

DISABLED WITHOUT BENEFITS: THE IMPACTS OF RECENT SOCIAL SECURITY REFORMS ON DISABLED CHILDREN

Abstract: *In 1996, Congress passed sweeping reforms aimed at overhauling the welfare system. The Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") included a new definition of childhood disability that, it is estimated, excluded 100,000 children from SSI benefits. This Note explains the changes implemented within the childhood disability system and explains the reasoning behind those changes. It then argues that the regulations promulgated in response to PRWORA exclude truly disabled children from receiving disability benefits. These regulations violate the Social Security Act, are inconsistent with the stated policies of the Social Security Administration and draw arbitrary distinctions, violating the legislative intent of the Social Security Act.*

INTRODUCTION

Matthew is a nine-year old with a history of mild mental retardation, attention deficit hyperactivity disorder ("ADHD"), oppositional defiant disorder ("ODD"), mild obesity and enuresis (nighttime bed-wetting).¹ Matthew also struggles with nightly sleep disturbances and migraines.² Described as anxious and agitated, most of the time he is unable to focus on tasks—even those he enjoys—for more than a few minutes.³ While most nine-year olds find themselves in the third or fourth grade, Matthew continues to read at a first grade level and performs math at the kindergarten level despite several years of special education.⁴ Matthew acts aggressively toward other children and lashes out at his parents and neighbors, in spite of months of individual and family counseling and other therapeutic behavioral interven-

¹ See Memorandum from Jonathan Stein, General Counsel, Robert Lukens, Staff Attorney and Richard Weishaup, Senior Attorney, Community Legal Services, to Consortium of Citizens with Disabilities Social Security and SSI Committee 9 (Feb. 1, 1999) (on file with author).

² See *id.*

³ See *id.*

⁴ See *id.*

tions.⁵ Matthew also has trouble dressing himself, even though he is at an age where this task should be routine.⁶

As a result of the numerous disorders from which Matthew suffers, his ability to function is severely limited. While none may be severe enough individually to qualify him for disability benefits, the combination severely limits his ability to function and should entitle him to receive benefits.⁷ Despite this, Matthew has been denied Social Security disability benefits twice—benefits that could be used to pay for additional educational assistance and medication.⁸ Matthew, and thousands of other children like him, fell victim to new regulations promulgated in response to the welfare reforms enacted by Congress in 1996.⁹

This Note explores the issues associated with Congress's attempt to redefine childhood disability in regard to disability benefits. Part I traces the evolution of childhood disability benefits, including the changing definitions of childhood disability and the various standards used to determine whether a disability exists.¹⁰ Part II discusses the reasons behind the 1996 Congressional reform and the anticipated effects of the new disability standards.¹¹ Part III analyzes the regulations promulgated in response to the 1996 definition of childhood disability and argues that the new regulations violate the Social Security Act and are inconsistent with the stated policies of the Social Security Administration.¹² Finally, Part IV argues that by denying children like Matthew benefits, the new regulations draw arbitrary distinctions and violate the legislative intent of the Social Security Act.¹³

I. DEFINING CHILDHOOD DISABILITY

In 1972, Congress enacted the Supplemental Security Income ("SSI") program under Title XVI of the Social Security Act (the "Act").¹⁴ The program attempted to set a guaranteed minimum in-

⁵ See Stein et al., *supra* note 1, at 9.

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *infra* notes 14–118 and accompanying text.

¹¹ See *infra* notes 119–46 and accompanying text.

¹² See *infra* notes 147–230 and accompanying text.

¹³ See *infra* notes 231–47 and accompanying text.

¹⁴ See Social Security Amendments of 1972, Pub. L. No. 92–603, § 301, 86 Stat. 1329, 1465 (codified as amended at 42 U.S.C. § 1381 (1994)).

come level for individuals who had attained age sixty-five, or were blind or were otherwise disabled.¹⁵ The Act, codified in section 42 of the United States Code, defines the term "disabled" as the inability to engage in "substantial gainful" activity because of a medically determinable physical or mental impairment.¹⁶ According to the Act, the impairments must be sufficiently severe to prevent an individual from engaging in any substantial gainful activity given his or her age, education and work experience.¹⁷ An impairment may result from anatomical, physiological or psychological abnormalities demonstrable by medically acceptable clinical techniques.¹⁸

This definition of disability applied to both children and adults until Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA") as part of its welfare overhaul in 1996.¹⁹ The reforms of the PRWORA amended the Social Security Act by creating a new definition specific to children.²⁰ The new definition for children considers a child disabled if he or she can demonstrate a medically determinable physical or mental impairment that results in "marked" and "severe" functional limitations.²¹ To im-

¹⁵ See *id.*; *Sullivan v. Zebley*, 493 U.S. 521, 524 (1990).

¹⁶ See 42 U.S.C. § 1382c(a)(3)(A) (Supp. III 1997). This section provides:

[A]n individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.

Id.

¹⁷ See *id.* § 1382c(a)(3)(B). This section provides:

[A]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work

Id.

¹⁸ See *id.* § 1382c(a)(3)(D).

¹⁹ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211-212, 110 Stat. 2105, 2188-92 (codified as amended at 42 U.S.C. § 1382c(a)(3)(C) (Supp. III 1997)).

²⁰ See *id.* § 1382c(a)(3)(C)(i); Determining Disability for a Child Under Age 18, at 62 Fed. Reg. 6407, 6408 (1997) (to be codified at 20 C.F.R. pts. 404, 416).

²¹ See 42 U.S.C. § 1382c(a)(3)(C). This section provides:

(i) An individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has

plement the new definition of childhood disability, the Social Security Administration ("SSA") amended several regulations and created new procedures for determining disability.²²

A. *Childhood Disability Before the PRWORA*

Before the welfare reforms of 1996, childhood disability existed as a subset of adult disability, noted only by a parenthetical statement at the end of the adult definition.²³ The Act provided that a child qualified for disability benefits "if he suffers from any . . . impairment of comparable severity" to one that would render an adult "unable to engage in any substantial gainful activity."²⁴ The Social Security regulations require the SSA to perform a five-step evaluative process to determine adult disability.²⁵ The first step inquires whether the applicant is employed.²⁶ If an applicant is employed in substantial gainful activity, they will not qualify for benefits.²⁷ If the applicant is not employed, however, the next step evaluates the severity of the applicant's impairment.²⁸ In the second step, if the applicant's impairment or combination of impairments does not significantly limit the applicant's ability to perform basic work activities, the application is denied in accordance with the regulations, without regard to the age, education or work experience of the applicant.²⁹ Upon a determination

lasted or can be expected to last for a continuous period of not less than 12 months.

(ii) Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity . . . may be considered to be disabled.

Id.

²² See Determining Disability for a Child Under Age 18, at 62 Fed. Reg. at 6409.

²³ See *id.* at 6408.

²⁴ See 42 U.S.C. § 1382c(a)(3)(A) (1994). Determinations regarding whether a person qualifies for disability—child or adult—may be made by the SSA, or by a State agency, such as Disability Determination Services ("DDS"), or other designee of the Commissioner of the SSA. See 20 C.F.R. § 416.926a(e) (1997).

²⁵ See 20 C.F.R. § 416.920.

²⁶ See *id.* § 416.920(b).

²⁷ See *id.*

²⁸ See *id.* at § 416.920(c).

²⁹ See *id.*; see also *Bowen v. Yuckert*, 482 U.S. 137, 148–49 (1987). In 1987, in *Yuckert*, the United States Supreme Court held that the severity regulation—step two of the determination process—was valid. See 482 U.S. at 149–51. The regulation permits the denial of a disability benefits claim on the basis of a determination that the claimant did not suffer from a medically severe impairment significantly limiting the claimant's ability to perform basic work activities. See *id.* The Court reasoned that "the severity regulation increase[s] the efficiency and reliability of the evaluation process by identifying at an early stage those claimants whose medical impairments are so slight that it is unlikely they would be found

that the applicant's impairment is severe, the impairment will then be evaluated against a list of impairments³⁰ determined to constitute a disability within the meaning of the statute.³¹ In the third step, when an applicant's impairment meets or equals a listed impairment, the applicant qualifies for SSI disability benefits.³²

If the SSA does not make a decision based upon the first three factors, it will review the applicant's residual functional capacity and the physical and mental demands of the work previously done by the applicant.³³ In the fourth step, an applicant who can continue to perform the kind of work done in the past will not qualify for disability benefits.³⁴ The fifth and final evaluative step examines the residual functional capacity of the applicant in light of age, education and past work experience to determine whether the applicant is capable of performing another form of work.³⁵ An applicant qualifies as disabled if, given those considerations, he or she is determined to be unable to perform the kind of work done in the past.³⁶

Initially, childhood disability was established by superimposing the same adult disability framework on the child applicant.³⁷ The application process included an evaluation of a child's employment status and an evaluation of whether the child's impairment met or equaled the severity of a listed impairment.³⁸ The procedure mirrored the first three steps of the adult application process.³⁹ Because children generally do not work, the SSA felt it was inappropriate to apply vocational rules to children.⁴⁰ Therefore, the child's disability determination did not include steps four and five of the adult determination.⁴¹ As a result, the adult application process included two oppor-

to be disabled even if their age, education and work experience were taken into account." *Id.* at 153. This case resolved a split in the circuits as to whether the severity regulation was valid and brought some litigation back to the court for redetermination on the validity of disability claims. See generally *Johnson v. Heckler*, 769 F.2d 1202 (7th Cir. 1989); *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1985).

³⁰ For the list of impairments see 20 C.F.R. § 404, Subpt. P, App. 1.

³¹ See 20 C.F.R. § 416.920(d).

³² See *id.*

³³ See *id.* § 416.920(e); see also *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. 6407, 6408 (1997) (to be codified at 20 C.F.R. pts. 404, 416).

³⁴ See 20 C.F.R. § 416.920(e).

³⁵ See *id.* § 416.920(f).

³⁶ See *id.*

³⁷ See *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. at 6408.

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See *id.*

tunities to prove that a disability existed, while children had only one opportunity to show such a disability—by meeting or exceeding a listed impairment.⁴²

B. *The Sullivan v. Zebley Standard*

In 1990, in *Sullivan v. Zebley*, the United States Supreme Court held that the child disability regulations were manifestly contrary to the statutory standard of providing benefits to children with impairments of "comparable severity" to that qualifying an adult for aid.⁴³ In *Zebley*, the respondent was a named member of a class of children seeking a judgment that would entitle them to an administrative determination as to whether they could receive SSI benefits or whether the SSA improperly denied or terminated such benefits.⁴⁴ The complaint alleged that the regulations governing the granting of SSI benefits violated the Act's comparable severity standard because the regulations required children to have a listed impairment or the medical equivalent of a listed impairment, whereas adults could meet the disability requirements through alternative means.⁴⁵ In holding that the regulations did not comply with the Act's comparable severity provision, the Court stated that children claiming SSI disability benefits were entitled to an individualized assessment as part of the disability determination process, comparable to the determination for adults who have impairments that do not meet or equal the severity of a listing.⁴⁶ The Court reasoned that the disability listings were more restrictive than the statutory standard; first, they did not cover all illnesses and abnormalities that could be disabling, and second, the medical conditions that were covered by the listings were defined by a criteria "setting a higher level of severity than the statutory standard."⁴⁷ Furthermore, the Court explained that the listings excluded claimants whose impairments were not necessarily always disabling in the larger population, but were particularly disabling to individual claimants.⁴⁸ The Court explained that the equivalence analysis excluded claimants with severe yet unlisted impairments and those with

⁴² See *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. at 6408.

⁴³ See *Zebley*, 493 U.S. at 536-37.

⁴⁴ See *id.* at 526-27.

⁴⁵ See *id.*

⁴⁶ See *id.* at 535-37; see also *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. at 6408 (explaining the SSA's interpretation of *Zebley*).

⁴⁷ *Zebley*, 493 U.S. at 533-34.

⁴⁸ See *id.* at 534.

a combination of impairments that did not meet the criteria for any particular listed impairment.⁴⁹ The Court reasoned that for adults, the fact that the listings set a criteria above the statutory minimum was remedied by the final two evaluative steps, which created a more individualized assessment based on vocational abilities.⁵⁰ For children, however, the absence of an individualized assessment denied them the full protection of the statutory standard, possibly denying benefits to children with the same disability as an adult.⁵¹ The Court further noted that although the vocational analysis used by the SSA to process claims for adults was inapplicable to claims for SSI benefits for children, that did not mean that some corresponding form of functional analysis could not be applied to children's claims.⁵² Therefore, the Court held that the regulations violated the Act by failing to sufficiently evaluate whether a child's impairment was of comparable severity to that qualifying an adult for benefits.⁵³

In response to *Zebley*, the SSA revised the rules used to evaluate childhood disability claims, promulgating several new regulations.⁵⁴ The *Zebley* standard defined comparable severity in terms of the impact of an impairment or a combination of impairments on a child's ability to function "independently, appropriately and effectively in an age-appropriate manner."⁵⁵ The SSA created an Individualized Functional Assessment ("IFA") for children whose impairment, or combination of impairments, did not meet or equal the requirements of any listing.⁵⁶ The IFA evaluated the impact of the child's disability on his or her overall ability to function independently, appropriately and effectively in an age-appropriate manner.⁵⁷

The 1991 regulations created a three-step process to consider a child's functioning, taking the place of steps four and five in the adult determination process.⁵⁸ At each step, the SSA evaluated the impact of all the child's medically-determinable impairments on his or her

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See *id.* at 535-36.

⁵² See *Zebley*, 493 U.S. at 539-40; see also *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. 6407, 6408 (1997) (to be codified at 20 C.F.R. pts. 404, 416).

⁵³ See *Zebley*, 493 U.S. at 541.

⁵⁴ See *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. at 6408.

⁵⁵ 20 C.F.R. § 416.924(a) (repealed 1996), quoted in *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. at 6408-09; see *Zebley*, 493 U.S. at 541.

⁵⁶ See *Determining Disability for a Child Under Age 18*, 62 Fed. Reg. at 6409.

⁵⁷ See *id.*

⁵⁸ See *id.*

ability to function.⁵⁹ Part of that determination included an evaluation of the effects of the individual's symptoms and the side effects of medication, the nature of the impairment, the age of the child, the child's ability to be tested given his or her age, the child's ability to perform age-appropriate daily activities and other relevant factors.⁶⁰

The first step served as a threshold for further evaluation.⁶¹ It inquired into whether the "child had more than a slight abnormality, or combination of slight abnormalities, that caused a more than minimal limitation in a child's ability to function."⁶² The second step provided an expansion of the definition of "functional equivalence" and its relation to the listing of impairments.⁶³ Previously, a child had to demonstrate that an impairment met or *medically* equaled the severity of a listing.⁶⁴ Under the 1991 rules, a child could demonstrate a disability if the *functional* limitations of a child were equal to those limitations of a listed impairment.⁶⁵ This functional equivalence could be demonstrated "without regard to whether the listed impairment chosen for comparison was medically related to the child's impairment."⁶⁶

The final step applied to children who failed to demonstrate that an impairment met or medically equaled the severity of a listing, as required by the second step.⁶⁷ The SSA would evaluate the functional impact of a child's impairment through an IFA.⁶⁸ The IFA addressed the functional impact of a child's impairment by viewing it through broad areas of functioning known as domains and behaviors.⁶⁹ These domains, including cognition, communication and motor abilities, incorporated all areas of a child's functioning, including age-specific behaviors.⁷⁰ If a child's ability to function within these domains was substantially impaired, the child would be considered disabled because his or her impairment was of comparable severity to a qualifying

⁵⁹ See *id.*

⁶⁰ See *id.*

⁶¹ See Determining Disability for a Child Under Age 18, at 62 Fed. Reg. at 6409. The first step paralleled the severe impairment analysis of the second step of the adult analysis. See *id.*

⁶² *Id.*

⁶³ See *id.*

⁶⁴ See *id.* at 6408.

⁶⁵ See *id.* at 6409.

⁶⁶ See Determining Disability for a Child Under Age 18, at 62 Fed. Reg. at 6409.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

adult.⁷¹ Under the IFA system, children with extreme, marked and at times even moderate impairments could qualify for disability.⁷² The regulations gave examples of how a combination of several moderate impairments could constitute a substantial reduction in functioning, thus qualifying a child for disability.⁷³ For example, a child could qualify for benefits when suffering from a combination of moderate impairments that might include: a full scale IQ of seventy-four in cognitive functioning; limited age-appropriate relationships with peers and adults with occasional serious conflicts with others in social functioning; and the frequent inability to complete age-appropriate complex or simple tasks.⁷⁴

C. *New Standards Under the Personal Responsibility and Work Opportunity Reconciliation Act*

The most substantial change to the child disability laws enacted in 1996 under the PRWORA was the replacement of the "comparable severity" standard with a specific definition of childhood disability.⁷⁵ Under the new definition, a child's impairment or combination of impairments must cause more severe limitations than any of the previous regulations required.⁷⁶ PRWORA provides that the child must suffer from a medically-determinable physical or mental impairment that results in marked and severe functional limitations.⁷⁷ The new standard eliminates the IFA developed after the *Zebley* decision, which

⁷¹ See Determining Disability for a Child Under Age 18, at 62 Fed. Reg. at 6409.

⁷² See *id.* A child suffers from a marked limitation when he or she scores two standard deviations or more below the norm—but less than three standard deviations—on a standardized test used to measure functional abilities in a development area. See 20 C.F.R. § 416.926a(c)(3)(i) (1997). A child suffers from an extreme limitation in a development area when he or she scores three standard deviations or more below the norm on a standardized test aimed at measuring functional abilities. See *id.* Children between birth and age three who function at one-half of their chronological age or less will be determined to suffer from an extreme limitation. See *id.* The SSA will also find that children suffer from an extreme limitation if they demonstrate no meaningful functioning in a given area. See *id.* Under the 1991 regulations, a child functioning at more than two-thirds, but not more than three-fourths of his or her chronological age suffered from a moderate impairment. See 20 C.F.R. § 416.924e(b)(1) (repealed 1996).

⁷³ See Determining Disability for a Child Under Age 18, at 62 Fed. Reg. at 6409.

⁷⁴ See 20 C.F.R. § 416.924e(c)(2)(ii) (repealed 1996).

⁷⁵ See 42 U.S.C. § 1382c(a)(3)(C); Determining Disability for a Child Under Age 18, at 62 Fed. Reg. at 6409.

⁷⁶ Compare 20 C.F.R. § 416.926a(c) (1997) with § 416.924e(c)(2)(ii) (repealed 1996).

⁷⁷ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211-212, 110 Stat. 2105, 2188-92 (codified as amended at 42 U.S.C. § 1382c(a)(3)(C) (Supp. III 1997)).

assessed applicants on a more individualized basis.⁷⁸ Instead, children must meet the more restrictive medical listings.⁷⁹

In compliance with the PRWORA, the SSA has created a four-step procedure for determining childhood disability.⁸⁰ Similar to the old three-step procedure, children are first evaluated to determine whether they are employed.⁸¹ Children engaged in substantial gainful activity will not qualify for benefits.⁸² Further, the second step is similar to the previous regulations because it requires the SSA to determine whether the child has a severe impairment that causes more than minimal functional limitations.⁸³ The third step requires that the impairments or combination of impairments be expected to result in either death or last for a continuous period of at least twelve months.⁸⁴ The fourth step requires that the impairments result in a marked and severe functional limitation—moderate impairments are insufficient to qualify for benefits.⁸⁵

The SSA considers an impairment marked and severe if it falls into one of four categories.⁸⁶ In the first category, an impairment will be considered marked and severe if a limitation on a specific function (e.g. walking or talking), or a combination of limitations on specific functions, is the same as those of a listed impairment.⁸⁷ The impairments causing a limitation in this category must be linked to a specific listing.⁸⁸

The second category of impairments considered marked and severe consists of episodic impairments such as asthma.⁸⁹ A chronic impairment that is characterized by frequent illnesses or attacks, or by exacerbations and remissions, may qualify as a sufficiently severe impairment to entitle a child to benefits.⁹⁰ The SSA may evaluate children suffering from episodic impairments in terms of the specific

⁷⁸ See *id.* § 211(b)(2).

⁷⁹ See *id.* § 211(b)(1); Determining Disability for a Child Under Age 18, 62 Fed. Reg. at 6409–10; Robert L. Raper, *An Advocate's Guide to Childhood Disability Under the New Supplemental Security Income Standard*, 6 KY. CHILDREN'S RTS. J. 1, 4–5 (1998).

⁸⁰ See 20 C.F.R. § 416.924; see also Raper, *supra* note 79, at 4.

⁸¹ See 20 C.F.R. § 416.924(b) (1997).

⁸² See *id.*

⁸³ See *id.* § 416.924(c).

⁸⁴ See *id.* §§ 416.924(a), 416.925(a).

⁸⁵ See *id.* § 416.924(d).

⁸⁶ See 20 C.F.R. § 416.926a(b).

⁸⁷ See *id.* § 416.926a(b)(1).

⁸⁸ See Raper, *supra* note 79, at 7.

⁸⁹ See 20 C.F.R. § 416.926a(b)(3).

⁹⁰ See *id.*

functional limitations⁹¹ or through an evaluation of the child's functioning in broad areas of development.⁹² In the alternative, the SSA may compare the child's impairment with the listing for an impairment with similar episodic criteria to determine whether the impairment has an impact on the child's ability to function such that it is functionally equivalent to the severity of one of the listings.⁹³ Even if a child can function adequately between episodes, the child may still be entitled to benefits if the episodic impairment produces the same limitations as a listed impairment.⁹⁴

Children who suffer from functional limitations related to treatment or medication may qualify for disability benefits under the third category.⁹⁵ In instances where the length of the treatment or the treatment itself causes marked and severe functional limitations, a child may be entitled to benefits.⁹⁶ In these situations, the child is evaluated in relation to limitations on a specific function, or in broad areas of development or functioning, or the child's functional limitations are evaluated in comparison to the criteria in listings based on treatment or medication.⁹⁷

The fourth, and the most complex, category set forth in the new regulations examines six broad areas of a child's development or functioning.⁹⁸ When a child applies for benefits, the SSA examines the extent of his or her functional limitations in each of the areas affected by the impairment.⁹⁹ The SSA also examines the impact of the limitation in one area upon the child's development in other areas.¹⁰⁰ The effect of a child's impairment on physical and mental functioning is examined in light of the impairment itself, the age of the child and the ability of the child to be tested.¹⁰¹ In addition, the SSA will examine any help the child needs in light of its appropriateness given the child's age.¹⁰² The areas of development or functioning include: cognition/communication; motor skills; social skills; responsiveness to

⁹¹ See *id.* § 416.926a(b)(1).

⁹² See *id.* § 416.926a(b)(2). See *infra* notes 98–117 and accompanying text for a discussion on the broad areas of functioning.

⁹³ See 20 C.F.R. § 416.926a(b)(3).

⁹⁴ See *id.*

⁹⁵ See *id.* § 416.926a(b)(4).

⁹⁶ See *id.*

⁹⁷ See *id.*

⁹⁸ See 20 C.F.R. § 416.926a(b)(2).

⁹⁹ See *id.* § 416.926a(c)(1)(i).

¹⁰⁰ See *id.*

¹⁰¹ See *id.* § 416.926a(c)(2).

¹⁰² See *id.*

stimuli; personal development; and concentration, persistence or pace.¹⁰³ Not all of the six areas apply to each age group.¹⁰⁴ Rather, section 416.926a(c)(4) of the Code of Federal Regulations defines each area of development and assigns them to particular age groups.¹⁰⁵ For example, children from birth to age one may be evaluated based on their responsiveness to stimuli, whereas children between the ages of three and eighteen may be evaluated for their personal development and their ability to care for their own health and safety (e.g. feeding, dressing and bathing).¹⁰⁶ Furthermore, the regulation offers descriptions for age-appropriate behavior within each development area.¹⁰⁷ If a child has a marked disability in any two of these categories, or an extreme impairment in any one category, the SSA will determine the child to be disabled.¹⁰⁸

A child suffers from a marked limitation when he or she scores two standard deviations—but less than three standard deviations—below the norm on a standardized test used to measure functional abilities in a development area.¹⁰⁹ The SSA will also determine that a child from birth to age three who functions at one-half, but not more than two-thirds, of his or her chronological age within a development area suffers from a marked limitation.¹¹⁰ A marked limitation may also arise not only when an impairment limits several activities or functions, but also when a single impairment interferes seriously with the child's functioning.¹¹¹ Children between the ages of three and eighteen suffering from an impairment that is "more than moderate" and "less than extreme," will qualify as having a marked limitation.¹¹² No single moderate limitation, or even a combination of moderate limitations, will constitute a marked limitation.¹¹³

A child suffers from an extreme limitation in a development area when he or she scores three standard deviations or more below the norm on a standardized test aimed at measuring functional abili-

¹⁰³ See 20 C.F.R. § 416.926a(c)(4)(i)-(vi).

¹⁰⁴ See *id.* § 416.926a(c)(4)(iv)-(vi).

¹⁰⁵ See *id.* § 416.926a(c)(4)(i)-(vi).

¹⁰⁶ See *id.* § 416.926a(c)(4)(iv), (v).

¹⁰⁷ See *id.* § 416.926a(c)(5)(i)-(iv).

¹⁰⁸ See 20 C.F.R. § 416.926a(b)(2), (c).

¹⁰⁹ See *id.* § 416.926a(c)(3)(i)(A).

¹¹⁰ See *id.* § 416.926a(c)(3)(i)(B).

¹¹¹ See *id.* § 416.926a(c)(3)(i)(C).

¹¹² See *id.*

¹¹³ See 20 C.F.R. § 416.926a(c)(3)(i)(C); SOCIAL SECURITY ADMINISTRATION, OFFICE OF DISABILITY, PUB. NO. 64-075, CHILDHOOD DISABILITY TRAINING STUDENT MANUAL 15 (1997).

ties.¹¹⁴ Children between birth and age three who function at one-half of their chronological age level or less suffer from an extreme limitation.¹¹⁵ Furthermore, the SSA will find that children who demonstrate no meaningful functioning in a given area suffer from an extreme limitation.¹¹⁶ In addition, the SSA may find an extreme limitation in a function area by combining several limitations within that function area.¹¹⁷

II. THE REASONING BEHIND THE CHANGES TO SSI AND THE ANTICIPATED IMPACTS

One of the key reasons Congress passed the PRWORA was to rein in the skyrocketing number of children receiving disability benefits.¹¹⁸ Allegations that children with "mild" disorders received benefits and that some children were being "coached" to manipulate the process fueled public and Congressional sentiment against the old regulations.¹¹⁹ Studies by the SSA, the General Accounting Office ("GAO") and the Office of the Inspector General ("OIG"), however, indicated that the majority of the growth in the number of children receiving disability benefits resulted not from the IFA standards themselves, but from an increase in children with mental impairments who qualified under new and more inclusive listings in addition to the IFA.¹²⁰ Despite the results of these studies and their failure to find indications of significant abuse of the SSI program, Congress passed the PRWORA and mandated an end to the IFA determination.¹²¹

¹¹⁴ See 20 C.F.R. § 416.926a(c)(3)(ii)(A).

¹¹⁵ See *id.* § 416.926a(c)(3)(ii)(B).

¹¹⁶ See *id.* § 416.926a(c)(3)(ii)(C).

¹¹⁷ See *id.*

¹¹⁸ See *Review of Social Security Administration's Implementation of New SSI Childhood Disability Legislation: The Childhood Disability Program* (visited Oct. 3, 1998) <<http://www.ssa.gov/policy/child003.html>> [hereinafter *Childhood Disability Program*].

¹¹⁹ See *id.*

¹²⁰ See *id.* (citing GAO/HEHS, 94-225, RAPID RISE IN CHILDREN ON SSI DISABILITY ROLLS FOLLOWS NEW REGULATION (1994); OIG, A-03-94-02602, CONCERNS ABOUT PARTICIPATION OF CHILDREN WITH DISABILITIES IN THE SUPPLEMENTAL SECURITY INCOME PROGRAM (1994); SOCIAL SECURITY ADMINISTRATION, FINDINGS FROM THE STUDY OF TITLE XVI CHILDHOOD DISABILITY CLAIMS (1994); OIG, A-03-94-02603, SUPPLEMENTAL SECURITY INCOME: DISABILITY DETERMINATIONS FOR CHILDREN WITH MENTAL IMPAIRMENTS (1995)).

¹²¹ See *Childhood Disability Program*, *supra* note 118.

A. Growth in the Disability Rolls

In the early 1990s, the number of children receiving disability benefits increased dramatically.¹²² Between 1990 and 1996, the number of children receiving SSI benefits increased from approximately 350,000 to more than 965,000.¹²³ Roughly one third of the children receiving benefits during this time became eligible under the IFA procedure, enacted after *Zebley*.¹²⁴

In the ten years preceding the *Zebley* decision, however, the number of children receiving benefits increased modestly, rising from 228,000 to 340,000.¹²⁵ Between 1990 and 1996, the years between *Zebley* and the passage of the PRWORA, the number of children receiving benefits nearly tripled.¹²⁶ Further, between 1990 and 1996, the costs of the childhood disability program rose from \$1.3 billion to over \$5 billion.¹²⁷

The increase in the number of children receiving disability benefits did not occur solely because of the new standards.¹²⁸ Updated listings for evaluating mental disorders in children were published in 1990, making benefits available to some children previously ineligible for disability coverage.¹²⁹ A Congressional requirement that the SSA make outreach efforts to locate children who qualified for benefits and a rise in the number of children living below the poverty line also contributed to the increase.¹³⁰

As a result of the new regulations passed in accordance with the PRWORA, the SSA anticipates saving \$4.7 billion to SSI programs over a six-year period.¹³¹ An additional savings of \$455 million is expected in Medicaid expenditures before 2002.¹³² Further savings are expected in the form of reduced Medicaid program outlays for states.¹³³

¹²² See *id.*

¹²³ See Social Security Administration, *A Factsheet from Social Security* (visited Oct. 3, 1998) <<http://www.ssa.gov/pubs/wrchild.html>> [hereinafter *Social Security Factsheet*].

¹²⁴ See *id.*; *Sullivan v. Zebley*, 493 U.S. 521, 541 (1990).

¹²⁵ See *Zebley*, 493 U.S. at 541; *Childhood Disability Program*, *supra* note 118.

¹²⁶ See *Zebley*, 493 U.S. at 541; *Childhood Disability Program*, *supra* note 118.

¹²⁷ See *Childhood Disability Program*, *supra* note 118.

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. 6407, 6417 (1997).

¹³² See *id.*

¹³³ See *id.*

B. Many Children Impacted by Reforms

In December of 1996, the SSA sent letters notifying over 263,000 children that their cases would be reviewed under the new standards.¹³⁴ The PRWORA required that the SSA complete the reassessments within one year of its passage.¹³⁵ The Balanced Budget Act of 1997 extended this deadline to February of 1998.¹³⁶ Under these timelines, no child lost benefits before July 1, 1997, even if the SSA completed a child's redetermination before that date.¹³⁷

Initially, the SSA anticipated that 135,000 children would ultimately lose disability benefits under the new definition and regulations.¹³⁸ Revised estimates suggest that it is more likely that 100,000 children will lose their monthly benefits.¹³⁹ The newer estimates anticipate that upon a second review of 45,000 cases, 17,000 will be reopened with benefits restored.¹⁴⁰ Additionally, the Commissioner of Social Security, Kenneth Apfel, announced in December of 1997 that those children who had lost benefits and had not appealed would have a second opportunity to do so.¹⁴¹ This opportunity to appeal was also expected to result in renewed benefit payments to some children initially terminated from the rolls.¹⁴²

C. Further Impacts on Children Through the Redetermination Process

The PRWORA required the Commissioner of the SSA to redetermine the eligibility of any individual under eighteen whose benefits might be terminated by the new legislation.¹⁴³ The Act also requires the Commissioner to perform eligibility redeterminations every three

¹³⁴ See *Social Security Factsheet*, *supra* note 123.

¹³⁵ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211(d)(2), 110 Stat. 2105, 2190-91 (codified as amended at 42 U.S.C. § 1382c(a)(3)(H) (Supp. III 1997)).

¹³⁶ See Social Security Administration, *Review of Social Security Administration's Implementation of New SSI Childhood Disability Legislation: The Executive Summary* (visited Oct. 3, 1998) <<http://www.ssa.gov/policy/child002.html>> [hereinafter *Executive Summary*].

¹³⁷ See *Social Security Factsheet*, *supra* note 123.

¹³⁸ See *id.*

¹³⁹ See *Executive Summary*, *supra* note 136.

¹⁴⁰ See Social Security Administration, *Review of Social Security Administration's Implementation of New SSI Childhood Disability Legislation: Conclusion* (visited Oct. 3, 1998) <<http://www.ssa.gov/policy/child009.html>>.

¹⁴¹ See Social Security Administration, *SSA Will Review 45,000 Cases of Children who had SSI Benefits Ceased, Offer Second Chance for Appeal to All* at 1 (visited Oct. 3, 1998) <http://www.ssa.gov/press/childhood_press.html>.

¹⁴² See *id.*

¹⁴³ See 42 U.S.C. § 1382c(a)(3)(H) (Supp. III 1997).

years if the child suffers from an impairment that is likely to improve.¹⁴⁴ Additionally, all children receiving benefits must undergo a disability redetermination within one year of their eighteenth birthday to determine whether their impairments meet the criteria for adult disability benefits.¹⁴⁵

III. THE NEW REGULATIONS FAIL TO CONSIDER THE TOTALITY OF A CHILD'S IMPAIRMENTS IN MAKING DISABILITY DETERMINATIONS

The new regulations promulgated by the SSA do not acknowledge the potentially severe impact of moderate impairments on a child's ability to function.¹⁴⁶ The second step of the evaluative process requires that a child demonstrate more than a slight abnormality in order to qualify for benefits.¹⁴⁷ This severity test serves as a floor to the level of impairment necessary to demonstrate a disability.¹⁴⁸ Under the new regulations, however, a large gap exists between the floor set by the severity test and the severity required to qualify for benefits.¹⁴⁹ By requiring that a child either meet a medical listing or demonstrate two marked functional impairments or one extreme functional impairment, the new regulations ignore a multitude of moderate impairments that, when taken in combination, can become debilitating.¹⁵⁰ For instance, the SSA recently denied benefits to Ivan, a ten-year old, who suffers from mental retardation, ADHD, ODD and enuresis.¹⁵¹ These impairments, although individually not necessarily severe enough to be debilitating, in combination seriously impair Ivan's ability to function.¹⁵² Chronologically old enough to be in fifth grade, Ivan is currently completing the third grade and performing reading

¹⁴⁴ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211(a), 110 Stat. 2105, 2188-89 (codified as amended at 42 U.S.C. § 1382c(a)(3)(H) (Supp. III 1997)).

¹⁴⁵ See *id.* § 212(b).

¹⁴⁶ See 20 C.F.R. § 416.926a(c)(3)(i)(C) (1997).

¹⁴⁷ See *id.* § 416.924(c).

¹⁴⁸ See *id.*

¹⁴⁹ Compare 20 C.F.R. § 416.924(c) (explaining Step Two of the disability determination process), with § 416.924(d) and § 416.926a(c) (explaining functional equivalence test and requirement of one extreme or two marked impairments to qualify for benefits).

¹⁵⁰ See 20 C.F.R. §§ 416.924(d), 416.926a(c).

¹⁵¹ See Stein et al., *supra* note 1, at 10. Ivan was initially denied benefits by the state Disability Determination Service ("DDS") in May 1997. See *id.* On reconsideration, the state DDS denied his application again in July 1997. See *id.*

¹⁵² See *id.*

and arithmetic at a pre-first grade level.¹⁵³ Ivan has failed to be promoted to the next grade twice.¹⁵⁴ He has serious difficulties following directions, is easily frustrated and has a history of impulsive and violent behaviors at home and at school.¹⁵⁵ Despite his functional difficulties, which require therapeutic support and behavioral interventions, Ivan's impairments were considered moderate, not marked, and thus, he did not qualify for benefits.¹⁵⁶

Under the regulations first established in response to *Zebley*, moderate impairments played an important role in the IFA.¹⁵⁷ A child suffering from moderate impairments in three areas, or a marked impairment in one area and a moderate impairment in another, would qualify for benefits.¹⁵⁸ A child functioning at more than two-thirds, but not more than three-fourths, of his or her chronological age suffered from a moderate impairment.¹⁵⁹ Under the 1996 regulations, however, moderate impairments are not even defined because the administration will not count any number of moderate impairments toward a finding of disability.¹⁶⁰

The IFA regulations accounted for the individuality of the child as he or she grew older.¹⁶¹ Under the IFA, the definition of a moderate impairment was more flexible to accommodate the varying needs of older children and included impairments that ranged from those just shy of marked to an impairment slightly more debilitating than a mild impairment.¹⁶² The IFA defined disabilities in younger children in terms of developmental delay.¹⁶³ Evaluations of developmental delays looked less at the context of the child and more at the medical or functional development compared to the general population of children that age.¹⁶⁴ For older children, the guidelines were less precise because they generally described disabilities in terms of specific kinds of age-appropriate activities or abnormal behaviors.¹⁶⁵ Determinations thus required an individualized examination into the context sur-

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See Stein et al., *supra* note 1, at 10.

¹⁵⁷ See 20 C.F.R. § 416.924e(c)(2)(i)-(ii) (repealed 1996).

¹⁵⁸ See *id.*

¹⁵⁹ See *id.* § 416.924e(b)(1).

¹⁶⁰ See *id.* § 416.926a(c); SOCIAL SECURITY ADMINISTRATION, *supra* note 113, at 15.

¹⁶¹ See 20 C.F.R. § 416.924e(b) (repealed 1996).

¹⁶² See *id.* § 416.924e(b)(2).

¹⁶³ See *id.* § 416.924e(b)(2)(i).

¹⁶⁴ See *id.* § 416.924e(b).

¹⁶⁵ See *id.* § 416.924e(b)(2).

rounding that child's behavior, including performance in school, work or other relevant settings.¹⁶⁶ It required careful evaluation and judgment in each individual case, taking into account the child's age and other relevant factors.¹⁶⁷ The IFA determinations for younger children were less individualized than those of older children.¹⁶⁸

The current evaluative scheme results in a less individualized assessment of children applying for benefits. The scheme fails to consider the totality of a child's impairments by ignoring any moderate impairments the child possesses. These regulations, therefore, conflict with the express provision of the Act as interpreted by the courts and with the stated policy of the SSA.

A. *The Courts Require Consideration of Combination of Impairments*

A series of cases decided in the 1980s interpreted the Act to require the SSA to consider the combined effects of an individual's various impairments when evaluating an adult claimant for disability.¹⁶⁹ The courts ruled that the SSA must consider the totality of a claimant's physical and mental impairments to comply with the statutory requirements of the Act.¹⁷⁰ With this series of cases, the courts overturned the SSA's policy between 1980 and 1984 of refusing to consider non-severe impairments in totality.¹⁷¹

In 1984, in *Bowen v. Heckler*, the United States Court of Appeals for the Eleventh Circuit held that where a claimant has alleged a multitude of impairments, a claim for disability benefits may exist even though none of the impairments considered individually is disabling.¹⁷² The claimant, who suffered from poor eye-hand coordination, low-back pain, leg pain and a learning handicap, sued the SSA after being denied benefits.¹⁷³ The Eleventh Circuit remanded the case for entry of an order granting benefits to appellant.¹⁷⁴ Noting several previous cases that served as persuasive authority, the court stated that addressing the combined effects of appellant's impair-

¹⁶⁶ See 20 C.F.R. § 416.924e(b) (repealed 1996).

¹⁶⁷ See *id.* § 416.924e(b)(1).

¹⁶⁸ See *id.* § 416.924e(b).

¹⁶⁹ See *Johnson v. Sullivan*, 922 F.2d 346, 352 (7th Cir. 1989); *McDonald v. Secretary of Health and Human Servs.*, 795 F.2d 1118, 1127 (1st Cir. 1986); *Bowen v. Heckler*, 748 F.2d 629, 635 (11th Cir. 1984).

¹⁷⁰ See *Johnson*, 922 F.2d at 352; *McDonald*, 795 F.2d at 1127; *Bowen*, 748 F.2d at 635.

¹⁷¹ See *Johnson*, 922 F.2d at 352; *McDonald*, 795 F.2d at 1127; *Bowen*, 748 F.2d at 635.

¹⁷² See 748 F.2d at 635.

¹⁷³ See *id.* at 630.

¹⁷⁴ See *id.* at 637.

ments was a crucial issue, neglected by the Secretary and the administrative review process.¹⁷⁵ In addition, the court emphasized the importance of evaluating the totality of physical and mental impairments in a disability determination.¹⁷⁶ Thus, the court held that the SSA must consider the effect of all alleged impairments in determining disability eligibility.¹⁷⁷

In 1986, in *McDonald v. Secretary of Health and Human Services*, the United States Court of Appeals for the First Circuit held that various physical, mental and psychological defects, each non-severe in and of itself, might make it impossible for a claimant to work when combined, potentially qualifying the applicant for disability benefits.¹⁷⁸ In *McDonald*, the United States District Court for Massachusetts certified a class action, of which the plaintiff was a named member, for all Massachusetts disability applicants who had been denied benefits under "Step Two" of the evaluative process on the ground that they did not have a severe impairment.¹⁷⁹ The action challenged the severity test, prescribed in Step Two, for determining eligibility for disability benefits and the policy of the Secretary for not reevaluating the claims of applicants whose non-severe, multiple impairments were not considered in combination under previous regulations.¹⁸⁰

The district court ruled in favor of the plaintiff, holding the severity regulation invalid and ordering the SSA to consider the combined effects of all impairments when evaluating claims for disability.¹⁸¹ On the severity issue, the First Circuit ruled that the Step Two regulation was a valid exercise of the Secretary's regulatory powers.¹⁸² The court held that the Secretary's requirement that the applicant demonstrate a severe impairment constituted nothing more than a de minimis screening policy aimed at excluding frivolous claims.¹⁸³

On the second issue, concerning the combination of non-severe impairments, the appellate court upheld the district court.¹⁸⁴ The

¹⁷⁵ See *id.* at 634-35; see generally *Brenem v. Harris*, 621 F.2d 688 (5th Cir. 1980); *Strickland v. Harris*, 615 F.2d 1103 (5th Cir. 1980); *Farley v. Celebrezze*, 315 F.2d 704 (3d Cir. 1963).

¹⁷⁶ See *Bowen*, 748 F.2d at 635.

¹⁷⁷ See *id.*

¹⁷⁸ See 795 F.2d at 1127.

¹⁷⁹ See *id.* at 1120-21.

¹⁸⁰ See *id.* at 1121.

¹⁸¹ See *id.*; *McDonald v. Heckler*, 624 F. Supp. 375, 380 (D. Mass. 1985).

¹⁸² See *McDonald*, 795 F.2d at 1122.

¹⁸³ See *id.*

¹⁸⁴ See *id.* at 1127.

court noted that the refusal to acknowledge combinations of non-severe impairments was as illogical as a mathematician attempting to prove that because two does not equal four, two plus two could never equal four.¹⁸⁵ The court recognized that the Act itself speaks in terms of multiple impairments or abnormalities and, thus, the Secretary's refusal to acknowledge combinations of impairments was inconsistent with the Act.¹⁸⁶ Accordingly, although the court upheld the severity regulation, it overturned the SSA's policy of not considering the combined effect of non-severe impairments in determining disability.¹⁸⁷

In 1989, in *Johnson v. Sullivan* ("Johnson II"), the United States Court of Appeals for the Seventh Circuit held that the SSA's no-combination policy was arbitrary and capricious.¹⁸⁸ In *Johnson II*, the court reheard a case originally decided in 1985.¹⁸⁹ *Johnson v. Heckler* ("Johnson I") was a class action suit filed in 1983 challenging the SSA's Step Two severity regulation and the no-combination policy.¹⁹⁰ In *Johnson I*, the Seventh Circuit rejected both the severity regulation and the no-combination policy.¹⁹¹ After the United States Supreme Court approved the severity regulation in *Bowen v. Yuckert*, the Secretary challenged the entire decision in *Johnson I* and the case was reheard by the district court.¹⁹² The district court refused to reverse the determination that the no-combination policy was inconsistent with the Act.¹⁹³ The Seventh Circuit affirmed the district court decision, and reasserted its holding in *Johnson I*.¹⁹⁴ Thus, based upon the plain language of the Act and the legislative history of subsequent clarifying amendments passed by Congress, the court held the no-combination policy invalid.¹⁹⁵

¹⁸⁵ See *Dixon v. Heckler*, 589 F. Supp. 1494, 1508 (S.D.N.Y. 1984), quoted in *McDonald*, 795 F.2d at 1127.

¹⁸⁶ See *McDonald*, 795 F.2d at 1122, 1127.

¹⁸⁷ See *id.* at 1127.

¹⁸⁸ See 922 F.2d at 352.

¹⁸⁹ See *id.* at 350; *Johnson v. Heckler*, 769 F.2d 1202 (7th Cir. 1985).

¹⁹⁰ See 769 F.2d at 1204.

¹⁹¹ See *id.* at 1212, 1215.

¹⁹² See *Bowen v. Yuckert*, 482 U.S. 137, 152-54 (1987); *Johnson*, 922 F.2d at 350.

¹⁹³ See *Johnson*, 922 F.2d at 349-50; *Johnson v. Sullivan*, 697 F. Supp. 346, 352 (N.D. Ill. 1988).

¹⁹⁴ See *Johnson*, 922 F.2d at 350, 352.

¹⁹⁵ See *id.* at 351-52.

B. Ignoring Moderate Impairments Violates the Social Security Act and Contravenes the Stated Policy of the SSA

The SSA maintains that it has a longstanding policy to consider all of the effects of a child's impairments in assessing whether that child is disabled.¹⁹⁶ With the exception of the four-year period between 1980 and 1984, the SSA has considered non-severe impairments in combination since the 1967 inception of social security disability benefits.¹⁹⁷ In publishing the 1996 regulations, the SSA stated that it was adding language to the regulations to make this policy clear.¹⁹⁸ The regulations now state that in determining disability for children, the SSA will consider all relevant evidence and consider the *combined* effects of all impairments upon the child's overall health and functioning.¹⁹⁹

The Act provides that in determining whether an individual's physical or mental impairment(s) qualifies for benefits, the SSA must consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered separately, would be of sufficient severity.²⁰⁰ The statute states:

(G) In determining whether an individual's . . . impairment or impairments are of a sufficient medical severity that . . . [they] could be the basis of eligibility under this section, the Commissioner of Social Security shall *consider the combined effect of all of the individual's impairments* without regard to whether any such impairment, if considered separately, would be of such severity. . . . [T]he combined impact of the impairments shall be considered throughout the disability determination process.²⁰¹

This portion of the statute pertains to both adult and child disability provisions.²⁰² Under the current regulations, however, if a child's impairment falls within a broad area of functioning and is not "marked"

¹⁹⁶ See *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. 6407, 6411 (1997) (explaining 20 C.F.R. § 416.906).

¹⁹⁷ See *Johnson*, 922 F.2d at 350; *McDonald*, 795 F.2d at 1120; 20 C.F.R. § 404.1522 (repealed 1984).

¹⁹⁸ See *Determining Disability for a Child Under Age 18*, at 62 Fed. Reg. at 6411 (explaining 20 C.F.R. § 416.906).

¹⁹⁹ See 20 C.F.R. § 416.924(a), (f) (1997).

²⁰⁰ See 42 U.S.C. § 1382c(a)(3)(G) (Supp. III 1997).

²⁰¹ See *id.* (emphasis added).

²⁰² See *id.* § 1382c.

or "extreme," it does not figure into the SSA's determination of disability.²⁰³ Thus, a child suffering from numerous moderate disabilities, ranging across broad areas of functioning and resulting in significant overall functional limitations, will not qualify for benefits under the current scheme.²⁰⁴

Johnson, Bowen and McDonald focused on the SSA policy that existed from 1980 to 1984, which refused to acknowledge adult impairments in combination.²⁰⁵ Although the SSA's refusal to consider moderate functional limitations for children is less explicit and applies to children rather than adults, the logic behind these decisions is still applicable.²⁰⁶ The SSA's failure to acknowledge moderate disabilities in children is as egregious as its prior refusal to address combinations of impairments in adults.²⁰⁷ The end result of such a policy is that children with extreme disabilities are denied access to disability benefits.

McDonald reasoned that although a single non-severe impairment does not meet the disability requirements, it does not follow that a combination of such impairments could not qualify an applicant for benefits.²⁰⁸ The current SSA regulations fail to recognize that non-marked and non-extreme impairments could, in combination, render a child disabled within the meaning of the statute.²⁰⁹ Instead, the regulations currently suggest that simply because a single moderate impairment is not sufficient to qualify a child for benefits, no combination of moderate impairments could result in a disability determination.²¹⁰ For instance, George, an eight-year old with a history of borderline intellectual functioning, ADHD and otitis media—a recurring condition of liquid in the inner ear—was recently denied benefits.²¹¹ George struggles in school, is disruptive, falls out of his chair and throws temper tantrums.²¹² He appears to be suffering from

²⁰³ See 20 C.F.R. § 416.926a(c).

²⁰⁴ See *id.*

²⁰⁵ See *Johnson*, 922 F.2d at 348; *McDonald*, 795 F.2d at 1126; *Bowen*, 748 F.2d at 635.

²⁰⁶ See *Johnson*, 922 F.2d at 348; *McDonald*, 795 F.2d at 1126; *Bowen*, 748 F.2d at 635; 20 C.F.R. § 416.926a(c).

²⁰⁷ See *Johnson*, 922 F.2d at 348; *McDonald*, 795 F.2d at 1126; *Bowen*, 748 F.2d at 635; 20 C.F.R. § 416.926a(c).

²⁰⁸ See 795 F.2d at 1127.

²⁰⁹ See 20 C.F.R. § 416.926a(c).

²¹⁰ See *id.*

²¹¹ See Stein et al., *supra* note 1, at 11. George was initially denied benefits in October of 1997. See *id.* On reconsideration, the DDS again denied George's application in April of 1998. See *id.*

²¹² See *id.*

a developmental regression that worsens as he ages and does not respond to medication or therapeutic behavioral interventions.²¹³ The money from the SSI program could be used by children like George to pay for additional therapy, medication and educational assistance.²¹⁴ The problem is that no two of George's impairments rise to the level of marked disabilities.²¹⁵ Because George's impairments are only considered moderate, he was not found disabled.²¹⁶ Thus, children like George who not only suffer from borderline intellectual functioning, ADHD and otitis media, but who are also affected with a mild form of asthma, speech and language delays, ODD and diabetes, will still not qualify for disability benefits because all of their impairments are considered moderate.²¹⁷ Like the mathematician who argues that two and two cannot equal four because two does not equal four, the SSA regulations defy common sense. Furthermore, the regulations violate the Act, neglecting the holdings of the *Johnson*, *Bowen* and *McDonald* courts.²¹⁸

The regulations are also inconsistent in their treatment of individuals with moderate impairments, resulting in the SSA granting benefits to some while denying them to others with similar disabilities. When a child demonstrates that his or her impairment meets a listing requirement, the SSA considers the combined effects of all of a child's impairments—even moderate impairments—on the child's overall health and functioning.²¹⁹ A child with a listed disability will automatically qualify for benefits.²²⁰ Not all of the listings require marked limitations in two functioning areas, or a single extreme limitation; rather, the listings look to the total impact of a child's impairments.²²¹ Therefore, in some instances moderate impairments can meet a listing and thus, the regulations governing disability determinations acknowledge that a child with marked impairments in fewer than two domains and without an extreme impairment may be

²¹³ See *id.*

²¹⁴ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 212(a), 110 Stat. 2105, 2192-93 (codified as amended at 42 U.S.C. § 1382c(H)(ii)(II)) (requires representative's payee to use benefits for treatment); Stein et al., *supra* note 1, at 11.

²¹⁵ See 20 C.F.R. § 416.926a(c)(3) (1997); Stein et al., *supra* note 1, at 11.

²¹⁶ See 20 C.F.R. § 416.926a(c)(3); Stein et al., *supra* note 1, at 11.

²¹⁷ See 20 C.F.R. § 416.926a(c)(3); Stein et al., *supra* note 1, at 11.

²¹⁸ See *Johnson*, 922 F.2d at 352; *McDonald*, 795 F.2d at 1127; *Bowen*, 748 F.2d at 635.

²¹⁹ See 20 C.F.R. § 416.924(a).

²²⁰ See *id.*

²²¹ See *id.* § 416.925(b)(2).

sufficiently disabled to qualify for benefits.²²² For children not meeting a listing, however, the totality of their disability can never be fully evaluated because the new regulations only consider functional impairments that qualify as marked or extreme and ignore those that fall within the moderate impairment category.²²³

Additionally, the regulations that ignore moderate impairments contravene the stated policy behind the Act that looks to the totality of a person's impairments in determining whether he or she qualifies for benefits.²²⁴ The policy of refusing to combine non-severe impairments in adults was an explicit policy, whereas the current decision to neglect the moderate impairments of children is not explicitly stated within the regulations.²²⁵ The Childhood Disability Training Manual published by the SSA, however, expressly states that moderate limitations cannot be "added-up" to equal a marked limitation.²²⁶ Although the failure to acknowledge moderate disabilities is more the practical result of the current regulation construct than an explicit policy to disregard such impairments, the result remains a failure to take into account the total effect of a child's impairments. The courts refused to accept such a request when it applied to adults in *Bowen*, *Johnson* and *McDonald*.²²⁷ For example, the applicant in *Bowen* demonstrated that several non-severe impairments, when combined, can result in a sufficiently severe disability to prevent an adult from working.²²⁸ A child could easily suffer from similar impairments, creating a substantial inability to function within a school or social setting. Under the current regulations, however, if only one of those impairments rises to a marked level and the remainder reach only moderate levels of impairment, that child will not receive benefits.²²⁹ As a result, the totality of the child's disability is never considered and the child may not receive the treatment or medication the child could have otherwise obtained with benefits.²³⁰

²²² See *id.*

²²³ See *id.*

²²⁴ See Determining Disability for a Child Under Age 18, at 62 Fed. Reg. 6407, 6411 (1997).

²²⁵ See 20 C.F.R. § 416.926a(c); 20 C.F.R. § 404.1522 (repealed 1984).

²²⁶ See SOCIAL SECURITY ADMINISTRATION, *supra* note 113, at 15.

²²⁷ See *Johnson*, 922 F.2d at 352; *McDonald*, 795 F.2d at 1127; *Bowen*, 748 F.2d at 635.

²²⁸ See 748 F.2d at 635.

²²⁹ See 20 C.F.R. § 416.926a(c).

²³⁰ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, § 212(a)(ii)(II), 110 Stat. 2105, 2192 (codified as amended at 42 U.S.C. § 1382c(H)(ii)(II) (Supp. III 1997)). During a child's eligibility redetermination, the PRWORA requires the representative payee of the child to present evidence at the time of

IV. THE NEW CHILDHOOD DISABILITY REGULATIONS DRAW ARBITRARY DISTINCTIONS AND NEGLECT THE LEGISLATIVE INTENT BEHIND SSI

Proponents of the current SSI regulations may argue that the regulations remain true to the letter of the PRWORA and uphold the legislative intent of that statute.²³¹ The conference report that accompanied the PRWORA indicates that the conferees intended needy children with severe disabilities to qualify for SSI.²³² Although the conference report indicates that a child needs at least two marked impairments to qualify for disability, the PRWORA standard itself does not prevent children with multiple moderate disabilities from qualifying.²³³ To qualify, children suffering from multiple moderate impairments must demonstrate that they suffer from a severe disability that prevents gainful activity.²³⁴ In so doing, children with multiple moderate impairments would probably demonstrate that two marked impairments were equivalent to three or more moderate impairments in functional shortcomings.²³⁵ If the purpose of childhood disability benefits is to provide for needy children with severe disabilities, it would seem arbitrary to deny benefits to a child suffering from multiple impairments simply because the child suffers from three slightly less severe impairments rather than two marked impairments. A child with multiple moderate impairments may be no less disabled than one with two marked impairments, and thus meets the Congressional standards to qualify for disability benefits under the PRWORA.²³⁶

A brief examination of the examples of Matthew, Ivan and George will highlight this discrepancy.²³⁷ Although each of their impairments may fall short of a marked designation, the impairments of each are severe enough in combination to significantly interfere with

the determination review that the child is, and has been, receiving treatment considered medically necessary and available for the condition that was the basis of providing SSI benefits. *See id.*

²³¹ *See* Determining Disability for a Child Under Age 18, at 62 Fed. Reg. 6407, 6410 (1997).

²³² *See* H.R. CONF. REP. NO. 104-725, at 328 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716.

²³³ *See id.*; Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, § 211(a), 110 Stat. 2105, 2188 (codified as amended at 42 U.S.C. § 1382c(a)(3)(H) (Supp. III 1997)).

²³⁴ *See* 20 C.F.R. § 416.924.

²³⁵ *See id.* § 416.924e (repealed 1996).

²³⁶ *See* H.R. CONF. REP. NO. 104-725, *reprinted in* 1996 U.S.C.C.A.N. at 2716.

²³⁷ *See supra* notes 1-9, 151-56 and 211-17 and accompanying text.

each child's ability to function.²³⁸ What the individual impairments lack in severity is made up for by the total combined effect the impairments have on these children and others like them.

Furthermore, the current regulations create a situation in which a child may be denied benefits while an adult suffering from the same impairments would qualify. The possibility that a child just shy of her eighteenth birthday would be denied benefits and then qualify only days later under the adult standard demonstrates the arbitrariness of the current differences between the adult and childhood disability regulations. In *Zebley*, the United States Supreme Court expressed concern over this possibility.²³⁹ The SSA should heed that concern and work to eliminate the possibility of disparate treatment between adult and child applicants.

Moreover, drawing an arbitrary line between multiple moderate impairments and a lesser number of more severe impairments does not serve the purposes of the SSI program. The legislative history of the original statute granting disability benefits indicates that Congress intended to provide for those who could not provide for themselves.²⁴⁰ The House Report states: "[i]t is . . . [the] committee's belief that disabled children who live in low-income households are certainly among the most disadvantaged of all Americans and that they are deserving of special assistance in order to help them become self-supporting members of our society."²⁴¹ Children suffering from multiple moderate impairments can experience the same difficulties functioning in society as those with fewer, more pronounced disabilities. Matthew, Ivan and George each struggle significantly to function in their environments.²⁴²

Congress intended to provide a source of benefits to the aged, blind and disabled whose income and resources are below a specified level.²⁴³ Through the Social Security system, Congress further intended to provide funding and opportunities for those unable to work or in need of rehabilitation. Congress aimed to help them escape the dependent situations their disabilities create.²⁴⁴ Denying those with

²³⁸ See Stein et al., *supra* note 1.

²³⁹ See *Sullivan v. Zebley*, 493 U.S. 521, 536 (1990).

²⁴⁰ See H.R. REP. NO. 92-231, at 603 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4989, 5133-34.

²⁴¹ *Id.*

²⁴² See *supra* notes 1-9, 151-56, and 211-17 and accompanying text.

²⁴³ See 1972 U.S.C.C.A.N. at 5133-34.

²⁴⁴ See *id.* at 5133.

severe disabilities the benefits available under SSI frustrates both of these purposes.²⁴⁵ It limits the ability of poor, disabled children to gain access to treatment and education that could assist them in coping with and overcoming their disabilities.

Furthermore, granting disability benefits to children suffering from multiple moderate impairments does not provide a handout to non-needy children. Rather, it opens the door to those severely disabled children not engaging in gainful activities.²⁴⁶ Failing to grant benefits to these children alienates them from society and places the burden of caring for them on already poor families. Social Security regulations provide that a child's representative must use a part of the child's SSI benefits to obtain treatment for that child.²⁴⁷ Because only relatively poor families receive SSI benefits, denying those benefits to children with multiple moderate disorders most likely would result in a lack of treatment. This not only creates an immediate problem for the child who never receives treatment, but also creates a long-term problem. Lack of treatment could result in some children's failure to participate in educational and rehabilitative programs necessary for them to become self-supporting adults. Children given proper treatment and rehabilitation have a better opportunity to become self-supporting adults than those denied treatment in their formative years. Waiting until an individual turns eighteen to provide them with assistance in obtaining treatment may prove too late to prevent long-term dependence on state funding.

CONCLUSION

The Supreme Court made clear in *Zebley* that difficulties in administering a fair policy did not excuse the SSA from implementing fair standards, consistent with the stated policy of the agency. Consistent with *Zebley*, *Johnson*, *Bowen* and *McDonald*, the SSA needs to reconstruct its regulations to conform with both the letter and spirit of the Act by providing benefits to those children suffering from multiple moderate impairments that render them disabled. Not only do the current regulations violate the requirement that the Act look at non-

²⁴⁵ See *id.*

²⁴⁶ Both the employment regulation and the severity regulation remain intact in the assessment of childhood disability as steps one and two of the process. See 20 C.F.R. § 416.924 (1997).

²⁴⁷ See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-93, § 212(a)(ii)(II), 110 Stat. 2105, 2192 (codified as amended at 42 U.S.C. § 1382c(H)(ii)(II) (Supp. III 1997)).

severe impairments in combination, but the regulations are internally inconsistent because they fail to consider the totality of the applicant's impairments. Furthermore, the regulations promote bad public policy and are contrary to the legislative intent of the Act. The SSA cannot hide behind the difficulties of creating a manageable regulatory scheme that acknowledges the potential role of moderate impairments in establishing a disability. Rather, the SSA must return to a full consideration of the totality of a child's impairments in determining disability benefits.

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