NLWJC - Kagan

Counsel - Box 036 - Folder 002

Federal Public Benefits – definition

ATTACHMENT 6
INTERIM GUIDANCE -- FEDERAL MEANS-TESTED PUBLIC BENEFITS

The Act provides that qualified aliens entering the U.S. on or after August 22, 1996, are ineligible for federal means-tested public benefits during the first five years they are qualified aliens, unless they fall within a specific exception.

The Department of Health and Human Services and the Department of Housing and Urban Development, with the concurrence of other relevant federal agencies, have interpreted the limitations on eligibility for "federal means-tested public benefits" to apply only to mandatory spending programs, i.e. programs for which funding is not subject to annual congressional appropriations action. Expenditures under mandatory spending programs are determined by the amount of benefits granted to all beneficiaries who meet the eligibility requirements for such programs rather than by a fixed annual appropriation. As of the date of this Guidance, the following programs provide federal means-tested public benefits: Medicaid, Food Stamps, TANF, **[which others?]**.

The eligibility of qualified aliens for federal means-tested public benefits turns on three factors: the date on which they entered the U.S., the benefits they are seeking, and their immigration status.

1. Determine the date on which the qualified alien entered the U.S by reviewing the documents evidencing his or her status or, if the documents do not indicate the date of entry, by filing INS Form G-845 along with a copy of the document with the local INS district office. If the qualified alien entered the U.S. before August 22, 1996, he or she is eligible for all federal means-tested public benefits for which he or she satisfies all programmatic eligibility requirements, and you should not engage in any further verification of immigration status. If the qualified alien entered the U.S. on or after August 22, 1996, determine if he or she is eligible under paragraph 2 below.

2. Qualified aliens entering the U.S. on or after August 22, 1996, are immediately eligible for some federal means-tested public benefits, but are ineligible for all other federal means-tested benefits during the first five years after their entry into the U.S. as a qualified alien unless they fall within an exception.

    a. Qualified aliens entering the U.S. on or after August 22, 1996, are eligible for all federal means-tested benefits during the first five years after their entry into the U.S. as a qualified alien only if they are:

        (1) Refugees, asylees and aliens whose deportation has been

withheld -- see Attachment 4 for definition and documentation, or

(2) Aliens lawfully residing in any State who are honorably discharged veterans, or on non-training active duty in the U.S. Armed Forces, or are the spouse or unmarried dependent child of such a veteran or active duty personnel -- see Attachment 5 and Exhibit B thereto for definition and documentation.

b. All qualified aliens entering the U.S. on or after August 22, 1996, are eligible for the following benefits:

- Medical assistance under Title XIX of the Social Security Act (or any successor program to such title) for care and services that are necessary for the treatment of an emergency medical condition (as defined in § 1903(v)(3) of such Act) of the alien involved and are not related to an organ transplant procedure, if the alien involved otherwise meets the eligibility requirements for medical assistance under the state plan approved under such title (other than the requirement of the receipt of aid or assistance under title IV of such Act, SSI benefits under title XVI of such Act, or a state supplementary payment);

- Short-term, non-cash, in-kind emergency disaster relief;

- Assistance or benefits under the National School Lunch Act;

- Assistance or benefits under the Child Nutrition Act of 1966;

- Public health assistance (not including any assistance under title XIX of the Social Security Act) for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease;

- Payments for foster care and adoption assistance under parts B and E of title IV of the Social Security Act for a parent or child who would, in the absence of the Act's prohibition on payment of federal means-tested public

benefits to qualified aliens during the first five years after entry into the U.S. with qualified alien status, be eligible to have such payments made on the child's behalf under such part, but only if the foster or adoptive parent(s) of such child is a qualified alien;

- Benefits covered by Attorney General Order No. 2049, 61 F.R. 45985 (Aug. 30, 1996), attached to Attachment 3 of the Interim Guidance re: government-funded community programs, services or assistance that are necessary for protection of life or safety;

- Programs of student assistance under titles IV, V, IX, and X of the Higher Education Act of 1965, and titles III, VII, and VIII of the Public Health Service Act;

- Means-tested programs under the Elementary and Secondary Education Act of 1965;

- Benefits under the Head Start Act;

- Benefits under the Job Training Partnership Act; and

- Refugee and entrant assistance activities authorized by title IV of the INA and section 501 of the Refugee Education Assistance Act of 1980 for Cuban and Haitian entrants as defined in § 501(e)(2) of the Refugee Education Assistance Act of 1980.

ED Comments on Draft DOJ Guidance on P.L. 104-193
"Federal Public Benefits" (Section 401)
December 12, 1996

ED is very concerned that, as drafted, "attachment 2" does not make clear that benefits under Federal preschool, elementary, and secondary education programs are not affected by section 401of the Act. (Attached to these comments is a summary of the legal arguments that support the conclusion that section 401 does not affect such programs.) We are particularly concerned that program administrators in State and local school systems across the country may erroneously conclude that such programs are "similar" to "postsecondary education" programs within the meaning of section 401(c)(1)(B) and, thinking the issue to be other than a "close case," fail to consult with ED before excluding aliens who are not qualified aliens from participation in those Federal programs.

Accordingly, we strongly recommend that the third sentence of the last paragraph on the first page of attachment 2 be revised to read as follows: "Thus, if a local agency were to receive a 'grant' that the agency used to provide police or ambulance services; fire protection; crime victim counseling; or preschool, elementary, or secondary education services to a group including non-qualified aliens, the prohibition would not apply." We also believe it advisable to replace "If a close case is presented," in the preceding paragraph with "If you have any questions about the application of section 401 to your program,".

Why Section 401 Does Not Apply To Federal Preschool, Elementary, and Secondary Education Programs

Summary of Argument

(1) Dissimilar Benefits. Federal public benefits include "retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit ... provided to an individual, household, or family eligibility unit...." Section 401(c)(1)(B)(emphasis added). Federal preschool, elementary and secondary education programs are not similar to postsecondary programs either in the benefits they provide or their program design. Federal elementary and secondary education programs typically involve grant assistance to State and local school systems to supplement their instructional programs to meet the special educational needs of particular at-risk student populations (e.g., students attending schools in low-income neighborhoods or children with disabilities.) Federal postsecondary education programs, on the other hand, typically involve loans (or loan guarantees) and grants to individual students at the postsecondary level, based on specific statutory criteria such as financial need.

(2) Conference Report Language. The conference report to the Act plainly states: "The intent of the conferees is that title I, part A of the Elementary and Secondary Education Act would not be affected by section 401 because the benefit is not provided to an individual, household, or family eligibility unit." (at p. 380.) Title I, part A, by far the largest Federal K-12 program, provides formula grants to States, who subgrant the funds to school districts to provide supplementary educational services to students with special educational needs who attend schools in low income areas. School districts have broad discretion to determine which students they serve and what services (e.g., supplementary reading or math instruction) are provided. While it is not entirely clear why the conference report concludes that title I, part A does not provide a benefit "to an individual, household, or family eligibility unit," it may be that the benefit was conceived as going not to students or their families, but to the State and local school systems themselves (consistent with the nature of a grant under the Grant and Cooperative Agreement Act), since those systems were able to determine, within broad statutory limits, which students would be served and what services would be provided--with no student having a right to be served. Moreover, these programmatic characteristics are not unique to title I, part A, but are widely shared by other Federal K-12 programs.

(3) Plyler v. Doe. Section 401 must be read in light of section 433(a)(2), which plainly states the intent of Congress to not change the result of Doe v. Plyler with respect to the eligibility of aliens "for a basic public education." Services under Federal K-12 programs, which have never based eligibility upon citizenship status, are typically (and properly) integrated into the local curriculum such that they are indistinguishable from the basic program of instruction. It is exceedingly unlikely that Congress would have intended to make the citizenship status of students an issue for Federal K-12 programs through section 401 while attempting overall to preserve the rights of undocumented alien children in public elementary and secondary schools.

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- §433(a)(2) protects "basic public educ". Can this be rd to incl all programs providing any sort of and for such educ?

- Can't be all programs or exemp in § 403 unnec. -- see 403(c)(2)(I)+(J) ?? exempts mins-tested programs under the Elt Sec Ed Act
Not nec b/c it also repeats AG order, so pot. redundant -- also not enumerated in 401 exceptions. Plus list doesn't incl a program under E+SA Act (or are they all mins-tested?) Irrelev b/c pt/focus is on "mins-tested" so this indic bnd exemp wrt E+SA Act??

- Can't be all programs rel to elt sec educ tho cld be all those under Elt Sec Ed Act title I, A ... which is??

Also: Labor proposed to amend 401 to bar public education benefits not largely funded by parents

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WARNATH_S @ A1
12/13/96 03:46:00 PM

Record Type: Record

To: Elena Kagan

cc: BENAMI_J @ A1@CD@LNGTWY, FORTUNA_D @ A1@CD@LNGTWY
Subject: Tuesday meetings

Elena -- I left you a long voice mail about having two follow-up meetings: First, a meeting on the charitable organizations definition at 2pm Tuesday in rm 211. Second, federal public benefits definition at 4pm Tuesday in rm 211.

For charitable organizations, we want to decide how best to handle this in the guidance. Right now the agencies are just identifying various interpretations based upon some legislative drafting ambiguity and the lack of preciseness of what constitutes a charitable organization. They haven't bitten the bullet to recommend a course of action here. The agencies who care about this were asked to firm up their legal analysis of options for Tuesday's meeting. We have also received a memo from the Georgetown Law Center and and Catholic Charities today that sets out some legal/policy issues to consider and we need to get that to you to look over.

On federal public benefits, DOJ and HHS have been working on this. We also have a memo prepared pro bono by Arnold & Porter that is worth looking at -- Randy Moss has a copy of this that he can provide to you. It looks like we may end up with a preliminary definition that will be refined and supplemented later. HHS in particular has been exploring this option. This meeting is to make some decisions and wrap this up.

I have asked Hayashi and OLC to be prepared to assist make sure these meetings unfold in a productive way.

On timing: I continued a hard line on the need to do this for January 1st in today's meeting. But there is no way this is going to be cleared and ready for a proper release by that time, in my opinion. And the problem is that if this is not done right we will contribute to the problem and raise the level of anxiety, confusion, and uncertainty. INS observed that we have already been tolerating the possibility of verification proceeding without federal guidance, so we should be willing to allow two weeks into January to do this right. HHS noted that getting this finalized and cleared and doing the necessary preparing for release (Q & As or whatever) -- especially with many sensitive issues -- during

the Christmas week is an impossibility. Obviously some drafting continues into next week. We will meet with some outside groups at the end of next week for further input that will certainly require some additional thinking. Then many crucial people leave for all parts of the country. I am raising this so that you all might have a discussion about how this should be handled at this point.

Thanks.

Draft 4
12/17/96

DRAFT DISCUSSION PAPER OF THE DEFINITION OF FEDERAL PUBLIC BENEFIT

Section 401 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), Pub. L. No. 104-193, provides that an alien who is not a qualified alien is not eligible, with certain specified exceptions, for any Federal public benefit. "Federal public benefit" is defined as follows:

> (A) any grant, contract, loan, professional license, or commercial license provided by an agency of the United States or by appropriated funds of the United States; and
>
> (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of the United States or by appropriated funds of the United States.

Federal programs that provide benefits that fall within this definition may need to require providers to determine the immigration status of all individuals who receive the benefits of those programs. Therefore, program administrators will need to know whether their programs fall within the definition of federal public benefit.

Whether or not a given program falls within category A of the definition (grants, contracts, loans, etc.) is relatively straightforward; category B, on the other hand, is less clear and, therefore, we must provide guidance on how to interpret its meaning. The analytic process for category B asks two questions. First, is the program among those enumerated in PRWORA section 401(c)(1)(B)? Second, are the program benefits provided to an individual, household or family eligibility unit by an agency of the United States or by appropriated funds of the United States? The answer to both questions must be affirmative in order for the program to be a "Federal public benefit."

To answer the first question, we look at the list of programs enumerated in the statute. PRWORA 401(c)(1)(b) expressly includes in the definition "any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit. . . ." Accordingly, it does not include programs which are neither enumerated nor "similar" to those that are.

The second question focuses on the statutory requirement that the benefit provided under the program go to an individual,

household, or family eligibility unit. We understand this language to apply only when there is both a uniform determination of eligibility and a determination of the particular assistance or amount of assistance for which the unit is eligible. Thus, if the grantee (e.g., a state) has discretion to determine whether or not a particular individual, household, or family receives certain benefits, the amount of the benefits, or the type, and the individual, household, or family does not have a claim on what she or it receives, then the beneficiary is not an individual family eligibility unit.

This interpretation is buttressed by the legislative history. Congress, in its Conference Report on PRWORA, expressly states that Title I, Part A of the Elementary and Secondary Education Act (20 U.S.C. § 2711-2731) would not be considered a "Federal public benefit" for purposes of PRWORA Title IV "because the benefit is not provided to an individual, household, or family eligibility unit." Under Title I, Part A of the Elementary and Secondary Education Act, the Federal government provides formula grants to states that, in turn, allocate funds to school districts to provide supplementary educational services to students with special needs in low income areas. School districts have broad discretion to determine which students they serve and what services (e.g., supplementary reading or math instruction) are provided.

Consistent with our proposed definition of "Federal public benefit," and supported by the legislative history, schools receiving Title I money fall outside the definition because they have broad discretion to determine who is educationally deprived, the type of services that such children will receive, and the number of educationally deprived children who will actually receive such services. Similarly, at HHS, for example, within broad guidelines, Ryan White moneys are outside the definition because they go to consortia that decide how the money will be spent, on what services and to which clients; community health clinics receive grants to assist them in providing a range of services that are made available to any or any subset of persons within their geographic area in need of medical services as the clinics determine necessary.*

On the other hand a number of programs -- including but not

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* Under this analysis, the Title XX Social Services Block Grant (SSBG) program would fall outside the definition of "Federal public benefit." However, Congress made explicit provision for this program under PRWORA 402(b), enabling the states to make eligibility determinations with respect to qualified aliens. The unavoidable implication of section 402(b) is that Congress intended the SSBG program to be included within the definition of "Federal public benefit."

limited to Medicaid, Medicare, Title II Social Security, SSI, Food Stamps, Unemployment Insurance, postsecondary student loans, retirement benefits, and child care assistance -- fall within the definition of "Federal public benefit" because they require an individual, household, or family eligibility unit determination. TANF would also fall within the definition because assistance is provided to needy families according to objective criteria for the determination of eligibility and the delivery of benefits.

Federal Public Benefits

1. Elementary / Secondary benefits

1. Education - to provide list - not covered.
wants to send. 'sheet out saying this

2. HHS
"eligibility cost"
→ have interp.

10:00 Thursday.