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WELFARE LAW-AFDC-Agency-Caused Overpayments May be Recouped by Reducing Grants of Recipients who have "Disregarded" Income Available to Meet their Standard of Need

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WELFARE LAW—AFDC—Agency-Caused Overpayments May Be Recouped by Reducing Grants of Recipients Who Have "Disregarded" Income Available to Meet Their Standard of Need. *McGraw v. Berger*, 75 Civ. 4682 (S.D.N.Y. Feb. 25, 1976), *appeal docketed*, No. 76-7102, 2d Cir., Mar. 5, 1976.

A woman and her nine dependent children, recipients of semimonthly benefits under the program for Aid to Families with Dependent Children (AFDC) in New York,[1] received overpayments caused by welfare agency error.[2] The agency attempted to recoup the overpayments by reducing the family's AFDC grant,[3] in accordance with a state regulation which authorized such recoupment where a welfare recipient had current income available in excess of the AFDC grant.[4] The woman made an unsuccessful challenge at an administrative hearing and then instituted an action for injunctive and declaratory relief in the Federal District Court for the Southern District of New York.[5] She claimed that the state's recoupment policy violated federal law and denied her due process and equal protection under the United States Constitution.[6]

The court held that the challenged recoupment policy did not violate the Social Security Act, and it left the constitutional challenges to the determination of a three-judge court.[7]

A state participating in the AFDC program must furnish aid to

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1. Aid to Families with Dependent Children, 42 U.S.C. §§ 601-44 (1970), *as amended*, (Supp. IV, 1974) [hereinafter cited as AFDC], is one of the categorical public assistance programs established by the Social Security Act of 1935. It is supported by the federal government on a matching fund basis, and is administered by the states. Those states wishing to participate must submit plans, for approval by the Secretary of Health, Education and Welfare (HEW), which conform to the requirements of AFDC and the regulations of HEW. Williams v. Wohlgemuth, 400 F. Supp. 1309, 1316 (E.D. Pa. 1975).

2. The cause of the agency's error is not disclosed in the court's opinion. Agency error may result from computing errors within the agency. Often, a non-willful failure by the applicant to furnish complete information, leading to an incorrect budget calculation, will be labeled "agency error." Defendant's Memorandum of Law at 22, McGraw v. Berger, 75 Civ. 4682 (S.D.N.Y. Feb. 25, 1976), *appeal docketed*, No. 76-7102, 2d Cir., Mar. 5, 1976.

3. 75 Civ. 4682, at 7-8.

4. 18 N.Y.C.R.R. § 352.31(d)(1)(ii) (1975). Income "disregarded" by the agency (as a work incentive) when determining eligibility for AFDC is considered to be currently available income for purposes of recoupment. *Id.*

5. Federal courts may review state welfare regulations before HEW has ruled on their validity. *See* Rosado v. Wyman, 397 U.S. 397 (1970).

6. 75 Civ. 4682, at 2-3.

7. *Id.* at 18.

dependent children[8] "as far as practicable under the conditions in such State . . . ."[9] The state must test applicants for eligibility under two federal prerequisites—need and dependency.[10] A two-step procedure is carried out.

First, the state measures eligibility by "determining need."[11] It fixes a standard of need, "a yardstick for measuring who is eligible for public assistance,"[12] which represents the minimum subsistence level for families in the state.

In determining eligibility, the state must take into consideration only the income and resources actually available to the needy child and those persons who support him.[13] The state may not assume that aid will come from those not legally obligated to support the welfare child.[14] An applicant's available income is compared with the standard of need.[15] If the income falls below the standard of need, he is eligible for AFDC.[16] As part of the aforementioned comparison, the state must disregard a specified amount of the applicant's earned income[17] in furtherance of congressional work-incentive policies.[18]

Second, the state determines how much assistance will be given. The amount of the assistance payment is "based upon"[19] the difference between the applicant's available (non-disregarded) income and the state's standard of need.[20] However, it need not equal 100

8. The term "dependent child" is defined in 42 U.S.C. § 606(a) (1970).

9. *Id.* § 601 (1970).

10. Holloway v. Parham, 340 F. Supp. 336, 342 (N.D. Ga. 1972).

11. 42 U.S.C. § 602(a)(7) (Supp. IV, 1974).

12. Rosado v. Wyman, 397 U.S. 397, 408 (1970). The New York standard of need is established in N.Y. Soc. Serv. Law § 131-a (McKinney 1976). A state's standard of need is not necessarily reflective of actual need. County of Alameda v. Carleson, 5 Cal. 3d 730, 746 n.18, 488 P.2d 953, 964 n.18, 97 Cal. Rptr. 385, 396 n.18 (1971), *appeal dismissed*, 406 U.S. 913 (1972).

13. *See* text accompanying notes 15-18 *infra*.

14. *See* Van Lare v. Hurley, 421 U.S. 338 (1975) (presumed income from "lodger" in household); Lewis v. Martin, 397 U.S. 552 (1970) (presumed income from "adult male person assuming role of spouse"); King v. Smith, 392 U.S. 309 (1968) (presumed income from "substitute father" not legally obligated to support child).

15. 42 U.S.C. § 602(a)(7) (Supp. IV, 1974).

16. Shea v. Vialpando, 416 U.S. 251, 253-54 (1974).

17. 42 U.S.C. § 602(a)(8) (Supp. IV, 1974).

18. *See* text accompanying notes 47-49 *infra*.

19. Shea v. Vialpando, 416 U.S. 251, 254 (1974).

20. This differential has been called the "budget deficit" in the subject case. McGraw v. Berger, 75 Civ. 4682, at 6 (S.D.N.Y. Feb. 25, 1976), *appeal docketed*, No. 76-7102, 2d Cir., Mar. 5, 1976.

percent of that differential,[21] as each state is free "to determine the level of benefits by the amount of funds it devotes to the program."[22]

Title IV of the Social Security Act,[23] which establishes the program for aid to needy families with children, contains no provision directing participating states to recoup overpayments.[24] However, recoupment has been authorized in the regulations issued by the Department of Health, Education and Welfare (HEW).[25] Such recoupment may be effected only if "the recipient has income or resources *exclusive* of the current assistance payment currently available in the amount by which the agency proposes to reduce payments . . . ."[26]

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21. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

22. King v. Smith, 392 U.S. 309, 318-19 (1968).

23. 42 U.S.C. §§ 601-44 (1970), *as amended*, (Supp. IV, 1974).

24. *But cf.* 42 U.S.C. § 404 (1970); *id.* § 1383(b) (Supp. IV, 1974). Federal recovery of Old-Age, Survivors, and Disability Insurance (OASDI) overpayments is expressly authorized in 42 U.S.C. § 404 (1970). Federal recovery of Supplemental Security Income (SSI) overpayments is expressly authorized in 42 U.S.C. § 1383(b) (Supp. IV, 1974). However, both provisions proscribe recovery from a person without fault if such recovery would defeat the purposes of the program or be against equity and good conscience. The Social Security Act does entitle the federal government to a pro rata share of amounts recovered by those states which do provide for recoupment. 42 U.S.C. § 603(b)(2)(B) (1970).

25. The regulations deal only with *involuntary* recoupment of overpayments. Hagans v. Wyman, 399 F. Supp. 421, 424 (E.D.N.Y.), *vacated as moot*, 527 F.2d 1151 (2d Cir. 1975). In *Hagans*, the court struck down a New York regulation which permitted recoupment (from subsequent grants) of an advance allowance made to an AFDC recipient to prevent eviction for non-payment of rent. *Id.* at 425. While the case proceeded through appellate review and remand in connection with jurisdictional issues, Hagans v. Lavine, 415 U.S. 528 (1974), the regulation was revised to require written consent to recoupment. 399 F. Supp. at 423. The district court, on the most recent remand, held the regulation invalid, *id.* at 425, in part because such a consent, although "knowing," was unlikely to be voluntary in view of the recipient's only alternatives: consent-to-recoupment or eviction. *Id.* at 423. The court of appeals vacated this holding on mootness grounds in that the amended procedure calling for written consent to recoupment did not retroactively apply to plaintiff. 527 F.2d at 1153-54.

26. 45 C.F.R. § 233.20(a)(12)(i)(A)(1) (1975) (emphasis added). Where the recipient has made willful misstatements concerning his income or resources, or willfully failed to report changes in his income which may affect the amount of his AFDC grant, recoupment of overpayments by reduction of AFDC grants may be carried out whether or not the recipient has income available aside from his AFDC grant. *Id.* §§ 233.20(a)(12)(i)(A)(2), (B)(1)-(2). However, the state must limit deductions from current assistance payments "so as not to cause undue hardship or [sic] recipients." *Id.* § 233.20(f). In Jacquet v. Bonin, 72 Civ. 2589 (E.D. La. July 21, 1975), *appeal docketed*, No. 75-3828, 5th Cir., Oct. 23, 1975, the court refused to enjoin recoupment (by grant reduction) of an overpayment caused by willful failure of the recipient to report income. At the time of recoupment, the recipient had no income available other than the AFDC grant. *Accord*, Lomax v. Lavine, 72 Civ. 2457 (S.D.N.Y. July 31, 1972). *But see* Brown v. Wohlgemuth, 371 F. Supp. 1035, 1039 (W.D. Pa.), *aff'd*, 492 F.2d

A state may elect not to recoup overpayments,[27] but it must maintain a quality control system[28] and suffer a reduction in federal financial participation when AFDC overpayments exceed a specified percentage-level.[29] Under certain conditions, states may resort to civil actions to recover overpayments of assistance.[30]

The paramount goal of the AFDC program has traditionally been viewed as the protection of the needy, dependent child.[31] Courts have been hostile to the imposition of additional conditions, under state AFDC plans, which have effected reductions or denials of aid to needy children.[32] Recoupment policies which punish an innocent, needy child for the errors of others have been found to conflict with the paramount goal of AFDC.[33]

1238 (3d Cir. 1974) (state cannot withhold AFDC grants to recoup prior duplicate assistance payments even where recipient has fraudulently acquired the duplicate payment).

27. 45 C.F.R. § 233.20(h) (1975).

28. *Id.* § 205.40.

29. *Id.* § 205.41(c).

30. A state court has held that welfare agencies may bring civil suits in assumpsit, for money had and received, to recover overpayments of assistance, except where overpayments result from administrative error. Redding v. Burlington County Welfare Bd., 65 N.J. 439, 445-47, 323 A.2d 477, 480-81 (1974). *See also* Webb v. Swoap, 40 Cal. App. 3d 191, 114 Cal. Rptr. 897 (1974) (public welfare recipients are free of liability for repayment of grants legitimately obtained in absence of a statute imposing liability). *See generally* Mount Sinai Hosp. v. Weinberger, 517 F.2d 329 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3593 (U.S. April 20, 1976) (government has inherent authority to recover sums erroneously paid, but Congress may delimit when and from whom such recoupment may be obtained).

31. King v. Smith, 392 U.S. 309, 325 (1968).

32. *See* Van Lare v. Hurley, 421 U.S. 338 (1975) (preventing ineligible lodgers from receiving welfare benefits); Shapiro v. Thompson, 394 U.S. 618 (1969) (discouraging influx of poor people); King v. Smith, 392 U.S. 309 (1968) (discouraging immorality); Hagans v. Wyman, 399 F. Supp. 421 (E.D.N.Y.), *vacated as moot*, 527 F.2d 1151 (2d Cir. 1975) (teaching proper management of funds); Doe v. Hursh, 337 F. Supp. 614 (D. Minn. 1970) (administrative convenience). *But see* New York Dep't of Social Serv. v. Dublino, 413 U.S. 405 (1973) (participation in state work incentive program a valid condition for receipt of benefits); Wyman v. James, 400 U.S. 309 (1971) (acceptance of home visits by social worker a valid condition for receipt of benefits).

45 C.F.R. § 233.10(a)(1) (1975) directs participating states to impose each condition of eligibility required by the Social Security Act. States may impose conditions on applicants for and recipients of public assistance which, if not satisfied, result in the denial or termination of public assistance. Such conditions must assist the state in the efficient administration of its public assistance programs, or further an independent state welfare policy, but cannot be inconsistent with the provisions and purposes of the Social Security Act. *Id.* § 233.10(a)(1)(ii)(B).

33. *See* Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971); Cooper v. Laupheimer, 316 F. Supp. 264 (E.D. Pa. 1970); Dunn v. Bates, 50 App. Div. 2d 561 (2d Dep't 1975); Gonzalez v. Lavine, 46 App. Div. 2d 675, 359 N.Y.S.2d 908 (2d Dep't 1974).

In striking down earlier federal recoupment regulations, a federal court enjoined HEW from promulgating recoupment regulations which violated the principle of "in-fact availability of income and resources."[34] A presumption that overpayments are still on hand to satisfy current needs is unreasonable.[35]

Although entitlement to eligibility for AFDC does not confer entitlement to the actual receipt of a given level of benefits,[36] a recipient's level of benefits should be maintained until his economic situation improves. One court has held that without an indication of decreased need, "payments to eligible children may not be reduced for purposes of recouping excess grants . . . ."[37] As long as the recipient remains eligible under the state's initial determination of need, reduction of his grant is unwarranted.[38] In view of the statutory mandate to furnish aid "with reasonable promptness to all eligible individuals,"[39] a qualified recipient should not be denied benefits "even temporarily"[40] by a reduction of his grant without a prior re-determination of need.

On the other hand, there is no entitlement to funds comprising the overpayment.[41] It is reasonable for the state "to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need"[42] by recovering overpayments from

34. National Welfare Rights Organization v. Weinberger, 377 F. Supp. 861, 869 (D.D.C. 1974). The court stated that its holding should not be construed to prohibit by regulation the recoupment from current grants of prior overpayments caused by a recipient's willful withholding of information concerning his income and resources. *Id.* at 869. Tennessee's AFDC regulations violating this principle were struck down in Caruthers v. Friend, No. 74-1821 (6th Cir. Feb. 28, 1975). The current regulation requires in-fact availability. *See* text accompanying note 26 *supra*.

35. Cooper v. Laupheimer, 316 F. Supp. 264, 269 (E.D. Pa. 1970). Recovery of overpayments resulting from administrative error, of which the recipient had no knowledge, is unfair since the extra funds could easily have been unwittingly dissipated. Adkin v. Berger, 50 App. Div. 2d 459, 461, 378 N.Y.S.2d 135, 137 (3d Dep't 1976).

36. Jacquet v. Bonin, 72 Civ. 2589, at 9 (E.D. La. July 21, 1975), *appeal docketed*, No. 75-3828, 5th Cir., Oct. 23, 1975. *See* King v. Smith, 293 U.S. 309, 334 (1968) (state has undisputed power to set the level of benefits).

37. Gonzalez v. Lavine, 46 App. Div. 2d 675, 359 N.Y.S.2d 908, 909 (2d Dep't 1974).

38. *See* Holloway v. Parham, 340 F. Supp. 336 (N.D. Ga. 1972).

39. 42 U.S.C § 602(a)(10) (Supp. IV. 1974).

40. Jefferson v. Hackney, 406 U.S. 535, 545 (1972).

41. McGraw v. Berger, 75 Civ. 4682, at 8 (S.D.N.Y. Feb. 25, 1976), *appeal docketed*, No. 76-7102, 2d Cir., Mar. 5, 1976.

42. New York Dep't of Social Serv. v. Dublino, 413 U.S. 405, 413 (1973).

those persons with independent resources and redirecting the funds to those persons with greater needs.[43]

In contrast with the cases discussed above, the challenged recoupment in *McGraw v. Berger*[44] was not made either from overpayments presumably still in the recipient's hands, or from a recipient whose only source of income was her semi-monthly AFDC grant. It was made from a recipient who had earned income from employment.[45] In accordance with federal work-incentive policies, a portion of her earnings had been *disregarded* by the state when it determined her eligibility for AFDC.[46]

Congress had encouraged AFDC recipients to seek income apart from the assistance payments, by making the income-disregard[47] a mandatory feature of state AFDC plans in the Social Security Amendments of 1967.[48] Congress also created programs for education and training of welfare recipients, and established child-care to encourage AFDC parents to take advantage of work programs.[49]

In making the determination of eligibility (need) prescribed by section 602(a)(7) of the AFDC,[50] the welfare agency is to consider the client's currently available income and resources only "after all poli-

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43. State welfare regulations must be rationally-based and free of invidious discrimination to survive equal protection challenges. Dandridge v. Williams, 397 U.S. 471 (1970).

44. 75 Civ. 4682 (S.D.N.Y. Feb. 25, 1976), *appeal docketed*, No. 76-7102, 2d Cir., Mar. 5, 1976.

45. *Id.* at 5.

46. *Id.* at 6. 42 U.S.C. § 602(a)(7) (Supp. IV, 1974) provides, in pertinent part:

> A State plan for aid and services to needy families with children must . . . provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid . . . .

42 U.S.C. § 602(a)(8)(ii) (Supp. IV, 1974) provides, in pertinent part:

> [T]he state agency shall with respect to any month disregard . . . in the case of earned income . . . the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month . . . .

47. The disregard provisions do not apply to income earned in certain kinds of public training and public service employment programs. 42 U.S.C. § 602(a)(8)(A)(ii) (Supp. IV, 1974). *See* Betts v. Weinberger, 391 F. Supp. 1122, 1125 (D. Vt.), *aff'd sub nom.* Betts v. Matthews, 96 S. Ct. 388 (1975).

48. Act of Jan. 2, 1968, Pub. L. No. 90-248, 81 Stat. 821. "If all the earnings of a needy person are deducted from his assistance payment, he has no gain for his effort." S. REP. No. 744, 90th Cong., 2d Sess. (1967), *quoted in* X v. McCorkle, 333 F. Supp. 1109, 1116 (D.N.J. 1970), *modified sub nom.* Engelman v. Amos, 404 U.S. 23 (1971).

49. X v. McCorkle, 333 F. Supp. 1109, 1115-16 (D.N.J. 1970), *modified sub nom.* Engelman v. Amos, 404 U.S. 23 (1971).

50. *See* note 46 *supra*.

cies governing . . . *disregard* or setting aside of income . . . have been uniformly applied."[51] Accordingly, if the act of recoupment involves a "determination of need" under section 602(a)(7), then the agency must apply the disregard policy in carrying out recoupments. It could not look to disregarded income as a fund from which recoupments might be made.

In *McGraw* the welfare agency followed the disregard policy when it compared plaintiff's available income with the state's standard of need and found her eligible for AFDC.[52] Subsequently, upon realization that there had been agency-caused overpayments, the agency determined that the recipient had, for recoupment purposes, currently available income exclusive of the assistance grant.[53] The recipient was still eligible for AFDC grants,[54] but the agency claimed a right to a limited recoupment therefrom.[55] Such a recoupment would not invade the recipient's basic standard of need,[56] because the disregarded income could replace the monies withheld from the AFDC grant.

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51. 45 C.F.R. § 233.20(a)(3)(ii) (1975) (emphasis added). In Williams v. Lavine, 77 Misc. 2d 566, 353 N.Y.S.2d 340 (Sup. Ct. 1974), a welfare agency was prohibited from considering work-incentive income of an AFDC recipient in determining her need for a discretionary excess-shelter allowance. The court said this income cannot be "counted twice," in determining an applicant's ordinary needs and then her excess-shelter needs, because it has been "used up" in meeting ordinary needs. *Id.* at 571, 353 N.Y.S.2d at 345. The *McGraw* court viewed *Williams* as a mere reaffirmance of the principle that income-disregard "must be honored" in determining an AFDC recipient's need. 75 Civ. 4682, at n.3.

52. 75 Civ. 4682, at 6.

53. *Id.* at 7. The New York regulation upheld in *McGraw* considers disregarded income as being currently available income exclusive of the current assistance payment. 18 N.Y.C.R.R. § 352.31(d)(1)(ii) (1975). A state court has held it to be in conformity with federal law and regulations. De Luca v. D'Elia, 83 Misc. 2d 1080, 374 N.Y.S.2d 92 (Sup. Ct. 1975). The *McGraw* court gave little weight to *De Luca* as the latter was largely conclusory. 75 Civ. 4682, at a n.3. Earlier federal regulations treated disregarded income as available income for recoupment purposes without qualification as to the cause of the overpayment. 38 Fed. Reg. 22010 (1973). A current federal regulation treats disregarded income as available income out of which there may be recoupment of overpayments due to willful recipient misconduct. 45 C.F.R. § 233.20(f) (1975). It is silent as to whether disregarded income is available for recoupment of overpayments due to agency error.

54. AFDC benefits "may not be *terminated* without a determination of ineligibility unless an agency is unable to evaluate eligibility by reason of the recipient's refusal to cooperate. . . ." Norton v. Lavine, 74 Misc. 2d 590, 597, 344 N.Y.S.2d 81, 89 (Sup. Ct. 1973) (emphasis added).

55. 75 Civ. 4682, at 7-8.

56. *Id.* at 8.

The *McGraw* court held that disregarded income was not protected against recoupment of agency-caused overpayments.[57] The disregard mandate applied only to the initial determination of need under section 602(a)(7),[58] and not to later determinations in which the actual amount of the grant is derived,[59] because the grant is "a function not only of the recipient's need, but also of the administrative imperatives that may be dictated by a state's limited fiscal resources."[60] The court felt that Congress had not expressed an intent to shield disregard income "under all circumstances and against every State exigency."[61] The court noted that HEW supported the challenged practice, a view conceded by plaintiff.[62]

Prior to the decision in *McGraw*, a federal court in Minnesota, in *Johnson v. Likins*,[63] had enjoined a welfare agency from recouping agency-caused overpayments by reducing AFDC grants in amounts up to one-half the disregarded income of the recipients.[64] The case treated a fact pattern substantially the same as that in *McGraw*. The *McGraw* court noted that ordinarily the authority of *Johnson* would have been persuasive.[65] However, it considered "*Johnson*'s precedential value [to be] seriously undermined by the *clearly erroneous* premises on which the *Johnson* court rested its decision."[66]

To the *Johnson* court, the concept of "need" seemed "central to every aspect of the AFDC program."[67] Accordingly, the determination to recoup involved an inherent determination of need.[68] The *Johnson* court found a congressional intent that the disregard mandate be observed whenever an agency determined need,[69] or made

57. *Id.* at 17.

58. The state must apply the disregard policy "in determining whether a particular family *qualifies* for aid." County of Alameda v. Carleson, 5 Cal. 3d 730, 739, 488 P.2d 953, 959, 97 Cal. Rptr. 385, 391 (1971), *appeal dismissed*, 406 U.S. 913 (1972) (emphasis added).

59. 75 Civ. 4682, at 14-15.

60. *Id.* at 14.

61. *Id.* at 16.

62. *Id.* at 11.

63. 4-75-Civ. 318 (D. Minn. Oct. 10, 1975).

64. *Id.* at 39.

65. 75 Civ. 4682, at 13.

66. *Id.* (emphasis added).

67. 4-75-Civ. 318, at 29.

68. *Id.* at 32; *cf.* Holloway v. Parham, 340 F. Supp. 336, 343 (N.D. Ga. 1972).

69. 4-75-Civ. 318, at 31.

an assistance payment.[70] However, *McGraw* read the "determination of need" concept more narrowly. The income-disregard was to be observed only when the section 602(a)(7) test was carried out to discover an applicant's budget deficit and qualify her for AFDC. *McGraw* concluded the *Johnson* court had failed to discern the proper "relation between the budget deficit and the ultimate AFDC grant."[71] Even though the two may be equivalent in amount, as was the case both in New York and Minnesota, they are not "functionally identical."[72] The budget deficit represents the maximum allowable AFDC grant; in consideration of its available financial resources, the state may award a grant amounting to less than 100 percent of the budget deficit.[73]

The *McGraw* court reasoned that *Johnson* "read into [the disregard provisions] more than Congress said or intended."[74] Although a portion of earned income would be disregarded in determining eligibility, it was not to be ignored when recoupment was carried out.[75] The agency's action in such a case was not a "determination of need" under section 602(a)(7).[76]

The HEW regulations are ambiguous as to whether disregarded income is considered to be currently available income *exclusive* of the current assistance grant for purposes of recouping agency-caused overpayments.[77] The *Johnson* court concluded that "HEW would appear *not* to allow recoupments from disregard income in cases of agency error or non-willful recipient error."[78] The plaintiff

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70. *Id.* at 29.

71. 75 Civ. 4682, at 14.

72. *Id.*

73. *Id.*

74. *Id.*

75. "The proportion of the current assistance grant that may be deducted for recoupment purposes shall be limited on a case-by-case basis so as not to cause undue hardship, and in no case shall exceed 10 percent of the household needs . . . ." 18 N.Y.C.R.R. § 352.31(d)(4) (1975).

76. *Cf.* County of Alameda v. Carleson, 5 Cal. 3d 730, 742 n.14, 488 P.2d 953, 961 n.14, 97 Cal. Rptr. 385, 393 n.14 (1971), *appeal dismissed*, 406 U.S. 913 (1972) (error to equate the term "needs" with the "standard of need" established by the state, as the Social Security Act distinguishes between the general concept of "needs" and the administratively-fixed "need as determined by the State agency").

77. *See* note 53 *supra*.

78. 4-75-Civ. 318, at 35 (emphasis added). The court referred to an amicus curiae brief of HEW in Hagans v. Wyman, 399 F. Supp. 421 (E.D.N.Y.), *vacated as moot*, 527 F.2d 1151 (2d Cir. 1975), which seemed "to treat disregard income as non-exclusive of the current

in *McGraw* represented to the court that "consultation between attorneys for the [National Welfare Rights Organization] and HEW indicated that HEW allow[s] the [recoupment] practice challenged herein."[79] Thus, the *McGraw* court found that HEW's actual position permitting recoupment from disregarded income contradicted the *Johnson* court's conclusion.[80]

The *Johnson* court decided, upon its reading of congressional intent, that "the income disregard work incentive is absolutely essential to the total AFDC program,"[81] and that the policy of encouraging employment of AFDC parents was now of equal force with the policy of aiding needy children.[82] *McGraw* found no intent to shield disregarded income under all circumstances[83] once it had influenced the determination of eligibility. The challenged recoupment invaded disregarded income for a limited period of time while it accomplished the valid objectives of recovering overpayments and promoting a fair apportionment of limited AFDC funds.[84] Thus, "there is no destruction of the work incentive, but only a temporary diminution or suspension thereof, and thus no thwarting of congressional intent."[85]

As *McGraw* points out,[86] *Johnson*'s holding was influenced by the belief that income-disregard may be a disguised supplement to

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assistance grant and as non-currently available income and resources." 4-75-Civ. 318, at 34-35. The court did not refer to the federal regulation which treats disregarded income as available income out of which there may be recoupment of overpayments due to willful recipient misconduct. *See* note 53 *supra*.

In Bradford v. Juras, 331 F. Supp. 167 (D. Ore. 1971), it was said that "federal regulations treat cash reserves and income disregards as *separate and distinct* from the welfare grant." *Id.* at 169 (emphasis added). The holding in *Bradford*, which approved recoupment from disregarded income, was distinguished away by both the *Johnson* and *McGraw* courts because it erroneously presumed that the income-disregard policy was discretionary. 4-75-Civ. 318, at 26; 75 Civ. 4682, at n.3.

79. Plaintiff's Supplementary Brief at 11, McGraw v. Berger, 75 Civ. 4682 (S.D.N.Y. Feb. 25, 1976), *appeal docketed*, No. 76-7102, 2d Cir., Mar. 5, 1976.

80. 75 Civ. 4682, at 13.

81. 4-75-Civ. 318, at 32.

82. *Id.* at 31.

83. *See* text accompanying note 61 *supra*.

84. 75 Civ. 4682, at 17.

85. *Id. Johnson* viewed the recipients of disregard income as "those who have demonstrated the ability and initiative to obtain employment while raising a family." 4-75-Civ. 318, at 46 n.25. It should not be assumed that such persons will have their incentive destroyed so completely by a temporary setback.

86. 75 Civ. 4682, at a n.5.

AFDC families in states (unlike Minnesota and New York) which pay less than 100 percent of the standard of need.[87] The *McGraw* court limited its analysis to the case at hand:[88] recoupment by a state paying 100 percent of the standard of need.

McGraw's careful reading of the statute, in the process of upholding the challenged recoupment, gives greater weight to the factors other than recipient need which ultimately must affect the amount paid out in benefits. The current heightened awareness that there are limits to state resources[89] has resulted in the tightening and curtailment of welfare programs. Welfare agencies must make greater efforts to decrease errors which produce overpayments;[90] but because much "agency error" is recipient-generated,[91] there is a need for an equitable means of recovering overpayments from those who have supplemental resources.

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87. 4-75-Civ. 318, at 37.

88. 75 Civ. 4682, at 17. In its speculation about conditions in the poorer states, the *Johnson* court did not mention that other programs, such as food stamps, might bring AFDC families up to the standard of subsistence.

89. "Congress was itself cognizant of the limitations on state resources from the very outset of the federal welfare program." Dandridge v. Williams, 397 U.S. 471, 478 (1970).

90. *See* text accompanying notes 28-29 *supra*.

91. *See* note 2 *supra*.