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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

C.K., <u>et al.</u> ,	:	
	:	
Plaintiffs,	:	
	:	Docket No. 93-5354 (NHP)
v.	:	Civil Action
	:	
DONNA SHALALA, Secretary,	:	
United States Department of	:	
Health and Human Services,	:	
<u>et al.</u> ,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM OF LAW OF ASSOCIATION FOR CHILDREN OF NEW JERSEY, THE NATIONAL ORGANIZATION FOR WOMEN (NOW-NJ), AMERICAN FRIENDS SERVICE COMMITTEE, THE LUTHERAN OFFICE OF GOVERNMENTAL MINISTRY IN NEW JERSEY, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, INC., THE CHILD CARE LAW CENTER, THE CHILD WELFARE LEAGUE OF AMERICA, THE FOOD RESEARCH AND ACTION CENTER, AND THE NATIONAL ASSOCIATION OF CHILD ADVOCATES, AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	v
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	2
A. New Jersey's Family Development Program and the Child Exclusion Provision	2
B. Aid To Dependent Children and the Social Security Act	6
(i) The History of the AFDC Program	6
(ii) State Participation in the AFDC Program	10
ARGUMENT	12
NEW JERSEY'S CHILD EXCLUSION PROVISION IS CONTRARY TO THE EXPRESS PURPOSE AND REQUIREMENTS OF THE SOCIAL SECURITY ACT	12
1. The Stated Punitive Purpose of the Child Exclusion Provision Directly Contradicts Long-Standing Federal Law and Policy Against Punishing a Dependent Child to Influence the Behavior of the Parent	13
2. New Jersey's Child Exclusion Provision Redefines an "Eligible Individual" in Violation of the Social Security Act	15
3. The Child Exclusion Directly Contravenes the Stated Objectives of the Social Security Act	19
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

Statutes and Rules

45 C.F.R. § 233.10(a)(1)	17
N.J. Admin. Code § 10:82-1.2(b)	3,10
N.J. Stat. Ann. § 44:10-1 <u>et seq.</u>	<u>passim</u>
N.J. Stat. Ann. § 44:10-3.5	15
42 U.S.C. §§ 601-609	<u>passim</u>
42 U.S.C. § 1315(a)	11,20
H.R. Rep. No. 615, 74th Cong., 1st Sess. 24 (1935)	8,20
S. Rep. No. 744, 90th Cong., 1st Sess. (1967) <u>reprinted in</u> U.S.C.C.A.N. 2837	9
Social Security Amendments of 1939, ch. 666, § 403, 53 Stat. 1360, 1380 (1939)	8
107 Cong. Rec. 3766 (1961)	9

Cases

<u>Banks v. Trainor</u> , 525 F.2d 837 (7th Cir. 1975), <u>cert. denied</u> , 424 U.S. 978 (1978)	22,23
<u>Beno v. Shalala</u> , No. 93-16411, 1994 WL 330364 (9th Cir. 1994)	20,21
<u>Carleson v. Remillard</u> , 406 U.S. 598 (1972)	16,17
<u>Chu Drua Cha v. Noot</u> , 696 F.2d 594 (1982)	22
<u>Dandridge v. Williams</u> , 397 U.S. 471 (1970)	18,19
<u>King v. Smith</u> , 392 U.S. 309 (1968)	<u>passim</u>
<u>Moore v. Miller</u> , 579 F. Supp. 1188 (N.D. Ill. 1983)	23
<u>Paxton v. Secretary of Health and Human Serv.</u> , 856 F.2d 1352 (9th Cir. 1988)	23
<u>In re Petition for Rulemaking, N.J.A.C. 10:82-1.2</u> , 566 A.2d 1154 (N.J. 1989)	10,11

<u>Tasker v. Ginsberg</u> , 705 F.2d 1382 (4th Cir. 1983)	5,18
<u>Towsend v. Swank</u> , 404 U.S. 282 (1971)	16,17
<u>Van Lare v. Hurley</u> , 421 U.S. 338 (1975)	14
 <u>Other Authorities</u>	
Association for Children of New Jersey, <u>Abandoned Dreams: New Jersey's Children in Crisis</u> (1985)	24
Association for Children of New Jersey, <u>Keeping the Focus on Children: Accountability for Educational Improvement in the Special Needs Districts</u> (1992)	24
Association for Children of New Jersey, <u>Kids Count</u> , (1993)	21
Association for Children of New Jersey, <u>Splintered Lives: A Report on Decision-making for Children in Foster Care</u> (1988)	24
Association for Children of New Jersey, <u>Stolen Futures: A Report on Preventing Foster Care Placement in New Jersey</u> (1994)	25
Carnegie Corporation of New York, <u>Starting Points: Meeting The Needs of our Youngest Children</u> (Apr. 1994)	6,22
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Committee on Ways and Means, U.S. House of Representatives, <u>Overview of Entitlement Programs, 1994 Green Book, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means</u> , U.S. Government Printing Office, July 1994	2,4,22
Letter from ACNJ to Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services (May 8, 1992)	12
Letter from Jo Anne Barnhart to Cecilia Zalkind of ACNJ (June 23, 1992)	12
I. Lurie, <u>Major Changes in the Structure of the</u>	

AFDC Program Since 1935, 59 Cornell L. Rev. 825 (1974) 7,8,9

Newark Pre-School Council, Inc. and Association
for Children of New Jersey, Not Enough to Live On
(Apr. 1984) 5,22

New Jersey State Department of Education,
The Education of Homeless Children and Youth
In New Jersey: A Plan for State Action 23

Notice of Approval to New Jersey of AFDC State
Plan Amendment Revising Standard of Need and
Payment Standards (July 1, 1992) 10

State Letter No. 452, Bureau of Public Assistance,
Social Security Administration, Department of
Health, Education, and Welfare, dated
January 17, 1961 9

United States General Accounting Office,
Report to the Chairman, Subcommittee on Children,
Family, Drugs and Alcoholism, Committee on Labor and
Human Resources, U.S. Senate, Infants and Toddlers:
Dramatic Increases in Numbers Living in Poverty
(Apr. 1994) 21,22

L. Williams, The Ideology of Division: Behavior
Modification Welfare Reform Proposals,
102 Yale L. J. 719 (1992) 8

Statement to Assembly Bill 4703 4

STATEMENTS OF INTEREST OF AMICI CURIAE

The Association for Children of New Jersey ("ACNJ") is a statewide, non-profit advocacy organization dedicated to improving programs and policies for New Jersey's children and families. ACNJ began in 1846 as the Newark Orphan Asylum, which merged in 1960 with the Newark Children's Aid Society to form the Child Service Association. In 1978, the Child Service Association joined with the Citizens' Committee for Children of New Jersey to become the Association for Children of New Jersey. ACNJ has directed its advocacy efforts to all areas that affect the lives of New Jersey's children and families: child welfare, juvenile justice, health, housing, education, and child care. In particular, ACNJ has conducted several studies on the plight of poor children in New Jersey. These include How Long Deferred: Statistical Indicators (1988) which examined the status of minority children and families in our state; Abandoned Dreams: New Jersey's Children in Crisis (1985) which contrasted the special problems facing New Jersey's poor and minority children to the state of children in general; Not Enough to Live On (1984) which described the living conditions of Head Start families in Newark; Through the Safety Net: A Citizen's Report on New Jersey Children and Families in Need (1983) which assessed the impact of federal budget cuts on New Jersey's poor children and families; and Splintered Lives: A Report on Decision-making for Children in Foster Care (1988). As an independent child advocacy organization, ACNJ believes that its expertise would be of assistance in deciding this case. ACNJ's long history of

advocacy for the vulnerable children and families of New Jersey will enable it to furnish unique information about the special needs and problems of the State's poor children.

National Organization for Women ("NOW-NJ") works to bring women into full equality with men in society. The New Jersey chapter was founded 21 years ago, and currently has approximately 10,000 members throughout the State of New Jersey. Its membership is comprised of women and men of all ages, races, ethnic backgrounds and economic classes, including women who currently are receiving, or have in the past received, AFDC, or who may in the future need public assistance. NOW-NJ has been actively involved in speaking out and working against welfare laws which worsen the living conditions of poor women and their families. NOW-NJ has held public forums on and testified before governmental bodies both about the law which is the subject of this litigation and other welfare reform provisions which have been enacted or proposed by the State of New Jersey. NOW-NJ feels strongly that the law which is the subject of this litigation serves only to punish poor women for circumstances over which they very often have no control; attempts to place upon poor women blame for the current economic problems facing the state; and deprives newborn children of life-sustaining resources based solely on the circumstances of their birth. NOW-NJ believes that its concern, interest, and experience will be of assistance to the Court in determining the critically important

issue of the limitations to be placed on a State in implementing restrictive provisions in the name of welfare "reform."

The American Friends Service Committee ("AFSC") has been active since 1917 in works of humanitarian relief and service, reconciliation among nations and peoples, and programs to overcome discrimination and oppression. The AFSC carries out its work as a social justice arm of the Religious Society of Friends. AFSC has worked closely with groups and organizations seeking greater fairness and effectiveness in the system of providing public assistance. In its testimony to the Administration Working Group on Welfare Reform, AFSC stressed that "a decent living for children and their caretakers should be the cornerstone of welfare reform." AFSC has participated in several lawsuits opposing assistance cuts and supporting reproductive rights.

The Lutheran Office of Governmental Ministry in New Jersey ("LOGM/NJ") is a partnership of the New Jersey Synod-Evangelical Lutheran Church of America, the New Jersey Council of Churches, and Lutheran Social Ministries in New Jersey. The partnership was established in 1985 to advocate justice for the poor and powerless. LOGM/NJ has opposed the "child exclusion" provision of New Jersey's Family Development Program since its original introduction in 1991, and has testified before the State Assembly Committee on Health and Human Services.

The National Association of Social Workers, Inc. ("NASW") is the largest association of professional social

workers in the world with over 147,000 members in 55 chapters throughout the United States and abroad. Founded in 1955 from a merger of seven predecessor social work organizations, NASW is committed to improving the quality of life through utilization of social work knowledge and skills, promoting the quality and effectiveness of social work practice, and advancing the knowledge base of the social work profession. The New Jersey Chapter has over 6,600 members. NASW believes that New Jersey's "Child Exclusion" program violates the statutory purposes for which AFDC was established. NASW supports the principle that by providing financial assistance to children in need, the well-being of the family is furthered and maintained. The New Jersey exclusion runs counter to NASW's efforts to improve social conditions through positive changes in policy and legislation.

The Child Care Law Center ("CCLC") is a national, non-profit legal services organization incorporated in April, 1985. The Center's major objectives are to use legal tools to foster the development of quality, affordable child care programs, and to assist low-income families in obtaining child care services. CCLC is interested in participating as an amicus curiae in this case because under the New Jersey scheme, infants excluded from AFDC benefits also are denied child care services to which they would otherwise be legally entitled. As an organization that works to increase poor parents' access to child care supports so that they may achieve economic self-sufficiency, CCLC is deeply concerned by the New Jersey program, which denies such child care

assistance, and will serve only to further impoverish thousand of families and their very young children.

The Child Welfare League of America ("CWLA") is a 74-year old association of more than 750 public and voluntary agencies across the United States and Canada whose staff annually serve over two million abused, neglected, and otherwise vulnerable children, youths and their families, many of whom depend on Aid to Families with Dependent Children (AFDC) program benefits to meet their basic needs for food, shelter, and clothing. CWLA member agencies respond to the needs of these primarily low-income children and young people with a wide range of services, including kinship and family foster care, adoption, residential group care, child day care, family preservation services, mental health services, and programs for pregnant and parenting teenagers. CWLA believes that child exclusion policies in the AFDC program will serve only to further impoverish children and young people, and will increase the risks to their well-being and healthy development. Further, such exclusions contradict the statutory purpose of the AFDC program, which is to provide basic support to needy children.

The Food Research and Action Center ("FRAC"), based in Washington, D.C., was founded in New York in 1970 as a small public interest law firm. It now acts as the hub for thousands of individuals and agencies all fighting to end hunger. Because hunger is a condition of poverty, it is FRAC's position that the "Child Exclusion" rule, by denying families additional dollars

that could be used to feed and support another child, will only force more children and their families into hunger and need. Thus, FRAC opposes the "Child Exclusion" rule.

The National Association of Child Advocates ("NACA") works for safety, security, health and education for all American's children by building and supporting state and community-based independent child advocacy organizations. Founded in 1984, NACA provides technical assistance to child advocacy organizations in more than 40 states and Canada on substantive issues concerning children, organizational development, and action strategies. These organizations speak out for improvement in the condition of the children in their communities and states and foster the development of innovative policies to meet children's needs. NACA has a strong interest in this litigation because the child exclusion legislation at issue harms children, whom NACA and its New Jersey member organization, Association for Children of New Jersey, strive to protect.

The expertise of *amici* will aid this Court in understanding the irreparable harm that the State's poor children are likely to suffer if the Child Exclusion provision of the Family Development Program is permitted to continue in operation.

PRELIMINARY STATEMENT

In 1992, New Jersey overhauled its welfare system and became the first state in the Nation to enact a birth penalty, depriving statutorily-eligible children of benefits. In an attempt to "promote individual responsibility," the Child Exclusion provision of the State's Family Development Program eliminates the previously automatic grant increase provided when a mother bears an additional child. This legislation, which was enacted under a waiver provision in the federal Social Security Act, is in fact contrary to the very purpose, objectives and language of the Social Security Act, which Congress enacted nearly sixty years ago specifically to assist needy children and their families. The Child Exclusion provision must therefore be struck down.¹

Moreover, New Jersey's Child Exclusion provision, which is intended to penalize children for no other reason than their mother's decision to give birth to them, is illegal and absurdly inconsistent with the intent of the Social Security Act. Families subsisting on welfare already face considerable challenges. Yet, without any proof that the increased assistance that the State formerly provided for an additional child affected

¹ *Amici* focus this brief on the conflict between the Child Exclusion provision and the Social Security Act and information they believe will be useful to the Court on the detrimental effect that the Child Exclusion provision will have on children. The brief does not address the propriety of the waiver granted to New Jersey by the Secretary of Health and Human Services to effect the Child Exclusion, nor does it address the Exclusion's other procedural, regulatory, or constitutional violations.

family size,² the law's proponents have decided to conduct a human experiment using innocent infants as subjects. The results of this experiment are obvious -- New Jersey's Child Exclusion will increase malnutrition among newborns, drive more families into homelessness and force indigent mothers to place their children into the foster care system.

STATEMENT OF FACTS

A. New Jersey's Family Development Program and the Child Exclusion Provision

In January 1992, the New Jersey Legislature enacted five separate bills collectively known as the Family Development Program (the "FDP"). On January 21, 1992, then-Governor Florio signed the FDP into law.

The FDP, a welfare reform package, effected a permanent statewide change in New Jersey's Aid to Families with Dependent Children ("NJAFDC") program. The FDP's more laudable components include the creation and expansion of job placement, vocational training and education programs; the expansion of day care; the

² In fact, empirical evidence regarding Aid to Families with Dependent Children ("AFDC") from other states indicates that the grant amount bears no correlation to family size. Mississippi has the highest percentage of families with four or more children and has the lowest AFDC grant amount, with a maximum amount of \$415 (\$120 in grant allowance and \$295 in food stamps for a one-parent family with two children). Committee on Ways and Means, U.S. House of Representatives, Overview of Entitlement Programs, 1994 Green Book, Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means, U.S. Government Printing Office, July 1994 at 366, 412-13 ("Green Book"). Mississippi AFDC recipients receive only \$24 per additional child, *id.*, hardly enough to influence the decision on whether to bear a child.

retention of benefits, under certain circumstances, by a mother who marries; and the extension of Medicaid benefits. The FDP also reduces or eliminates benefits for able-bodied welfare recipients if the children of such recipients are over two years of age and the recipients refuse to work, continue their education or take part in job training or vocational assessment programs. See N.J. Admin. Code 10:82 et seq.

The only component of the FDP challenged in this action is what has come to be known as the "Child Exclusion." The Child Exclusion changes existing State law by eliminating the standard NJAFDC grant increase for any child conceived by and born to an NJAFDC recipient after August 1, 1993. See N.J. Stat. Ann. 44:10-3.5; N.J. Admin. Code 10:82-1.11(a).³ The stated purpose of the Child Exclusion is to "discourage AFDC recipients from

³ The Child Exclusion provides:

The Commissioner of Human Services shall revise the schedule of benefits to be paid to a recipient family under the program of aid to families with dependent children (AFDC) established pursuant to P.L. 1959, c.86 (C.44:10-1 et seq.), by eliminating the increment in benefits under the program for which that family would otherwise be eligible as a result of the birth of a child during the period in which the family is eligible for AFDC benefits, or during a temporary period in which the family or adult recipient is ineligible for AFDC benefits pursuant to a penalty imposed by the commissioner for failure to comply with benefit eligibility requirements, subsequent to which the family or adult recipient is again eligible for benefits. The commissioner shall provide instead that a recipient family in which the adult recipient parents an additional child during the adult recipient's period of eligibility for AFDC benefits, or during a temporary penalty period of ineligibility for benefits, may receive additional benefits only pursuant to section 2 of this act, except in the case of a general increase in the amount of AFDC benefits which is provided to all program recipients.

having additional children during the period of their welfare dependence." See Statement to Assembly Bill 4703.

The law's proponents claim that any hardship resulting from the Child Exclusion is offset by a provision that allows AFDC recipients with excluded children to retain a larger portion of the income they earn from outside sources than recipients who are not subject to the exclusion (the "earned income disregard"). See N.J. Stat. Ann. 44:10-3.6. In actuality, only 2.7% of NJAFDC households qualified for the earned income disregard in 1992, see Green Book at 414,⁴ and although these parents are supposed to receive priority for employment and training services, Governor Whitman's proposed fiscal budget for 1995 provides no additional funds for the FDP's employment programs.

Therefore, although the law allows for a higher earned income disregard for families with excluded children, the State has failed to provide the resources necessary for parents to fill the significant financial gap caused by the Child Exclusion. Thus, the Child Exclusion will plunge children and their families deeper into poverty, thereby increasing the likelihood of child abuse and neglect.⁵

⁴ *Amici* respectfully state that they will make available to the Court the source material cited herein, should the Court so request.

⁵ While child abuse and neglect occur in families from all socioeconomic backgrounds, statistics indicate that parents who experience poverty, joblessness and homelessness are more likely to neglect and abuse their children than other parents. Center for Law and Social Policy, The Jury Is Still Out: An Analysis of the Purported Impact of New
(continued...)

Proponents of the Child Exclusion likewise claim that the federal food stamp program -- which continues to provide increased benefits for additional children -- will prevent undue harm to infants excluded from NJAFDC.⁶ Yet, although most families on NJAFDC receive food stamps, the benefits frequently run out before the end of the month, and parents must dip into their NJAFDC allotment to feed their children. Newark Pre-School Council, Inc. and Association for Children of New Jersey, Not Enough to Live On at i-ii. (1984).⁷ Families receiving food stamps expend an average of 37% of their combined income,⁸ including \$60 out of their own pocket, for food; 83% of food stamp recipients report that they "sometimes" or "often" run out of food before the end of the month and cannot feed their families. Id. at iv. Many desperate parents also resort to watering down infant formula or feeding babies age-inappropriate foods, thus depriving their children of the nutrients that they need to grow and develop properly.

⁵(...continued)

Jersey's AFDC Child Exclusion (aka "Family Cap") Law at 6 (1994).

⁶ Courts have observed, however, that the food stamp program is separate from AFDC and thus increased food stamp allotments do not permit a state to decrease AFDC payments. See Tasker v. Ginsberg, 705 F.2d 1382, 1386-87 (4th Cir. 1983).

⁷ The authors of Not Enough to Live On gathered responses from 1800 survey respondents whose children were enrolled in the Head Start Program in Newark, New Jersey. Three-quarters of the Head Start families rely on NJAFDC.

⁸ Income includes their food stamp allotment and their NJAFDC grant.

Children who are excluded from the grant allowance will likely suffer malnutrition, which has permanent debilitating effects on their future growth and development. Inadequate nutrition before birth and during the first years of life interferes with brain development and leads to severe neurological and behavioral disorders including learning disabilities and mental retardation. Carnegie Corporation of New York, Starting Point: Meeting The Needs of Our Youngest Children at 7-8 (Apr. 1994). Studies have shown that inadequate nutrition has a permanent impact and that the benefits of early intervention are cumulative. Id. at 8.

Indeed, studies of children raised in poor environments indicate that children may suffer irreversible cognitive deficits by age eighteen months. Id. Children are particularly likely to suffer malnutrition in the winter months when their parents are forced to divert their limited resources from food to heating fuel. Id. at 66. These children will be ill-prepared to enter school and will suffer educational obstacles that will make it more difficult for them to escape the cycle of poverty and welfare dependence.

B. Aid to Dependent Children and
the Social Security Act

(i) The History of the AFDC Program

Congress established the AFDC⁹ program through the Social Security Act of 1935 (the "Social Security Act"). The

⁹ The AFDC program was originally enacted under the name "Aid to Dependent Children."

AFDC program is a cash grant program which enables States to aid needy children who have been deprived of parental support because their father or mother is absent from the home continuously, is incapacitated, is deceased or is unemployed. See 42 U.S.C. §§ 601-609. The federal government has a long-standing policy of encouraging indigent parents to care for their children within the home rather than placing them in state institutions and, to that end, has provided financial assistance to those parents. See 42 U.S.C. § 601 (noting that the financial assistance is "for the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . .").

AFDC had its genesis in the mothers' pension movement of the early twentieth century. Prior to the passage of mothers' pension laws, children were placed in institutions if a parent could not take care of them due to the death, disability, or desertion of their spouse. See I. Lurie, Major Changes in the Structure of the AFDC Program Since 1935, 59 Cornell L. Rev. 825, 826 (1974). In 1909, President Theodore Roosevelt convened the White House Conference on the Care of Dependent Children which recommended that children be raised at home rather than in institutions and suggested that the government provide aid to parents who wished to care for children at home. Id. By 1931, all states except Georgia and South Carolina had enacted mothers' aid pension legislation. Id.

During the Great Depression, state and local governments found that they could no longer shoulder the burden

of supporting single parents and their children without federal assistance. See L. Williams, The Ideology of Division: Behavior Modification Welfare Reform Proposals, 102 Yale L. J. 719, 722 (1992). Thus, in 1935, Congress passed the Social Security Act. The Social Security Act was intended to help not only the unemployed, the elderly, the blind and the orphaned, but also was intended to continue, through the AFDC program, the aid provided under mothers' aid pension programs. See Major Changes at 826. In 1939, Congress redefined a "dependent child" as a "needy child." Social Security Amendments of 1939, ch. 666, § 403, 53 Stat. 1360, 1380 (1939) (codified as amended at 42 U.S.C. § 505 (1982)).

In proposing the AFDC program, Representative Doughton from the Committee on Ways and Means declared that "the core of any social program must be the child. It has long been recognized in this country that the best provision that can be made for families of this description [without fathers in the home] is public aid with respect to dependent children in their own homes." H.R. Rep. No. 615, 74th Cong., 1st Sess. 24 (1935). However, while the legislators' paramount concern was the financial support of needy children, the legislative history of the Social Security Act's AFDC program indicates some federal legislators' initial desire to allow the states to "impose such other eligibility requirements -- as to means, moral character, etc. -- as [they] see[] fit." Id. Accordingly, when the number of illegitimate births began to rise sharply in the 1940's and

50's, several states began to enact "suitable home" provisions to deny AFDC benefits to homes with illegitimate children. Major Changes, at 831.

The Secretary of Health, Education and Welfare strongly disapproved of this type of legislation and in 1961 issued the "Flemming Ruling," which states:

I have concluded that when a needy child who otherwise fits within the Aid to Dependent Children program of the State is denied the funds that are admittedly needed to provide the basic essentials of life itself, because of the behavior of his parent or other relative, the State plan imposes a condition of eligibility that bears no just relationship to the Aid to Dependent Children program. I therefore believe that this Department should inform the State agencies administering Aid to Dependent Children plans that eligibility conditions with the effect described above are not compatible with entitlement for continued Federal grants.

State Letter No. 452, Bureau of Public Assistance, Social Security Administration, Department of Health, Education, and Welfare, dated January 17, 1961. Congress approved the Flemming Ruling quickly.¹⁰ 75 Stat. 77, as amended, 42 U.S.C. § 604(b).

¹⁰ Illustrative of this shift in attitudes, Representative Hoffman asked Representative Gross (who had discussed mothers "hatching out illegitimate children" and who suggested "one mistake and you are out") whether he believed that "these innocent children, no matter what the circumstances under which they were born, are to be deprived of the necessities of life." Representative Gross answered by assuring Hoffman that he did not and further agreed with his suggestion that the proper approach would be to prevent illegitimate births. 107 Cong. Rec. 3766 (1961). In the 1967 amendments to the Social Security Act, Congress directly addressed the goal of reducing the birth rate among AFDC recipients by requiring states to provide voluntary family planning services, exemplifying a preventive approach rather than a punitive one. S. Rep. No. 90th Cong., 1st Sess. (1967) reprinted in U.S.C.C.A.N. 2837.

Congress' ratification of the Flemming Ruling meant that the states effectively were precluded from denying AFDC benefits to dependent children on the basis of their parent's alleged "immoral behavior."

(ii) State Participation in the AFDC Program

The AFDC program is financed largely by the federal government on a matching fund basis, and is administered by the States. States are not required to participate in the AFDC program. However, those states that desire to take advantage of the substantial federal funds available for distribution to needy children under AFDC are required to submit an AFDC plan to the Secretary of Health and Human Services ("HHS") (formerly the Secretary of Health, Education and Welfare). See 42 U.S.C. §§ 601-604. The AFDC plan must comply with a variety of federal requirements.¹¹ 42 U.S.C. § 602. Participating states, like New Jersey, may set their own standard of "need," set their own benefit levels, establish income and resource limits and administer the program or supervise its administration.¹² Id.

¹¹ New Jersey has participated in the federal AFDC program since 1938. In re Petition for Rulemaking, N.J.A.C. 10:82-1.2, 566 A.2d 1154 (N.J. 1989).

¹² The NJAFDC program is administered by the Department of Human Services, which sets grant amounts taking into account family size. N.J. Stat. Ann. 44:10-1 et seq.; N.J. Admin. Code 10:82-1.2(b). These grant amounts, however, do not meet the standards that the Department itself has established. The State has determined that a family of three needs at least \$985 per month to meet basic minimum living requirements. Nevertheless, the State allots such a family only 45% of the established standard of need. See Notice of Approval to New Jersey of AFDC State Plan

(continued...)

The Social Security Act further requires that States administering an AFDC plan must furnish aid "with reasonable promptness to all eligible individuals" (including dependent children). 42 U.S.C. § 602(a)(10).

Section 1315 of the Social Security Act allows the Secretary of HHS to waive a state's compliance with the Act's requirements only for the period and extent necessary to implement experimental projects which "assist in promoting the objectives" of the AFDC program. 42 U.S.C. § 1315(a). The AFDC program's objectives are set forth in detail in Section 601 of the Social Security Act, and specifically include the provision of financial assistance to "needy dependent children."¹³ Despite the fact that the Child Exclusion deprives needy children of their NJAFDC benefits in violation of the purposes of the

¹²(...continued)

Amendment Revising Standard of Need and Payment Standards (July 1, 1992).

¹³ In Petitions for Rulemaking, 566 A.2d at 1157-58, the State's highest court recognized that the purposes of New Jersey's AFDC Act are the same as the federal program's, namely:

1) To provide for the care of eligible dependent children in their own homes or in the homes of relatives, under standards and conditions compatible with decency and health,

2) To help maintain and strengthen family life,

3) To help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection ...

N.J. Stat. Ann. 44:10-1(a).

Social Security Act, the State's provision was implemented pursuant to a waiver from the Secretary approved July 20, 1992.¹⁴

ARGUMENT

NEW JERSEY'S CHILD EXCLUSION PROVISION IS CONTRARY TO THE EXPRESS PURPOSE AND REQUIREMENTS OF THE SOCIAL SECURITY ACT

The New Jersey Child Exclusion does nothing to further the Social Security Act's mandate of aiding needy children. Rather, the Exclusion improperly subverts the Social Security Act's requirements and objectives by redefining the class of children who are eligible for NJAFDC benefits simply for the stated purpose of discouraging particular parental behavior. Thus, New Jersey's excluded children are being told to look for their support elsewhere, without being offered any meaningful alternative protection by the State. Such an outcome is wholly improper, unreasonable and unsupported by the very purpose and language of the Social Security Act.

¹⁴ Amicus Association for Children of New Jersey filed objections to the waiver regarding these issues, but the Secretary for Health and Human Services did not address them in granting the waiver. See Letter from ACNJ to Jo Anne B. Barnhart, Assistant Secretary for Children and Families, Department of Health and Human Services (May 8, 1992). See also Letter from Jo Anne Barnhart to Cecilia Zalkind of ACNJ (June 23, 1992). While this brief does not address the appropriateness of the waiver granted to New Jersey by the Secretary in any detail, for the reasons which follow, the waiver was clearly improper because the Child Exclusion does not further the objectives and goals of the Social Security Act.

1. The Stated Punitive Purpose of the Child Exclusion Provision Directly Contradicts Long-Standing Federal Law and Policy Against Punishing a Dependent Child to Influence the Behavior of the Parent

The legislative history of the Child Exclusion makes clear that needy children of New Jersey are being deprived of benefits solely for the purpose of discouraging the reproductive behavior of their parents. However, the Supreme Court has already found such a purpose to be in plain conflict with both the legislative intent and the executive branch's interpretation of the Social Security Act. See King v. Smith, 392 U.S. 309, 320-326 (1968).

The Supreme Court has made clear that a parent's alleged immoral behavior "should be dealt with through rehabilitative measures rather than measures that punish dependent children, and that protection of such children is the paramount goal of AFDC." King, 392 U.S. at 325 (emphasis added). In King, Alabama sought to discourage AFDC mothers from "cohabiting" in or outside their homes with any single or married able-bodied man. In rejecting Alabama's argument based on its interest in discouraging what it considered to be unacceptable behavior, the Court reviewed the development of the public welfare programs and the AFDC. 392 U.S. at 320-27. The Court recognized that the AFDC program has evolved from a program premised on a concept of reserving aid to the "worthy poor" to a program based on a more enlightened approach which recognizes that the State could not punish a child for the behavior of the parent. Id. Thus, the Court found it "simply inconceivable"

that a State would be free to discourage what it deemed to be unacceptable parental behavior by the device of absolute disqualification of needy children. 392 U.S. at 326.

The classifications reviewed in King and in Van Lare v. Hurley, 421 U.S. 338, 346 (1975) (invalidating a state plan which denied AFDC benefits to otherwise eligible children whose parent allowed a lodger to reside in the home), unreasonably denied benefits to otherwise eligible needy children based on the behavior of their parents. This inequitable treatment based on the behavior of the parent, irrespective of need, conflicted fundamentally with the primary goal of the AFDC -- which is to provide assistance to needy dependent children.

New Jersey's Child Exclusion provision, which unquestionably aims to discourage particular parental behavior by the absolute disqualification of eligible dependent children, marches backward nearly 30 years to resurrect eligibility conditions that have long been deemed fundamentally inconsistent with the Social Security Act. If New Jersey wishes to influence what it perceives to be "unacceptable" behavior, it may do so through measures such as family planning and sex education counseling.¹⁵ It cannot, however, effect punitive measures against defenseless children through methods which plainly

¹⁵ In fact, Congress addressed the need for providing or reducing the incidence of births out of wedlock by requiring States to provide family planning services to all AFDC recipients who voluntarily request it. See 42 U.S.C. 602(a)(15).

conflict with the Social Security Act and established precedent.

2. New Jersey's Child Exclusion Provision Redefines an "Eligible Individual" in Violation of the Social Security Act

The Social Security Act requires that "aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals." 42 U.S.C. § 602(a)(10). An eligible "dependent child" is defined as a "needy child" who is deprived of parental support or care by reason of the death, continued absence or incapacity of a parent and who is under the age of 18, or a student under the age of 21. 42 U.S.C. § 606(a). "Aid" is defined as "money payments with respect to a dependent child or dependent children" 42 U.S.C. § 606(b).

The Child Exclusion provision essentially redefines these eligibility conditions by excluding any child born after August 1, 1993 to a parent already participating in the AFDC program. N.J. Stat. Ann. 44:10-3.5. By denying aid to an otherwise eligible needy child, the provision is in direct contravention of Sections 602(a)(10) and 606(a) of the Social Security Act.

The Supreme Court has repeatedly struck down attempts by states to redefine federal AFDC eligibility standards, and has held that AFDC eligibility must be determined by federal standards emphasizing that

at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal

AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause.

Townsend v. Swank, 404 U.S. 282, 286 (1971) (invalidating Illinois statute that sought to exclude needy dependent children 18 through 20 years old who attended a college or university, but did not exclude children of the same age attending high school or vocational training school).

Indeed, previously in King, the Supreme Court held that Alabama's redefinition of "parent" was inconsistent with the federal standard set forth in Section 606(a) of the Social Security Act and was therefore invalid. King, 392 U.S. at 333. In King, Alabama denied benefits to children of a mother who co-habited with an able-bodied man, because the statute defined that man as a non-absent parent and the State assumed he would provide for the family's children. Since a dependent child had to be deprived of one parent's presence to qualify for AFDC, the definition worked to disqualify the family from receiving AFDC benefits. The Court rejected Alabama's redefinition, stating that the State had a federally-imposed obligation to furnish aid to needy children and that "if Alabama believes it necessary that it be able to disqualify a child on the basis of a man who is not under such a duty of support, its arguments should be addressed to Congress and not this Court." 392 U.S. at 332-33.

Similarly, in Carleson v. Remillard, 406 U.S. 598 (1972), California attempted to exclude children of military enlistees on the premise that these children, while admittedly deprived of parental support by reason of continued absence, were

not eligible because the parent's continued absence was due to military service. After determining that California's narrowed definition of "continued absence" conflicted with the federal criterion, the Court invalidated the state's exclusion of otherwise eligible children. Carleson, 406 U.S. at 604.

Although HHS regulations provide that states may make reasonable classifications for purposes of determining eligibility, such classifications must not be unreasonable and they must not result in inequitable treatment of individuals in light of the purposes of the Social Security Act. 45 C.F.R. § 233.10(a)(1). The Supreme Court in Townsend thus stated that to the extent Section 233.10(a)(1) could be deemed to provide states with some flexibility to determine eligibility standards, any such effort would be clearly circumscribed by the requirement of Section 602(a)(10) of the Social Security Act that aid be furnished to all eligible individuals. 404 U.S. at 286.

In the present case, New Jersey redefines an otherwise needy dependent child as an ineligible individual based solely on the fact that the child was born into a family already participating in the NJAFDC program. The Social Security Act places no such limitation on needy children. The Child Exclusion therefore conflicts with the federal eligibility standard set forth in Section 606(a) of the Social Security Act.

Nor is the Child Exclusion defensible as a plan which implements a reduction in benefits provided to an AFDC family as a unit, as opposed to a state plan which singles out for

disqualification an otherwise eligible individual. See Tasker v. Ginsberg, 705 F.2d 1382, 1387 (4th Cir. 1983). In Tasker, a West Virginia AFDC plan excluded spouses of incapacitated and unemployed persons from receiving AFDC benefits in violation of the federal eligibility standard. The court rejected the state's argument that the exclusion was merely a reduction in the level of benefits, stating that the plaintiffs "have been completely disqualified from AFDC money payments by the action of the state." 705 F.2d at 1382. Clearly, the New Jersey Child Exclusion completely disqualifies needy children born into an NJAFDC family unit and cannot be characterized as a reduction of benefits to the family unit as a whole.

While it is not disputed that state plans may place a cap or ceiling on AFDC benefits due to the finite amount of available resources, "so long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." Dandridge v. Williams, 397 U.S. 471, 481 (1970) (emphasis added). In Dandridge, the Supreme Court upheld a Maryland plan which placed a ceiling of approximately \$250 per month on AFDC assistance to a family unit. The amount of aid for each child would thus become proportionately smaller as the AFDC family grew in number. The Court recognized that States had limited resources and had some latitude in setting maximum amounts of family grants, subject to a requirement that the State set such caps in an equitable manner, and not disqualify an

otherwise eligible individual from participation in the AFDC program.

Unlike in Dandridge, where the State lowered the amount of funds available for the family unit as that unit's monthly grant approached the \$250 cap, New Jersey's Exclusion denies benefits to the particular children born into an NJAFDC family unit after the August 1 cutoff date, no matter how small that unit may be. This plainly violates the Social Security Act's mandate to provide assistance to eligible needy children. See 42 U.S.C. § 602(a)(10).

3. The Child Exclusion Directly Contravenes the Stated Objectives of the Social Security Act

The Child Exclusion is also in direct conflict with the express objectives and the legislative history of the Social Security Act, which makes clear that the purpose of the AFDC program is to encourage the care of needy dependent children in their own homes.

Section 601 of the Social Security Act states:

For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have

submitted, and had approved by the Secretary, State plans for aid and services to need families with children.

42 U.S.C. § 601 (emphasis added). As stated above, the legislative history of the Social Security Act expressly states that "the core of [the AFDC program] is the child." H.R. Rep. No. 615. Thus, the very text of Section 601, along with the pertinent legislative history of the Social Security Act, make clear that the primary objective of the AFDC program is the care of "needy dependent children."

Indeed, the Supreme Court has stated that the protection of needy children is the "paramount goal" of the AFDC program. King, 392 U.S. at 325. See also Beno v. Shalala, No. 93-16411, 1994 WL 330364, at *9 (9th Cir. July 13, 1994) ("As [Section 601], its legislative history, and courts have made clear, the AFDC program's main objective is to support needy children"). Any state project that deviates from the Social Security Act's substantial requirements must assist in promoting the objectives of the AFDC program. See 42 U.S.C. § 1315(a).

The Ninth Circuit's recent decision in Beno v. Shalala further illustrates that State AFDC projects must be consistent with federal requirements, be unlikely to harm recipients and be likely to further the goals of the Social Security Act. In Beno, plaintiffs appealed the denial of their request for a preliminary injunction enjoining a statewide benefits cut in California as part of an experimental work-incentive project. Plaintiffs also challenged the Secretary of HHS' waiver of certain AFDC

requirements which allowed the implementation of California's experimental project. In reversing the district court's denial of injunctive relief, the Ninth Circuit, noting the clear language of Section 601 of the Social Security Act and its legislative history, held, inter alia, that the proposed project must be likely to further the objectives of the AFDC program and that consideration obviously must be given to the "impact of the state's project on the children and families the AFDC program was enacted to protect." 1994 WL 330364 at **8-9.

Clearly, New Jersey's Child Exclusion fails to withstand scrutiny as a plan which promotes the objectives of the AFDC program. The Child Exclusion will impose irreparable harm on needy dependent children and their recipient families by making it impossible for them to afford adequate housing, increasing homelessness and driving more parents to place their children in foster care.¹⁶ The substandard housing that families on welfare can afford is, more often than not, uninhabitable for young children. The average AFDC family in New Jersey spends 60% of its grant allowance on rent. Children's

¹⁶ A sampling of the statistics of children living below the poverty level in several of the State's largest cities indicates that New Jersey has many "needy children." In Camden 50% of the children live below the poverty level; in Atlantic City 40.4% of the children are poor; in Newark 37.2% are poor; and in Jersey City 29.7% of the children live in poverty. Association for Children of New Jersey, Kids Count (1993). See also United States General Accounting Office, Report to the Chairman, Subcommittee on Children, Family, Drugs and Alcoholism, Committee on Labor and Human Resources, U.S. Senate, Infants and Toddlers: Dramatic Increases in Numbers Living in Poverty at 51-52 (Apr. 1994).

Defense Fund, A Vision for America's Future at 132 (1989). Virtually all of the State's AFDC households rent their homes, yet nearly 80% of the recipients receive no federal or state housing subsidies. Green Book at 416. A quarter of the families must share housing so that they can reduce the cost of rent. Not Enough to Live On, at iv. But, despite the disproportionate percentage of their income that these families must spend on housing, most of the State's children on AFDC are forced to live in squalor because of their parent's poverty. Almost 90% of the children live in roach-infested homes; 61% of the children live in rat-infested homes; and 40% live in housing with leaking roofs or ceilings. Id. at v. Poor children are more likely than others to be exposed to toxic levels of lead that adversely affect brain development and functioning and increase the child's risk of having a reading disability sixfold and of dropping out of school sevenfold. Starting Points at 66.

These families, with an additional child to house, need more money, not less money. The Child Exclusion provision -- intended to punish mothers for bearing additional children -- thus deprives needy children of necessary funding.¹⁷

¹⁷ Indeed, numerous cases have held that even relatively small reductions in AFDC benefits impose irreparable harm on recipient families. See, e.g., Chu Drua Cha v. Noot, 696 F.2d 594, 599 (8th Cir. 1982) ("we have no doubt that irreparable harm is occurring to the plaintiff class as each month passes without the AFDC level of benefits . . . For people at the economic margin of existence, the loss of \$172 a month and perhaps some medical care cannot be made up by the later entry of a money judgment"); Banks v. Trainor, 525 F.2d 837, 842 (7th Cir. 1975) (noting that preliminary
(continued...)

The Child Exclusion provision also will aggravate the ever-growing problem of homelessness -- which directly contravenes the Social Security Act's primary objective of maintaining families "in their own homes." See 42 U.S.C. § 601. When parents are unable to survive because the State reduces their grant allowances or simply because they can no longer stretch the grant dollars far enough, they and their children must often take refuge in homeless shelters or be thrown out onto the streets. At least 20,000 children per year become homeless in New Jersey -- a figure that does not include families who have not entered the social service network. New Jersey State Department of Education, The Education of Homeless Children and Youth in New Jersey: A Plan for State Action (1986) at 10, 18. These homeless children fall behind academically because their chaotic living arrangements mean that they often come to school tired, hungry, anxious, or unprepared. A Vision for America's

¹⁷(...continued)

injunction was warranted because while defendants would suffer administrative inconvenience and costs, hardship to plaintiff [families] outweighed defendants' interests), cert. denied, 424 U.S. 978 (1976); Moore v. Miller, 579 F. Supp. 1188, 1191-92 (N.D. Ill. 1983) ("those affected by the pecuniary loss are not corporations or average citizens, but are citizens in the grip of poverty . . . For those . . . living on the financial edge, even a small decrease in payments can cause irreparable harm . . . Welfare recipients live on the edge with their health and wellbeing depending on the level of benefits received each month."); cf. Paxton v. Secretary of Health and Human Serv., 856 F.2d 1352, 1354 (9th Cir. 1988) (in a Supplemental Security Income case, court observed that "[w]hen a family is living at subsistence level, the subtraction of any benefit can make a significant difference in its budget and to its ability to survive.").

Future at 132. See also Association for Children of New Jersey, Keeping the Focus on Children: Accountability for Educational Improvement in the Special Needs Districts at 6 (1992)

(indicating that 70% of the children from Asbury Park, Camden and Newark -- cities with high rates of homelessness, hunger, child abuse and neglect -- have been classified as "at-risk" and are disadvantaged before they even enter school).

Furthermore, rather than "maintain[ing] and strengthen[ing] family life," as the Social Security Act requires, the Child Exclusion will break up families by increasing the number of voluntary and involuntary foster care placements. By eliminating benefits for additional children, the provision will force NJAFDC recipients to place children in foster homes or other outplacement alternatives out of financial necessity. This outplacement is reminiscent of the institutionalization that the government sought to eliminate at the turn of the century. Statewide, more than 90% of the children in foster care come from families with incomes below the poverty level and the majority of those families depend on public assistance. Association for Children of New Jersey, Abandoned Dreams: New Jersey's Children in Crisis (1985). Homelessness is an underlying factor for placement in foster care in 42% of the cases, Association for Children of New Jersey, Splintered Lives: A Report on Decision-Making for Children in Foster Care at 15 (June 1988). Indeed, parents on public assistance cite lack of affordable housing as a primary barrier to the return of young

children from foster care. Many of these parents are on waiting lists for subsidized housing for several years, further delaying the reunification of their families. Association for Children of New Jersey, Stolen Futures: A Report on Preventing Foster Care Placement in New Jersey at 31 (1994).

Finally, the Child Exclusion will undermine the Social Security Act's goal to facilitate parents' "maximum self-support and personal independence." See 42 U.S.C. § 601. The FDP purports to make it easier for parents to become self-sufficient by expanding educational opportunities and vocational training for NJAFDC recipients and by requiring participation in various employment-related programs (for which New Jersey has failed to allocate funding).¹⁸ However, it is both unrealistic and unreasonable to expect recipients to comply with the FDP's mandates because parents cannot focus on developing job skills when their children are hungry and have no place to live. Rather than enabling parents to become more independent, the Child Exclusion provision will foster greater dependence on the State.

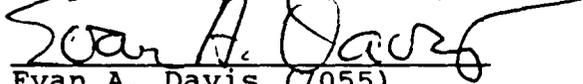
¹⁸ In fact, the State's budget for this year curtails funding for the concededly laudable components of the FDP such as job training while maintaining the Child Exclusion statewide.

CONCLUSION

The Child Exclusion provision clearly violates the very purpose and intent of the Social Security Act. Moreover, the measure will have little impact on birth rates but a tremendous impact on a parent's ability to take care of his or her children. The punitive nature of the Child Exclusion provision is diametrically opposed to the other aspects of the FDP package that create affirmative incentives for parents to leave the welfare rolls. Surely the State can promote responsibility and foster independence in a manner that does not harm innocent children. Accordingly, this Court must enjoin enforcement of the Child Exclusion provision and require the State to consider other, more humane solutions to the problem of welfare dependency, rather than one that forces innocent babies to suffer malnutrition, homelessness and abandonment.

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