringent Food Stamp sanctions, changes to Foster Care, minimum wage and other labor issues in work programs, and receiving AFDC funds without providing State matching funds.

Last week, Dole stopped in Wisconsin to attack the Administration for not completing its review of the waiver. However, the earliest the waiver can be approved without legal challenge is July 11 -- which marks the end of the required 30-day period for public comment.

Congressional Action Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute in a relatively close vote. The Senate is less likely to move similar legislation because of the range of procedural options available to Senate Democrats. It is also not clear how the Senate's legislation would look. CBO would likely advise the Senate that it would score the House's bill at over $.5 billion. In addition, Gov. Thompson publicly disavowed parts of the waiver request having to do with worker displacement.

Public Comments The Administration received comments on this demonstration from an extremely large number of organizations representing program recipients; providers of social services including child care; state and national labor organizations; local officials including the Mayor of Milwaukee; the Catholic archbishop of Milwaukee and representatives of other religious groups; members of the state legislature and members of the State's congressional delegation. In addition, thousands of private citizens participated in letter campaigns or signed a petition to the department regarding this waiver application. With few exceptions, the individuals and organizations urged denial or modifications of the waivers. The objections focused especially on the lack of guarantees of services and jobs, on various provisions that make families worse off, and on privatization, displacement and the minimum wage.

Key Elements of AFDC Waivers

Work Program Wisconsin's waiver would replace AFDC's cash welfare system with a program that provides temporary jobs slots (generally up to five years). The State would pay private sector or local government contractors fixed amounts to provide job slots to those applicants the contractor deems eligible. After a two-week job search, an applicant would be placed in one of four programs -- an unsubsidized work or job search (where some child care assistance would be available), a trial subsidized job, or one of two types of community service jobs.

Wisconsin projects this plan would cut welfare caseloads in half. As an incentive to reduce welfare caseloads, contractors could retain funds from higher-than-expected caseload reductions, and generally would have to pay the costs of lower-than-budgeted caseload reductions.

Benefits Assistance would be based solely on the hours of work -- no work, no money. Accordingly, benefits would not be adjusted based on family size. Since families would be required to provide co-payments for using child care services, benefits could decline with larger family size.

Protections and Contingencies Only issues related to financial eligibility could be appealed to the State. All other eligibility, job placement, and sanction decisions would be at the contractor's discretion, with no right to appeal to the State. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. The State could set up rights to appeal to the State, but has not proposed to do so. It is unclear whether any housing vouchers for children would be available after the time limit.

Key Elements of Medicaid Waivers

The waiver would end the Federal entitlement to Medicaid for poor families with children. In its place, families below 165% of poverty would pay a premium for more limited coverage than is available under Medicaid. Those who fail to pay premiums, those who drop out of the program, and most of those with access to employer-sponsored coverage would be ineligible.

MAJOR POLICY ISSUES

There are two ways of approaching the major remaining policy issues in the Wisconsin plan.

- One approach is to base policy judgements on the principles that the Administration has consistently articulated in its own legislative proposals, and that have provided the basis for previous approvals of waiver demonstrations. For example, we would ask whether the provisions are consistent with the protections for children advocated by the Administration. We could also use the standard of consistency with the principle of assuring jobs, health care and child care that both the President and Governor Thompson have articulated in describing the Wisconsin waiver.

- An alternative approach is to base policy judgements on what would be allowed under national legislation that the Administration has indicated it would be willing to accept -- such as the Administration-endorsed Breaux-Chafee welfare bill. Under this approach, if the Administration has indicated it would be willing to see a policy become the law of the land, it would be willing to let Wisconsin test it under this waiver.

The first approach would deny some provisions of the Wisconsin waiver that the State would be allowed to implement under the Breaux-Chafee welfare bill. The second approach would anger some important constituencies and set a new standard for waivers. Many States that have received waivers would want to renegotiate the existing protections for workers and children, and future requests would undoubtedly seek to go even further than Wisconsin.

Entitlement and Due Process

Background.

The toughest issue in the entire waiver is how best to make sure that recipients get jobs and child care, without handing Thompson the chance to claim we vetoed his waiver by insisting upon an individual entitlement to welfare, which we have not done in the congressional debate. (We have, however, pressed Congress for much stronger due process protections than Wisconsin proposes.) The stated intent of the Wisconsin plan is to provide enough work and child care to go around, and to use savings from caseload reduction toward that purpose, but there is no explicit guarantee. The Wisconsin statue specifically denies that any individual is entitled to a job slot. The problem is how to structure a response and hold them to their stated intent. There is not a simple mechanism for doing this.

The central question is whether to waive paragraph 402(a)(10)(A) of the Social Security Act, which is the basis of the entitlement to assistance. That paragraph reads:

> "[The State plan for aid and services to needy families with children must] provide that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals"

This paragraph is the basis for equal protections that ensure that individuals are not treated arbitrarily, or wait-listed because the contractor is running short of funds. It is also the basis of the Goldberg v. Kelly due process requirements that the State requests not apply to their demonstration. A wide variety of groups oppose a waiver of the "entitlement" provision, including among others, the Archbishop of Milwaukee, other religious groups, Democratic Congressmen and labor organizations. Governor Thompson and other Republicans in Congress are likely to strongly criticize the Administration if this provision is not waived.

Wisconsin Request

The Wisconsin legislature enacted a specific non-entitlement provision that also limits due process. While the State did not say why , there are two likely reasons. First, the major national welfare reform bills end the entitlement. Second, the State wanted to avoid the due -process constraints of Goldberg v. Kelly, a 1970 Supreme Court case which requires states to grant a recipients notice and an evidentiary hearing (including the opportunity submit evidence, cross-examine opposing witnesses, and retain a lawyer) before reducing or terminating any benefits to which the recipient has a statutory entitlement. Wisconsin argues that requiring a full evidentiary hearing before reducing or terminating benefits would make it easier for recipients to get around work requirements, and would keep the system looking more like a welfare program than the real world of work. Due process procedures similar to Goldberg v. Kelly would also make more of the contractors' decisions appealable to the State.

To ensure there is no appearance of entitlement, Wisconsin seeks almost full contractor discretion in providing assistance. A contractor could effectively refuse to provide assistance by placing individuals in permanent unsubsidized job search. Applicants and (former) recipients could appeal to State only on matters of income eligibility. They could not appeal to the State the denial or termination of a job opportunity for any other reason.

The Administration has sought much stronger due process provisions in welfare bills. Both Castle-Tanner and Chafee-Breaux are much stronger than Wisconsin; the Republican bills are not much stronger. The Administration has argued that States should be required to set specific rules for providing assistance, and follow them, and that applicants and beneficiaries should be able to appeal to the State who wrote the rules, not just to a contractor that has incentives to deny assistance.

<u>Options and discussion</u>

The basic options are:

1) Grant the State's request to provide jobs and assistance at the discretion of the contractor [waive 402(a)(10)(A)].

2) Make the new program discretionary, but require that the State make its best efforts to provide jobs to eligible families [waive 402(a)(10)(A)].

3) Guarantee a job (as opposed to a welfare check) to eligible families, with some level of due process and appeals to the State [partially waive 402(a)(10)(A)].

4) Waive due process requirements that are not required by Goldberg v. Kelly [do not waive 402(a)(10)(A)].

Under option 1, assistance would be at the discretion of the contractor. Individual protections and appeal rights would be at the discretion of the State. The option affords needy individuals virtually no protection from arbitrary decisions by contractors with financial incentives to reduce the welfare rolls. The Governor will object publicly to any other option. Advocacy groups, religious groups, and the vast majority of the commenters will object most strenuously to this option. If granted, this will become the new standard for waivers. Over time, this could lead to waiver of the entitlement in any State that would do so under a block grant.

A second approach would be to grant the request to waive the entitlement, but require the State to make "best efforts" to ensure that all those eligible receive job slots. This language would confine, but not completely eliminate the State's discretion. (Similar provisions could require the State to use "good faith" in attempting to provide job slots to all eligible individuals or to show a "substantial reason" for failing to do so. Each of these formulations may have certain advantages and disadvantages, but they all accomplish the same basic thing.) Because some discretion remains, the State almost certainly could avoid the due process protections of Goldberg: recipients would get the process proposed by the State, but not a full evidentiary hearing prior to sanction. If the State failed to meet this best efforts standard, HHS would have the authority to revoke the waiver. The standard also might be enforceable through private action.

Option three would write into the waiver the Governor's public statements -- that the State would guarantee poor families timely child care and jobs -- rather than grant the waiver that was requested. Paragraph 402(a)(10) would be rewritten rather than completely waived. Recipients would be able to appeal to the State if they believed they were denied a job or terminated unfairly. They could not be fired until after the fair hearing, but could be subjected to lesser sanctions such as a reduction in benefits. They would also have a private right of action in court after the appeal to the State. However, due process procedures could be streamlined, and Goldberg v. Kelly would not need to apply to benefit reductions based on failure to work. This option does not set a major precedent for future waivers, since there would be an entitlement to assistance, though not to a cash grant. It would also be consistent with the Administration's emphasis on work and protections for families.

Under the fourth option, the existing entitlement language would not be waived. The key difference between this option and the third is that Goldberg v. Kelly protections would apply to a wider range of actions. Any sanction -- including a reduction in benefits for failure to work -- would be subject to Goldberg v. Kelly. This option wold probably be the most objectionable to Gov. Thompson, but would clearly be the strong preference of advocacy groups, religious groups, and the vast majority of the commenters.

The decision on entitlement -- and related equal treatment and due process procedures -- needs to factor in the financial incentives contractors will have. They will be paid based on the number of people they remove from the welfare rolls. If fewer people leave the rolls than the State budgeted, the contractor would have to pay the added costs (unless it were due to increasing local unemployment rates). Absent rights to appeal to the State, financially strapped contractors may inappropriately deny or terminate job slots to reduce costs.

Time Limits

Background

Wisconsin proposes to limit participation in any one job component of W-2 to two years, with a five year time limit on overall participation. Some individuals might effectively have less than a five year overall time limit. Contractors could provide extensions at their discretion, but generally would have to pay the costs themselves. These optional extensions would be based in part on the contractors' assessment of an individual's ability to get a job in the local market. A parent whose request for an extension was denied would not have the right to appeal the decision to the State.

When HHS granted Wisconsin's current time limit waiver ("Work, Not Welfare"), it intended that those who play by the rules but cannot find work would get an extension. Wisconsin interpreted the waiver differently, and has drafted procedures making the extensions discretionary. The rules have not yet been tested, since no one has reached the time limit. The waiver also calls for child vouchers for housing "if a child will be made homeless as a result of the termination of benefits". It is not clear whether the State intends to continue the vouchers under W-2.

The Administration's legislative position has emphasized vouchers for children whose parents reach the time limit more than extensions for parents who play by the rules but do not find jobs. "Work, Not Welfare" provides less in vouchers than the Administration has sought in legislation. It cannot be compared directly to the Castle-Tanner and Chafee-Breaux proposals; they require vouchers in all cases where the time limit is less than five years.

Options and discussion

The three basic options are:

1) Grant the State's request for extensions to the time limits to be at the discretion of the contractor.
2) Grant terms identical to those used in the existing "Work, Not Welfare" demonstration
3) Use terms similar to "Work, Not Welfare", but specify that extensions will be granted to those who play by the State's rules and still cannot find work.

Option 1's main advantages are that the Governor and congressional majority will be pleased with the decision. However, those who play by the rules would not be protected. Extensions would effectively be paid for by the contractors, not the State, so their financial incentive would be to deny as many requests as possible. This approach would become the new standard for waivers, and a dozen or more States would likely request to have the extension rules deleted from their waivers. This approach was also strongly opposed by most commenters.

Under option 2, the Administration could deflect the Governor's criticisms by saying he had accepted identical terms once before. There would be some more extensions available to those who played by the rules than under option 1. However, the administrative structure would mean that there were fewer extensions than under the current waiver. Now, the counties are using State funds when approving an extension. Under W-2, contractors would effectively use their own. Since this approach would offer fewer protections for those reaching the time limits than existing waivers, it also would set a new precedent for waivers.

Option three would provide the greatest protections for those who play by the rules, as it would counter the financial incentives contractors had to deny extensions. It also would refrain from setting new precedents for other States. Public commenters would more satisfied with this approach. However, the Governor could be expected to object more strongly to this option than to others.

pwc (a backtrack)

Medicaid

Wisconsin has submitted a welfare waiver with significant Medicaid financial and programmatic implications. In connection with the work-based system, the Wisconsin waiver proposes to provide health insurance to current Medicaid eligibles and expand Medicaid eligibility for all families and children under 165% of poverty, subject to payment of premiums. Although the plan would expand coverage to some populations, the plan is predicated on a block grant financing structure and would eliminate the federal entitlement to Medicaid for the AFDC population (although if passed under current law, the waiver would not be structured as a block grant, despite such rhetoric). If the Administration approves the Medicaid proposal, the waiver would set a precedent for waiving mandatory eligibility and services that states could potentially use to restrict eligibility when expenditures exceed revenues. Approval of the Wisconsin plan would also undermine the Administration's objection to Republican proposals that deny the federal guarantee of Medicaid eligibility. The Administration could also be criticized for approving a plan that, similar to the Republican reconciliation package, would link a generally acceptable welfare reform proposal to unacceptable Medicaid changes.

In addition to the above concerns, the following eligibility restrictions could compromise the guarantee of Medicaid coverage. Recipients would lose Medicaid eligibility due to non-payment of premiums, or if they have access to any employer- sponsored health insurance after 12 months of employment. In addition, recipients would not be eligible for Medicaid if they had employer-subsidized insurance (at 50% or greater) for any one month during the past 18 months or currently. The Wisconsin plan would also limit several mandatory services, including treatment services for children under the EPSDT requirements, and skilled nursing and home care services.

If the Wisconsin health plan is approved without the above restrictions on eligibility, budget neutrality requirements will be harder for the state to achieve.

OTHER ISSUES

Residency Requirement

One constitutional issue will require a White House decision. The State asked for a 60-day residency requirement before an individual could apply for assistance. DOJ believes that under Shapiro v. Thompson, a 1969 decision in which the Supreme Court held a one-year residency requirement to violate the constitutional "right to travel," any residency requirement must meet the most stringent kind of Supreme Court review, requiring assertion of a "compelling state interest." DOJ also notes that, so far, the State has failed to advance such an interest.

Lawyers have explored whether a 30-day residency requirement could be substituted in place of the longer period requested by Wisconsin, but they have determined that the length of the residency requirement is not the issue. Demonstration of a "compelling state interest" is the determining factor.

There are two options here. The first is to deny the request on the basis that Wisconsin's stated reason for instituting a residency requirement -- to deter people from moving into the State to receive welfare benefits -- does not meet the constitutional standards, and, in fact, was found by the Shapiro court to be impermissible.

The second option is to grant the request for a period up to sixty days for which the State can demonstrate an interest satisfying constitutional standards. This approach would authorize the State to institute a 60-day residency requirement if such action is constitutional, leaving the issue of constitutionality to the courts. This would allow the Administration to grant the State's request, but it would place the burden on the State to defend its provision in court. DOJ does not see any problems with this approach.

A drawback to this option is that it could represent an abdication to the courts of a decision that could properly be made by the Administration. This approach could set a dangerous precedent for the future making it difficult to deny waivers for projects we believe to be unconstitutional if the State presents any colorable argument supporting it. Benefits to this approach are that it is fully legal and it resolves a tricky issue by both giving the State what it wants and not approving anything we feel improper. A decision to hand this question to the courts may be especially appropriate in this context because the law is uncertain: a great many constitutional commentators believe that the current Court is looking for an opportunity to reverse or severely curtail Shapiro.

Labor Issues

Labor organizations, including the AFL-CIO, AFSCME, and SEIU at the international and state levels, have expressed deep concerns about W-2. In addition to supporting retention of the entitlement, due process standards, and time limit extension protections, unions have raised three labor-specific issues, two of which can be worked out to the satisfaction of the unions:

First, they have opposed Wisconsin's proposal to waive anti-displacement language in the current AFDC statute which protects public employees from losing their positions to welfare recipients serving work assignments. This issue can be resolved to address the unions' concerns. After public criticism, Governor Thompson withdrew all but one of his requests to waive anti-displacement provisions. Since HHS does not have the legal authority to waive any anti-displacement language and has taken that position in denying states' requests for similar waivers, labor organizations will expect the Administration to deny Wisconsin's remaining wavier request relating to displacement.

Second, they have expressed concerns that W-2 wage levels will violate Federal minimum wage protections. This issue can also be worked out to substantially satisfy labor's concerns. HHS proposes to require Wisconsin to pay the equivalent of the minimum wage (including any future increases) to W-2 participants for time spent at work. Labor organizations will appreciate this proposed minimum wage protection (which HHS has insisted upon for other states). They will continue to be concerned, however, that the Administration is allowing Wisconsin to require W-2 recipients to engage in non-work activities (such as job search, education, and training) as a condition of participation in W-2 for which they will receive no remuneration.

Third, labor opposes Wisconsin's proposal to permit private entities to compete for and operate W-2 agencies. While the W-2 proposal does provide a right of first refusal for counties which meet the state's contract performance criteria, labor organizations will perceive the contracting process as stacked against them. In supporting their position, unions have argued that public sector accountability and civil service protections are important to maintain in the operating of any public assistance program. Wisconsin currently runs a county-based AFDC program, and AFSCME represents the workers in every county agency in the state. While they will oppose the decision, there is not a reasonable option to deny this waiver.

Benefit Reductions

The State has proposed benefit reductions in three areas which the Administration would accept. We should expect opposition from a number of advocacy groups.

First, Wisconsin would switch to a system of flat grants to families based on participation in work activities. Large families would face a benefit reduction, but small families would receive a grant increase. This change is central to the W-2 proposal, and must be approved for Wisconsin to test its approach. Approval is, however, likely to provoke significant negative criticism.

Second, Wisconsin would require participants to make co-payments for subsidized child care. Recipients would have to make these payments from their W-2 grant, thereby reducing the overall benefit. Under the proposal, a family's co-payment increases with the number of children in care, and the cost of care. As a result, benefits effectively go down as family size increases.

Third, the State would reduce the benefits to families in which the parents are SSI recipients. Benefits to children in these families would be reduced from $248 to $135.

Cost Neutrality

AFDC Welfare waivers normally include provisions that limit total Federal spending to the amount that would have been spent absent a waiver. In all but two cases, this has been based on random assignment with experimental and control groups. Wisconsin's request does not contain a cost-neutrality provision. To assure budget control, the Administration would be required to alter its current methodology. Preliminary estimates are that Wisconsin's request would increase Federal spending by more than $100 million annually. This increase is comprised of:

- An AFDC block grant that is increased to the 1994 level. (Wisconsin, like many States, has declining spending and caseload)
- Increases in Food Stamp spending to the 1994 level that would result from Food Stamp expansions and cuts in AFDC benefits. (Food Stamp spending is also going down.)

The Administration cannot legally waive the State's matching requirements, as the State requests. Wisconsin is likely to criticize the Administration for any decision that does not give the State significant increases in Federal funding. Wisconsin in essence seeks financial credit for past caseload decreases, much of which is due to the State's low unemployment rate and healthy economy. If Wisconsin is provided historical funding levels, most other States are likely to request it as well.

The current plan is to work with the State to develop an adequate formula for determining what costs would have been under current law. Wisconsin seems amenable to this approach. This is a favorable approach because there is plenty of time to develop the formula and the Administration could not be attacked for short-funding the State.

Medicaid In considering Medicaid waivers in general, budget neutrality is assumed if the agreed upon estimate of spending absent the waiver is greater than the estimate of spending with the waiver. Should the Federal entitlement be retained, it is highly unlikely that the Wisconsin Medicaid waiver alone would be budget neutral.

Wisconsin has been using managed care in its Medicaid program since 1983. The state currently enrolls its SSI and AFDC populations in Primary Care Case Management. In five of the largest counties, Wisconsin has established a voluntary HMO plan for the AFDC population which has enrolled 93% of the AFDC population in those counties. The state has recently submitted a 1915(b) waiver to establish mandatory HMO enrollment for the entire AFDC population, 45% of whom are already enrolled into managed care. The state assumes that the waiver will save only $16.8 million in FY 1997 off of a base of $481 million in fee-for-service expenditures.

HHS has proposed to allow the state to use these savings to offset the costs of the expansion population. The Administration's policy to date which has been not to allow states to use managed care savings from proposed or operating 1915(b) waivers. OMB staff estimate that if all states "took credit" for savings associated with their current managed care programs, the costs to the Federal government for the period from FY 1997- FY 2001 would equal approximately $3 billion. We assume that approximately 50% of the AFDC adults and children will be enrolled in managed care under current law.

In addition to the concerns about precedent, OMB staff, based upon state estimates, believe that the savings from the 1915(b) are not enough to offset the costs of the expansion population. Thus, we believe that if Medicaid is to stand alone, it will not be budget neutral with or without the use of the managed care savings.

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Medicaid

Wisconsin has submitted a welfare waiver with significant implications for Medicaid financing, benefits, and eligibility. Similar to the current Republican reconciliation package, Wisconsin requested the elimination of the Federal Medicaid entitlement and a block grant financing structure.

In addition, the Wisconsin waiver is structured to produce savings by removing from the Medicaid program some people who currently receive Medicaid coverage. This design is contrary to the Administration's policy to retain the coverage guarantee for **all** current eligibles. Under the Wisconsin waiver, current recipients could lose Medicaid eligibility due to non-payment of premiums, or if they have access to employer-sponsored health insurance (even non-subsidized insurance) after 12 months of employment. In addition, recipients would not be eligible for Medicaid if they had employer-subsidized insurance (at 50% or greater) for any one month during the past 18 months or currently. The Wisconsin plan would also limit several benefits that are now mandatory, including treatment services for children under the EPSDT requirements and skilled nursing and home care services.

Moreover, it is unlikely that the Wisconsin waiver meets Federal budget-neutrality requirements even if the State is allowed to restrict coverage for current eligibles (see further discussion of Medicaid budget neutrality, below).

There are two options for dealing with the Medicaid waiver. First, the Administration could choose to address a Medicaid waiver on a separate and somewhat slower track the welfare waiver. Second, the Administration could approve the acceptable portions of the Medicaid waiver immediately (i.e., such as allowing managed care), and negotiate the remaining items (~~such as elimination of the Federal entitlement~~), subject to existing budget neutrality standards.

Medicaid Cost Neutrality

The Administration's Medicaid budget neutrality policy requires that estimated spending absent the waiver is equal to or greater than estimated spending with the waiver. Wisconsin's Medicaid waiver could be budget-neutral only if the State uses a new methodology that would set a very costly precedent. Even if this precedent were allowed, the new methodology would not cover the costs of the Wisconsin plan, and the State would have to achieve further savings by removing current eligibles who ~~cannot afford~~ the premiums or have access to employer-sponsored insurance. Allowing these new eligibility restrictions would contradict the Administration's position in the Federal Medicaid debate to maintain the Federal entitlement -- and is still unlikely to achieve budget neutrality.

In either case, we would presumably say that we would not waive the e

Cover sheet

July 11, 1996 (1:39pm)

Wisconsin Waiver

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Status of Waiver

Administration Action On May 29, Gov. Thompson delivered a 400-page request for waivers of 69 AFDC, 18 Medicaid, and 5 Food Stamp provisions. The Adminstration is prepared to grant many of the requested waivers and have been working closely with the State to work out mutually agreeable alternatives in some problem areas. However, a number of critical issues remain unresolved. Changes made by the State since its original waiver request raised some additional concerns. Some waiver requests the Executive Branch cannot legally grant -- such as more stringent Food Stamp sanctions, changes to Foster Care, minimum wage and other labor issues in work programs, and receiving AFDC funds without providing State matching funds.

Last week, Dole stopped in Wisconsin to attack the Administration for not completing its review of the waiver. However, the earliest the waiver can be approved without legal challenge is July 11 -- which marks the end of the required 30-day period for public comment.

Congressional Action Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute in a relatively close vote. The Senate is less likely to move similar legislation because of the range of procedural options available to Senate Democrats. It is also not clear how the Senate's legisaltion would look. CBO would likely advise the Senate that it would score the House's bill at over $.5 billion. In addition, Gov. Thompson publicly disavowed parts of the waiver request having to do with worker displacement.

Public Comments The Administration received comments on this demonstration from an extremely large number of organizations representing program recipients; providers of social services including child care; state and national labor organizations; local officials including the Mayor of Milwaukee; the Catholic archbishop of Milwaukee and representatives of other religious groups; members of the state legislature and members of the State's congressional delegation. In addition, thousands of private citizens participated in letter campaigns or signed a petition to the department regarding this waiver application. With few exceptions, the individuals and organizations urged denial or modifications of the waivers. The objections focused especially on the lack of guarantees of services and jobs, on various provisions that make families worse off, and on privatization, displacement and the minimum wage.

Key Elements of AFDC Waivers

Work Program Wisconsin's waiver would replace AFDC's cash welfare system with a program that provides temporary jobs slots (generally up to five years). The State would pay private sector or local government contractors fixed amounts to provide job slots to those applicants the contractor deems eligible. After a two-week job search, an applicant would be placed in one of four programs -- an unsubsidized work or job search (where some child care assistance would be available), a trial subsidized job, or one of two types of community service jobs.

Wisconsin projects this plan would cut welfare caseloads in half. As an incentive to reduce welfare caseloads, contractors could retain funds from higher-than-expected caseload reductions, and generally would have to pay the costs of lower-than-budgeted caseload reductions.

Benefits Assistance would be based solely on the hours of work -- no work, no money. Accordingly, benefits would not be adjusted based on family size. Since families would be required to provide co-payments for using child care services, benefits could decline with larger family size.

Protections and Contingencies Only issues related to financial eligibility could be appealed to the State. All other eligibility, job placement, and sanction decisions would be at the contractor's discretion, with no right to appeal to the State. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. It is unclear whether any housing vouchers for children would be available after the time limit.

Key Elements of Medicaid Waivers

The waiver would end the Federal entitlement to Medicaid for poor families with children. In its place, families below 165% of poverty would pay a premium for more limited coverage than is available under Medicaid. Those who fail to pay premiums, those who drop out of the program, and most of those with access to employer-sponsored coverage would be ineligible.

MAJOR POLICY ISSUES

There are two ways of approaching the major remaining policy issues in the Wisconsin plan.

- One approach is to base policy judgements on the principles that the Administration has consistently articulated in its own legislative proposals, and that have provided the basis for previous approvals of waiver demonstrations. For example, we would ask whether the provisions are consistent with the protections for children advocated by the Administration. We could also use the standard of consistency with the principle of assuring jobs, health care and child care that both the President and Governor Thompson have articulated in describing the Wisconsin waiver.

- An alternative approach is to base policy judgements on what would be allowed under national legislation that the Administration would be willing to accept -- such as the Breaux-Chafee welfare bill -- rather than what the Administration wants from Congress.

The first approach would deny some provisions of the Wisconsin waiver that the State would be allowed to implement under the Breaux-Chafee welfare bill. The second approach would anger some important constituencies and set a new standard for waivers. Many States that have received waivers would want to renegotiate the existing protections for workers and children, and future requests would undoubtedly seek to go even further than Wisconsin.

Entitlement and Due Process

Background.

The toughest issue in the entire waiver is how best to make sure that recipients get jobs and child care, without handing Thompson the chance to claim we vetoed his waiver by insisting upon an individual entitlement to welfare, which we have not done in the congressional debate. (We have, however, pressed Congress for much stronger due process protections than Wisconsin proposes.) The stated intent of the Wisconsin plan is to provide enough work and child care to go around, and to use savings from caseload reduction toward that purpose, but there is no explicit guarantee. The Wisconsin statue specifically denies that any individual is entitled to a job slot. The problem is how to structure a response and hold them to their stated intent. There is not a simple mechanism for doing this.

The central question is whether to waive paragraph 402(10)(A) of the Social Security Act, which is the basis of the entitlement to assistance. That paragraph reads:

> "[The State plan for aid and services to needy families with children must] provide that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals"

This paragraph is the basis of the Goldberg v. Kelly due process requirements that the State requests not apply to their demonstration. A wide variety of groups oppose a waiver of this provision, including among others the Archbishop of Milwaukee, other religious groups, Democratic Congressmen and labor organizations. Governor Thompson and other Republicans in Congress are likely to strongly criticize the Administration if this provision is not waived.

Wisconsin Request

The Wisconsin legislature enacted a specific non-entitlement provision that also limits due process, for two stated reasons: 1) The major national welfare reform bills end the entitlement; and 2) the state wanted to avoid the due -process constraints of Goldberg v. Kelly, a 1970 Supreme Court case which requires states to grant a recipients notice and an evidentiary hearing (including the opportunity submit evidence, cross-examine opposing witnesses, and retain a lawyer) before reducing or terminating any benefits to which the recipient has a statutory entitlement. Wisconsin argues that requiring a full evidentiary hearing before reducing or terminating benefits would make it easier for recipients to get around work requirements, and would keep the system looking more like a welfare program than the real world of work. Due process procedures similar to Goldberg v. Kelly would also make more of the contractors' decisions appealable to the State.

To ensure there is no appearance of entitlement, Wisconsin seeks almost full contractor discretion in providing assistance. A contractor could effectively refuse to provide assistance by placing individuals in permanent unsubsidized job search. Applicants and (former) recipients could appeal to State only on matters of income eligibility. They could not appeal to the State the denial or termination of a job opportunity for any other reason.

The Administration has sought much stronger due process provisions in welfare bills. Both Castle-Tanner and Chafee-Breaux are much stronger than Wisconsin; the Republican bills are not much stronger. States would have to set specific rules for providing assistance, and follow them. Applicants and beneficiaries could appeal to the State who wrote the rules, not just to a contractor that has incentives to deny assistance.

<u>Options and discussion</u>

While the fundamental choice is whether to waive the entitlement and the related due process protections, the suboptions are as stark. Options include:

- Waiving the entitlement:
  - Waive both the entitlement and due process procedures
  - Waive the entitlement, but set up due process procedures that are less stringent than Goldberg v. Kelly

- Not waiving the entitlement:
  - Retaining all current due process procedures
  - Specify that Goldberg v. Kelly (including appeals to the State) applies only to the denial or termination of a job slot, but not to reducing benefits for failure to work. Allow the State to develop their own procedures as long as they meet Goldberg v. Kelly.

Goldberg v. Kelly does not apply to assistance that is discretionary. As a result, waiving the entitlement voids its due process requirements unless some other entitlement is set up in its stead (such as a guarantee of a job slot). Absent an alternative entitlement, appeal rights would be those the State proposes unless more substantial ones were required by the waiver terms and conditions. Added appeal rights might include, for example, a timely post-termination evidentiary hearing before the State. (Goldberg v. Kelly requires a pre-termination hearing).

The State says it intends to provide timely assistance to all who are eligible. Therefore, it is not clear that waiving the entitlement is necessary for Wisconsin to accomplish its goals. Under W-2, any entitlement would be very different from the current one. A remaining entitlement could be structured so that Goldberg v. Kelly rules applied only to whether or not someone was offered a job slot or fired, but not to whether their benefit was reduced for failure to work. Current due process protections are more substantial than Goldberg v. Kelly requires, so the State could be given substantial flexibility to design its own procedures. This would substantially reduce the burden of fair hearings while providing assurances that a job would be available.

Any due process procedures need to factor in the financial incentives contractors will have. They will be paid based on the number of people they remove from the welfare rolls. If fewer people leave the rolls than the State budgeted, the contractor would have to pay the added costs (unless it were due to increasing local unemployment rates). Absent rights to appeal to the State, financially strapped contractors may inappropriately deny or terminate job slots to reduce costs.

Time Limits

Wisconsin proposes to limit participation in any one job component of W-2 to two years, with a five year time limit on overall participation. Some individuals might effectively have less than a five year overall time limit. Contractors could provide extensions at their discretion, but generally would have to pay the costs themselves. These optional extensions would be based in part on the contractors' assessment of an individual's ability to get a job in the local market. A parent whose request for an extension was denied would not have the right to appeal the decision to the State. When an extension was not granted, it is not clear whether any vouchers would be available for children needing assistance to retain housing.

There are three basic options:

- Grant the State's request without further clarification.
- Grant terms identical to those used in the existing "Work, Not Welfare" demonstration
- Use terms similar to "Work, Not Welfare", but ~~specify~~ clarify that individual capacities must be considered when deciding whether to grant an extension to the time limit.

Wisconsin's current small "Work, Not Welfare" demonstration calls for extension on cash assistance when local conditions were such that individuals "who play by the rules" could not find a job. When approving the existing waiver, it was intended that the State's criteria for extensions should factor in individual's capacities to do work, and that extension would be granted to those who met them. However, the State's procedures (which have not been used since no one has reached the time limit yet) look only at local economic conditions and are optional to the counties rather than mandatory. The waiver also calls for child vouchers for housing "if a child will be made homeless as a result of the termination of benefits". It is not clear whether the State intends to continue the vouchers under W-2.

The Administration's legislative position has emphasized vouchers for children whose parents reach the time limit more than extensions for parents who play by the rules but do not find jobs. "Work, Not Welfare" provides less in vouchers than the Administration has sought. It cannot be compared directly to the Castle-Tanner and Chafee-Breaux proposals; they require vouchers in all cases where the time limit is less than five years. With respect to extensions, the Administration has sought to increase the number of exemptions States could offer, but has not proposed the specific exemptions it has sought in waivers (such as jobs that are suitable to a person's intellectual and other capacities). On the other hand, it has sought for States to have standard procedures for deciding who got an extension, rather than leaving it up to contractors.)

It is unlikely that Wisconsin would use the "Work, Not Welfare" procedures if W-2 waivers are granted without modification. The State plans to leave the decision to contractors, and not have written procedures. Each extension would effectively be paid for by the contractor, not the State, so their financial incentive would be to deny as many as possible.

Similarly, using terms identical to "Work, Not Welfare" would lead to a different outcome. Now, the counties are using State funds when approving an extension. Under W-2, contractors would effectively use their own.

Medicaid

being replaced

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In addition to the above concerns, the following eligibility restrictions could compromise the guarantee of Medicaid coverage. Recipients would lose Medicaid eligibility due to non-payment of premiums, or if they have access to any employer- sponsored health insurance after 12 months of employment. In addition, recipients would not be eligible for Medicaid if they had employer-subsidized insurance (at 50% or greater) for any one month during the past 18 months or currently. The Wisconsin plan would also limit several mandatory services, including treatment services for children under the EPSDT requirements, and skilled nursing and home care services.

If the Wisconsin health plan is approved without the above restrictions on eligibility, budget neutrality requirements will be harder for the state to achieve.

OTHER ISSUES
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One constitutional issue will require a White House decision. The State asked for a 60-day residency requirement before any person could apply for assistance. DOJ believes that under Shapiro v. Thompson, a 1969 decision in which the Supreme Court held a one-year residency requirement to violate the constitutional "right to travel," any residency requirement must meet the most stringent kind of Supreme Court review, requiring assertion of a "compelling state interest." DOJ also notes that, so far, the State has failed to advance such an interest.

Lawyers have explored whether a 30-day residency requirement could be substituted in place of the longer period requested by Wisconsin, but they have determined that the length of the residency requirement is not the issue. Demonstration of a "compelling state interest" is the determining factor.

There are two options here. The first is to deny the request on the basis that Wisconsin's stated reason for instituting a residency requirement -- to deter people from moving into the State to receive welfare benefits -- does not meet the constitutional standards.

The second option is to grant the request for a period up to sixty days for which the state can demonstrate an interest satisfying constitutional standards. This approach would authorize the State to institute a 60-day residency requirement if such action is constitutional, leaving the issue of constitutionality to the courts. This would allow the Administration to grant the State's request, but it would place the burden on the State to defend its provision in court. DOJ does not see any problems with this approach. (It should be noted that many constitutional commentators believe the current court is looking for an opportunity to reverse or curtail Shapiro.) This option, however, may be viewed as passing to the courts what should be an Executive Branch decision. Some might see this as a precedent reducing the authority of the Executive Branch.

Labor Issues Cons other States

Labor organizations, including the AFL-CIO, AFSCME, and SEIU at the international and state levels, have expressed deep concerns about W-2. In addition to supporting retention of the entitlement, due process standards, and time limit extension protections, unions have raised three labor-specific issues, two of which can be wor~~ked out favorably~~:

First, they have opposed Wisconsin's proposal to waive anti-displacement language in the current AFDC statute which protects public employees from losing their positions to welfare recipients serving work assignments. This issue can be worked out favorably for the unions. After public criticism, Governor Thompson withdrew all but one of his requests to waive anti-displacement provisions. Since HHS does not have the legal authority to waive any anti-displacement language and has taken that position in denying states' requests for similar waivers, labor organizations will expect the Administration to deny Wisconsin's remaining wavier request relating to displacement.

somewhat

Second, they have expressed concerns that W-2 wage levels will violate federal minimum wage protections. This issue can also be worked out favorably. HHS proposes to require Wisconsin to pay the equivalent of the minimum wage (including any future increases) to W-2 participants for time spent at work. Labor organizations will appreciate this proposed minimum wage protection (which HHS has insisted upon for other states). They will continue to be concerned, however, that the Administration is allowing Wisconsin to require W-2 recipients to engage in non-work activities (such as job search, education, and training) as a condition of participation in W-2 for which they will receive no remuneration.

waiver needed on merit pay

Third, they oppose Wisconsin's proposal to permit private entities to compete for and operate W-2 agencies. Resolution of this issue is unclear. While the W-2 proposal does provide a right of first refusal for counties which meet the state's contract performance criteria, labor organizations will perceive the contracting process as stacked against them. In supporting their position, unions have argued that public sector accountability and civil service protections are important to maintain in the operating of any public assistance program. Wisconsin currently runs a county-based AFDC program, and AFSCME represents the workers in every county agency in the state.

Benefit Reductions

Texas

The State has proposed benefit reductions in three areas. First, they would switch to a system of flat grants to families based on participation in work activities. Large families would face a benefit reduction, but small families would receive a grant increase. This change is central to the W-2 proposal, and must be approved for Wisconsin to test its approach. Approval is, however, likely to provoke significant negative criticism.

Second, Wisconsin would require participants to make co-payments for subsidized child care. Recipients would have to make these payments from their W-2 grant, thereby reducing the overall benefit. Under the proposal, the copay increases with the number of children in care, and the cost of care. As a result, benefits effectively go down as family size increases. The Administration discussed the possibility of capping the copays for lower income families.

Third, the State would reduce SSI children's grants to the smallest amount by which current benefit are increased when family size increases (the difference between two and three persons). It is not clear why this benefit level was selected. One possibility is using the average increment, rather than the smallest one.

Cost Neutrality

Welfare waivers normally include provisions that limit total Federal spending to the amount that would have been spent absent a waiver. In all but two cases, this has been based on random assignment with experimental and control groups -- and only one of those was not based on the research evaluation data. Preliminary estimates are that Wisconsin's request would increase Federal spending by more than $100 million annually, an amount that is roughly 25% of their AFDC grant. (HHS and USDA do not have complete detailed estimates.) This increase is comprised of:

- An AFDC block grant that is increased to the 1994 level. (Wisconsin, like many States, has declining spending and caseload)
- Increases in Food Stamp spending to the 1994 level that would result from Food Stamp expansions and cuts in AFDC benefits. (Food Stamp spending is also going down.)

Wisconsin is likely to criticize the Administration for any decision that does not give the State significant increases in Federal funding. Wisconsin in essence seeks financial credit for past caseload decreases, much of which is due to the State's low unemployment rate and healthy economy. If Wisconsin is provided historical funding levels, most other States are likely to request it as well.

The third option appears to be the best approach -- agreeing to work with the State to develop an adequate formula for determining what costs would have been under current law. There is plenty of time, since the waiver would not be implemented for over a year. The Administration could not be attacked for short-funding the State, since the number would not be known. There would also be no precedent for other States to apply for similar funding increases.

Medicaid Cost Neutrality

being replaced

In considering Medicaid waivers in general, budget neutrality is assumed if the agreed upon estimate of spending absent the waiver is greater than the estimate of spending with the waiver. Should the federal entitlement be retained, it is highly unlikely that the Wisconsin Medicaid waiver alone would be budget neutral.

Wisconsin has been using managed care in its Medicaid program since 1983. The state currently enrolls its SSI and AFDC populations in Primary Care Case Management. In five of the largest counties, Wisconsin has established a voluntary HMO plan for the AFDC population which has enrolled 93% of the AFDC population in those counties. The state has recently submitted a 1915(b) waiver to establish mandatory HMO enrollment for the entire AFDC population, 45% of whom are already enrolled into managed care. The state assumes that the waiver will save only $16.8 million in FY 1997 off of a base of $481 million in fee-for-service expenditures.

HHS has proposed to allow the state to use these savings to offset the costs of the expansion population. The Administration's policy to date which has been not to allow states to use managed care savings from proposed or operating 1915(b) waivers. OMB staff estimate that if all states "took credit" for savings associated with their current managed care programs, the costs to the federal government for the period from FY 1997- FY 2001 would equal approximately $3 billion. We assume that approximately 50% of the AFDC adults and children will be enrolled in managed care under current law.

In addition to the concerns about precedent, OMB staff, based upon state estimates, believe that the savings from the 1915(b) are not enough to offset the costs of the expansion population. Thus, we believe that if Medicaid is to stand alone, it will not be budget neutral with or without the use of the managed care savings.

July 11, 1996 (1:34pm)

Wisconsin Waiver

Status of Waiver

Administration Action On May 29, Gov. Thompson delivered a 400-page request for waivers of 69 AFDC, 18 Medicaid, and 5 Food Stamp provisions. The Adminstration is prepared to grant many of the requested waivers and have been working closely with the State to work out mutually agreeable alternatives in some problem areas. However, a number of critical issues remain unresolved. Changes made by the State since its original waiver request raised some additional concerns. Some waiver requests the Executive Branch cannot legally grant -- such as more stringent Food Stamp sanctions, changes to Foster Care, minimum wage and other labor issues in work programs, and receiving AFDC funds without providing State matching funds.

Last week, Dole stopped in Wisconsin to attack the Administration for not completing its review of the waiver. However, the earliest the waiver can be approved without legal challenge is July 11 -- which marks the end of the required 30-day period for public comment.

Congressional Action Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute in a relatively close vote. The Senate is less likely to move similar legislation because of the range of procedural options available to Senate Democrats. It is also not clear how the Senate's legisaltion would look. CBO would likely advise the Senate that it would score the House's bill at over $.5 billion. In addition, Gov. Thompson publicly disavowed parts of the waiver request having to do with worker displacement.

Public Comments The Administration received comments on this demonstration from an extremely large number of organizations representing program recipients; providers of social services including child care; state and national labor organizations; local officials including the Mayor of Milwaukee; the Catholic archbishop of Milwaukee and representatives of other religious groups; members of the state legislature and members of the State's congressional delegation. In addition, thousands of private citizens participated in letter campaigns or signed a petition to the department regarding this waiver application. With few exceptions, the individuals and organizations urged denial of modifications of the waivers. The objections focused especially on the lack of guarantees of services and jobs, on various provisions that make families worse off, and on privatization, displacement and the minimum wage.

Key Elements of AFDC Waivers

Work Program Wisconsin's waiver would replace AFDC's cash welfare system with a program that provides temporary jobs slots (generally up to five years). The State would pay private sector or local government contractors fixed amounts to provide job slots to those applicants the contractor deems eligible. After a two-week job search, an applicant would be placed in one of four programs -- an unsubsidized work or job search (where some child care assistance would be available), a trial subsidized job, or one of two types of community service jobs.

Wisconsin projects this plan would cut welfare caseloads in half. As an incentive to reduce welfare caseloads, contractors could retain funds from higher-than-expected caseload reductions, and generally would have to pay the costs of lower-than-budgeted caseload reductions.

Benefits Assistance would be based solely on the hours of work -- no work, no money. Accordingly, benefits would not be adjusted based on family size. Since families would be required to provide co-payments for using child care services, benefits could decline with larger family size.

Protections and Contingencies Only issues related to financial eligibility could be appealed to the State. All other eligibility, job placement, and sanction decisions would be at the contractor's discretion, with no right to appeal to the State. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. It is unclear whether any housing vouchers for children would be available after the time limit.

Key Elements of Medicaid Waivers

The waiver would end the Federal entitlement to Medicaid for poor families with children. In its place, families below 165% of poverty would pay a premium for more limited coverage than is available under Medicaid. Those who fail to pay premiums, those who drop out of the program, and most of those with access to employer-sponsored coverage would be ineligible.

MAJOR POLICY ISSUES

There are two ways of approaching the major remaining policy issues in the Wisconsin plan.

- One approach is to base policy judgements on the principles that the Administration has consistently articulated in its own legislative proposals, and that have provided the basis for previous approvals of waiver demonstrations. For example, we would ask whether the provisions are consistent with the protections for children advocated by the Administration. We could also use the standard of consistency with the principle of assuring jobs, health care and child care that both the President and Governor Thompson have articulated in describing the Wisconsin waiver.

- An alternative approach is to base policy judgements on what would be allowed under national legislation that the Administration would be willing to accept -- such as the Breaux-Chafee welfare bill -- rather than what the Administration wants from Congress.

The first approach would deny some provisions of the Wisconsin waiver that the State would be allowed to implement under the Breaux-Chafee welfare bill. The second approach would anger some important constituencies and set a new standard for waivers. Many States that have received waivers would want to renegotiate the existing protections for workers and children, and future requests would undoubtedly seek to go even further than Wisconsin.

Entitlement and Due Process

Background.

The toughest issue in the entire waiver is how best to make sure that recipients get jobs and child care, without handing Thompson the chance to claim we vetoed his waiver by insisting upon an individual entitlement to welfare, which we have not done in the congressional debate. (We have, however, pressed Congress for much stronger due process protections than Wisconsin proposes.) The stated intent of the Wisconsin plan is to provide enough work and child care to go around, and to use savings from caseload reduction toward that purpose, but there is no explicit guarantee. The Wisconsin statue specifically denies that any individual is entitled to a job slot. The problem is how to structure a response and hold them to their stated intent. There is not a simple mechanism for doing this.

The central question is whether to waive paragraph 402(10)(A) of the Social Security Act, which is the basis of the entitlement to assistance. That paragraph reads:

> "[The State plan for aid and services to needy families with children must] provide that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals"

This paragraph is the basis of the Goldberg v. Kelly due process requirements that the State requests not apply to their demonstration. A wide variety of groups oppose a waiver of this provision, including among others the Archbishop of Milwaukee, other religious groups, Democratic Congressmen and labor organizations. Governor Thompson and other Republicans in Congress are likely to strongly criticize the Administration if this provision is not waived.

Wisconsin Request

The Wisconsin legislature enacted a specific non-entitlement provision that also limits due process, for two stated reasons: 1) The major national welfare reform bills end the entitlement; and 2) the state wanted to avoid the due -process constraints of Goldberg v. Kelly, a 1970 Supreme Court case which requires states to grant a recipients notice and an evidentiary hearing (including the opportunity submit evidence, cross-examine opposing witnesses, and retain a lawyer) before reducing or terminating any benefits to which the recipient has a statutory entitlement. Wisconsin argues that requiring a full evidentiary hearing before reducing or terminating benefits would make it easier for recipients to get around work requirements, and would keep the system looking more like a welfare program than the real world of work. Due process procedures similar to Goldberg v. Kelly would also make more of the contractors' decisions appealable to the State.

To ensure there is no appearance of entitlement, Wisconsin seeks almost full contractor discretion in providing assistance. A contractor could effectively refuse to provide assistance by placing individuals in permanent unsubsidized job search. Applicants and (former) recipients could appeal to State only on matters of income eligibility. They could not appeal to the State the denial or termination of a job opportunity for any other reason.

The Administration has sought much stronger due process provisions in welfare bills. Both Castle-Tanner and Chafee-Breaux are much stronger than Wisconsin; the Republican bills are not much stronger. States would have to set specific rules for providing assistance, and follow them. Applicants and beneficiaries could appeal to the State who wrote the rules, not just to a contractor that has incentives to deny assistance.

Options and discussion

While the fundamental choice is whether to waive the entitlement and the related due process protections, the suboptions are as stark. Options include:

- Waiving the entitlement:
  - Waive both the entitlement and due process procedures
  - Waive the entitlement, but set up due process procedures that are less stringent than Goldberg v. Kelly

- Not waiving the entitlement:
  - Retaining all current due process procedures
  - Specify that Goldberg v. Kelly (including appeals to the State) applies only to the denial or termination of a job slot, but not to reducing benefits for failure to work. Allow the State to develop their own procedures as long as they meet Goldberg v. Kelly.

Goldberg v. Kelly does not apply to assistance that is discretionary. As a result, waiving the entitlement voids its due process requirements unless some other entitlement is set up in its stead (such as a guarantee of a job slot). Absent an alternative entitlement, appeal rights would be those the State proposes unless more substantial ones were required by the waiver terms and conditions. Added appeal rights might include, for example, a timely post-termination evidentiary hearing before the State. (Goldberg v. Kelly requires a pre-termination hearing).

The State says it intends to provide timely assistance to all who are eligible. Therefore, it is not clear that waiving the entitlement is necessary for Wisconsin to accomplish its goals. Under W-2, any entitlement would be very different from the current one. A remaining entitlement could be structured so that Goldberg v. Kelly rules applied only to whether or not someone was offered a job slot or fired, but not to whether their benefit was reduced for failure to work. Current due process protections are more substantial than Goldberg v. Kelly requires, so the State could be given substantial flexibility to design its own procedures. This would substantially reduce the burden of fair hearings while providing assurances that a job would be available.

Any due process procedures need to factor in the financial incentives contractors will have. They will be paid based on the number of people they remove from the welfare rolls. If fewer people leave the rolls than the State budgeted, the contractor would have to pay the added costs (unless it were due to increasing local unemployment rates). Absent rights to appeal to the State, financially strapped contractors may inappropriately deny or terminate job slots to reduce costs.

Time Limits

Wisconsin proposes to limit participation in any one job component of W-2 to two years, with a five year time limit on overall participation. Some individuals might effectively have less than a five year overall time limit. Contractors could provide extensions at their discretion, but generally would have to pay the costs themselves. These optional extensions would be based in part on the contractors' assessment of an individual's ability to get a job in the local market. A parent whose request for an extension was denied would not have the right to appeal the decision to the State. When an extension was not granted, it is not clear whether any vouchers would be available for children needing assistance to retain housing.

There are three basic options:

- Grant the State's request without further clarification.
- Grant terms identical to those used in the existing "Work, Not Welfare" demonstration
- Use terms similar to "Work, Not Welfare", but specify that individual capacities must be considered when deciding whether to grant an extension to the time limit.

Wisconsin's current small "Work, Not Welfare" demonstration calls for extension on cash assistance when local conditions were such that individuals "who play by the rules" could not find a job. When approving the existing waiver, it was intended that the State's criteria for extensions should factor in individual's capacities to do work, and that extension would be granted to those who met them. However, the State's procedures (which have not been used since no one has reached the time limit yet) look only at local economic conditions and are optional to the counties rather than mandatory. The waiver also calls for child vouchers for housing "if a child will be made homeless as a result of the termination of benefits". It is not clear whether the State intends to continue the vouchers under W-2.

The Administration's legislative position has emphasized vouchers for children whose parents reach the time limit more than extensions for parents who play by the rules but do not find jobs. "Work, Not Welfare" provides less in vouchers than the Administration has sought. It cannot be compared directly to the Castle-Tanner and Chafee-Breaux proposals; they require vouchers in all cases where the time limit is less than five years. With respect to extensions, the Administration has sought to increase the number of exemptions States could offer, but has not proposed the specific exemptions it has sought in waivers (such as jobs that are suitable to a person's intellectual and other capacities). On the other hand, it has sought for States to have standard procedures for deciding who got an extension, rather than leaving it up to contractors.)

It is unlikely that Wisconsin would use the "Work, Not Welfare" procedures if W-2 waivers are granted without modification. The State plans to leave the decision to contractors, and not have written procedures. Each extension would effectively be paid for by the contractor, not the State, so their financial incentive would be to deny as many as possible.

Similarly, using terms identical to "Work, Not Welfare" would lead to a different outcome. Now, the counties are using State funds when approving an extension. Under W-2, contractors would effectively use their own.

Medicaid

Wisconsin has submitted a welfare waiver with significant Medicaid financial and programmatic implications. In connection with the work-based system, the Wisconsin waiver proposes to provide health insurance to current Medicaid eligibles and expand Medicaid eligibility for all families and children under 165% of poverty, subject to payment of premiums. Although the plan would expand coverage to some populations, the plan is predicated on a block grant financing structure and would eliminate the federal entitlement to Medicaid for the AFDC population (although if passed under current law, the waiver would not be structured as a block grant, despite such rhetoric). If the Administration approves the Medicaid proposal, the waiver would set a precedent for waiving mandatory eligibility and services that states could potentially use to restrict eligibility when expenditures exceed revenues. Approval of the Wisconsin plan would also undermine the Administration's objection to Republican proposals that deny the federal guarantee of Medicaid eligibility. The Administration could also be criticized for approving a plan that, similar to the Republican reconciliation package, would link a generally acceptable welfare reform proposal to unacceptable Medicaid changes.

In addition to the above concerns, the following eligibility restrictions could compromise the guarantee of Medicaid coverage. Recipients would lose Medicaid eligibility due to non-payment of premiums, or if they have access to any employer- sponsored health insurance after 12 months of employment. In addition, recipients would not be eligible for Medicaid if they had employer-subsidized insurance (at 50% or greater) for any one month during the past 18 months or currently. The Wisconsin plan would also limit several mandatory services, including treatment services for children under the EPSDT requirements, and skilled nursing and home care services.

If the Wisconsin health plan is approved without the above restrictions on eligibility, budget neutrality requirements will be harder for the state to achieve.

OTHER ISSUES

Residency Requirement

One constitutional issue will require a White House decision. The State asked for a 60-day residency requirement before any person could apply for assistance. DOJ believes that under Shapiro v. Thompson, a 1969 decision in which the Supreme Court held a one-year residency requirement to violate the constitutional "right to travel," any residency requirement must meet the most stringent kind of Supreme Court review, requiring assertion of a "compelling state interest." DOJ also notes that, so far, the State has failed to advance such an interest.

Lawyers have explored whether a 30-day residency requirement could be substituted in place of the longer period requested by Wisconsin, but they have determined that the length of the residency requirement is not the issue. Demonstration of a "compelling state interest" is the determining factor.

There are two options here. The first is to deny the request on the basis that Wisconsin's stated reason for instituting a residency requirement -- to deter people from moving into the State to receive welfare benefits -- does not meet the constitutional standards.

The second option is to grant the request for a period up to sixty days for which the state can demonstrate an interest satisfying constitutional standards. This approach would authorize the State to institute a 60-day residency requirement if such action is constitutional, leaving the issue of constitutionality to the courts. This would allow the Administration to grant the State's request, but it would place the burden on the State to defend its provision in court. DOJ does not see any problems with this approach. (It should be noted that many constitutional commentators believe the current court is looking for an opportunity to reverse or curtail Shapiro.) This option, however, may be viewed as passing to the courts what should be an Executive Branch decision. Some might see this as a precedent reducing the authority of the Executive Branch.

Labor Issues

Labor organizations, including the AFL-CIO, AFSCME, and SEIU at the international and state levels, have expressed deep concerns about W-2. In addition to supporting retention of the entitlement, due process standards, and time limit extension protections, unions have raised three labor-specific issues, two of which can be worked out favorably:

First, they have opposed Wisconsin's proposal to waive anti-displacement language in the current AFDC statute which protects public employees from losing their positions to welfare recipients serving work assignments. This issue can be worked out favorably for the unions. After public criticism, Governor Thompson withdrew all but one of his requests to waive anti-displacement provisions. Since HHS does not have the legal authority to waive any anti-displacement language and has taken that position in denying states' requests for similar waivers, labor organizations will expect the Administration to deny Wisconsin's remaining wavier request relating to displacement.

Second, they have expressed concerns that W-2 wage levels will violate federal minimum wage protections. HHS proposes to require Wisconsin to pay the equivalent of the minimum wage (including any future increases) to W-2 participants for time spent at work. Labor organizations will appreciate this proposed minimum wage protection (which HHS has insisted upon for other states). They will continue to be concerned, however, that the Administration is allowing Wisconsin to require W-2 recipients to engage in non-work activities (such as job search, education, and training) as a condition of participation in W-2 for which they will receive no remuneration.

Third, they oppose Wisconsin's proposal to permit private entities to compete for and operate W-2 agencies. While the W-2 proposal does provide a right of first refusal for counties which meet the state's contract performance criteria, labor organizations will perceive the contracting process as stacked against them. In supporting their position, unions have argued that public sector accountability and civil service protections are important to maintain in the operating of any public assistance program. Wisconsin currently runs a county-based AFDC program, and AFSCME represents the workers in every county agency in the state.

Benefit Reductions

The State has proposed benefit reductions in three areas. First, they would switch to a system of flat grants to families based on participation in work activities. Large families would face a benefit reduction, but small families would receive a grant increase. This change is central to the W-2 proposal, and must be approved for Wisconsin to test its approach. Approval is, however, likely to provoke significant negative criticism.

Second, Wisconsin would require participants to make co-payments for subsidized child care. Recipients would have to make these payments from their W-2 grant, thereby reducing the overall benefit. Under the proposal, the copay increases with the number of children in care, and the cost of care. As a result, benefits effectively go down as family size increases. The Administration discussed the possibility of capping the copays for lower income families.

Third, the State would reduce SSI children's grants to the smallest amount by which current benefit are increased when family size increases (the difference between two and three persons). It is not clear why this benefit level was selected. One possibility is using the average increment, rather than the smallest one.

Cost Neutrality

Welfare waivers normally include provisions that limit total Federal spending to the amount that would have been spent absent a waiver. In all but two cases, this has been based on random assignment with experimental and control groups -- and only one of those was not based on the research evaluation data. Preliminary estimates are that Wisconsin's request would increase Federal spending by more than $100 million annually, an amount that is roughly 25% of their AFDC grant. (HHS and USDA do not have complete detailed estimates.) This increase is comprised of:

- An AFDC block grant that is increased to the 1994 level. (Wisconsin, like many States, has declining spending and caseload)
- Increases in Food Stamp spending to the 1994 level that would result from Food Stamp expansions and cuts in AFDC benefits. (Food Stamp spending is also going down.)

Wisconsin is likely to criticize the Administration for any decision that does not give the State significant increases in Federal funding. Wisconsin in essence seeks financial credit for past caseload decreases, much of which is due to the State's low unemployment rate and healthy economy. If Wisconsin is provided historical funding levels, most other States are likely to request it as well.

The third option appears to be the best approach -- agreeing to work with the State to develop an adequate formula for determining what costs would have been under current law. There is plenty of time, since the waiver would not be implemented for over a year. The Administration could not be attacked for short-funding the State, since the number would not be known. There would also be no precedent for other States to apply for similar funding increases.

Medicaid Cost Neutrality

In considering Medicaid waivers in general, budget neutrality is assumed if the agreed upon estimate of spending absent the waiver is greater than the estimate of spending with the waiver. Should the federal entitlement be retained, it is highly unlikely that the Wisconsin Medicaid waiver alone would be budget neutral.

Wisconsin has been using managed care in its Medicaid program since 1983. The state currently enrolls its SSI and AFDC populations in Primary Care Case Management. In five of the largest counties, Wisconsin has established a voluntary HMO plan for the AFDC population which has enrolled 93% of the AFDC population in those counties. The state has recently submitted a 1915(b) waiver to establish mandatory HMO enrollment for the entire AFDC population, 45% of whom are already enrolled into managed care. The state assumes that the waiver will save only $16.8 million in FY 1997 off of a base of $481 million in fee-for-service expenditures.

HHS has proposed to allow the state to use these savings to offset the costs of the expansion population. The Administration's policy to date which has been not to allow states to use managed care savings from proposed or operating 1915(b) waivers. OMB staff estimate that if all states "took credit" for savings associated with their current managed care programs, the costs to the federal government for the period from FY 1997- FY 2001 would equal approximately $3 billion. We assume that approximately 50% of the AFDC adults and children will be enrolled in managed care under current law.

In addition to the concerns about precedent, OMB staff, based upon state estimates, believe that the savings from the 1915(b) are not enough to offset the costs of the expansion population. Thus, we believe that if Medicaid is to stand alone, it will not be budget neutral with or without the use of the managed care savings.

July 8, 1996

DRAFT

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Ken Apfel

SUBJECT: Major Issues -- Wisconsin Waiver

Here is a brief summary of issues the White House needs to resolve in the next few days so that the President can announce the Wisconsin waiver at the NGA meeting July 16.

I. Overview

On May 29, Gov. Thompson delivered a 400-page request for specific waivers of 69 AFDC, 18 Medicaid, and 5 Food Stamp provisions. HHS sees no problem with at least 54 of the 69 welfare provisions and 7 of the 18 Medicaid provisions. USDA has more limited waiver authority (it cannot allow changes that would make any families worse off), but __ of __ have been worked out.

The earliest the waiver can be approved without legal challenge is July 11, which marks the end of 30-day period for public comment. Dole stopped in Wisconsin last week to attack the Administration for not getting the waiver done yet. Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, but the Senate is less likely to move that legislation -- unless we stir it up again by turning down too much.

II. Major Policy Issues

There are two schools of thought on how to approach the major remaining policy and legal issues in the Wisconsin plan. One approach, advocated by HHS, is to treat Wisconsin as another waiver request, and try to hold the line on a handful of issues -- time limits, residency requirements, etc. -- that HHS has denied states in the past. The other approach would be to treat Wisconsin as the political equivalent of another welfare reform bill, and judge its elements based on what we are willing to accept or reject in national legislation from Congress. The first approach would deny Wisconsin some provisions even though states could do them under the Breaux-Chafee welfare bill we support. The second approach would take the same position on Wisconsin that we have staked out in the national debate: yes to a work-based welfare block grant, no to a Medicaid block grant.

1. Medicaid: On Medicaid, the state will get very little of what it asked for. Although the health plan was designed to expand coverage up to 165% of poverty by placing welfare recipients in managed care, we will have to reject the basic framework, which is a block grant that ends the Medicaid guarantee. HCFA is also firmly opposed to allowing premiums of $20 a month and forcing recipients to accept insurance from their employer if it is available. However, we can grant a pending Medicaid 1915(b) waiver that will place welfare recipients in managed care and use the savings to expand coverage, and pledge to keep working with the state to approve as much of the W-2 waiver as we can while preserving the guarantee. As always, budget neutrality will be a problem. The Medicaid provisions are the primary reason we need to keep Congress from passing legislation to deem the waiver approved, because such a bill would be their current reconciliation package in miniature -- generally acceptable welfare reform linked to unacceptable Medicaid. ?

2. Time Limits: The Wisconsin plan includes a 5-year lifetime limit, like our bill and all the major congressional plans. The issue for the waiver is whether to impose terms on who should get extensions to the time limit. Wisconsin wants to leave that decision to the discretion of the caseworker. In other states, HHS has always forced states to accept mandatory extensions for anyone who reaches the time limit and can't find a job. The one exception is the two-county waiver we granted Wisconsin in 1993, which essentially left that decision to the state.

We have two realistic options: 1) allow the state to implement the exact terms statewide that we granted in 1993; or 2) let the state develop its own terms. Under the first option, Thompson could only complain a little, since he has bragged in the past that his two-county waiver was the toughest in the country. Under the second option, the state could do what it will be able to do anyway if welfare reform becomes law. As a practical matter, Wisconsin will probably implement the same rules whichever option we choose. (Mary Jo Bane favors a third option, to "clarify" the 1993 terms along the lines of what HHS has demanded from other states -- but others at HHS consider this a non-starter, since it would enrage Thompson without enabling us to say he had agreed to the same terms once before.)

3. Entitlement: The toughest issue in the entire waiver is how best to make sure that recipients get jobs and child care, without handing Thompson the chance to claim we vetoed his waiver by demanding an individual entitlement, which has not been our bottom line in the congressional debate. The intent of the Wisconsin plan is to provide enough work and child care to go around, and to use some savings from caseload reduction toward that purpose, but like Breaux-Chafee and other congressional reform bills, there is no explicit guarantee.

The legislature enacted a specific non-entitlement provision, for two reasons: 1) the major national welfare reform bills end the entitlement; and 2) the state wanted to avoid the due-process constraints of *Goldberg v. Kelly*, a 197_ Supreme Court case which requires states to grant a recipient notice and an evidentiary hearing (including the opportunity to submit evidence, cross-examine opposing witnesses, and retain a lawyer) before terminating any benefits. Wisconsin is willing to provide "reasonable notice and opportunity for a review," but argues that requiring a hearing before terminating benefits would make it easier for recipients to get around work requirements, and would keep the system still looking like a welfare program instead of the real world of work.

There is no having it both ways on this question: any outright guarantee will maintain the individual entitlement, even if we call it an assurance or something else. HHS would like to do just that, and impose due process procedures that go further than the state proposed. That would have the advantage of protecting recipients if the state runs out of money. On the other hand, it might prompt Thompson to reject the terms of the waiver, claim that we had vetoed welfare reform a third time in order to preserve the current system, and lobby Congress to pass a full Wisconsin waiver.

Another approach would be to require the state to "make best efforts to ensure that those eligible receive services and benefits." Holding Wisconsin to a "best efforts" standard would make it easier for courts and the Administration to review the waiver if Wisconsin fails to provide jobs, but it could not be interpreted as an individual entitlement. Recipients would get the notice and review proposed by the state, but they could not go to court every time they were sanctioned.

White House Counsel suggests that instead of HHS outlining its own detailed due process procedures for the state, we could grant the state the right to go forward with its procedural provisions "insofar as and to the extent that they comport with applicable consistitutional requirements." Since these issues are bound to be litigated no matter what we say, it probably makes sense to leave them to the courts to decide.

III. Legal Issues

On two of labor's main concerns (worker displacement and the minimum wage), we lack the legal authority to grant exactly what the state wanted. The provision that requires workfare participants to be placed in new (not existing) job vacancies is in a section of the Social Security Act that cannot be waived under current law. But every major welfare bill would remove that provision, so Wisconsin will be free to do what it wants once welfare reform becomes law. On the minimum wage, we can essentially grant the state's request to pay participants the minimum wage for 30 hours a week of work but not additional hours of education and training. But the state will have to reduce hours or raise benefits once an increase in the mininum wage goes into effect.

Two constitutional issues will require a White House decision. First, the state asked for a 60-day residency requirement before applying for assistance. HHS has refused to grant even 30-day requirements in the past, based on a 1970<ck> Supreme Court decision, *Shapiro v. Thompson* (no relation) that a one-year residency requirement violated the constitutional right to travel. HHS is now willing to go along with a 30-day requirement for Wisconsin (and Minnesota, which has had a waiver pending for several months), on the grounds that 30 days represents a reasonable administrative period but 60 days does not. White House

Counsel argues that many states have residency requirements of 60 days or longer for other benefits -- Wisconsin requires university students to live in the state for a full year before they can qualify for resident tuition -- and that we could grant the state a residency requirement for "the period up to 60 days for which the state can demonstrate a compelling administrative interest." That would allow us to grant the state's request, but put the burden on Wisconsin to defend its provision in court.

[The second constitutional issue involves the denial of benefits to U.S.-born citizen children of illegal immigrants. HHS argues that because the children are born here, they have a right to get welfare, even though their parents are not eligible and cannot be required to work. White House Counsel argues that if welfare is turned into a jobs program and eligibility is based on work, the children of illegal immigrants might well have no constitutional claim, any more than the children of parents who refuse to work. This is not a big issue in Wisconsin, where there are very few child-only cases, but it is an enormous concern in California, where most of the caseload growth in the past decade has been child-only cases involving children of illegal immigrants.]

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

09-Jul-1996 10:46am

TO: Diana M. Fortuna

FROM: Carol H. Rasco
Domestic Policy Council

SUBJECT: Wisconsin

Here is email I sent Leon yesterday.

Two notes:

I understand now Dole isn't going.

Kevin told me yesterday they have sent the first set of easy terms and conditions and have a call(meeting?) with Wisconsin today.

Thanks.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

08-Jul-1996 04:04pm

TO: Jennifer Palmieri

FROM: Carol H. Rasco
Domestic Policy Council

SUBJECT: Wisconsin

LEON:

I have talked to Kevin Thurm followed by a discussion with Bruce Reed. HHS is moving full steam ahead knowing that they may be called upon to be ready with the terms and conditions in final form by Tuesday of next week for POTUS to announce at NGA.

They are preparing to approve the waiver with the vast majority of the welfare reform side approvable and approx 7 or so of the 18 pieces of medicaid...so it would not be a complete separation of Medicaid. For anything in either program we are not approving we would not disapprove. HHS will be prepared to say the things not currently approved are either legally not approvable or use terminology that reflects back Thompson's words of "protecting children, assuring jobs, etc."

I am waiting now to hear from Jack Lew as I am not sure OMB is as far along as HHS....no proof of that, just a hunch at this point.

Finally, Bruce and I have just talked at length about timing...I want to strongly urge the approval be done before the President goes to NGA and that his speech then focus on welfare reform needed from Congress and other similiar items...I say this because I think we can do a better job of rolling this out from here, it will counteract whatever Dole does to us in his speech Monday (I assume he is still speaking Monday?), we can better brief Dem. governors to support us by getting it done Monday afternoon perhaps, and finally, it won't look like POTUS is the one who does the actual approving....I would like to discuss this at 7:30 meeting tomorrow morning.

Thanks.