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THREE STEPS AND YOU'RE OUT: THE MISUSE OF THE SEQUENTIAL EVALUATION PROCESS IN CHILD SSI DISABILITY DETERMINATIONS†

Frank S. Bloch*

The federal Supplemental Security Income (SSI) program provides cash benefits to financially needy persons who are 65 years of age or older, blind, or disabled. It also provides cash benefits to children with disabilities under the age of 18. This Article examines three sets of regulatory efforts to implement special disability standards for children, based first on the original SSI legislation, then on a seminal Supreme Court decision, and finally on amendments to the Social Security Act overruling the Court's decision, and shows how the "sequential evaluation process," which has been useful for adjudicating adult disability claims, has been a counterproductive force in the child's SSI program. It then suggests how the Social Security Administration might meet the program's goals more effectively by breaking with the sequential evaluation model and replacing it with a unique disability determination process for children.

*Take me out to the ball game,
Take me out with the crowd.
Buy me some peanuts and Cracker Jack,
I don't care if I never get back,
Let me root, root, root for the home team,
If they don't win it's a shame.
For it's one, two, three strikes, you're out,
At the old ball game.***

I. INTRODUCTION

Social welfare in the United States has always been directed by special need, coupled, in most instances, with a moral or practical link to lack of "fault." This special needs focus is apparent in the national system of "categorical" social benefit programs; most beneficiaries fall into one of a distinct set of special-need

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** "Take me out to the ballgame," music by Albert Von Tilzer; lyrics by Jack Norworth.

categories: the elderly, the blind and disabled, and children (or, more commonly, children deprived of full parental support).¹ The lack-of-fault element builds on these categorical groupings, with added emphasis via a “deserving poor” rationale for most public assistance programs.²

Children with disabilities make up a classic without-fault, special-need group; it is not surprising, therefore, that social policy experts and planners have paid a great deal of attention to the special needs of these children and have supported substantial programming to meet those needs.³ Except for cash benefits. The Social

1. With room for some variation in the definition of “elderly” and the inclusion of a child’s family in the children category, these three groups are the primary targets of the three main federal cash benefit programs: Old Age, Survivors, and Disability Insurance (OASDI), 42 U.S.C. §§ 401–433 (2000), Supplemental Security Income (SSI), 42 U.S.C. §§ 1381–1394 (2000), and Temporary Assistance to Needy Families (TANF) (the post-1996 replacement for Aid to Families with Dependent Children (AFDC)), Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, tit. I, 110 Stat. 2105, 2184 (codified as amended at scattered provisions of 42 U.S.C.). Moreover, since eligibility for Medicare and Medicaid is linked to a large degree to eligibility for benefits under one of these programs, the same three groups are also the primary targets of the two main federal medical benefit programs. See 42 U.S.C. §§ 1395–1395b-7 (2000) (Medicare); 42 U.S.C. §§ 1396–1396v (2000) (Medicaid). There are, of course, exceptions; the national food stamp program, for example, is not limited to these or other “categories” of persons. Although many state and local “general relief” or “general assistance” programs have not always applied a categorical approach, the current trend is otherwise. Compare Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871, 967–83 (1995) (discussing a “categorization imperative” found in modern general assistance programs), with Cynthia J. Reichard, *Due Process in the Administration of General Assistance: Are Written Standards Protecting the Indigent?*, 59 IND. L.J. 443, 443 (1984) (contrasting general assistance programs with SSI and AFDC; “General assistance provides financial aid to people in need who cannot qualify for categorical assistance or whose categorical assistance is especially inadequate”). See generally CORI E. UCCELLO ET AL., STATE GENERAL ASSISTANCE PROGRAMS (1996); Julia Henly & Sandra Danzinger, *Confronting Welfare Stereotypes: Characteristics of General Assistance Recipients and Postassistance Employment*, 20 SOC. WORK RES. 217 (1996).

2. The concept of “deserving poor”—distinguishing among poor persons to identify those worthy of public assistance—has its roots in pre-colonial history and remains important to contemporary welfare policy. See generally JOEL F. HANDLER & ELLEN J. HOLLINGSWORTH, *THE “DESERVING POOR”: A STUDY OF WELFARE ADMINISTRATION* (1971). See also Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty State Overview*, 8 MICH. J. GENDER & L. 121, 125–38 (2002) (discussing the “moralistic dimension” of the distinction between deserving and undeserving poor).

3. Examples include: the Maternal and Child Health Services Block Grant program, 42 U.S.C. §§ 701–709 (2002), which provides funds to states for health services for low-income mothers and children; the Early and Periodic Screening, Diagnostic, and Treatment Services program (EPSDT), 42 U.S.C. § 1396d(a)(4)(B), a component of Medicaid that focuses on prevention and intervention for children with disabilities; and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400–1457 (2000), which provides special education services. See generally Deborah Spitalnik, *An Overview of Policy Issues in Access to Care for Children with Disabilities*, 19 PACE L. REV. 285 (1999); Alan J. Tomkins & Victoria Weisz, *Social Science, Law, and the Interest in a Family Environment for Children with Disabilities*, 26 U. TOL. L. REV. 937 (1995).

Security Act did not include any disability benefit programs—for adults or for children—when first enacted in 1935.⁴ It was not until the 1950s that disability was added as a basis for eligibility for federal benefit programs: first in 1950 with the introduction of Aid to the Permanently and Totally Disabled (APTD), a joint federal/state public assistance program that merged eventually with a broader program of Aid to the Aged, Blind, and Disabled (AABD), and then in 1956, with the addition of disability benefits to the re-titled Old Age, Survivors, and Disability Insurance (OASDI) program.⁵ However, both of those programs were aimed exclusively at adults.⁶ It was only with the creation of the first fully federal public assistance program in 1974—Supplemental Security Income (SSI)⁷—that cash benefits were made available nationally to children with disabilities.

4. Social Security Act, ch. 531, 49 Stat. 620 (1935). The Committee on Economic Security, which made the recommendations that formed the basis of the Social Security Act, recognized that disability insurance presented particularly important and difficult problems for a national program for economic security; however, it decided to leave those problems for the future. See EDMUND E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 189 (1962).

5. See Social Security Act Amendments of 1950, Pub. L. No. 81-734, 64 Stat. 477; Social Security Amendments of 1956, Pub. L. No. 84-880, § 103(a), 70 Stat. 807, 815–24, reprinted in 1956 U.S.C.A.N. 942, 952. Notwithstanding a great deal of debate over whether disability should be treated as a public assistance program or a social insurance program, Congress's reasons for adding at first only a public assistance program for the disabled were never made clear. See generally, Jacobus ten Broek & Richard B. Wilson, *Public Assistance and Social Insurance—A Normative Evaluation*, 1 UCLA L. REV. 237 (1954); Jacobus ten Broek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809 (1966). See also Matthew Diller, *Entitlement and Exclusion: The Role of Disability in the Social Welfare System*, 44 UCLA L. REV. 361, 393–433 (1996).

6. APTD and AABD operated under state rules; however, states were required to follow federal guidelines in order to qualify for federal grants. The definition of disability recommended by federal regulations was firmly directed at adult claimants. See 45 C.F.R. § 233.80 (1972) (recommending that states set the disability standard as a “permanent physical or mental impairment, disease, or loss, or combination thereof, [that] substantially precludes him from engaging in useful occupations within his competence, such as holding a job”); 45 C.F.R. § 233.80 (2002) (same regulation, currently applicable to state grants supplementing SSI). For cases applying such a standard to pre-SSI federal-state programs, see *Ryan v. Shea*, 394 F.Supp. 894, 899 (D. Colo. 1974), and *Boisvert v. Zeiller*, 334 F. Supp. 403, 408 (D.N.H. 1971). OASDI's insured status requirement effectively precludes disability insurance eligibility for children and dependent children (whose wage earning parent has died or has become elderly or disabled) who are entitled to benefits without regard to disability until they are at least 18 years old. Although there is an “adult child” disability benefit program under OASDI, the term “child” in that program refers to the parent-child relationship between the beneficiary and his or her insured parent as the “child” must be at least 18 years old. See 42 U.S.C. § 402(d) (2000).

7. 42 U.S.C. §§ 1381 et seq. (2000). The federalization of benefits for the elderly, blind, and disabled and the creation of the SSI program are discussed *infra* at text accompanying notes 14–15.

The federal SSI program, which replaced federal-state AABD programs, continues to provide cash benefits to financially needy persons who are 65 years of age or older, blind, or disabled. It also provides cash benefits to children with disabilities under the age of 18. From the outset, however, the purpose of the "child's SSI program," which targets children with disabilities under the age of 18, has been unclear. As opposed to the former Aid to Families with Dependent Children (AFDC) program and AFDC's successor, Temporary Assistance for Needy Families (TANF), the child's SSI program was never intended to be a broad cash benefit program for financially needy children.⁸ It is also not a disability benefit program in the traditional sense. Disability benefits are intended to compensate for loss of income due to the inability to work, and, therefore, eligibility focuses on adult conditions and adult activities; children under the age of 18 are not part of that picture.⁹ Nor is SSI a focused special needs program. Even for children with disabilities typically, special needs are met through the delivery of goods or services, such as food (or food stamps), housing, medical care, social and educational support, etc.¹⁰

Although the child's SSI program cannot be classified as a traditional children's benefit, disability benefit, or other type of special need program, it provides a substantial cash benefit, by public assistance standards, to an undeniably special needs group. Its

8. AFDC (or, more accurately, its predecessor Aid to Dependent Children (ADC)) was part of the original Social Security Act of 1935. See Social Security Act of 1935, ch. 531, tit. IV §§ 401-06, 49 Stat. 620, 627-29, *repealed by* Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105. Although also not comprehensive in its coverage of children—eligibility depended on the child living in a family and being deprived of parental support—AFDC targeted far more needy children than the relatively small number of needy children who qualify as disabled under the SSI program. Over the years, and especially after World War II, it became the largest and most controversial federally supported welfare program. As part of the "welfare reform" movement in the mid-1990s, AFDC was replaced by TANF with the intention of reducing federal control over the program and limiting benefits to a fixed number of years. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, § 116(c), 110 Stat. 2105, 2183. For a critique of TANF as welfare reform, see Peter B. Edelman, *The Impact of Welfare Reform on Children: Can We Get it Right Before the Crunch Comes?*, 60 OHIO ST. L.J. 1493 (1999); Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare As We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357 (1998). PRWORA provisions relating to the child's SSI program are discussed *infra* at text accompanying notes 26-34.

9. This distinction is significant because traditional, adult-focused disability programs have a particularly important role in the modern welfare state. As Deborah Stone has observed, "The very notion of disability is fundamental to the architecture of the welfare state; it is something like a keystone that allows the other supporting structures of the welfare system and, in some sense, the economy at large to remain in place." DEBORAH A. STONE, *THE DISABLED STATE* 12 (1984).

10. See examples cited *supra* note 3.

purposes, however, remain largely undefined and it continues to grapple with an eligibility standard—"disability"—that has not been well adapted to address the unique circumstances of children, as opposed to adults. The program also turned out, after a slow start, to be far larger and more expensive than had been expected.¹¹ It is not surprising, therefore, that it has been under challenge, scrutiny, and attack for much of its history.¹²

This article explores the difficult history of the child's SSI program from a particular vantage point: the negative role that the Social Security Administration's "sequential evaluation process" for determining disability has played in defining the eligibility criteria for children seeking SSI benefits.¹³ Drawing on three sets of regulatory efforts to implement the statutory standard for childhood disability, based first on the original SSI legislation, then on a seminal Supreme Court decision, and finally on amendments to the Social Security Act overruling the Court's decision, this article shows how the sequential evaluation process—a process that has been, and continues to be, useful for adjudicating adult disability claims—has been a counterproductive force in the child's SSI program. It then suggests how the Social Security Administration

11. Thus, the program grew from approximately 212,000 beneficiaries after its first five years (1979) to a little less than 300,000 ten years later (1989), but then more than tripled to almost 900,000 five years after that (1994). The cost of the program grew during that last five-year period (1989–94) from a little over \$1 billion to almost \$5 billion. See NATIONAL COMMISSION ON CHILDHOOD DISABILITY, SUPPLEMENTAL SECURITY INCOME FOR CHILDREN WITH DISABILITIES 15 (1995) [hereinafter NATIONAL COMMISSION REPORT]. The number reached almost one million in 1996 before beginning to decline slightly in 1998. SOC. SECURITY ADMIN., ANNUAL STATISTICAL SUPPLEMENT 201 20 (2001). The program's growth in the 1990s is discussed more fully *infra* at text accompanying notes 154–56.

12. Various periods of this history have been well chronicled in the literature. See, e.g., Elizabeth J. Jameson & Stephen C. King, *The Failure of the Federal Government to Care for Disabled Children: A Critical Analysis of the Supplemental Security Income Program*, 20 COLUM. HUM. RTS. L. REV. 309 (1989); Rachele Lombardi, *The Evaluation of Children's Impairments in Determining Disability Under the Supplemental Security Income Program*, 57 FORDHAM L. REV. 1107 (1989); Richard P. Weishaupt & Robert E. Rains, *Sullivan v. Zebley: New Disability Standards for Indigent Children to Obtain Government Benefits*, 35 ST. LOUIS U. L.J. 539 (1991); Gay Gellhorn, *Disability and Welfare Reform: Keep the Supplemental Security Income Program But Reengineer the Disability Determination Process*, 22 FORDHAM URB. L.J. 961 (1995); Amber R. Anderson, Note, *Disabled Without Benefits: The Impacts of Recent Social Security Reforms on Disabled Children*, 41 B.C. L. REV. 125 (1999); D.J. Hilson, *Who Will Help the Children: Major Changes to the Supplemental Security Income Program Leave Thousands Unrepresented*, 3 T.M. COOLEY J. PRAC. & CLINICAL L. 81 (1999).

13. The sequential evaluation process runs disability assessments through a series of steps, each with its own set of criteria and its own required supporting evidence. There are five steps for adults and three for children; hence, the title of this article. The five-step adult sequence is described *infra* at Part II.B.2.a; the various incarnations of the child sequence (first three steps, then briefly four, and now three once again), are described *infra* at Parts II.B.2.b, III.C, and IV.B.

might meet the program's goals more effectively by breaking with the sequential evaluation model and replacing it with a unique disability determination process for children.

II. OVERVIEW OF THE CHILD'S SSI PROGRAM

As noted above, federal benefits for children with disabilities were provided for the first time in 1974 when previously existing federal-state public assistance programs for the aged, blind, and disabled were incorporated into the new Supplemental Security Income (SSI) program. The federalization of public assistance for the aged, blind, and disabled, including the shift of full administrative responsibility to the federal Social Security Administration, is thus an important context for understanding the original goals and purposes of the child's SSI program. This section begins with a brief description of the birth of the SSI program followed by a more detailed description of the origins of the child disability provisions of the new law. It then discusses at some length the Social Security Administration's sequential evaluation process and how that process was first incorporated into the regulations governing the disability determination process for children under the age of eighteen.

A. Federalization of Public Assistance for the Aged, Blind, and Disabled

When SSI began operating on January 1, 1974, it marked a tremendous shift in responsibility for the administration of public assistance programs in the United States—second only to the creation of the original Social Security program in 1935. Until 1935, the federal government had not assumed general responsibility for either social insurance or public assistance; the monumental Social Security Act of 1935 drew a clear distinction between social insurance, which became an exclusively federal responsibility, and public assistance, responsibility for which was to be shared by the federal government and the states.¹⁴

14. The sharing of responsibility between the federal government and the states became known as "cooperative federalism" and was particularly controversial with respect to the administration of the AFDC program. See *infra* text accompanying note 18.

Consistent with the approach to welfare practiced in England at the time of the colonies, early social welfare programs in the United States—to the extent they existed at all—were a matter of local concern.¹⁵ The only exceptions to local and state assumption of responsibility were various early national relief programs for war veterans and their families.¹⁶ Recognizing that providing for basic subsistence needs for the poor was a necessary complement to its due-to-be proposed national system of social insurance, the Committee on Economic Security included federally supported state public assistance in its famous 1935 report that became the basis of the original Social Security Act.¹⁷ Thus began a new chapter in the history of social legislation and social welfare policy in the United States that ran from Franklin Roosevelt's post-depression New Deal through Lyndon Johnson's pre-Vietnam era War on Poverty.

The basic formula for the new federal/state public assistance programs was simple: federal legislation authorized grants to states for programs aimed at federally defined categories of beneficiaries—the aged, blind, disabled, and dependent children—and the cost, once a state submitted a program consistent with federal guidelines, was shared by the federal government and the

15. At the beginning, local meant local churches and private community welfare organizations. Local governments became involved gradually with “poor houses” and other forms of “poor relief,” with great differences in coverage, conditions, and amount of benefits. See Philip Harvey, *Joblessness and the Law Before the New Deal*, 6 GEO. J. ON POVERTY L. & POL'Y 1, 18 (1999) (“[T]he so-called ‘great poor law’ enacted in 1601 served as the model for the administration of poor relief in the United States until the 1930s.”); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 102 (1998) (“English Poor Laws are the single most influential legal source in the historical development of the poor laws of the United States.”). See generally William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111 (1997); William P. Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790–1820*, 18 N. ILL. U. L. REV. 1 (1997); Larry Cata Backer, *Medieval Poor Law in Twentieth Century America: Looking Back Towards a General Theory of Modern American Poor Relief*, 44 CASE W. RES. L. REV. 871 (1995).

16. As one commentator put it, “[O]nly in times of acute national crisis such as the Civil War, Reconstruction, and the Great Depression, has the federal government assumed responsibility for anything resembling economic rights, or minimum welfare guarantees.” Frank E.L. Deale, *The Unhappy History of Economic Rights in the United States and Prospects for Their Creation and Renewal*, 43 HOW. L.J. 281, 288 (2000). The plight of war veterans presented a politically unique incentive for federal government involvement. See generally THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992). See also William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 176 (1997).

17. See WINIFRED BELL, *AID TO DEPENDENT CHILDREN* 25–26, 36 (1965); J. DOUGLAS BROWN, *AN AMERICAN PHILOSOPHY OF SOCIAL SECURITY* 61 (1972) (“The firm foundation of an adequate, national system of public assistance would permit the OASDI system of contributory social insurance to perform more effectively in its own area of protection.”). See generally ARTHUR J. ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* (1966).

respective states. This approach, which became known as “cooperative federalism,” resulted in some significant federal-state tensions but was virtually undisputed as the dominant paradigm for thirty-five years.¹⁸

SSI took the next step and became the first—and so far, the only—fully federal public assistance program. Interestingly, SSI came into being without much fanfare, mainly because it was an anticlimactic compromise of an even greater welfare revolution proposed by the Nixon White House. Early in his first term, Richard Nixon proposed a radical shift away from both cooperative federalism and the categorical approach to public assistance benefits. The idea was to create a federal “Family Assistance Plan” that would provide a minimum guaranteed income for families, as well as the elderly, blind, and disabled.¹⁹ Although there was widespread agreement that shared federal-state responsibility for public assistance programs had become unmanageable, the politics proved to be equally unmanageable and the grand plan had to be dropped.²⁰ Following almost four years of legislative debate and maneuvering, the more controversial program for families with dependent children was removed from the bill and kept as a “cooperative federalism” program in order to make way for a new fully federal public assistance program for the elderly, blind, and disabled. The program that emerged was SSI, to be implemented by the federal Social Security Administration.

18. Most of the tensions related to the AFDC program, both because of its size and because of the sensitivity of its core eligibility criterion: a child deprived of parental support. Various state efforts to limit or to control eligibility for benefits through differing approaches to the concept of dependency led to a series of challenges by recipients and a number of controversial Supreme Court decisions on both the state regulations involved and the nature of cooperative federalism itself. See generally Frank S. Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 Wisc. L. Rev. 1 (1979). For a thoughtful analysis of AFDC's place in social welfare policy prior to the 1990s, see Joel F. Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 N.Y.U. REV. L. & SOC. CHANGE 457 (1987/88).

19. See H.R. 1, 92nd Cong., 1st Sess. (1971); H.R. REP. NO. 92-231 (1972), reprinted in 1972 U.S.C.C.A.N. 4989.

20. For a thorough description of this effort by President Nixon's then domestic policy advisor (and later Democratic Senator from New York), see DANIEL P. MOYNIHAN, *THE POLITICS OF A GUARANTEED INCOME: THE NIXON ADMINISTRATION AND THE FAMILY ASSISTANCE PLAN* (1973). See also CHRISTOPHER LEMAN, *THE COLLAPSE OF WELFARE REFORM* (1980); VINCENT J. BURKE & VEE BURKE, *NIXON'S GOOD DEED* (1974). For a discussion of the merits of the Family Assistance Plan, see M. KENNETH BOWLER, *THE NIXON GUARANTEED INCOME PROPOSAL: SUBSTANCE AND PROCESS IN POLICY CHANGE* (1974).

B. Something New: Benefits for Children with Disabilities

Putting aside the considerable administrative challenges facing the Social Security Administration, the transition from the federal-state AABD Program to SSI was relatively simple. The core requirement for old-age benefits remained the same: 65 years of age.²¹ As for blind and disabled adults, the new SSI program simply adopted the statutory definitions of blindness and disability used in the Social Security Act's Old Age, Survivors, and Disability Insurance (OASDI) program.²² The OASDI disability standard is framed in terms of the "inability to engage in any substantial gainful activity"²³ due to a "medically determinable physical or mental impairment" that must be expected to last at least twelve months or to result in death.²⁴ The Act further provides that an individual meets the statutory standard "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 which exists in the national economy."²⁵ The OASDI disability standard was thus designed to test the level of

21. 42 U.S.C. § 1382c(a)(1)(A) (2000).

22. 42 U.S.C. § 1382c(a)(1) (2000). The definition of blindness is rather technical: 20/200 or less in the better eye with the use of a correcting lens or visual field limited to an angle of no greater than 20 degrees. See 42 U.S.C. § 416(i)(1)(B). There were, and continue to be, provisions that "grandfather" persons who met AABD disability standards at the time of the changeover to SSI. See 42 U.S.C. § 1382c(a)(3)(E) (1994); 42 U.S.C. § 1382c(a)(3)(F) (2000). In response to concerns that large numbers of otherwise ineligible persons were being shifted on to the state rolls at the last minute, Congress restricted grandfathered eligibility to persons who were on the rolls before July 1973. See Social Security Benefits Increase, Pub. L. No. 93-233, § 9, 87 Stat. 947, 957 (1973); 20 C.F.R. § 416.907 (2003).

23. 42 U.S.C. § 423(d)(1)(A) (2000). The disability standard for Supplemental Security Income has slightly different introductory language so that the standard is phrased in terms of an individual who is "unable to engage in any substantial gainful activity." 42 U.S.C. § 1382c(a)(3)(A) (2000). The substance of the two standards is the same, however, and they are interpreted consistently as being essentially identical. See, e.g., *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987) (stating that both titles of the Social Security Act define "disability" as the inability to engage in substantial gainful activity); *Perez v. Chater*, 77 F.3d 41, 46 (2d Cir. 1996).

24. 42 U.S.C. § 423(d)(1)(A) (2000). Originally, the Act required an impairment of "indefinite" duration. See Social Security Amendments of 1956, Pub. L. No. 880, § 223(c)(2), 70 Stat. 807, 815.

25. 42 U.S.C. § 423(d)(2)(A) (2000). See also 42 U.S.C. § 1382c(a)(3)(B) (2000) (SSI). For a discussion of the history behind this provision and its tie to the work-related element of the OASDI and adult SSI disability standard, see Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976).

disability for persons insured against loss of work; as a result, it fit the adult-centered provisions of the new SSI programs as well.

The situation was entirely different, however, with respect to benefits for children under the age of eighteen. As mentioned above, the SSI program extended eligibility for disability benefits to children for the first time; under the predecessor AABD Program (and in the OASDI program), disability benefits were provided only to adults. The SSI legislation did not, however, address how the special circumstances of children with disabilities should be considered relative to eligibility for benefits; instead, it set out a statutory standard for child disability tied to the adult standard: "in the case of a child under the age of eighteen, [the child is disabled] if he suffers from any medically determinable physical or mental impairment of comparable severity [to that of a disabled adult]."²⁶ This "comparable severity" standard did not itself say much about the social policy choice of including children with disabilities as beneficiaries in the new SSI program. The legislative history offers some limited insight into the intended coverage of the program. Far more important as a practical matter were the Social Security Administration's regulations implementing the new child's disability standard. Both are discussed below.

1. *Rationale of Special Need*—Congress sought to achieve several goals with the 1972 Social Security Act amendments that created the SSI program.²⁷ On the one hand, it wanted to assure continuing support for the previously designated categories of needy persons covered by the federal-state AABD program—the elderly, blind, and disabled—and to provide for them a federally established income floor.²⁸ On the other hand, Congress also wanted to achieve welfare reform and reign in the ballooning costs of the "cooperative federalism" model of administering federal/state public assistance programs, particularly AFDC.²⁹ Tied to this concern was the desire to reinforce the "deserving poor" element of

26. See 42 U.S.C. § 1382c(a)(3)(A) (1974).

27. See Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, *amending*, Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended at 42 U.S.C. §§ 301-1397b (1994)).

28. See 20 C.F.R. § 416.110 (2003) ("The basic purpose underlying the supplemental security income program is to assure a minimum level of income for people who are 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level.").

29. Thus, the House Report accompanying the Social Security Amendments of 1972 pointed out specific statistics such as the fact that, in 1967, federal funds for AFDC were at \$2 billion; the estimated expenditures for 1972 were \$6.8 billion. See H.R. REP. NO. 92-231, pt. 1, at 1-3 (1972) *reprinted in* 1972 U.S.C.C.A.N. 4989, 4990.

existing social legislation. As stated in the House Report accompanying the legislation:

[T]he American people do not want a system which results in promoting welfare as a way of life. . . . Deliberations, therefore, have been aimed toward providing adequate assistance to those who cannot help themselves, while at the same time creating a system of assistance which will maximize the incentive and the obligation of those who are able to work to help themselves.³⁰

Thus, the social goal of providing federally guaranteed aid to those less fortunate was tied to a fiscal goal of at least controlling the amount of public funds dedicated to welfare. The decision to assume full federal responsibility for the less controversial elderly, blind, and disabled group of welfare beneficiaries without being willing to do the same for the flagship child welfare program, AFDC, placed Congress in a difficult position: what to do about the fact that children with disabilities had not been included in the soon-to-be-federalized AABD program? Rather than simply ignore this fact and restrict the disabled category of SSI beneficiaries to adults, Congress took the opportunity to highlight the special need of children with disabilities: “[D]isabled children who live in low-income households are certainly among the most disadvantaged of all Americans and . . . are deserving of special assistance in order to help them become self-supporting members of our society.”³¹ Perhaps as a way of justifying that most needy children—most notably those that would have been covered had SSI federalized AFDC as well—were left out of the new program, Congress rationalized its singling out children with disabilities by comparison: “Making it possible for disabled children to get benefits under this program, if it is to their advantage, rather than under the programs for families with children, would be appropriate because their needs are often greater than those of nondisabled children.”³²

Other than these comments, published in the House Ways and Means Committee’s report accompanying the bill, little more was said about this new category of SSI beneficiaries.³³ Even without a

30. *Id.*

31. H.R. REP. NO. 92-231, pt. 1, at 146–48, *reprinted in* 1972 U.S.C.C.A.N. 4989, 5133–34.

32. *Id.*, at 148, *reprinted in* 1972 U.S.C.C.A.N. 4989, 5134.

33. *See* Weishaupt & Rains, *supra* note 12, at 545 (“Virtually no floor debate or legislative history records congressional thinking on this addition, other than the House Ways and Means Committee’s observation.”). Indeed, the entire SSI program was debated relatively

more explicit expression of Congress' reasoning, however, the underlying policy reasons for including children in the disability coverage of SSI seem fairly clear. Professors Jameson and Wehr have noted that three principles are at work in developing the bases for recognizing the special needs of children: "[S]ociety has an unusually strong economic and moral interest in ensuring that children grow into productive adults, . . . children should not be worse off than adults[, and] ensuring comparable access to services may require that children and adults receive different treatment because of their inherent differences."³⁴ All three seem to be implicated in Congress's recognition of the need to include children with disabilities within the ambit of those entitled to receive funds under SSI.

This makes intuitive sense as well. If one of Congress's goals in enacting SSI was to decrease the amount of spending for social welfare programs, mitigating the effects of disability for children can serve to keep at least some of them from having to rely on public funds for a lifetime. Certainly, money spent treating a child with a disability may save money in the long run; perhaps providing cash assistance to help support those same children would have the same effect. Less clear, however, is how Congress saw child's SSI benefits fitting in with both the general purposes of SSI and those of the myriad of other federal programs that also target children with disabilities.³⁵ Although Congress explicitly recognized the

little, compared to the family and children provisions of the abandoned Family Assistance Plan. See *id.* at 545 n.38 ("The AFDC provisions of FAP sparked most of the debate. The floor debates only fleetingly mentioned the inclusion of children in the SSI program.") (citing 117 CONG. REC. 21, 329 (1971)). The Senate Committee on Finance would note later that the Supreme Court had only "limited legislative history and obscure statutory language" to rely on when it reviewed the regulations implementing the child SSI disability standard in *Sullivan v. Zebley* in 1990. See S. REP. NO. 104-96, at 19 (1995). The *Zebley* case is discussed *infra* at Part III.B.

34. See Elizabeth J. Jameson & Elizabeth Wehr, *Drafting National Health Care Reform Legislation to Protect the Health Interests of Children*, 5 STAN L. & POL'Y REV. 152, 157 (1993). The third basis, recognizing that children and adults have differing health needs, was brought out clearly in the *amicus* brief filed by the American Medical Association in *Sullivan v. Zebley*, 493 U.S. 521 (1990). See *Amicus Brief of American Medical Association et al.* at 3; *Sullivan v. Zebley*, 493 U.S. 521 (1990) (No. 88-1377) ("Children's health needs differ from those of adults in part because of the different ways children think, experience emotion or pain, respond to stress, metabolize drugs and manifest disease."). The brief also demonstrated support for the first proposition of aiding children to become productive adult members of society through programs such as SSI. See *id.* ("A primary concern of pediatric medicine is to prevent potentially debilitating illness or injury from arresting a child's development of the characteristics and skills essential to adulthood.")

35. Some of these programs are listed *supra* in note 3. One set of commentators noted that, "[V]arious federal programs and laws reflect . . . [the convention's] interest in a child with disability's right to 'a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community' and the services necessary to achieve these

need to include children with disabilities in the newly created federal program as a result of the special position in which low-income children with disabilities find themselves, the “comparable severity” disability standard written into the law was not explained. As a result, responsibility for setting the terms of eligibility for child SSI benefits fell to the Social Security Administration. If Congress had thought through exactly why it was adding this category of beneficiaries, surely it could have come up with a more specific, child-focused eligibility criterion. The special needs of children with disabilities were articulated by Congress; however, the meaning of and rationale for the child’s SSI program statutory disability standard was not.

2. *Implementation of the “Comparable Severity” Disability Standard: Adopting the Sequential Evaluation Model*—The most obvious consequence of the federalization of the AABD program was to shift responsibility for administering the new SSI program, including implementing the statutory disability standard, to the Social Security Administration.³⁶ To be sure, the federal government, specifically, the Department of Health and Human Services,³⁷ had a significant role to play under the “cooperative federalism” structure of the AABD program; however, its authority was shared with, and influenced by, state legislatures and state and local welfare agencies.³⁸ Moreover, the Social Security Administration had assumed historically a strong substantive role relative to the disability provisions of the OASDI program. Although not fully clear how it would transfer over to the SSI program, Congress had given the Administration expressly delegated power to implement the Social Security Act’s OASDI disability standard.³⁹ Given the largely

rights.” Alan Tomkins & Victoria Weisz, *Social Science, Law, and the Interest in a Family Environment for Children with Disabilities*, 26 U. Tol. L. Rev. 937, 945 (1995) (quoting Convention on the Rights of the Child, Working Group of the U.N. Commission on Human Rights, U.N. Doc. E/CN.4/1989/L.88 (1989), reprinted in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PREPARATOIRES” 332 (Sharon Detrick ed., 1992)).

36. Technically, the responsibility rested with the Secretary of the Department of Health and Human Services; however, most of the relevant policy work was done at the SSA under the supervision of the Social Security Commission. Effective 1995, SSA was removed from under DHHS and set up as an independent agency. See Social Security Independence and Program Improvement Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464 (1994).

37. Before splitting off from the Department of Education, it was the Department of Health, Education and Welfare.

38. For a description of the “cooperative federalism” relationship, see Bloch, *supra* note 18, at 3–12.

39. This authority is stated clearly in the OASDI provisions of the Social Security Act. See 42 U.S.C. § 405(a) (2000):

unexplained “comparable severity” statutory directive under the new law and the Social Security Administration’s expansive role in implementing the cross-referenced OASDI disability standard, it is not surprising that the Administration was quick to assert its influence over the disability requirements for children when it promulgated the inaugural regulations for the SSI program as a whole.

The new regulations for adult SSI disability claims were simple to write; as the general disability standard for adults was the same as the OASDI standard, the Social Security Administration simply published parallel regulations for the SSI program.⁴⁰ In effect, the Administration’s implementation of the new child’s SSI disability standard began when it decided to use existing OASDI regulations for adult SSI claims. In addition to being relevant generally with respect to child SSI claims, due to the “comparable severity” language in the child’s disability standard, substantial parts of the adult regulations on determining disability were specifically incorporated into the original child’s regulations as well. Because the resulting relationship between the two sets of regulations was at the

The Commissioner of Social Security shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder.

Thus, in an important case concerning the SSA’s implementation of the general disability standard applicable at the time to OASDI disability insurance and SSI adult disability benefit claims, the Supreme Court noted that “Congress has ‘conferred on the Secretary exceptionally broad authority to prescribe standards for applying . . . the [Social Security] Act.’” *Heckler v. Campbell*, 461 U.S. 458, 466 (1983) (quoting *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981)). Although the SSI provisions of the Act seem to incorporate this delegation of rulemaking authority, see 42 U.S.C. § 1383(d)(1) (providing that the provisions of 42 U.S.C. § 405(a), among others, “shall apply with respect to [the SSI program] to the same extent as they apply [with respect to OASDI]”), the Supreme Court did not apply it clearly in its one major case that focused exclusively on the Child’s SSI disability standard. *Compare Sullivan v. Zebley*, 493 U.S. 521, 541 (1990) (“The Secretary’s approach to child disability is ‘manifestly contrary to the statute,’ and exceeds his statutory authority.” (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844)), *with Zebley*, 493 U.S. at 541–42 (White, J., dissenting) (“Only two Terms ago, when reviewing an aspect of the Secretary’s methodology for evaluating disability applications under this Act, we emphasized that ‘Congress has “conferred on the Secretary exceptionally broad authority”’ in this context, and we stated that the Secretary’s regulations were therefore entitled to great deference. Because the majority has failed to abide by this principle, I respectfully dissent.” (citing *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987), quoting *Heckler v. Campbell*, 461 U.S. 458, 466 (1983))).

40. *Compare* 20 C.F.R. §§ 404.1501–.1694 (2003) (OASDI) *with* 20 C.F.R. §§ 416.901–.1094 (2003) (SSI).

heart of subsequent challenges to the child's regulations discussed later in this article, the adult regulations will be described in some detail before proceeding to the original child's regulations.

a. Five-Step Sequential Evaluation for Adults—The Social Security Administration uses a five-step “sequential evaluation process” to determine disability for all OASDI and adult SSI claims.⁴¹ Although not codified as formal regulations until the late 1970s,⁴² the same 5-step process had already been in regular use for some time.⁴³ It remains in use today throughout the administrative process and is fully accepted by the courts as the framework for analysis of a Social Security disability claim.⁴⁴

The sequential evaluation process is designed to test a claimant's evidence of disability in different contexts, each of which raises different factual and legal issues relative to a finding of disability. It operates somewhat like a flow chart; at each level, depending on the facts, the claim is either resolved (depending on the level, either with a finding that the claimant is disabled or that the claimant is not disabled), or, if that finding cannot be made, then the process continues to the next step. For evaluations that reach the fifth and final level, the process dictates finally—again, depending on the facts—whether the claimant is disabled or not.

In effect, the sequential evaluation process asks a series of questions. The first question is whether the claimant is performing substantial gainful activity. If so, the claimant is considered not disabled, regardless of his or her medical condition, and the process

41. See 20 C.F.R. §§ 404.1520, 416.920 (2003). See also Soc. Sec. Ruling 82-56, 1975-1982 Soc. Sec. Rep. Serv. 762 (1982). Earlier regulations had used the term “sequential evaluation process” to describe this procedure, and that term is still widely used. See 20 C.F.R. § 404.1503 (1980); *Lofton v. Schweiker*, 653 F.2d 215, 217 (5th Cir. 1981).

42. The regulations passed through a series of notices in the Federal Register, with the first effective date in 1979. See Federal Old-Age Survivors and Disability Insurance Benefits and Supplemental Security Income for the Aged, Blind, and Disabled, 43 Fed. Reg. 9284 (Mar. 7, 1978) (taking effect Feb. 25, 1979); 44 Fed. Reg. 38,879 (July 3, 1979); 45 Fed. Reg. 55,566 (Aug. 20, 1980) (final regulations; codified at 20 C.F.R. Parts 404, 416).

43. See, e.g., *Hall v. Harris*, 658 F.2d 260, 264 (4th Cir. 1981) (“To regularize the adjudicative process, the Social Security Administration has recently promulgated new and detailed regulations incorporating longstanding medical-vocational evaluation policies that take into account a claimant's age, education, and work experience in addition to his medical condition.”).

44. See, e.g., *Bowen v. Yuckert*, 482 U.S. 137, 153 (1987); *Plummer v. Apfel*, 186 F.3d 422, 428 (3d Cir. 1999); *Beech v. Apfel*, 100 F. Supp. 2d 1323, 1327 (S.D. Ala. 2000). As one court stated, “It is important for the [administrative law judge] to follow the orderly framework set out in the [sequential evaluation regulations] to ensure uniformity and regularity in outcome as well as fairness to the claimant.” *Mitchell v. Schweiker*, 551 F. Supp. 1084, 1087-88 (W.D. Mo. 1982).

ends.⁴⁵ If the claimant is not currently engaging in substantial gainful activity, the process moves to the second question, which is whether the claimant has a “severe” impairment that significantly limits his or her ability to perform work. If not, the claimant is considered not disabled and the process ends there.⁴⁶ If the claimant does have a severe impairment, the evaluation process continues on to a third question, which asks whether the claimant’s medical condition meets or equals the requirements set out for certain impairments in an appendix to the Social Security regulations known as the Listing of Impairments.⁴⁷ If so, the claimant is considered disabled and the process stops at this third step.⁴⁸ If the claimant’s impairment does not meet the requirements of the Listing, the claim continues to a fourth step, which asks a medical-vocational question: is the claimant prevented from performing his or her past relevant work? If not, the claimant is considered not disabled and, once again, the process stops there.⁴⁹ If the claimant is prevented from performing past relevant work, the sequential evaluation process reaches its final step, which addresses the ultimate medical-vocational standard for disability benefits: considering the claimant’s residual functional capacity, age, education, and prior work experience, can he or she perform other substantial gainful work that exists in significant numbers in the national economy? If such other work exists, the claimant is not disabled; if such work does not exist, then he or she is disabled.⁵⁰

45. 20 C.F.R. §§ 404.1520(b), 416.920(b) (2003) (“If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.”).

46. 20 C.F.R. §§ 404.1520(c), 416.920(c) (2003) (“If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled.”).

47. The Listing of Impairments and the concept of “medical equivalence” to a listed impairment are described *infra* at text accompanying notes 56–62.

48. 20 C.F.R. §§ 404.1520(d), 416.920(d) (2003) (“If you have an impairment(s) which meets the duration requirement and is listed in [the Listing of Impairments] or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.”).

49. 20 C.F.R. §§ 404.1520(e), 416.920(e) (2003) (“If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.”).

50. 20 C.F.R. §§ 404.1520(f)(1), 416.920(f)(1) (2003) (“If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled.”). A different rule is applied at this step for claimants who did only “arduous unskilled physical labor” for 35 years or more and

Generally, claimants have the burden of proof on the issue of disability.⁵¹ However, neither the Social Security Act nor the Social Security regulations specify how the claimant's burden operates in the context of the sequential evaluation process. Nonetheless, case law makes it clear that, upon proof by a claimant at Step 4 that he or she cannot perform prior work, the burden shifts to the Social Security Administration at Step 5 to prove that the claimant can perform other work available in the national economy.⁵²

When followed fairly and correctly, the sequential evaluation process is an effective way to reach decisions in accordance with the words and goals of the statutory disability standard. The first three steps are the most efficient. Claimants who are working and thereby demonstrate that they are not "unable to perform substantial gainful activity" (Step 1) and those with no severe impairments (Step 2) are denied quickly and relatively easily. At one point, the "severe impairment" requirement of Step 2 came under sustained attack on the ground that it was being misused to deny claims that would, or at least could, be granted at Steps 4 or 5. The controversy was resolved in 1987 when the Supreme Court upheld Step 2 as applied by the Administration, noting that "[i]f the impairments are not severe enough to limit significantly the claimant's ability to perform most jobs, by definition the impairment does not prevent the claimant from engaging in any substantial gainful activity."⁵³ In an often-cited concurring opinion, Justice O'Connor found that the Administration did not intend to implement more than a de minimis severity requirement and urged that it be applied only to "claimants with slight abnormalities that do not significantly limit any 'basic work activity.'"⁵⁴ Claimants with impairments that match or equal the quite strict criteria set forth in the Listing of Impairments (Step 3) are granted benefits quickly and relatively objectively.

with only a "marginal" education. 20 C.F.R. §§ 404.1520(f)(2), 416.920(f)(2) (2003). *See also* 20 C.F.R. §§ 404.1562, 416.962 (2003).

51. *See* 20 C.F.R. §§ 404.1512(a), 416.912(a) (2003); *see also* 42 U.S.C. § 423(d)(5)(A) (2000) ("An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Commissioner of Social Security may require.").

52. *See, e.g.*, *Bowen v. Yuckert*, 482 U.S. 137, 146-47 n.5 (1987); *Erickson v. Shalala*, 9 F.3d 813, 816-17 (9th Cir. 1993); *Williams v. Shalala*, 997 F.2d 1494, 1497 (D.C. Cir. 1993).

53. *Yuckert*, 482 U.S. 137 at 146.

54. *Id.* at 158 (O'Connor, J., dissenting). Later cases have confirmed a de minimis severity requirement at Step 2. *See, e.g.*, *Corrao v. Shalala*, 20 F.3d 943, 949 (9th Cir. 1994); *Hudson v. Bowen*, 870 F.2d 1392, 1396 (8th Cir. 1989).

The third step in the sequential evaluation process deserves special attention because of its prominent role in child SSI disability regulations.⁵⁵ This step revolves around the application of the Social Security Administration's Listing of Impairments, which identifies a number of specified impairments and the medical findings necessary to show that a claimant with that impairment is disabled.⁵⁶ The claimant's impairments are compared to the criteria set out in the Listing and, as noted earlier, if an impairment meets the requirements of a listed impairment then the claimant is considered disabled. If not, a claimant can still be found disabled if the same or other impairments, alone or in combination, are the "medical equivalent" of a listed impairment.⁵⁷

The criteria in the Listing are quite strict and are based on the notion of *per se* disability; to qualify, a claimant must have physical and mental impairments that are "severe enough to prevent a person from doing any gainful activity."⁵⁸ All of the findings in the Listing require medical evidence; vocational factors are not considered. This is the case for claimants wishing to show medical equivalence as well, which is further defined in the regulations as requiring "medical findings . . . at least equal in severity and duration to the listed findings."⁵⁹ A comparison is made between the symptoms, signs, and laboratory findings relative to the claimant's impairment or impairments and the medical criteria of a particular

55. See discussion *infra* Parts II.B.2.b, III.C, and IV.B.

56. 20 C.F.R. Pt. 404 Subpt. P, App. 1 (2003). The Listing is divided into two parts: Part A deals with those impairments that affect adults and children in the same manner; Part B deals with impairments that only affect children. There are thirteen sections in the Listing, each covering a different major body system. The first part of each section is a general introduction that defines terms used in that section and may spell out exact medical findings necessary to meet particular listings. The introduction is then followed by a "Category of Impairments," which sets forth individual impairments of the relevant body system and the medical findings necessary to show that a claimant with that impairment is disabled.

57. The claimant has the burden of proof in providing the medical findings necessary to show that his or her impairment meets a listing. See 20 C.F.R. §§ 404.1512(a), 416.912(a) (2003).

58. 20 C.F.R. § 404.1525(a) (2003). See also 20 C.F.R. § 416.925(a) (2003). The SSI regulations include additional language on listing-level severity applicable only to children. See 20 C.F.R. § 416.925(a) (2003).

59. 20 C.F.R. §§ 404.1526(a) (2003). See also 20 C.F.R. §§ 404.1526(b), 416.926(a), (b) (2003) ("Medical equivalence must be based on medical findings. We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence must be supported by medically acceptable clinical and laboratory diagnostic techniques."); *Hickman v. Apfel*, 187 F.3d 683, 688 (7th Cir. 1999) ("Whether a claimant's condition equals a listed impairment is strictly a medical determination."). For a discussion of SSA's policy on medical equivalence, see Soc. Sec. Ruling 96-6p (1996).

listing.⁶⁰ Medical equivalence can be based on more than one impairment if no one impairment equals a listed impairment; in such cases, the question is whether the symptoms, signs, and laboratory findings of a combination of the claimant's impairments are medically equal to the criteria of a particular listing.⁶¹

This "any gainful activity" standard used in the Listing—often referred to as "listing-level severity"—has its origins in the former special disability standard for disabled spouses and stands in specific contrast to the "substantial gainful activity" standard used for most disability claims.⁶² The bar was set extra-high so that only the most clearly disabled claimants could establish eligibility automatically on medical findings alone. For claimants whose medical condition does not match or equal the strict Listing criteria, they can continue through two more steps and show nonetheless that they can not engage in substantial gainful activity.

The last two steps of the sequential evaluation process take on the closer cases—those that cannot be resolved through the first three steps—and address the more complex medical-vocational aspects of the adult statutory disability standard. Step 4 is still relatively focused; it looks at jobs that the claimant held in the relatively recent past and that would qualify as substantial gainful activity.⁶³ Claimants who can still perform any of those jobs that, by definition, are within their vocational competence, are denied benefits on that ground.⁶⁴ Only at Step 5, when the Social Security Administration has the burden of proof, does the process deal with the open-ended, ultimate question of whether the claimant can perform any jobs at all, given his or her age, education, and work experience. For both Steps 4 & 5, the claimant is assigned a residual

60. 20 C.F.R. §§ 404.1526(a), 416.926(a) (2003). The listing used to determine medical equivalence is the listing for the particular impairment or, if that impairment is not listed, the listing of the impairment most like the claimant's impairment included in the Listing of Impairments will be used. *Id.*

61. *Id.*

62. See *infra* text accompanying notes 83–86.

63. Work performed up to 15 years earlier qualifies as past relevant work; work performed more than 15 years earlier will "ordinarily" not be considered. See 20 CFR §§ 404.1565(a), 416.965(a) (2003).

64. Step 4 evaluations are not always simple. See, e.g., *Vaughn v. Heckler*, 727 F.2d 1040, 1042 (11th Cir. 1984) (finding that claimant who could perform prior work as a maid, but whose earnings at that job were insufficient to constitute substantial gainful activity, was improperly denied benefits). In a recent decision, the Supreme Court reversed a divided Third Circuit panel that had held that a claim cannot be denied at Step 4 if the claimant can perform prior work that no longer exists in the national economy. See *Thomas v. Commissioner*, 294 F.3d 568 (3d Cir. 2002), *rev'd* *Barnhart v. Thomas*, 124 S. Ct. 376, ___ U.S. ___ (2003).

functional capacity (often referred to as RFC), which represents the level of work, if any, that the claimant has the capacity to perform.⁶⁵ Then, by taking into account the claimant's RFC, age, education, and prior work experience, a decision is reached whether the claimant can perform his or her past work or, if not, whether there are significant numbers of jobs in the national economy that he or she can perform.

For the most difficult cases, those that must address the full medical-vocational reach of the statutory disability standard at Step 5, the federal regulations provide a special set of rules and tables known as the Medical-Vocational Guidelines.⁶⁶ The heart of the Guidelines is the so-called "grids," which include three tables covering different levels of RFC.⁶⁷ Based on data from various government publications,⁶⁸ each table has a set of "rules" consisting of three columns that account for a claimant's age, education, and previous work experience, and a fourth column that directs a decision of disabled or not disabled. Thus, provided a claimant's vocational factors and residual functional capacity coincide with all of the criteria of a particular rule, that rule directs a conclusion that the claimant is or is not disabled.⁶⁹ For example, if a claimant is limited to light work, is closely approaching advanced age

65. A claimant's RFC is based on his or her physical and mental limitations and how they affect his or her ability to work; it is an evaluation of "what [the claimant] can still do despite [those] limitations." 20 C.F.R. §§ 404.1545(a), 416.945(a) (2003). The basic requirements for sedentary, light, medium, heavy, and very heavy work focus on exertional limitations and are set out specifically in the regulations. See 20 C.F.R. §§ 404.1567, 416.967 (2003). For example, sedentary work requires the ability to lift a maximum of 10 pounds at one time, to lift or carry light objects occasionally, such as files or small tools, and can require occasional walking or standing. See 20 C.F.R. §§ 404.1567(a), 416.967(a) (2003).

66. See 20 C.F.R. Pt. 404 Subpt. P App. 2 (2003).

67. Table 1 applies to individuals whose residual functional capacity limits them to sedentary work, 20 C.F.R. Pt. 404 Subpt. P App. 2 § 201.00 (2003); Table 2 to those limited to light work, 20 C.F.R. Pt. 404 Subpt. P App. 2 § 202.00 (2003); and Table 3 to those limited to medium work, 20 C.F.R. Pt. 404 Subpt. P App. 2 § 203.00 (2003). No tables exist for individuals still able to perform heavy or very heavy work because the Guidelines state, in effect, that regardless of their age, education, or work experience, sufficient jobs exist in the national economy for such individuals to pursue substantial gainful activity. 20 C.F.R. Pt. 404 Subpt. P App. 2 § 204.00 (2003).

68. These include, most notably, the Dictionary of Occupational Titles and the Occupational Outlook Handbook, both published by the Department of Labor. See 20 C.F.R. Pt. 404 Subpt. P App. 2 § 200.00(b) (2003).

69. See generally Kathleen Pickering, Note, *Social Security Disability Determinations: The Use and Abuse of the Grid System*, 58 N.Y.U. L. REV. 575 (1983). Although the Guidelines had their critics, see, e.g., John J. Capowski, *Accuracy and Consistency in Categorical Decision-Making: A Study of Social Security's Medical-Vocational Guidelines—Two Birds With One Stone or Pigeon-Holing Claimants?*, 42 MD. L. REV. 329 (1983), the Supreme Court upheld them in 1983. *Heckler v. Campbell*, 461 U.S. 458, 467 (1983). The Court made it clear, however, that the Guidelines' grids can be used to determine disability only where the claimant's particular circumstances match each of the component parts of the particular rule. *Heckler*, 461 U.S. at 462 n.5.

(defined as between the ages of 50 and 54), is illiterate, and has either no previous work experience or previous work experience limited to unskilled labor, the grids would direct a finding that the claimant is disabled.⁷⁰ On the other hand, if that same claimant were at least literate, then the grids would direct a finding that the claimant is not disabled.⁷¹ If a claimant's RFC or relevant vocational factors are different from those reflected in a particular grid rule, the Guidelines cannot be used to meet the Administration's burden of proof.⁷² In such cases, there must be proof that specific jobs exist in significant numbers in the national economy that the claimant can perform, given his or her impairments, age, education, and prior work experience.⁷³

b. Three-Step Sequential Evaluation for Children—When it came time to implement the disability standard for the child's SSI program, the Social Security Administration opted to cut off the sequential evaluation process for child SSI claims after the first three steps.⁷⁴ Thus, after passing through the first two steps of the process (by showing that the were not engaged in substantial gainful activity and had a severe impairment), claimants under the age of 18 had to prove that they had an impairment, or combination of impairments, that met or equaled the requirements of the Listing of Impairments.⁷⁵ In other words, there was no post-Step 3 evaluation of a child SSI claim comparable to the fourth and fifth steps of the sequential evaluation process used for adult disability evaluations.

70. 20 C.F.R. Pt. 404 Subpt. P App. 2 § 202.09 (2003).

71. 20 C.F.R. Pt. 404 Subpt. P App. 2 § 202.10 (2003).

72. This policy is reflected in the Guidelines themselves. See 20 C.F.R. Pt. 404 Subpt. P App. 2 (Guidelines) § 200.00(a) (2003).

73. Typically, this proof comes from a vocational expert, either in a written report or, at the administrative hearing level, through live testimony. Although regulations provide that the Social Security Administration will choose when to use vocational experts, 20 C.F.R. §§ 404.1566(e), 416.966(e) (2003), sometimes they are required. See, e.g., *Luna v. Shalala*, 22 F.3d 687, 691 (7th Cir. 1994) (“[W]here a non-exertional limitation might substantially reduce a range of work an individual can perform, the ALJ must consult a vocational expert.”); *Wheeler v. Sullivan*, 888 F.2d 1233, 1238 (8th Cir. 1989) (vocational expert required where claimant had severe mental impairment).

74. As mentioned earlier, the sequential evaluation process was not codified formally until the late 1970; as a result, the three-step process for determining child disability for SSI was not committed to regulations until then as well. However, as was the case with the adult 5-step process, the 3-step process for child SSI claims had been in use before the formal regulations were promulgated. See, e.g., *Winfield v. Mathews*, 571 F.2d 164, 167 (3d Cir. 1978) (“For children under the age of 18, their impairments, if not listed in the Appendix, must be ‘medically the equivalent of a listed impairment.’” (quoting 20 C.F.R. § 416.901 (1977))).

75. 20 C.F.R. § 416.923 (1974). The regulations also outlined when the Administration would find that a claimant met or equaled a listed impairment. See 20 C.F.R. § 416.923(b) (1974).

To mitigate the limiting effect of determining children's disabilities solely on the basis of the Listing of Impairments, the Administration added a separate Part B to the Listing to be used only for child claimants, which was intended to supplement the adult listings for impairments where the adult listings alone would not be appropriate for evaluating children.⁷⁶

This truncated sequential evaluation process was not a new idea. When spouses became eligible for dependent and survivor disability benefits (claiming insurance benefits due to their own disability but on the earnings record of their elderly, disabled, or deceased spouse) in the 1950s, the Administration used the same three-step approach.⁷⁷ However, as explained in more detail below, the three-step sequential evaluation process used for disabled spouse claims was implemented to apply a stricter disability standard for that group of beneficiaries. Until 1991, the statutory standard for disabled spouse claims required a showing that a claimant could not engage in "any gainful activity," as opposed to "any substantial gainful activity," and expressly precluded the consideration of vocational factors.⁷⁸

The decision to use, in effect, the same sequential evaluation process for child SSI claims as was being used for disabled spouse claims was odd, given the difference between the restrictive "any gainful activity" standard for spouses and the open-ended "comparable severity" standard for children. Making Step 3 the final step for children was also at odds with its limited role in the five-step process used for adult SSI claims. It was not as if the Social Security Administration denied that the Social Security Act provided that children with impairments comparable to those that would qualify for an adult were entitled to benefits.⁷⁹ In response to comments to

76. 42 Fed. Reg. 14,705 (Mar. 16, 1977); 20 C.F.R. § 404, App. 1, Subpart P (Part B) (2003). As explained further by the Social Security Administration, Part B corresponds to Part A "for those impairments common to both adults and children. . . , with modifications of the adult criteria, where necessary, to take into account the different impact on children. In addition, [Part B] contains impairments that are generally seen only in children." 42 Fed. Reg. 14,705, at 14,706. Generally, children are evaluated first under Part B; if the criteria set forth in Part B do not apply to the particular claim, then Part A can be used. 20 C.F.R. § 416.925(b)(2) (2003).

77. This was the case even before the sequential evaluation process was codified formally in the regulations. *See, e.g.,* Zanolviak v. Finch, 314 F. Supp. 1152, 1156 (W.D. Pa. 1970) (noting that eligibility could be based on "extremely specific" listing of "particular disabilities" or if an "impairment or cumulative impairments are determined medically to be the equivalent in severity and duration of a specific impairment listed in the Appendix"). *See also* 20 C.F.R. § 404.1578 (2003) (still applicable to periods of disability prior to 1991).

78. *See infra* text accompanying notes 83–86.

79. The original SSI regulations reworded the statutory "comparable severity" language without changing its effect, providing that children under the age of 18 would be found disabled if they were suffering from any "medically determinable physical or mental

its Notice of Proposed Rulemaking to the effect that requiring children under the age of 18 to have an impairment that met or equaled the Listing of Impairments in order to be found disabled conflicted with the “comparable severity” standard in the Act, the Administration responded that “the use of vocational factors is not appropriate since the activities of children under age 18 are extremely difficult to measure in vocational terms.”⁸⁰ The Administration did not, however, address the substance behind those comments—that since an adult could be found to be disabled on the basis of vocational considerations even when their impairment did not meet or equal the Listing of Impairments, requiring children under age 18 to meet or equal the criteria in the Listing meant, in effect, that they had to have a more severe impairment than an adult to qualify for benefits. Instead, the Administration stated that it was “more equitable” to evaluate children’s claims using only medical evidence and noted that it was adding supplemental listings for children to account for the fact that certain conditions have a different effect on children than on adults: “This supplement realistically expands the area of medical consideration for children, and lessens any inequity that could result because of the absence of vocational evaluation.”⁸¹

With this regulatory regime in place, SSI disability assessments for newly covered children with disabilities focused exclusively on specifically listed criteria for selected identified impairments set out in the Listing of Impairments. The child’s SSI regulations did include findings of medical equivalence of a listed impairment as a basis for disability, which allowed some room to evaluate child disability claims outside the precise requirements of the Listing. However, medical equivalence assessments were tied closely to the Listing’s criteria. As a result, the limits of the new child’s SSI program—what the “comparable severity” disability standard really meant—had to be tested through the relatively narrow window of medical equivalence or by challenging the limited three-step sequential process as inconsistent with the Social Security Act.

impairment” which compares in severity to an impairment that would make an adult (a person over age eighteen) disabled. 20 C.F.R. § 416.906 (1974).

80. Federal Old Age, Survivors, and Disability Insurance Benefits; Supplemental Security Income for the Aged, Blind, and Disabled, 45 Fed. Reg. 55,566, 55,570 (Aug. 20, 1980).

81. *Id.*, 45 Fed. Reg. at 55,570–71 (Aug. 20, 1980).

III. FROM THREE STEPS TO FOUR: *SULLIVAN v. ZEBLEY* AND THE INTRODUCTION OF INDIVIDUALIZED FUNCTIONAL ASSESSMENTS

As noted above, the Social Security Administration's three-step sequential evaluation process for child SSI benefits requiring a child to meet or equal the requirements of the Listing of Impairments was questioned from the beginning as fundamentally inconsistent with the "comparable severity" language of the Social Security Act. Two different approaches emerged in response to this restrictive implementation of the statutory standard: efforts to liberalize Step 3 by expanding the concept of "medical equivalence" to a listed impairment; and direct challenges to the three-step process itself as inconsistent with the Social Security Act. Over time, some cases did begin to expand the scope of medical equivalence at Step 3; however, in the end it was the direct challenges that took center stage—culminating with the Supreme Court's 1990 *Sullivan v. Zebley* decision that overruled the Administration's three-step approach.⁸²

This Section examines the fate of the three-step sequential evaluation process for child SSI claims. It begins by reviewing two sets of pre-*Zebley* cases: those that challenged the three-step process as used for dependent spouse claims and those that challenged it in the context of child SSI claims. With respect to both types of claims, cases that focused on the meaning of medical equivalence are discussed as well. This section continues with an analysis of the *Zebley* decision and then concludes with a description of the regulations promulgated by the Social Security Administration to implement *Zebley*. The next Section chronicles the downfall of *Zebley*, brought about in large measure by Congressional reaction to the Administration's post-*Zebley* regulations.

A. Pre-*Zebley* Cases

The three-step sequential evaluation process used to implement the "comparable severity" standard for child SSI claims posed two related, but ultimately quite different, legal issues: what Step 3 accomplished by looking at whether a claimant met or equaled the requirements of the Listing of Impairments and whether stopping

82. *Zebley* is discussed at length *infra* at Part III.B.

the inquiry at Step 3 allowed for a full evaluation under the statutory standard. The issues differed in that the first focused on the application of Step 3 while the second focused on its role in the disability determination process. They also differed because cases seeking to construe Step 3 would apply to all types of disability claims, including those for which Step 3 was only an optional route for finding disability in a five-step sequential evaluation process. Cases that challenged Step 3 as the final step in the sequential evaluation process arose only in the context of claims for child SSI or dependent spouse benefits. The two issues were tied together in the sense that if the answer to the first question—what does a medical equivalence assessment entail—was something short of evaluating whether a child's impairment was comparable to a qualifying impairment for an adult, then the answer to the second question—whether the three-step process fully implemented the "comparable severity" standard—would have to be "no."

The basic arguments in the child SSI cases challenging the three-step sequential evaluation process were essentially the same as those litigated by dependent spouses, even though the underlying statutory disability standards were quite different. Although the contexts in which the two sets of cases were litigated—wage earners' disabled dependent spouses seeking benefits as opposed to low-income children with disabilities—were also quite different, the fate of the two sets of three-step sequential evaluation regulations often were intertwined. Therefore, cases challenging the three-step process for dependent spouse benefits, many of which were litigated even before SSI was enacted, will be discussed briefly below before moving on to those involving child SSI claims.

1. *Disabled Spouse Cases*—As with the child's SSI program, Congress had set out a separate disability standard for disabled dependent spouses when they became eligible for benefits under the OASDI program in 1967. The difference, however, is that the separate statutory standard for dependent spouses really was different. At all times relevant to this discussion, from when dependent spouse benefits were first made available until the disabled spouse standard was amended to conform with the general disability standard in 1991, dependent spouses had to show that their physical or mental impairments were "of a level of severity . . . sufficient to preclude an individual from engaging in any gainful activity."⁸³ Not only did this standard substitute "any gainful activity"

83. 42 U.S.C. § 423(d)(2)(B) (1988) (amended 1990). The Act also expressly authorized the Social Security Administration to define this level of severity by regulation. *Id.*

for the more liberal “any substantial gainful activity” requirement used for wage earners’ benefits, it specifically stated that a spouse’s ability to engage in any gainful activity had to be determined without considering non-medical vocational factors, such as age, education, and work experience, that are included in other adult disability assessments.⁸⁴

Congress was well aware that it was setting a stricter disability standard for these new beneficiaries. As noted by the Senate Committee on Finance in its report on the 1967 amendments, the new category of benefits for disabled spouses was being added “under a test of disability that is somewhat more restrictive than that for disabled workers.”⁸⁵ Congress was motivated, at least in part, by the very practical concern that using the more liberal “substantial gainful activity” standard could prove too costly.⁸⁶

The Social Security Administration thus set out to implement this new, stricter disability standard with a separate disability determination process. Even before the sequential evaluation process was codified and before the Listing of Impairments was published, claimants for dependent spouse benefits had to show that they had an impairment that was on a prescribed list or was the equivalent of an impairment on the list.⁸⁷ Later, after the Listing of Impairments was published, the requirement was stated as meeting or equaling the criteria set out in the formal Listing.⁸⁸

In a series of cases beginning in the early 1970s, claimants charged that restricting dependent spouse benefits to persons with a listed impairment, or the medical equivalent, violated the Social Security Act and the Constitution. All of the early cases challenging the implementing regulations failed, with the courts ruling that the Social Security Administration had acted well within its delegated authority to establish guidelines for eligibility.⁸⁹ In response to

84. 42 U.S.C. § 423(d)(2)(A) (1988) (amended 1990).

85. S. REP. NO. 90-744, at 49 (1967), *reprinted in* U.S.C.A.N. 2834, 2883. *See also* Hollis v. Mathews, 520 F.2d 338, 340 (“Congress established more stringent eligibility standards for widow disability benefits than for other categories of beneficiaries.”).

86. *See* 113 CONG. REC. 23,049 (1967) (statement of then Chair of the House Committee on Ways and Means: “A stricter test of disability than [that used for wage earners] would apply to widows and widowers. . . . We wrote this provision of the bill very narrowly because it represents a step into an unexplored area where cost potentials are an important consideration.”).

87. *See supra* note 77.

88. *See* 20 C.F.R. § 404.1577 (1980).

89. *See, e.g.*, Frasier v. Finch, 313 F. Supp. 160, 163 (N.D. Ala.), *aff’d sub nom.* Frasier v. Richardson, 434 F.2d 597 (5th Cir. 1970) (approving delegation of authority and noting that SSA regulations “are presumptively valid and should not be disturbed unless they are inconsistent with the statute or unreasonable”); Zanolviak v. Finch, 314 F. Supp. 1152 (W.D. Pa. 1970); Gillock v. Richardson, 322 F. Supp. 354, 357 (D. Kan. 1970) (“The Court could well

arguments that disabled spouse claims should have been evaluated according to the same process used for claims filed by disabled wage earners, courts pointed specifically to the legislative history mentioned above that made it clear that Congress had intended to create a higher and more restrictive standard for disabled spouses with the "any gainful activity" language in the Act.⁹⁰ Constitutional challenges were uniformly unsuccessful as well.⁹¹

Later cases, beginning in the early 1980s, focused on the meaning of "medical equivalence" at Step 3 and sought to extend its reach by arguing that spouse disability assessments, regardless of the number of steps involved, must address fully the "any gainful activity" statutory standard.⁹² They began to draw a distinction between considering vocational factors at Step 5 of the sequential evaluation process, which the statute expressly precluded for spouse claims, and measuring residual functional capacity at the beginning of Step 4. As the Second Circuit put it, in one of the earlier of these cases:

It would be entirely understandable that benefits would be denied after a determination that a widow did not have an impairment equivalent to a listed impairment if that conclusion were based on a determination that the claimant's residual functional capacity left the claimant with adequate capacity to perform "any" gainful activity. On the other hand, if the claimant's residual functional capacity leaves that person unable to

agree with the Examiner's comment that it is difficult to visualize [the claimant] in any situation of gainful employment, but this, of course, is not the test. Congress has given the [SSA] full authority to govern the issue by regulation."). This delegation of authority is discussed at note 39, *supra*, and accompanying text.

90. See *Davidson v. Secretary*, 912 F.2d 1246, 1250 (10th Cir. 1990) ("The legislative history of the section of the Act allowing for disabled widow's benefits makes it clear that Congress contemplated a stricter standard to be used."); *Sullivan v. Weinberger*, 493 F.2d 855, 862 (5th Cir. 1974), *cert. denied*, 421 U.S. 975 (1975) ("The legislative history of the Social Security Amendments of 1967 makes clear that Congress intended widows' benefits to be paid only for a disabling medical impairment, not simply for an inability to obtain employment.").

91. See *Sims v. Harris*, 607 F.2d 1253, 1257 (9th Cir. 1979) (holding that the statutory classification "is sufficiently rational to be upheld against plaintiffs' equal protection challenge"); *Wokojanec v. Weinberger*, 513 F.2d 210, 212-13 (6th Cir. 1975) (holding that while "[t]here can be no doubt that the Social Security Act is subject to scrutiny under equal protection concepts implicit in the due process clause[,] . . . Congress has wide latitude in the area of social welfare legislation" and the statutory classification survives rational basis review); *Sullivan v. Weinberger*, 493 F.2d 855, 862-63 (5th Cir. 1974).

92. See, e.g., *Paris v. Schweiker*, 674 F.2d 707, 710 (8th Cir. 1982) ("Viewing [the claimant's] conditions as a whole, we find it impossible to reasonably conclude that she is capable of any gainful activity. This standard is the core of the medical equivalence test and we find that [the claimant] has met it.").

perform any such activity, then it is difficult to see how the impairment would fail to be the equivalent of some impairment on a list of what purports to be impairments “considered severe enough to prevent a person from doing any gainful activity.”⁹³

The progress of these cases was cut short, however, when Congress amended the Social Security Act in 1991 to make the standards for determining disability the same for both wage earner and dependent spouse claims.⁹⁴

The question of what Step 3 medical equivalence meant in this context thus became moot, except for an increasingly small number of claims that involve periods of disability before 1991.⁹⁵ It is worth noting, however, that by the time the statute was amended, a majority of the circuits had held that a dependent spouse’s residual functional capacity must be considered under the “any gainful activity” standard, regardless of the number of steps used in the disability determination process.⁹⁶ The courts’ reasoning was similar to that expressed initially by the Second Circuit: without an administrative determination of residual functional capacity, the Administration lacked sufficient information to determine whether the claimant was actually able to engage in “any gainful activity.”⁹⁷

93. *Tolany v. Heckler*, 756 F.2d 268, 271–72 (2d Cir. 1985) (quoting 20 C.F.R. § 404.1525(a) (1984)).

94. *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 § 5103, 104 Stat. 1388, 1388–251 (1990). This action was taken in recognition of the differences between the two standards and was seen as the fair thing to do, not as externally required in any way. Thus, the Senate report noted, “[t]his landmark legislative provision removes a major inequity in the Social Security program, and will assist many thousands of deserving older Americans in the future.” S. REP. NO. 102-28, pt. 1, at 31 (1991), 1991 WL 52579 (Leg. Hist.). *See generally* Social Security Benefits for Widows and Spouses: Hearing Before the Subcomm. on Social Security of the House Comm. on Ways and Means, 101st Cong., 2d Sess. 1–20 (1990).

95. Current disabled spouse claims covering a period of disability prior to 1991 are governed by the same regulations that were in place before the 1990 amendments. *See* 20 C.F.R. §§ 404.1577–1578 (2003).

96. *See* *Marcus v. Sullivan*, 926 F.2d 604, 609 (7th Cir. 1991) (“The language of Section 423(d)(2)(B) itself indicates that a determination of the individual’s impairments and functional capabilities must supplement any mechanical comparison of medical findings with the Listing.”); *Finkelstein v. Sullivan*, 924 F.2d 483, 489 (3d Cir. 1991); *Bennett v. Sullivan*, 917 F.2d 157, 160–61 (4th Cir. 1990); *Davidson v. Sec’y of HHS*, 912 F.2d 1246, 1253–54 (10th Cir. 1990); *Ruff v. Sullivan*, 907 F.2d 915, 919 (9th Cir. 1990); *Cassas v. Sec’y of HHS*, 893 F.2d 454, 458 (1st Cir. 1990); *Kier v. Sullivan*, 888 F.2d 244, 247 (2d Cir. 1989).

97. *See, e.g., Marcus*, 926 F.2d at 610 (noting that “the Listing represents a non-exhaustive sampling of impairments”); *Cassas*, 893 F.2d at 458 (noting that “the listings do not exhaust the entire universe of incapacities [therefore] residual functional capacity cannot be ignored in considering medical equivalence”). One court stated broadly that “the Secretary’s regulations setting forth the factors to be considered in analysis of the impairments of a claimant for disabled widow’s benefits are ‘manifestly contrary to the statute.’”

The argument was a weaker version of the argument that was about to prevail at the Supreme Court for child SSI claims; however, the relief obtained—statutory amendment—proved to be more permanent than the Court's ruling.⁹⁸

2. *Child SSI Cases*—Challenges to the use of a three-step sequential evaluation process for child SSI claims were more successful, although not initially. The Eleventh Circuit was the first appellate court to rule on the regulations and their consistency with the “comparable severity” statutory disability standard. In a 1982 decision, after the bulk of the unsuccessful direct challenges to the dependent spouse benefits standard had failed but before the second group of spouse cases supporting residual functional assessments as part of the determination of medical equivalence had been filed, the court held that the regulations were not inconsistent with the language of the Social Security Act.⁹⁹ Noting that Congress did not define “comparable severity” in the statute and the lack of legislative history on that particular language, the court reasoned that this reinforced the special deference given to the Social Security Administration to implement the statute by promulgating regulations intended to achieve the statutory goal.¹⁰⁰ The court also echoed statements made by the Administration in response to comments critical of the regulations filed following its Notice of Proposed Rulemaking, finding that there was a legitimate reason not to include an RFC analysis when assessing child claimants: children under eighteen have no attachment to the workforce; therefore, a vocational analysis is not feasible or necessary.¹⁰¹ Cutting off a child's disability determination process at step three of the five-step adult analysis was not inequitable; it was a practical necessity.

The Fifth Circuit joined the Eleventh Circuit two years later.¹⁰² Reasoning that the “comparable severity” language in the statute

Davidson, 912 F.2d at 1254 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 844 (1984)).

98. For a discussion of the parallels between the two sets of arguments, see Michael G. Ruppert & Thomas M. Weinland, *Developments in Social Security Law*, 24 IND. L. REV. 1109, 1117–21 (1991).

99. *Powell v. Schweiker*, 688 F.2d 1357 (11th Cir. 1982). The statutory standard is discussed *supra* at text accompanying notes 26–34.

100. *Id.* at 1360.

101. *Id.* at 1362. These comments are discussed *supra* at text accompanying notes 80–81.

102. *Hinckley v. Sec'y of HHS*, 742 F.2d 19 (5th Cir. 1984). Two other circuits held that the Secretary properly denied benefits under the regulations but did not rule directly on the validity of the regulations themselves. See *Nash v. Bowen*, 882 F.2d 1291, 1293 (8th Cir. 1989) (noting that because “the issue will be decisively addressed by the Supreme Court in the

indicated that Congress did not intend that child and adult claims be evaluated according to identical standards, the court accepted, as had the Fifth Circuit, the Administration's logic that assessing a child's residual functional capacity to work was unnecessary: "Since children seldom work even if they have no impairment, it would be inappropriate to consider whether a child is able to engage in 'substantial gainful activity.'"¹⁰³ Having found the three-step process reasonable, the court upheld that choice as within the range of permissible administrative regulation and thus deserving deference.¹⁰⁴

The view that a three-step, listings-only approach carried out the "comparable severity" mandate of the Act effectively was not, however, unanimous. In *Zebley v. Bowen*,¹⁰⁵ the Third Circuit held that the statutory standard required children to be assessed on an individual basis similar to adults and that the regulations were invalid because they failed to accomplish that result.¹⁰⁶ The court rejected explicitly the arguments accepted by the Eleventh and Fifth Circuits, finding that Congress intended that children be given an opportunity for individual assessment "comparable to the residual functional capacity assessment for adults."¹⁰⁷ The court reasoned, in effect, that because adults were given an opportunity to be judged individually and outside the narrow constraints of Step 3, children should be afforded the same privilege. Although some courts noted similar arguments concerning the limited use of medical equivalence, this issue was not addressed fully in the child's SSI cases—perhaps because of the inherent difficulty of pairing two amorphous concepts like "comparable severity" and "medical equivalence."¹⁰⁸ Before that issue could be developed further, the Supreme Court took on the direct challenge.

near future" it need not decide the validity of the regulations but that "as applied in this case [the regulation] is not invalid"); *Burnside v. Bowen*, 845 F.2d 587, 591 (5th Cir. 1988).

103. *Hinckley*, 742 F.2d at 22.

104. *Id.* at 23 ("[T]he fact that we are able to devise broader standards for measuring disabilities in children does not permit us to strike down the reasonable standard promulgated by the Secretary pursuant to her statutory authority.").

105. 855 F.2d 67 (3d Cir. 1988).

106. *Zebley*, 855 F.2d at 76.

107. *Id.* Commentators also went against the weight of authority among the circuit courts and argued that the original regulations were too restrictive. See generally Jameson & King, *supra* note 12; Lombardi, *supra* note 12.

108. See, e.g., *Cornelius v. Sec'y of HHS*, 655 F. Supp. 1211, 1213-14 (W.D.N.Y. 1987); *Powell v. Schweiker*, 514 F. Supp. 439, 443-44 (D. Fla. 1981).

B. Sullivan v. Zebley

The Supreme Court resolved the split among the circuits in 1990 by affirming the Third Circuit and requiring that the Social Security Administration issue new regulations that would more closely resemble the adult sequential evaluation process.¹⁰⁹ The Court began its analysis by noting the very simple proposition that, by the terms of the statute itself, a child was “entitled to benefits if his impairment is as severe as one that would prevent an adult from working.”¹¹⁰ The Court then looked in depth at the sequential evaluation regulations, focusing in particular on Step 3 and the role of the Listing of Impairments. Concentrating its analysis on the practical effect of the sequential evaluation process, the Court observed that the Listing is used at the third step of the adult sequential evaluation process as an efficient way to find presumptive disability for claimants with certain impairments and that the impairments listed had to “prevent an adult, regardless of his age, education, or work experience, from performing *any* gainful activity, not just ‘substantial gainful activity.’”¹¹¹

Having found that the Listing was designed to produce only a presumptive finding at an early stage in the determination process, the Court went on to discuss four ways in which the three-step, listings-only approach to child SSI disability determinations was more restrictive than the five-step sequential evaluation process used for adults and therefore ran against the statutory directive of “comparable severity.” The first flaw to which the Court pointed was that the Listing does not cover all impairments that can result in a finding of disability.¹¹² Second, the Court noted that, even if a claimant’s condition is included in the Listing, the criteria established for listed impairments are set at a higher level of severity than the standard prescribed in the statute (*any* gainful activity, as opposed to *substantial* gainful activity).¹¹³ The third problem the Court found with a listings-only approach to disability determinations focused on the lack of an individual assessment; any claimant who suffers from an impairment that may not disable all persons but does disable the individual claimant nonetheless is denied

109. *Sullivan v. Zebley*, 493 U.S. 521 (1990). A dissenting opinion by Justice White and joined by the Chief Justice is discussed briefly *infra* at text accompanying notes 118–19.

110. *Zebley*, 493 U.S. at 529.

111. *Id.* at 532 (citing 20 C.F.R. § 416.925(a) (1989)).

112. *Id.* at 533.

113. *Id.* at 534.

benefits. The final shortcoming the Court noted was that the “medical equivalence” option at Step 3 still required claimants with unlisted impairments to fit all the criteria for a closely related, listed impairment; claimants with more general indicators of disability that could meet the statutory requirement could not qualify for benefits.¹¹⁴

In effect, the Court found that cutting off the sequential evaluation process at Step 3, and thus precluding the use of something like Steps 4 and 5 or their comparable equivalent, effectively denied child SSI claimants the benefits of the statutory “comparable severity” standard.¹¹⁵ The Court thus acknowledged the unique role that Step 3 plays in the full, five-step sequential evaluation process. As noted earlier, Step 3 allows the Administration to make relatively easy determinations of disability early in the process; the two final steps serve to catch claimants who might qualify as unable to engage in any substantial gainful activity but do not meet the stricter, any-gainful-activity requirement of the Listing of Impairments. Since no set of listings could ensure that child claimants would receive benefits when their impairments were of comparable severity to impairments that would qualify for benefits as an adult, an individual, functional analysis was required.¹¹⁶ In rejecting the argument that a vocational analysis of the type given adults through an RFC assessment is inapplicable to children, the Court stated, “[T]he fact that a *vocational* analysis is inapplicable to children does not mean that a *functional* analysis cannot be applied to them.”¹¹⁷ Thus, the Court went well beyond voiding the three-step sequential evaluation process for child’s SSI benefits; it signaled the inherent deficiency of any regulations that did not allow for individual assessments of a child claimant’s impairments.

The dissent saw the problem along the same lines as did most of the lower courts, noting that comparing the child and adult evaluation processes was like “comparing apples and oranges.” Writing for himself and Chief Justice Rehnquist, Justice White argued that, since the severity of an impairment for an adult is measured by its effects on the claimant’s ability to engage in substantial gainful activity, or employment, that type of analysis is not useful in

114. *Id.*

115. One way this could be seen was where a claimant was denied benefits as a child but granted benefits after turning eighteen, with the same impairment. *See id.* at 536 n.17 (“The disparity in the Secretary’s treatment of child and adult claimants is thrown into sharp relief in cases where an unsuccessful child claimant, upon reaching age 18, is awarded benefits on the basis of the *same* impairment deemed insufficient to qualify him for child disability benefits.” (citing *Wills v. Sec’y of HHS*, 686 F. Supp. 171, 172 (W.D. Mich. 1987))).

116. *Zebley*, 493 U.S. at 539.

117. *Id.* at 539–40.

adjudicating children's claims; therefore, the Social Security Administration's decision to use a different disability determination process for children was understandable and perhaps even unavoidable.¹¹⁸ The solution, he said, was not to declare the sequential evaluation regulations void on their face; rather, children denied benefits at Step 3 should appeal the decision in individual cases.¹¹⁹

C. Post-Zebley Regulations

The Supreme Court's decision in *Zebley* left little doubt that the Social Security Administration would have to revise entirely the SSI disability evaluation regulations for children. Not only had the Court identified fundamental conflicts between the three-step sequential evaluation process and the statutory disability standard, but the Court had also described the improvements it felt were necessary to ensure that the disability determination process for children would carry out the statutory directive of more closely resembling the process for adults. In early 1991, one year after the *Zebley* was decided, the Social Security Administration issued final regulations describing a new process for determining disability for SSI claimants under the age of eighteen.¹²⁰

Taking its cue from the Supreme Court, the Administration's new regulations for child disability assessments closely followed the format used to determine disability for adults. The new regulations again centered on a sequential evaluation process; however, this time, rather than simply cut the adult five-step process short along

118. See *id.* at 543 (White, J., dissenting) ("Given this task of comparing apples and oranges, it is understandable that the Secretary implemented the statute with respect to children in a somewhat different manner than he did for adults, and surely there is no direction in the statute to employ the same methodology for both groups.")

119. *Id.* at 545 ("[O]nly then can a court confidently say that the medically identifiable impairment, though neither a listed impairment nor its equivalent, is nevertheless of 'comparable severity' and hence disabling when considered with nonmedical factors.")

120. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534 (Feb. 1, 1991) (to be codified at 20 C.F.R. Pt. 416). SSA issued the regulations initially in final form and not as a notice of proposed rulemaking, due to the urgency of the need for final regulations to govern the post-*Zebley* process. For a thorough description of the post-*Zebley* regulations, see Julie Clark, *Determining Disability for Children: Implementation of Sullivan v. Zebley. Part I: The New Sequential Evaluation Process—An Overview*, 25 CLEARINGHOUSE REV. 246 (1991); Julie Clark, *Determining Disability for Children: Implementation of Sullivan v. Zebley. Part II: The Individualized Functional Assessment*, 25 CLEARINGHOUSE REV. 494 (1991); Julie Clark, *Determining Disability for Children: Implementation of Sullivan v. Zebley. Part III: Medical and Functional Equivalence*, 25 CLEARINGHOUSE REV. 979 (1991).

the way, the Administration created a new four-step process for children.¹²¹ The first three steps essentially tracked the first three steps of the adult sequential evaluation process, although there were some significant differences at Step 3. Step 4 was entirely new and unique to child SSI claims. The new Step 4 also proved to be highly controversial.

The first step was the same as that used for all types of disability assessments and addressed the question whether the claimant was engaged in substantial gainful activity.¹²² The regulations set out the same definition of "substantial gainful activity" for both adult and child claims: any work performed had to be both substantial, meaning that it involved doing significant physical or mental activities, and gainful, meaning work done for pay or profit.¹²³ Claimants engaged in substantial gainful activity were not disabled; those not engaged in substantial gainful activity proceeded to the next step.¹²⁴

The second step was also taken from the adult sequential evaluation process: a child's impairment, or combination of impairments, had to be "severe" in order to move on to Step 3.¹²⁵ Adapted slightly to account for the fact that a child's limitations were not to be measured according to work related activity, the critical question was whether the child's impairment or combination of impairments caused more than a minimal limitation in his or her ability "to function in an age-appropriate manner."¹²⁶ The Administration stressed that it was not its intention to deny benefits at this step to children who might otherwise fit within the statutory definition but rather to create a more efficient process.¹²⁷

The third step in the new sequential evaluation process for children resembled both the third step of the five-step adult process and what had been the final step of the process for children prior to *Zebley*: did the child's impairment meet or equal the require-

121. The new children's sequential evaluation process was codified at 20 C.F.R. § 416.924 (1992).

122. 20 C.F.R. § 416.924(a) (1992).

123. See 20 C.F.R. § 416.972(a)-(b) (1992).

124. 20 C.F.R. § 416.924(c). SSA kept this step for child claims because, in its view, the statutory definition of disability required it. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534, 5537 (Feb. 1, 1991).

125. 20 C.F.R. § 416.924(d) (1992). The validity of the severity step in the adult determination process had already been upheld by the Supreme Court in *Bowen v. Yuckert*, 482 U.S. 137 (1987). See *supra* text accompanying notes 53-54.

126. 20 C.F.R. § 416.924(d) (1992).

127. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534, 5538 (Feb. 1, 1991). SSA also stated that it added this requirement in an effort to make the children's process more comparable to the adult process already in place. *Id.* Step 2 of the adult process had come under attack earlier as an over-used basis for denials. See *supra* text accompanying notes 53-54.

ments of a listed impairment as set out in the Administration's Listing of Impairments?¹²⁸ However, the new equivalence analysis for children differed in important respects from both the equivalence analysis used for adult claimants and the pre-*Zebley* analysis used for children.¹²⁹ Step 3 equivalence for adults had always been based solely on medical evidence and it was kept that way in the adult sequential evaluation process,¹³⁰ but the Administration established an entirely new method for determining equivalence for children.¹³¹ The new regulation still allowed for a showing of equivalence based on medical evidence; however, if medical equivalence was not found, then the regulations permitted a finding of equivalence to a listed impairment "based on an assessment of the child's overall functioning."¹³²

In keeping with the spirit of the *Zebley* decision and the Supreme Court's emphasis on the need for an individual, functional determination for children that mirrored the RFC analysis in the adult determination process, the Social Security Administration stated that "the primary focus [of new Step 3 equivalence determinations] should be on the disabling consequences of an individual's conditions, as long as there is a direct, medically determinable cause for an individual's disability."¹³³ To effectuate this policy, the new regulation stated that, in making a determination whether a child's impairment equaled a listed impairment, the Administration would consider "all relevant evidence."¹³⁴ The regulations also included a list of examples of impairments that were functionally equivalent to listed impairments.¹³⁵ By emphasizing functional assessments as well as medical evidence, the new regulations responded to the Supreme Court's concern that the Listing does

128. 20 C.F.R. § 416.924(d) (1992).

129. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534, 5543-45 (Feb. 1, 1991). See generally Daniel L. Skoler, *Evaluation of Disability Benefits for Children: The Zebley Revolution*, 14 CHILDREN'S LEGAL RTS. J. 8, 10 (Winter-Spring 1993) (providing a brief analysis of the regulations following *Zebley*).

130. Thus, adult regulations provided that the SSA will "always base [the] decision about whether [the claimant's] impairment(s) is medically equal to listed impairment on medical evidence only" and that medical evidence had to be supported by "medical acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. § 416.926 (1992). Current adult regulations are to the same effect. See 20 C.F.R. §§ 404.1526, 416.926 (2003).

131. 20 C.F.R. § 416.926a (1992).

132. Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534, 5543 (Feb. 11, 1991). SSA noted that the new equivalence determination method was based on three sources: the *Zebley* decision, the concept of "screening," and the Listing of Impairments which contained examples of overall impairments of functioning. *Id.*

133. 56 Fed. Reg. at 5544.

134. 20 C.F.R. § 416.926(a) (1992).

135. See 20 C.F.R. § 416.926a(d) (1992).

not include every possible disabling impairment and that a functional analysis should be applied to children in lieu of the adult vocational analysis. The Administration's intention was "to remove any suggestion that the ultimate finding of equivalence must be based on objective medical evidence alone"¹³⁶ though Step 3 still remained closely tied to the Listing of Impairments.

Most importantly, therefore, the new sequential evaluation process for children did not end at Step 3. If, notwithstanding the more liberal concept of medical or functional equivalence, a child claimant did not have an impairment or combination of impairments that met or equaled a listed impairment, the process continued to a fourth and final step that was analogous to the Steps 4 & 5 assessment for adults: an individualized functional assessment (IFA) based on the child's ability to function "independently, appropriately, and effectively in an age-appropriate manner."¹³⁷ By introducing an IFA separate from the work activity-based RFC, the Administration effectively acknowledged the Supreme Court's observation in *Zebley* that "[t]he fact that a vocational analysis is inapplicable to children does not mean that a functional analysis cannot be applied to them."¹³⁸

The goal of the new Step 4 IFA was to evaluate whether a child claimant had an impairment or combination of impairments that was of comparable severity to an impairment that would prevent an adult from engaging in substantial gainful activity; in other words, whether the child met the "comparable severity" disability standard of the Act. Because this analysis necessarily is complex, the Administration provided detailed guidelines on IFA analysis in the regulations.¹³⁹ A detailed discussion of the rules is not necessary for the purposes of this article, especially since, as noted below, they have been repealed. However, some description of their complexity will help put their repeal in context.¹⁴⁰

136. Supplemental Security Income; Determining Disability for a Child Under Age 18, 56 Fed. Reg. 5534, 5545 (Feb. 11, 1991).

137. 56 Fed. Reg. at 5537, 5538-40. See also 20 C.F.R. § 416.924(f) (1992).

138. *Sullivan v. Zebley*, 493 U.S. 521, 539-40 (1990). The separate approaches utilized in order to reach a determination for children and adults is addressed directly in *Hall v. Chater*, 894 F. Supp. 968 (W.D. Va. 1995). In *Hall*, the court noted that the use of a vocational expert or a Medical Assessment to do a Work test was inappropriate when determining disability for a child claimant. See 894 F. Supp. at 972-73. But see *Ware v. Shalala*, 902 F. Supp. 1262, 1273-74 (E.D. Wash. 1995) (finding that where the claimant was over sixteen, a vocational expert was needed because the regulations relate disability determinations for older adolescents to ability to function in a work-like setting).

139. See generally 20 C.F.R. §§ 416.924(a)-(e) (1992).

140. For an early assessment of *Zebley* and the Social Security Administration's response, see Weishaupt & Rains, *supra* note 12. See generally Clark, *supra* note 20 (Part II).

The basic guideline for determining disability through an IFA was the child's ability to function at an "age-appropriate" level. In order to keep IFA determinations within a framework that would result in some degree of uniformity, the regulations divided claimants by age and then used "domains" of either development or functioning (depending on the claimant's age) to determine disability.¹⁴¹ The regulations divided children into three age groups: newborn and young infants (from birth to age one); older infants (from ages one to three); and children (between the ages of three and eighteen).¹⁴² The "children" category was subdivided further into four categories: preschool children (from ages three to six); school-age children (from ages six to twelve); young adolescents (from ages twelve to sixteen); and older adolescents (from ages sixteen to eighteen).¹⁴³ In practice, then, there were really six age categories, which the Administration stated it would "not apply . . . mechanically in borderline situations."¹⁴⁴

After the age of the claimant had been established, she or he was then assessed with regard to the "domains" set forth in the regulations.¹⁴⁵ The regulations listed seven separate domains, some of which were limited to certain age groups: cognition, communication, motor abilities, social abilities, responsiveness to stimuli (for children from birth to age one), personal/behavioral patterns (for children from ages one to eighteen), and concentration, persistence, and pace in task completion (for children from ages three to eighteen).¹⁴⁶ After the list of domains, the regulations described the general kinds of age-related activities that could be affected by an impairment for each age group and each domain.¹⁴⁷

In order to be found disabled at Step 4, the claimant's IFA would have to demonstrate either a moderate impairment in one domain and a marked impairment in another, or a moderate impairment in three domains.¹⁴⁸ For children approaching adulthood, those

141. Generally, the domains for claimants under the age of seven were referred to as "developmental" domains; from the age of seven to the age of eighteen, they were referred to as "functional domains." See 20 C.F.R. § 416.924a(c)(4) (1992).

142. 20 C.F.R. § 416.924b(b) (1992).

143. 20 C.F.R. § 416.924(b)(3) (1992).

144. *Id.* The child's age was generally based on birth date, but adjustments were possible for children born prematurely. See 20 C.F.R. § 416.924b(b) (1992).

145. See generally 20 C.F.R. § 416.924c(a)(2) (1992).

146. 20 C.F.R. § 416.924c(a)(2) (1992).

147. See 20 C.F.R. §§ 416.924c(b)-(g) (1992).

148. 20 C.F.R. §§ 416.924e(c)(1)-(2) (1992). Even if it was determined that a child did suffer from an impairment or combination of impairments that met one of these two criteria, it did not automatically qualify him or her for disability benefits; it was merely a general guideline. *Id.*

between sixteen and eighteen, the regulations set up a more individualized structure that “evaluated in terms that are the same as, or similar to, those used for the evaluation of the youngest adults.”¹⁴⁹ The IFA for children between the ages of sixteen and eighteen thus took on a more vocational-oriented focus than the determination for younger children.¹⁵⁰ The regulations also discussed the nature of the evaluation of mental and physical functions, which looked at the claimant’s ability to function in a work-like environment and perform tasks such as following instructions, using judgment, sitting, standing, and lifting.¹⁵¹ If, after completing an IFA, the Administration determined that the claimant’s impairment or combination of impairments seriously interfered with his or her ability to function independently, appropriately, and effectively in an age-appropriate manner, the claimant would be found disabled.¹⁵² If a claimant was found not disabled, the adjudicator had to state exactly how and why that decision was reached.¹⁵³

By any measure, these regulations were a full and generous follow up to the Supreme Court’s *Zebly* decision. Having been upbraided for selling short the “comparable severity” standard with the three-step sequential evaluation regulations, the Social Security Administration responded by opening up to child SSI claimants. Still operating with only limited guidance as to which “disabled” children Congress intended to include in the child’s SSI program, the Administration corrected its obvious mistake of having imported the overly restrictive dependent spouse sequential evaluation process. However, the new four-step process—and, in particular, individual functional assessments called for at Step 4—proved to be extremely vulnerable to criticism from the other end.

149. 20 C.F.R. § 416.924e(d)(1) (1992).

150. See *Ware v. Shalala*, 902 F. Supp. 1262, 1273 (E.D. Wash. 1995) (“[W]hile the rationale for not employing steps four and five of the adult process (a vocational analysis) is valid for determining a child’s disability when that child is under the age of 16, that rationale disappears when evaluating the disability of an adolescent, aged 16 to 18.”).

151. See 20 C.F.R. § 416.924e(d)(2)–(3) (1992).

152. 20 C.F.R. § 416.924a (1992).

153. 20 C.F.R. § 416.1453(a) (1992). This explanation requirement was the subject of substantial amounts of litigation. See, e.g., *Figuroa v. Chater*, 911 F. Supp. 98, 102 (W.D.N.Y. 1996) (“A court ‘cannot . . . conduct a review that is both limited and meaningful if the ALJ does not state with sufficient clarity the legal rules being applied and the weight accorded the evidence considered.’” (quoting *Ryan v. Heckler*, 762 F.2d 939, 941 (11th Cir. 1985))); *Miller v. Chater*, 929 F. Supp. 95, 101 (W.D.N.Y. 1995) (“[T]he ALJ’s failure to detail his adherence to the regulations, or to otherwise explain his determination of plaintiff’s limitations in the social domain as ‘less than moderate,’ constitutes error.”).

IV. THE FALL OF *ZEBLEY* AND A RETURN TO THE PAST

The combination of the Supreme Court's decision in *Zebley* and the Social Security Administration's new regulations implementing that decision had a dramatic impact on the effective disability standard for child SSI benefits. Congress was not prepared for the resulting expansion of the SSI rolls and responded by repealing the "comparable severity" standard, substituting a new disability standard for children, and directing the Social Security Administration to rewrite its regulations once again. This section reviews the Congressional reaction to *Zebley* and the Social Security Administration's post-*Zebley* regulations, including 1996 amendments to the Social Security Act, and then describes the current SSI disability regulations for children implementing those amendments. It concludes with a critique of the current regulations, which revert back to a modified three-step sequential evaluation process, as having failed to learn from their pre- and post-*Zebley* past.

*A. Reaction to Zebley and the post-Zebley Regulations:
1996 Amendments to the Social Security Act*

The liberalization of the disability standard for child SSI claims brought about by the Social Security Administration's Supreme Court-ordered revisions of the sequential evaluation process did not go unnoticed in Congress, where concerns with the level of expenditures on the program began to mount soon after the *Zebley* decision was announced.¹⁵⁴ Between 1989—the year before *Zebley* was decided—and 1994, the cost of the child's SSI program more than tripled from \$1.2 billion to \$4 billion, prompting the House Committee on Ways and Means to declare that the program was "out of control."¹⁵⁵ During that same time, Congress directed the Secretary of Health and Human Services to appoint a bipartisan commission—what became the National Commission on

154. Thus, in a 1992 oversight report, the Human Resources Subcommittee of the House Committee on Ways and Means noted that the Social Security Administration was expecting to add 125,000 blind or disabled children to the SSI rolls by the end of fiscal year 1992, as a direct result of the *Zebley* case. H.R. REP. NO. 102-431, at 85 (1992).

155. H.R. REP. NO. 104-81, pt. 1, at 49 (1995), 1995 WL 374459 (Leg. Hist.). The number of children receiving SSI benefits grew from about 300,000 in 1959 to about 900,000 in 1994. *Id.*

Childhood Disability—to study, among other things, the effect of the then-current definition of disability for children under 18.¹⁵⁶

The strongest criticism focused specifically on the new individualized functional assessments included at Step 4 of the child sequential evaluation process.¹⁵⁷ At one level, Step 4 and its IFAs were seen as setting an overly permissive standard for eligibility; going beyond the Listing of Impairments and measuring functional limitations individually allowed less than fully disabled children to receive benefits.¹⁵⁸ Although this view persisted throughout the relevant period of Congressional activity, it remained in the background of the debate—perhaps because no direct link between the growth of the child's SSI program rolls and the use of IFAs was ever shown.¹⁵⁹

156. The Commission was charged with studying the effect of the then-current definition of disability for children under 18, federal health care, vouchers, rehabilitation, trusts, and the effects of the SSI program on families. See Pub. L. No. 103-296 § 202, 108 Stat. 1464 (1994). Pursuant to that authority, the National Commission on Childhood Disability issued its report in 1995. See NATIONAL COMMISSION REPORT, *supra* note 11. The year before, the Chairs of the House Committee on Ways and Means and the Social Security Subcommittee of the Committee on Ways and Means had asked the private National Academy of Social Insurance (NASI) to review the Social Security disability programs, including SSI; in light of the pace of legislative developments relative to the child's SSI program, the NASI study group issued a report of its own focusing on that program—first as a preliminary report in 1995, and then in its final form in 1996. See RESTRUCTURING THE SSI DISABILITY PROGRAM FOR CHILDREN AND ADOLESCENTS: REPORT OF THE COMMITTEE ON CHILDHOOD DISABILITY OF THE DISABILITY POLICY PANEL v (Jerry L. Mashaw et al. eds., 1996) [hereinafter RESTRUCTURING SSI].

157. See S. REP. NO. 104-96, at 50 (1995), 1995 WL 351655 (Leg. Hist.) (noting that proposed legislation “would eliminate childhood IFAs and their statutory underpinning, the ‘comparable severity’ rule, as a basis for [finding disability]. Many children on the rolls as a result of an IFA (roughly a quarter of children now on SSI) would be terminated, and future awards based on an IFA would be barred.”). There was also a more general concern that the program's true intent was being lost in an overbroad definition of disability. See H.R. REP. NO. 104-725, at 328, *reprinted in* 1996 U.S.C.C.A.N. 2183, 2716. See also NATIONAL COMMISSION REPORT, *supra* note 11, at 55. At the same time, the concern of some scholars when children were first added to the SSI program was that the disability standard would exclude those who most needed assistance. See Jameson & King, *supra* note 12, at 316.

158. As explained by the House Committee on Ways and Means in support of its version of legislation that would eventually repeal Step 4, “[c]hildren receiving monthly checks based on an individualized functional assessment are . . . the least disabled SSI recipients.” H.R. REP. NO. 104-81, pt. 1 at 49 (1995), 1995 WL 374459 (Leg. Hist.). Similarly, the Senate Committee on Finance called the IFA “a misnomer” and noted: “[I]n reality the IFA is a set of regulations that permits individuals with modest conditions or impairments to be eligible for this program.” S. REP. NO. 104-96, at 18 (1995), 1995 WL 351655 (Leg. Hist.). The same idea was expressed without direct reference to IFAs, blaming the problem of excessive growth on “generally broadened eligibility criteria” brought about by the post-*Zebley* regulations. H.R. REP. NO. 104-651, at 1386 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2445.

159. Thus, the GAO reported a similar rise in numbers through the end of 1992 but concluded that “most of the children who received new awards would have qualified for them even without the functional assessment process mandated by the *Zebley* decision.” See

IFAs and their focus on age-appropriate behavior were more strongly criticized as being subject to abuse. A common and widely publicized charge was that parents were “coaching” their children to act out and under-perform in school in order to qualify as disabled.¹⁶⁰ Dissatisfaction with evaluation of children’s mental impairments was tied to this concern as well.¹⁶¹ Although documented cases were rare,¹⁶² the coaching charge stuck. As noted by the National Commission on Childhood disability, which itself had examined these charges and found that coaching children was not a significant factor in the child SSI disability determination process, “[T]he news media has continued to report allegations of coaching. Such coverage has fueled Congressional interest and heightened public concern that fraud may constitute a major source of program growth.”¹⁶³ In the House Committee on the Budget’s report on the bill, for example, the amendments were

US GENERAL ACCOUNTING OFFICE, SOCIAL SECURITY: RAPID RISE IN CHILDREN ON SSI DISABILITY ROLLS FOLLOWING NEW REGULATIONS GAO/HEHS-94-225 2 (1994).

160. See, e.g., 138 CONG. REC. E2773 (1992) (“Doctors are reporting that parents are asking them to put their children on the drug Ritalyn, because the parents have learned that a prescription for this drug is treated by the Social Security Administration as a criterion for automatic entitlement to supplemental security income checks. Claims based on such criteria as these go unchallenged almost as a matter of routine.” (Statement of Rep. Paul B. Henry)).

161. See H.R. REP. NO. 104-81, at 373 (1995), 1995 WL 374459 (Leg. Hist.) (“Eliminating ‘maladaptive behavior’ from the so-called ‘domains’ on which benefits may be based would eliminate the possibility of children receiving benefits because parents have coached them to misbehave.”).

162. For example, the GAO examined two initiatives by the SSA designed to uncover this type of abuse and concluded that both initiatives “identified few cases of suspected coaching and very few of the children involved received SSI benefits.” US GENERAL ACCOUNTING OFFICE, SSA INITIATIVES TO IDENTIFY COACHING, GAO/HEHS-96-96R 2 (1996) (report to Rep. Blanche Lambert Lincoln). See also RESTRUCTURING SSI, *supra* note 156, at 2 (report by independent National Academy of Social Insurance): “Any evidence of such coaching or ‘gaming the system’ is extraordinarily thin—and appears to be based on anecdotes or perceptions of dubious benefit claims, which upon investigation are found to have been denied.”

163. NATIONAL COMMISSION REPORT, *supra* note 11, at 23 (report to Congress of the National Commission on Childhood Disability). As examples, the Commission cited several newspaper accounts. *Id.* at 23 n.37. See also H.R. REP. NO. 104-725, at 261 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649 (“eliminating incentives for coaching children to misbehave so they can qualify for benefits” listed as rationale for repeal of post-Zebley regulations); H.R. REP. NO. 104-651, at 1386 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2445 (“The committee received extensive testimony about the inducement that cash payments present to some poor families with children who are not severely disabled. Particularly troubling are reports of ‘coaching’ on the part of parents . . .”). See generally Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 454–55 (2001). On the merits of the charges, the Commission concluded that available data “suggests strongly that coaching is not a significant cause of growth in the SSI program.” NATIONAL COMMISSION REPORT, *supra* note 11, at 24.

justified, in part, because children exhibiting “age-inappropriate” behavior was “particularly prone to abuse.”¹⁶⁴

All of this prompted Congress to amend the SSI disability standard for children as part of its major overhaul of welfare laws in 1996. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) changed both the statutory definition of disability for children and the four-step sequential evaluation process that had been put in place following *Zebley*.¹⁶⁵ The new legislation repealed the “comparable severity” standard and replaced it with a child-specific standard that provides: “An individual under the age of 18 shall be considered disabled . . . if that individual has a medically determinable physical or mental impairment, which results in marked and severe functional limitations.”¹⁶⁶ PRWORA also directed the Social Security Administration to remove IFAs from the sequential evaluation process¹⁶⁷ and to modify specified sections of the Listing of Impairments to eliminate references to maladaptive behavior in the domain of personal/behavioral function.¹⁶⁸ As explained in the conference report, “The conferees intend that only needy children with severe disabilities be eligible for SSI, and the Listing of Impairments and other current disability determination regulations as modified by

164. H.R. REP. NO. 104-651, at 1323 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2382. *See also id.* (amendments intended “to better target benefits for children who are disabled and also to combat abuse of the SSI program”).

165. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 211–212, 110 Stat. 2105, 2188–92 (1996) (codified as amended at 42 U.S.C. § 1382c(a)(3)(C) (2000)). PRWORA was most visible and controversial for its repeal of AFDC. *See, e.g.,* Greg J. Duncan & Gretchen Casparly, *Welfare Dynamics and the 1996 Welfare Reform*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 605, 611 (1997) (critique of post-AFDC TANF program for failure to account for “heterogeneity” of the welfare experience). Also, POWORA’s revision of the SSI child’s disability standard has had an impact well beyond the SSI cash benefit program. *See* Sara Rosenbaum & Kathleen A. Maloy, *The Law of Unintended Consequences: The 1996 Personal Responsibility and Work Opportunity Reconciliation Act and Its Impact on Medicaid for Families with Children*, 60 OHIO ST. L.J. 1443 (1999); Linda C. Fentiman, *Health Care Access for Children with Disabilities*, 19 PACE L. REV. 245, 269–73 (1999).

166. Pub. L. No. 104-193, § 211(a), 110 Stat. 2105, 2188 (1996) (codified at 42 U.S.C. § 1382c(a)(3)(C)(i) (2000)). Child SSI claimants must also meet the traditional duration requirement—their impairments must have lasted or be expected to last at least 12 months—and they cannot be engaging in substantial gainful activity. *Id.*; 42 U.S.C. § 1382c(a)(3)(C)(ii) (2000) (“Notwithstanding clause (i), no individual under the age of 18 who engages in substantial gainful activity . . . may be considered to be disabled.”).

167. *See* Pub. L. No. 104-193, §§ 211(b)(1), (2), 110 Stat. 2105, 2189 (removing 20 C.F.R. §§ 416.924d, 416.924e (1992)).

168. *See* Pub. L. No. 104-193, § 211(d)(1)(A)(ii), 110 Stat. 2105 (1996) (modifying 20 C.F.R. Part 404 Subpart P Appx 1 (Listings) §§ 112.00(C)(2), 112.02(B)(2)(c)(2) (1996)).

these provisions properly reflect the severity of disability contemplated by the new statutory definition."¹⁶⁹

The conference report also provided some specific directions for evaluating domains of functioning in the Listing of Impairments: "In those areas of the Listing that involve domains of functioning, the conferees expect no less than two marked limitations as the standard for qualification."¹⁷⁰ At the same time, the conferees also made it clear—consistent with the statement quoted above to the effect that the Listing of Impairments, together with "other current disability determination regulations," should be used to assure that the level of severity required for eligibility matches the new statutory standard—that the Listing was not necessarily the exclusive means for evaluating disability for children. After noting that the *Zebley* Court had found that the Social Security Administration had been "remiss" in following the statutory directive that the effect of combined impairments be considered in evaluating disability, the report continued, "The conferees also expect SSA to continue to use criteria in its Listing of Impairments and in the application of other determination procedures, such as functional equivalence, to ensure that young children, especially children too young to be tested, are properly considered for eligibility of benefits."¹⁷¹

Clearly, the new "marked and severe functional limitations" standard was intended to be more stringent than the "comparable severity" standard that it replaced. Moreover, Congress was explicit in its disapproval of IFAs and certain details of the Listing of Impairments. The post-*Zebley* four-step sequential evaluation process had to go and, although Congress did not go this far, ordering the Social Security Administration to break completely from the sequential evaluation process model would have been a good thing. The original three-step process imported from the dependent spouse program was a disaster, resulting in all the difficulties and costs associated with the Supreme Court's intervention in *Zebley*,

169. H.R. REP. NO. 104-725, at 328 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716. The House report contained similar language. See H.R. REP. NO. 104-651, at 1385 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2444.

170. *Id.*

171. H.R. REP. NO. 104-725, at 328 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716. See also *id.* ("[T]he conferees expect that SSA will properly observe the requirements of [42 U.S.C. § 1382c(a)(3)(G)] and ensure that the combined effects of all the physical or mental impairments of an individual under age 18 are taken into account in making a determination regarding eligibility under the definition of disability. The conferees note that the 1990 Supreme Court decision in *Zebley* established that SSA had been previously remiss in this regard.").

and the post-*Zebley* effort to create the equivalent of the adult Steps 4 and 5 for children through IFAs brought on the heat that drove the reactionary 1996 amendments. At the same time, some progress had been made: for the first time, Congress set out a disability standard uniquely for children. Had the Social Security Administration chosen to implement the new “marked and severe functional limitations” standard from scratch, it could have created a truly child-centered approach to disability determination. Instead, the Administration reached backward and resuscitated the three-step sequential evaluation process, complete with its unavoidable pre-*Zebley* baggage.

B. Back to the Future: Implementing the 1996 Amendments with a “New” Three-Step Process

The Social Security Administration implemented the 1996 amendments with interim final regulations in 1997, followed by final regulations in 2000.¹⁷² The Administration certainly understood its broad mission; in its introduction to the interim final regulations, the Administration noted that, “[u]nder the new law, a child’s impairment or combination of impairments must cause more serious impairment-related limitations than the old law and our prior regulations required.”¹⁷³

Having seen Congress remove Step 4 and its IFAs from the child sequential evaluation process, it was easy for the Social Security Administration to stick with sequential evaluation logic and conclude that, in order to satisfy the new “marked and severe

172. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 62 Fed. Reg. 6408 (Feb. 11, 1997); Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747 (Sept. 11, 2000). The final regulations included substantial changes in the methods for evaluating functional limitations. Instead of the six domains listed in the current regulation, there were five developmental categories: cognition/communication; motor; social; personal; and concentration, persistence, and pace. See 20 C.F.R. 416.926(c)(4) (2000); *Harris v. Barnhart*, 231 F. Supp. 2d 776, 780 (N.D. Ill. 2002). The goal of this change was to provide a more accurate assessment of the child’s limitations. 65 Fed. Reg. at 54,759. However, the definitions and required test results for “marked” and “extreme” limitations—in effect, the standard for eligibility—remained the same. See *id.* at 54,756; *Briggs v. Massanari*, 248 F.3d 1235, 1238 n.2 (10th Cir. 2001) (“The amendments mark a major change in the evaluation process employed . . . in child disability cases and provide a single method of evaluation based only on domains of functioning. . . . The definitions and testing results for marked and extreme disabilities, however, have not changed.”); *Hicks v. Barnhart*, 2002 WL 377709 (N.D. Ill. 2002) (“Both parties agree that the basic standard for determining functional equivalence remains unchanged from the interim rules.”).

173. 62 Fed. Reg. at 6409.

functional limitations” requirement, a claimant under the age of eighteen would have to meet or equal the requirements of a listed impairment—precisely the requirement prior to *Zebley*. The Administration knew that it could not revert exactly to the pre-*Zebley* approach since Congress had made it clear that functional limitations should remain important in evaluating child disability claims.¹⁷⁴ Indeed, the preamble to the new regulations specifically acknowledged this holdover from the post-*Zebley* era, “[E]ven though it eliminated the IFA, Congress directed us to continue to evaluate a child’s functional limitations where appropriate, albeit using a higher level of severity than under the former IFA.”¹⁷⁵ Nonetheless, the Administration stated its charge of translating the new statutory standard into operational regulations in familiar three-step sequential evaluation terms: “[T]he term *marked and severe functional limitations* . . . is a level of severity that meets or medically or functionally equals the requirements of a listing.”¹⁷⁶

The current regulations require the adjudicator to “follow a set order” in determining whether a child is disabled.¹⁷⁷ That set order amounts to, in effect, the first three steps of a traditional three- or five-step sequential evaluation process:

If you are doing substantial gainful activity, we will determine that you are not disabled and not review your claim further. If you are not doing substantial gainful activity, we will consider your physical or mental impairment(s) first to see if you have an impairment or combination of impairments that is severe. If your impairment(s) is not severe, we will determine that you are not disabled and not review your claim further. If your impairment(s) is severe, we will review your claim further to see if you have an impairment(s) that meets, medically equals, or functionally equals the listings. If you have such an impairment(s), and it meets the duration requirement, we will find that you are disabled. If you do not have such an impairment(s), or if it does not meet the duration requirement, we will find that you are not disabled.¹⁷⁸

174. See H.R. REP. NO. 104-725, at 328 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2649, 2716 (“Where appropriate, the conferees remind SSA of the importance of the use of functional equivalence disability determination procedures.”). See also H.R. REP. NO. 104-651, at 1385 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2183, 2444.

175. 62 Fed. Reg. at 6413.

176. 62 Fed. Reg. at 6410.

177. 20 C.F.R. § 416.924(a) (2003).

178. *Id.*

Each step is then explained further:

If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or age, education, or work experience.¹⁷⁹

If you do not have a medically determinable impairment, or your impairment(s) is a slight abnormality or a combination of slight abnormalities that causes no more than minimal functional limitations, we will find that you do not have a severe impairment(s) and are, therefore, not disabled.¹⁸⁰

An impairment(s) causes marked and severe functional limitations if it meets or medically equals the severity of a set of criteria for an impairment in the listings, or if it functionally equals the listings.

(1) Therefore, if you have an impairment(s) that meets or medically equals the requirements of a listing or that functionally equals the listings, and that meets the duration requirement, we will find you disabled.

(2) If your impairment(s) does not meet the duration requirement, or does not meet, medically equal, or functionally equal the listings, we will find that you are not disabled.¹⁸¹

The first step—required by explicit mention in the Social Security Act, added together with the new disability standard, that children engaging in substantial gainful activity are not disabled¹⁸²—incorporates the work-centered criteria used in Step 1 of the five-step sequential evaluation process for adult disability determinations. The second step is essentially the same as Step 2 of the five-step sequential evaluation process, except that it includes a reference to functional limitations. In this respect, it is similar to Step 2 of the post-*Zebley* four-step process. The new third step looks to whether a child's impairment meets or equals a listed impairment, again, tracking the adult Step 3, but then specifies two types of equivalence: proof of an impairment or combination of im-

179. 20 C.F.R. § 416.924(b) (2003).

180. 20 C.F.R. § 416.924(c) (2003).

181. 20 C.F.R. § 416.924(d) (2003).

182. See 42 U.S.C. § 1382c(a)(3)(C)(ii) (2000) (“[N]o individual under the age of 18 who engages in substantial gainful activity . . . may be considered to be disabled.”).

pairments that “medically equals the severity of a set of criteria for an impairment in the listings, or . . . functionally equals the listings.”¹⁸³

The “functional equivalence” option at Step 3 is also reminiscent of the post-*Zebly* regulations; however, functional equivalence plays a more important role in the current regulations. As the final extension of a terminal Step 3, it ties the current three-step process to the amended statutory standard and, as a result, is the key to its uniqueness. A separate regulation dedicated exclusively to functional equivalence sets the standard for a finding of functional equivalence and thus the effective meaning of the new “marked and severe functional limitations” language in the statute. “By ‘functionally equal the listings,’ we mean that your impairment(s) must be of listing-level severity; *i.e.*, it must result in ‘marked’ limitations in two domains of functioning or an ‘extreme’ limitation in one domain.”¹⁸⁴ The regulation specifies six domains of functioning: acquiring and using information; attending and completing tasks; interacting and relating with others; moving about and manipulating objects; caring for themselves; and health and physical well-being.¹⁸⁵ These domains are “broad areas of functioning intended to capture all of what a child can or cannot do”¹⁸⁶ and are described in great detail in the regulation, with examples.¹⁸⁷

The functional equivalence regulation defines a marked limitation as one that interferes seriously with the child’s “ability to independently initiate, sustain, or complete activities.”¹⁸⁸ Placing it between “moderate” and “extreme,” a marked limitation “is the equivalent of the functioning [one] would expect to find on standardized testing with scores that are at least two, but less than three, standard deviations below the mean.”¹⁸⁹ An extreme limitation is defined as one that “interferes very seriously with [the child’s] ability to independently initiate, sustain, or complete activities.”¹⁹⁰ It can be shown by a valid score on a standardized test that is three or more

183. 20 C.F.R. § 416.924(d) (2003).

184. 20 C.F.R. § 416.926a(a) (2003).

185. 20 C.F.R. § 416.926a(b)(1)(i)–(vi) (2003).

186. 20 C.F.R. § 416.926a(b)(1) (2003).

187. *See* 20 C.F.R. § 416.926a(g)–(l) (2003).

188. 20 C.F.R. § 416.926a(e)(2)(i) (2003).

189. *Id.* For children under the age of 3 without standard scores from standardized tests, a “marked” limitation means a level of functioning “that is more than one-half but not more than two-thirds of [the child’s] chronological age.” 20 C.F.R. § 416.926a(e)(2)(ii) (2003).

190. 20 C.F.R. § 416.926a(e)(3)(i) (2003).

standard deviations below the mean.¹⁹¹ The adjudicator is directed to assess the “interactive and cumulative effects” of all of a child’s impairments and to consider all relevant factors that affect a child’s functional limitations, including how well the child initiates and sustains activities, how much extra help he or she needs, the effects of structured or supportive settings, how the child functions in school, and how the child is affected by his or her medications or other treatment.¹⁹² The regulation then provides that the adjudicator will look at all of the information in the record, including what the child does at home, at school, and in the community, in order to determine “how appropriately, effectively, and independently” the child performs compared to other children of the same age.¹⁹³

In effect, these regulations do two things: they tie the level of severity required to show functional equivalence to the Listing of Impairments—listing-level severity—and they explain that listing-level severity for these purposes means either one “extreme” or two “marked” limitations of functioning in the prescribed domains. Exactly how the “one extreme or two marked limitations” standard will work and whether it will allow for full and fair assessments of functional equivalence (or, more importantly, whether it will allow children to prove that they meet the statutory standard of “marked and severe functional limitations”) remains to be seen. Some questions have been raised already in the courts¹⁹⁴ and in the literature,¹⁹⁵ but assuming that the regulations—with their extensive categorizations, examples, and use of recognized measures—will stand, adjudicators will have to look at conflicting evidence from a variety of sources in order to determine whether a child has the required number of “extreme” or “marked” limitations of functioning. It is at this point, and particularly with the closest cases,

191. *Id.*

192. See 20 C.F.R. § 416.926a(a)(1)–(3) (2003) (“We will assess the functional limitations caused by your impairment(s); *i.e.*, what you cannot do, have difficulty doing, need help doing, or are restricted from doing because of your impairment(s). When we make a finding regarding functional equivalence, we will assess the interactive and cumulative effects of all of the impairments for which we have evidence, including any impairments you have that are not ‘severe.’ When we assess your functional limitations, we will consider all the relevant factors in [related regulations] including, but not limited to: (1) How well you can initiate and sustain activities, how much extra help you need, and the effects of structured or supportive settings; (2) How you function in school; and (3) The effects of your medications or other treatment.”).

193. 20 C.F.R. § 416.926a(b) (2003).

194. The regulation’s failure to consider less than marked limitations was challenged recently unsuccessfully, with the court deferring to the Administration and its congressionally delegated rulemaking power. See *Encarnacion v. Barnhart*, 331 F.3d 78, 86–89 (2d Cir. 2003).

195. See, *e.g.*, Anderson, *supra* note 12.

that the three-step sequential evaluation process of the current regulatory scheme can be misunderstood and misused.

*C. The Problem of a Three-Step Overlay
on the Current Regulations*

As shown earlier, a shortened, three-step version of the sequential evaluation process has been misused in the past, especially in the child's SSI program during the period prior to *Zebley*. While the Social Security Administration may have had some justification for so limiting the disability determination process for disabled spouses, reasoning that the strict pre-1991 "any gainful activity" statutory standard for dependent spouse claims matched the medical-only "any gainful activity" standard of the Listing of Impairments,¹⁹⁶ its recent return to a three-step process for child SSI claims is confusing and destructive to the aim of effectively implementing the Congressional policy of providing benefits to needy children with disabilities. The seeds of this confusion can be seen in the current regulations themselves and it appears to have been picked up in the cases reviewing the first denials under those regulations.

Although the words do not appear in the regulations, the Social Security Administration specifically retained the "sequential evaluation process" terminology in explaining how post-1996 child SSI disability determinations should proceed.¹⁹⁷ Similarly, many current cases refer to child SSI disability determinations as a three-step sequential evaluation process or some variant of that term.¹⁹⁸

196. A number of courts saw this differently, however. See *supra* text accompanying notes 92-97.

197. Thus, the Administration explained that it established "a new sequential evaluation process" following the 1996 amendments. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,748 (Sept. 11, 2000).

198. See, e.g., *Brindisi v. Barnhart*, 315 F.3d 783, 785 (7th Cir. 2003) ("A three-step process is employed to decide whether a child is disabled."); *Mancuso v. Barnhart*, No. 02-2088, 2002 WL 31656558, at *1 (3d Cir. Nov. 26, 2002) (unpublished) (post-1996 regulations "articulated a new three-step sequential evaluation process"); *Jefferson v. Barnhart*, 209 F. Supp. 2d 1200, 1202 (N.D. Okla. 2002) ("Through regulations, the Commissioner has adopted a three-step sequential analysis to determine whether a child is disabled."); *Beliveau v. Apfel*, 154 F. Supp. 2d 89, 93 (D. Mass. 2001) ("In determining whether a child is eligible for SSI benefits on the basis of disability, a three-step evaluation process is followed."); *Smith v. Massanari*, 139 F. Supp. 2d 1128, 1132 (C.D. Cal. 2001) ("Regulations promulgated by the Commissioner establish a three-step sequential evaluation process to be followed in a child disability case."); *Roelandt v. Apfel*, 125 F. Supp. 2d 1138, 1145-46 (S.D. Iowa 2001) ("20 C.F.R. § 416.924(a) sets out a three step sequential evaluation process for childhood

There is nothing inherently wrong with this, as the current regulations do indeed set out, in effect, a three-step process.¹⁹⁹ There is a danger, however, if the current process—in particular, Step 3 of the current process—is equated with three-step sequential evaluations of the past. A clear example of this is a recent case in which the court saw the effect of the 1996 amendments as simply removing the fourth step of the post-*Zebley* sequential evaluation process: “The 1996 legislation truncated the sequential analysis by cutting off the fourth step, so that if the child’s impairment failed to meet or equal one of the Listings, the child would be conclusively adjudged not disabled.”²⁰⁰ After quoting the new “marked and severe functional limitations” standard now in the Social Security Act, the court concluded, “The regulations promulgated following the 1996 statute preserved the first three steps in the sequential analysis, which continued to reflect properly the statutory language . . . coupled with the proviso . . . that no child engaged in substantial gainful activity may be considered disabled.”²⁰¹

Do the current regulations prescribe a “new” sequential evaluation process—one that aims specifically at the new “marked and severe functional limitations” disability standard for children—or do they signal a return to the pre-*Zebley* past? Unfortunately, the current regulations do not provide a clear answer. At one level, they are simple and clear: in order to qualify for SSI benefits, a child cannot be working and must have a severe impairment (or combination of impairments) that meets or equals the criteria set forth in the Listing of Impairments. Most children under the age of 18 do not work, even without disabilities, and the threshold “severe” impairment requirement is minimal; therefore, the key to eligibility is that child claimants must either meet or equal the requirements of the Listing

disability claims.”). The Seventh Circuit’s formulation of the process in *Brindisi* is typical. “First, if the child is engaged in substantial gainful activity, his or her claim is denied. Second, if the child does not have a medically determinable ‘severe’ impairment or combination of impairments, then his or her claim is denied. Finally, for a child to be considered disabled, the child’s impairment(s) must meet, medically equal, or functionally equal the requirements of a listed impairment in [the Listing of Impairments].” 315 F.3d at 785 (citations omitted).

199. See *supra* text accompanying notes 177–81.

200. *Fontanez v. Barnhart*, 195 F. Supp. 2d 1333, 1348 n.9 (M.D. Fla. 2002).

201. *Id.* (citing 20 C.F.R. § 416.924(a)). See also *Hart v. Chater*, 963 F. Supp. 835, 839–40 (W.D. Mo. 1997) (“Now, under the new law, there are only three steps in the sequential analysis for a child seeking SSI disability benefits, effectively returning the Commissioner’s process for evaluating disability in children to that employed prior to 1990 when the Supreme Court decided *Sullivan v. Zebley*. With the statutory abolition of the comparable severity standard, the Commissioner’s three-step procedure for the evaluation of childhood disability for SSI now meets the statutory requirements, in contrast to the pre-*Zebley* period. Consequently, under the new law, the analysis ends at step three with the determination of whether the child’s impairments meet or equal any of the listed impairments.”).

in order to qualify for benefits. The regulations lose their clarity, however, where they go on to provide that a child can meet the requirements of the listing by showing either “medical equivalence” or “functional equivalence.” Is there a substantial difference—not just a difference in the type of evidence considered—between medical equivalence, a familiar option at Step 3 of the sequential evaluation process, and functional equivalence, the new component that distinguishes the current Step 3 from its predecessors? If so (or if not), how does one (or the other, or both) relate to the new disability standard for children in the Social Security Act?

The place to begin is the general definitions regulation, which states,

When we refer to an impairment(s) that ‘meets, medically equals, or functionally equals the listings,’ we mean that the impairment(s) meets or medically equals the severity of any listing in [the Listing of Impairments] . . . or that it functionally equals the severity of the listings, as explained in [a separate regulation on functional equivalence].²⁰²

The functional equivalence regulation, in turn, explains, “By ‘functionally equal the listings,’ we mean that your impairment(s) must be of listing-level severity; *i.e.*, it must result in ‘marked’ limitations in two domains of functioning or an ‘extreme’ limitation in one domain.”²⁰³ This seems to indicate that “listing-level severity” means a showing of either a “marked” limitation in two domains of functioning or an “extreme” limitation in one; in other words, the Administration set the two “marked” or one “extreme” limitation standard for functional equivalence as a proxy for listing-level severity. It should be noted here that the difference between matching proof of medical equivalence against “the severity of *any listing*” and matching proof of functional equivalence against “the severity of *the listings*” signals that a child’s functional limitations do not have to match the severity requirements of any particular listing.²⁰⁴ That

202. 20 C.F.R. § 416.902 (2003) (cross-referencing 20 C.F.R. § 416.926a(a)).

203. 20 C.F.R. § 416.926a(a) (2003).

204. See Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,757 (Sept. 11, 2000) (noting, in relation to revised 20 C.F.R. § 416.926(a)(d) on functional equivalence, “[W]e provide explicitly that we will not compare a child’s functioning to the requirements of any specific listing to underscore that we are delinking the policy from direct reference to the listings.”).

distinction does not, however, result in a difference in the level of severity required.²⁰⁵

So “functional equivalence” means “‘marked’ limitations in two domains of functioning or an ‘extreme’ limitation in one domain,” which amounts to “listing-level severity.” At the same time, we know what listing-level severity means: the level of severity represented by the criteria set out for the various impairments included in the Listing of Impairments, which has always been set at the extra-high standard of “inability to engage in any gainful activity.”²⁰⁶ Since the Administration cannot say that in this context—if it did, the new functional equivalence option for children would add nothing to a traditional Step 3 analysis—the current Listing regulations explain further, “The Listing of Impairments describes, for each of the major body systems, impairments that are considered severe enough to prevent an adult from doing any gainful activity or, for a child, that causes marked and severe functional limitations.”²⁰⁷ In other words, listing-level severity becomes a flexible standard: when a child’s impairments are measured against the Listing in order to determine whether they are of listing-level severity, the ultimate standard is the new statutory standard for child SSI benefits—“marked and severe functional limitations”—not the extra-high “any gainful activity” standard used as the measure of listing-level severity at Step 3 for adult claims.²⁰⁸

205. See 65 Fed. Reg. at 54,756 (“[A]lthough we delinked our policy of functional equivalence from reference to specific listings, we continue to use the phrase ‘functionally equals the listings,’ to underscore that the impairment(s) must be of listing-level severity.”).

206. See *Wilson v. Barnhart*, 284 F.3d 1219, 1224 (11th Cir. 2002) (“The Listing of Impairments describes, for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity.” (citing 20 C.F.R. § 404.1525(a) (2001))); *Ghant v. Bowen*, 930 F.2d 633, 635 n.4 (8th Cir. 1991) (“The listing describes impairments which are considered severe enough to prevent an individual from performing any gainful activity.” (citing 20 C.F.R. §§ 404.1525(a) and 416.925(a) (1990)). See also *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990) (“The Secretary explicitly has set the medical criteria defining the listed impairments at a higher level of severity than the statutory standard. The listings define impairments that would prevent an adult, regardless of his age, education, or work experience, from performing *any* gainful activity, not just ‘substantial gainful activity.’” (citing 20 CFR § 416.925(a) (1989) and Soc. Sec. Ruling 83-19 (1983), which provides that the Listing defines medical conditions which ordinarily prevent an individual from engaging in any gainful activity)). See generally *supra* text accompanying notes 58–59, 83–86.

207. 20 C.F.R. § 416.925(a) (2003).

208. The concept of “listing-level severity” is used confusingly with respect to “meeting” the requirements of the Listing as well. Thus, the regulations provide, “[I]n general, a child’s impairment(s) is of ‘listing-level severity’ if it causes marked limitations in two broad areas of functioning or extreme limitations in one such area” but then goes on to qualify that statement as follows: “However, when we decide whether your impairment(s) meets the requirements for any listed impairment, we will decide that your impairment is of ‘listing-level severity’ even if it does not result in marked limitations in two broad areas of function-

This seems to suggest that there are two different standards in the Listing: “any gainful activity” for adults and “marked and severe functional limitations” for children. There is, however, no indication that the Listing was intended to reflect separate levels of severity for adults and children; indeed, the intention was just the opposite. The separate rules for applying the Listing to children, including the application of the child-specific Part B, were intended to cover child disabilities more accurately, not to set a different level of severity.²⁰⁹ To the extent that the criteria in the Listing represent a level of severity, they do so at the same level for adults and children. In reality, therefore, by equating functional equivalence with “listing-level severity” and “‘marked’ limitations in two domains of functioning or an ‘extreme’ limitation in one domain” and by equating listing-level severity with the statutory disability standard for children, the regulations do two things. First, they set all parts of Step 3, including the new and unique functional equivalence option, at a single level of severity. This point is reflected in the general definitions regulation discussed above, which also states, “*Marked and severe functional limitations*, when used as a phrase, means the standard of disability in the Social Security Act for children claiming SSI benefits based on disability. It is a level of severity that meets, medically equals, or functionally equals the listings.”²¹⁰ Second, despite an attempt in the Listing regulations to say otherwise, they at least suggest that “marked and severe functional limitations” is the same as the “inability to engage in any gainful activity.”

Why does all this confusion matter? So what if all parts of Step 3 in the child SSI sequential evaluation process—meeting a listing, medically equaling the requirements of a listing, and

ing, or extreme limitations in one such area, if the listing that we apply does not require such limitations to establish that an impairment(s) is disabling.” 20 C.F.R. § 416.925(b)(2) (2003). If that is the case, what is the measure for “listing-level severity” when functional equivalence is being measured against an impairment that does not require marked or extreme limitations? The lack of consistency between the listings in the Listing and the level of severity announced under the new standard has itself been a source of controversy. See U.S. GENERAL ACCOUNTING OFFICE, SUPPLEMENTAL SECURITY INCOME: SSA NEEDS A UNIFORM STANDARD FOR ASSESSING CHILDHOOD DISABILITY, GAO/HEHS-98-123 (May 1998).

209. See *Sullivan v. Zebley*, 493 U.S. at 532 (“When the Secretary developed the child-disability listings, he set their medical criteria at the same level of severity as that of the adult listings.” (citing 42 Fed. Reg. 14,705 (1977) (the child-disability listings describe impairments “of ‘comparable severity’ to the adult listing”) and SSA Disability Insurance Letter (FN12) No. III-11 (Jan. 9, 1974), App. 97 (child-disability listings describe impairments that affect children “to the same extent as . . . the impairments listed in the adult criteria” affect adults’ ability to work)).

210. 20 C.F.R. § 416.902 (2003).

functionally equaling the severity of the Listings—require a showing of “listing-level severity” (read: “inability to engage in any gainful activity”)? After all, there are pages and pages of additional provisions in the regulations that explain, often by specific example, how the new functional equivalence option for children can be proven. But despite the impressive detail in the regulations, many of the required findings require a subjective assessment. Not all claims are supported by standardized tests with results that can be transformed into standard deviations.²¹¹ Not all claims fit the detailed definitions and examples of “extreme” and “marked” limitations in the regulations.²¹²

By framing the disability determination process in classic three-step sequential evaluation terms, the more difficult and subjective child SSI disability assessments for children are likely to become three-step-bound. As a result, the frame of reference for those claims will be the most demanding, listing-level severity standard that is associated—correctly, with respect to the five-step sequential evaluation process—with Step 3: the inability to engage in any gainful activity. While we may not know exactly what Congress meant when it set the disability standard for children at “marked

211. Thus, adjudicators are to “consider all the relevant information in your case record that helps . . . determine [the child’s] functioning,” including descriptions of the child’s functioning from her or his parents, teachers, “and other people who know [the child].” 20 C.F.R. § 416.926a(e)(1)(i) (2003). *See also* 20 C.F.R. § 416.926a(e)(1)(ii) (2003) (“The medical evidence *may* include formal testing Standard scores . . . can be converted to standard deviations. *When* you have such scores, we will consider them together with the information we have about your functioning to determine whether you have ‘marked’ or ‘extreme’ limitation in a domain” (emphasis added)). Even when test scores are available, they are not the final word. *See* 20 C.F.R. § 416.924a(a)(1)(ii) (2003) (“We consider all of the relevant information in your case record and will not consider any single piece in isolation. Therefore, we will not rely on test scores alone when we decide whether you are disabled.”); 20 C.F.R. § 416.926a(e)(4)(i) (2003) (same, with respect to functional equivalence: “No single piece of information taken in isolation can establish whether you have a ‘marked’ or an ‘extreme’ limitation in a domain.”).

212. For this reason, the regulations include some remarkably less-than-specific guidance as well. *See, e.g.*, 20 C.F.R. § 416.926a(e)(2)(i) (2003) (“‘Marked’ limitation . . . means . . . ‘more than moderate’ but ‘less than extreme.’”); 20 C.F.R. § 416.926a(e)(3)(i) (2003) (“‘Extreme’ limitation . . . means a limitation that is ‘more than marked.’ [It] is the rating . . . give[n] to the worst limitations. However, ‘extreme limitation’ does not necessarily mean a total lack or loss of ability to function.”). As an example of a claim requiring subjective evaluation, see *Bridges v. Massanari*, No. CIV.A.00-2639, 2002 WL 202221, at *3 (E.D. La. Feb. 7, 2002) (“The Court finds that while there is evidence of [the claimant’s] inattention, hyperactivity and impulsiveness, there is nonetheless substantial evidence in the record supporting the ALJ’s conclusion that these did not rise to the level of marked limitations. In his decision, the ALJ noted that the State Agency Medical Consultants concluded that [the claimant’s] impairments were severe, but did not meet, medically equal or functionally equal the severity of a listing.”).

and severe functional limitations,”²¹³ surely Congress did not mean the “inability to engage in any gainful activity.”

V. CONCLUSION

Children with disabilities were included in the SSI program rather casually in 1972 and perhaps that helps explain the Social Security Administration’s rather casual importation of the restrictive three-step sequential evaluation process for determining disability that it was using at the time for dependent spouses to the new child’s SSI program. It took a long and expensive journey—twenty-five years of pushing and pulling in the courts and in Congress—to free the child’s SSI program from a mismatched disability determination process and to reestablish the program in today’s social legislation climate.²¹⁴ Unfortunately, the Social Security Administration implemented the most recent amendments to the Social Security Act with the familiar three-step sequential evaluation model that remains ill suited to determining disability for children. In doing so, it has reinforced the notion that traditional Step 3 constraints—most notably, tying eligibility to listing-level severity—have returned to the child SSI disability determination process.

It is hard to measure the extent to which a three-step sequential evaluation mindset reinforces confusion and misunderstanding surrounding the implementation of the important “functional equivalence” option in the current child disability regulations. At a minimum, it seems to have a numbing effect; as noted earlier, most courts fell quickly into using familiar three-step sequential evaluation language to describe the new disability determination process for children. Not surprisingly, there are also indications that adjudicators are slipping into accepting the use of “listing-level severity” as a proxy for the statutory disability standard at Step 3, without distinguishing the current three-step sequential evaluation process

213. Thus, in the context of comparing the current child disability standard with the pre-1996 version, one court observed, “Without considering more than the statutory language, one cannot determine which is more severe: 1.) an ‘impairment of comparable severity’ to that which would prevent an adult from engaging in substantial gainful activity; or 2.) an ‘impairment which results in marked and severe functional limitations.’” *Haws v. Apfel*, 61 F. Supp. 2d 1266, 1278 (M.D. Fla. 1999).

214. For an assessment of the relatively greater need for cash assistance for needy children with disabilities as Congress was contemplating its post-*Zebley* amendments, see *Restructuring SSI*, *supra* note 156, at 15–19.

from its predecessors.²¹⁵ Had the Social Security Administration constructed the regulatory scheme for child SSI disability determinations from the ground up, this would not have happened. Even within the sequential evaluation construct, the Administration could have distinguished the disability determination process for children and better highlighted the functional equivalence option by creating a new, post-1996 four-step process rather than a recycled, pre-*Zebly* three-step process.²¹⁶ Either way, it is time to abandon the sequential evaluation model for the child's SSI program and to free child claimants from the old Step 1, Step 2, Step 3 and you're out.

215. See, e.g., *Orben v. Barnhart*, 208 F. Supp. 2d 107, 109 (D.N.H. 2002) (noting that if a child's impairment does not meet or equal a listed impairment, an ALJ must "consider whether the child's impairment is equivalent in severity to that of a listed impairment (i.e., whether it 'results in limitations that functionally equal the listings'). In this case, at step three of the sequential analysis, the ALJ concluded that [the claimant's] impairments did not meet, and were not medically or functionally equal in severity to, a listed impairment." (citing 20 C.F.R. § 416.926a(a))); *Jefferson v. Barnhart*, 209 F. Supp. 2d 1200, 1204 (N.D. Okla. 2002) ("If a child's impairment does not meet or medically equal a Listing, the Commissioner's regulations require a consideration of whether the child's impairment is severe enough that it is functionally equivalent to the severity required by the Listings. Functional equivalency means that the claimant's impairment is of listing-level severity." (citing 20 C.F.R. § 416.926a)); *McCaskill ex rel. Harris v. Massanari*, 152 F. Supp. 2d 270, 273 (E.D.N.Y. 2001) ("An impairment meets the severity of a listing if it matches the precise definition in the listings. An impairment is medically equivalent to a listed impairment if it is 'at least equal in severity and duration to the listed findings.' . . . An impairment is functionally of 'listing-level severity' if it causes marked limitations in two broad areas of functioning or extreme limitations in one such area." (quoting 20 C.F.R. §§ 416.926(a), 416.925(b)(2))). See also *Mancuso v. Barnhart*, No. 02-2088, 2002 WL 31656558, at *1 (3d Cir. Nov. 26, 2002) (describing Step 3 as requiring claimants to show "that his or her impairment or combination of impairments is of 'listing-level' severity, which essentially means that the impairment meets, medically equals, or functionally equals the severity of an impairment in the Listings of Impairments").

216. A few courts have interpreted the regulations as setting out a four-step process. Thus, in *Hernandez v. Barnhart*, 203 F. Supp. 2d 1341, 1351 (S.D. Fla. 2002), the court limited the third step to determining whether a claimant "meet[s] or medically or functionally equal[s] the requirements listed in the Listing of Impairments" and described the determination "whether an impairment or a combination of impairments is functionally equivalent to a listed impairment" as a separate fourth step. A similar idea was expressed by characterizing medical and functional equivalence as separate steps, after ignoring the traditional first two steps of a "sequential evaluation." See *Hart v. Massanari*, 192 F. Supp. 2d 31, 33 (W.D.N.Y. 2001) ("[T]he Commissioner determines whether the child's impairment or combination of impairments meets, medically equals or functionally equals, in severity any impairment contained in the [Listing of Impairments]. If the impairment or combination of impairments does not meet or medically equal a listed impairment, the Commissioner then must determine whether the child's impairment 'functionally equals' a listed impairment.").