



CERIN M. LINDGRENSAVAGE

**MODEL FAIRNESS AND ADVOCACY FOR
INTERESTED RECIPIENTS (FAIR) ACT:
ENSURING FAIR AND BALANCED TREATMENT
OF AMERICANS PARTICIPATING IN
SOCIAL SECURITY ACT PROGRAMS THROUGH
LEGAL REPRESENTATION AND COUNSEL**

August 28, 2014

Abstract: This white paper was selected as the winning entry for the 2014 NYU Journal of Legislation & Public Policy Legislation Competition, and aims to explain to advocates and provide them tools to use when talking to legislators about the attached draft bill. The Legislation Competition asked participants to develop and submit model state legislation to address a specific policy issue identified by the Legislation Competition Committee and further submit a white paper to supplement the draft bill. Entries were reviewed by the chairs of the Legislation Competition Committee who rated entries on criteria such as originality, creativeness, quality of submission, and viability of proposal. The first section is a quick “leave behind” one-page document to help advocates briefly explain the issue the bill is trying to address, why the issue matters, and a describe the proposed law. The rest of the white paper provides additional information, including an example of how the bill might actually work, should it become law.

Author: J.D. Candidate, New York University School of Law, 2016; Staff Editor, *NYU Journal of Legislation & Public Policy*; Legislation Competition 2014 Winner



MODEL FAIRNESS AND ADVOCACY FOR INTERESTED RECIPIENTS (FAIR) ACT

Ensuring fair and balanced treatment of Americans participating in Social Security Act programs through legal representation and counsel.

Cerin M. Lindgrensavage

MILLIONS OF AMERICANS NEED HELP GETTING LEGAL HELP



Each year fewer than one in five low-income people with civil legal problems obtain the legal assistance they need.¹ For middle-income individuals, two- to three-fifths of their needs remain unmet.² Legal aid programs turn away nearly one million cases each year from people who need help.³

FAILING TO PROVIDE LEGAL REPRESENTATION IS UNFAIR AND UN-AMERICAN

When Americans across our country hold their hand over their hearts to pledge allegiance to our nation's flag, they declare that ours is a nation with "liberty and justice for all."

In the landmark *Gideon v. Wainwright* decision, the Supreme Court required states to provide counsel for criminal defendants.⁴ This requirement has not been extended to civil cases⁵ despite the difficulty people face when interacting with bureaucracies administering social services. Without assistance in ensuring fair treatment by Medicaid, child services, welfare, and other programs, many

¹ See *Documenting the Justice Gap in America*, LEGAL SERVS. CORP. 1 (Sept. 2009), http://www.lsc.gov/sites/default/files/LSC/pdfs/documenting_the_justice_gap_in_america_2009.pdf [hereinafter *Documenting the Justice Gap*].

² See Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1785 (2001).

³ *Documenting the Justice Gap*, *supra* note 1, at 12.

⁴ 372 U.S. 335, 344–45 (1963).

⁵ See *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 18 (1981).

people risk losing the means to support and sustain themselves and their loved ones through tough times.

LEGAL DEMONSTRATION PROJECTS INTEGRATED INTO SOCIAL SECURITY ACT PROGRAMS ADMINISTERED AT STATE AND LOCAL LEVEL CAN FILL IN GAPS

The FAIR Act would provide authority for state agencies that run essential programs, such as Medicaid or welfare, to negotiate with the federal government to create demonstration projects that provide people with legal counsel. Demonstration projects allow states to waive federal rules and test new approaches to administering Social Security Act (SSA) programs. For example, states could run Medicaid demonstration programs that automatically enroll high-need patients in managed care, or invest in chronic disease management and quality-improvement programs to reduce overall health care costs.⁶ These demonstration programs provide a budget-neutral path forward to support the creation and expansion of legal services for people in need by leveraging our existing safety net programs and investments.

Model Fairness and Advocacy for Interested Recipients (FAIR) Act

Ensuring fair and balanced treatment of Americans participating in Social Security Act programs through legal representation and counsel.

MILLIONS OF AMERICANS NEED HELP GETTING LEGAL HELP

Each year less than 20 percent of low-income people facing civil legal problems obtain the legal assistance they need.⁷

Federal legal aid programs funded through the Legal Services Corporation turn away nearly one million cases each year from people that need help.⁸ Additionally, numerous other people need help but do not know where to seek it.

In the United States there is one lawyer for every 429 people, but for low-income individuals and families that need legal aid, there is only one lawyer for every 6415 people.⁹

FAILING TO PROVIDE LEGAL REPRESENTATION IS UNFAIR AND UN-AMERICAN

⁶ See *Medicaid and the uninsured*, KAISER FAMILY FOUND. (May 2012), <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/8318.pdf>.

⁷ See *Documenting the Justice Gap*, *supra* note 1, at 1.

⁸ *Id.*

⁹ *Id.* at 21.

In August 2006, the American Bar Association House of Delegates unanimously adopted a landmark resolution calling on federal, state, and territorial governments to provide low-income Americans with counsel in cases where their basic human needs are at stake. They wrote:

RESOLVED, That the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody, as determined by each jurisdiction.¹⁰

In the landmark *Gideon v. Wainwright* decision, the Supreme Court required that states provide counsel for criminal defendants because “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”¹¹

That same requirement has not been extended to civil cases.¹² And while the Supreme Court recognized that due process may require counsel in some civil cases, they have held that counsel is not necessary in cases that do not risk imprisoning a defendant.¹³

EXISTING RESOURCES ARE NOT ENOUGH

The Legal Services Corporation (LSC), the single largest provider of civil legal services in the United States, is limited by statute and resources in the assistance that it can provide to the millions of Americans in need.¹⁴ LSC programs serve people in households with annual incomes at or below 125 percent of the federal poverty level.¹⁵

Existing social assistance programs such as Medicaid and State Children’s Health Insurance Programs serve individuals and families with a broader range of income (up to 400 percent of the federal poverty level) than LSC-funded

¹⁰ABA Task Force on Access to Civil Justice, Recommendation 112A (Aug. 7, 2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_06A112A.authcheckdam.pdf.

¹¹372 U.S. 335, 344–45 (1963).

¹²See *Lassiter v. Dep’t of Social Servs.*, 452 U.S. 18, 18 (1981).

¹³See Paul Marvy & Debra Gardner, *A Civil Right to Counsel for the Poor*, HUM. RTS., Summer 2005, at 8.

¹⁴See Legal Servs. Corp. Annual Report 2012, 1, 18 available at http://www.lsc.gov/sites/lsc.gov/files/LSC/lscgov4/AnnualReports/2012%20Annual%20Report_FINAL-WEB_10.1.pdf.

¹⁵*Id.* at 18. (In 2014, 125% of the poverty line is \$14,587.50 for an individual and \$29,812.50 for a family of four. See Annual Update of the HHS Poverty Guidelines, 9 Fed. Reg. 3593 (Jan. 22, 2014)).

programs.¹⁶ Therefore, millions of Americans interacting with these complex bureaucracies are likely doing so without legal counsel or representation and are ineligible to receive aid from the largest provider of legal services to low-income persons.

Additionally, even for those eligible for LSC aid, funding has not only failed to keep pace with the growth of the population it was created to serve, it has also failed to stay in line with inflation. The inflation-adjusted amount of funding that Congress provided LSC in 1995 would be over \$600 million today,¹⁷ but in 2014, LSC received \$365 million.¹⁸

LEGAL DEMONSTRATION PROJECTS PROVIDE AN OPPORTUNITY FOR
INCREMENTAL IMPROVEMENTS IN THE SHORT TERM

The FAIR Act would authorize state agencies that administer Social Security Act programs to open negotiations with the appropriate federal agencies to create demonstration projects that provide people with legal counsel.

In general, demonstration projects, such as those currently approved for many states under Medicaid, allow states to waive federal rules and test new approaches to the administration of SSA programs.¹⁹ For example, current Medicaid demonstration programs allow states to automatically enroll high-need patients in managed care or invest in chronic disease management and quality improvement programs to reduce overall health care costs.²⁰

The FAIR Act's goal is to develop demonstration projects that provide a budget-neutral path forward to support the creation and expansion of legal services for people in need. Such demonstration programs would leverage investment in existing programs (including Medicaid and foster care) to provide legal services integrated with those programs. For example, people who need legal help to address a health care problem would access a demonstration program via Medicaid. In addition to increasing investment in legal services generally, these demonstration projects would be able to integrate the provision of legal services

¹⁶ *Where are States Today? Medicaid and CHIP Eligibility Levels for Children and Non-Disabled Adults as of January 1, 2014*, KAISER FAMILY FOUND. 3, tbl.1 (Jan. 2014), available at <http://kaiserfamilyfoundation.files.wordpress.com/2014/01/7993-04-where-are-states-today-medicaid-and-chip-eligibility-levels.pdf>; see generally *Medicaid Enrollment Under the Affordable Care Act: Understanding the Numbers*, KAISER FAMILY FOUND. (Jan. 29, 2014), available at <http://kaiserfamilyfoundation.files.wordpress.com/2014/01/8548-medicaid-enrollment-under-the-affordable-care-act-understanding-the-numbers2.pdf>.

¹⁷ *Fiscal Year 2015 Budget Request*, LEGAL SERVS. CORP. 6, <http://www.lsc.gov/sites/lsc.gov/files/LSCFY2015BudgetRequest.pdf>.

¹⁸ See *id.*

¹⁹ See generally *Medicaid and the uninsured*, *supra* note 6.

²⁰ *Id.* at 1.

into programs in a way that could reach people who might have been ineligible for assistance through a stand-alone legal aid organization or those unaware that legal assistance was available through another organization.

DEMONSTRATION PROJECTS UNDER SECTION 1115 OF THE SOCIAL SECURITY
ACT

Demonstration projects under section 1115 of the SSA²¹ allow states to enter into innovative agreements with federal agencies to create budget-neutral ways of improving SSA programs. For example, past programs have provided Medicaid funding for preventive health and wellness rather than paying more when patients develop serious illnesses.

The Secretary of Health and Human Services has the authority to waive requirements of specific programs listed in section 1115(a)(1) to allow state agencies to use federal funds in ways that are not otherwise allowed.²² Otherwise binding federal restrictions can be waived provided that the demonstration project is “likely to assist in promoting the objectives” of the program.²³

While it is not a statutory requirement, the Department of Health and Human Services has administratively imposed a requirement of budget neutrality.²⁴ Ultimately, the Secretary has discretion in approving requests from states for demonstration waivers.²⁵

It is important to note that even though waivers are budget-neutral, investment in new projects is still possible. The budget-neutral investment made through a waiver is calculated by estimating the cost savings of the demonstration project and then allowing for an investment of the amount that will be saved.²⁶

The additional investment could come in the form of increased availability for federal funding or federal matching funds. For example, SSA programs

²¹ 42 U.S.C. § 1315 (2012).

²² *Id.*

²³ See Memorandum from Kathleen Swendiman, to the Hon. Sander M. Levin on Authority of the Sec’y of HHS to Approve Certain TANF Demonstration Programs Pursuant to section 1115 of the Soc. Sec. Act, at 3 (Sept. 4, 2012), available at <http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/112/pdf/CRS-TANFWaiverAuthorityMemo.pdf>

²⁴ *Id.*

²⁵ *Id.*

²⁶ See CINDY MANN, FINANCING UNDER FEDERAL MEDICAID SECTION 1115 WAIVERS: FEDERAL POLICY AND IMPLICATIONS FOR NEW HAMPSHIRE 9 (Sept. 9, 2004), available at <http://www.dev.mdvinteractive.com/ccf/wp-content/uploads/2012/03/Financing%20under%201115%20waivers%20in%20new%20hampshire.pdf>.

such as Medicaid and foster care match state funding with federal funding through the Federal Medical Assistance Percentage (FMAP) formula.²⁷ The lowest possible FMAP is statutorily set at 50 percent, which means that under these programs the federal government pays half the costs, so for each new dollar that a state invests, the federal government invests at least one new dollar.²⁸

While many states have been experiencing budget shortfalls²⁹ and would be unable to secure additional funding to invest in these programs, by integrating some existing legal services programs into these demonstration projects, states can use the funding *already being spent* on legal services to receive *additional* federal funds. Furthermore, existing local government funding *already being spent* on legal services could be included in the demonstration project and used as a Certified Public Expenditure to draw down additional federal funds.³⁰ Thus, while the state presents the section 1115 program to the Secretary of Health and Human Services for review and approval, the state could partially fund its share of the cost from funding the state and local government has already committed to similar programs. For example, a state application for a Medicaid demonstration project could include in its share of project funding any money expended by a county or municipality to improve the efficiency and quality of care for a public hospital so long as the projects share similar goals.

INTEGRATING LEGAL ASSISTANCE INTO SOCIAL SECURITY ACT PROGRAMS
ADMINISTERED AT THE STATE AND LOCAL LEVEL CAN FILL IN GAPS IN EXISTING
LEGAL SERVICE AVAILABILITY

Integrating legal services within SSA programs has the potential to reach the millions of Americans in need of assistance. Currently, there are 55 million beneficiaries enrolled in Medicaid and 5.7 million in state Children's Health Insurance Programs.³¹ The continued implementation of the Affordable Care Act will allow millions of Americans who have not previously had access to health care insurance to become eligible for assistance.³² As noted above, these programs serve individuals and families with incomes that are, in some cases, more

²⁷ See Federal Financial Participation in State Assistance Expenditures; Federal Matching Shares for Medicaid, the Children's Health Insurance Program, and Aid to Needy Aged, Blind, or Disabled Persons for October 1, 2014 Through September 30, 2015, 79 Fed. Reg. 3385 (Jan. 21, 2014).

²⁸ *Id.*

²⁹ *State Budget Shortfalls, SFY2013*, KAISER FAMILY FOUND., <http://kff.org/other/state-indicator/state-budget-shortfalls-sfy13/> (last visited Aug. 27, 2014).

³⁰ See U.S. Gov't Accountability Office, *Medicaid: CMS Needs More Information on the Billions of Dollars Spent on Supplemental Payments* 9, n.24 (2008), available at <http://www.gao.gov/new.items/d08614.pdf>.

³¹ *Medicaid Enrollment Under the Affordable Care Act: Understanding the Numbers*, KAISER FAMILY FOUND. 3 (Jan. 29, 2014), available at <http://kaiserfamilyfoundation.files.wordpress.com/2014/01/8548-medicaid-enrollment-under-the-affordable-care-act-understanding-the-numbers2.pdf>.

³² *Id.*, at 1.

than twice the LSC's limit for eligibility.³³ Providing legal services through demonstration programs integrated with existing SSA programs would expand eligibility for legal services BECAUSE eligibility for legal services would track and adapt to changes in eligibility for the underlying program. Thus, as eligibility for Medicaid expands, as it did under the ACA, eligibility for the legal services demonstration project would expand accordingly.

HOW THE FAIR ACT COULD WORK IN PRACTICE: ONE EXAMPLE OF A POTENTIAL DEMONSTRATION PROJECT: MEDICAL-LEGAL PARTNERSHIPS

As an example, the FAIR Act would enable a state health agency to request a section 1115 waiver to provide legal assistance through its Medicaid program. Currently, medical-legal partnerships exist to provide legal assistance to people who have legal problems that impact their health. Medical-legal partnerships—programs that provide legal assistance to patients to address social, environmental, and economic factors that harm their health—are a potential path forward for integrating more legal services into Medicaid. The programs are often sponsored or hosted by health care providers (such as hospitals) which serve Medicaid patients.³⁴ Host institutions can realize savings from the legal assistance programs, providing an incentive for health care providers to participate and supporting project investment on a budget neutral basis.³⁵

The potential for providing legal assistance within a budget neutral framework has been borne out by experiences at the state level, such as when Massachusetts saved an estimated \$4.5 million in shelter costs by providing legal services to defend against evictions; or when New York saved at least \$2 million in health care costs by providing legal representation to homeless individuals.³⁶

A more personal example that was collected by the National Center for Medical-Legal Partnership is that of Rhode Island three-year old named Refnelly.³⁷ Refnelly went to an emergency room three times for pneumonia, was losing weight, and was developing rashes.³⁸ Her mother thought that the mice infesting

³³ *Where are States Today?*, *supra* note 16, at 1.

³⁴ Ellen Lawton & Elizabeth Tyler, *Optimizing the Health Impacts of Civil Legal Aid Interventions: The Public Health Framework of Medical-Legal Partnerships*, R.I. MED. J., July 2013, at 23.

³⁵ *Id.*

³⁶ See *Fiscal Year 2015 Budget Request*, *supra* note 17, at 3.

³⁷ Milken Institute School of Public Health, *When a Rhode Island 3-year-old is hospitalized for pneumonia, her doctor paged an attorney*, NATIONAL CENTER FOR MEDICAL-LEGAL PARTNERSHIP, <http://www.medical-legalpartnership.org/3-year-old-hospitalized-pneumonia-doctor-paged-attorney/> (last visited Aug. 27, 2014, 10:54 AM).

³⁸ *Id.*

their family apartment might be causing her daughter's illness, but her building's manager had refused repeated requests to exterminate them.³⁹

Refnely's case was referred from a doctor at Hasbro Children's Hospital in Rhode Island to Rhode Island's Medical-Legal Partnership for Children whose director explained to the building manager that they were legally required to exterminate the mice.⁴⁰ After receiving a letter and another phone call from their advocate, Refnely's building manager hired a new exterminator that would treat the building more often, changed trash collection practices, and correspondingly, Refnely's health improved.⁴¹

CONCLUSION

Millions of Americans need help getting legal assistance. The FAIR Act would provide authority and direction for state agencies to pursue demonstration programs to provide resources to meet this need. This authority is the beginning of an effort, but much of its success will depend on the willingness of the federal government to act as a partner and participate in the support of these demonstration projects. FAIR Act advocates concerned with the lack of legal representation to many millions of people in our communities stand ready to work for the approval of these waivers. Together, we can take this important step forward and make these essential programs more *fair* for the American people.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

2014

QUORUM

85

APPENDIX
-----Model Fairness and Advocacy for Interested Recipients (FAIR) ActSECTION 1. SHORT TITLE

This Act may be cited as the “Model Fairness and Advocacy for Interested Recipients Act” or “FAIR Act.”

SECTION 2. STATEMENT OF PURPOSE

(A) According to the Legal Services Corporation (LSC) report, Documenting the Justice Gap in America, each year less than 20 percent of the low-income Americans with civil legal problems get the legal assistance they need.

(B) Each year, the LSC, the largest single source of civil legal aid for low-income Americans, turns away an estimated one million cases due to lack of resources.

(C) In 2006, the American Bar Association House of Delegates unanimously approved Resolution 112A, stating that “the American Bar Association urges federal, state, and territorial governments to provide legal counsel as a matter of right at public expense to low income persons in those categories of adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody.”

(D) In *Gideon v. Wainwright*, the Supreme Court required states to provide legal counsel for low-income defendants in criminal actions, but in *Lassiter v. Dep't of Social Services*, the Supreme Court did not extend this requirement to litigants in civil cases.

(E) Section 1115 of the Social Security Act (SSA) (42 U.S.C. § 1315) provides authority for the Secretary of Health and Human Services to waive requirements of specific programs listed in section 1115(a)(1) to allow state agencies to use federal funds in ways that are not otherwise allowed provided that the demonstration project is “likely to assist in promoting the objectives” of the program.

(F) SSA programs which have allowed demonstration programs under section 1115 include but are not limited to: Title IV-A Temporary Assistance to Needy Families, Title IV-D Child Support, Title IV-E Foster Care, Title XIX

Medicaid programs and Title XXI State Children's Health Insurance Programs.

(G) The purpose of this legislation is to authorize state agencies administering programs under the SSA to negotiate for section 1115 waivers with the Department of Health and Human Services and other relevant Federal agencies and officials in order to provide support to demonstration projects that provide legal representation and counsel for eligible beneficiaries and individuals contesting their ineligibility for programs.

SECTION 3. DEFINITIONS

(A) "Demonstration Project" has the meaning established under section 1115 of the SSA.

(B) "State Agency" means a board, commission, department, officer, or other authority of the government of the State, whether within, or subject to review by, another agency, except the General Assembly, the courts, and Governor that meets the requirements for participation in a demonstration program as set out in section 1115 of the SSA.

(C) "Budget neutral" means having no estimated increase on state budget expenditures or outlays as determined by the state legislative analyst.

(D) "Social Security Act program" means any program authorized by the SSA (42 U.S.C. Ch. 7) and administered by a State agency.

(D) "Legal counsel" means any legal representation, counsel or assistance as authorized by State law and in accordance with State Bar Association limitations in administrative proceedings, petitions, or adversarial proceedings where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody for eligible beneficiaries and individuals contesting their ineligibility.

SECTION 4. STATE AGENCIES MAY INITIATE NEGOTIATIONS FOR DEMONSTRATION PROGRAMS

(A) Pursuant to this Act, a State Agency may enter into negotiations to create a demonstration project to provide legal counsel to any resident individual or family who is an eligible beneficiary or is contesting eligibility for a SSA program (as defined in this Act).

(B) State agencies may enter into negotiations to include demonstration projects authorized under this Act as amendments to existing waivers under section 1115, provided that the amendment meets the limitations and conditions set forth in section 5 below.

SECTION 5. LIMITATIONS AND CONDITIONS

(A) Nothing in this Act shall be construed as providing authorization for additional spending by the State, but use of local funds as matching funds to increase federal financial participation shall be permitted to the extent allowable under Federal law.

(B) Nothing in this Act shall be construed as limiting eligibility for current and future beneficiaries of the qualified programs, nor shall it be viewed as requiring amendments of existing waivers under section 1115 of the SSA that have been approved as of the effective date.

(C) This waiver authority is contingent upon Federal approval and Federal financial participation.

SECTION 6. REPORTS TO GOVERNOR AND LEGISLATURE

State agencies shall write a report in the first year and in each year thereafter to the appropriate legislative committee(s) with jurisdiction over each SSA program (as defined in this Act) regarding the status of any negotiations initiated pursuant to this Act.

SECTION 7. SEVERABILITY

If any provision of this FAIR Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this FAIR Act which can be given effect without the invalid provision or application, and to this end the provisions of this FAIR Act are severable.

SECTION 8. EFFECTIVE DATE

This act shall take effect immediately, and shall be null, void and of no force and effect on and after January 1, 2020.

