DEPARTMENTAL GRANT APPEALS BOARD

Department of Health, Education, and Welfare

SUBJECT: California Department of Social Services
Docket No. 78-161-CA-SSI
Decision No. 86

DATE: February 28, 1980

Charlton G. Holland, Deputy Attorney General, for the State of California. Mamie McDowell, Chief, Supplemental Security Income Branch, and Donald F. Garrett, Attorney, HEW Office of the General Counsel, Social Security Division, for the Social Security Administration.

DECISION

This case involves a dispute between the State of California and the Federal government with respect to liability for certain payments made pursuant to Federal/State agreements providing for Federal administration of State supplementary payments under Title XVI of the Social Security Act. The exact amount in dispute depends on the final establishment of certain figures necessary for the computation formula but has been estimated by the parties to be approximately $50 million.

The issue in dispute is whether the value of support and maintenance in kind in the household of another is income for purposes of a statutory formula, known as the "hold harmless" provision, enacted by Congress as a limitation on fiscal liability of States choosing Federal administration of their supplementary payments. While this issue is basically a question of statutory interpretation, in which deference would normally be accorded to the administering agency's interpretation, there are countervailing considerations in favor of the State in this appeal which preclude mechanical application of the normal rule. The State here is not in the position of being a recipient of Federal funds but is a party to an agreement pertaining primarily to State funds. Congress, in recognition of the special character of that relationship, sought through the hold harmless formula to provide some protection to the States.

Having carefully weighed these considerations, I have nevertheless concluded, based on the record before me, that the Social Security Administration's interpretation best reflects Congressional intent with respect to both the statutory treatment of support and maintenance and the hold harmless formula. While the Agency appears not to have been completely consistent in employing various program terms, in substance it has generally been consistent with Congressional purpose and with the intent underlying its agreement with the State. There may be certain instances, discussed below, in which the State paid higher benefits due to SSA's application of its interpretation, though it is not clear from the record whether this was not a result the State intended. Any adjustment for these instances, however, can be sought by the State as part of

its continuing discussions with SSA and, if the issue is not there resolved, a further appeal will then be available.

Background

The Social Security Amendments of 1972, P.L. 92-603, October 30, 1972, amended Title XVI of the Social Security Act to establish a national program to provide supplemental security income for the needy aged, blind, and disabled. The new program (SSI), a system of Federally-administered cash payments to individuals eligible under uniform criteria, was scheduled to begin January 1, 1974. SSI benefits were to be paid generally at statutory levels set forth at Section 1611, reduced for income not excluded by Section 1612(b). (Citations are to Title XVI of the Social Security Act, codified at 42 U.S.C. 1381 et seq. (1974), unless otherwise noted.) For an individual living in another person's household and receiving support and maintenance in kind from such person, the SSI benefit specified in Section 1611 was to be reduced by one-third. Section 1612(a)(2)(A).

Under the SSI program, as originally enacted, a State was permitted, but not required, to supplement the basic Federal benefit. Section 1616. The Secretary of HEW was authorized to enter into agreements with States for Federal administration of these optional State supplementary payments. Subsequent legislation provided that, as a condition to receiving Title XIX (Medicaid) funds, a State must pay supplementary benefits, known as mandatory minimum supplements, to all who had been recipients under the State programs replaced by SSI to the extent necessary to insure no loss of income. These payments could also be made by the State through Federal administration. P.L. 93-66, Section 212, December 31, 1973. (For a discussion of the background of this provision, see Martin, Public Assurance of an Adequate Minimum Income in Old Age: The Erratic Partnership between Social Insurance and Public Assistance, 64 CORNELL L. REV. 400, 437 (1979).) As an incentive to States to enter into agreements for Federal administration of State supplementation, Congress provided that, for States which chose Federal administration, there would be a limitation on the State's fiscal liability for supplementary payments. Section 401, P.L. 92-603; Section 1616 note. This provision is popularly known as "hold harmless."

On December 5, 1973, at a special session, the California Legislature passed, and the Acting Governor signed, legislation authorizing State welfare officials to enter into an agreement for Federal administration of California supplementary payments. California Welfare and Institutions Code §12000 et seq. On the same day, California officials signed a Federal administration agreement based on the 1973 Master Contract (or Model Agreement), the terms of which had been negotiated between Federal officials and representatives of the various States. (For a

discussion of the negotiation process, see Martin, Procedures Used in Forming and Carrying Out Federal-State Agreements under the Supplemental Security Income Program, Report to the Administrative Conference of the United States (1979).) Provisions specific to the State of California were contained in the appendices to the agreement. This agreement was in effect from January 1, 1974 to June 30, 1974. Subsequent agreements signed June 12, 1974, and November 22, 1976, were based on the 1974 and 1976 revisions of the Master Contract respectively.

Under the disputes clauses of the 1973 and 1974 agreements, California appealed on June 18, 1976, a determination by the regional office of SSA that the amount of the one-third reduction in the situation of an individual living in the household of another would be considered unearned income for purposes of calculating the amount to which California would be entitled under the "hold harmless" provision. An initial determination upholding the regional office's position was issued on December 6, 1976, by the Associate Commissioner for Program Operations, and the State requested reconsideration of this determination on January 5, 1977. The Acting Commissioner of Social Security affirmed the initial determination and notified the State on July 7, 1978 that it could request reconsideration by the Secretary of HEW within 90 days.

By letter dated October 6, 1978, the State appealed the Acting Commissioner's decision to the Secretary, requesting reconsideration of the matter by the "Grant Appeals Board" through, if possible, an expedited process with a hearing before the Board Chairman. The Secretary, by letter dated December 21, 1978, referred the dispute "to the Chairman of the Departmental Grant Appeals Board, Malcolm S. Mason, with the authority to make final disposition of the issues in a manner consistent with the terms of the agreements and the principles of 45 CFR Part 16, with such modifications of detail as may be necessary." On December 22, 1978, the Executive Secretary of the Board wrote to the State, with a copy to the Commissioner of the Social Security Administration, informing them of the referral and requesting certain documents. Some, but not all of these documents were submitted by the State after some delay.

On July 18, 1979, I issued a Notice of Conference, containing a 17-page analysis of the issues as I tentatively understood them, inviting both parties to identify other issues and to correct if necessary my understanding of the facts. Pursuant to this Notice, the parties submitted further information and documentation. In addition, both parties filed preconference briefs which were helpful, and both parties participated in an informal conference, held February 14, 1980, in which their positions were fully and clearly stated by counsel and assisting representatives. A transcript has been made and furnished to the parties, but

the parties were advised that, on the strength of their written presentations and very clear oral presentations, I would proceed with consideration of the matter.

The "Hold Harmless" Calculation

The "hold harmless" provision assures that --

> The amount payable to the Secretary by a State for any fiscal year pursuant to its agreement or agreements under section 1616 of the Social Security Act shall not exceed the non-Federal share of expenditures as aid or assistance for quarters in the calendar year 1972 under the plans of the State approved under title I, X, XIV, and XVI of the Social Security Act....
> Section 401(a)(1), P.L. 92-603; Section 1616 note.
> (Subsequent amendments to this section are not relevant to this dispute.)

This provision applies only with respect to --

> "[T]hat portion of the supplementary payments... in any fiscal year which does not exceed in the case of any individual the difference between --
> (A) the adjusted payment level under the appropriate approved plan of such State as in effect for January 1972..., and
> (B) the benefits under title XVI of the Social Security Act...plus income not excluded under section 1612(b) of such act in determining such benefits, paid to such individual in such fiscal year.
> Section 401(a)(2)

For purposes of this provision, the term "adjusted payment level" (APL) is defined to mean, in general, the amount of the money payment which an individual with no other income would have received under the appropriate State plan in effect in 1972. Section 401(b)(1). This amount could be adjusted at State option in a manner not relevant here.

Definitions in the initial program regulation dealing with State supplementation, Subpart T of Part 416 of 20 CFR, 40 FR 7640, Feb. 21, 1975, expand upon the definitions used in the "hold harmless" provision. The portions of State payments which do not count toward "hold harmless" are called "unprotected payments," §416.2080(d), and "income not excluded under 1612(b)" is referred to as "countable income," §416.2025(b). As will be explained below, the total "hold harmless" calculation must also

take into account a system of credits and debits established by regulation. With this qualification, the calculation of the protected portion of a State Supplementary Payment (SSP) can be expressed as follows:

Protected payment = APL - (SSI benefit actually paid + countable income)

In general, when the sum of the protected payments made by a State in any fiscal year reaches the State's "baseline" (the non-Federal share of expenditures as aid or assistance under approved plans in 1972), the State has reached "hold harmless" status and further protected payments will be made from Federal funds. Any increase in the amount of countable income in an individual case would decrease the amount of the protected payment, thus decreasing the amount added on to help a State reach its baseline or, if the baseline had been reached, decrease the amount paid with Federal rather than State funds.

For example, if the adjusted payment level (APL) applicable to an individual recipient is $175, if the Federal SSI benefit paid to him is $55, and if he has countable income of $45, the protected payment, using the above equation, would be: $175 - ($55 + $45) = $75. Assuming then that the SSP paid to that recipient was $100, $75 would count toward reaching the State's baseline or, if the baseline had been reached, would be paid with Federal funds. The remaining $25 portion of the SSP would be paid generally with State rather than Federal funds whether the baseline had been reached or not, i.e. it would be unprotected.

The regulatory exception, mentioned above, to treatment of the $25 excess as unprotected results from application of a system of credits and debits in States where the payment levels for different categories of recipients vary so that some are above an established APL and some are below. 20 CFR 416.2080, 40 FR 7644. For instance, the example given above would result in a $25 debit under the regulatory scheme. If in another situation, with the same APL, Federal SSI benefit, and countable income, the SSP were only $50, the total $50 would be protected and, in addition, $25 would be considered a credit to the State, since the State could have paid $25 more without its total SSP exceeding the difference between the APL and the SSI benefit plus countable income. Under the regulatory scheme, debits are applied against credits. If total credits within a category of supplementation exceed total debits within that category in a fiscal year, the excess will count toward hold harmless. If total debits exceed total credits, the amount of the excess will be borne entirely at State expense.

The effect on this calculation of increasing the amount of countable income can be seen by using the original example (where the SSP was $100) but increasing countable income from $45 to $95. The protected payment portion would be reduced to $25, i.e. $175 - ($55 + $95). In the modified example (where the SSP was only $50), only $25 of the SSP would be protected and the State would be debited $25 instead of being credited $25.

Definition of "Income"

The term "income" is not defined separately for purposes of the "hold harmless" provision. The dispute in this case arises because Section 1612(a) of the Act, captioned "Meaning of Income," provides that, "for purposes of this title," income means both earned income and unearned income, including --

> Support and maintenance furnished in cash or kind; except that (i) in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) as specified in subsections (a) and (b) of section 1611 shall be reduced by 33-1/3 percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph... .
>
> 1612(a)(2)(A).

Both parties rely on placement of the one-third reduction provision in the statute and on the language of the provision in support of their interpretations. While SSA argues that Congress would have placed the one-third reduction provision in Section 1612(b), Exclusions From Income, if it intended to exclude support and maintenance in the household of another from income, the State appears to be correct that such explicit exclusion would not be necessary if Congress has clearly defined the term "income" to not include such support and maintenance in the first instance.

The State is not correct, however, that the definition of income is plain and unambiguous on its face. It is true that Section 1612(a) does give the meaning of income for "purposes of this title." Also, the language of the subparagraph, 1612(a)(2)(A), does clearly provide that for purposes of determining the amount of the benefit to be paid, in lieu of including the value of such support and maintenance in income so as to reduce the benefit, the one-third reduction will apply. The language does not, however, clearly exempt such support and maintenance from income for all purposes.

Section 1612(a)(2)(A) begins with a statement that "unearned income includes -- Support and maintenance furnished in cash or in kind" and this statement is followed by a semicolon. The semicolon separates a general proposition from a particular exception for "the case of any individual... living in another person's household and receiving support and maintenance in kind...." The dollar amounts otherwise applicable for determining the benefit to be paid to such an individual are to be reduced by one-third "in lieu of including such support and maintenance

maintenance in the unearned income of such individual ... as otherwise required by this subparagraph... ." There are at least two ways of reading this, either that 1) the subparagraph requires that support and maintenance in kind in the household of another, in the absence of the one-third reduction provision, would be included in the definition of income but because of this provision is not so included (the State's contention); or 2) the subparagraph requires that such support and maintenance be included as income otherwise than for purposes of reducing the benefit to be paid in the way income generally reduces the benefit, the one-third reduction being a substitute for inclusion for this purpose. Thus, the provision is ambiguous on its face and legislative history may properly be consulted as a means of discerning legislative intent.

Congressional Intent

SSA's position that "the purpose of section 1612(a)(2)(A) is to avoid difficult valuation problems" is supported by the legislative history of the section. The language as enacted is substantially the same as that of the original bill, H.R. 1. The House Report on the bill described the section as follows:

> In determining an individual's eligibility and the amount of his benefits, both his earned and unearned income would have to be taken into consideration. ... Unearned income would mean all other forms of income, among which are ... support ... and so forth. For people who live as members of another person's household, the value of their room and board would be deemed to be 33-1/3 percent of the full monthly payment.
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> H.R. REP. 92-231, 92d Cong., 1st Sess. 25 (1971)

The Senate Report states:

> In recognition of the practical problems that would be encountered in determining the value of room and board for people who live in the household of a friend or relative, the bill would provide specific rules for use in these situations. Under the bill, the value of room and board, regardless of whether any payment was made for room and board, would be assumed to be equal to one-third of the applicable benefit standard.
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> S. REP. 92-1230, 92d Cong., 2d Sess. 388 (1972); Cf. H.R. REP. 92-231, 92d Cong., 1st Sess. 152 (1971).

The State has pointed to nothing in the legislative history which would contradict the inference which SSA draws from this stated purpose of the provision. Special rules are provided for valuing such support and maintenance, but that deemed value is applied, as other income is, to reduce the benefit level.

The Purpose of "Hold Harmless"

A provision similar to "hold harmless" appeared in the original House bill, but applied to a proposed Family Assistance Program as well as the proposed SSI Program. The Senate committee version dropped this provision, but a Senate floor amendment was added which provided other "fiscal relief" to the States. The conferees adopted the Senate amendment modified so as to basically parallel the original House provision but to apply only to SSI. CONF. REP. H.R. REP. 92-1605, 92d Cong., 2d Sess. 29 (1972). The House Report describes the purpose of the original provision as follows:

> By entering into agreements for Federal administration of their supplemental payments, States will be losing all administrative control over the operation of those benefits. Your committee expects that the tight Federal administration and the substantial improvements in the work and training aspects of the new Federal benefit programs will bring the expansion of caseloads under control. It must be recognized, however, that States may not fully share this confidence and also that patterns of State-to-State migration could result in an increase in caseloads for a given State even if national caseloads remain stable or decrease. Your committee's bill, therefore, includes a "hold harmless" provision designed to assure the states that their welfare expenditures will not be increased over 1971 levels because of the effects of the provisions of this bill (and the administration of those provisions) on State supplemental payments which are administered by the Federal government.
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> H.R. REP. 92-231, 92d Cong., 1st Sess. 200-201 (1971); See also, revised and extended remarks of Rep. Byrne (Wis.) on the House Floor, Cong. Rec., June 22, 1971 at H5598.

The "hold harmless" formula was thus designed to protect States from increases in the caseload but not from increases in payment levels. See, McInnis v. Weinberger, 530 F. 2d 55, 57-8 (1st Cir. 1976).

The State acknowledged at the conference that this was the purpose of the provision but argued unpersuasively that failure to recognize support and maintenance in kind in the household of another as income in the "hold harmless" calculation would not contravene this purpose. Such support and maintenance did result in reduced payments in the pre-SSI programs, however, and non-recognition for "hold harmless" purposes would result in Federal subsidization of increases in payment levels.

As SSA has pointed out, "the hold harmless" formula is "in essence, a comparison of two levels, the pre-SSI level made by the State and the current Federal SSI level...." (Transcript, p. 98.) Had Congress described the comparison that way, i.e. protected payment = APL - Section 1611 Federal benefit level, the ambiguous phrase "income not excluded..." would not have appeared in the formula. In its preconference brief, SSA offered a plausible explanation of why Congress expressed the formula as it did. Individuals whose countable income exceeds the Section 1611 level do not receive Federal SSI benefits but, if their countable income does not exceed the applicable State payment standard, will still receive a State Supplementary Payment (SSP). Congress intended to protect these SSP's only to the extent they brought the individuals up to the pre-SSI APL. For example, if the Section 1611 level was $130, the individual's countable income was $140 and the APL was $150, Congress wanted to protect only a $10 SSP. In this situation, the protected payment would not equal the APL - Section 1611 level ($150-$130) but would equal APL - (SSI benefit actually paid + countable income) [$150 - (0+$140) = $10]. Given this plausible explanation of the formula, I do not accept as an adequate explanation the State's position, expressed at the conference, that it "assumes" that Congress deliberately introduced the term "income" into the formula because there would be a bonus to States in the form of higher protected payments in the one-third reduction situation. (Transcript, p. 58.)

SSA Determination of Supplementary Payment Amounts

The State's principal argument here is that SSA's interpretation is inconsistent with SSA's methods of computing State supplementary payments (SSP's). The State establishes the total income levels, or "payment standards," it considers necessary for various categories of recipients according to their living arrangements. A schedule showing these levels is attached to the agreement. The State originally argued that SSA computes the SSP's for all individuals in the one-third reduction situation by deducting the Federal benefit level as reduced by one-third from the same State payment standard from which it deducts the unreduced Federal level for other individuals and that this resulted in higher SSP's for the one-third reduction cases. The Notice of Conference pointed out that, since the agreement itself identified as a a separate living arrangement "Residing in the Household of Another and Receiving Room and Board In Kind" and provided a payment standard already adjusted downward precisely by the amount of the one-third reduction for persons in that living arrangement, it would appear that those persons were generally not receiving higher SSP's. At the conference, the State admitted that, as suggested in the Notice, SSA's manner of calculating the SSP's resulted in higher SSP's for one-third reduction cases only in the relatively infrequent situation where there was an overlap between the one-third reduction category and one of two other living arrangements identified in the agreement ("non-medical board and care" and "disabled minor..."). SSA estimates that these overlap situations represent only about 5% of all the SSP's.

Where this overlap occurred, SSA was making higher payments based on its interpretation of the agreement. Whether this interpretation was incorrect or was based on the State authorizing statute, §12200(i), is a subsidiary issue not raised at the lower levels of this disputes process. I have heard argument on whether this issue is germane and have concluded that it is not essential to the resolution of the principal dispute and that it would be improvident for me to decide it. The reasons for this conclusion are that the issue appears to be raised as an afterthought; the briefing does not permit me to have confidence that, in an area as complex as this, I have a clear enough understanding of the issues which I see as collateral to the principal one; and in any case discussions between the parties are necessarily continuing, and if these issues are not otherwise resolved, a further appeal will then be available.

With respect to the issue of SSA's inconsistencies, the State is focusing on terminology rather than substance. The SSA does treat the Section 1611(b) benefit level reduced by one-third as a "standard payment amount" and does calculate SSP's for applicable situations by deducting that standard payment amount from the payment levels set forth in the States' agreements. These payment levels I understand have generally, however, as in the case of California, been adjusted downward to account for this treatment so that the person in the one-third reduction situation is receiving an SSP comparable to that of a person in an independent living arrangement. SSA treats the one-third reduction as establishing a "standard" payment amount because the statute requires a standard reduction in the 1611(b) levels to reflect the imputed value of the support and maintenance. (See Transcript, p. 88-9.) The alternative, always starting with the Section 1611(b) level, reducing it by the one-third amount and then reducing it for other countable income, would perhaps be more consistent with the concept that the one-third reduction represents income. It would, however, add an unnecessary administrative step, and since the result is always the same for purposes of calculating the Federal benefit to be paid, and, for persons identified as in the "household of another" living arrangement, also the same for purposes of calculating SSP's, SSA was not unreasonable in using instead a separate standard payment amount as the starting point.

Treatment by SSA of the one-third reduction as establishing a lower payment standard did lead to a change in the California statute authorizing SSP's. A subdivision providing for a corresponding reduction of State grant levels (for all recipients except those in the "nonmedical board and care" and the "disabled minor" categories discussed above) is described in the statute as "operative only during such time that such in-kind support and maintenance, under federal law, is treated as providing the basis for a lower payment standard rather than being treated as unearned income." § 12200(i),

California Welfare and Institutions Code, Cal. State. 1974, chap. 75, p. 163, § 2, effective March 14, 1974. This State statute relates, however, only to the grant levels set forth in the agreement. In fact, this subdivision was added after the agreement had been originally authorized and signed. The State was provided at several points in this proceeding an opportunity to explain when it became aware of SSA's treatment of the one-third reduction and to document whether an interpretation that the one-third reduction would not be income for hold harmless purposes was a factor in its choice of Federal administration. The State has responded only with vague generalizations.

Treatment of Analogous Situations

In its treatment of other in kind support and maintenance and of other imputed income situations, SSA did act consistently with its position that the one-third reduction reflects income.

The one-third reduction rule applies only when an individual lives in the household of another and receives both support and maintenance from that person. To provide for continuity of treatment between the one-third reduction situation and other closely analogous situations (such as where an individual is receiving in kind support and maintenance but not residing in the household of the person providing the support and maintenance), SSA has devised a "presumed maximum value" rule. 20 CFR 416.1125. This rule results in reduction of the benefit by the one-third amount to account for the in kind income unless the recipient can show that the actual value of the income is less than the presumed value. This presumed value, which reduces the benefit, is income for "hold harmless" purposes. In substance, the in kind support and maintenance in the household of another is not different in nature and should similarly affect the "hold harmless" calculation.

Inclusion of the one-third reduction (the imputed value of in kind support and maintenance in the household of another) in income for "hold harmless" purposes is also consistent with SSA's treatment of other imputed income. Section 1611(e)(1)(B)(i) addresses the situation of certain individuals who receive medical board and care under State Medicaid plans, providing that, rather than being eligible for SSI Federal benefits at the Section 1611(b) rates, these individuals will be eligible for benefits at a rate not to exceed $300 per year ($25 per month). The practical effect of this provision is the same as if Congress had said that such individuals should have their benefits reduced by the difference between the Section 1611(b) rates and the $300 or had provided that the value of the medical board and care would be deemed to equal that difference. SSA has stated that, for purposes of determining protected payment amounts, SSA treats the difference between the Section 1611(b) rate and the special rate established by Section 1611(e)(1)(B)(i) as unearned income. The State has not disputed this.

Other Considerations

At an earlier stage of the case, the State argued that "even if the one-third reduction does, in fact, constitute unearned income, the treatment itself is invalid because it constitutes an arbitrary presumption of income." (Wortman Decision, p.5.) The Acting Commissioner rejected this argument, calling it "irrelevant to the question of whether support and maintenance must be included in the hold harmless computation" and "a challenge to the constitutionality of the Social Security Act which is not properly raised in this dispute ...." (Wortman Decision, p.8.) Several cases were cited by the State in support of its "presumption of income" argument. They were distinguished by the Acting Commissioner on the ground that the cited cases dealt with the AFDC program in which both the statute and the regulations required that only actual income available to the recipient be counted in determining the AFDC payment, whereas the one-third reduction in the SSI program is contained in the statute itself. (Wortman Decision, p.9.) The Acting Commissioner's view of the cited cases as distinguishable appears to be correct, [See, for example, Cooper v. Swoap, 11 Cal. 3d 856, cert. denied 419 U.S. 1022 (1974) (invalidating State regulation requiring that income of an individual acting in the role of spouse be imputed to families on an AFDC grant)] and the State has not chosen to pursue the argument at this level of review.

The State has also not pursued an argument that if support and maintenance in kind in the household of another is income for "hold harmless" purposes it should not necessarily be valued at the one-third reduction amount for that purpose. Apparently, SSA is correct that using a current market value rule for such support and maintenance would typically result in a higher figure for the amount of such income, and, therefore, the State would not benefit by use of the actual value rather than the one-third reduction amount. Furthermore, it would not be administratively feasible to determine actual value to the recipient of such support and maintenance solely for "hold harmless" purposes and it cannot be supposed that the Congress intended that that be done.

Conclusion

The purpose of the "hold harmless" provision was to protect States choosing Federal administration of their supplementary payments from possible increases in caseload but not from increases in benefit levels. To accept the State's interpretation that in kind support and maintenance in the household of another is not income to be counted in the "hold harmless" calculation would result, contrary to Congressional intent, in Federal subsidization of increased benefits for individuals receiving such support and maintenance. This would create an arbitrary distinction between beneficiaries receiving such support and maintenance and those receiving other in kind support and maintenance or imputed income.

If the plain meaning of the one-third reduction provision were that such support and maintenance should not be included in income for any purpose, this distinction might be considered a clear choice by Congress. Contrary to the State's assertion, however, the language of the provision is not plain and unambiguous. As the legislative history of the provision clearly shows, Congress enacted the one-third reduction provision not because it did not wish to treat such support and maintenance as income but because it wished to avoid problems associated with determining the precise value of such support and maintenance. Congress deemed such support and maintenance to have a certain value (the one-third amount) and treated that value in the same manner as it treated the value of other in kind support and maintenance -- as income to be applied in reducing the benefit level.

The State's argument correctly identifies a weakness in the draftmanship of Title XVI but does not seem to me to represent a realistic reading of the Congress' actual intent or a sound workable approach to the administration of the statute. I therefore sustain on this issue the Social Security Administration's position.

/s/ Malcolm S. Mason