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Medicaid Waivers

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Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
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- P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

TO: Ken Apfel
Bruce Reed
Keith Fontenot
Jeremy Ben-Ami
Elena Kagan
Emily Bromberg

FROM: Diana Fortuna 

DATE: December 16, 1996

Attached is HHS's proposal for a cost neutrality policy for child support pass-through waivers.

HHS proposes to forgive cost neutrality requirements for waivers that allow families to benefit from higher child support, but require cost neutrality for waivers that use higher child support levels to reduce other income to the family and save the state money.

Ken and Keith: How much would this policy cost? How should we go forward on a decision given where we are on the budget?

Please get back to me on what you think of their proposed policy by this Friday. Otherwise, I will assume you have no comment.

COST NEUTRALITY FOR EXCESS COSTS OF CHILD SUPPORT PASS-THROUGH WAIVERS

HHS proposes the following approach to child support pass-through waivers: To the extent that states disregard the child support pass-through income, HHS will forgive past and future excess costs for child support pass-through policies. We will retain cost neutrality to the extent that states do not disregard the child support pass-through income. Background on this issue and the pros and cons of the policy are provided below.

Background: Prior law provided that the first \$50 in child support payments from noncustodial parents be passed through to an AFDC family and disregarded as income for AFDC purposes. PRWORA eliminated the mandatory \$50 pass through and disregard. The Administration opposed the elimination of this requirement because it reduced the income of AFDC families that receive child support.

States may still opt to pass through all or part of child support collected to families, but they must reimburse the Federal government for its share of such collections without regard to the pass through. They may similarly choose to disregard pass-through payments in determining TANF eligibility and benefits and use TANF funds to make up any difference in costs.

Ten states currently have waivers that allow them to pass through some child support payments directly to the AFDC family. Some of the pass-through payments are disregarded so the net family income goes up. Other payments are treated as unearned income and thus offset that child support payment with lower TANF assistance payments. Net income to the family does not increase, but states save money because they have lowered their cash assistance payments to poor families, and have effectively substituted federal dollars for state dollars.

The Administration supported continuation of a mandatory \$50 pass through, but the provision was eliminated. Many people feel that the pass through is important as an incentive for noncustodial parents to pay support and custodial parents to cooperate because it means that the child directly benefits from the child support payment.

Discussion: It is reasonable that our policies on cost-neutrality for existing child support pass through waivers make a distinction between child support pass through payments that benefit the family and child support pass through payments that only benefit the state. It would not make sense to figure a state's excess costs and allow the state later to eliminate the disregard and maximize federal dollars for their program rather than provide more income to families. Instead, we recommend a policy that encourages states to continue to disregard the income passed through to the family. State commitments to a

disregard policy under TANF should be the basis for holding harmless excess costs in negotiating new amended terms and conditions that facilitate continuing pass-through waivers.

Since it is important to ascertain whether pass-through policies do have a positive impact, States' agreements to maintain a rigorous evaluation of the effects of the policy should also be required for forgiving their excess costs.

Policy Position: To the Extent that States Disregard the Income, Forgive Past and Future Excess Costs For Child Support Pass Through Policies. Retain Cost-Neutrality to the Extent that States do not Disregard the Child Support Pass Through Income

PROS:

- o Ensures that our policies for extended Transitional Medicaid and Child Support Pass Through are similar, reducing potential challenges.
- o Gives us more leverage to encourage those states that want to continue pass through demonstrations also to hold on to their evaluation designs; allowing us to have more reliable data about the impact of these policies.
- o If we can document empirically that pass through and disregard policies have a positive impact on self-sufficiency, there will be more support for passing more child support payments directly to families. A larger child support payment combined with wages will increase family income, and may give families more incentives to leave the welfare rolls.

CONS:

- o There is a Federal cost associated with this option.

MEDICAID WAIVERS UNDER PRWORA

A. Section 1931

Section 1931(d) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) addresses the continuation of title IV-A waivers granted as part of welfare reform demonstrations. Three possible interpretations of section 1931 have been proposed:

1. States have interpreted section 1931(d) to be an alternative to the baseline requirements of section 1931(b). Under this approach, any waiver of an AFDC provision in effect on July 16, 1996 or submitted to the Secretary before August 22, 1996 and approved on or before July 1, 1997 could continue to apply at the State's option as long as the waiver affects Medicaid eligibility. These waivers could continue beyond their original expiration date. A State could continue to use its waiver of a title IV-A rule even this resulted in additional or more restrictive Medicaid eligibility compared to the regular pre-PRWORA title IV-A rules.
2. Sara Rosenbaum has offered a much more limited reading of section 1931, namely that section 1931(b) overrides section 1931(d). Our understanding is that her approach views section 1931(b) to be the ultimate guarantee of Medicaid eligibility to anyone who would have qualified for AFDC on July 16, 1996, except to the extent that a State used a more restrictive income standard not lower than its May 1, 1988 standard. The difficulty with this reading is that it appears to make section 1931(d) superfluous, which we do not believe is a supportable interpretation.
3. A third approach has been advanced by Cindy Mann of the Center on Budget and Policy Priorities. This position views section 1931(b) as providing the criteria for determining Medicaid eligibility for individuals based upon "their receipt of AFDC." These criteria include the income and resource standards and methodologies for determining eligibility under the title IV-A state plan in effect on July 16, 1996 and the state plan deprivation (family composition) rules that were in effect on that date. However, States could not use section 1931(d) as authority to continue practices authorized under welfare reform waivers that do not pertain to financial eligibility or deprivation. This option is consistent with the overall legislative history of the Chafee-Breaux amendment, even though none of the remarks in the floor debate focused specifically on 1931(d)'s "waiver" provision.

Discussion

There are 4 existing welfare reform demonstration projects with AFDC waivers negatively impacting Medicaid eligibility and no special term and condition protecting the Medicaid eligibility of all demonstration participants. All of these negative impacts are due to sanctions, and are

described in the attachment, along with the 4 welfare reform demonstration projects with HCFA waivers negatively impacting Medicaid eligibility.

If Option 1 (the "States" interpretation) is adopted, there is no guarantee that the 4 States involved will protect the Medicaid eligibility of those individuals who would have been eligible absent the AFDC demonstration provisions. In 2 of the demonstrations (California and Wyoming), very few people would potentially be affected. New Hampshire is currently negotiating with HCFA on a section 1115 health reform demonstration project, and so an opportunity exists to build in safeguards to protect Medicaid eligibility. Therefore, only in the case of Nebraska is there serious concern about the implications of adopting the "States" interpretation of section 1931.

If Option 3 (the Mann approach) were adopted, Medicaid eligibility in all of the 4 demonstrations described above would be protected, since States would not be allowed to impose eligibility sanctions more restrictive than those in effect on July 16, 1996. For these 4 demonstrations, selecting Option 3 would have no negative impact.

Option 1 provides States with the greatest flexibility under the statute, since it would permit State TANF programs to use either more liberal or more restrictive rules than would be authorized under section 1931(b).

We believe Option 3 is the preferred approach. Option 3 is consistent with the intent of the drafters of the Chafee-Breaux amendment, who have indicated that section 1931(d) should be used only to allow expansions of Medicaid eligibility. This option protects Medicaid beneficiaries from restrictive eligibility policies related to sanctions.

Recommendation

We recommend adoption of Option 3.

B. Medicaid Waivers

While section 1931 addresses the continuation of title IV-A demonstration provisions affecting Medicaid eligibility, the question remains of whether or not to continue Medicaid waivers approved under section 1115 authority. As noted above and detailed in the attachment, there are 4 welfare reform demonstration projects with HCFA waivers negatively impacting Medicaid eligibility.

The joint terms and conditions for the demonstrations include the following boilerplate language:

If Federal or State statutes or regulations that would have a major effect on the design and impacts of this demonstration are enacted, the Departments [of Health and Human Services and Agriculture] and the State will reassess the overall demonstration and develop a mutually agreed-upon strategy for dealing with the demonstration in the context of such changes. If such a mutually agreed-upon strategy cannot be developed, each Department reserves the right, in its sole discretion, to withdraw any or all waivers at such time(s) as that Department determines.

In addition, the following term and condition appears as part of the HCFA approval package:

HCFA reserves the right to withdraw waivers at any time, if it determines that continuing the waivers would no longer be in the public interest. If a waiver is withdrawn, HCFA will be liable for only normal close-out costs.

Therefore, provisions exist that can be invoked if HCFA decides that termination is the appropriate course of action. We recognize that States might object to the termination of HCFA waivers, since these were granted in order to support welfare reform. We will make a decision on a case-by-case basis.

Attachment

*Friday 11/10***DRAFT****DRAFT COST NEUTRALITY POLICY FOR CURRENT WELFARE WAIVERS AND FOR FUTURE FOOD STAMP AND MEDICAID WELFARE WAIVERS*****ISSUE***

As States adopt their new TANF rules, they are also assessing their desire to continue their existing welfare reform waivers which were granted in three programs: AFDC/JOBS, Food Stamps and Medicaid. The welfare bill forgives past cost overruns for the components of AFDC waivers the State ends. States want to know whether cost neutrality will continue to apply to waivers they seek to continue and, if so how cost neutrality would work if it applies. The issue needs to be addressed separately for past cost overruns, and future cost overruns. This paper lays out a draft policy proposal for cost neutrality for both circumstances.

BACKGROUND ON MULTI-PROGRAM WAIVERS

Currently, over 40 States have approved welfare reform research and demonstration waivers. AFDC changes directly affect both Food Stamps and Medicaid costs, so all of these waivers have tracked costs in those programs, and many have included Medicaid and Food Stamp components. Under these waivers States have been permitted to vary the statutory requirements of the former AFDC/JOBS program, Medicaid and Food Stamps to test whether alternative approaches increased employment and reduced time on AFDC.

All waivers have been granted with the condition that the flexibility granted to States not increase net Federal costs across the AFDC, Medicaid, and Food Stamp programs. States were allowed some modest cost increases early in the demonstrations to invest in enhanced work programs, with procedures to ensure that cost neutrality was achieved by the end of the demonstration. If the State did not achieve programmatic savings, the waiver agreement called for AFDC funding to be reduced to make up the difference. While cost neutrality is an administrative, not statutory, policy, it has allowed the federal government to be much more flexible in waivers that would otherwise increase costs in one program alone.

Generally, States have opted to improve work programs, implement AFDC time limits, and sometimes tighten AFDC eligibility in order to offset Medicaid and Food Stamp expansions. When States were allowed to increase costs early in the waiver period, they had to demonstrate that these work programs and time limits would offset these costs prior to the end of the demonstration. Now that AFDC is a block grant, no savings can accrue in that program to offset cost increases due to waivers of Medicaid and Food Stamp statutes. None of the waiver provisions that affect only Medicaid or Food Stamps save money -- they are either cost-neutral or increase costs. *As a result, most welfare waivers will start increasing federal costs as soon as States put their TANF program into place.*

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COST OVERRUNS INCURRED TO DATE

The welfare bill forgives increases in federal costs for those components of AFDC waivers which States elect to terminate -- and almost all States will terminate parts of their waivers. Since those AFDC waivers also affected Food Stamps and Medicaid, the bill forgives some cost increases in those programs as well. States have been careful to maintain cost neutrality; it appears that total Food Stamps and Medicaid expenditures related to waivers so far -- including those the statute forgives -- are probably less than \$100 million in total. (More detailed estimates are necessary.) States carefully phase implementation to spend savings, but not incur overruns.

The original welfare budget neutrality agreements were based on a control group comparison. States had five years to determine if initial costs would result in savings later on. For waivers that were only a few years old, only the costs of the Medicaid transitional benefits would be measurable, while the AFDC savings might not have been realized yet. In addition, States can no longer use future AFDC savings to pay for past cost increases in Medicaid and Food Stamps. Practically, HHS and USDA cannot separate out most costs due to waivers which are terminated vs. those that are continued. As a result, it is recommended that States be held harmless for any federal costs already incurred as a part their existing welfare reform waivers (AFDC, Medicaid or Food Stamps), -- including cost overruns from Food Stamp waivers, Medicaid waivers, and AFDC waivers States do not want to terminate. (This recommendation is based on the assumption that the budget impact is not prohibitively high. They would be held harmless as of the later of January 1, 1997 or the date their TANF plan is determined to be "complete."

FUTURE COSTS

Cost neutrality must be revised. The Food Stamp and Medicaid pieces of the old welfare waivers -- including cost neutrality provisions -- need to be renegotiated. The waiver agreements call for waivers to be renegotiated if there is a substantial change in law. Under TANF, the AFDC changes that cost or saved money are now State options, and there will not be any Federal savings. (Actually, good State work programs will increase Federal costs through the EITC.) Since AFDC has been block granted and can no longer offset Food Stamp and Medicaid cost increases, cost-neutrality provisions of existing waivers must be renegotiated. It is recommended that States be provided with guidance on how cost neutrality will be work under future Medicaid and Food Stamp waivers.

Food Stamp and Medicaid waivers should be considered separately. In the past, Medicaid and Food Stamps have been included in AFDC waiver packages because of (a) the financial implications of AFDC changes on Food Stamps and Medicaid, (b) policy linkages between AFDC and Medicaid and (c) policy linkages between AFDC and Food Stamps. States have also sought and received waivers that involved only Food Stamps or only Medicaid. These one-

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program waivers should be the model for the future. TANF has broken all the linkages that held Medicaid and Food Stamp waivers together. Also, Food Stamp changes (discussed below) make many of the Food Stamp waivers operational options for States. As a result of these factors, there no longer is any reason to package Medicaid and Food Stamp waivers together, and efficiency reasons to separate them.

Timing. The Medicaid and Food Stamp waivers could be renegotiated at the same time States decide whether to continue AFDC waivers that are inconsistent with TANF requirements. States are already expected to include in their TANF plans information on which component of their AFDC waivers they intend to maintain under TANF. The statute gives States up to 90 days after the end of their next legislative session to terminate AFDC waivers and receive forgiveness of costs for the waivers they terminate.

FUTURE MEDICAID-SPECIFIC WAIVERS

As of the enactment date of PRWORA, 20 states had welfare waivers with Medicaid demonstration authority included and another 6 had applications pending. The Medicaid pieces of the welfare waivers typically extend transitional benefits, in some cases for up to 36 months instead of the normal 12 months.

States should be held accountable for cost neutrality for current transitional benefit waivers that continue or new waivers that are granted. Cost neutrality will have to be newly established given the change in the law which eliminated the AFDC program and block grants the TANF program. Cost neutrality ensures that the federal government will not spend more than it would have without the waiver. If a policy was to be adopted that no longer required budget neutrality for Medicaid extended transitional benefits in the future, federal costs over a seven year period (assuming half the states implemented an additional 12 months of coverage) could be as high as \$2 billion.

With no change in federal policy, a state could terminate its transitional benefits waiver and apply for an amendment to their current Medicaid-only waiver, if they have one. (Alternatively, States could apply for a Medicaid-only waiver that includes extended transitional benefits.) These costs could then be subject to the Medicaid without-waiver baseline and paid for with managed care savings. Only 4 states have both a welfare waiver with transitional benefits and a Medicaid-only waiver. Another 6 states have either a waiver pending or have an approved, but not yet implemented Medicaid-only waiver.

Alternatively, if the state does not have -- or seek -- a Medicaid-only waiver, the Medicaid/welfare waiver could exist as a stand-alone waiver. Because there are no longer any savings to be found from AFDC, it is recommended that the federal government pay 0% of the costs (i.e. provide no federal match) for the extended transitional benefits for the following reasons:

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Effectively No Change from Current Policy. Before welfare reform the federal government was *effectively* paying 0% FMAP if the waiver was cost neutral. Should the waiver not have been cost neutral, the state would have received reduced matching under AFDC (i.e. 0% FMAP for some AFDC costs). This is similar to the proposed policy.

State Savings. It can be argued that States will only continue the transitional benefits waivers if they believe there are savings to be gained on the TANF side. However, the state will keep all TANF savings due to the block grant, which could offset the costs at the State level. Thus, a 0% FMAP ensures that the federal government is not paying for services which reap savings only to the state.

Equity to non-waiver states. An inequity would exist if the future costs of the transitional benefits were forgiven for states with current waivers, while new states that want to extend transitional benefits had to pay all the costs themselves.

There has been some discussion of establishing a new control group to determine whether transitional benefits can keep people off the Medicaid rolls in the long run. To be able to measure these long-run savings, the control group would have to be maintained over a time period longer than the life of the waiver. To guard against attrition over this long time period, the control group which would not receive the transitional benefits would have to be quite large. For these reasons, it is possible that a control group might never show savings.

FUTURE FOOD STAMP SPECIFIC WAIVERS

As States review their current waivers in conjunction with developing their TANF plan, they will discover that many of their food stamp waivers are no longer necessary due to the 20 State options now allowed under the program and the new Simplified Food Stamp Program. For example, wage supplementation, cooperation of child support and increasing the asset limits for TANF households are policy options which no longer require waivers. Furthermore many of the food stamp waivers which States were denied in the past are also allowable State options. These include policies like tougher employment and training requirements and sanctions. Another critical factor in this new State flexibility is the link between TANF and Food Stamps. TANF households are categorically eligible for Food Stamps. If the TANF rules are vastly more liberal than Food Stamps, those households will remain eligible for Food Stamps. This means States will no longer need to receive food stamp waivers when they alter their TANF programs.

However, there are policies which will continue to require statutory waivers. *In particular, States will want to be able to apply similar food stamp rules to their non-TANF households as they do their TANF households for administrative ease and household equity.* For example, if the TANF program allows a household to own a vehicle valued at up to \$10,000, a State might want to increase the current Food Stamp vehicle asset limit from \$4,550 to \$10,000 for non-TANF households. This change would require a waiver under the Food Stamp Act. This raises the possibility of increased costs but also raises a question of whether waivers which seek only to

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modify the Food Stamp Program to individual State designs are appropriate. This issue is discussed further below.

Cost Neutrality Should Continue to Apply. Many of the waivers which States are likely to want to continue or to seek in the future are policies which expand Food Stamp eligibility. Based on conversations with State Directors and a sampling of current waivers, these "new" waivers would be designed to expand eligibility rules increasing the amount of allowable cash and the value of automobiles as well as changing the treatment of earned and unearned income. Preliminary estimates indicate that if all States raised their non-TANF vehicle asset limit to \$10,000 the annual federal cost would be approximately \$200 million. If the cash resource limit were waived nationwide from \$2,000 to a limit of \$4,000 the annual federal cost would be approximately \$300 million. Not all States would take such a waiver if it were granted. However if it were granted the Administration would face enormous pressure to continue applying the same fiscal policy for all States and it is not hard to imagine that States will find ways to expand the Food Stamp Program. Food Stamps benefits are 100% federally financed; States have no financial incentive to keep expenditures down. The following table lays out several preliminary estimates of scenarios based on popular State asset waivers:

| Waiver for non-TANF Households | Annual Cost of Such a Waiver Nationwide |
|---------------------------------------|--|
| Vehicle Asset Limit at \$10,000 | \$200 million |
| Vehicle Asset Limit at \$ 8,000 | \$135 million |
| Vehicle Asset Limit at \$6,000 | \$70 million |
| Cash Resources at \$4,000 | \$300 million |
| Cash Resources at \$3,000 | \$180 million |

The ramifications of eliminating the cost neutrality requirement are much larger than the figures represented above. USDA was able to deny a State waiver request which would have lifted the cap off of the excess shelter deduction on the basis of cost neutrality. While this policy is something to which the Administration is sympathetic, it could increase federal costs in excess of \$3 billion dollars over the next six years and approximately \$750 million in FY2002 if applied nationwide. The Administration was successful, with support from the States, in fending Congressional attempts to place a hard appropriations cap on the Food Stamp Program. The Agriculture Committees felt that food stamp expenditures were "out of control" and that the program was "on automatic pilot." Administrative actions which would re-raise the specter of the annual spending cap on Food Stamps should be avoided.

In order to avoid such increases in this 100% federally financed program, it is recommended that the Administration's policy of cost neutrality continue to apply to all future food stamp waivers.

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States will have the ability to achieve cost neutrality within the Food Stamp Program due to the newly expanded authority which allows waivers which reduce benefits. It is recommended that the current cost neutrality standard be modified to require annual cost neutrality rather than cost neutrality over the life of the waiver in order to remain consistent with the Simplified Food Stamp Program.

Annual Cost Neutrality. The welfare reform bill expanded the ability of States to align their TANF and Food Stamp rules for those households in which all or some members are TANF and Food Stamp recipients under the "Simplified Food Stamp Program". Non-TANF households are precluded from participating in the program. This new authority creates a new precedent for annual federal cost neutrality within the Food Stamp Program. *The legislative language for the Simplified Program requires that these programs be cost neutral at least on an annual basis.* If USDA determines that the program is increasing federal costs under the normal Food Stamp Program and the State is unable to adjust the program to lower costs, "the Secretary shall terminate the approval" of the program. If the Administration applies a less restrictive cost neutrality policy to food stamp waivers than that which is required under the Simplified Program, States may seek to align their TANF and Food Stamp rules via the waiver authority rather than the Simplified Program. Such a policy would appear to circumvent the intent of the Simplified Program authority.

Recent waivers have been granted for as long as 12 years. States have been allowed to incur modest added costs up front. The theory was to invest in AFDC-to-work programs. While there were decreasing annual caps on cumulative cost overruns, States were able to stretch repayment of those amounts over the entire waiver. Under the revised Food Stamp statute, most of the waivers will be for benefit increases that have no long term savings potential. As a result, the concept of up-front investment does not apply. The longer a State has to achieve federal cost neutrality, the more likely it will pursue proposals that promise a short-term rise in Food Stamp benefits with the possibility of long term payoff. USDA's experience with large State liabilities is that they are uncollectible. We believe a multi-year cost neutrality policy would put the Department in the position of approving waivers which are known to increase federal costs several years out. It is recommended that cost neutrality be applied on an annual basis in the Food Stamp Program -- at a minimum we suggest that waivers prove themselves to be cost neutral by the second year of implementation of the waiver. This would be consistent with the Food Stamp-only waivers granted to Oregon in late 1995.

State Reaction. Our belief is that States are generally pleased with the newly expanded program and waiver flexibility. Many of the waivers they currently have and even those they were denied in the past are now allowable options under the Food Stamp Program and the Simplified Food Stamp program. States probably expect cost neutrality to continue to apply to food stamp waivers within the Food Stamp Program. This policy makes sense given States new availability of offsets due to the authority which permits waivers which reduce benefits. However, it is reasonable to assume that States would prefer cost neutrality to continue to be applied over the life of the waiver rather than on an annual basis.

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Over time, States may find the new waiver authority less flexible than it currently appears. States's ability to find offsets within the Food Stamp program may not be easy. The Administration and Congressional Democrats were successful in placing limits on the restrictions and benefit reductions States can place on recipients -- the State can't apply a waiver statewide which would lower benefits by 20% for more than 5% of households. In addition, the welfare bill includes language which should narrow the focus of future waivers. The new waiver authority is more clear that the waivers are for time-limited experimental projects rather than efforts to modify the Food Stamp Program in each State -- one could interpret the intent of this language to mean that waivers should not be granted to simply conform the food stamp rules for TANF households with non-TANF households

While States may want to redesign the Food Stamp Program to their own specifications, the Administration fought tenaciously and successfully against such a policy -- the Food Stamp Block Grant and all other measures which would have undermined the national benefit structure. Much of the tenor of the debate around the food assistance programs centered on the very issue of whether national nutrition and benefit standards should remain. The Administration and Congress have acted to expand State flexibility while preserving the Food Stamp Program. It is recommended that USDA work proactively with States to assist them in taking full advantage of the flexibility provided under the law, however the waiver authority should not be used as a mechanism to undermine the Administration's firm commitment to maintaining a national Food Stamp Program.

**WELFARE REFORM DEMONSTRATION PROJECTS WITH AFDC WAIVERS
NEGATIVELY IMPACTING MEDICAID ELIGIBILITY AND NO SPECIAL TERM
AND CONDITION PROTECTING THE MEDICAID ELIGIBILITY OF ALL
DEMONSTRATION PARTICIPANTS**

1. California ("Work Pays Demonstration Project")

As part of an amendment approved on September 11, 1995, the following term and condition was added:

Fraud Prevention: Individuals found by a court or administrative hearing to have committed fraud by submitting multiple applications for aid or submitting documents for nonexistent or ineligible children will be ineligible to receive AFDC benefits for two years on the first offense, four years on the second offense, and for the remainder of the demonstration on the third offense.

ACF has confirmed our interpretation that "AFDC benefits" in this situation includes all categorically-linked benefits and that the individual's Medicaid eligibility is not protected.

2. Nebraska ("Welfare Reform Demonstration Project")

Title IV-A waiver authority limits cash benefits for a total of 24 months within a 48-month period while expanding eligibility by increasing the earned income and resource disregards and allowing two parent families to become and remain AFDC eligible. In this demonstration, only children are protected from losing Medicaid eligibility.

3. New Hampshire ("New Hampshire Employment Program")

Under this demonstration, the State is given the option of requiring mandatory JOBS participants to attend an employability assessment interview as a condition for AFDC eligibility. Failure to comply with this requirement will result in the denial of the AFDC application or termination of AFDC financial assistance. However, a term and condition protects pregnant women and children from losing Medicaid eligibility as a result of the demonstration.

4. Wyoming ("New Opportunities and New Responsibilities")

This demonstration imposes some limitations on AFDC applicants and recipients pursuing advanced education. With some exceptions, individuals who complete either an associate's or a bachelor's degree while receiving AFDC will be eligible for no more than 6 additional months of AFDC benefits. An individual pursuing a second associate's, bachelor's, or any kind of graduate degree will be ineligible for AFDC. In addition, an

individual who is pursuing an initial bachelor's degree beyond a sixth year or vocational training or an associate's degree beyond a fourth year will also be ineligible for AFDC.

Adult recipients who either confess to or are convicted of AFDC program fraud will have their needs removed from the grant while incarcerated, until all outstanding fines and monetary penalties are paid, and until full restitution of all erroneous payments is made.

In both these situations, ACF has advised us that the individual would be ineligible for Medicaid.

WELFARE REFORM DEMONSTRATION PROJECTS WITH HCFA WAIVERS NEGATIVELY IMPACTING MEDICAID ELIGIBILITY

1. Montana ("Families Achieving Independence in Montana")

This demonstration involves the enrollment of participants, including Medical Assistance Only (MAO) recipients, in managed health care. The Medicaid benefits package has been reduced to exclude optional services. However, this reduction is estimated to apply only to a very limited group of able-bodied adults. Full Medicaid coverage under the demonstration will continue for all children through the month of their 21st birthday, pregnant women, the elderly, and those who meet the SSI-related Medicaid criteria (the Aged, Blind, and Disabled). There are no AFDC waivers negatively impacting Medicaid eligibility and there is no special term and condition protecting the Medicaid eligibility of participants who are made ineligible due to AFDC demonstration provisions.

2. New Hampshire ("New Hampshire Employment Program")

The State has received HCFA approval to streamline Medicaid eligibility by allowing the AFDC income and resource standards of the demonstration to be used in place of the methodologies of the AFDC State Plan for determining eligibility for AFDC-related Medicaid-only groups. This provision may cause some able-bodied adults to lose Medicaid eligibility. However, a term and conditions protects pregnant women and children from losing Medicaid eligibility as a result of the demonstration.

3. Nebraska ("Welfare Reform Demonstration Project")

Nebraska is unique because it was given Medicaid demonstration authority under section 1902(a)(17) to permit adults to lose their AFDC-related Medicaid eligibility through sanctions or after a cumulative 24 months of eligibility in a 48-month period under the AFDC waivers. The State also received section 1902(a)(10)(B) waiver authority in regard to the comparability of benefits. In this demonstration, only children are protected from losing Medicaid eligibility.

In contrast, Medicaid eligibility was also expanded under the demonstration to allow expenditures for Medicaid coverage for those using higher income and resource limits than those permitted under section 1902(a)(17); to permit persons in two-parent cases to become and remain AFDC and Medicaid eligible without regard to work history or hours of employment, and to expand the Medicaid transition benefit authority to 24 months from the 12-month maximum which is available under current law.

4. Wisconsin ("Work Not Welfare (WNW)")

The Wisconsin WNW demonstration is limited to two counties (Pierce and Fond du Lac). (The biggest county in Wisconsin with the largest AFDC caseload is Milwaukee County.) The demonstration limits receipt of AFDC cash assistance to 24 monthly payments and 12 months of Medicaid transitional benefits within a 48-month period.

HCFA authority was granted to permit the State to provide fewer than 12 months of Medicaid transition benefits once a participant has reached the end of the 48-month benefit period, to impose a premium that exceeds 3 percent of the family's average gross monthly earnings (less the average monthly costs for such child care as is necessary for the employment of the caretaker relative), and to impose a premium during the first 6 months of receipt of Medicaid transition benefits.

Policy Analysis

THE STANDARD TERM AND CONDITION PROTECTING MEDICAID ELIGIBILITY IN WELFARE REFORM DEMONSTRATIONS AND ITS RELATIONSHIP TO SECTION 1931(d) OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (PRWORA)

Some States with section 1115 welfare reform demonstrations have a special term and condition protecting the Medicaid eligibility of individuals who are terminated from AFDC due to AFDC demonstration provisions. With minor variations from State to State, the term and condition reads as follows:

For the purposes of Medicaid coverage, all individuals subject to the provisions of the demonstration will retain their Medicaid eligibility if they would have been eligible in the absence of these [AFDC] demonstration provisions.

This term and condition prevents the States that have it from continuing the AFDC demonstration provisions for determining Medicaid eligibility beyond the date the demonstration would otherwise expire (as section 1931(d) of PRWORA generally allows) if these provisions are more restrictive than permitted by the AFDC state plan in effect on July 16, 1996.

The term and condition began to be included in the Joint Terms and Conditions of the welfare reform demonstrations (drafted primarily by ACF) as early as late 1992. Around this time, States were beginning to incorporate some AFDC provisions in their demonstrations that restrict eligibility for AFDC, such as time limits, more stringent work requirements, and sanctions. Medicaid eligibility was based on receipt of AFDC. The Department wished to protect the Medicaid eligibility of individuals whose AFDC was terminated because of more restrictive provisions in the demonstrations, and so added a term and condition to guarantee this.

At first, the term and condition was used selectively, depending on the specific AFDC provisions contained in a given welfare reform demonstration. Then, in late 1995, it began to be included on a regular basis, in recognition of the fact that there are probably some individuals in every demonstration whose Medicaid eligibility may be in jeopardy due to AFDC provisions. At present, at least 25 States have this term and condition, some in more than one project.

Although the term and condition was intended to guarantee that individuals would not lose Medicaid eligibility if they would have been eligible in the absence of the demonstration, it is unclear whether States have been implementing it. To do so, a State would have to do a hypothetical AFDC eligibility determination using their State plan whenever an individual becomes ineligible for cash assistance under the demonstration and is not eligible under a Medicaid-only eligibility group. We believe that States may have instructed caseworkers to look

only at the most punitive of the provisions. However, HCFA and ACF have not been able to find evidence that States are taking this additional step. At the same time, we are not aware of any complaints from recipients or their advocates that Medicaid eligibility is not being ensured as appropriate to demonstration participants.

As mentioned above, section 1931(d) of PRWORA permits States to continue to apply waivers of title IV-A affecting Medicaid eligibility (either in effect as of July 16, 1996 or submitted before August 22, 1996 and approved on or before July 1, 1997) beyond the date the demonstration would otherwise expire. Unlike under section 415, these provisions can be extended indefinitely. However, the above term and condition prevents the States that have it from continuing the AFDC demonstration provisions for determining Medicaid eligibility beyond the date the demonstration would otherwise expire if these provisions are more restrictive than permitted by the AFDC state plan in effect on July 16, 1996.

If a State has not been complying fully with the term and condition (however this is ascertained) and asks to continue its AFDC demonstration provisions for determining Medicaid eligibility (per section 1931(d)), there are 2 options:

1. Enforce the term and condition strictly.
2. Enforce the term and condition selectively (i.e., only for some States).

We recommend that Option 1 be exercised.

10-11-96

Medicaid issues

1. Waiver issue

SR - Three possibilities:

1. (States' view) - b or d.

↳ if waiver in place

2. (Rosenbaum) - ^b in toto supersedes d.

d essentially has no meaning

↓

~~2. (Rosenbaum)~~ (Congress?) -

↓ allows ~~state~~ demo projects if more generous Medicaid applies, but not if less so - if restricts Medicaid.

3. D overrides B in certain cases: only where

waiver

is about

Eligibility provisions - income/resources

literal Medicaid waiver

allows net impact on medic chip.

MT
NEB
NH

Max states - 12

other 8 -

5 states -

1. California - stand prov. thru AFDC.

4. Wisconsin - 2 cert's

time limit - AFDC

2. Nebraska - time limits -

time limit on AFDC

5. ~~Massachusetts~~ Wyoming -

again, AFDC lens.

3. New Hampshire -

mand job prog - cond. AFDC eligibility

Not income + resources -

therefore protected under

Mann's interpretation

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

11-Oct-1996 05:55pm

TO: Elena Kagan

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: Meeting Tuesday at 11 with HCFA

This is a note to explain what you'll be walking into at 11 on Tuesday w/HHS and HCFA. The issue in question is very heavily legal -- and a big deal politically. I have told HHS that I see this meeting as a chance for us (me, OMB, and particularly you) to get up to speed on this issue, prior to HHS making a decision on a legal interpretation.

Here's the issue: one of our proudest achievements in welfare reform was protecting Medicaid. That protection is contained in section 1931 (a) and (b) of the bill, and it says that states have to continue to do eligibility as they did in July 1996 for Medicaid purposes, and not continue to link Medicaid to welfare.

A provision was added that was supposedly intended to give states a bit more flexibility -- section 1931(d). But the fear is that through what may or may not be faulty drafting, that provision could essentially gut the Medicaid protection, at least in certain states.

1931(d) was supposedly intended, according to the advocates, to let states deviate slightly from eligibility standards by continuing parts of their waivers. But it can also be read as a SUBSTITUTE for 1931(b), which creates the issue.

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| 001. memo | Phone No. (Partial) (1 page) | 10/04/1996 | P6/b(6) |
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COLLECTION:

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Elena Kagan
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FOLDER TITLE:

Medicaid Waivers

2009-1006-F
bm14

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Freedom of Information Act - [5 U.S.C. 552(b)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

EXECUTIVE OFFICE OF THE PRESIDENT

04-Oct-1996 10:52am

TO: Elena Kagan
FROM: Diana M. Fortuna
Domestic Policy Council
SUBJECT: RE: I am on a long phone call on medicaid

I hear it second-hand from Emily. If you want the full story, she may be at home today at P6/(b)(6). [OOI]

I may have a Medicaid issue for you today -- maybe 2; I assume you're the person.

Issue 1: The question is in Section 114 of Title I, clause (b) vs. (d). Clause (b) is the thing that said states have to keep Medicaid where it was pre-reform, by doing Medicaid eligibility according to the rules in effect in July 1996, essentially requiring dual eligibility systems for Medicaid and TANF.

Clause (d) says that states can use Medicaid eligibility rules from their waivers instead if they want to. Rumors are that HCFA may interpret (d) to mean that they don't have to obey (b) -- thereby potentially gutting one of the key achievements of the bill from our perspective by letting states cut Medicaid eligibility. At least so the advocates (Center on Budget, Sara Rosenbaum) say. I am investigating.



175TH ANNIVERSARY 1821-1996

MEDICAL CENTER

CENTER FOR HEALTH POLICY RESEARCH

MEMORANDUM

To: Bruce Vladeck, Administrator, Sally Richardson, Deputy Administrator and Deborah Chang, Director, Policy and Legislation

From: Sara Rosenbaum and Kay Johnson

Subject: Follow-up to recent meeting

Date: September 30, 1996

Thank you for inviting us to meet with you earlier this month. The purpose of this memorandum is to follow up on several of the points that were raised.

1. Categories of title IV-A Waivers Covered by the Waiver Exemption Under Section 1931

Read literally section 1931(d) appears to exempt from at least some aspects of section 1931 state that operate their Title IV-A programs under one or more Section 1115 waivers that "affects eligibility of individuals for medical assistance". While discussions with individuals who worked on the final legislation indicate that the scope of the exemption was meant to apply only to specific types of demonstrations (i.e., those that directly address a Medicaid eligibility issue, such as an extended work transition program or a specific change in budgeting methodologies for Medicaid) nothing in the statute itself appears to narrow the scope of the exemption. [Since any [Title IV-A waiver] would affect medical assistance,] if a state's waiver program meets the timeliness rules under section 1931(d), then we believe that the state should be eligible for an exemption.

2. Scope of the Waiver Exemption under Section 1931

While, as noted, we believe that the scope of the qualifying waivers provision is broad, we do not believe that the exemption from otherwise applicable duties under Section 1931 is broad. We would interpret section 1931(d) to allow a waiver of the bifurcated application process and the methodologies requirements but not of the "hold harmless" program. That is, a state with a Title IV-A waiver that "affects eligibility for medical assistance" would be permitted to continue to issue Medicaid cards

automatically to any individual who qualifies for IV-A waiver benefits and could use waiver standards and methodologies (where the waiver covers this issue) but would have to recognize a "hold harmless" population consisting of individuals who meet its eligibility standards as in effect on July 16, 1996.

We do not read section 1931(d) as eliminating states' obligation to create a new mandatory categorically needy coverage group consisting of individuals who satisfy their 7/16/96 financial eligibility rules but who no longer qualify for assistance (e.g., because the state subsequently tightened eligibility requirements under its waiver). Were HCFA to read section (d) as extinguishing waiver states' "hold harmless" obligations this interpretation would effectively read out of existence in more than 40 states the President's commitment to not deprive former welfare recipients of their access to Medicaid.

3. Fast-track certification process for states with TANF programs no more liberal than their AFDC programs

In those states that do not have Title IV-A waivers and that must implement section 1931(b), we recommend that HCFA develop a fast track certification process that would permit a state to certify that its TANF eligibility requirements are no more liberal (either categorically or financially) for some or all of covered populations than its prior AFDC requirements. For these "no more liberal" populations, states could continue to issue cards automatically and without a separate eligibility determination.

4. Implementation of Medicaid Provisions for Current Resident Qualified Aliens

Since states' option to deny Medicaid to qualified aliens who were residents as of August 22, 1996, extends only to certain classes of qualified aliens, we recommend that states be required to demonstrate as part of their state plan submissions that they have the capacity to separate out mandatory coverage aliens from those whose coverage is at state option. In other words the election should be permitted only if a state has the means of identifying those qualified aliens for whom coverage continues to be mandatory under section 402 (i.e., refugees, asylees, parolees, members of the armed services and their families, persons with sufficient work history and veterans and their families).

5. Redetermination Requirements

The provisions of 42 CFR sections 435.916 and 435.930 should be read as requiring a redetermination of any individual for whom welfare reform potentially may terminate Medicaid coverage before coverage can be terminated. The issue is not merely

requelifying children and adults for coverage but also ensuring that those who continue to remain eligible for coverage do so if there exists any alternative basis of eligibility.

6. Continued duty to cover emergency care, including active labor, for pregnant women who are either undocumented aliens or post-enactment "qualified aliens"

Based on our discussions with Medicaid agency staff, we believe that a number of agencies are under the impression that the Act in some way alters their duty under Section 1903(v) of the Act to extend Medicaid coverage to otherwise qualified aliens with emergency conditions, at least where pregnant women are concerned. We believe that it is important that HCFA guidance clarify that the Act does nothing to alter this state duty.

Agency concerns appear to be based, not on the law, but on the legislative history accompanying Title IV of the Act (pertaining to public assistance for non-citizens). The Conference Agreement states that :

The allowance for emergency medical services under Medicaid is very narrow. The conferees intend that it apply only to medical care that is strictly of an emergency nature, such as medical treatment administered in an emergency room, critical care unit, or intensive care unit. The conferees do not intend that emergency medical services include prenatal or delivery care that is not strictly of an emergency nature as specified herein.

Conference Agreement at Cong. Rec. H8296 (July 30, 1996).

Other than this bit of dicta, the Act does not address either section 1903(v) or section 1867 (EMTALA). There are no changes to the statute. Therefore, in our opinion this fragment of legislative history should be read as simply restating the obvious: that in the case of federal Medicaid funds, FFP is available only for emergencies; and that in the case of hospital care, the EMTALA duty applies only to emergencies. Unless a pregnancy-related condition constitutes an emergency, there is no coverage under either statute. Both the EMTALA and Medicaid definitions of "emergency" extend to pregnant women with emergency conditions (including but not limited to active or emergency labor); the new law does not alter the scope of either statute.

Both the Medicaid and EMTALA offer crucial protections for pregnant women. During the mid-1980s, we conducted two studies which found that one of the most common, serious gaps in service reported by state and local maternal and child health officials was the lack of care for uninsured pregnant women with emergencies. Specifically we found that pregnant women in labor experienced enormous difficulties in

gaining admission to a hospital. In 1986, 15 state health agencies reported that hospitals were denying admission to women in active labor and another 13 reported that hospitals were denying admission to women not yet in active labor.¹ This practice was driven by the increasing number of pregnant women who were uninsured and who, with their infants, would become part of the hospital's uncompensated care burden if admitted as patients.^{2,3} Some reports were dramatic (e.g., women in labor being turned away when the newborn was partially visible), but many, many reports made it clear that increasing numbers of poor, uninsured pregnant women felt they had to wait until they were in labor to try to gain entry to hospitals. In turn, hospitals grew more likely to turn away patients they could not afford.

The Emergency Medical Treatment Act, including its definition of emergency, has made a sizable difference in access during a pregnancy-related emergency.⁴ In addition, state obligations to finance emergency hospital care involving otherwise qualified undocumented pregnant women under Medicaid has made it possible for hospital emergency hospital services to survive what otherwise would be their almost certain financial demise under a reading of the Act that would terminate states' emergency coverage duties with respect to pregnant women. While nothing in welfare reform alters current law, it is evident that clarification of this point is needed.

The clarification of these maternity-related issues, particularly states' continuing obligations under the Medicaid hospitals' duties under EMTALA, both merit HCFA's attention in its forthcoming guidance. Given that an estimated one-third of all births are covered by Medicaid and that infants born to undocumented women and qualified aliens will be U.S. citizens, it is critical that every available tool be used to maximize infant health.

¹Rosenbaum, Hughes, and Johnson. Maternal and Child Health Services for Medically Indigent Children and Pregnant Women. *Medical Care*, 1988.

²Sloan et al. Identifying the Source of Uncompensated Hospital Care: A statistical profiles. Vanderbilt University, 1984.

³Gold and Kenny. Paying for Maternity Care. *Family Planning Perspectives*, 17:48-55, 1985.

⁴Emergency Medical Treatment and Active Labor Act, P.L. 99-272, 42 U.S.C. Section 1395dd (1986) (renamed and amended in 1989). The 1996 version of the Act set out the hospitals obligation to examine and treat emergency medical conditions and women in active labor. The 1989 amendments further emphasized obligations during active labor.

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

10-Oct-1996 11:28am

TO: DChang@hcfa.gov@INET
TO: JMonahan@os.dhhs.gov@INET@EOPMRX
TO: JMoore1@hcfa.gov@INET@EOPMRX
TO: SRichardson@hcfa.gov@INET

FROM: Diana M. Fortuna
 Domestic Policy Council

SUBJECT: Medicaid and section 1931 b vs. d

Just ran into a furious Laurie Rubiner of Chafee's staff who says she is hearing from you guys that you are reading the waiver provisions of section 1931 in a way that would potentially gut 1931(b). She says there is a meeting Tuesday with her, some advocates, and Debbie Chang.

Since you guys have said you don't have an interpretation on this yet and that's why we haven't been briefed, I can't imagine that you are telling outsiders how you read this provision at this point. What is she hearing that is alarming her and why are we having to raise people's blood pressure before we know whether it's necessary?

Please call me.

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

10-Oct-1996 11:48am

TO: (See Below)

FROM: Emily Bromberg
Intergovernmental Affairs

SUBJECT: RE: FYI on Medicaid and waiver issue

This is a problem. States are anxious to know our answer on wavier (as am I)--and we've told them that we are still working on it. I certainly hope we are not telling the Hill and the advocates something that neither the White House nor the states know about.

Distribution:

TO: Diana M. Fortuna

CC: Jeremy D. Benami
CC: Elena Kagan
CC: Nancy-Ann E. Min
CC: Mark E. Miller
CC: Christopher C. Jennings

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

10-Oct-1996 05:02pm

TO: Elena Kagan
TO: Mark E. Miller
TO: Nicolette Highsmith
TO: Barbara E. Washington

FROM: Diana M. Fortuna
 Domestic Policy Council

CC: Laura Oliven Silberfarb

SUBJECT: Tuesday at 11

Looks like I have roped HCFA (Sally Richardson) into coming over here this Tuesday 10/15 at 11am in room 211 to talk about this waiver issue (1931 b vs d). This is a major issue Hcfa is still working on, but the implications are so great that I have told them they must talk to us DURING their deliberation process, not after.

I really hope you guys can make it at that time. If I can't have Elena and enough OMB representation, I will have to reschedule.

By the way, HCFA's concern that 1931(d) reads out of existence the protection of the Medicaid program that we thought we had secured is so great that they are already talking to the Hill and some advocates on this. I was talking to Chafee's person today on something else, and she bent my ear on this. She said she was appalled that HCFA's lawyers were even considering reading the law in such a way.

I have told HHS not to spread alarm and panic on this until we know more; they say they are fairly certain there is a major issue here and they need to be talking to the Hill about Congressional intent. However, we agreed that they should not be giving any interpretation of the law to outsiders at this time.