A Due Process Primer in the Block Grant Era
Due Process for Welfare Recipients Subject to Changing Program Rules: An Illinois Case Study

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I. Introduction

Consider the following scenario. A state legislature decides to cut back on a welfare program by tightening eligibility rules. It makes the new rules effective on a particular date. On that date, the state terminates benefits to all recipients who do not already satisfy the new rules, even though, if given a fair opportunity, many of them could have proven that they actually meet the new requirements. Reapplying for benefits will cost them months of eligibility during the processing of the application. Federal law gives the state the power to make the cutback (under block grants, waivers, or other authorizations of "flexibility"), and there is no other apparent way to challenge the substantive change in the law itself. The state claims that the program from which the recipients were terminated no longer even exists as of the effective date of the new requirements; it has been "eliminated" and "replaced" by a new and smaller program with a new name and even a new funding scheme.

Sound familiar? Program cutbacks of this type have been common in recent years for a variety of reasons. States have considerable flexibility under existing federal entitlement laws, and they have unlimited flexibility with respect to state-funded programs such as general assistance (GA). In addition, states have been liberally granted waivers of the federal requirements that do exist. The base of funding for many programs has been shrinking, and many governors are running for higher elective office by attempting to build reputations as welfare innovators. Not content with this shower of cutbacks, Congress and state leaders, with a fair amount of cooperation from the Clinton Administration, are drawing a bath of cutbacks and entitlement reforms in which to immerse the poor.

As federal statutory protections become threatened or weakened, what protections remain available under the Due Process Clause to ameliorate the transition from existing eligibility rules to new and tighter rules? When is there a legitimate chance to prevail in court? How should the issues be framed, and what are some of the basic sources of constitutional authority? How can common defenses be countered? How do advocates evaluate whether a victory will produce enough gain to be worth the effort?
The recently decided Illinois case of Youakim v. McDonald /1/ involved these "transitional" due process issues. /2/ It presents a helpful case study that addresses all of these questions.

II. Youakim v. McDonald

Youakim involves Illinois policy governing foster care placements in the homes of the foster children’s relatives and the payment of foster care benefits on behalf of those children. /3/ The case began over 20 years ago, when the plaintiffs successfully challenged the policy of excluding children living with relative foster parents from eligibility for foster care benefits. /4/

In succeeding years Illinois adopted a policy of preferring to place state wards in relative foster care. /5/ While nonrelative foster homes were required to be licensed in order to care for foster children and to receive full foster care benefits on the children’s behalf, relative homes did not have to have a license. Relative homes had to pass a preliminary "safety check" prior to placement of the child, but, after placement, Illinois paid full foster care benefits on behalf of the child.

In 1986, Illinois adopted a process known as "approval" under which it applied requirements substantially the same but somewhat less stringent than formal licensing requirements to relative homes. /6/ It asked relative homes to go through the "approval" process because it was easier than the licensing process for both the home and the agency and because Illinois could claim federal matching funds for foster care benefits paid to children in either "licensed" or "approved" homes. /7/ But even if a relative home was neither licensed nor approved, so long as it had passed the safety check, the state would pay full foster care benefits on behalf of the relative foster child. These became known in the litigation as "preapproved" homes. From foster parents’ point of view, it made no difference at all whether their homes were licensed, approved, or preapproved, and many homes mistook their passage of the initial safety check as meaning that they were licensed or approved. From the state's point of view, the "preapproved" homes did not qualify for federal matching funds, so the foster care benefits paid to children in those homes were fully state funded.

To the extent that Illinois encouraged preapproved relative foster homes to undertake either licensing or approval, it actively channeled them into approval rather than licensing. By April 30, 1995, of relative foster homes caring for state wards, 1.2 percent were licensed, 42.6 percent were approved, and the rest were preapproved. /8/ In the context of the overall boom in the foster care population in Illinois, this large population of fully state-funded foster children began to be perceived as a budget issue. /9/

On March 1, 1995, the Illinois Department of Children and Family Services (DCFS) announced a cutback measure known as "Home of Relative Reform" or "HMR Reform," which provided that effective July 1, 1995, DCFS would not pay full foster care benefits to any children not living in licensed foster homes. /10/ As things turned out, most of the children in approved relative homes were maintained on full foster care payments after July 1, 1995, and until they had a fair chance to prove that their relative homes could qualify for a license. /11/ It was the approximately 15,000 state wards living in preapproved relative homes that, having been lulled by years of state policy channeling them away from the licensing process, were suddenly threatened with the cutoff of benefits effective July 1, 1995. /12/ History showed that the average processing time for a license
application was indeterminate, but in excess of 90 days and certain to extend far beyond July 1, even assuming that the homes would receive an adequate notice and promptly apply for a license prior to July 1. /13/ DCFS gave one ambiguous notice of the reform to the preapproved relative homes in late April 1995 and a somewhat clearer notice on June 12. It did not establish any special application process for these homes. Most, if not all, of them were destined to be terminated as of July 1, 1995, whether or not they had applied for a license prior to that time, even though many, if not most, of them could qualify for a license.

In federal district court foster children living in relative homes challenged the procedures for implementing the impending benefit cutoffs. They stated claims under the original 1976 injunction in Youakim, Title IV-E of the Social Security Act, and the Due Process Clause. /14/ Plaintiffs perceived that they had no claim against the substantive reform amendments themselves (mainly the licensing requirement). Instead, they attacked the reform transition process and alleged that their benefits would be terminated without a fair opportunity to show that their homes were entitled to licensure. Ultimately, the court held that the 15,000 children who were living in preapproved homes had no basis for challenging the transition process under the 1976 order or Title IV-E but did have a claim under the Due Process Clause. /15/ To prevail, these plaintiffs had to establish that they had a protectible property interest in continued benefits and that they were threatened with deprivation of this property without the level of process they were due. /16/

A. The Protected Property Interest

Plaintiffs asserted a property interest protected by the Due Process Clause in continued receipt of foster care benefits. The district court /17/ and the court of appeals /18/ agreed. The defendant never seriously contested the notion that the right to receive foster care benefits is a species of property. /19/

DCFS’s main attack was to claim that, after the effective date of the reform, plaintiffs’ property interest was extinguished. It argued that the program of state-funded relative foster care had been eliminated by the HMR Reform, and that the children were asserting a property interest under a program that no longer existed. /20/ In effect, DCFS argued that the HMR Reform deadline -- the time limit within which relative homes had to have a license or else lose their benefits -- was a substantive element of the program, not a procedural rule for implementing the changes.

The court of appeals, calling this argument "tautological," held that, once a state creates a property interest, it may only eliminate that interest pursuant to constitutionally adequate procedures. /21/ Relying heavily on Logan v. Zimmerman Brush Co. /22/, the court stated:

There, the Court rejected the theory that a state legislature, as the creator of an entitlement, can also establish the procedures under which that entitlement can be forever lost. . . . The required procedures are a matter of federal law, the Court said, which "are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action." . . . Any other rule, the Court explained, "would allow the State to destroy at will virtually any state-created property interest." . . . Thus, once a state has
created a property interest, the adequacy of the procedures employed to deprive an individual of that interest must be judged in constitutional terms. /23/

Thus, the court held that plaintiff children had a protectible property interest in the continued receipt of the benefits they had been receiving before the reform, and the inquiry turned to the adequacy of the process employed to deprive them of this interest.

B. The Process Due

Plaintiff children, citing Logan /24/, Cosby v. Ward /25/, and Carey v. Quern, /26/ argued that they were due a fair and reasonable eligibility determination process before any termination of benefits.

In Carey, the Seventh Circuit considered an Illinois Department of Public Aid (IDPA) eligibility determination and payment scheme for state-funded GA benefits. Under this scheme, IDPA supplied a clothing allowance to employed public assistance recipients as part of their regular monthly grant, but supplied such an allowance to unemployed GA recipients only on an "as needed" basis. /27/ However, IDPA had no system or method in place to inform unemployed GA recipients of their rights to a clothing allowance and how to go about getting one if they needed it. /28/ The court held that, "[i]n the context of eligibility for welfare assistance, due process requires at least that the assistance program be administered in such a way as to insure fairness and to avoid the risk of arbitrary decision making. . . ." /29/ The clothing allowance system violated due process because it required unemployed GA recipients to apply for something they did not know existed, and it required favorable action from IDPA without reference to any standards for eligibility. /30/ Because this was an unfair and arbitrary system, it violated due process. /31/

In Cosby, the Seventh Circuit considered an Illinois Department of Employment Security (IDES) eligibility determination and payment scheme for unemployment compensation benefits. Under this scheme, IDES gave claimants notices that included the general information that unemployment compensation benefits "are restricted by federal law to people actively seeking work." /32/ However, the notices did not inform claimants that IDES actually used objective rules of thumb to determine claimants’ eligibility for benefits, and claimants in fact did not know about the rules being used to deny them benefits. /33/ For example, claims routinely would be denied if claimants did not state that they would travel at least one hour each way for work or that they were willing to work on different shifts. /34/ The Seventh Circuit held that due process required that claimants be "informed of IDES’s rules of thumb at the outset of their work searches." /35/

In Logan, the Supreme Court considered an Illinois Fair Employment Practices Commission scheme for adjudicating handicap discrimination claims. Under the Illinois Fair Employment Practices Act (FEPA), the Commission was given 120 days from the filing of a handicap discrimination charge to "convene a fact-finding conference designed to obtain evidence, ascertain the positions of the parties, and explore . . . a negotiated settlement." /36/ Logan filed a charge against Zimmerman Brush Co. under the FEPA, but the Commission "fail[ed] to convene a timely conference -- a matter beyond Logan’s . . . control . . . ." /37/ The Illinois Supreme Court concluded that under the express terms of the FEPA the conduct of a fact-finding conference within 120 days
was "mandatory" and that the Commission’s failure to conduct the hearing thereby required dismissal of Logan’s charge. /38/ The U.S. Supreme Court unanimously reversed:

As our decisions have emphasized time and time again, the Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged. . . . To put it as plainly as possible, the State may not finally destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement. . . .

Logan is entitled to have the Commission consider the merits of his charge, based upon the substantiality of the evidence, before deciding whether to terminate his claim. /39/

Carey, Cosby, and Logan teach that the Due Process Clause requires a state agency’s determination processes to be procedurally fair to the claimant. This means, at least, that claimants must be afforded a reasonable opportunity to show that they in fact meet the substantive eligibility standards established under the program.

The children in Youakim argued that the HMR Reform eligibility determination scheme ran afoul of the law by terminating benefits upon expiration of the deadline without providing the children’s caretakers a fair opportunity to apply for licensure and to receive a determination on the merits of their applications.

The defendant’s counterargument, based on Atkins v. Parker, was that the children had received all the process due them in the legislative process that produced the HMR Reform amendments. /40/ In Atkins, Congress had amended the Food Stamp Act in such a way that when the change was applied mechanically to all cases it resulted in the reduction or termination of benefits to some food stamp recipients. /41/ A class of food stamp recipients attacked, under the Due Process Clause, the adequacy of the notice sent them about the statutorily mandated reduction or termination of their benefits. /42/ The Court stated:

This case . . . does not concern the procedural fairness of individual eligibility determinations. Rather, it involves a legislatively mandated substantive change in the scope of the entire program.

The congressional decision to lower the earned income deduction from 20 percent to 18 percent gave many food-stamp households a less valuable entitlement. . . . [But] [a]s we have frequently noted: "[A] welfare recipient is not deprived of due process when the legislature adjusts benefit levels. . . . [T]he legislative determination provides all the process that is due." /43/

DCFS argued that HMR Reform presented a situation identical to Atkins because it involved a legislative change in the scope of a welfare program. Accordingly, the legislative process itself provided all the process that was due.
Rejecting this argument, the district court in Youakim noted that the Court in Atkins had clarified that the legislative process provided all the process that was due only when there was an across-the-board mass change in a program and not when the procedural fairness of individual eligibility determinations was at issue. /44/ The district court found that plaintiffs did not challenge any of the parts of HMR Reform that were across-the-board substantive changes, but only the failure of HMR Reform to give them an opportunity to meet the new standards before cutting off their benefits. /45/

Appealing this finding, DCFS argued that Atkins should apply because the plaintiffs in Atkins had also sought individual eligibility determinations with respect to the effect of the legislative change. But the court of appeals in Youakim noted the key distinction -- in Atkins, the across-the-board change meant that no individual eligibility determination could prevent or alter the application of the new rule to claimants’ cases, while HMR Reform added an eligibility requirement to the foster care program that most if not all of the relative homes would be able to meet if given an opportunity to do so. Thus, whether a particular household can satisfy the additional requirement and retain foster care benefits requires an "individual eligibility determination" as that term was understood in Atkins. /46/

Affirming the district court’s injunction prohibiting the termination of foster care benefits to the 15,000 children in preapproved homes, the court of appeals held that the benefits could not be terminated until the homes received an adequate notice and the opportunity to apply for a license and, for those that timely applied, continuing benefits until determinations on their applications were made. /47/

III. Youakim’s Lessons Regarding Transitional Due Process

A. Identify the Property Interest

Advocates should be very careful to identify what the property interest is and whose it is. The defense in Youakim consistently tried to characterize plaintiffs’ claim as asserting the relative foster parents’ right to a license or to benefits. This would have made the claim more difficult. In seeking a license, the foster homes were applicants, without any right to the benefits of licensure until they established their qualifications. It would be difficult to assert the relative homes’ right to continue to be treated as licensed homes when they had never had a license.

Also, if the right to benefits had been asserted on behalf of the relative foster parents, DCFS would have a much easier time establishing that the state had indeed accomplished an across-the-board elimination of the program. No individual determination could establish eligibility for unlicensed foster parents to receive benefits for themselves after the effective date of the HMR Reform. Atkins might well control.

Instead, the property right belonged to the children. And the right was to benefits, not to a license for their relative home. The state surely did not eliminate its foster care program for children who were state wards living with relatives; it simply changed some of the eligibility rules. Children living with relatives were recipients, not applicants, so they had a legitimate expectation of
continued benefits protected by the Due Process Clause. And since many of them could prove
continuing eligibility under the new rules if given an individual determination of whether the
homes they lived in met licensing requirements, Atkins did not apply.

B. Determine Whether the Program Was Really Eliminated

The defense in Youakim insisted that Illinois had eliminated its state-funded relative foster care
program. If that were true, and not just rhetorical, then plaintiffs would have no claim to
transitional due process, which cannot manufacture the continuation of an eliminated program
beyond its date of death. In Youakim this was a question of fact, and it did not prove to be a serious
barrier. Advocates should look beyond the names of programs or even funding streams to the
reality of what remains for recipients after the change. Is there a way for them to prove continuing
eligibility? If so, recipients have a possible claim to an individualized determination of whether
they qualify under the new rules prior to any cutoff.

C. Determine Whether A Meaningful Number of Recipients Are Likely to
Establish Continuing Eligibility

There is a strong claim to an individualized determination of eligibility under the new eligibility
rules if there remains a way for recipients to qualify under the new rules -- in other words,
something to be gained from the process other than buying time before an otherwise inevitable
cutoff. These situations are not always clear. /48/ In Youakim the court noted that "most if not all"
of the relative homes would be able to win a license if given a fair opportunity to apply and obtain a
determination on the merits. This was not necessarily a dispositive finding, but the district court
and the court of appeals both thought it was important enough to mention. Plaintiffs in transitional
due process cases should put into the record whatever data or expert testimony they can find that
establishes a likelihood that a meaningful number of recipients may or will be able to meet the new
requirements. Advocates should certainly seek to avoid a finding that "few" recipients will be able
to meet the new requirements. Indeed, if it is true that "very few" can meet the new requirements
after being given a fair opportunity to do so, then the wisdom of filing a suit asking for
predeprivation individual determinations should be thought through carefully.

D. That a Change Is "Across-the-Board" Is Not Dispositive

The defendants in Youakim took to referring to the change in Atkins, like HMR Reform, as "a
mandatory across-the-board" legislative change. All of these adjectives only obfuscate the real
issue -- whether the impact of the change could be avoided by individual recipients through further
action (e.g., coming forward with proof of meeting new eligibility rules). If so, due process requires
that they have a fair opportunity to do so before any cutoff. The change in Youakim was
mandatory, not really across-the-board (only applying to relative foster homes, but across-the-board
as to them), and legislative. Similarly, the change in Atkins was mandatory, not really across-the-
board (applying only to food stamp households with earned income, but across-the-board as to
them), and legislative. And, since all those adjectives are beside the point, the cases were resolved differently.

E. **That Effective Dates Are "Procedural" Is Only the First Issue**

With Youakim and Greene, /49/ two circuits have now properly analyzed the effective dates of program cutbacks as being procedural under Logan and Loudermill. States should not be able to assert that an effective date is part of the substantive definition of benefit recipients’ property rights under a preexisting program. This moves the analysis to the issue of whether, in the circumstances of a particular case, the effective date and other procedures for implementing the change, taken together, are a fair enough implementation scheme to satisfy due process. In Youakim, it was very important to prove that DCFS would not be able to determine most, if any, license applications by the deadline. An implementation scheme with a transition period that gave an adequate opportunity for most recipients to present a claim and receive a determination of continuing eligibility on the merits before the deadline might or might not survive a challenge brought on behalf of a small group of recipients whose benefits were terminated after the deadline but before continuing eligibility determinations under the new rules could be made in their cases. A challenge by those recipients to such an implementation scheme could be worth bringing and quite possibly won, but it would be a somewhat different case factually from Youakim.

F. **The Same Analysis Applies to Both Eligibility and Benefits Cuts**

Youakim involved a change in an eligibility requirement that cut the number of children in relative homes who could qualify for foster care benefits. Atkins involved a benefit cut, brought about through a tightening of a technical budgeting rule (the earned income disregard). It is tempting to say that benefit cuts are likely to fall on the Atkins side, while eligibility changes are more likely to fall on the Youakim side. But neither proposition is necessarily true. Again, the operative rule is whether claimants can do anything in an individualized process to avoid the impact of the change. If so, they have a claim to that process prior to losing benefits as a result of the change.

G. **Process Is Still Due Even in Atkins-Type Cases**

As long as there is a protectible property interest, some process is due. The issue in Atkins was not whether any process at all was due but whether the "one size fits all" notice about the change was sufficient. In fact, the Atkins change was accompanied by more process than the state was willing to provide in Youakim. In Atkins, in addition to the generic notice of the change received by all recipients, any recipient who thought the rule had been mistakenly applied or that there had been a mistake in arithmetic could file an appeal and freeze the current benefit level. In Youakim, the state offered no such procedure, and if any relative foster home obtained a license after the cutoff, no retroactive benefits were offered. DCFS attempted an extremely aggressive, but by no means frivolous, use of Atkins, the logical extension of which would mean that not even a generic notice would be required when benefits are cut off under an Atkins-type law change. The possibility that
courts may start construing Atkins in that way is very real, and it should be a caution to litigants. But opponents should not be able to cite Atkins to claim that recipients have no property interest.

IV. Rule Changes That Eliminate "Entitlement Status"

The elimination of "entitlement status" is the big question under the impending federal block grants and an important issue for more thorough analysis. However, some initial ideas can be put forward here. Assume that the Youakim change had not only eliminated unlicensed relative care but had made foster care payments in licensed relative care contingent on "state resources permitting." This would have raised the possibility that an otherwise eligible person could be denied benefits if the agency were out of money (the state no longer being required to make a supplemental appropriation to fund the program until the end of the fiscal year). Such a scenario would require thinking separately about "entitlements" and "protectible property interests." Eligible children could be said to have an entitlement to foster care benefits, contingent on money being available to pay for such benefits. On the other hand, the courts may say that such a contingent entitlement is not an entitlement at all. /50/

But it may be a different question whether recipients have a protectible property interest in establishing their status as eligible persons, so that they could be paid benefits when state funding was available (or so that they could secure a preferred spot on a waiting list). If such a property interest exists, then the transitional due process analysis should be the same as in Youakim. Since the question of whether state funds were available could not be changed in an individual proceeding, it would probably be treated as an Atkins-type issue, and a generic notice might be all the process due as to that issue. But the issue of whether a relative home could qualify for a license should be treated the same as in Youakim. Children have a protectible property interest in establishing the eligible status of the homes they live in, and due process provides them the right to prove it prior to a cutoff, except a cutoff based on the lack of state funds. /51/

V. Conclusion

Transitional due process cases cannot win a change in substantive law; they do not yield an injunction against the harmful changes in the law. In Youakim, however, tens of thousands of children avoided a major benefit cut for many months, with a net gain to them of tens of millions of dollars. More important, most of these children will never experience the cut at all because most of the homes in which they live are proving themselves eligible for licenses. Advocates contemplating transitional due process cases must think about the possible results without being distracted by two types of error. The first error is to assume that if the substantive change cannot be blocked on its face there is no point in bringing a case at all. In fact, substantial gains, including the avoidance of the harmful effects of the change for many class members, are possible. The second error is to bring a sterile claim because it looks winnable. If the case cannot produce tangible gains (even though those gains may be temporary), then it should not be brought. Bringing it risks making bad law and surely constitutes a waste of attorney resources. The principal question is whether a significant (not necessarily a majority) of clients, given a fair opportunity, can prove that they
satisfy the new requirements and thereby avoid the impact of the change in the law. If so, then a suit seeking procedural rights for everybody is not ill advised. /52/

Footnotes

/1/ Youakim v. McDonald, 71 F.3d 1274 (7th Cir. 1995), aff’d No. 73 C 635 (N.D. Ill. June 30, 1995) (Clearinghouse No. 15,393). With most of the ideas in this article the author credits his colleagues on the Youakim litigation team: Bob Lehrer and Diane Redleaf of Lehrer & Redleaf; Stacy Platt and Michelle Gilbert of the Legal Assistance Foundation of Chicago; and Peter Schmiedel and Charles Golbert of the Cook County Office of the Public Guardian.

/2/ "Transitional due process," for purposes of this article, refers to due process rights of recipients under a welfare program when that program makes the transition from existing eligibility and benefit rules to new rules that add eligibility requirements, eliminate coverage to certain populations, or decrease the package of assistance.

/3/ See Youakim, 71 F.3d 1279 -- 80 (summarizing the background of the case).

/4/ Miller v. Youakim, 440 U.S. 125 (1979), aff’d 562 F.2d 483 (7th Cir. 1977), aff’d 431 F. Supp. 40 (N.D. Ill. 1976) (Clearinghouse No. 15,393). At the time of these decisions, federally assisted foster care benefits were governed by 42 U.S.C. Sec. 608, which was in the Aid to Families with Dependent Children (AFDC) title of the Social Security Act (Title IV-A), and the program was often referred to as the AFDC-F program. Since then, the program has been recodified in Title IV-E of the Act at 42 U.S.C. Secs. 671 et seq. and is often referred to as the Title IV-E program.

/5/ See 20 ILCS 505/7(b) (amended effective July 1, 1995). As of April 30, 1995, 26,368 out of 47,007 state wards were in relative foster care. Youakim, 71 F.3d at 1280 n.3.

/6/ See 89 Ill. Admin. Code 335.102 (repealed effective July 1, 1995).

/7/ See 42 U.S.C. Sec. 672(c).

/8/ Youakim, 71 F.3d at 1280.

/9/ Perhaps working backward from this budget issue, Illinois officials also began to wonder whether the ease of obtaining foster care payments was unnecessarily drawing into the formal foster care system children who were already being adequately cared for by their relatives ("informal kinship care"). Especially for poor relative care givers, this issue had stark focus. In Illinois, AFDC payments for children are small ($102 for one child; $205 for two children) compared to foster care payment of $350 per child. In the committee debates, the powerful Senate appropriations committee chair was heard to denounce relative care givers who enter the foster care system as perpetrating "fraud on the system." The child welfare agency director noted in reply that due to the state’s parsimony in the AFDC program these are extremely poor people who have nevertheless come forward to care for related children whose own parents have failed them. In this
context, one should regard relative caregivers’ conduct in seeking additional funds through foster care payments as very responsible in the child’s interests.

/10/ The relevant amendment provides:
Effective July 1, 1995, only foster care placements licensed as foster family homes pursuant to the Child Care Act of 1969 shall be eligible to receive foster care payments from the Department. Relative caregivers who, as of July 1, 1995, were approved pursuant to approved relative placement rules previously promulgated by the Department at 89 Ill. Admin. Code 335 and had submitted an application for licensure as a foster family home may continue to receive foster care payments only until the Department determines that they may be licensed as a foster family home or that their application for licensure is denied or until September 30, 1995, whichever occurs first. Ill. Pub. Act 89-21 (amending 20 ILCS 505/5(u-5)).

/11/ See Youakim, 71 F.3d at 1278 n.1, 1281 n.6 (successive extensions of the eligibility cutoff deadline for approved homes, 90 percent of which filed applications for a license by July 1, 1995).

/12/ See id. at 1281 and n.5. (preapproved homes were cut off as of July 1995 whether or not they had applied for a license before July 1, 1995).

/13/ Youakim, No 73 C 635, mem. op. at 18. See also id. at 17 (expert testimony that it would take six months to process applications). Deposition testimony revealed that the July 1 effective date was selected not by considering the likely application processing time but because that was the beginning of the next fiscal year.

/14/ See Youakim, 71 F.3d at 1278. The court’s power was invoked under its continuing jurisdiction to enforce the 1976 injunction, under its general contempt power, and under 28 U.S.C. Sec. 2202 to enter injunctive relief in aid of its original declaratory judgment.

/15/ See id. at 1287 -- 88 (holding that children in preapproved homes were not entitled to any relief under either the 1976 order or the Social Security Act), 1288 -- 92 (finding that the Home of Relative Reform (HMR Reform) transition process violated the Due Process Clause).


/17/ Youakim, No. 73 C 635, mem. op. at 27 -- 28 (analogizing the foster care benefits to the food stamp benefits held to be protectible in Atkins v. Parker, 472 U.S. 115 (1985), and the welfare benefits held to be protectible in Goldberg v. Kelly, 397 U.S. 254 (1970) (Clearinghouse No. 1799)).

/18/ Youakim, 71 F.3d at 1288 (citing Atkins and Goldberg and adding Mathews v. Eldridge, 424 U.S. 319 (1976) (Clearinghouse No. 11,466) (disability benefits)).

/19/ DCFS did try two diversionary tactics. First, it argued that plaintiffs, by not challenging the substantive changes in the HMR Reform and challenging only the lack of an adequate transition process for the implementation of the changes, were asserting an interest in "process alone," which is not a protectible interest under cases such as Doe v. Milwaukee County, 903 F.2d 499, 502 -- 3
(7th Cir. 1990). Rejecting this argument, the district court held that plaintiffs asserted the right to continuation of the benefits themselves until they were afforded a fair opportunity to prove their eligibility under the new criteria. Youakim, No. 73 C 635, mem. op. at 28 n.16. Second, DCFS argued that plaintiffs were not really deprived of their property interest at all since they had every right to apply for a foster home license and requalify for benefits. Id. However, the court found that plaintiffs had still been deprived of property rights and that plaintiffs could requalify for benefits by reapplying did not do away with that deprivation. Id. Defendant did not press either of these diversionary tactics on appeal.

/20/ Youakim, 71 F.3d at 1288 -- 89.

/21/ Id. at 1289. The court also quoted Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 541 ("The categories of substance and procedure are distinct. Were the rule otherwise, the [Due Process] Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation . . ."); and Bennett v. Tucker, 827 F.2d 63, 73 (7th Cir. 1987) ("a state may not deprive an individual of his or her property interest without due process, and then defend against a due process claim by asserting that the individual no longer has a property interest").

/22/ Logan, 455 U.S. 422.

/23/ Youakim, 71 F.3d at 1289 (citations omitted). Logan was a particularly apt precedent because it involved state-imposed deadlines for the expiration of a right over which the individual asserting the right had little or no control. In Youakim, the children in preapproved homes were going to lose their right to foster care benefits as of July 1, 1995, no matter how quickly their homes applied for a foster home license or submitted their proof of eligibility for one. In Logan, persons claiming employment discrimination would lose their right to assert the claim when the state let a 120-day deadline pass without taking the action required under the state statute. The Logan Court rejected the employer’s claim, which had been accepted by the Illinois Supreme Court, that this deadline was a part of the substantive definition of a right of action for discrimination: "[T]he State remains free to create substantive defenses or immunities for use in adjudication -- or to eliminate its statutorily created causes of action altogether -- just as it can amend or terminate its welfare or employment programs. The 120-day [deadline] limitation in the [discrimination statute] . . . of course, involves no such thing. It is a procedural limitation on the claimant’s ability to assert his rights, not a substantive element of the [discrimination] . . . claim." Logan, 455 U.S. at 432 -- 33.

/24/ Logan, 455 U.S. 422.

/25/ Cosby v. Ward, 843 F. 2d 967 (7th Cir. 1988) (Clearinghouse No. 34,728).

/26/ Carey v. Quern, 588 F. 2d 230 (7th Cir. 1978) (Clearinghouse No. 16,996).

/27/ Id. at 231

/28/ Id. at 232
/29/ Id.
/30/ Id.
/31/ Id.

/32/ Cosby, 843 F.2d at 971 -- 73.
/33/ Id. at 973.
/34/ Id.

/35/ Id. at 984 (citing Carey, 588 F.2d at 232).

/36/ Logan, 455 U.S. at 425 (citing the Illinois Fair Employment Practices Act).
/37/ Id. at 426 -- 27.

/38/ Id. at 427.
/39/ Id. at 427 -- 28.

/40/ Atkins, 472 U.S. 115.

/41/ Id. at 118.
/42/ Id. at 119 -- 20.

/43/ Id. at 129 -- 30 (footnote and citations omitted).

/44/ Youakim, No. 73 C 635, mem. op. at 31. See Atkins, 472 U.S. at 130, 131 n.35 ("[t]his, of course, would be a different case . . . if the reductions were based on individual factual determinations, and notice and an opportunity to be heard had been denied").

/45/ Youakim, No. 73 C 635, mem. op. at 31.

/46/ Youakim, 71 F.3d at 1290 -- 91. The court endorsed and followed the approach of the Ninth Circuit in Greene v. Babbitt, 64 F.3d 1266 (9th Cir. 1995). There, Congress had added an eligibility requirement to a federal benefit program requiring that Indians receiving benefits under the program had to be members of a tribe recognized by the federal government. The court rejected an Atkins-based argument and held that the recipients’ benefits could not be terminated prior to a hearing to determine whether their tribe met the recognition requirements. Id. at 1273 ("the due process clause requires a meaningful hearing to determine whether those previously eligible can meet the new and narrowed requirements").
Youakim, 71 F.3d at 1292. The district court, citing Logan, Cosby, and Carey, had fashioned affirmative relief requiring DCFS to send a new and more explicit notice to all class members, to allow them 35 days to file an application, and to maintain their benefits from July 1, 1995, until they either failed to apply within the 35 days after the notice or until their timely application was decided on the merits. Youakim, No. 73 C 635, mem. op. at 34 -- 36. However, this relief as to preapproved homes was stayed pending appeal, so their foster care benefits were terminated as of July 1. Youakim, 71 F.3d at 1278 n.1. When it entered its opinion, the court of appeals vacated the stay. Id. at 1293. After procedural delays, on February 18, 1996, many of the children in preapproved homes were reinstated to current benefits and their homes were given a new opportunity to apply for a license. Youakim, No. 73 C 635, interim injunctive order (N.D. Ill. Feb. 18, 1996). As of April 1996, the parties are negotiating final relief, including benefits for the period after July 1995 when plaintiffs’ benefits were terminated under the stay orders. DCFS is preparing a petition for a writ of certiorari to the Supreme Court.

The Youakim opinion assembles and distinguishes a number of cases. See 71 F.3d at 1290 n.14. These cases vary widely on their facts, but they share one distinguishing feature: they are like Atkins and unlike Youakim because they involve program changes that individual recipients cannot avoid. See Story v. Greene, 978 F.2d 60, 63 (2d Cir. 1992) (New York’s repeal of exemption previously enjoyed by disabled veterans from a city’s regulation of street peddling); Rosas v. McMahon, 945 F.2d 1469, 1475 (9th Cir. 1991) (amendment that increased the types of income to be included in determining eligibility for AFDC program); Hoffman v. City of Warwick, 909 F.2d 608, 619 -- 20 (1st Cir. 1990) (repeal of state statute granting enhanced seniority to returning war veterans); Slaughter v. Levine, 855 F.2d 553 (8th Cir. 1988) (amendment providing that a family receiving nonrecurring lump sum-income is ineligible for AFDC benefits for the number of months that income would satisfy the family’s standard of need); Oliver v. Ledbetter, 821 F.2d 1507, 1515 -- 16 (11th Cir. 1987) (new regulation requiring that Old Age, Survivors, and Disability Insurance benefits received by one child must be included in calculating, for AFDC eligibility purposes, available income of coresident siblings); Gattis v. Gravett, 806 F.2d 778, 780 -- 81 (8th Cir. 1986) (amendment withdrawing "persons holding the rank of major and above" from personnel covered by state civil service protections); Frock v. United States R.R. Retirement Bd., 685 F.2d 1041 (7th Cir. 1982) (statute eliminating right to receipt of dual benefits under two federal programs), cert. denied, 459 U.S. 1201 (1983).

Greene, 64 F.3d 1266.

But see Eidson v. Pierce, 745 F.2d 453, 462 (7th Cir. 1984) (Clearinghouse No. 32,097) (referring to establishment of eligibility contingent on availability of resources as "establish[ing] entitlement").

A property interest exists not only in a "secure" benefit but also in a "claim" to a benefit based on state rules and understandings. See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (Clearinghouse No. 3329) ("property interests . . . are created . . . and defined by . . . rules or understandings that secure certain benefits and that support claims of entitlement to those benefits"). See also Goldsmith v. Board of Tax Appeals, 270 U.S. 117 (1926) (admission to practice before Board of Tax Appeals based on rules, but also subject to discretion of board to deny any applicant admission; existence of the rules gave denied attorney a sufficient claim to constitute

a property interest to which due process requirements applied); Davis v. Ball Memorial Hosp. Ass’n, 640 F.2d 30,42 (7th Cir.1980) (Clearinghouse No. 25,087) (due process attaches to claim for status as person eligible for Hill-Burton free hospital care even though hospital will exhaust annual obligation to provide free care before all claimants can be served). Compare Davis with Eidson, 745 F.2d 453, 462 (no property interest in claim to Section 8 housing slot, as opposed to Section 8 eligibility, because, even where claimant meets eligibility requirements, landlord has full discretion to give the slot to someone else; "[a] hearing in Davis could establish entitlement; a hearing for these plaintiffs could not").

/52/ Advocates should also consider using transitional due process law to convince the agency or the legislature to build an adequate transition process into the budget projections for the "savings" associated with the cutback. The first year’s savings would then be a little lower, with "annualized" savings in future years.