The AFDC Lump Sum Rule: How It Works and How to Avoid It

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The AFDC Lump Sum Rule: How It Works and How to Avoid It

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I. Introduction

Legal services advocates are unfortunately all too familiar with the problems that plague AFDC recipients who receive lump sum payments such as personal injury settlements. Receipt of a lump sum may initially appear to present a poor family with the first opportunity in many years to improve its situation by paying back bills and making long-deferred purchases. However, the family is at risk of plunging deeper into poverty instead. AFDC eligibility can be lost for extended periods of time that continue long after the family has fully expended the lump sum. Some families have lost their AFDC eligibility for years because of the receipt of a lump sum. In addition, the loss of AFDC eligibility because of the lump sum rule may affect recipients' Medicaid coverage; a state may completely deny medical assistance to some or all family members or it may transfer the family's coverage to a more limited medically needy program. /1/

A family's expenditure of the lump sum before the end of the disqualification period is almost a given. AFDC families, whose grants are invariably below the poverty level, accumulate bills and other debts and do without basic necessities, such as school clothes and basic home furnishings. They are under desperate pressure to spend a lump sum just to catch up, even if they know that they may be faced with a period of ineligibility. And all too many families either never receive meaningful information about the lump sum rule from the welfare department or are given misinformation.

The harms caused by the lump sum rule, however, can be avoided or ameliorated in many cases. Advocates for poor families should be thoroughly versed in the rule, its limits, and its exceptions so that they can effectively represent their clients. This article reviews the rule and the major issues arising under it, discusses developments in the law, and offers suggestions for client representation. It does not address every issue that may arise under the rule, and advocates are urged to contact the Center on Social Welfare Policy and Law for further assistance on individual matters.
This article also discusses the following suggestions for avoiding or minimizing the harms of the rule:

- To avoid the lump sum rule, AFDC applicants and recipients who are expecting a lump sum payment should consider withdrawing from AFDC individually or as a unit before the month in which the lump sum is received.
- Education of the private bar about the lump sum rule will encourage counseling of AFDC recipients before an award is received and will promote appropriate structuring and/or earmarking of awards.
- In individual cases, the purported lump sum may not be properly subject to the rule.
- If the state starts the period of ineligibility in a month after the month of receipt of the lump sum payment, advocates should consider whether the family would be better off if the ineligibility period began in the month of receipt.
- The broadest possible application of the exceptions to the rule will minimize the rule's harm to individual families.
- In cases of agency misinformation that leads a recipient to spend the lump sum, there may be state law equitable estoppel arguments, state law claims that might arise under state law requirements for a written explanation of the rule, and an argument that this situation is covered by the exception for cases in which the lump sum is unavailable due to circumstances beyond the family's control.

II. The Statute and Regulations

Section 402(a)(17) of the Social Security Act requires the state welfare agency to provide that if a child or relative applying for or receiving [AFDC], or any other person whose need the State considers when determining the income of a family, receives in any month an amount of earned or unearned income which, together with all other income for that month not excluded under paragraph (8), exceeds the State's standard of need applicable to the family of which he is a member--

(A) such amount of income shall be considered income to such individual in the month received, and the family of which such person is a member shall be ineligible for aid under the plan for the whole number of months that equals (i) the sum of such amount and all other income received in such month, not excluded under paragraph (8), divided by (ii) the standard of need applicable to such family, and

(B) any income remaining (which amount is less than the applicable monthly standard) shall be treated as income received in the first month following the period of ineligibility specified in subparagraph (A);

except that the State may at its option recalculate the period of ineligibility otherwise determined under subparagraph (A) (but only with respect to the remaining months in such period) in any one or more of the following cases: (i) an event occurs which, had the family been receiving aid under the State plan for the month of the occurrence, would result in a change in the amount of aid payable for such month under the plan, or (ii) the income received
has become unavailable to the members of the family for reasons that were beyond the control of such members, or (iii) the family incurs, becomes responsible for, and pays medical expenses (as allowed by the State) in a month of ineligibility determined under subparagraph (A) (which expenses may be considered as an offset against the amount of income received in the first month of such ineligibility). /2/

Current federal regulations are found at 45 C.F.R. Sec. 233.20(a)(3)(ii)(F). /3/

III. Overview

The lump sum provision applies when an AFDC applicant, recipient, or other person, whose needs the state considers when determining the family's income, /4/ receives in a month a lump sum payment that together with the family's other countable income exceeds the state's standard of need for that family for that month. The family is ineligible for AFDC for one or more months and may also receive a reduced payment in the first month in which it is again eligible. The provision reflects Congress's decision that the family should spend the lump sum at the rate of the minimal level of subsistence defined by the state's standard of need, and therefore the family should be denied aid for the entire period that could have been covered by the lump sum if it were spent in this way.

The number of months of ineligibility is determined by taking the total countable income of the AFDC family for the month of receipt of the lump sum--i.e., the total of the lump sum and all other countable income received by the unit in the month--and dividing it by the need standard applicable to the family for that month. Any remainder that does not equal or exceed the standard of need for the month is counted as income in the first month in which the family is not disqualified by reason of the lump sum. For example, if a state's standard of need for a family of three is $600 a month, and the family receives a lump sum payment of $1,900 and has no other countable income for that month, the family becomes ineligible for AFDC for three months ($1,900 divided by $600 equals three, plus a remainder of $100). The remaining $100 is counted as income in the fourth month.

The federal statute allows the state to shorten the ineligibility period for a family in three situations that will be discussed later in this article. The relief that this provides to families depends both on the state's exercise of the options and how broadly it defines the options.

IV. What Is Lump Sum Income?

For the lump sum rule to apply, a sum must be nonrecurring; must be "available income" for AFDC purposes; must be "countable" income, i.e., not subject to disregard or exemption; and must not be a "resource."

A. Nonrecurring Sum
HHS's regulation specifies that the rule applies only when "non-recurring earned or unearned lump sum income" is received. Such sums include "title II and other retroactive monthly benefits, and payments in the nature of a windfall, e.g., inheritance or lottery winnings, personal injury and worker compensation awards." 

However, the regulation does not specify how to determine whether a sum is nonrecurring. According to one dictionary's definition, "nonrecurring" means not "recurring," i.e., not "coming or happening again." This definition leaves the question of what time frame applies to determine whether a particular payment is one of a series of recurring payments. Clearly, payments due to a person each month are recurring. But what about a payment received at widely separated times that is of a type received in the past or that can be expected to be received again in the future but that is not received on any regularly scheduled basis? One court has concluded, in the context of the food stamp program, that an annual back-to-school clothing allowance is a recurring payment. On the other hand, another court has concluded that annual, one-time state emergency temporary benefits for homeless AFDC families are nonrecurring payments for food stamp purposes. The court described them as a one-time benefit paid over a four-week period that did not repeat on a regular basis. It rejected the state's argument that these benefits recur, because families may be eligible for them once a year.

While there appears to be no clear answer for AFDC purposes, to the extent that a sum can be characterized as arising from an underlying entitlement and similar sums have been received in the past or are reasonably expected in the future, a good argument can be made that the sum is recurring. Such an argument is stronger if a definite interval occurs at which the payment is received. For example, if a person receives regular distributions from a trust resulting from a personal injury award (even though the distributions are not received on a monthly basis), the lump sum rule arguably should not apply. However, it might be more difficult to argue that distributions that are made irregularly on a discretionary basis are recurring. (Amounts excluded from classification as a lump sum because they are recurring may still be countable as regular income in the month of receipt and as resources in subsequent months to the extent that they are still on hand in those months.)

B. Income Within the Meaning of the AFDC Program

Section 402(a)(17) refers to an "amount of earned or unearned income." As HHS recognized in the preamble to the 1981 regulations, when Congress referred to "income" it meant that the provision is to be applied subject to the existing body of law defining income for AFDC purposes. While any sum of money or other item of value may be referred to as income in a general sense, only money that is countable income for AFDC purposes is income for purposes of the lump sum provision. As described below, the determination of countable income generally requires consideration of at least three separate issues: the available income rule, the applicability of any of the disregard provisions, and the distinction between resources and income.
1. "Available Income"

Generally, in AFDC, a sum must be actually available for current use to meet the basic living needs provided for in the AFDC grant before it can be treated as income. (This requirement of availability also applies in determining whether any item constitutes a resource.) /11/ The availability rule excludes certain sums from consideration as lump sum income.

Earmarked funds used for a designated purpose are not lump sum income. The current regulation requires counting of a lump sum "to the extent it is not earmarked and used for the purpose for which it is paid, i.e. monies for back medical bills resulting from accidents or injury, funeral and burial costs, repair or replacements of resources, etc." /12/ HHS has stated that the earmarking cannot be for items that duplicate AFDC and that the state must verify that the funds were used for the earmarked purpose. /13/ Therefore, it is important to ensure that if an AFDC recipient's personal injury or other damage award or settlement includes a provision for special expenses related to the injury, including future educational costs, the appropriate portions are clearly earmarked for such purposes. /14/ Effective implementation of this exception requires education of the private bar by legal services staff. /15/

Trust funds and other inaccessible funds are not subject to the lump sum rule as long as they remain inaccessible. HHS has clearly stated that the available income rule bars counting any amount as a lump sum if it is not accessible to the AFDC recipient, such as a personal injury settlement released only with court approval. Only that portion actually released to the recipient for general needs can be counted as income when it is actually released. /16/ Still, the AFDC agency can have reasonable requirements for the recipient to petition for release of the funds. /17/

If a petition for the release of trust funds or other restricted access funds is made, it should clearly identify the effect that the released funds will have on the family's AFDC grant. Consideration should also be given to whether appropriate distributions can be made to improve the family situation so as not to trigger the lump sum rule, such as using trust funds for direct payments for rent where state AFDC regulations would not count such payments as income to the family. Federal AFDC policy provides that states may exclude noncash contributions, including vendor payments. /18/

Because of this exclusion, placing court awards, settlements of personal injury claims, or similar amounts in trust when the intended beneficiary is an AFDC recipient may offer the possibility of immunizing such amounts from treatment as lump sum income in some circumstances, assuming that rendering the funds inaccessible is in the intended beneficiary's best interest. The establishment of a trust does not foreclose consideration of some or all of the funds as lump sum income, however. Among other things, the degree of control exercised by the beneficiary or his or her caretaker before establishing the trust may be a factor in determining whether a lump sum has been received notwithstanding the trust.

Similarly, although the lump sum rule cannot be applied to funds received while the beneficiary is not receiving AFDC, as discussed below, establishing a trust with regard to such funds is not necessarily trouble-free. States with transfer of assets rules may try to apply those rules to disqualify families from aid in those cases in which trusts have been so established. /19/
To summarize, whether a trust would be beneficial to a family in a particular circumstance is a question with no simple answer. The private bar, which will most often be handling matters in which the question of possible trust arrangements will arise, should be aware of the various ramifications of this issue. In addition, advocates handling particular problems related to such issues are urged to contact the Center on Social Welfare Policy and Law for individualized assistance.

Funds used to reimburse states for past assistance are not subject to the lump sum rule. States that impose liens for the repayment of assistance or require assignments of property for such purpose cannot count as lump sum income any part of the lump sum that is used to repay assistance. /20/ At least one state gives recipients the option to use the lump sum to repay assistance and thus avoid the lump sum disqualification. /21/ Such an option might help recipients who otherwise would be subject to the rule, but who-because of state Medicaid rules--want to retain AFDC eligibility in order to receive Medicaid.

2. Income Disregards or Exemptions

Various federal statutes and the federal AFDC regulations set out a number of specific income disregards and exemptions in addition to the general principle of counting only available income. Amounts subject to these disregards or exemptions cannot be subject to the lump sum rule. These amounts include educational loans and grants (and, according to recent HHS policy, may include all bona fide loans); /22/ payments received under title II of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970; /23/ payments received from the Agent Orange Litigation settlement fund; /24/ and certain Indian and Alaska Native trust or settlement payments. /25/ States also must disregard the Earned Income Tax Credit (EITC) as income for all purposes. /26/

The lump sum rule also does not apply to a retroactive SSI payment made to a person who is receiving AFDC benefits while awaiting a determination of SSI eligibility and who is eligible for SSI for the month in which the retroactive SSI payment is received. This bar follows from the statutory provision that generally prohibits states from counting an SSI recipient's income or resources as income to a family receiving AFDC or from considering the SSI recipient to be a member of the AFDC family for the purpose of determining AFDC benefits. /27/ Whether the lump sum rule applies to retroactive SSI for a closed past period received by an AFDC recipient who is not currently SSI-eligible is an open question.

3. Payments Representing Resources

The lump sum rule applies only to sums that are "income" and not to sums that are "resources." (Classification of an amount as a "resource" can affect AFDC eligibility. A family that is over the resource limit is ineligible until resources have been spent down below the limit.) /28/ The distinction between income and resources is not always clear. /29/ Neither the Social Security Act nor the federal AFDC regulations define either term for AFDC purposes.
In a defeat for AFDC recipients, the U.S. Supreme Court in Reed v. Lukhard /30/ upheld the treatment of personal injury awards as income rather than as a resource for lump sum purposes. In doing so, the Court rejected the recipients' arguments that for a sum to be "income" there must be gain to the individual. /31/ The Ninth Circuit subsequently upheld HHS's 1986 amendments to the lump sum regulation, which define lump sum income to include "title II and other retroactive monthly benefits, and payments in the nature of a windfall, e.g., inheritances or lottery winnings, personal injury and worker compensation awards." /32/

Under HHS regulations, income tax refunds are not income and therefore are not subject to the lump sum rule. /33/ Instead, they are treated as a resource. HHS attributed this classification to the fact that a refund may be a return of money already counted as income for AFDC purposes. /34/ This counting results from another departure from the availability principle: all earnings other than the standard work expense disregard of $90 a month and an allowance for child care costs are counted as income for AFDC purposes even if taxes and other non-child care expenses exceed $90. /35/

HHS also has stated, in response to inquiries about specific client situations, that other refunds and similar payments are resources, not income. For example, HHS has stated that escrowed rent returned by a court to the recipient in a consolidated grant state is a resource, since it represents savings. /36/ HHS also advised Tennessee that local housing authority reimbursements to AFDC clients for utility overcharges pursuant to Underwood v. Harris are resources and not income. /37/ According to HHS, the refunds were similar to retroactive payments to correct an AFDC underpayment, which HHS classifies as a resource. (Although a countable receipt is normally counted as income or a resource in the month of receipt, HHS policies provide that corrections of underpayments are not countable as a resource until the second month after the month of receipt, and this same treatment was extended to the Underwood payments.) /38/

Proceeds from the sale of resources are also resources, not lump sum income. /39/ Divorce settlements that represent the conversion of an individual's interest in a marital asset--for example, the family home--should be treated as resources. At least two fair hearing decisions have found that property settlements pursuant to a divorce action are resources, and Alaska has decided to change its AFDC requirements to implement the same policy. /40/

V. Whose Income Is Counted Under the Lump Sum Rule?

The lump sum rule applies only to income received by those whose needs are included in determining eligibility and payment. Section 402(a)(17) applies only to lump sums received by "a child or relative applying for or receiving [AFDC], or any other person whose need the State considers when determining the income of a family." (Emphasis added.) HHS's regulation provides that "family includes all persons whose needs are taken into account in determining eligibility and the amount of the assistance payment." /41/ This language limits the rule to those applicants or recipients who are AFDC-dependent children, caretaker relatives, /42/ or essential persons.
The lump sum rule does not apply to income received by household members whose needs are not included in determining eligibility and payment even if some or all of such individuals' income may be deemed to the AFDC unit. /43/ Such individuals include stepparents who are not eligible for aid even though their income may be deemed under 42 U.S.C. Sec. 602(a)(31), children over the AFDC age limit, nonrecipient spouses of caretaker relatives or essential persons, SSI recipients, or other unrelated household members. Similarly, the rule does not apply to lump sums received by individuals whose needs are not considered for AFDC purposes because they are being sanctioned. In those cases in which two or more AFDC units live in the same household, the receipt of lump sum income by a member of one unit does not have any effect on the eligibility of the other unit(s).

The inapplicability of the rule to stepparents who are not themselves eligible for inclusion in the unit and are not essential persons is clear from the regulation, but an HHS policy statement has addressed the issue as well. /44/ The policy states that a family may become ineligible for AFDC for the month in which a stepparent receives a lump sum if the amount of such sum attributed to the family under the stepparent deeming rules is sufficiently large. However, amounts retained by the stepparent in months after the month of receipt would be resources rather than income. They therefore would not affect the family's eligibility or payment except to the extent that they were actually made available to the family, since there is no deeming of stepparent resources.

Similarly, the lump sum rule does not apply to lump sums received by individuals who are not in the AFDC unit because of a sanction. The sanctioned individual is ineligible for AFDC by definition for the months in which the sanction applies, and his or her needs are not considered in determining the AFDC family's needs. /45/

As with stepparents, receipt of a lump sum by a sanctioned individual could affect the family's eligibility and payment, since in some cases some of the lump sum may be deemed to be income to the family members receiving aid. /46/ The rules for counting a sanctioned person's income raise a number of complicated issues that are beyond the scope of this article. /47/ In general, however, a lump sum received by a sanctioned person, such as a parent whose income is subject to deeming under AFDC rules, should be counted in the same way as income deemed from a stepparent--an amount deemed in the month of receipt is treated as regular income of the family and amounts retained thereafter are treated as the parent's resources except to the extent actually shared with the unit members.

Persons who have withdrawn from AFDC are not persons "whose needs are included in the determination of eligibility and payment" for months after the month in which their withdrawal took effect. Since the lump sum provision applies only to payments received by individuals who are applicants, recipients, or essential persons when they receive the lump sum payment, a family may be able to avoid the lump sum ineligibility period if it knows in advance that a lump sum will be received. In such cases, either the individual who is about to receive a lump sum payment could withdraw from the unit or, if that is not possible, the entire unit could withdraw from AFDC. An individual cannot withdraw from the unit alone if he or she is a parent or sibling of an AFDC child who is required to be in the unit. /48/ If the individual is the only AFDC child in the unit or otherwise required to be in the unit, the entire unit will have to
withdraw. The AFDC caretaker can choose to exclude the essential person from the unit if the essential person expects a lump sum. /49/

Withdrawal may not be the best course of action in all cases. Counseling on this option should include consideration of factors such as the effect of withdrawal on Medicaid eligibility, the possible delay in restoration of AFDC eligibility after a withdrawal, the degree of certainty as to the date of receipt of the lump sum and the feasibility of withdrawing without risking an interim period without income, and whether the family will be able to fulfill all AFDC eligibility conditions at the time of reapplication if reapplication is a possibility.

HHS has acknowledged that as long as the unit's effective date of withdrawal is before the month when the lump sum is received, the unit can avoid the lump sum rule. /50/ (Generally, for the purposes of determining AFDC status, an individual who seeks aid during a month or receives aid for any part of a month is an applicant or recipient for an entire month.) One state has agreed, as part of a litigation settlement, to provide counseling on this option. /51/ The steps that need to be taken to withdraw and the period before withdrawal takes effect should be delineated in state policies.

If a family or individual reapply for AFDC in a month after the month in which the lump sum was received, the lump sum rule cannot be applied and any remaining amount held by the family must be treated as a resource. A more difficult question is raised if the family or individual reapply in the month in which the lump sum was received. HHS has indicated that the lump sum rule applies if the reapplication is made in the same month in which the lump sum is received. /52/

In states with transfer of assets provisions, the state is likely to inquire into how the lump sum was spent if a family reapply for AFDC after having withdrawn from AFDC before the month of receipt of a lump sum. In this area, counseling of clients by legal services and/or welfare agencies before the client receives the lump sum, and education of the private bar (especially those handling personal injury, workers compensation, title II, and similar cases) about the importance of early client counseling on the AFDC implications of the lump sum rule can prevent serious problems for many AFDC recipients.

VI. Effect of Changes in Family Composition During Ineligibility Period

The lump sum rule clearly applies to persons whose needs were considered in determining eligibility and payment for the unit that included the lump sum recipient for the month in which the lump sum is received. However, since the period of ineligibility usually continues for months after the month in which the lump sum is received, questions may arise about the rule's effect when individuals join or leave that assistance unit after the month of receipt of the lump sum.
An individual who joins the household of an AFDC unit disqualified by the lump sum rule after the month in which the unit received the lump sum is not affected by the rule. HHS has stated as follows:

The lump sum provision applies only to individuals receiving AFDC for the month in which the lump sum payment was received. Other family members who apply may be eligible as a separate assistance unit. /53/

The most common situations are likely to involve a child born to the family during the AFDC ineligibility period or a child who has been out of the home who returns during an ineligibility period. Such an individual, if otherwise eligible, can receive AFDC for himself or herself, despite the ineligibility of other family members. In determining such a child's income, past lump sum income received by a family member cannot be counted. However, current income of an ineligible parent may be deemed to the child under the general parent-to-child deeming provisions. /54/

An individual who leaves the unit during the ineligibility period may arguably be entitled to aid despite the disqualification. A person who is part of an AFDC family disqualified because of the lump sum rule but who did not personally receive the lump sum might have a right to have his or her eligibility determined without respect to the lump sum rule if he or she leaves the household and joins another AFDC household. The statute provides that "the family of which such person [the person who received the lump sum] is a member shall be ineligible." Since "family" in this context clearly describes the family assistance unit rather than "family" in the dictionary sense, an argument can be made that once the person leaves that family assistance unit, he or she is no longer a member of that family within the meaning of the statute and therefore is not affected by the eligibility bar. At least one 1982 federal agency informal policy memo stated that a person could not avoid application of the rule in this situation unless he or she came within an exception to the rule. The memo did not consider the argument suggested above, however. /55/

A family may have the ineligibility period shortened if the person who received the lump sum takes it and leaves the AFDC household. As discussed below in part VIII.B, if a person who receives the lump sum leaves the household with it, the remaining family members may have the ineligibility period shortened if the state has chosen to provide for this shortening.

VIll. Period of Ineligibility

A. Determined by Comparison to Standard of Need

The lump sum rule applies when the amount of the lump sum that a family has received plus the total of the AFDC unit's other countable income for that month (including income properly deemed from others, such as a stepparent, grandparent, and/or alien sponsor) exceeds the state standard of need applicable to that family. The length of the ineligibility period is also determined by the relationship between this total income for the month and the standard of
need, even if the state has a payment standard or benefit level that is less than the standard of need. There is a significant potential for state errors in this regard, since most states have a payment standard or benefit level that is less than their "standard of need." /56/

The lump sum rule's use of calculations based on the standard of need is one way in which poor people can benefit from an increase in the standard of need even if it is not accompanied by an increase in the payment level. /57/

**B. Begins the Month of Receipt of Lump Sum**

The lump sum provision does not expressly state when the ineligibility period begins. However, by its terms, it calls for a determination as to eligibility, and 42 U.S.C. Sec. 602(a)(13) requires that eligibility for a month be based on a family's income and other relevant circumstances in that month. /58/ This general rule for a current needs eligibility determination applies in all cases. Therefore, it appears that the lump sum must be counted as income in the month of receipt and that the ineligibility period must begin in that month.

HHS's regulation states that the period of ineligibility can begin in the month of receipt (Option 1) or "as late as the corresponding payment month" (Option 2). /59/ This rule, if valid, only authorizes a delayed start of the ineligibility period for a family whose payment is determined under retrospective budgeting.

Under current needs or prospective budgeting, the grant for a payment month is based on a family's income and circumstances for that month. The payment month, the month for which payment is made, is the same as the budget month, the month whose income and circumstances are used to determine payment. Under retrospective budgeting, however, the payment month can be one or two months after the budget month. /60/

There is a strong likelihood that many--if not most--families are covered or should be covered by current needs budgeting at this time. As of October 1, 1990, a state can only use retrospective budgeting for families required to file monthly reports under 42 U.S.C. Sec. 602(a)(14). It must use current needs or prospective budgeting for all others. It may also choose to use current needs or prospective budgeting for monthly reporters, and it is not required to use monthly reports for any families. /61/

It is possible, however, that states are still improperly delaying start up of the lump sum ineligibility period in cases not covered by monthly reporting requirements or otherwise not subject to retrospective budgeting. While states have eliminated or reduced monthly reporting requirements in response to these changes, it is not clear that they have made the required concomitant shift to current needs budgeting. Even when they have done so, they may not have taken full account of the effect of this change on their application of the lump sum rule.

For families properly subject to retrospective budgeting, however, Option 2 means that the ineligibility period could begin as late as the second month after the month of receipt of a lump sum. For example, if a family receives a lump sum in April that, together with other countable
income, makes the family ineligible for two months under Option 2, it could be denied AFDC for two months beginning in June.

There does not appear to be any basis for HHS's regulation authorizing states to begin the ineligibility period later than the month of lump sum receipt. HHS itself initially took the position that the statute did not permit beginning the ineligibility period in a month after the month of receipt of the lump sum. /62/ Its change of position was based on two arguments: (1) requiring the period of ineligibility to start in the month of the receipt of the lump sum would cause overwhelming administrative problems, and (2) starting the period after the month of receipt is permissible because of retrospective budgeting. /63/

On the second point, HHS is clearly incorrect. The lump sum provision is specifically cast in terms of eligibility, i.e., the receipt of the lump sum makes the family ineligible. As HHS should well know, since it was the source of section 602(a)(13), that provision does not permit use of a retrospective budgeting system to determine eligibility. Rather, it requires a state to "determine a family's eligibility for aid for a month on the basis of the family's income, composition, resources, and other similar relevant circumstances during such month." /64/

HHS clearly appreciates the significance of this distinction between eligibility and payment determinations and has generally followed the approach that eligibility depends on current circumstances, although the payment amount to an otherwise eligible family may be based on past circumstances. For example, HHS has instructed states that they cannot make payments for a month that would otherwise be forthcoming based on retrospective budgeting if they know that the family will fail to meet the eligibility conditions for that month. It has also told states that a family must be found ineligible for a payment that it has already received in a month if a change in circumstances that causes ineligibility occurs in the payment month after the payment was issued. /65/ There is no basis for treating receipt of a lump sum differently.

Similarly, there appears to be no basis for the allegation that beginning the period of ineligibility in the month of receipt causes "overwhelming administrative problems." HHS offered no evidence to support this conclusion. There is clear evidence that it is not supported.

Beginning ineligibility as of the month of receipt is clearly no problem if the agency knows in advance when the sum will be received. There is also no administrative problem when the agency learns of the receipt too late to take action for the month of receipt. It simply makes a retroactive determination of ineligibility no different from the retroactive determinations that it makes in other cases in which an event causing ineligibility for a month occurs after payment for the month has been issued. It then proceeds to recover the resulting overpayment as it would in such cases or in cases in which a fair hearing request postponed implementation of a suspension of aid. Indeed, for lump sums that only affect eligibility for two or three months, the agency is probably better off administratively dealing with the lump sum after the fact. It can avoid the need for termination and reinstatement after processing a reappplication, as HHS claims it must do whenever ineligibility lasts for more than one month.

Moreover, HHS admits that there are not insuperable administrative problems, since it requires states to develop systems that apply the lump sum rule as of the month of receipt in current or prospective budgeting cases. Even if HHS's conclusion as to administrative problems were
correct, this would not authorize the agency to depart from the clear statutory directive. This is not a situation in which the statute gives the agency discretion with regard to definition of the ineligibility period.

State attempts to begin the ineligibility period any later than permitted by HHS's regulation are clearly invalid. In Medberry v. Hegstrom, /66/ the Ninth Circuit invalidated a state policy of beginning the ineligibility period in the month after it discovered receipt of a lump sum (when the month of discovery was months after receipt of the lump sum) or after issuance of an adverse hearing decision on a lump sum issue. Although the Ninth Circuit grounded its decision on inconsistency with the federal regulation, its decision is not a validation of that rule, since it was not presented with an argument that the initial month of eligibility should be the budget month as opposed to the payment month.

The determination of the beginning of the ineligibility period is extremely important for recipients. Starting the ineligibility period after the month of receipt exacerbates the potential harms, because the months without AFDC will be farther away from the time when the family received the lump sum. In addition, families will generally be better off being treated as having been overpaid in past months rather than as ineligible in current or future months, because the limits on the amount by which the state can reduce the grant to recover any AFDC overpayments spreads the loss of income over a period of time. /67/ The family will receive at least some AFDC in each month in which overpayments are being recovered, and perhaps as importantly will remain categorically eligible for Medicaid throughout the overpayment recovery period.

**C. Length of Ineligibility Period**

As explained above, the number of months of ineligibility is equal to the whole number obtained by dividing the family's total countable income in the month in which the lump sum is received by the standard of need that applies to such a family for that month. If any amount is left over (a remainder), that amount is counted as income to the family in the month following the ineligibility period. Any income received during the ineligibility period, including other lump sum income, has no effect on the length of the ineligibility period, since neither the lump sum rule nor the other rules for counting income in AFDC look to income received while the family is financially ineligible for AFDC. /68/

Counting the lump sum prospectively so that ineligibility is determined in months after receipt raises a question as to what standard of need applies if the composition of the assistance unit changes after the month of receipt. In 1981, when section 402(a)(17) was originally adopted, HHS indicated that the entire ineligibility period would be determined by the standard of need applicable to the family in the month of receipt. Future family changes would not affect the length of the ineligibility period. /69/

Using the standard of need applicable to the family in the month in which the lump sum is received should not cause problems when family size changes after such month. As discussed above, individuals who join the assistance unit after the month of receipt of the lump sum are not affected by the lump sum rule and would have their eligibility and aid determined as a
separate unit. In the converse situation, if an individual who was in the household at the time of receipt leaves the household, the remaining family members who are ineligible because of the lump sum rule are better off if the standard is not reduced to reflect such departure.

The 1984 amendments to section 402(a)(17) allow an exception to the rule that the standard of need applicable to the family in the month of receipt of the lump sum governs the length of the ineligibility period. As discussed in part VIII.A, below, if the need standard increases during the period of ineligibility and if the state has exercised the option to shorten the ineligibility period in such a situation, the family will be protected by a recalculation of the ineligibility period. /70/

VIII. How States Can Shorten the Period of Ineligibility

Section 402(a)(17) allows states to shorten the period of ineligibility when

- an event occurs in a month that would change the amount of aid payable to the family with respect to that month if it were receiving AFDC; or
- the lump sum income has become unavailable to the family for reasons beyond its control; or
- the family incurs, becomes responsible for, and pays medical expenses in a month of ineligibility.

Congress added these options in 1984 because of dissatisfaction with the narrow HHS regulation limiting exceptions to life-threatening circumstances and requiring that the recipient meet specified conditions. The legislative history reveals Congress's intent to give the states greater flexibility in responding to the needs of families adversely affected by the lump sum rule. /71/ The extent to which these exceptions provide relief to families disqualified by the lump sum rule depends on (1) the state's choice to use one or more of these options; (2) how liberally a state defines the circumstances in which an exception applies; and (3) how families disqualified by the rule are informed of the exceptions so that they know when to invoke them.

A. Shortening Ineligibility Period Due to an Event That Would Have Affected the Amount of Aid

The statute characterizes the event that triggers this exception as one that would result in a "change in the amount of aid payable for such month" if the family were receiving aid. However, the federal regulation provides that it applies only when "the standard of need increases and the amount the family would have received also changes." /72/ HHS's explanation for this apparently narrowing language is that changes that affect income cannot be considered because the formula for determining the ineligibility period requires that it be measured by dividing the family's lump sum plus other countable income in the month of receipt of the lump sum (the numerator) by the family's need standard (the denominator). /73/
According to HHS, events that trigger this exception could include "an increase in family expenses, such as rent, in a State where a portion of the need standard, e.g., shelter is based on actual costs; eligibility for a special need item; and any general increase in the need standard." /74/ The federal regulation requires the state to specify the types of circumstances that will be included. Obviously, to protect families fully, the state must recognize all events that result in an increase in the need standard.

The recalculation is done as of the month in which the event occurs. The state first calculates the hypothetical remainder of the income counted in the month of receipt of the lump sum by assuming that in each prior month of the ineligibility period the family spent an amount equal to the previously applicable standard of need. The new ineligibility period is determined by dividing this remainder by the new need standard. According to HHS, as of October 1991, all but 14 states had adopted this option (one state did not provide information). /75/

**B. Shortening Ineligibility Period When the Lump Sum Becomes Unavailable Due to Circumstances Beyond the Family's Control**

This exception provides the state with the broadest opportunity to deal with situations in which the family has lost control of or spent all or some of the lump sum on pressing family needs. In order to give states "maximum flexibility," /76/ HHS has left it to each state to define how the lump sum has become "unavailable" and what circumstances are considered "beyond the family's control." According to HHS, "[e]xamples might include loss or theft of income, or a life-threatening circumstance." /77/

However, these are only examples, and at least one state, Tennessee, has secured HHS approval of a far more comprehensive policy, despite strong initial resistance by HHS. Tennessee's policy provides that a lump sum is unavailable due to circumstances beyond a family's control when it was used under sufficiently exigent circumstances for essential needs, such as housing, utilities, food, clothing, basic furnishings, and other needs required for the family's health and well-being. /78/ The state's victory over HHS is a message to other states that this exception can be broadly defined to protect desperately poor families who, for sufficiently serious reasons, have spent the lump sum for essential needs.

The state's broad discretion to define the scope of the exception suggests that the definition need not contain an exclusive listing of the circumstances that the state recognizes. A nonexclusive or broadly worded definition may provide the opportunity for a shortening of the ineligibility period in cases in which a family has been harmed because it spent the lump sum based on misinformation given to it by an agency worker. At least one administrative decision has applied the exception in a case in which the recipient spent the lump sum on food, clothing, furniture, and household items, finding that the misinformation provided by the agency was beyond the family's control. /79/

Also, the exception as adopted by various states has been applied to situations in which the person with control of the lump sum left the household and to cases in which a person turned over the lump sum to another under threats of physical violence. /80/
Litigation challenging state definitions has not been successful. The Ninth Circuit has rejected a challenge to Hawaii’s narrow definition of this exception on the ground that plaintiffs lacked standing. /81/ One court has rejected a claim that the statute requires that those family members who do not actually control the lump sum remain eligible because disposition of the lump sum is beyond their control. /82/

As of October 1991 all but four states (Colorado, Idaho, Kansas, and Guam) had adopted this exception. /83/

C. Shortening Ineligibility Period When Family Incurs, Becomes Responsible, and Pays Medical Expenses During Ineligibility Period

The statute authorizes a state that adopts this exception to define the medical expenses that it will cover. The federal regulation requires the covered expenses to be listed in the state’s plan. /84/ How helpful this option is to families depends upon the extent of medical expenses that the state recognizes.

The statute also provides that the ineligibility period is to be recalculated by reducing the amount of the lump sum by the amount of the recognized medical expenses and comparing that reduced amount plus any other countable income received in the month of receipt of the lump sum with the standard of need applicable to the month of receipt of the lump sum. States need not do the recalculation until "medical expenses equal or exceed the amount of any remaining income left after determining the number of months of ineligibility. This is because the number of months of ineligibility will not change until income is reduced by that amount." /85/

According to an HHS report, as of October 1991, all states except Alaska, Colorado, Idaho, and Guam had adopted this exception. The HHS report does not include information about the medical expenses that each state recognizes. /86/

IX. State Aid for Families Ineligible for AFDC Because of the Lump Sum Rule

Nothing in federal law prohibits a state or locality from using state or local funds to provide for families ineligible for AFDC or from providing federally subsidized Emergency Assistance to Families under sections 403(a)(5) and 406(e) of the Social Security Act, 42 U.S.C. Secs. 603(a)(5) and 606(e).

X. Reinstatement of AFDC After Ineligibility Period

Determination of a family’s eligibility for AFDC after the lump sum disqualification period has ended must be based on a family’s income and circumstances at that time. As discussed above in part VII, the question of whether a family is eligible for a month is always a question of
current income or circumstances in that month regardless of whether the state uses retrospective budgeting for some payment calculations.

For cases subject to current needs budgeting, payment should also be determined based on current income and circumstances. For those subject to retrospective budgeting, HHS's rules acknowledge that current needs budgeting must be used to determine payment in the first month of eligibility following a period of nonpayment of aid because of ineligibility. /87/ However, these rules could cause a problem for families whose lump sum ineligibility period ends before their payments are stopped.

The rule /88/ purports to authorize states to apply retrospective budgeting to determine payment for the initial month of eligibility if the family actually received payments in the prior month. While the validity of this rule is questionable as to cases subject to retrospective budgeting, application is limited to such cases.

Of course, the family could be ineligible for a payment in the month following a period of ineligibility resulting from a lump sum even though they are no longer ineligible because of the lump sum. For example, the lump sum remainder could be above the payment standard even though it is less than the need standard, or the family could expect to receive other countable income in that month, which makes them ineligible when added to the remainder.

Another issue in reestablishing eligibility for payment after expiration of the lump sum disqualification period is the need to reapply. In states that pay AFDC from the date of application, a family will suffer an additional loss of aid unless they reapply no later than the first day of the first month for which they can again receive aid. Larger problems arise in states that only pay from the date of application approval, or, if earlier, 30 days after application. To protect itself against an additional loss in such states, the family would have to apply no later than 30 days before the first day on which it again would be eligible for aid.

Even if the family does promptly apply to ensure payment as of the first day of eligibility, the filing of an application often does not guarantee prompt payment thereafter. A reasonable agency should be willing to maintain the family's file in anticipation of reopening it and to limit verification at the time of the new application to facts not already established by the existing information. /89/

**XI. Remedies for Harms Caused by Agency's Failure to Provide Information**

As bad as the lump sum rule is, its effects are particularly egregious if a family expends some or all of the lump sum without understanding that it is going to lose AFDC benefits, because it was never given any information or because it was given misinformation. There are two general approaches to dealing with these problems. First, agencies can improve dissemination of informational materials about the lump sum rule. Second, in those cases in which the recipient has relied on misleading agency information, he or she may use an equitable estoppel
argument to challenge the effects of the lump sum rule, or argue that the exception for circumstances beyond the family's control applies.

A. Written Explanations of the Rule

Recipient understanding of the rule could be greatly aided by the agency's provision of a general written explanation of the rule to all applicants as well as all recipients at the time of redetermination, and provision of more specific information when the agency learns of the lump sum. Of course, this would not cure the problems caused by a family's inability to make the lump sum last, but it could help to diminish the harms.

The U.S. Supreme Court has held that the federal rules requiring provision of program information to applicants /90/ do not require the state welfare agency to provide an advance explanation of the lump sum rule to all AFDC families. /91/ However, the agency is clearly free to provide an explanation and even the Gardebring majority stated that such notice "might well represent sound policy." /92/

Even though federal regulations do not require a written explanation, in some cases state regulations might be interpreted to impose such requirements on the state agency. An agency's failure to provide any required explanation would not necessarily prevent the application of the lump sum rule, /93/ but such relief had been obtained in some pre-Gardebring cases. /94/

Providing an explanation is certainly consistent with the congressional intent behind the lump sum rule, namely, that families who receive a lump sum spend it over a period of time. To have any chance of stretching the lump sum to cover the ineligibility period, a family must know that the lump sum will replace AFDC for a certain period and must be saved for family needs over that period.

Both the district court orders in Gardebring /95/ and the settlement order in a similar Oklahoma case /96/ contain examples of procedures for providing written explanations that states could adopt. Both orders require that the explanation be given at application and at six-month redeterminations. In Oklahoma, when a recipient reports receipt of a lump sum, the agency worker is required to give an oral explanation that precedes the advance notice of termination. Providing an explanation periodically, such as at redetermination, is also especially important, since people are not likely to remember or retain an explanation provided only once, for example, at application.

B. Equitable Estoppel

Some recipients misled to their detriment by agency misinformation may be able to argue that equitable estoppel bars application of the lump sum ineligibility period. In some states, state law may support the application of equitable estoppel in appropriate cases. Although equitable estoppel claims against welfare agencies are by no means easy, /97/ there have been some favorable AFDC decisions, including cases involving lump sums, in state courts and at the administrative hearing level. /98/ Application of equitable estoppel, a remedy for use in
individual cases, depends both upon state law and the specific facts of the case. In particularly egregious cases of agency misconduct, courts and hearing officers may use the doctrine to place the burden of worker misconduct on the state agency rather than on the innocent recipient.

Generally, for equitable estoppel to apply against a government agency, an injured person must show that (1) the agency had the relevant information; (2) the agency intended, or had reason to know, that the individual would rely upon the agency statement; (3) the individual did not know the correct information; and (4) the individual actually relied upon the agency's information and was harmed by that reliance. /99/ In addition, some courts also balance the injustice from failure to apply estoppel with the public policy implications of applying estoppel. /100/ Others require that the person claiming estoppel show that (1) estoppel is necessary to prevent manifest injustice, and (2) the exercise of governmental functions will not be impaired. /101/ Special difficulties can arise if, in arguing for equitable estoppel, the individual seeks to avoid substantive--as opposed to procedural--limits on benefits. /102/

In lump sum cases, an equitable estoppel claim under state law might arise if a family (1) never received an explanation of the lump sum rule from the AFDC agency; /103/ (2) received a lump sum and reported it; (3) was incorrectly advised by the agency that the lump sum could be spent and that the family would then be eligible for AFDC again; and (4) spent the lump sum relying on the agency's advice and therefore did not save the payment to use during the ineligibility period.

The availability of federal funding to match the payments made during the putative lump sum ineligibility period should not be a decisive factor in application of estoppel. A court could properly conclude that state responsibility for the full payment in such cases is simply a consequence of the equitable adjustment. Moreover, a recent clarification of federal policy indicates that there is no question of the availability of matching in such cases.

Federal regulations provide for matching for "payments of assistance within the scope of the federally aided public assistance programs made in accordance with a court order." /104/ Questions have been raised about whether the "within the scope" language has limited the availability of federal matching. However, HHS has recently indicated that in cases in which payments are made pursuant to a court order, federal matching will be available "without regard to the 'scope' of program limitation" /105/ in the regulation.

C. Circumstances Beyond Family's Control

As discussed in part VIII.B, above, this exception to the application of the lump sum rule may apply to families harmed because they spent the lump relying on agency misinformation.
1. See NATIONAL HEALTH LAW PROGRAM, AN ADVOCATE'S GUIDE TO THE MEDICAID PROGRAM 3.10, 3.26, and n.191 (1990) (suggesting that the lump sum rule should not be used in determining Medicaid eligibility and citing cases rejecting and supporting the proposition); Smith v. Concannon, 938 F.2d 966 (9th Cir. 1991) (Clearinghouse No. 45,037). For information and advice concerning Medicaid issues, contact the National Health Law Program, 2639 S. La Cienega Blvd., Los Angeles, CA 90034.

2. 42 U.S.C. Sec. 602(a)(17), as added by the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, Sec. 2304 and amended by the Deficit Reduction Act of 1984 (DRA), Pub. L. No. 98-369, Sec. 2632 [hereinafter section 402(a)(17)]. The DRA amendments specified that the rule applies to both earned and unearned lump sums and added the state option to shorten the ineligibility period.


4. An essential person is an AFDC ineligible person in the AFDC household whose needs are included in the family's grant. The current regulation, 45 C.F.R. Sec. 233.20(a)(2)(vii), has been successfully challenged in litigation. HHS has announced that it will reinstate the former regulation, 45 C.F.R. Sec. 233.20(a)(2)(vi) (1988), and apply the former regulation until the reinstatement occurs. HHS Action Transmittal ACF-AT-91-16 (May 16, 1991) (Clearinghouse No. 46,900). See also Center on Social Welfare Policy & Law, Welfare Law Developments, 25 CLEARINGHOUSE REV. 1282, 1284, and nn.13, 15 (Jan. 1992).


13. Memo from Jo Anne B. Ross, Associate Commissioner for Family Assistance, HHS, to Billie A. Thompson, Regional Administrator of OFA Region VI (Jan. 31, 1984) (Clearinghouse No. 47,799).

14. Compare Coppola v. Fulton, 809 P.2d 1291 (Okla. 1991) (no deduction from lump sum personal injury award for medical bills not earmarked in the award and paid with lump sum proceeds) with Littlefield v. Maine Dep't of Human Servs., 480 A.2d 731 (Me. 1984) (Clearinghouse No. 36,137) (finding sufficient earmarking if accident settlement moneys could be seen as actually containing amounts for payments of bills related to the accident where client did in fact spend the proceeds on these bills).


16. Memo from Ross, Acting Associate Commissioner, to Walker, Regional Administrator of OFA, Region IV (Sept. 30, 1983) (Clearinghouse No. 36,064F) (concerning accident settlement that court ordered in guardianship account for child's benefit; mother had to petition court for funds and account for expenditures); letter from Carl H. Walker, Regional Administrator of OFA, to James L. Solomon, Commissioner of the South Carolina Department of Human Services (Apr. 24, 1985) (Clearinghouse No. 47,802). Neither memo addresses directly the question of when such payments are considered nonrecurring and therefore not subject to the lump sum rule. The 1983 memo suggests that the rule applies when funds are released in two consecutive months. It does not explicitly discuss the "nonrecurring" issue.

17. 45 C.F.R. Sec. 233.20(a)(3)(ix); letter from Hugh F. Galligan, Regional Administrator, Family Support Administration, to Stephen B. Heintz, Commissioner of the Connecticut Department of Income Maintenance (May 23, 1988) (Clearinghouse No. 47,803) (indicating, inter alia, that if litigation is required to obtain funds, state should consider the costs and benefits in determining whether recipient can be reasonably required to pursue funds). See, e.g., Essex County Director of Welfare v. O.J., 588 A.2d 403 (N.J. Super. Ct. App. Div. 1991) (holding that AFDC recipients could be required to petition for release of trust funds established for minors after receipt of tort judgments and that a state statute precluding use of such funds to repay past assistance does not insulate such funds from use for current support).
In re Royster (N.Y. Sup. Ct., Westchester County, July 6, 1984) (Clearinghouse No. 43,562) (South Carolina advocate's summary of administrative decision that New York personal injury trust settlement was not available based on New York attorney's statement that New York courts were not likely to release funds and information regarding attorney fees and travel costs in attempting to obtain funds; Quality Control agreed with the decision). The federal AFDC regulations do not specify what makes a sum inaccessible. Compare this position with the food stamp regulations on the circumstances under which trust funds are considered inaccessible. 7 C.F.R. Sec. 273.8(e)(8).

18. HHS AFDC QUALITY CONTROL MANUAL Sec. 3566 (Jan 1, 1989). However, this HHS policy provides that a Title II benefit issued to a representative payee and spent on behalf of the beneficiary is always counted as income to the beneficiary and cannot be treated as in-kind income. The author is not aware of any federal policy material dealing explicitly with trust distributions made in the form of third-party payments.

19. Cf. Kanda v. Chang, 475 F. Supp. 368 (D. Haw. 1979) (plaintiff's voluntary action of placing home in irrevocable trust for children's future did not preclude counting equity in home--the court noted that plaintiff still controlled the property and had transferred the property into a trust without consideration); Williams v. Department of Health & Rehabilitative Servs., 522 So. 2d 951 (Fla. Ct. App. 1988) (reversing agency decision to terminate appellant's AFDC on ground of transfer of assets; appellant had used insurance payments for fire damage to her home to buy a mobile home, but her name was inadvertently not included in the title to the home).


21. 18 N.Y.C.R.R. Sec. 352.29(h)(1)(3). It has been pointed out, however, that in cases in which the family has other income in addition to the lump sum, it may be financially advantageous not to use the lump sum to repay assistance, since the lump sum ineligibility is computed without considering other income that the family may receive during the ineligibility period. This is one example of the importance of client counseling. See Barry Strom, Public Benefits in New York PA-112 (Sept. 1990).

22. 45 C.F.R. Sec. 233.20(a)(3)(iv)(B) and (4)(ii)(d). HHS now allows all bona fide loans to be disregarded, and an argument can be made that all such loans must be disregarded. See Center on Social Welfare Policy & Law, AFDC: Favorable New Policies Exclude Certain Payments from Income and Resources, 23 CLEARINGHOUSE REV. 266 (July 1989). HHS has proposed regulations requiring the exclusion of bona fide loans. 56 Fed. Reg. 35152 (July 15, 1991). See also HHS Action Transmittal FSA-AT-91-19 (June 11, 1991) (Clearinghouse No. 46,985).


27. 42 U.S.C. Sec. 602(a)(24); 45 C.F.R. Sec. 233.20(a)(3)(x). See also In re X., FH No. 1699481 K (New York Dep't of Social Servs. Oct. 9, 1991) (Clearinghouse No. 47,148) (AFDC terminated under lump sum rule upon receipt of retroactive social security; parent subsequently found eligible for SSI retroactive to month before month in which social security had been received; state found that although termination was correct when made, it must restore AFDC for child retroactive to termination).


29. For one recent case distinguishing income from resources, see Rodriguez v. Montana Dep't of Social & Rehabilitation Servs., No. DV 89-902 (Mont. Dist. Ct., Yellowstone County, Sept. 5, 1990) (Clearinghouse No. 46,207) (holding that when an AFDC recipient redeemed series E savings bonds upon learning of her ownership of the bonds, the initial amount invested was a resource and the interest earned on the bonds paid at redemption was lump sum income).


31. Note, however, that HHS's recent policy on the exclusion of loans is based on the absence of gain. See note 22, supra.

32. 45 C.F.R. Sec. 233.20(a)(3)(ii)(F) (emphasis added); LaMadrid v. Hegstrom, 830 F.2d 1524 (9th Cir. 1987).


35. 42 U.S.C. Sec. 602(a)(8)(ii) and (iii).

36. Letter from Marion N. Steffy, Regional Administrator of the Family Support Administration, HHS, to Patricia K. Barry, Director of the Ohio Department of Social Services (Feb. 6, 1989) (Clearinghouse No. 44,870). A consolidated standard is one in which various need items have been combined for households of a given size. See, e.g., 45 C.F.R. Sec. 233.20(a)(2)(ii). Ohio's consolidated standard included an amount for shelter. HHS noted that a family's grant amount did not depend on the existence of a shelter obligation. Although it did clearly explain its decision, HHS concluded that the escrowed rent was similar to savings and
therefore when returned to the recipient was a resource, not income. It did not indicate whether there would be a different result if the grant amount was based on the existence of a shelter obligation.

37. HEW Action Transmittal SSA-AT-80-3 (Feb. 4, 1980) (Clearinghouse No. 47,812).

38. Id. Letter from Jesse D. Joseph, Assistant General Counsel, Tennessee Department of Human Services, to Gloria Samuels, Legal Services of Upper East Tennessee, Inc. (Jan. 27, 1989) (Clearinghouse No. 47,806).


42. See Blong & Casey, supra note 28, at 879.

43. The AFDC Quality Control Manual states that "[f]or purposes of applying the lump sum provision, the [assistance unit] includes all individuals whose needs are considered in determining eligibility and payment amount. This does not include individuals who are not in the unit but whose income is considered available to the unit." HHS, AFDC QUALITY CONTROL MANUAL Sec. 3551 (Jan. 1, 1989) (emphasis in original).

44. HHS Action Transmittal, SSA-AT-84-9 (May 7, 1984) (Clearinghouse No. 47,813) (issued as a result of the consent decree in Childers v. Heckler, No. 83-235C (S.D. Iowa May 10, 1984) (Clearinghouse No. 36,138)).

45. See, e.g., 42 U.S.C. Sec. 602(a)(19)(G)(I) and 45 C.F.R. Sec. 250.34 regarding sanctions for failure to participate in JOBS; 42 U.S.C. Sec. 602(a)(26) and 45 C.F.R. Secs. 232.11(a)(2), (3), and 232.12(d) regarding failure to cooperate with child support enforcement.

46. 45 C.F.R. Sec. 233.20(a)(3)(vi); 42 U.S.C. Sec. 602(a)(38); and HHS Action Transmittal SSA-AT-86-1, 5 (Jan 13, 1986) (Clearinghouse No. 46,750). It is not clear that the policy expressed in the Action Transmittal is correct.

47. Clients who face issues in this area should contact the Center for further assistance.

49. 45 C.F.R. Sec. 233.20(a)(2)(vi)(b) (1988) and note 4, supra. Families with essential persons may not be aware of their right to exclude the essential person when changes in the essential person's status make it financially disadvantageous to continue as an essential person.

50. See Plaintiffs' Requests for Admission, Numbers 13 and 14 and Federal Defendant's Response to Plaintiffs' Requests for Admission, Responses 13 and 14, Jones v. Cuddy, No. C84-7056 (N.D. Ohio filed May 25, 1984) (Clearinghouse No. 36,025). State policies that seek to apply the lump sum rule when a family withdraws from AFDC in anticipation of receiving a lump sum are inconsistent with the statute. See Stipulated Judgment, Johnson v. Carlson, No. C91-01171 (Cal. Super. Ct., Contra Costa County, Apr. 24, 1991) (Clearinghouse No. 46,601). The Clearinghouse file for this case includes an Oct. 25, 1990, letter from Dana, Regional Director of HHS, Region IX, to Murphy, indicating that such policies are illegal.


52. See Federal Defendant's Response to Plaintiffs' Requests for Admission, Response Numbers 13 and 14, Cuddy, No. C84-7056.


57. Increases in the standard of need can also limit the number of families that are denied aid because of the 185 percent income cap on eligibility under 42 U.S.C. Sec. 602(a)(18) and the amount of income that will be deemed or counted from stepparents or alien sponsors.

58. The statute literally deals with the rules for determining eligibility and payment for states that use retrospective budgeting to determine payment. However, HHS clearly requires current needs or prospective eligibility determinations in all cases. See 45 C.F.R. Sec. 233.31; HHS Action Transmittal ACF-AT-91-26 (QC/QCM 2/88-33) (Aug. 23, 1991) (Clearinghouse No. 47,105).


60. 42 U.S.C. Sec. 602(a)(13).
61. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Sec. 505(a) and (b), amending 42 U.S.C. Sec. 602(a)(13) and (14). HHS has not yet issued regulations.


63. 47 Fed. Reg. 5656 (Feb. 5, 1982).


66. Medberry v. Hegstrom, 786 F.2d 1389 (9th Cir. 1986).

67. 45 C.F.R. Sec. 233.30(a)(13).

68. See Rodriguez, No. DV 89-902.


74. Id.

75. The states not applying the exception are Alabama, Alaska, Colorado, Idaho, Illinois, Kansas, Maryland, Missouri, North Carolina, Pennsylvania, South Dakota, Texas, Utah, and Guam. Iowa did not provide information. HHS Automated State AFDC Plans (ASAP) (Oct. 1991), Report No. 36 (Clearinghouse No. 38,695X) [hereinafter HHS ASAP].


77. Id.

78. See Tennessee Dep't of Human Servs. Reconsideration Hearing--Disapproval of Proposed Title IV State Plan Amendment, No. 88-184 (1988) (Clearinghouse No. 44,445). In support of its proposed policy, Tennessee noted the inadequacy of its need standard. The Clearinghouse file includes samples of favorable policies from other states.

80. See Bulla v. Director, Dep't of Social Servs., 408 N.W.2d 908 (Mich. Ct. App. 1987) (exception applied once husband who had control of lump sum left household, even though it was spent while he was in household); In re B.D., No. 004018 (Bergen CWA/HDW 8851 88) (N.J. Dep't of Human Servs. Feb 2, 1990) (Clearinghouse No. 47,816) (agency applied exception in case in which family member absconded with funds; under fear of son's violence, AFDC mother who was son's representative payee gave lump sum to son who left household); In re R., No. 2-3401-HFA384 (Or. Dep't of Human Resources Feb. 20, 1991) (Clearinghouse No. 46,666) (personal injury settlement was unavailable due to circumstances beyond client's control because she turned it over to abusive partner out of fear; testimony revealed that client had signs of "battered woman syndrome").

81. Coakley v. Sunn, 895 F.2d 604 (9th Cir. 1990).


83. HHS ASAP, supra note 75.


86. HHS ASAP, supra note 75.

87. 45 C.F.R. Sec. 233.34.

88. Id.


90. 45 C.F.R. Sec. 206.10(a)(2).

91. Gardebring v. Jenkins, 108 S. Ct. 1306, remanded sub nom. Slaughter v. Levine, 855 F.2d 553 (8th Cir. 1988). On remand from the Supreme Court, the Eighth Circuit held that due process does not require such explanation either.

92. Id., 108 S. Ct. at 1312.
93. See id. (majority opinion) and id. at 1318 (opinion of Justice O'Connor, concurring in part and dissenting in part joined by Justice Brennan and in part by Justice Marshall) (rejecting the argument that failure to provide explanation barred implementation of the rule).

94. See Consent Decree in Rutan v. McMahon, No. 612542-4 (Cal. Super. Ct., Alameda County, Feb. 19, 1988) (Clearinghouse No. 41,492) (notice claim based on state law); and Consent Decree in Hill, No. CIV-87-943-P (notice claim based on federal regulation). Both consent decrees provided class relief and were entered before the U.S. Supreme Court's decision in Gardebring. The New York agency also provides a written explanation, and it is reported that advocates have succeeded in avoiding application of the lump sum rule when the explanation is not given. Strom, supra note 21, at PA-117. See also Bulla, 408 N.W.2d 908 (decided before the Supreme Court's decision in Gardebring).


96. Hill, No. CIV-87-943-P.

97. Recent adverse decisions on equitable estoppel claims against the federal government do not give much hope of success against the federal government. See, e.g., Office of Personnel Management v. Richmond, 110 S. Ct. 2465 (1990) (government employee's incorrect advice to benefits claimant not the basis for claim that government was estopped from denying benefits because of appropriations clause requirement that payment be authorized by statute); Schweiker v. Hansen, 450 U.S. 785 (1981) (equitable estoppel does not apply against Social Security Amendments and no retroactive social security must be paid in case involving delay in filing application because of agency misinformation); Heckler v. Community Health Servs. of Crawford, 467 U.S. 51 (1984) (HHS not estopped from recovering overpayments made under Medicare cost containment procedures). However, these decisions do not directly apply when an AFDC recipient seeks relief against a state agency.

(Clearinghouse No. 45,621); Woods v. Wisconsin Dep't of Health & Social Servs., No. 90 CV 65 (Wis. Cir. Ct., Winnebago County, Nov. 2, 1990) (Clearinghouse No. 46,382); In re M., No. 89214058CC (Cal. Dep't of Social Servs. Dec. 12, 1989) (Clearinghouse No. 45,483); Contra Publico v. Rubin, No. 87-0142 (D. Haw., Oct. 9, 1987) (Clearinghouse No. 42,951).

99. E.g., Lentz, 777 P.2d 83.

100. Id.

101. E.g., Mendez v. Utah, Dep't of Social Servs., 813 P.2d 1234 (Utah App. Ct. 1991) (requirement to recover food stamp overpayments is not a per se bar to application of equitable estoppel in appropriate cases); Kramarevcky v. Washington Dep't of Social & Health Servs., No. 28337-5-I (Wash. Ct. App. Jan. 27, 1992) (Clearinghouse No. 46,946) (rejecting state welfare agency's narrow approach in applying elements of equitable estoppel and the argument that an individual must show substantive eligibility for benefits).

102. Compare, e.g., Lentz, 777 P.2d 83 (equitable estoppel available in fair hearings as defense to recoupment of AFDC overpayment; court states that estoppel may be appropriate if the agency's failure is the cause of the individual's noncompliance with procedural requirements but does not decide whether estoppel is available in cases involving individual's substantive ineligibility for benefits) and Kramarevcky, No. 28337-5-I.

103. Policies requiring an explanation of the rule and adherence to those policies would undermine an equitable estoppel claim.

104. 45 C.F.R. Sec. 205.10(b)(3).