AFDC Based on Incapacity:
Still Forgotten After All These Years
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By Christopher Lamb

Christopher Lamb is a staff attorney with the Center on Social Welfare Policy and Law, 275 Seventh Ave., 6th Floor, New York, NY 10001-6708, (212) 633-6967. Much of the compilation and initial analysis of the survey material discussed in this article was done by Edna Torres, a law graduate formerly with the Center, and her contribution is gratefully acknowledged.

In August 1984, the Clearinghouse Review published the Center on Social Welfare Policy and Law's The Forgotten Program for Two-Parent Families: AFDC Based on Incapacity. Based on the responses to a survey recently conducted by the Center, it appears that the AFDC-I program remains largely unremembered a decade later. Although it seemed for a time that the Clinton Administration might propose making AFDC available to all needy families, thus eliminating the different categorical bases for AFDC eligibility, the Administration's welfare bill does not take that step. As a result, it appears that incapacity of a parent will remain an eligibility factor for AFDC for the foreseeable future. Updating the Center's 1984 article, this article describes the numerous barriers reported by survey respondents to full utilization of AFDC-I and outlines possible litigation strategies for dealing with these barriers.

I. The Federal Incapacity Standard

Federal law governing incapacity has not changed since 1984. Under the federal AFDC statute, AFDC benefits are available to needy children who are deprived of parental support or care by a parent's death, continued absence from the home, "physical or mental incapacity," or unemployment.

The federal regulations define incapacity as follows:

"Physical or mental incapacity" will be deemed to exist when one parent has physical or mental defect, illness or impairment. The incapacity shall be supported by competent medical testimony and must be of such debilitating nature as to reduce substantially or eliminate the parent's ability to support or care for the otherwise eligible child and be expected to last for a period of at least 30 days. In making the determination of ability to support, the agency shall take into account the limited employment opportunities of handicapped individuals. A finding of eligibility for OASDI or SSI benefits based on disability or blindness is acceptable proof of incapacity for AFDC purposes.

II. Underutilization of AFDC-I
A. Evidence of Underutilization

In the summer of 1993, the Center distributed to legal services advocates in 51 AFDC jurisdictions a questionnaire asking among other things whether the advocates believed that AFDC-I was underutilized in their jurisdictions. Of 35 advocates who responded to the survey, 27 believed that the program was underused in their jurisdictions. Five advocates did not believe that their jurisdictions had a problem with underutilization; two were unsure; and one did not answer the question.

Statistics available from HHS appear to be consistent with the advocates' perceptions, both with respect to overall underutilization and disparate utilization by the states. With respect to overall underuse, participation in the AFDC-I program as a percentage of all AFDC cases steadily declined from the 1950s, when 22 percent of all AFDC families were eligible due to parental incapacity, until 1983 when AFDC-I families for the first time represented less than 3 percent of all AFDC cases. Since 1983, AFDC-I participation has fluctuated slightly, never rising above 3.4 percent of the caseload and never dropping below 2.8 percent. During 1991, the last year for which statistics are available, only 3.3 percent of the 4.4 million families receiving AFDC nationwide were found eligible based on the incapacity of a parent. The number of families in the AFDC-I program reached its peak in 1971, when the program served 246,000 families. The total dropped to 100,000 in 1983 and in 1991 stood at approximately 144,000.

Numerous factors in addition to underuse have contributed to the relative decrease in the number of AFDC-I cases. These include the availability and utilization of social security disability benefits, the legal victories of the late 1960s that struck down barriers to AFDC receipt by unmarried mothers, the increase in births to unmarried mothers, and the increased availability of AFDC-UP in some states. It is beyond the scope of this article to try to sort out the impact of all of these factors on the relative utilization of AFDC-I.

HHS statistics also show that AFDC-I utilization varies considerably from one jurisdiction to another from a low of 0.5 percent in the District of Columbia and 0.6 percent in Maryland to a high of 13.2 percent in Kentucky and in Puerto Rico. In ten jurisdictions in 1991, AFDC-I represented less than 2 percent of the caseload while in four jurisdictions it represented more than 7 percent. Some of this variation may be attributable to whether states have GA programs that serve families. In states with GA programs that serve two-parent families, it may be easier for welfare eligibility workers to categorize families as GA rather than undertaking an incapacity determination. Some of the difference in AFDC-I utilization, however, does not appear to be explainable by differences in GA programs or demographics. For example, neighboring states Connecticut (0.8 percent) and Rhode Island (3.0 percent), Maryland (0.6 percent) and Virginia (3.7 percent), and Michigan (1.1 percent) and Ohio (3.5 percent) had very different AFDC-I utilization rates although they all had noncategorically restricted GA programs that provided ongoing benefits.
B. **Factors Contributing to Underutilization**

1. **Improper Legal Standards**

Over half (22 out of 35) of the state policy materials provided to the Center in mid- to late 1993 by survey respondents did not specifically require that, in making incapacity determinations, the state agency "take into account the limited employment opportunities of handicapped individuals." At least 11 jurisdictions had definitions of incapacity that were inconsistent in other ways with the federal definition of incapacity. These problematic state policies fell into two categories. Some states apply a "usual function" test, which finds the family eligible for AFDC-I only if the parent with the impairment is unable to perform the role of either wage earner or caregiver, whichever was the parent's usual role before the impairment became serious. Other states use an employability test that defines a parent as not incapacitated if the parent is able to work a certain number of hours per week. In addition, 14 jurisdictions had provisions requiring some incapacitated parents to submit to treatment as a condition of receiving AFDC-I, which are not authorized by the federal AFDC statute. /22/

a. **Limited Employment Opportunities for Persons with Disabilities**

Advocates in West Virginia, Virginia, Louisiana, Oklahoma, Washington, Texas, and New Hampshire have successfully challenged state standards that failed to include the language from the federal regulation regarding the limited employment opportunities for persons with disabilities. /23/

An appellate court in Oregon, however, upheld the state's incapacity definition in spite of its failure to include this language. /24/ The Oregon court found that the federal regulation requires only that states consider that the AFDC-I applicant may be excluded from certain jobs because incapacity makes it impossible to perform them but does not require the states to consider the lack of suitable jobs for persons with disabilities in the labor market or discrimination against them in making AFDC-I determinations. In other words, the Oregon court held that the provision of the federal regulation regarding the limited job opportunities for persons with disabilities added nothing to the meaning of the regulation, which even without that sentence clearly would require the state agency to consider whether the incapacity has made it impossible for the AFDC-I applicant to do certain jobs. This interpretation is wrong because it renders a sentence in the federal regulation meaningless.

The Washington state regulation, which was adopted after litigation regarding AFDC-I was resolved through a combination of court order and stipulation, is a better guide to this provision's meaning. The regulation requires consideration of discrimination against those with disabilities by instructing that one way of establishing deprivation based on incapacity is when the condition "is the reason employers refuse to employ the parent for work he or she could do." /25/ Most other courts that have considered this part of the regulation have not discussed its meaning. They have merely held that states must include similar language in their regulations. /26/ Nevertheless, at least 22 states have not incorporated this federal requirement into their AFDC-I standards.
b. Usual Function Test

Usual function tests are contrary to federal regulations as interpreted in a 1980 HHS action transmittal. Prior to 1980, the usual function test was common practice in most states. Following the action transmittal, most states changed their practices. Such tests were successfully challenged through litigation in Indiana, Florida, and Maine as denying aid to eligible AFDC recipients. However, at least four states -- Alaska, New Mexico, North Dakota, and Wisconsin -- continue to apply a usual function test in incapacity determination. For example, the Wisconsin policy instructs caseworkers that in determining incapacity they must "consider the parent's capacity to perform his/her usual function." Alaska policy defines incapacity as existing when

[t]he parent who normally has primary care for the physical needs of the child and performs the normal maintenance activities within the home . . . is totally unable to perform these necessary tasks or is unable to perform them without extensive help from others; and/or [t]he parent who normally engages in activities primarily intended to provide the household with the means to sustain itself . . . is totally unable to work, is unable to work full-time at regular employment, is incapacitated in such a way that he is able to work but potential employers refuse him employment because of his incapacity, or is unable to continue his usual physical activities to a degree that cannot obtain sufficient subsistence materials to maintain the household.

New Mexico and North Dakota's AFDC-I definitions are similar to Alaska's in that they require that a parent be considered either a "breadwinner," whose incapacity will be determined by the ability to engage in paid work, or a "homemaker," whose incapacity will be determined by the ability to care for children. In contrast, the federal policy requires a finding of eligibility when either parent's ability to support or to care for a child is substantially reduced. The Wisconsin, New Mexico, North Dakota, and Alaska policies would wrongly lead to denials of AFDC-I when a homemaker's ability to support his or her child through work was substantially reduced and when a parent who worked outside of the home suffered an incapacity that substantially reduced his or her ability to care for the children. The Alaska policy also appears to require a greater degree of incapacity than the federal standard.

c. Employability Test

Under the federal incapacity standard, a parent can be employable or in fact employed, even employed full-time, and still be incapacitated for AFDC purposes if the parent's ability to support the child has been substantially reduced. A previously highly paid construction worker with an impairment that makes it impossible for her to continue in construction work and who instead works full-time stuffing envelopes for minimum wage has had her ability to support her child substantially reduced due to her impairment. State standards that mandate a finding of no incapacity if a parent works or can work a certain number of hours are thus an improper restriction of a federal eligibility category. Advocates have successfully challenged employability tests through litigation in Oklahoma, Washington, Michigan, and Texas.
Based on responses to the Center's survey, at least six states -- Maine, Utah, Vermont, North Carolina, Nebraska, and Louisiana -- continue to impose employability tests on applicants for AFDC-I. In Maine, to show incapacity with respect to ability to support, applicants "must show that the incapacity prevents the individual from working within their capabilities 20 hours or more per week." /34/ In Utah, "full time[EPa3] employment nullifies a person's claim to incapacity." /35/ In Vermont, "[i]f an applicant for [AFDC-I] works 35 hours or more per week he or she is not eligible on the basis of incapacity." /36/ Under both the North Carolina and Nebraska policies, families are no longer eligible for AFDC if the incapacitated parent goes back to work without regard to whether the parent works at a substantially reduced level. /37/ In Louisiana, the state agency lists 15 impairments, including amputations, asthma, diabetes, and epilepsy, which will not form the basis for AFDC-I eligibility unless "the client cannot engage in a useful occupation because of the impairment." Thus, in Louisiana, families with a parent whose ability to support his or her children has been substantially reduced, but not eliminated, by one of the listed conditions are not eligible for AFDC-I. /38/ All six of these policies constitute illegal restrictions of the federal incapacity standard.

d. Treatment Requirements

Of the 35[EPa4] states whose AFDC-I policies were sent to the Center by survey respondents, 14 require incapacitated parents to cooperate in obtaining treatment, if treatment is recommended, as a condition of AFDC-I eligibility. /39/ In contrast, several other states specifically state in their policies that eligibility cannot be conditioned on acceptance of treatment. /40/

Because the federal AFDC statute does not authorize them, treatment requirements could be challenged under King v. Smith and Townsend v. Swank as impermissibly narrowing the federal definition of AFDC eligibility. /41/ Federal regulations, however, permit states to impose conditions on receipt of AFDC "if such conditions assist the State in the efficient administration of its public assistance programs, or further an independent state welfare policy, and are not inconsistent with the provisions and the purposes of the Social Security Act." /42/ Furthermore, in the 1974 Federal Register[EPa5] preface to the incapacity regulations, the Department of Health, Education, and Welfare specified that states may administratively impose treatment requirements. /43/

Although it can be argued that regulatory authorization of additional eligibility conditions conflicts with the statutory requirement that AFDC be furnished to all eligible individuals /44/ and with King and Townsend, unfortunately a strong counterargument exists, also based on Supreme Court precedent. Notwithstanding its holdings in King and Townsend, the Court, in New York State Department of Social Services v. Dublino, permitted New York to impose on AFDC recipients work requirements not required by the federal statute. /45/ In Dublino, the Court distinguished the New York work regulations from the state requirements struck down in King and Townsend by describing the New York work regulations as "supplementary regulations promulgated within the legitimate sphere of state administration" rather than state laws that "excluded people from AFDC benefits who the Social Security Act expressly provided would be eligible." /46/
In order to succeed, a challenge to a state’s treatment requirement would have to convince a court that the requirement was not within “the legitimate sphere of state administration” but rather excluded people from AFDC who "the Social Security Act expressly provided would be eligible." A state defending a treatment requirement would no doubt claim that, like the work requirements upheld in Dublino, the requirement did not exclude anyone willing to cooperate and furthered an important goal of the Act in fostering self-sufficiency. The possibility of successfully challenging a state treatment requirement on its face therefore may depend on whether the requirement appears reasonable. /47/ Treatment requirements that allow for good-cause exceptions will be more difficult to challenge than policies that do not provide for any such exceptions. /48/[EPA6]

Finally, even if a state can condition the incapacitated parent’s eligibility on acceptance of treatment, arguably it cannot deny benefits to the other members of the family based on a finding that the parent has not cooperated with treatment. /49/ When the federal statute prescribes penalties for individual failures to cooperate, the penalty is individual disqualification. /50/ The children, after all, are still deprived of parental support or care when they have an incapacitated parent who is not obtaining treatment. /51/ Since they meet the definition of dependent child and all other eligibility criteria, they should receive AFDC benefits whether or not their parent accepts treatment.

2. Restrictive State Practices

Although many states continue to have written incapacity standards that do not conform to the federal standard, it is apparent that the problem of AFDC-I underutilization goes beyond overly restrictive or otherwise improper state definitions of incapacity. Advocates reported a wide variety of practices that restrict access to AFDC-I in their states.

a. Use of Incorrect Medical Standard

Advocates in 17 of 33 states indicated that they believed that in practice decisionmakers apply a more stringent medical standard to AFDC-I applicants than permitted by federal law. /52/ This may be a particular concern when the ultimate incapacity determination (rather than just the finding of whether a "defect, illness, or impairment" exists) is made by a doctor who is unfamiliar with the legal standard for incapacity. Doctors who are familiar with the more widely used and more stringent disability standard used in the social security and SSI disability programs may not realize that incapacity under AFDC does not require the same level of impairment. Yet respondents to our survey indicated that in 9 out of 33 jurisdictions doctors are responsible for incapacity determinations.

Although it is more difficult to attack improper incapacity determinations resulting from incorrect applications of correct standards than it is to attack standards that are improper as written, such challenges may be undertaken. If agency determinations consistently result in decisions that applicants who meet federal standards are not incapacitated, a lawsuit alleging that eligible individuals are being denied aid in violation of 42 U.S.C. Sec. 602(a)(10) would be as legally appropriate as if the state standard were wrong as written. /53/ The challenge is to show a pervasive pattern and practice of use of an improper standard. In the first instance, this could be done by
presenting a complaint on behalf of numerous plaintiffs who are incapacitated under federal standards but who have been denied aid by the state. Subsequent discovery, including depositions of decisionmakers, might establish that improper standards are in fact being used.

Obtaining procedural protections may be another way to ensure that decisions are made in a proper fashion. In a lawsuit brought on behalf of a class of people who had been or might be in the future denied or terminated from AFDC based on a finding of no incapacity, advocates in Oklahoma obtained a settlement establishing a detailed sequential evaluation process for AFDC-I determinations. /54/ If the medical evidence alone does not support an incapacity finding, then a comprehensive listing of social and vocational factors must be evaluated. The settlement also required revision of the forms used in the AFDC-I application process and retraining of agency workers involved in the process. Attorneys for the plaintiffs were entitled to notice of the training sessions and permitted to observe them. The attorneys were also allowed to review randomly the files of class members for a period of one year after the settlement. All class members were entitled to a reevaluation of their incapacity claims and payment of lost benefits if they were found eligible after reevaluation.

In Stump v. Miller, advocates in West Virginia reached a settlement that requires the state's AFDC agency in making all incapacity decisions to (1) employ a medical review team comprised of at least one doctor and one person with a degree in a social service field; (2) increase reimbursement for second physical or psychological examinations obtained at state expense; (3) use a specified form in making incapacity determinations and provide a full explanation of any adverse decisions on that form; and (4), in the case of denials, provide that form to the applicant with notification of the denial. /55/ The settlement in Stump built on a settlement in an earlier case that had used due process claims to secure an agreement by the state to pay for second medical examinations in incapacity determinations. /56/

b. Restrictions on Medical Evidence

Advocates in 11 states reported that their state agencies disallow or discount evidence of incapacity from nondoctors such as social workers or nurse practitioners. Yet the preamble to the incapacity regulations in discussing competent medical testimony state explicitly that "states can make use of other professionals (such as psychologists and optometrists) who are qualified to give testimony on certain conditions." /57/ Such evidence may be critical in those types of cases in which care is given by nondoctors, for example, psychiatric impairments that may be treated by a psychiatric social worker or psychologist.

Restrictions on the evidence that will be accepted as proof of incapacity could be challenged as violating the federal statute requiring that applicants for assistance be allowed to submit applications and demonstrate their eligibility and federal regulations ensuring that anyone wishing to do so must be permitted to apply for assistance, that agency procedures must not preclude the opportunity for individuals to apply and obtain an eligibility determination, and that methods for determining eligibility must be consistent with the goal of assisting all eligible persons to apply. /58/
c. Obtaining Medical Records

Advocates in 11 states reported that their states do not have adequate systems for obtaining medical records to evaluate claims of AFDC-I eligibility or place the entire onus of obtaining such records on the applicant. Many states have requirements that agency workers assist applicants in obtaining documentation to verify their eligibility for AFDC. Such provisions provide a straightforward basis for challenging an inadequate state system for obtaining information documenting incapacity or a practice of requiring applicants to provide such information without assistance. In states without such requirements, the federal statutory provision requiring that all potential applicants have an opportunity to file an application and the regulation requiring that eligibility be determined in a method consistent with the objective of assisting all eligible persons to qualify /59/ could form the basis for a suit to require reform of the process of obtaining evidence of incapacity. /60/

In Campos v. Carr, these claims were used to secure a settlement in which Texas agreed to require workers to obtain medical records going back five years, rather than 60 days; to inform applicants that the state will pay for medical examinations; to assist applicants in finding a doctor to perform an examination; and to use standard forms for requesting medical records and examinations from doctors. /61/

Advocates raising claims under these federal provisions have also successfully negotiated settlements that include acceptance by state agencies of a general obligation to assist applicants in obtaining documentation to verify their eligibility. /62/ Any general obligation would of course include an obligation to assist AFDC-I applicants in obtaining records to document their incapacity.

d. Payment for Medical Examinations

Advocates in eight states reported that their states do not pay for medical examinations for people claiming AFDC-I eligibility. The same federal statutory and regulatory provisions discussed above regarding restrictions on medical evidence and inadequate systems for obtaining documentation of incapacity could be used as the basis for a suit alleging that a state should pay for a medical examination if one is necessary to document incapacity. Advocates alleging violations of these provisions have been successful in obtaining settlements requiring the state to pay for documentation of eligibility that an applicant cannot afford to obtain. /63/ It may also be helpful in advocating for states to pay for doctor's examinations that the federal regulations provide for federal financial participation (at the rate of 50 percent) for expenses incurred in establishing incapacity. /64/

e. Delays in Application Process

Advocates in seven states reported that there are unreasonable delays in processing AFDC-I applications in their states. The federal AFDC statute requires that aid be furnished to all eligible applicants with "reasonable promptness." /65/ The federal regulations require the states to set a time standard for applications not in excess of 45 days. /66/ The regulation allows for exceptions in "unusual circumstances" such as when the agency cannot reach a decision due to delay on the part
of the applicant or physician. However, the regulation states specifically that it applies only when
the agency cannot reach a decision. Thus, if delay is caused by the failure to obtain an extra
physician's report that is not necessary for a decision, the "reasonable promptness" requirement is
violated. Because the exception applies only to unusual circumstances, reasonable promptness is
also violated if all or most AFDC-I applications are delayed due to a cumbersome process for
making determinations in those cases.

Cases have been litigated in numerous states involving delay in all AFDC applications and have
generally resulted in orders requiring compliance, though usually after lengthy litigation to
demonstrate general lack of compliance with the state's application processing time standard. /67/ If
pervasive delays occur in a state's application processing for AFDC-I applicants, a class of those
applicants could litigate the issue of application delay as to themselves, even if a showing of delay
could not be shown for the entire caseload. It might be easier to prove delay in such a smaller class
and to formulate relief since the delays may be directly attributable to particular parts of the AFDC-
I application process. For example, orders in successful challenges to delays could be fashioned to
eliminate unnecessary procedures for establishing incapacity, to speed up referrals when separate
determination units are used, or to increase staffing in such units if delays were caused by backlogs.

In addition, in states that have outstanding orders against state welfare departments for delays
beyond the states' application processing time standards, it might be possible to seek reform of
problems in the AFDC-I process by using those orders. Thus, in a state with an order that
applications be processed within the required period, even if the state is complying with regard to
the rest of the caseload, the existing order might be used to obtain relief with regard to delays in
AFDC-I applications.

f. Faulty Fair Hearing Procedures

Advocates in four states reported faulty fair hearing procedures in which the agencies' initial
determinations are affirmed despite not being based on any coherent evidence of ineligibility.
Under both due process case law and under federal regulations, welfare fair hearings must include
the right of the recipient to appear, present evidence, and confront and cross-examine the witnesses
the welfare department relied upon in making an adverse decision. In addition, the hearing decision
must be based solely on the evidence adduced at the hearing and the reasons for the decision must
be clearly stated. /68/

In West Virginia, the state's highest court, in reversing a denial of AFDC-I benefits, held that the
hearing officer's decision was flawed in that it did not contain findings of fact on all pertinent issues
and a reasoned explanation of his ultimate conclusions. /69/ The court found the hearing officer's
opinion "woefully inadequate" in citing one doctor's report as its basis while failing to discuss the
weight accorded all of the evidence presented and failing to articulate the legal standards used. /70/

g. Cumbersome Verification Practices
Advocates in three states reported cumbersome verification practices in which agencies require specialized medical evidence that is not really necessary to a determination of incapacity. Extensive consultative examinations with specialists should not be necessary in incapacity determinations. The relevant medical questions are only: (1) Does an impairment exist that could reduce an individual's ability to support or care for children? and (2) Is it likely to last 30 days? Additional medical verification requirements that are not necessary to establish these basic points should not be imposed on applicants for aid.

Challenge of excessive verification requirements in AFDC-I through litigation may be difficult since the state can rightly claim that federal law requires medical evidence, and drawing the line as to when medical requirements go from being necessary to being excessive can be difficult. One approach might be application-delay challenges in states where unnecessary verification requirements routinely delay AFDC-I applications beyond the state's time limit for application determinations. /71/

III. Greater Outreach and Agency Education

While improper legal standards and restrictive state practices both play roles in limiting AFDC-I use, most survey respondents believed that another important factor is a lack of awareness among potential recipients and agency personnel that eligibility for AFDC is available to two-parent families when one of the parents is incapacitated. Legal services staff and other advocates and service workers should be attuned to possible physical or mental impairments that could be the bases for AFDC-I eligibility for poor two-parent families seeking assistance. In particular, it is important for advocates to remember that AFDC-I may be a source of income for families of persons in the following situations:

-- SSI recipients with children may be eligible for receipt of AFDC-I on behalf of their spouses and children.

-- Individuals denied or terminated from SSI or Title II social security benefits due to a finding of no disability may be entitled to AFDC-I benefits for themselves, their spouses, and their children under the less restrictive AFDC-I standard.

Advocates may also wish to distribute flyers and hang posters in and around their own offices and local social security and welfare offices informing families of the possibility of AFDC-I eligibility. It may be possible to secure agreement from a state AFDC agency to participate in outreach as part of the relief in a case regarding improper legal standards or overly restrictive practices regarding incapacity. It may also be possible to obtain an order requiring such outreach if a court is convinced that the agency's past policies or actions discouraged people from applying. In states with GA programs for families, it may be possible to convince officials that AFDC-I outreach is in their interest as a way of increasing federal reimbursements.

There is a good basis for arguing that federal law requires the state agency to conduct a limited form of outreach by considering whether there is another basis for eligibility before terminating aid because the factor that originally served as the basis for eligibility (e.g., parental absence or
unemployment) no longer exists if the agency has information in its possession that indicates the possible existence of eligibility on other grounds (e.g., parental incapacity). This obligation may also extend to a duty to make inquiry about the possible existence of another basis in all cases where the original factor giving rise to eligibility has ceased to exist. Federal regulations requiring that aid continue until the family is determined ineligible, and the requirement to redetermine eligibility on receipt of information about a change that may make the family ineligible, appear to put the burden of establishing grounds for termination on the state. * Implicit in this burden is an obligation to determine whether another basis of eligibility exists before terminating aid.

A number of courts have considered the question of whether states have to consider alternative bases of eligibility in the Medicaid context and, on the basis that the Medicaid regulations are virtually identical to the AFDC rules, have concluded that states are barred from terminating Medicaid solely on loss of the original basis for eligibility without considering whether another basis exists for continuation. In the leading case, Stenson v. Blum, the court held that the state could not terminate Medicaid without determining whether an individual who was terminated from SSI remained eligible for Medicaid on another basis. * Implicit in this burden is an obligation to determine whether another basis of eligibility exists before terminating aid.

Two lower-level state courts have considered whether states must investigate alternative grounds for AFDC eligibility before closing cases based on a change in the original factors that led to a finding of eligibility. Neither court provided extensive analysis in support of its result. The status of the issuing courts gives these decisions little precedential value, and their lack of analysis gives them little persuasive value.

In Ancona v. Carlson, the court remanded the plaintiff's case to the state agency for a determination of whether alternative grounds for eligibility existed but declined to hold that California's overpayment regulations were in violation of federal law on this issue. * In Jeffords v. Department of Human Services, the court, in refusing to hold that Maine was required to consider alternative bases for eligibility before assessing an overpayment, seemed mainly to be concerned that the alleged basis for incapacity was the fathers' alcohol and drug abuse problems. *

**IV. Conclusion**

In sum, it appears that many needy families who should be found eligible for AFDC-I are not receiving benefits due to a combination of illegal state incapacity definitions, overly restrictive state incapacity determination practices, and a lack of knowledge that the program is available to help two-parent families. The Center is available to assist local programs and other advocates whose clients are harmed by improper state administration of AFDC-I and urges advocates to contact the Center for assistance.

Footnotes

Another indication of the forgotten status of the AFDC-I program is the near total lack of federal agency activity in this area over the last decade. In response to a Freedom of Information Act request made by the Center in 1993 seeking copies of all documents in HHS's files discussing and interpreting incapacity as a basis for AFDC eligibility dated 1981 or later, HHS produced six memoranda totaling 15 pages. Four of the memos dealt with a single North Dakota case. The other two dealt with an inquiry from Puerto Rico.


Even in states that provide assistance to all needy families through federal waivers of the AFDC-UP 100-hour and connection-to-the-labor-force rules, AFDC-I will remain a preferable option to AFDC-UP for many families because it does not carry with it the same work obligations as AFDC-UP. 42 U.S.C. Sec. 603(l)(4); 45 C.F.R. Secs. 250.33, 250.74.

For a discussion of the legislative and regulatory history of the AFDC-I eligibility standard, see Leiwant, supra note 1, at 354 -- 56.

42 U.S.C. Secs. 606(a), 607.

45 C.F.R. Sec. 233.90(c)(1)(iv).

The 54 jurisdictions in the United States with AFDC programs are the 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. The Center sent questionnaires to advocates in 49 states, Puerto Rico, and the District of Columbia. Advocates in the following 35 jurisdictions responded: Alabama, Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Because some respondents did not respond to every question, the number of responses to some questions is less than 32. State policy materials provided to the Center by the survey respondents are available from the Clearinghouse (Clearinghouse No. 50,515).


HHS, Incapacity Under the AFDC Program xi (1981).

/14/ 1991 Characteristics, supra note 11, at 33.


/16/ For a more extensive account of the decline in AFDC-I utilization over time, see Leiwant, supra note 1, at 358 -- 59.

/17/ The relatively high utilization in Puerto Rico may reflect the unavailability of SSI.

/18/ It was less than 2 percent of caseload in the following jurisdictions: Connecticut (0.8 percent), District of Columbia (0.5 percent), Florida (1.6 percent), Illinois (1.1 percent), Maryland (0.6 percent), Michigan (1.1 percent), Nevada (0.9 percent), New Jersey (0.9 percent), North Dakota (1.2 percent), and the Virgin Islands (1.8 percent). It was over 7 percent in Kentucky (13.2 percent), Vermont (7.9 percent), West Virginia (7.2 percent), and Puerto Rico (13.2 percent). 1991 Characteristics, supra note 11.

/19/ Of the ten jurisdictions with AFDC-I utilization of under 2 percent in 1991, at least six (Connecticut, Illinois, Maryland, Michigan, Nevada, and New Jersey) had GA programs in 1989 that were not categorically restricted and provided ongoing benefits. The District of Columbia and Nebraska provided short-term benefits that were not categorically restricted. Florida had a categorically restricted program. Information was not available regarding the Virgin Islands. Lewin/ICF and James Bell Associates, State and Local General Assistance Programs: Issues and Changes 5 -- 6, 11 (1990).

/20/ Improper categorization of families as GA rather than AFDC-I in many states results in lower benefits, inferior Medicaid, and/or no JOBS services for the families. In addition, as a result of such incorrect categorizations states lose federal financial participation.

/21/ Lewin/ICF, supra note 19, at 5 -- 6, 11.

/22/ No advocates reported problems in their states with standards that require incapacity to last longer than the thirty days required by federal law. In the past, however, litigation has been necessary to force states to comply with this aspect of the federal definition. Pahle v. Adult & Family Serv. Div., 696 P.2d 1135 (Or. Ct. App. 1985) (Clearinghouse No. 38,633). See Silva v. Vowell, 621 F.2d 640 (5th Cir. 1980), cert. denied, 449 U.S. 1125 (1980) (Clearinghouse No. 26,185).


/24/ Gaspard v. Adult & Family Servs. Div., CA A44000 (Or. Ct. App. Dec. 7, 1988) (Clearinghouse No. 44,316). The Oregon incapacity standard has nevertheless been revised to include a requirement that the state consider the "limited job market opportunities of incapacitated individuals." Or. Admin. R. 461-125-230.


/26/ The federal regulatory history is not helpful in determining the meaning of this provision. It was added in 1974 without comment or explanation. 39 Fed. Reg. 34038 (Sept. 23, 1974).


/29/ Although New Mexico was not one of the states that responded to the Center's survey, the Center learned in a recent conversation with a legal services attorney in New Mexico that New Mexico applies a usual function test. Conversation with Clark de Scwheinitz, Northern New Mexico Legal Services (Sept. 12, 1994). In Nelson v. Cass County Social Servs., 424 N.W.2d 371 (N.D. 1988) (Clearinghouse No. 44,092), the North Dakota Supreme Court declined to invalidate the state's usual function test, despite acknowledging that the test "has no apparent basis in the appropriate federal regulation." The court instead remanded the case to a lower court for consideration of additional evidence regarding HHS's interpretation of the federal regulation. HHS has since specifically stated that North Dakota's use of a usual function test violates federal law. Unpublished memorandum dated April 11, 1990 from Director of Office of Family Assistance to Regional Administrator, Region VIII (Clearinghouse No. 50,510). North Dakota, however, still uses such a test.

/30/ Wisconsin, AFDC Handbook, Appendix Sec. 4.3.0.


37/ North Carolina Dep't of Human Resources, AFDC Manual, Sec. 2330, III; Nebraska, Department of Social Services Manual Sec. 2-005.03B4.

38/ Louisiana Dep't of Health and Human Resources, Office of Family Support, Policy B-350.

39/ Those states are Idaho, Illinois, Indiana, Kentucky, Louisiana, Maine, Missouri, Nebraska, Nevada, North Dakota, Oklahoma, Rhode Island, Washington, and West Virginia.

40/ E.g., Iowa's policy states: "The IM worker shall refer any parent who meets the ADC criteria for incapacity to the Department of Education, Division of Rehabilitation Services for evaluation and services. Acceptance of these services is optional." Iowa Dep't of Human Services, Employees' Manual, IV-B-16. See also Wisconsin, AFDC Handbook, Appendix Sec. 4.3.3 (acceptance of DVR services is optional).

41/ King, 392 U.S. at 309; Townsend v. Swank, 404 U.S. 282 (1971). In Townsend, the Court held that "in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." 404 U.S. at 286.


44/ 42 U.S.C. Sec. 602(a)(10).


46/ Dublino, 413 U.S. at 421 -- 22.

47/ It may be possible to draw useful analogies from limitations on the treatment requirements that can be imposed on social security disability and SSI disability recipients. 20 C.F.R. Secs. 404.1530, 416.930. In addition to providing good-cause exceptions to the requirement that recipients cooperate with treatment, these regulations also limit the treatment that can be required of recipients to treatment prescribed by their own physicians.

48/ Compare Indiana's policy ("Good cause" for a recipient's refusing treatment includes, but is not limited to, the following: (a) Such treatment is contrary to his religious beliefs; (b) Previous surgery of the type recommended was unsuccessful; (c) The recommended treatment is very risky because
of its magnitude, unusual nature, or other reason; or (d) The recommended treatment involves the amputation of a limb or a major part of a limb,") with Illinois's ("The incapacitated parent is required to accept medical treatment or rehabilitative services if recommended by the DPA or by the Department of Rehabilitation Services.").

/49/ Most state policies provided to the Center do not specify a penalty for noncooperation with treatment. Indiana, Louisiana, Washington, and West Virginia's policies explicitly make individual ineligibility the penalty. Under Nebraska's policy, the penalty is the ineligibility of the entire family.


/51/ See Huffstetler v. North Carolina Dep't of Human Resources, 89CVS314 (N.C. Ct. App. June 18, 1991) (Clearinghouse No. 47,147) (distinguishing cases involving termination of disability benefits to alcoholics who do not cooperate with treatment from terminating AFDC-I when an alcoholic parent does not seek treatment on the ground that AFDC-I is a program for needy children).

/52/ Only 33 advocates responded to the section of the questionnaire regarding restrictive state practices.


/54/ Upson, No. CIV-88-1373-W.


/56/ Miller v. Lipscomb, C.A. No. 74-390 CH (S.D. W. Va. amended consent decree Oct. 27, 1987) (Clearinghouse No. 44,184). Counsel for the plaintiffs in Stump and Miller reports that the right to get a second examination by a doctor of the applicant's choosing at state expense is critical to the success West Virginia advocates have in obtaining AFDC-I for their clients. For a discussion of due process claims challenging incapacity determinations procedures, see Leiwant, supra note 1, at 365.


/58/ 42 U.S.C. Sec. 602(a)(10) and 45 C.F.R. Sec. 206.10(a)(1) provide the right to apply for AFDC; 45 C.F.R. Sec. 233.10(a)(1)(vi) provides: "Eligibility conditions or agency procedures or methods must not preclude the opportunity for an individual to apply and obtain a determination of eligibility or ineligibility"; and 45 C.F.R. Sec. 233.10(a)(1)(vii) provides: "Methods of determining eligibility must be consistent with the objective of assisting all eligible persons to qualify."

/59/ 42 U.S.C. Sec. 602(a)(10); 45 C.F.R. Sec. 233.10(a)(1)(vii).
/60/ See also 45 C.F.R. Secs. 233.10(a)(1)(vi); 206.10(a)(5)(ii) ("assistance will not be denied, delayed, or discontinued pending receipt of income or other information requested . . . if other evidence establishes the individual's eligibility for assistance").

/61/ Campos, No. SA-93-CA-0348.


/64/ 45 C.F.R. Sec. 233.90(c)(3).

/65/ 42 U.S.C. Sec. 602(a)(10).


/69/ Harrison, 286 S.E.2d at 275.

/70/ In Estep, C.A. No. 08-0262-A, plaintiff raised claims regarding a fair hearing process which afforded the applicant no opportunity to cross-examine the doctor who wrote a medical report which the agency relied upon in denying plaintiff's AFDC-I claim, but the matter was settled on other grounds without reaching those claims. Welfare recipients prevailed in a challenge to state agency practices that denied them the opportunity to confront and cross-examine adverse witnesses in Ortiz v. Eichler, 794 F.2d 889 (3d Cir. 1986) (Clearinghouse No. 35,980).

/71/ For more information regarding approaches to challenging cumbersome and unnecessary verification procedures, see AFDC Verification Packet, supra note 62.
45 C.F.R. Secs. 206.10(a)(5), (a)(9). See also id. Sec. 233.10(a)(1)(vii) (must employ "methods of determining eligibility . . . consistent with the objective of assisting all eligible persons to qualify"); id. Sec. 206.10(a)(8) (must base eligibility decisions on facts in the record).


Ancona v. Carlson, No. 366533 (Cal. Super. Ct. June 9, 1992) (Clearinghouse No. 46,586). It should be noted that California has a regulation requiring evaluation of other possible bases for eligibility when the original basis no longer exists. The court did not state whether this was the reason it declined to find the state overpayment regulation in violation of federal law.