THE PRESIDENT HAS SEEN
7-12-96

THE WHITE HOUSE

WASHINGTON

July 11, 1996

MR. PRESIDENT:

The attached policy paper on the Wisconsin Welfare waiver was prepared by your advisors for your meeting tomorrow morning. **It would be useful for you to read it prior to that meeting.**

There are basically three issues for your decision -- two major ones (the entitlement/due process and time limits), and a third one (residency requirement) about which Counsel and HHS have differing views. There are also several subsidiary issues which do not involve contending options and are simply presented for your sign off.

The entitlement. Four main options are presented -- the first two waive the individual entitlement, the third partially waives it: (i) allow Wisconsin to provide jobs at the contractors' discretion (no guarantee of a job); (ii) require "best efforts" to provide a job; (iii) guarantee a job (i.e., an entitlement to a job, not to benefits); (iv) no waiver.

Time limits. The main issue is whether the extension should be at the contractor's sole discretion or should be mandated for those recipients who play by the rules but cannot find work. Three options are presented.

Residency. The issue is whether to deny Wisconsin's request for a 60-day residency requirement as unconstitutional or to buck the decision to the courts.

Finally, the memo discusses certain labor, benefit and cost issues.

Todd Stern

THE PRESIDENT HAS SEEN
7-12-96

96 JUL 11 P10:30

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.

Decision Issues

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

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

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

Other Issues

- 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.

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

175719

July 11, 1996 (10:16pm)

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 has 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 addressed some of these concerns. Some waiver requests cannot be legally granted by the Executive Branch -- 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. Dole stopped in Wisconsin last week to attack the Administration for not completing its review of the waiver and sent a letter on Thursday calling for the Administration to "get it done".

Congressional Action. Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute along party lines. 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. If the Administration disapproves too much of the Wisconsin request, the Republicans may look again at ways to pass legislation to deem the waiver approved.

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 slot (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. The State could, however, accept such appeals at its own discretion. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. Housing vouchers for children after the time limit would also be discretionary.

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.

DECISION ISSUES

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

- One approach is to base policy judgements on the principles that the Administration has 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 Administration could take the same position that it has stated in the national debate -- yes to ending the entitlement to AFDC and no to ending the entitlement to Medicaid.

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, and prompt a fierce reaction from

Thompson, Dole and other Republicans. 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 the Administration vetoed his waiver by insisting upon an individual entitlement to welfare, which it has not done in the congressional debate. (The Administration has, however, pressed Congress for 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 reductions toward that purpose, but there is no explicit guarantee. The Wisconsin statute 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, Bob Dole, 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 why, 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 the 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, though the State could accept such appeals at its discretion.

The Administration has sought stronger due process provisions in welfare bills. The Castle-Tanner legislation (and Chafee-Breaux, we believe) is somewhat stronger than Wisconsin; the Republican bills are about the same. 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 not 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. At the same time, it will enable Wisconsin to say to employers who agree to make job slots available that they will be able to deal with workers the same way they deal with their other employees. 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. The State might be able to implement its proposal without a waiver if a welfare reform bill is signed into law.

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, reflecting the State's and the Governor's intention to do so -- 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 children.

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. This option would also be subject to Goldberg. This option would probably be the most objectionable to Gov. Thompson. It would clearly be the strong preference of advocacy groups, religious groups, and the vast majority of the commenters, who would view any weakening of the entitlement as unacceptable.

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.

At the same time, this decision also should take into account that any attempt to preserve the entitlement will be seen as a change from the Administration's support for Chafee-Breaux and Castle-Tanner, but not as a change from the bill the Administration proposed.

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". The State intends to make the vouchers discretionary 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, but not beyond the five year limit.

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. If the current Republican bills become law, they will allow the State to implement their proposal.

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 3 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, and to claim that the Administration is less willing to accept time limits now than in 1993.

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.

OTHER ISSUES

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

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

Wisconsin has submitted a welfare waiver with significant and unacceptable 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. Given that Medicaid and welfare are being separated in the House and Senate, it makes sense to separate them in this context as well.

The Wisconsin waiver is structured to produce savings by removing from the Medicaid program some people who now receive Medicaid coverage -- a design 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. 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.

175719

per Todd no copy given to VP or EL

THE WHITE HOUSE

WASHINGTON

July 11, 1996

TO RES (Info)

MR. PRESIDENT:

The attached policy paper on the Wisconsin Welfare waiver was prepared by your advisors for your meeting tomorrow morning. **It would be useful for you to read it prior to that meeting.**

There are basically three issues for your decision -- two major ones (the entitlement/due process and time limits), and a third one (residency requirement) about which Counsel and HHS have differing views. There are also several subsidiary issues which do not involve contending options and are simply presented for your sign off.

The entitlement. Four main options are presented -- the first two waive the individual entitlement, the third partially waives it: (i) allow Wisconsin to provide jobs at the contractors' discretion (no guarantee of a job); (ii) require "best efforts" to provide a job; (iii) guarantee a job (i.e., an entitlement to a job, not to benefits); (iv) no waiver.

Time limits. The main issue is whether the extension should be at the contractor's sole discretion or should be mandated for those recipients who play by the rules but cannot find work. Three options are presented.

Residency. The issue is whether to deny Wisconsin's request for a 60-day residency requirement as unconstitutional or to buck the decision to the courts.

Finally, the memo discusses certain labor, benefit and cost issues.

Todd Stern

WISCONSIN WAIVER REQUEST

General Approach

96 JUL 11 P10 : 30

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

Decision Issues

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

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

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

Other Issues

- 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.

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

July 11, 1996 (10:16pm)

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 has 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 addressed some of these concerns. Some waiver requests cannot be legally granted by the Executive Branch -- 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. Dole stopped in Wisconsin last week to attack the Administration for not completing its review of the waiver and sent a letter on Thursday calling for the Administration to "get it done".

Congressional Action. Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute along party lines. 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. If the Administration disapproves too much of the Wisconsin request, the Republicans may look again at ways to pass legislation to deem the waiver approved.

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 slot (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. The State could, however, accept such appeals at its own discretion. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. Housing vouchers for children after the time limit would also be discretionary.

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.

DECISION ISSUES

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

- One approach is to base policy judgements on the principles that the Administration has 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 Administration could take the same position that it has stated in the national debate -- yes to ending the entitlement to AFDC and no to ending the entitlement to Medicaid.

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, and prompt a fierce reaction from

Thompson, Dole and other Republicans. 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 the Administration vetoed his waiver by insisting upon an individual entitlement to welfare, which it has not done in the congressional debate. (The Administration has, however, pressed Congress for 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 reductions toward that purpose, but there is no explicit guarantee. The Wisconsin statute 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, Bob Dole, 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 why, 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 the 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, though the State could accept such appeals at its discretion.

The Administration has sought stronger due process provisions in welfare bills. The Castle-Tanner legislation (and Chafee-Breaux, we believe) is somewhat stronger than Wisconsin; the Republican bills are about the same. 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 not 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. At the same time, it will enable Wisconsin to say to employers who agree to make job slots available that they will be able to deal with workers the same way they deal with their other employees. 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. The State might be able to implement its proposal without a waiver if a welfare reform bill is signed into law.

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, reflecting the State's and the Governor's intention to do so -- 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 children.

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. This option would also be subject to Goldberg. This option would probably be the most objectionable to Gov. Thompson. It would clearly be the strong preference of advocacy groups, religious groups, and the vast majority of the commenters, who would view any weakening of the entitlement as unacceptable.

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.

At the same time, this decision also should take into account that any attempt to preserve the entitlement will be seen as a change from the Administration's support for Chafee-Breaux and Castle-Tanner, but not as a change from the bill the Administration proposed.

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". The State intends to make the vouchers discretionary 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, but not beyond the five year limit.

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. If the current Republican bills become law, they will allow the State to implement their proposal.

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 3 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, and to claim that the Administration is less willing to accept time limits now than in 1993.

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.

OTHER ISSUES

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

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

Wisconsin has submitted a welfare waiver with significant and unacceptable 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. Given that Medicaid and welfare are being separated in the House and Senate, it makes sense to separate them in this context as well.

The Wisconsin waiver is structured to produce savings by removing from the Medicaid program some people who now receive Medicaid coverage -- a design 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. 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.

THE WHITE HOUSE

WASHINGTON

July 11, 1996

MR. PRESIDENT:

The attached policy paper on the Wisconsin Welfare waiver was prepared by your advisors for your meeting tomorrow morning. **It would be useful for you to read it prior to that meeting.**

There are basically three issues for your decision -- two major ones (the entitlement/due process and time limits), and a third one (residency requirement) about which Counsel and HHS have differing views. There are also several subsidiary issues which do not involve contending options and are simply presented for your sign off.

The entitlement. Four main options are presented -- the first two waive the individual entitlement, the third partially waives it: (i) allow Wisconsin to provide jobs at the contractors' discretion (no guarantee of a job); (ii) require "best efforts" to provide a job; (iii) guarantee a job (i.e., an entitlement to a job, not to benefits); (iv) no waiver.

Time limits. The main issue is whether the extension should be at the contractor's sole discretion or should be mandated for those recipients who play by the rules but cannot find work. Three options are presented.

Residency. The issue is whether to deny Wisconsin's request for a 60-day residency requirement as unconstitutional or to buck the decision to the courts.

Finally, the memo discusses certain labor, benefit and cost issues.

Todd Stern

WISCONSIN WAIVER REQUEST

96 JUL 11 P10:30

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.

Decision Issues

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

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

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

Other Issues

- 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.

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

July 11, 1996 (10:16pm)

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 has 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 addressed some of these concerns. Some waiver requests cannot be legally granted by the Executive Branch -- 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. Dole stopped in Wisconsin last week to attack the Administration for not completing its review of the waiver and sent a letter on Thursday calling for the Administration to "get it done".

Congressional Action. Last month, the House overwhelmingly passed a bill to deem the entire Wisconsin waiver approved, after defeating an Obey-Kleczka substitute along party lines. 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. If the Administration disapproves too much of the Wisconsin request, the Republicans may look again at ways to pass legislation to deem the waiver approved.

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 slot (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. The State could, however, accept such appeals at its own discretion. Extensions to the time limit for those who "play by the rules" would also be at the contractor's discretion. Housing vouchers for children after the time limit would also be discretionary.

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.

DECISION ISSUES

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

- One approach is to base policy judgements on the principles that the Administration has 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 Administration could take the same position that it has stated in the national debate -- yes to ending the entitlement to AFDC and no to ending the entitlement to Medicaid.

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, and prompt a fierce reaction from

Thompson, Dole and other Republicans. 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 the Administration vetoed his waiver by insisting upon an individual entitlement to welfare, which it has not done in the congressional debate. (The Administration has, however, pressed Congress for 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 reductions toward that purpose, but there is no explicit guarantee. The Wisconsin statute 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, Bob Dole, 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 why, 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 the 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, though the State could accept such appeals at its discretion.

The Administration has sought stronger due process provisions in welfare bills. The Castle-Tanner legislation (and Chafee-Breaux, we believe) is somewhat stronger than Wisconsin; the Republican bills are about the same. 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 not 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. At the same time, it will enable Wisconsin to say to employers who agree to make job slots available that they will be able to deal with workers the same way they deal with their other employees. 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. The State might be able to implement its proposal without a waiver if a welfare reform bill is signed into law.

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, reflecting the State's and the Governor's intention to do so -- 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 children.

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. This option would also be subject to Goldberg. This option would probably be the most objectionable to Gov. Thompson. It would clearly be the strong preference of advocacy groups, religious groups, and the vast majority of the commenters, who would view any weakening of the entitlement as unacceptable.

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.

At the same time, this decision also should take into account that any attempt to preserve the entitlement will be seen as a change from the Administration's support for Chafee-Breaux and Castle-Tanner, but not as a change from the bill the Administration proposed.

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". The State intends to make the vouchers discretionary 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, but not beyond the five year limit.

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. If the current Republican bills become law, they will allow the State to implement their proposal.

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 3 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, and to claim that the Administration is less willing to accept time limits now than in 1993.

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.

OTHER ISSUES

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

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

Wisconsin has submitted a welfare waiver with significant and unacceptable 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. Given that Medicaid and welfare are being separated in the House and Senate, it makes sense to separate them in this context as well.

The Wisconsin waiver is structured to produce savings by removing from the Medicaid program some people who now receive Medicaid coverage -- a design 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. 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.