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CONSUMER
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At A Glance

Major changes occurred in the social security system in 1994. The Social Security Administration was established as an independent agency, and the Commissioner unveiled her plan to reengineer the disability program. Other legislative, agency, and litigation developments affecting older people arose in the areas of

- pensions
- age discrimination
- protective services
- housing
- nursing homes and other long-term care
- Medicare
- Medicaid

The developments in the social security system will have major impact on older persons and persons with disabilities and will engage the attention of advocates this year.

Law of Elderly Poor People in 1994

By the National Senior Citizens Law Center

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I. Income and Employment

A. Social Security and SSI

1. Legislative Developments

On August 15, 1994, legislation was enacted that establishes the Social Security Administration (SSA) as an independent agency and separates it from HHS, effective March 31, 1995. /1/ The act also created new payment restrictions if alcoholism or drug addiction is a contributing factor material to the disability determination, including: extension of treatment and representative payee requirements to Title II beneficiaries; suspension of benefits for noncompliance with treatment; termination of benefits after 36 months unless the individual is disabled from another impairment; and proration of retroactive benefits. /2/ Other provisions in the act affect the Title II and SSI programs and SSA in general. /3/

Legislation was also enacted that will help resolve the "nanny tax" problem by simplifying the reporting process for employers and increasing the tax threshold. /4/ This act also provides for the suspension of Title II benefits to individuals found criminally insane and confined at public expense. /5/

2. Disability

In September 1994, the Commissioner issued her plan to reengineer the disability program, which includes dramatic changes to the claims process, the appeals structure, and the disability methodology, that is, sequential evaluation. /6/ Many advocates strongly criticized the proposed methodology, which had been published earlier in a draft report. /7/ While adopting the recommendations made to her, the Commissioner stated in her plan that the proposed methodology would require extensive research and testing to determine whether it can be implemented at all. /8/

The reengineering plan does not address the immediate problem with the increasing backlog in the disability program. The crisis is particularly acute at the hearing level where the disparity in

approval rates between the state agency and ALJs remains high (the ALJ reversal rate is about 70 percent), contributing to a high number of appeals. Litigation filed against state agencies and SSA focuses on the incomplete or improper development of evidence and the improper evaluation of medical and other evidence. /9/ However, one court limited the scope of relief for class members by refusing to order the state agency and SSA to provide current relief even though they had violated the law in the past. /10/

SSA issued final cardiovascular system listings that continue to feature exercise test criteria prominently. /11/

3. SSI Financial Eligibility Issues

Courts have issued a number of decisions in cases involving the SSI financial eligibility rules, with mixed results for SSI applicants and recipients. Four circuit courts of appeal have upheld SSA's policy of counting the dependent's portion of an augmented VA pension received by the veteran as income to the dependent. /12/ However, in a development more favorable to individuals, SSA issued a new rule providing that unreimbursed medical expense (UME) payments made by the VA to an SSI recipient are not income. /13/

The Sixth Circuit held that the Social Security Act does not require the Secretary to promulgate a "reliable information" exception to retrospective monthly accounting(RMA). /14/ The Ninth Circuit has invalidated SSA's policy of counting nonrecurring income in the first three months of eligibility. /15/

New regulations were issued codifying SSA's policy on treatment of bank accounts. /16/ Pursuant to a settlement agreement, SSA must improve its notices to explain better the availability of conditional benefits. /17/ The three-year sponsor-to-alien deeming provision has been temporarily extended to five years. /18/

4. Other Administrative Changes

SSA issued two useful policy changes regarding overpayments and waivers. A new ruling sets out SSA's policies on overpayment notices, appeals, and requests for waiver. /19/ SSA has also raised the amount for administrative waiver in SSI cases from $100 to $500. /20/ Final regulations were issued to implement statutory provisions requiring SSA to establish a deemed filing date for an application that was not filed because of misinformation provided by an SSA employee and to consider physical, mental, educational, or linguistic limitations in making good-cause, without-fault, and good-faith determinations. /21/

5. Recent Decisions Under Section 405(g)

In cases decided during 1994, appellate courts seem to be interpreting Bowen v. City of New York in a narrower fashion and have generally refused to invoke the doctrine of equitable tolling,

although they readily continue to waive the "exhaustion of administrative remedies" requirement. /22/ By refusing to invoke equitable tolling, the decisions have resulted in limiting the size of the classes in question. In Shalala v. Schoolcraft, the U.S. Supreme Court declined to review the government's petition for certiorari, which alleged that the Eighth Circuit improperly relied on Bowen by waiving the exhaustion requirement. /23/

B. ERISA

1. Health Care Litigation Developments

The U.S. Supreme Court granted the petition for certiorari in a case holding that ERISA preempted New York's rate-setting mechanism for hospital and other health care. /24/ The scheme imposed various surcharges on commercial insurance companies for the dual purposes of allowing Blue Cross and Blue Shield to compete with private insurers and of financing a state risk pool. Last year the Supreme Court denied certiorari in a Third Circuit case holding that New Jersey's similar rate-setting scheme was not preempted. /25/ In light of the conflicting decisions, federal district courts have split over whether state mechanisms to fund uncompensated care are preempted by ERISA. /26/

In a major victory for retirees, a district court ruled that General Motors (GM) could not reduce lifetime health benefits to early retirees. /27/ The court held the agreements with the retirees were enforceable as independent bilateral contracts and were not controlled by summary plan description language reserving the right of GM to modify benefits. The court subsequently ordered GM to continue paying the retiree health insurance pending its appeal of the earlier decision. /28/

2. Pensions

a. Litigation

An employer who never made any contributions to a pension plan was held to have created an ERISA plan. The employer had told employees it was making contributions to the plan on their behalf, had deducted money from their wages to contribute to the plan, and had provided a pension booklet describing the plan in detail. /29/ The court found that the existence of the pension plan was inferred from these "surrounding circumstances."

In a case of first impression, the Sixth Circuit ruled that ERISA requires a benefit plan to disclose actuarial reports upon request of participants. /30/ Since actuarial reports are "indispensable" to the plan's operation and a plan administrator must have them, they are instruments under which a plan is operated and subject to ERISA disclosure rules. /31/

b. Legislation

A new law grants standing under ERISA in fiduciary breach cases to individuals who lost the annuities they were awarded after the termination of their pension plans. /32/ The law, which applies to legal proceedings pending or brought on or after May 31, 1993, was designed to remedy the Ninth Circuit's ruling in Kayes v. Pacific Lumber. /33/

3. Looking Ahead

There is growing speculation that ERISA reform affecting employee benefits will be taken up by Congress. /34/ ERISA preemption and ERISA due process appeals provisions will continue to be debated in the context of health care reform on both the state and federal levels.

C. Age Discrimination

1. Legislative Developments

In 1986, Congress abolished the maximum age of 70 for persons protected under the Age Discrimination in Employment Act (ADEA), thereby prohibiting all mandatory retirement. /35/ The amendment carved out a special seven-year exemption for (a) police, firefighters, and correctional officials employed by state and local governments; and (b) tenured faculty members at colleges and universities. /36/ The exemption period expired on December 31, 1993, and has not been extended.

2. Litigation Developments

a. After-Acquired Evidence

The Supreme Court will decide whether employers who wrongly fire older workers in violation of the ADEA can escape all liability if they later discover a lawful basis for the firing. /37/ The Sixth Circuit ruled that the plaintiff's job misconduct completely precluded her claim of injury, although the employer learned of the misconduct after the age claim had been filed. The Seventh, Eighth, and Tenth Circuits also adopt this approach. /38/ The Third Circuit recently joined the Eleventh Circuit in holding that after-acquired evidence does not preclude an employer's liability for impermissible discrimination, although it may affect the plaintiff's right to reinstatement. /39/

b. Determining Date of Violation

Many victims of age discrimination are barred from seeking relief under the ADEA for failing to file a timely charge with EEOC under the short statutory time limits. /40/ A terminated older worker who is replaced by a younger worker may not learn of these facts until later. The Eleventh Circuit held that the date on which the older worker knows, or should know, of replacement by a younger worker giving rise to a claim of age discrimination, is the date which commences the period for filing a charge with EEOC. /41/

3. Looking Ahead

Last year, EEOC dismissed 96 percent of disputed age discrimination charges based on an agency investigator's finding of "no cause to believe a violation occurred." /42/ This practice was instituted in 1985 by EEOC under then-Chairman Clarence Thomas. Maintaining that it lacks any statutory authorization, misinforms thousands of victims of age bias, and subverts enforcement of the ADEA, senior organizations in October 1994 asked the current commission chairman to change the practice of mass dismissal of charges.

II. Health

A. Medicare

1. Legislative Developments

While the beneficiary community learned a lot and was quite successful in getting its message across, national health care reform was not enacted. The health care reform debate may begin anew, with a new Congress, in January 1995. Advocates anticipate that ERISA will be the model given the most serious consideration for an appeals process, a trend becoming evident near the end of the 1994 health care reform debate. Review options, however, are limited under ERISA, and the U.S. Department of Labor does not have a good record on enforcement of ERISA provisions or complaint investigation and resolution.

2. Litigation Developments

Cases filed by Medicare beneficiaries concerning restrictive coverage focused on durable medical equipment in nursing facilities, oxygen in the home, seat lifts, and inpatient rehabilitation. /43/ Beneficiaries have also filed suit to challenge HCFA's failure to promulgate regulations establishing "reasonable charge" limits on outpatient hospital charges for purposes of computing copayments that beneficiaries must pay. /44/

Beneficiaries challenged several Medicare Secondary Payer Program (MSP) practices, including HCFA's refusal to reduce recoveries proportionately when beneficiaries receive inadequate personal injury settlements, HCFA's failure to give beneficiaries accurate notices of their appeal rights and the use of threatening language toward attorneys, and HCFA's application of unduly restrictive standards in deciding when to waive MSP recovery. /45/ Plaintiff beneficiaries were largely successful in the district court but have appealed to the Ninth Circuit the district court's refusal to order apportioned recovery.

Medicare HMO enrollees sued to compel HCFA to enforce program requirements for HMOs, including requirements that a full range of Medicare services be provided to enrollees and that notices be given to enrollees when services are denied. /46/ The suit also seeks to compel HCFA to

bring the appeals system into compliance with due process standards by providing contemporaneous hearings for urgently needed care and to place the burden of proof on HMOs that have found a service not medically necessary.

3. Federal Agency/Policy Developments

a. HCFA Home Health Care Initiatives

1. Needs Assessment Instruments/Discharge Planning

In meetings with HCFA, advocates were informed that the Medicare Discharge Planning regulations would be issued in final form in June 1994. /47/ To date, final regulations have not been published.

2. Joint HCFA/AoA Home Health Initiative

HCFA and the Administration on Aging (AoA) are working together to make information about the Medicare and Medicaid Home Health Benefit more available to beneficiaries. To this end, these agencies have held a series of meetings with beneficiary and provider groups to get a broader sense of the issues and problems that are barriers to greater program participation. To date, HCFA has not issued any significant new policy directions. Clearer directions to intermediaries about coverage criteria and standards are necessary as is more information to beneficiaries describing the benefit and how to obtain it.

b. HCFA Initiative on Explanation of Medicare Benefit Form

HCFA has announced an initiative through which it will continue to refine the Explanation of Medicare Benefits Form (EOMB). Of importance is HCFA's intention to standardize its computer systems for the review and payment of claims.

c. HMO Regulations Promulgated

On July 15, 1994, HCFA published regulations strengthening remedies against HMOs and other managed care plans. /48/ The regulations provide for intermediate sanctions when an HMO fails to provide necessary services, requires payment of premiums not allowed by law, expels or refuses to enroll an enrollee without cause, or engages in practices that could reasonably be expected to deny coverage or to discourage enrollment.

B. Medicaid

1. Legislative and Administrative Developments

Two years after the Supreme Court decision in Suter v. Artist M., /49/ Congress has passed legislation restoring the interpretation of enforceable rights under the Social Security Act to its status prior to that court decision. /50/ The legislation is intended to assure that individuals injured by a state's failure to comply with state plan requirements of the Social Security Act can enforce those provisions to the same extent they could prior to Suter. It is applicable to cases pending at the time of enactment.

As a first step in implementing the 1993 amendments to Medicaid /51/ at the federal level, HCFA published guidance on the use of so-called Miller trusts in income cap states, /52/ and on estate recovery. /53/ The one federal court that has examined estate recovery under the 1993 amendments held that California must notify the surviving owners of a deceased Medicaid recipient's property and provide an opportunity for a hearing before the state can place a lien on the property pursuant to estate recovery law. /54/ It did not, however, find that the placing of the lien itself was unlawful.

2. Litigation Developments

Efforts to forestall or stop program cuts have met with varying degrees of success. A court enjoined New York's effort to include a "fiscal assessment" as part of the determination of the need for home care benefits; the same court ordered due process protections for people threatened with home care service cutbacks. /55/ Courts held that states may not implement state plan changes without notice to the public and may not implement changes retroactively. /56/ One circuit court, however, refused to reverse the denial of an injunction against the use of copayments. /57/

Eligibility issues continued to invite litigation. Two courts have ruled that the state must determine an individual's eligibility under any category covered by the state before terminating coverage or denying an application. /58/ Unfortunately, the D.C. Circuit Court held that, in a section 209(b) state, eligibility determination does not include mandatory application of the so-called Pickle disregards. /59/

People entitled to both Medicare and Medicaid (dually eligible), or entitled to have Medicaid pay their Medicare cost sharing (qualified Medicare beneficiary (QMB) only) made some gains through litigation. Two federal appeals courts and one district court have now held that states must pay full cost sharing for QMBs. /60/ A suit alleging that computer errors and processing difficulties denied QMBs benefits to which they are entitled under the law has resulted in over 10,000 new enrollees in that program. /61/ A state must pay for services for dually eligible individuals at its Medicaid rate, which may be higher than the Medicare rate, if the failure to do so results in those individuals being denied service. /62/

3. Looking Ahead

The threat of entitlement caps, issues related to managed care, and the process for approving Medicaid waivers will continue to be important to advocates at both the state and federal levels in 1995. In addition, interpretation and implementation of the 1993 amendments concerning transfers of assets, trusts, and estate recovery will be of great interest to clients and to the wider legal community.

C. Nursing Facilities

1. Resident Advocacy

The most active area of resident advocacy in 1994 was individual transfer and discharge hearings. Many residents successfully appealed their proposed transfers or discharges, on both procedural and substantive grounds, through state fair hearing procedures that were mandated by the 1987 nursing home reform law. /63/ A growing number of administrative and judicial decisions recognize and enforce facilities' obligation to provide care and services that residents need, as determined by their assessments and individualized plans of care. Decisions have prohibited facilities from transferring or discharging residents who refuse to take medications, who wander, and who are sexually aggressive when their facility can provide them with appropriate and necessary care and services. /64/ In ruling for residents, hearing officers have relied on the Americans with Disabilities Act (ADA) and the Fair Housing Act, as well as on the nursing home reform law.

Other resident litigation in 1994 led to federal court orders eliminating prereform law level of care classifications in nursing facilities in the District of Columbia and requiring Michigan to develop a comprehensive enforcement system using intermediate sanctions. /65/

2. Administrative Action

In 1994, as in 1993, HCFA did not issue any rules implementing the nursing home reform law, although final rules have not yet been published for enforcement /66/ and for the omnibus proposed rule published in February 1992 that addressed physical and chemical restraints, federal standards for evaluating nurse-staffing waivers, qualifications of nursing facility administrators, transfer and discharge, notice of Medicaid rights, and other issues. /67/

In June 1994, however, HCFA issued proposed rules authorizing an optional payment system for low-volume Medicare providers. /68/ These rules, which had been called for by the Consolidated Omnibus Budget Reconciliation Act of 1985 (enacted April 7, 1986), propose to increase Medicare beneficiaries' access to skilled nursing facilities (SNFs) by reducing the reporting requirements for SNFs that provide fewer than 1,500 days of Medicare-covered care. The rules do not recognize that the 1987 reform law's revision of Medicare and Medicaid, which made Requirements of Participation for the two federal payment programs virtually identical, created new incentives for facilities to increase their Medicare participation.

HCFA is also looking at ways to revise the federal survey process for nursing facilities. Motivated by both the need to conserve money spent in the survey process and the interest in improving the quality of federally mandated surveys, HCFA invited states and federal regional offices to conduct pilot tests during the summer of 1994. /69/ HCFA intends to incorporate, beginning in early 1995, most of the tests' findings into a new survey protocol.

3. Enforcement of Federal Standards

Enforcement of federal requirements of participation was mixed. On the federal law, enforcement was weak: an ALJ overturned termination of a facility from Medicaid participation because the Secretary failed to use the correct survey protocol; /70/ the Secretary refused to take any enforcement action against D.C. Village, a public nursing home in the District of Columbia, despite its finding that the facility failed to comply with five Level A Requirements of Participation; and, as noted, HCFA failed to publish final enforcement rules. At the state level, however, some use of intermediate sanctions and other creative enforcement have begun. Kentucky imposed a civil money penalty for improper transfer of a resident while Massachusetts signed an unusual agreement with a chain that sought permission to buy facilities in the state. /71/ Under the agreement, Massachusetts has unprecedented authority to oversee, control, and closely monitor compliance in the chain's facilities.

4. The Changing Long-Term Care Industry

The long-term care industry is expanding into "new" levels of care called assisted living and subacute care. /72/ While the services are not themselves new, the new names enable facilities to avoid the stigma that "nursing home" holds for many people and to sell their services in the absence of recognized standards for quality or cost.

III. Elderly Housing

A. Regulatory and Legislative Developments

1. Senior Housing Exemption

The Fair Housing Amendments Act exempts certain "housing for older persons" from the prohibitions against families with children. /73/ HUD has proposed regulations defining the "significant facilities and services" such housing must provide "to meet the physical and social needs of older persons" to qualify for the exemption." /74/ HUD proposes to look first at whether the facility or service "is readily accessible to and usable by older persons with mobility, visual and hearing impairments"; it recognizes that senior housing must accommodate the needs of elderly persons "aging in place" and further independent living. /75/

The issue of just what services and facilities must be provided by owners who seek to limit occupancy based on age is extremely controversial, and it is unlikely to be settled by HUD's issuance of regulations in this area. /76/

2. New Regulations

HUD issued final rules implementing new statutory provisions authorizing PHAs with approved allocation plans to designate specific buildings or portions of buildings for "elderly families," "disabled families," or "elderly and disabled families." /77/ HUD issued final regulations that provide for enforcement of Section 504 of the Rehabilitation Act of 1973 for all programs and activities conducted by HUD. /78/ Of significance is HUD's codification of the School Board of Nassau County v. Arline standard for excluding a person from participation in a HUD program because the person is a "direct threat to the health or safety of others." /79/

HUD has also issued a helpful supplement to its Fair Housing Accessibility Guidelines, reproducing the most commonly asked questions and answers concerning dwellings subject to the construction requirements of the Fair Housing Amendments Act and the technical specifications required by the Act. /80/

B. Administrative Developments

The Public and Assisted Housing Occupancy Task Force has issued to Congress and HUD its report and recommendations on occupancy and management issues in federally assisted housing. /81/

C. Litigation Developments

A number of courts have addressed reasonable accommodation in "rules, policies and practices" as applied to persons with disabilities, emphasizing the need to make a "case-by-case" determination of what is "reasonable" and balance the needs of the individual against the financial burden imposed on the housing provider. /82/

D. Looking Ahead

Advocates should direct their efforts to the promulgation and implementation of HUD regulations reflecting the recommendations of the Public and Assisted Housing Occupancy Task Force. If HUD drafts regulations that are true to the task force's report, the new rules will greatly improve the elderly's access to housing as well as increase flexibility in programs and policies based on reasonable accommodation. Advocates will need to comment on the proposed regulations and then work for speedy implementation of HUD's new rules.

IV. Protective Services

A. Elder Abuse

The Government Law Center of Albany Law School issued a report concerning the use and abuse of durable powers of attorney for financial matters. /83/ The report addresses both the utility of the durable power of attorney and the need for some regulation. Recommendations include mandatory formal execution requirements, use of cautionary language on preprinted forms, recordation, and clarification of procedures of revocation.

The Crime Control and Law Enforcement Act of 1994 requires the U.S. Sentencing Commission to review sentencing guidelines for defendants convicted of crimes of violence against people aged 65 and older. /84/ Sentences should provide for defendants an increasingly severe punishment commensurate with the degree of physical harm caused to the victim; consider the vulnerability of the victim; and provide for enhanced punishment against repeat offenders. The commission also must report to Congress concerning the adequacy of victim-related adjustments for fraud offenses against individuals over the age of 55. /85/

B. Litigation Developments

A Wisconsin intermediate appellate court refused to grant full faith and credit to a Florida guardianship order that had been entered after the ward became incapacitated while in Florida where no findings of fact showed that the ward had changed residence from Wisconsin to Florida, and testimony indicated his intent to return to his home state. /86/

A New Jersey court found that the role of appointed counsel for an incompetent person is different from that of a guardian ad litem in that an appointed attorney should not determine capacity but should advocate for the client's decision. /87/

The West Virginia Supreme Court ruled that the state guardianship statute violated due process and that a finding of incompetence could not be made summarily but must be established by clear and convincing evidence. The court also ruled that an attorney acting as a guardian ad litem must interview and examine witnesses and present evidence. /88/

C. Looking Ahead

States will continue to examine the due process provisions available in guardianship proceedings and to refine their laws to provide greater protection for defendants. The role of the attorney for the defendant will be debated, with legal services attorneys arguing that the attorney should serve as an advocate rather than as a guardian ad litem. Finally, the Albany report will generate additional discussion about the uses and abuses of durable powers of attorney and about financial abuse of older people in general.

V. Disability Rights

A. Health Insurance

Discrimination in health insurance based on disability is quite common. The most general forms include restrictions on mental health coverage not applicable to treatment of other conditions and restriction or total exclusion of treatment for AIDS-related illness.

The First Circuit issued the first published opinion holding that health insurers are subject to the ADA. /89/ The court held that an insurer might be liable as an "employer" within the meaning of Title I of the ADA and might be responsible under the ADA for discriminatory insurance practices as a place of public accommodation.

There are no reported decisions as yet concerning Title V of the ADA, which authorizes certain insurance practices if they are "not used as a subterfuge to evade the purposes of Title I and III." However, in June 1993 EEOC issued interim enforcement guidance on the subject of the ADA and health insurance. /90/ While EEOC adopts much of the advocates' point of view, advocates disagree with certain EEOC interpretations concerning self-insured plans and concerning limitations on coverage for mental health care.

B. Independent Living

Many persons with disabilities, particularly those who are older, are forced into nursing homes because of a lack of home health and personal care services that would allow them to live independently. In a case pending in the Third Circuit, two Philadelphia nursing home residents sued state officials under Title II of the ADA after they were declared eligible for home care services but were told there was a waiting period for the program. /91/ Their nursing home care cost four times as much as home care. The district court held that Pennsylvania had not discriminated against plaintiffs because of their disability but denied services due to a lack of funds. It then held that the ADA integration mandate may not be invoked unless there is first a finding of discrimination. /92/

The Justice Department in its amicus brief in the Third Circuit argued that, under the ADA, segregation of people with disabilities is discriminatory. ADA regulations under Title II, the coordination regulations under Section 504, and Titles I and III of the ADA require programs to be administered in the most integrated setting appropriate. The Justice Department concludes that segregation is itself a form of discrimination; hence the district court erred in requiring a finding of discrimination independent of segregation of services.

In Easley v. Snider, plaintiff nursing home residents were considered ineligible for a program that provided home care attendants for persons with physical disabilities because they were not "mentally alert" to manage their care giver or their program for care. /93/ The district court found that the ability to manage the attendant was not an "essential element" of the program, whose basic purpose was to enhance independent living of persons with physical disabilities. The Third Circuit reversed, deferring to the state's characterization of the program as involving independence of the consumer through control of attendant aid and, in some cases, possible employment. The circuit

court also found that modification of the program to accommodate plaintiffs through surrogate supervision of the attendant would be contrary to the essential nature of the program.

VI. Older Americans Act

A. Regulatory Developments

1. Intrastate Funding Formula Development

Proposed regulations implementing the intrastate funding formula (IFF) provisions of the Older Americans Act (OAA) require federal approval of a state's IFF and federal guidance and assistance to states in developing their IFFs. /94/ States are to demonstrate in narrative and numerical form the assumptions and factors contained in their IFFs and the impact of those assumptions on rural and urban communities and on low-income minorities. Advocates are concerned that the regulations do not properly address low-income minority concerns.

2. Implementing Title VII (Elder Rights)

Proposed regulations implementing Title VII are awaiting clearance from the Office of Management and Budget (OMB). /95/ The regulations emphasize statewide coordination. AoA is using the promulgation of these regulations as a springboard for launching an initiative on statewide coordination of services. Regional training conferences are planned and will include public hearings, beginning in November 1994, on the proposed Title VII regulations.

B. Policy Developments

1. Data Collection

In February 1994, AoA issued an information memorandum introducing two components of its National Aging Program Information System (NAPIS) format -- the new State Program Report (SPR) for Titles III and VII and the National Ombudsman Reporting System (NORS). /96/ These components are being tested in selected states prior to implementation in FY 1995. NAPIS is part of AoA's overall effort to respond to Congressional concerns about the lack of uniform national data on OAA programs.

2. Confidentiality in Reporting

Based on the new NAPIS components, some state and area agencies are seeking names, addresses, and other client-identifying data in violation of the OAA, its implementing regulations, and the American Bar Association Code of Professional Responsibilities. /97/ In response, to complaints by advocates, AoA issued a short letter affirming its position that NAPIS was not intended to undermine client confidentiality protections and promising agency guidance. /98/

3. Mini -- White House Conference on Aging on Legal Assistance

A mini -- White House Conference on Aging (WHCoA) on legal assistance made recommendations to the WHCoA to be held in May 1995. The recommendations include increased funding for LSC- and AoA-funded legal assistance programs, greater coordination and guidance from AoA on standards for legal assistance providers, program development, and outreach to low-income and minority populations.

C. Litigation Developments

Litigation highlighting the ongoing controversy over IFF development and its impact on low-income and minority urban populations has resulted in decisions in several cases: Southwest Missouri Office on Aging v. Missouri Department of Social Services, /99/ Martinez v. Wilson, /100/ Chicago v. Illinois Department on Aging. /101/ In this litigation, it is important to note the difficulty in balancing the interest of urban and rural communities, the effects of population shifts, and the need to target services to underserved populations in both urban and rural settings.

Footnotes

/1/ The Social Security Administrative Reform Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994). For a more detailed summary of the Act, see Ethel Zelenske, The Social Security Administrative Reform Act of 1994, 28 Clearinghouse Rev. 897 -- 904 (Dec. 1994).

/2/ Pub. L. No. 103-296, Sec. 201. The effective date of most of the substance addiction and alcoholism provisions is 180 days after enactment, i.e., Feb. 11, 1995.

/3/ Id. Secs. 202 -- 321.

/4/ The Social Security Domestic Employment Reform Act of 1994, Pub. L. No. 103-387, Sec. 2, 108 Stat. 4071 (1994). This issue is discussed in Ethel Zelenske, How the Failure to Pay Social Security Taxes Impoverishes Older Women, 27 Clearinghouse Rev. 571 (Oct. 1993).

/5/ Pub. L. No. 103-387, Sec. 4. Benefits are to be reinstated upon release so long as the institution ceases to meet the individual's basic living needs. The legislation also amends the current statute, 42 U.S.C. Sec. 402(x), so that payments are resumed for persons convicted of a felony who have been released to their homes where they are monitored by electronic devices but are responsible for their living expenses.

/6/ Plan for a New Disability Claim Process, 59 Fed. Reg. 47887 (Sept. 19, 1994).

/7/ 59 Fed. Reg. 18187 (Apr. 15, 1994).

/8/ Id. at 47889.

/9/ See, e.g., Bentley v. Phillips, No. 92-40-Civ-J-14 (M.D. Fla. filed Jan. 10, 1992) (Clearinghouse No. 47,751); Carmack v. Campbell. (E.D. Ky. filed Feb. 24, 1994) (Clearinghouse No. 49,851); Crayton v. Shalala, No. CV-94-C-1689-S (N.D. Ala. filed July 13, 1994) (Clearinghouse No. 50,132); Dugas v. Hoffpauir, No. CV-93-1699 (W.D. La. filed Oct. 1, 1993) (Clearinghouse No. 49,457); Goodnight v. Shalala, 837 F. Supp. 1564 (D. Utah 1993) (Clearinghouse No. 48,043); Sorenson v. Concannon, Civ. No. 94-874 JO (D. Ore. filed July 1994) (Clearinghouse No. 50,191).

/10/ Day v. Shalala, 23 F.3d 1052 (6th Cir. 1994), rev'g 794 F. Supp. 801 (S.D. Ohio 1991).

/11/ 59 Fed. Reg. 6468 (Feb. 10, 1994). A listings-level assessment based on ischemic heart disease (Sec. 4.04.A) will be made only when the claimant has either undergone an exercise test or when SSA determines that he or she is "at risk" for exercise testing. Further, the listing does not clearly indicate how ischemic heart disease could "equal" the listing if the exercise test results do not meet the criteria in Listing 4.04.A. While this position appears to conflict with the court's decision in New York v. Bowen, 655 F. Supp. 136 (S.D.N.Y. 1987), aff'd, 906 F.2d 910 (2d Cir. 1990), a letter of understanding from the government's attorney to plaintiffs' counsel states that the listing is consistent with the standards set forth in New York.

/12/ Inman v. Shalala, 30 F.3d 840 (7th Cir. 1994) (Clearinghouse No. 49,608); Ryder v. Shalala, 25 F.3d 944 (10th Cir. 1994); White v. Shalala, 7 F.3d 296 (2d Cir. 1993); Kennedy v. Shalala, 995 F.2d 28 (4th Cir. 1993) (Clearinghouse No. 45,512). Contra Paxton v. Secretary of HHS, 856 F.2d 1352 (9th Cir. 1988) (invalidating SSA's policy). SSA has acquiesced in Paxton, but in Ninth Circuit states only. See Social Security Acquiescence Ruling 90-1(9).

/13/ 59 Fed. Reg. 33906 (July 1, 1994) (amending 20 C.F.R. Sec. 416.1103). This change follows a number of court decisions that consistently held that unreimbursed medical expense payments are not income for SSI purposes. See, e.g., Summy v. Schweiker, 688 F.2d 1233 (9th Cir. 1982); Inman v. Sullivan, 809 F. Supp. 659 (S.D. Ind. 1992).

/14/ Gould v. Shalala, 30 F.3d 714 (6th Cir. 1994), rev'g 819 F. Supp. 685 (S.D. Ohio 1992). Following the district court order in Gould, SSA purported to comply with the requirement by offering a proposed regulation stating that no reliable information was currently available. See 58 Fed. Reg. 14191 (Mar. 16, 1993). In Newman v. Shalala, No. 89-4028SVW (SH) (C.D. Cal. Oct. 22, 1993) (Clearinghouse No. 44,877), the court held that the mere promulgation of the regulation complied with the statute. It did not pass judgment on the substance of the proposed rule but did retain jurisdiction.

/15/ Jones v. Shalala, 5 F.3d 447 (9th Cir. 1993). Contra Farley v. Sullivan, 983 F.2d 405 (2d Cir. 1993) (Clearinghouse No. 43,480). SSA has taken the position that if income recurs in the second month, even if significantly less than the first month, Jones does not apply. The district court held that the Ninth Circuit's decision does not address this situation and refused to invalidate SSA's position. Jones, No. 92-CV-554 (E.D. Cal. Sept. 2, 1994).

/16/ 59 Fed. Reg. 27985 (May 31, 1994). No opportunity is provided to rebut the presumption of sole ownership for individually held accounts. However, the presumption of ownership can be rebutted for joint accounts.

/17/ Taylor v. Shalala, No. CIVS-93-0033 (E.D. Cal. May 3, 1994). The agreement requires SSA to emphasize compliance with POMS sections that require detailed explanations prior to a denial based on excess resources and in the denial notice itself. See POMS SI 01150.203.B.1 and 01150.210.B.1.

/18/ Pub. L. No. 103-152 (1993), amending 42 U.S.C. Sec. 1382j(a). The change is effective from January 1, 1994, through September 30, 1996. The five-year deeming period applies to individuals who apply for SSI on or after January 1, 1994, and to those on the rolls whose three-year deeming period had not ended by January 1, 1994. The Clinton Administration's welfare reform bill introduced in June 1994 included a provision that would have made the extension to five years permanent.

/19/ Social Security Ruling 94-4p, published at 59 Fed. Reg. 35378 (July 11, 1994). SSA expects to issue proposed regulations by October 1995.

/20/ See 20 C.F.R Sec. 416.555; SSA Program Circular No. 03-94-OSSI (June 17, 1994).

/21/ 59 Fed. Reg. 44918 (Aug. 31, 1994), 1629 (Jan. 12, 1994).

/22/ Bowen v. City of New York, 476 U.S. 467 (1986). See, e.g., Day v. Shalala, 23 F.3d 1052 (6th Cir. 1994); Medellin v. Shalala, 23 F.3d 199 (8th Cir. 1994); Titus v. Shalala, 4 F.3d 590 (8th Cir. 1993); Johnson v. Shalala, 2 F.3d 918 (9th Cir. 1993).

/23/ Shalala v. Schoolcraft, 971 F.2d 81 (8th Cir. 1992), cert. denied, 114 S. Ct. 902 (1994).

/24/ Travelers Ins. Co. v. Cuomo, 14 F.3d 708 (2d Cir. 1993), cert. granted, 1994 U.S. LEXIS 7034 (Oct. 7, 1994).

/25/ United Wire v. Morristown Memorial Hosp., 995 F.2d 1179 (3d Cir.), cert. denied, 114 S. Ct. 382 (1993).

/26/ E.g., New Eng. Health Care Employees Union v. Mount Sinai Hosp., 846 F. Supp. 190 (D. Conn. 1994) (Connecticut funding provision is preempted); Boyle v. Anderson, 849 F. Supp. 1307 (D. Minn. 1994) (Minnesota's assessment against private plans is not preempted).

/27/ Sprague v. General Motors, 843 F. Supp. 266 (E.D. Mich. 1994).

/28/ Sprague v. General Motors, 857 F. Supp. 1182 (E.D. Mich. 1994), 63 U.S.L.W. 2116 (Aug. 23, 1994).

/29/ Kenney v. Roland Parson Contracting Corp., 28 F.3d 1254 (D.C. Cir 1994).

/30/ Bartling v. Fruehauf Corp., 29 F.3d 1062 (6th Cir. 1994).

/31/ Id. at 1070.

/32/ Pension Annuitants Protection Act of 1993, Pub. L. No. 103-401, 108 Stat. 4172.

/33/ Kayes v. Pacific Lumber, 1993 WL 187730 (9th Cir. 1993) (unpublished order). See National Senior Citizens Law Center (NSCLC), The Law of the Elderly Poor in 1993, 27 Clearinghouse Rev. 1086, 1088 (Jan. 1994).

/34/ See Vicki Gottlich, Twenty Years of ERISA: So What?, 28 Clearinghouse Rev. 678, 683 (Oct. 1994).

/35/ 29 U.S.C. Secs. 621 et seq.

/36/ Id. Secs. 623(i), 31(d).

/37/ McKennon v. Nashville Banner Publishing Co., 9 F.3d 539 (6th Cir. 1993), cert. granted, 114 S. Ct. 2099 (1994).

/38/ Reed v. Amax Coal Co., 971 F.2d 1295 (7th Cir. 1992) (per curiam); Welch v. Liberty Mach. Works, Inc., 23 F.3d 1403 (8th Cir. 1994); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700 (10th Cir. 1988).

/39/ Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221 (3d Cir. 1994).

/40/ A charge must be filed within 180 days "after the alleged unlawful practice occurred" (300 days in states where EEOC defers to the counterpart state agency). 29 U.S.C. Sec. 626(d).

/41/ Sturniolo v. Sheaffer, Eaton, Inc., 15 F.3d 1023 (11th Cir. 1994).

/42/ ADEA Receipts Resulting in Cause and No Cause Findings, FY 93 (statistical reports of the EEOC).

/43/ Snyder v. Shalala, Civ. No. 94-130 (AMW) (D. N.J. May 27, 1994) (stipulation and order.) (this case was settled prior to class certification or any dispositive motions; the issues presented remain unresolved) (Clearinghouse No. 49,681). Matthews v. Shalala, [1993] Medicare & Medicaid Guide (CCH) Para. 1,753 (S.D.N.Y. 1993) (motion for preliminary relief denied) (challenges strict arterial blood gas and oximetry values and specific diagnoses set forth at Sec. 0-4 of the Medicare Coverage Issues Manual); Hicock v. Shalala, Civ. NO. 2:91-CV-467 (JAC) (D. Conn. motion to reverse the decision of the Secretary filed Feb. 16, 1993) (challenges requirements in Sec. 0-8 of Medicare Coverage Issues Manual, specifically that beneficiaries be totally bed or chair confined to be eligible for a seat lift). Miller v. Shalala, Civ. No. 2:92-Civ-60 (JAC) (D. Conn. motion to reverse the decision of the Secretary filed July 7, 1993) (challenges eight restrictive criteria in HCFA Ruling 85-2 as inconsistent with Intermediary Manual Sec. 101.11 and

stipulated judgment in Hooper v. Sullivan, [1989-2] Medicare & Medicaid Guide (CCH) Para. 7,985 (D. Conn. 1989)).

/44/ Stephenson v. Shalala, C.A. No. S-93-962 EJG\JFM (E.D. Cal. filed June 14, 1993) (Clearinghouse No. 47,300). Plaintiffs claim violations of the Medicare statute, the Administrative Procedure Act, and due process notice requirements in HCFA's system, which protects the agency only against excess charges.

/45/ Zinman v. Shalala, 835 F. Supp. 1163 (N.D. Cal. 1993).

/46/ Grijalva v. Shalala, C.A. No. 93-711 TUC/ACM (D. Ariz. filed Nov. 15, 1993) (Clearinghouse No. 49,567).

/47/ See 53 Fed. Reg. 22512 (June 16, 1988).

/48/ 59 Fed. Reg. 36072 (July 15, 1994), 42 C.F.R. Secs. 417,500, 431.55., 434.22 et seq.

/49/ Suter v. Artist M., 112 S. Ct. 1360 (1992) (Clearinghouse No. 48,036). Suter held that children could not enforce state plan requirements of the federal foster care statute and that a state merely had to have a plan approved by the federal government to be in compliance with federal law. Subsequent to the decision, courts applied the holding to state plan requirements in other areas of the Social Security Act. Prepared in the summer of 1994, a docket of cases raising Suter as a bar to action listed 73 cases pending. These cases cover a wide range of programs operating under state plans. State plan requirements in the Social Security Act apply to AFDC, child welfare services, child support and establishment of paternity, foster care and adoption assistance, JOBS training, and Medicaid.

/50/ Pub. L. 103-382, Sec. 555, 108 Stat. 3518 (signed Oct. 20, 1994).

/51/ Pub. L. 103-66, Sec. 13611, 13612, amending 42 U.S.C. Sec. 1396p. The 1993 amendments increased penalties for transfers of assets without fair value, expanded the circumstances under which assets in a trust are considered available in the Medicaid eligibility process, and mandated recovery from the estates of older Medicaid recipients and certain persons who use long-term care services.

/52/ Memoranda from Sally Richardson, Director, Medicaid Bureau, to Regional Administrators, regarding Miller-type Trust Exemption Under OBRA 93 (Mar. 17, 1994; May 25, 1994) (copies available from NSCLC). See Patricia Nemore, Climbing Out of the Utah Gap: 1993 Medicaid Amendments Support the Use of Miller Trusts, 28 Clearinghouse Rev. 625 (Oct. 1994).

/53/ State Medicaid Manual -- Part 3 -- Eligibility: Transmittal No. 63, September 1994, Medicaid Estate Recoveries.

/54/ DeMille v. Belshe, No. C-94-0726 VRW (N.D. Cal. Sept. 16, 1994) (order granting partial summary judgment).

/55/ Catanzano v. Dowling, 847 F. Supp. 1070 (W.D.N.Y. 1994) (Clearinghouse No. 45,058).

/56/ Illinois v. Shalala, 4 F.3d 514 (7th Cir. 1994); North Carolina Dep't of Human Resources v. HHS, 999 F. 2d 767 (4th Cir. 1993).

/57/ Sweeney v. Bane, 996 F.2d 1384 (2d Cir. 1993) (Clearinghouse No. 48,219).

/58/ Sebastian v. Commissioner of Health Servs. of Tenn., 3:90-0871 (M.D. Tenn. 1993) (Clearinghouse No. 46,248); McCarthy v. Sheehan, No. 94-90-P-C (D. Me. 1994) (Clearinghouse No.49,891).

/59/ Noland v. Shalala, 12 F.3d 258 (D.C. Cir. 1994) (Clearinghouse No. 46,246).

/60/ Pennsylvania Medical Soc'y v. Snider, 29 F.3d 886 (3d Cir. 1994); New York City Health & Hosps. v. Perales, 954 F.2d 854 (2d Cir. 1992); Rehabilitation Ass'n of Va. v. Kozlowski, 838 F. Supp. 243 (E.D. Va. 1993); contra Haynes Ambulance Serv. v. Alabama, 820 F. Supp. 590 (M.D. Ala. 1993).

/61/ Action Alliance of Senior Citizens of Greater Philadelphia v. Snider, No. 93-CV-4827 (E.D. Pa. filed Sept. 1993) (Clearinghouse No. 49,642).

/62/ Charpentier v. Belshe, Civ. S-90-0758-EJG (E.D. Cal. Jan. 1994) (summary judgment).

/63/ Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, as codified at 42 U.S.C. Secs. 1395i-3(a)-(h) (Medicare) and 1396r(a)-(h) (Medicaid).

/64/ In the Matter of the Involuntary Discharge or Transfer of J.S. by Ebenezer Hall, C6-93-1718 (Minn. Ct. App. Feb. 23, 1994); Medicaid Appeal 550-072120-00-1 (Va.) (May 27, 1994) (in this case, the first decided under Virginia's transfer and discharge hearing procedure, the hearing officer found that the facility failed to show that it could not meet the resident's needs; the discharge notice was procedurally defective because it did not include residents' appeal rights; and the facility did not conduct discharge planning prior to issuing the discharge notice); In re E.R., Doc. No. 1293 A-211 (Washington Office of Hearings and Appeals, Department of Social and Health Services Mar. 16, 1994) (initial decision).

/65/ Newman v. Kelly, CA. No. 93-0004 (D.D.C. Mar. 24, 1994) (in this case of first impression, the district court held that the federal nursing home reform law prohibits use of skilled and intermediate level-of-care distinctions in nursing facilities); Ottis v. Sullivan, File No. 1:92-CV-426 (W.D. Mich. Jan. 27, 1994) (Clearinghouse No. 48,306). Following the summary judgment ruling for the statewide class of plaintiffs, the parties settled the litigation. Michigan agreed to develop an enforcement plan and to begin implementation by July 15, 1994.

/66/ HCFA published proposed rules in August 1992. 57 Fed. Reg. 39279 (Aug. 28, 1992). The reform law required publication of the enforcement rules by October 1, 1988. 42 U.S.C. Sec. 1396r(h).

/67/ 57 Fed. Reg.4516 (Feb. 5, 1992).

/68/ 59 Fed. Reg. 29578 (June 8, 1994).

/69/ See Toby S. Edelman, Federal Rules Governing Survey and Certification of Nursing Facilities Will Change Again, 28 Clearinghouse Rev. 263 (July 1994).

/70/ Heritage Manor of Marrero v. HCFA, HIP 000-61-7069 (SSA Office of Hearings and Appeals Jan. 21, 1994). The ALJ found that the Secretary improperly used the survey protocol that appears in the state operations manual, rather than the protocol that appears at 42 C.F.R. part 488, subpart C. This is the second decision disallowing federal enforcement actions against nursing facilities on this basis. See also Devon Gables Health Care Ctr., HIP 000-91-7050.

/71/ In the Matter of Royal Care of Pigeon Forge, Assessment of Civil Penalty, Tennessee Panel on Health Care Facility Penalties (Feb. 27, 1992); In the Matter of the Finding of Horizon Healthcare Corporation's Unsuitability to Operate Long-Term Care Facilities, Doc. No. PH-94-092 (Suffolk Co., Mass., Division of Administrative Law Appeals Feb. 17, 1994) (stipulation and agreement).

/72/ See Toby Edelman, The Changing Long-Term Care Industry: "New" Levels of Care, 28 Clearinghouse Rev. 630 (Oct. 1994).

/73/ Fair Housing Amendments Act, 42 U.S.C. Sec. 3607(b)(1). Housing for older persons is housing which is (1)"intended for, and solely occupied by, persons 62 years of age or older" or (2) "intended and operated for occupancy by at least one person 55 years of age or older per unit." Id. Sec. 3607(b)(2)(A) -- (C).

/74/ 59 Fed. Reg. 34092 (July 7, 1994). Subsequently, the comment period for the proposed regulation was extended to November 30, 1994. 59 Fed. Reg. 49035 (Sept. 29, 1994). The requirement of "significant facilities and services" applies only to housing for persons 55 years or older. 42 U.S.C. Sec. 607(b)(2)(C)(i)-(iii).

/75/ After meeting this threshold requirement, the proposed rule would then require an evaluation of whether the facilities and services "in the aggregate" are significant, measured against six factors. 59 Fed. Reg. 34905 (July 7, 1994). HUD has indicated that it believes the Fair Housing Act imposes a strict burden upon the person claiming the exemption to provide "credible and objective evidence" that the facilities meet the statutory definition of senior housing. 59 Fed. Reg. 34903 (July 7, 1994).

/76/ Evidencing the controversy surrounding this statutory requisite, S. 2247 and its companion legislation, H.R. 1843, would have eliminated the requirement of significant facilities and services where 80 percent of the residents are 55 years and older. Although neither provision passed, Congress did prohibit HUD from using any funds to publish, implement, or enforce its exemption regulations prior to July 1, 1995. H.R. 4624. The later date will probably have no practical effect as it is unlikely that final regulations will have been issued before this date.

/77/ Section 7 of U.S. Housing Act of 1937, 42 U.S.C. Sec. 437e. 59 Fed. Reg. 17652 (April 13, 1994). The regulations outline the process by which a PHA may seek approval from HUD for establishing designated housing including the development of an allocation plan, consultation in plan development, identification of supportive services for families with disabled members, and the submission of biennial updates for allocation plans.

/78/ 59 Fed. Reg. 31036 (June 16, 1994). Previously, HUD promulgated regulations applicable to private, state, and local programs or activities that are recipients of federal financial assistance. See 24 C.F.R. pt. 8.

/79/ School Bd. of Nassau County v. Arline, 480 U.S. 273 (1987). Arline defines "direct threat" as a "significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids or services." HUD is required to make an individual assessment as to the nature, duration, and severity of the risk; the likelihood that any injury will occur, and whether any reasonable modifications will mitigate the potential harm. 59 Fed. Reg. 31038 (June 16, 1994).

/80/ 59 Fed. Reg. 33362 (June 28, 1994). The final Fair Housing Accessibility Guidelines were published at 56 Fed. Reg. 9472 (March 6, 1991).

/81/ The report is available from the Clearinghouse, No. 50,125.

/82/ Fair Housing Amendments Act, 42 U.S.C. Sec. 3604(f)(3). See Cohen-Strong v. California Mobile Home Park Mgmt. Co., 94 Daily Journal D.A.R. 10019 (9th Cir. 1994); Shapiro v. Cadman, 844 F. Supp. 116 (E.D.N.Y. 1994); Congdon v. Strine, DC EPA, No. 93-4107 (May 24, 1994).

/83/ Government Law Center of Albany Law School, Abuse and the Durable Power of Attorney: Options for Reform (1994).

/84/ Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 Sec. 24002, 108 Stat. 1796. The report is due 180 days after enactment.

/85/ Id. Sec. 25003.

/86/ In re Jimmie L., No 93-2826 (Wis. Ct. App. Dec. 30, 1993). In refusing to grant full faith and credit to the Florida order, the court determined that a Wisconsin court should have the same authority as a Florida court to modify the guardianship order and that neither the Florida court nor the Florida guardian wanted the Florida order honored.

/87/ In the Matter of M.R., 638 A.2d 11274 (N.J. 1994). The court stated that an adversarial role allows the person to contest other issues, even when the issue of capacity is uncontested. The court also held that the party challenging the capacity of an individual to make decisions has the burden of proving specific incapacity by clear and convincing evidence.

/88/ State ex. rel. Shamblin v. Collier, 1994 W.Va. LEXIS 73 (W.Va. May 23, 1994) (Clearinghouse No. 49,606).

/89/ Carparts Distribution Ctr., Inc. v. Automotive Wholesaler's Ass'n of New England, 1994 WL 543530 (1st Cir. 1994) (Clearinghouse No. 49,588). The plaintiffs in the case were an employee with AIDS and his employer. The defendant was a self-insured health plan operated by a trade association. The health plan imposed a cap of $25,000 on benefits for AIDS-related illnesses; all other conditions had a $1 million cap.

/90/ See NSCLC Wash. Wkly. (June 11, 1993), at 88.

/91/ Helen L. v. Didario, 4 NDLR 66 (E.D. Pa. 1994).

/92/ Williams v. Secretary of Human Servs., 609 N.E.2d 447 (Mass. 1993), applied the same reasoning in dicta to the Title II statutory integration provision

/93/ Easley v. Snider, 1994 WL 513970 (3d Cir. 1994).

/94/ See 59 Fed. Reg. 1728 et seq. (Mar. 17, 1994); implementing 42 U.S.C. Secs. 024(c) and 3025(a)(2)(C). The regulations would be codified in a new 45 C.F.R. Sec. 321.17. The intrastate funding formula (IFF), reflected in a state's plan for distributing and using Older Americans Act (OAA) funds, is a tool used by the state in determining how it will allocate its OAA funds among its planning and service areas and reflects a state's assumptions about the social and economic needs of its older populations, including ethnicity, geographic location, and health status.

/95/ 42 U.S.C.Secs. 3058 et seq. (elder rights protections including statewide coordination of services, legal assistance (an unfunded mandate), the ombudsman program, elder abuse protections, outreach and counseling in the area of public benefits, and programs for Native Americans).

/96/ Administration on Aging (AoA) information memorandum, AoA-94-02.

/97/ See 42 U.S.C Sec. 026(d) (area agencies on aging), Sec. 3027(g) (state agencies on aging); 45 C.F.R. Sec. 1321.51(c); Canon 4, Code of Professional Responsibility; American Bar Association (ABA) Formal Ethics Opinion 334, ABA/BA901:1062 (Confidentiality, Disclosure of Client Identity), DR4-101(B)(1) and EC 4-2, 4-3.

/98/ A copy of the June 15, 1994, letter from John. F. McCarthy, Deputy Commissioner on Aging, is available from NSCLC. At writing, AoA has not issued the promised agency guidance

/99/ Southwest Mo. Office on Aging, 850 F. Supp 816 (W.D. Mo. 1994). See also Meek v. Martinez, 724 F. Supp. 888 (S.D. Fla. 1987) (Clearinghouse No. 42,981).

/100/ Martinex v. Wilson, CA No. 93-56655 (9th Cir. Aug. 23, 1994) (dismissing plaintiffs' appeal as moot and reversing the grant of attorney fees) (In the lower court, Martinez v. Wilson, CV-91-3343-RMT(JRx) (C.D. Cal. filed June 20, 1991) (Clearinghouse No. 48,159), the court found that the California IFF did not comply with the OAA and ordered a new formula to be developed. The new formula was approved by the court even though it had the effect of shifting money away from cities such as Los Angeles.).

/101/ Chicago v. Illinois Dep't on Aging, CA No. 92-C4666 (N.D. Ill. 1994) (The IFF violated the OAA because it did not take into account the number of elder persons who are disabled and those for whom language is a barrier).