The decision changed the Supplemental Security Income (SSI) program for children and awarded class relief for about a half-million children who had been illegally denied benefits.

Richard Weishaupt and Jonathan Stein celebrate the 1990 U.S. Supreme Court victory in *Sullivan v. Zebley*.

In the late 1980s and 1990s, we both worked at Community Legal Services in Philadelphia, a program that has always been committed to pursuing impact and broad systems antipoverty advocacy at the local, state, and national levels. We teamed with Mark Kaufman, who worked at the Delaware County Legal Assistance Association; we were eventually joined by Community Legal Services colleagues including James Lafferty, Thomas Sutton, Sheldon Toubman, and Sheila Zakre.¹

The *Zebley* case arose from three typical individual legal aid cases that challenged the denial of SSI benefits for children. We knew that the statute said that benefits should be awarded to children with impairments of “comparable severity” to those that would disable an adult but that in practice children were treated much more harshly than adults. Simply put, the U.S. Social Security Administration did not follow the statute and instructed adjudicators not to consider functional limitations and to award benefits only to children who met a listed impairment; the practice caused many children to be denied benefits even though they had disabling conditions.

The remembrances we received give a good overview. For example, Prof. Peter Edelman of the Georgetown University Law Center describes *Zebley* as “exhibit A for the proposition that impact litigation can still be the agent of change of historic

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dimension." And Prof. Sylvia Law of the New York University School of Law summarizes, “[T]he victory in Zbley was nothing short of miraculous.” She explains that while Zbley came a decade after the heyday of Supreme Court victories in the public benefits area, it came out of that tradition. Tom Yates of the AIDS Legal Council of Chicago aptly describes Zbley as a multiple game changer, “an audacious attack on a substantive social security policy” that had limited the children’s program to narrow medical criteria and denied children with disabilities a realistic and holistic assessment of their disabilities. As Yates notes, counsel argued that the “entire substantive disability standard for children violated the Social Security Act,” and the 7-to-2 Court decision “required [the Social Security Administration] to start over and devise a disability standard.” At the time of the Zbley litigation only about 300,000 low-income children with disabilities received SSI; today 1.3 million receive the benefit.

Many remembrances note the sustained implementation, monitoring, and defense of the reforms obtained in Zbley as critical contributions after the Court decision. Both Yates, who played a key part in the post-Zbley era, and former Social Security Administration Commissioner King, from inside the agency, recognize that the post-Zbley advocacy not only ensured the long-term continuation of the litigation victory in the face of media and political backlash but also established continuing avenues for accessing policymakers.

But before we share the remembrances, we offer, especially to a new generation of legal aid and public interest anti-poverty advocates, some insights into this past success to serve as a guide and encouragement for advocacy.

**Do Not Be Discouraged by Apparently Long Odds if You Think You Are Right**

Sure bets are rare in litigation, especially in challenging governmental policy, which is often assumed to be correct. When we appealed the Zbley case in the mid-1980s, it was a dismissed class action challenging regulations that had been in use since the inception of the SSI program. We had only the administrative records of three children with disabilities and no on-point, supportive case law. Moreover, at least two circuit courts had upheld the Social Security Administration’s cramped medical-listings-only approach. We knew we could marshal compelling evidence that childhood disability was not limited to poor people; it affected families from all walks of life. These facts, however, had to be presented through amicus briefs that documented how children and families were hurt by these policies even though the public—and federal court judges—knew that the children were disabled.

Although very little children’s SSI case law was on the books, we built upon a string of victories. We knew that while Zebley came a decade after the Court decision, we would have to propose a workable alternative since the Social Security Administration defended its position by claiming that a better system of evaluation could be devised. We had to offer the Supreme Court a vision of a regulatory policy that was medically sound and could be efficiently administered by the agency. In short, we argued that an “individualized functional assessment” was the norm of pediatric evaluations that made further efforts—such as Zebley—possible, even if not assured. Perhaps we were overly optimistic, but a certain amount of self-confidence and faith in the powers of skilled and aggressive advocacy is an important ingredient for successful challenges.

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climate that made further efforts—such as Zebley—possible, even if not assured. Perhaps we were overly optimistic, but a certain amount of self-confidence and faith in the powers of skilled and aggressive advocacy is an important ingredient for successful challenges.

The notice began with these words: “Good news”—the first and last time a Social Security Administration notice had this greeting.

4 Email from Peter Edelman, Carmack Waterhouse Professor of Law and Public Policy, Georgetown University Law Center, to Jonathan Stein, General Counsel, Community Legal Services of Philadelphia (Feb. 16, 2015) (in our files).

5 Hinckley v. Secretary of Health and Human Services, 742 F.2d 19 (1st Cir. 1984); Powell v. Schweiker, 688 F.2d 1357 (11th Cir. 1982). We used the “bad case law” precedent to illustrate how off base the Social Security Administration’s policy was in denying children who were disabled by any reasonable standard. Ultimately the U.S. Supreme Court even cited one of the cases as illustrative of the problems that arose under the agency’s illegal standard.

and professional assessment of children with disabilities and was required by the Social Security Act. Several of the amicus briefs specifically addressed this issue and how such a functional assessment was more consistent with modern medical and psychological practice than the listings-only approach of the SSI program.

**Invite All Your Allies into the Fray to Make Impact Litigation a Collective and Successful Effort**

We placed great effort in collaborating with advocates across the country in legal services programs and in the Protection and Advocacy system.7 Eileen Sweeney in Washington, D.C., created and maintained a vast network of advocates and kept us abreast of developments (Sweeney died in 2006), and Marilyn Holle in Los Angeles helped us with our West Coast connections and with the disability rights movement.

Our allies were a tremendous source of amicus briefs. Many of these briefs—such as the one filed on behalf of the Spina Bifida Association of Greater Los Angeles by California Protection and Advocacy, the Youth Law Center, and the National Center for Youth Law—offered myriad examples of seriously disabled children denied SSI; those examples plugged a major gap in our lower-court record. The National Organization of Social Security Claimants’ Representatives, in a brief authored by Robert Rains of the Dickinson School of Law, rebutted the Social Security Administration’s claim that the challenged system was fair and flexible. Others offered the support of major, respected national groups, such as the American Medical Association and the American Academy of Pediatrics, to confirm that functional assessment of disabled children was an accepted practice among professionals.

We obtained support from well beyond the usual allies—an amicus brief from 29 state attorneys general on the state fiscal impact of denying SSI to children and from the National Legal Center for the Medically Dependent and Disabled to support our claims and send a message to certain members of the Supreme Court.

**Implementation Is More than Half the Battle**

Court wins can often be pyrrhic victories since the executive and legislative branches have the last word when, as in Zebley, the issues are nonconstitutional. In these branches of the government the disenfranchised and powerless have the least leverage.

As a result we spent the greatest amount of our advocacy time over the past years not in the litigation but in post-Zebley implementation efforts as we monitored data and performance and defended the program from legislative attack. Immediately after the Supreme Court decision, we had lengthy settlement negotiations with the Social Security Administration to shape interim policies; we eventually entered into a 36-page stipulation and order approved by the district court. We were heavily involved in the adoption of the interim final regulation. Part of the stipulation gave us access to internal quality review reports on implementation, and that information allowed us to spot states adhering to prior bad practices. The stipulation allowed us to play a part in drafting implementation notices to the class, such as the one to the 435,000 families with potential retroactive awards going back to January 1, 1980; the notice began with these words: “Good news”—the first and last time a Social Security Administration notice had this greeting. (We were very pleased that 70 percent of the class—a very high number for a class response—requested review.) We negotiated an outreach program in the settlement agreement to ensure that parents and professionals knew about the reforms, and, with the Bazelon Center for Mental Health Law, we undertook further outreach and training of advocates and parents on the new, expanded rules.

When the inevitable backlash against the growth in the program came, fueled by grossly inaccurate reports in print and television news media (e.g., slandering parents with accusations that they duped psychologists to establish mental illness), we joined with advocates such as The Arc, the Joseph P. Kennedy Jr. Foundation, and Eunice Kennedy Shriver to defend the program. When Congress cut the program in 1996 in the so-called Personal Responsibility and Work Opportunity Reconciliation Act, we and our allies worked hard to prevent a return to the old, inflexible standard.8 Congress and the Social Security Administration agreed that a functional evaluation was needed to evaluate children fairly, and the worst damage was avoided.9

The backlash helped us develop more informed support for the SSI child program in Congress and in various administrations. We have continued to defend the program; for example, Jonathan Stein appeared as a witness along with a parent of a child with a serious disability to support the program at a 2011 hearing in the U.S. House of Representatives. We continue to ensure

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7 Federal and state laws establish a Protection and Advocacy system to provide legal representation and other advocacy services to all people with disabilities. All Protection and Advocacy agencies maintain a presence in facilities that care for people with disabilities, where the agencies monitor, investigate, and attempt to remedy adverse conditions. Under the auspices of the National Disability Rights Network, these agencies ensure full access to inclusive educational programs, financial entitlements, health care, accessible housing, and productive employment opportunities.


that every level of the Social Security Administration adheres to the children’s rules and even considers further regulatory improvements in the program. The media backlash of the mid-1990s led us to be much more vigilant of unprofessional or inaccurate reporting on the SSI disability program, and we have quickly responded to inaccuracies because we know the consequences that could result.10

Impact advocacy, of whatever kind, is for the long term. It requires vigilance and the same kind of energy and care that one puts into the initial effort. Our experience is that it is well worth the effort.


Remembrances

ROBERT E. RAINS
Professor Emeritus
Dickinson School of Law, Pennsylvania State University

I first met Richard Weishaupt over four decades ago when we shared an apartment our third year of law school. After graduation, he went to work for Community Legal Services in Philadelphia, and I joined the Pennsylvania Attorney General’s office in Harrisburg. We stayed in touch over the years. I eventually went into private practice, where I handled many Social Security Disability and SSI cases, and then joined the faculty of the Dickinson School of Law where I founded the Disability Law Clinic in 1985.

At about the same time, a lawyer at Delaware County Legal Assistance, Mark Kaufman, had filed the Zebley class action in the Eastern District of Pennsylvania, challenging the Social Security Administration’s restrictive regulations for indigent, disabled children seeking SSI. Zebley was of great interest to me and, although they certainly did not know it, to many of the clinic’s young clients. Not surprisingly, the district court granted summary judgment to the government.11 Then Rich and Community Legal Services’ Jonathan Stein took Zebley to the Third Circuit. Jon argued the case, and a unanimous panel of the Third Circuit reversed in 1988 while recognizing that it was “in the minority among courts which have considered the legality of these regulations.”12

We in the advocacy community certainly hoped that the Supreme Court would not grant certiorari, but of course it did.13 Jon and Rich, greatly aided by Thomas Sutton, worked

feverishly not only to prepare their brief and plan Rich’s oral argument but also to put together a group of amici who could supplement the meager record in the case.

On behalf of the National Organization of Social Security Claimants’ Representatives, I wrote an amicus brief in support of the respondents, primarily pointing out cases where individuals were denied SSI as children and then suddenly were declared to be disabled as of their 18th birthday, this being clearly in violation of the statutory “comparable severity” standard.14

I made arrangements for my clinic students to attend the oral argument on November 28, 1989, and we all got up very early that day to make the trip from Carlisle, Pennsylvania, to the Supreme Court. The oral argument went better than any of us could have anticipated. I was delighted that one of the justices asked the assistant solicitor general a question that clearly was based on my amicus brief, and he had no good answer to it.15 Then I had the pleasure of watching Rich go eye-to-eye with the justices. Indeed, as I recall, the first thing that the chief justice said to Rich was that he could raise the podium, which he did. It went so smoothly that with about seven minutes left of his time, Rich asked if there were any more questions, and, when there were none, he rested.

The assistant solicitor general would have done well to have likewise rested, but instead he attempted a rebuttal. He unwisely argued that since Zebley was a facial challenge to the regulations, it did not matter if in individual cases the regulations might be used to deny benefits to which individuals were entitled by statute. Justice Scalia became quite animated and reminded him that a regulation “has to be valid in all of its applications as written, at least.”16

After the argument, we all repaired to a nearby eatery for lunch, and the mood was elated. I asked my students what they thought of the argument, but mostly they were concerned with where they could go shoe shopping. I told Rich that I thought he had won Justice Scalia’s vote, or rather that the assistant solicitor general had lost it. Rich could not believe it, but Justice Scalia did indeed vote with the majority.

Community Legal Services won a brilliant 7-to-2 victory that has benefited many indigent families with disabled children. Much has happened to the children’s SSI program since with the vicissitudes of time.17 But the positive legacy of Zebley lives on. I’m proud to have been a small part of it.18

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17 See, e.g., Personal Responsibility and Work Opportunity Reconciliation Act § 211 (repealing comparable severity standard and in other ways restricting disabled children’s access to Supplemental Security Income).
18 See Zebley, 493 U.S. at 536 n.17 (citing Brief of the National Organization of Social Security Claimants’ Representatives, supra note 14).
The victory in Zebley was nothing short of miraculous. The rise of legal services launched a brief period when the Supreme Court applied the rule of law to the most vulnerable. King v. Smith in 1968 held that the intrusive “man in the house rules” authorizing midnight raids into the homes of poor families violated the federal Social Security Act and established that federal rules create legally enforceable rights.\(^\text{19}\) Goldberg v. Kelly in 1970 established that federal welfare programs create entitlements that cannot be terminated without notice and an opportunity for a hearing that meets constitutional standards of fundamental fairness.\(^\text{20}\) Shapiro v. Thompson in 1969 struck down durational residency requirements and more generally demanded that aid not be conditioned on the forfeiture of constitutionally protected liberties.\(^\text{21}\)

Thus, by the early 1980s, when Rich described social security policies that denied disability benefits to millions of poor, seriously disabled children, it was hard to be optimistic about the prospects of relief in the federal courts. By 1988, Community Legal Services had won in the Third Circuit, and the Reagan administration had asked the Supreme Court to reverse. I was honored to be part of the group that helped Rich prepare for the oral argument. He was as prepared and eloquently persuasive as humanly possible. Still, victory seemed unlikely. The administration was fiercely resistant. Billions of federal dollars for tens of thousands of poor children were on the line. Not only did the Supreme Court rule for the Zebley plaintiffs, the plaintiffs won on a 7-to-2 vote.

The administration, then led by George H.W. Bush, resisted. It delayed in issuing regulations and standards. It refused to notify people whose claims had been denied under

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\(^{19}\) King v. Smith, 392 U.S. 309 (1968).


\(^{23}\) Harris v. McRae, 448 U.S. 297 (1980).

the restrictive standards that the Supreme Court had declared illegal. Community Legal Services fought the resistance through political action and on-the-ground mobilization. Because the change in legal rules affected so many thousands of kids and each claim was complex, Community Legal Services enlisted the cooperation of many law school clinics around the country to aid in representing these children and their families.

And these changes have endured. What a great occasion for celebration!

The Supreme Court’s decision in Zebley altered the course of the nation’s social policy. When the SSI program was created in 1972 and implemented in 1974, most people thought it would serve primarily as a resource for the elderly. The decision to include children in what nearly everyone regarded as the adult welfare program occurred somewhere deep inside the workings of the policy process, away from public scrutiny. In the first place, Washington paid far more attention to social security than to public assistance. In the second place, the welfare-reform debate of the era centered on President Nixon’s Family Assistance Plan and not on what would become SSI. In the third place, the House of Representatives but not the Senate favored including children as an eligible category for SSI. As things turned out, obscure events in these years proved to be very important later.

As the SSI program developed, it became evident that people with disabilities and not elderly individuals would become its chief recipients. Even so, the children’s component of the program remained something of an afterthought. The people at the Social Security Administration took their understanding of disability from the Social Security Disability Insurance program that they already administered. That program featured all-or-nothing benefits, and it contained a very strict definition of disability that centered on the inability to engage in substantial gainful activity. It included a complex administrative system in which state authorities, rather than the federal government, made the initial disability determinations. The definition of disability in particular seemed more appropriate for adults with working histories than for children. No one took much time to examine the differences and see how they affected children with disabilities.

The policy process got caught up in concern over the rising costs of disability benefits, the apparent inconsistencies of the process that administered them, and the tenuous connection between disability and work. “Disability” meant that a person could no longer work at productive employment.

It was lawyers, rather than members of Congress or other politicians, who brought the problems of the nation’s disability system to public attention. They dealt with people who were denied benefits or who had their benefits cut off because authorities deemed them to be no longer disabled. Working within the administrative law structure that governed social security also brought the dilemmas of children to the attention of lawyers and other advocates. For the first time, children with disabilities in need of SSI came to public attention, thanks to the efforts of advocates such as Eileen Sweeney.
Zebley made people realize that a disability-determination system geared toward adults was not necessarily appropriate for children. It highlighted the inequities in the approach that the Social Security Administration took toward awarding disability benefits to children. Simply put, the agency did not do enough to consider the differences between adults and children. Children experienced disability in ways different from those of adults, and new procedures were required to identify those children with special needs.

The decision had an immediate effect on the disability rolls and probably constituted the single most important event in disability programs since the creation of the SSI program in 1972. By 1990, after twelve years of the Reagan-Bush administrations, passing progressive social welfare laws was difficult. The days of the Great Society were over, and change occurred in a highly incremental and limited fashion. The system did not appear capable of making large-scale changes on the order of comprehensive welfare reform or national health insurance.

Zebley made people realize that a disability-determination system geared toward adults was not necessarily appropriate for children.

With Congress largely blocked as a vehicle for change, the courts became more important to the social policy process. Zebley, argued so effectively by Richard Weishaupt and Jonathan Stein and others who practiced public interest law, had the effect of changing the SSI program to make it more inclusive of children.

The advocates did not stop with the decision itself. They realized the importance of implementation to the policy process and worked hard to make sure that the Social Security Administration actually followed the procedures suggested by the Supreme Court and codified them in new federal regulations. In this manner they changed the very nature of a public program created in a different era and with different expectations. Few people have altered the course of public policy so decisively.

To be sure, the need to advocate on behalf of children with disabilities continues. Congress has taken steps to undercut Zebley. Journalists have produced stories that have undermined the legitimacy of childhood disability benefits. Nonetheless, advocates remain ready to take on modern challenges, with the 1990 Zebley decision looming as a conspicuous success. It deserves to be celebrated a quarter century later.
All too often, public policies treat individuals like objects, uniform and devoid of humanity and distinctive experiences. Programs serving low-income people, in particular, fall into that pattern. But what a grim irony it was that, for so many years, we afforded the most inflexible, dehumanizing treatment of all to evaluating the needs of our children with disabilities. Had it not been for Zebley, that approach would still be in place today. Zebley was a victory for due process, for professionalism, and for millions of low-income families. Perhaps most important of all, however, it was a redemption of our fundamental humanity.

Zebley was a redemption of our fundamental humanity.

Simply put, Zebley was a game changer in multiple ways. First and foremost, the Zebley claims were an audacious attack on a substantive social security policy. They did not just attack the Social Security Administration for the procedures it used but rather argued that the entire substantive disability standard for children violated the Social Security Act. As a result of the Supreme Court decision, the agency was required to start over and devise a disability standard that applied to every child applicant in the United States and that was consistent with the Social Security Act. Zebley was a frontal attack on the agency’s regulatory system, and it succeeded.

Second, the impact for children with disabilities was dramatic. Before the Zebley decision was issued in 1990, roughly 310,000 children received SSI benefits. By 1996, the number of children receiving SSI had more than tripled, totaling roughly 955,000. Today over 1.3 million children receive SSI disability benefits.25 Every one of these children is a member of a family that is extremely low-income. These SSI benefits were and continue to be the factor that keeps eligible children and their families housed and adequately clothed and fed. The Zebley litigation made all this possible.

Third, the importance of Zebley was reinforced by the heat it generated with those parts of American society who believe that support for the less fortunate is a sign of national weakness. The gains from Zebley became the focus of attacks in the media and by some members of Congress. As a result, cutting SSI childhood disability became one of the centerpieces of the attack on all welfare programs that culminated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, one of the most disingenuously named pieces of legislation ever. The Act attempted to roll back the gains realized in the aftermath of the Zebley decision. But, as explained below, a curious thing happened. Unlikely allies coalesced and organized to save the heart of the SSI childhood disability program. While the Act led to changes in the childhood disability standard, it did not roll back the gains achieved with Zebley.

Fourth, the process that the Zebley attorneys and the legal team from the Social Security Administration went through in negotiating and agreeing to a new SSI childhood disability standard fundamentally changed the way that advocates interacted with

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the agency. As a result of Zebley, the Social Security Administration moved from being a closed agency to one in which its staff sought input from the legal aid community about how social security and SSI programs should be administered. For example, the agency signed consulting agreements with legal services attorneys—notably Jon Stein, Rich Weishaupt, and Robert Lukens of Community Legal Services—to assist them in devising the final SSI childhood disability standard after passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. Let me repeat that—\textit{the agency voluntarily sat down with legal services advocates to formulate a new disability standard for childhood SSI}. That still amazes me. And that cooperation has continued to this day. Advocates and the agency later cooperated on issuance of a set of eight social security rulings regarding childhood disability and a social security ruling that extended many of the tenets of childhood disability adjudication to the disability standard used for evaluating whether young adults were disabled. Advocates from legal aid programs have continued to meet and work closely with a succession of Social Security Administration commissioners, under both Republican and Democratic administrations, from Ken Apfel to Michael Astrue to current Acting Commissioner Carolyn Colvin, to improve how the agency operates. Zebley made that possible.

\textbf{Zebley must be included in the very short list of cases that most dramatically affected the practice of poverty law in the United States.}

In consideration of all these factors, Zebley must be included in the very short list of cases that most dramatically affected the practice of poverty law in the United States. I again want to offer my congratulations to Community Legal Services—one of the finest legal services programs in the nation—for its commitment to this case and cause, and to the Zebley attorneys themselves—dear friends of mine—who fought to achieve the initial court victory and have since continued to fight to preserve the SSI childhood disability program.

I am delighted to remember and celebrate Zebley’s past and continuing importance for children with disabilities and their families and to thank Jonathan Stein and Richard Weishaupt for their vision in putting the case together and their doggedness in its implementation. They ensured that the victory translated into actually changing for the better the lives of children with severe disabilities and the lives of their families. Their skillful work mitigated the backlash from that overwhelming victory. I look to Community Legal Services to see that the Zebley legacy is furthered and protected over the next 25 years.

I became involved with Zebley through my work on behalf of technology-dependent kids—kids who could qualify for nursing facility placement because of, say, a tracheostomy but who could not meet the SSI disability standard. We—then called Protection & Advocacy Inc.—with the Youth Law Center and the National Center
Zebley Counsel look back 25 years and forward to more impact advocacy

for Youth Law, filed an amicus brief supporting Brian Zebley in the Third Circuit on behalf of the Spina Bifida Association of Greater Los Angeles, among others. Our clients’ statement of interest was cited extensively in the Third Circuit opinion.26

When the case went to the Supreme Court, I was impressed by Jonathan and Richard’s strategies in deciding what needed to be covered in the amicus briefs. They were like commanders on a battlefield moving battalions into position. Alice Bussiere, then with the National Center for Youth Law; James D. Weill, then with the Children’s Defense Fund; and I were charged with the amicus brief putting forward the compelling cases all over the country of children who had severe disabilities but who were then in the administrative process and who would be expected to lose if the Supreme Court ruled for the Social Security Administration.

They were like commanders on a battlefield moving battalions into position.

After the Zebley victory, like many dozens of other attorneys around the country, we here in California were marshaled into assisting class members, training volunteer attorneys to represent class members, and training social service agencies on the medical and behavioral evidence to put together to support initial applications.

What’s missing from the Zebley story is documentation of its positive impact: keeping families intact and reducing the incidence of out-of-home placements, whether in a medical facility or through foster care, through disability-linked Medicaid including Early and Periodic Screening, Diagnosis, and Treatment and home-and-community-based services and Title V programs for children with special health care needs. Because of Zebley, these children received better access to medical and remedial services to further their quality of life and ability to participate in their communities.

Starting with the announcement of the social security disability program’s “sequential evaluation” regulations in 1978, there ensued a decade or more of grassroots litigation to flesh out the meaning of the terms in the regulations, ensure that the “steps” would work to produce just and sensible determinations, and cause the outcomes to comport with the governing Social Security Act.27 The work was coordinated nationally mostly by Eileen Sweeney, then at the National Senior Citizens Law Center, who in the pre-Internet era managed to send by snail mail a thick package of case documents and other materials every month to a national group of litigators. She furthered coordination and mutual learning at national meetings such as the National Legal Aid and Defender Association’s substantive law con-

26 Zebley v. Bowen, 855 F.2d 67, 72–73 (3d Cir. 1988). The amici included a 10-year-old boy who had cognitive disabilities related to lead exposure—probably from the paint on his crib—and who had not yet learned how to write his first name. He had lost in front of the administrative law judge, and his case was pending at the appeals council. After the Third Circuit decision, the Social Security Administration decided through creative analysis that he did meet the listings and awarded benefits without any remand.

ferences. Eileen’s work was a textbook example of how to coordinate a sustained national campaign, and the success of that campaign across that amazing decade is heavily to her credit.

I use the term “grassroots” to describe this campaign because it bubbled up all around the country from organizations and practitioners doing direct service work and encountering in actual client situations the real-world impact of the Social Security Administration’s implementation of the sequential evaluation regulations. Many of the cases that worked their way up the federal court system were individual administrative review cases. Some were class actions. Some were ambiguous (Zebley!). Some were handled by private bar practitioners, which created openings for the agency’s lawyers to pick and choose not just issues and judges but opposing counsel for issues to take on appeal or to the Supreme Court. The plaintiffs were not the only ones forum-shopping.

Those client situations forced practitioners to probe the regulations and figure out why unjust and wrong decisions (those counter to the clear weight of the evidence) kept happening. Because of Eileen’s coordination and our own communications with one another, the importance of “residual functional capacity” began to emerge as a key regulatory factor. The concept of disability in the Social Security Act is a “functional” one, not an abstract medical determination. When the Social Security Administration denied cases based on the claimant not having one impairment with a level of severity described in a regulatory list of impairments, it had abandoned the necessary functional assessment. One of the great accomplishments of Zebley is that now this concept of “functional assessments” seems fairly clear and not that complicated. At the time, though, with the counterweight of deference to agency regulatory decision making, it was quite complicated and not at all a slam-dunk.

In Chicago at the Legal Assistance Foundation, under the leadership of Bob Lehrer (litigation director), Joe Antolin (then in charge of the organization’s social security practice), and me (I represented our named plaintiff and later became supervisor of our more general public benefits practice), we sorted this out and brought a case on behalf of two groups whose cases were being denied based on not having an impairment described on a regulatory list: widows and children. Our named plaintiff, Esther Marcus, was a widow, but she purported to represent a class also including children since the core legal claims were the same.

At around the same time, Community Legal Services in Philadelphia, through Jon Stein and Rich Weishaupt and colleagues, acquired Brian Zebley as a client and began to press similar claims. I am still not quite sure how they did it, because it did not become clear until after the Supreme Court victory, but this case became a nationwide class action involving the children’s claims on the lack of functional assessments in the disability determination. Zebley overlapped with Marcus insofar as the children’s claims were concerned, and we began the friendly and collegial race to the Supreme Court.

I have not looked up the pace of the cases and do not remember the exact timing of the decisions in the two cases. I do remember them leapfrogging back and forth, with decisions that helped each other. At one point the Marcus case provided one of the best memories of our clients’ essential nobility in these kinds of cases. Esther Marcus,

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an elderly Jewish woman who had had a very tough life (maybe the most decent thing her husband had done in the relationship was to make her a widow), was offered a sort of victory if she would drop the case. Needing the money badly, nevertheless she said, “What about all those other people?” and refused the offer. I have seen clients do this many times over the years, and it is a big part of what makes our work so great.

We had a lot of fun cooperating on the Supreme Court preparations once it became clear that the flagship would be Zebley. We wrote an amicus brief on behalf of the Marcus class that was a tight legal analysis of the statutory construction in the case, essentially a second bolster of the leading legal claims in the main Zebley brief.29 We had frequent conferences with Jon and Rich (always a vigorous conversation!), and I think Bob went to the argument. With the victory, Community Legal Services acquired the administration of a national class, including the children in our class in Illinois. The Zebley team did a fantastic job of that—a huge undertaking—for many years following the resolution of the case, and to this day children with disabilities all across the country owe the Community Legal Services’ Zebley team a huge debt of gratitude. Of course, the fight is never over, so Zebley stands as a bulwark against the constant attacks on the program.

A case like Zebley is one of the very top things we can accomplish as public interest lawyers, but we can do it only if we are dedicated and extraordinarily good at the work, in terms of brains, skill, judgment, passion, and endurance. The exemplary Community Legal Services has all of that and showed it to the whole country, wrapped in a beautiful package of substantive progress for our most vulnerable clients.

29 The Marcus litigation regarding widows continued but became moot when Eileen Sweeney and colleagues managed to amend the Social Security Act in one of the Reagan-era budget reconciliation laws to eliminate the higher disability standard for widows. One day Esther Marcus met the mailman, and he gave her a check for about $50,000 in back benefits, an amount she had never come close to seeing in her difficult life. Several thousand other widows across Illinois had similar nice days.

GWENDOLYN S. KING
Commissioner of Social Security
1989–1992

I had just been sworn in as the eleventh commissioner of the U.S. Social Security Administration. Following the ceremony, I posed for pictures, hugged my family goodbye, and prepared to meet my new colleagues in the ninth floor conference room adjoining my office. Looking around for the general counsel, I was surprised to learn that he was not a regular participant at staff meetings held by my predecessor. I ran down two flights of stairs, found the general counsel sitting in a small office, or large closet, and asked him to join me at my first staff meeting. He and I climbed the stairs together, and he told me that the Supreme Court was about to take up the matter of Zebley. It was the first time I had heard of this case.

The day I arrived at the Supreme Court to hear arguments in Zebley, I remember being struck by how many people were so interested in a case with which I had only just become familiar. And I was stunned to learn that my son, Stephen, had just written a human rights law review article on Zebley while he was a student at Columbia Law School.30 After hearing the arguments that morning, I remember being ashamed of being associated with the

agency that had brought us to that moment. I remember telling my general counsel, Don Gonya, that whatever the Court decided, we were going to change the despicable regulations that had put such a burden on families needing benefits for children with disabilities.

That day was also my introduction to Jonathan Stein and Richard Weishaupt, two lawyers relentlessly pursuing justice for the most vulnerable among us. The admiration and appreciation I have for them and Community Legal Services is enormous. I had them both on my list of people to call whenever I needed a sounding board, a fact checked, a course plotted on the path to justice for kids. When I was told something could not be done, my Community Legal Services “adversaries” found a way to do it. Together we argued, agreed, disagreed, revised, and came up with workable, not perfect, but considerably improved government rules.

I feel blessed to have been a small part of this history. Thanks to all of you who work so hard to ensure that children and their families are treated with dignity and respect by the government agencies that exist for their protection.

In a law review article published in 1992, a constitutional scholar who conducted an empirical review of litigation brought by legal services programs throughout the country concluded that Community Legal Services was the “most successful of all legal services programs.”31 The scholar stated that “Community Legal Services’ most conspicuous characteristic, other than its successes, is its wealth of experienced and talented litigators.”32 This high honor was unquestionably influenced by Community Legal Services’ stunning victory in Zebley two years earlier.

One of two Community Legal Services cases won before the U.S. Supreme Court that term (both by 7-to-2 margins), Zebley was one of the most significant poverty law cases ever brought before the Supreme Court. According to most accounts, Zebley involved more money than any case in legal services’ history, dwarfing previous poverty law cases before the high court. At the time, the Social Security Administration estimated that in the first five years $2.5 to $3.5 billion would go to the hundreds of thousands of disabled children affected by this class action lawsuit; the Washington Post predicted the cost would reach $7 billion.33 What we know for sure is that Zebley opened the door to critical benefits, and with them dignity and well-being, for children with disabilities throughout the land.

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32 Id. at 774.
As executive director of Community Legal Services, I received countless letters from parents across the nation thanking us for what we had achieved. I especially remember a touching, handwritten letter from a mother, a Brooklyn resident, who wanted us to know that because of Community Legal Services’ lawyering, she would now be able to buy books to help her disabled child learn to read.

The legal journey confronting and overcoming strong governmental opposition in Zebley was extraordinarily difficult from the start. What many do not know is that the struggle to implement the Supreme Court’s decision was no less difficult. Zebley required a tenacious, brilliant, creative, and collaborative legal team. Fortunately, Community Legal Services had such a stellar team in Jon Stein, Rich Weishaupt, and Tom Sutton. Throughout this journey, they demonstrated the very finest qualities of the legal profession, the public interest community, and our legal services program.

Proud moments come often when you are the executive director of Community Legal Services. Zebley was among the proudest of them all.