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THE NEW TANF REQUIREMENTS AND INDIVIDUALS WITH DISABILITIES

State Comments to the TANF Regulations Illustrate Problems Posed by Inflexible Federal Requirements

By Sharon Parrott

The TANF provisions of the Deficit Reduction Act increase the effective TANF work participation rate — a measure of the proportion of TANF recipients engaged in federally countable work activities for a prescribed number of hours each week — states will be required to meet. States failing to meet these new standards are subject to fiscal penalties. At the same time, the DRA does *not* address long-standing concerns among states and others that the TANF work participation rate structure (both the allowable work activities and the hours of required participation) is too inflexible for many recipients with physical and mental disabilities.

In short, the DRA “raises the bar” on states — requiring them to engage more recipients in welfare-to-work activities — but does not provide them with the flexibility they need to tailor those activities to the circumstances of some TANF recipients with disabilities.

In addition, HHS used its new regulatory authority provided under the DRA to further limit states’ ability to craft programs that could address the needs of individuals with disabilities in a number of ways, including adopting rigid definitions of the work activities themselves and creating new restrictions that make it difficult for states to integrate activities designed to address barriers within other welfare-to-work activities. HHS also made no allowance for cases in which recipients with disabilities engage in work activities but, because of their disabilities, need to participate in alternative activities or participate fewer hours than required by the federal rules.

HHS issued its new regulations as “interim final rules” (which means that the rules are already in effect) but accepted public comments on the rules and is expected to release revised final rules later this year. In response to the comment period, HHS received more than 500 sets of comments from states, providers, advocates, analysts and others. Of those, HHS received more than 40 comments directly from state officials as well as comments from national organizations representing states’ interests such as the National Governors Association, the American Public Human Services Association, and the National Conference of State Legislators. *Most states submitting their own comments and all three of the national organizations representing agencies, governors, and state legislators highlighted the problems the new rules pose for states trying to serve individuals with disabilities in appropriate and an appropriate*

and effective manner. Many states noted the inherent conflict between their obligations under the Americans with Disabilities Act to make accommodations in their TANF programs for individuals with disabilities and the TANF work participation requirements that states must meet.

In some ways, this is a striking development. A decade ago, the extent to which TANF recipients have disabilities was not widely known and many states did not understand how the landmark Americans with Disabilities Act (as well as Section 504 of the Rehabilitation Act) affected their obligations to TANF recipients with disabilities. Over the past ten years, research has shown repeatedly that many recipients have physical and mental impairments and that the recipients “falling through the cracks” — those who are sanctioned, who hit time limits, or who remain on TANF for long periods — often have physical or mental impairments. Moreover, over the last ten years, some states have developed model programs for identifying disabilities and other barriers to employment and for engaging recipients with disabilities and other barriers in activities that can help them on a path to employment. Unfortunately, the DRA and subsequent regulations ignore these advances in knowledge and program strategies, and instead impose requirements that are overly rigid and that tacitly assume that all or nearly all TANF recipients are job ready or could become job ready with a narrow set of modest interventions.

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Congress can address these shortcomings in the DRA provisions and subsequent regulations by adjusting the federal work participation requirements so that states get credit when individuals with disabilities participate in work-related activities, even if the precise nature of those activities or the number of hours the individuals are able to participate do not match the standard TANF requirements. Such adjustments could be made in variety of ways and safeguards could be put in place to ensure that states identify disabilities correctly and develop appropriate employment plans for them.

If the requirements are made more flexible, states will have a greater incentive than they had previously to assess disability status correctly and develop work activities that can meet their needs. Without changes to the TANF requirements, however, states have an incentive to push individuals with disabilities into standard work activities, even if they are ill-suited to the families’ circumstances, and then cut families off the program if they can’t comply with those work requirements. Making these changes in the TANF requirements would be in keeping with the spirit of the bipartisan, broadly supported goals of the Americans with Disabilities Act. The intent of the ADA was to ensure that individuals with disabilities were treated equitably in public programs and that their individual circumstances would be taken into account when devising requirements and providing services.

In addition, as discussed below, states have identified one group of recipients — those with severe disabilities that leave them unable to work, including those with a pending application for Supplemental Security Income (SSI) benefits — that should be excluded from the work participation rate calculation entirely. The TANF regulations already exclude SSI recipients from the work participation rate calculation, but they do not allow states to exclude individuals applying for SSI or individuals with severe, but temporary, disabilities (who are ineligible for SSI) from the work rate calculation.

Trying to engage this group — a small share of TANF recipients and a minority of those TANF recipients with disabilities — in work activities may be a poor use of limited resources and can lead to inappropriate sanctioning of such recipients.

What Do States Say About the TANF Requirements and Individuals With Disabilities?

More than 20 states that submitted comments on the regulations called for changes with respect to recipients with disabilities. Most of the comments came in two broad areas:

- The need for greater flexibility to deem recipients with disabilities as meeting the work requirements if they participate in appropriate activities for the number of hours they are able to — as determined by a medical professional — given their circumstances. States called for flexibility both in making accommodations with respect to the *type of activity* the individual engaged in and *the number of hours* the recipient participated.
- Flexibility to exclude certain recipients with disabilities from the work participation rate calculation altogether, including recipients awaiting an SSI eligibility determination and recipients with severe temporary disabilities that preclude participation.

To be sure, states' comments were not all identical, but the degree of agreement among states commenting on this issue is striking. The comments came from a diverse group of states from all geographic regions of the country and includes states headed by both Democratic and Republican governors and those with more and less restrictive TANF programs, including states as diverse as California, Florida, Iowa, Illinois, Indiana, Mississippi, New Mexico, New York, Oregon, and Virginia.

Flexibility on Activities and Hours for Recipients with Disabilities

The APHSA comments on the interim final regulations state:

The preamble “encourages States to make every effort to engage individuals with disabilities in work activities.” However, we are concerned that the regulations have placed new limitations on the ability of states to accommodate the special needs of persons with disabilities who wish to participate in the TANF program. It is critical that states have maximum flexibility in receiving credit for key rehabilitative and supportive services such as substance abuse, behavioral/mental health, and domestic violence treatments in more than one activity. These services are an imperative part of moving recipients with barriers to work and retaining employment.ⁱ

The comments submitted by NGA echo a similar theme:

Governors continue to believe that states should have maximum flexibility in receiving credit for key rehabilitative and supportive services such as substance abuse, behavioral/mental health and domestic violence treatments in one or more work activity. These services are an imperative part of moving recipients, with barriers, to work and retaining employment. States need credit for these services in work activities that are fully countable for all hours of participation without time limit.ⁱⁱ

Many individual states elaborated on these general recommendations in their own comments to HHS. For example, the Director of the Iowa Department of Human Services wrote in his comments, “While the preamble makes numerous references to ‘encouraging’ states to engage persons with disabilities to the fullest extent, the rule offers little in practical terms enabling states to do so in a meaningful manner. In general what’s missing, and is most needed, are more and better mechanisms to allow TANF recipients who are themselves disabled, although not receiving SSI, to meet work participation requirements or be excluded from the definition of work eligible.”ⁱⁱⁱ

Iowa along with a number of other states recommended to HHS that when recipients with disabilities participate in activities for the number of hours allowed by a medical professional, that the participation be deemed to meet the work requirements. For example, the Maryland state agency wrote in its comments, "This can be accomplished by deeming full participation by persons with disabilities if they participate in federally defined core, or if physically unable to participate in core activities, then non-core activities, ...to the maximum level allowed by medical verification, even if it falls short of the present standard."^{iv} The Maryland agency, like several other commenters, noted, "This is the same principle that applies to your [HHS's] recommendations that recognize the situation of recipients who are subject to the Fair Labor Standards Act by deeming hours."

Iowa and Maryland were not alone in these comments:

- **Florida Department of Children and Family Services:** "Follow the FLSA deeming model. If the participant engages in work for the assigned number of hours each week as designated by the physician, and it does not equal 30 hours, deem the participant to have participated for the full 30 hours."^v
- **Indiana Family and Social Services Administration:** “Under the new regulations, individuals in a Community Work Experience Program will be deemed as meeting the 20 hours o[f] core activities even if the maximum number o[f] hours they may participate...is less than 20 hours thus allowing states to remain compliant with the Fair Labor Standards Act...Why was not similar logic applied to persons with disabilities and the needs for states to comply with the ADA? HHS stresses the need for states to work with persons with disabilities and the need to comply with ADA requirements, yet similar ‘deeming’ provision[s] were not created for persons with disabilities...”^{vi}
- **Maine Department of Health and Human Services:** "DHHS strongly suggests that the definitions of work activities be broadened to accommodate individuals with limited or no skills and individuals with significant physical and/or emotional challenges. There should be fewer hours required to fulfill the work requirements for these individuals...Not acknowledging the success of these efforts is punitive to TANF participants and to states that are providing appropriate and effective services to help individuals become independent of government assistance."^{vii}

HHS Contention that Additional Flexibility is Not Needed Because the Work Rate Is “Only 50 Percent” Ignores On-the-Ground Realities

In the preamble to the interim final regulations, HHS explains its view that states should be able to make reasonable accommodations for individuals with disabilities while still meeting the federal work participation rate because the target rate is “only 50 percent” not 100 percent:

That is why the participation requirement is only 50 percent. An individual's requirements are set by the State balancing the goals of the program, the needs of the family, and obligations under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. Thus, the State may require more or fewer hours of the individual than needed to count the family toward the Federal participation rate. States may also have a more expansive or a more restrictive list of allowable activities than those that count to meet the Federal participation rate.¹

This explanation ignores the on-the-ground reality of how difficult it is to meet a 50 percent participation rate in part because of the many legitimate reasons why *any* recipient may not meet the full hourly participation requirements in any particular month, including temporary illness, temporary gaps between work program components, and family emergencies such as trying to forestall an eviction, the need to find new housing, or the need to attend to a domestic violence problem. Many of these reasons have little or nothing to do with the modifications that a state may need to make, on an individualized basis, to accommodate a person with a disability. Moreover, HHS's reasoning sends a strong message to states that working with recipients with disabilities who need accommodations “counts for less” — that is, is less important and will be less rewarded — than working with recipients that do not need accommodations.

In its comments on the interim final rule, the Deputy Commissioner of the Connecticut Department of Social Services addressed the issue of whether the fact that the work rate is 50 percent provides states with the flexibility they need. In the context of her recommendation that those applying for SSI and those with serious disabilities that may be temporary in nature be excluded from the work rate calculation, she stated, “...[S]tates face significant challenges in engaging even those without disabilities at a level to meet the 50% work participation rate. The individuals who typically are in the 50% of TANF recipients not meeting the participation requirements are so because of time needed to accurately assess the barriers and training needs of those entering the program, delays created by waiting for scheduled activities to begin, allowing time for participants to make the necessary child care and transportation arrangements, and time to allow due process for conciliation and appeals for those subject to sanctions for non-cooperation.”

- **Massachusetts Department of Transitional Assistance:** "Accommodations made under the ADA or Section 504 of the Rehabilitation Act should be recognized by ACF for work participation rate purposes."^{viii}
- **Minnesota Department of Human Services:** "In the regulations and in presentations to the states, HHS has stressed the need to work with persons with disabilities and the need to comply with ADA requirements. However, the way the TANF work participation rate is calculated creates a disincentive for states to work with these individuals if they are not able to work at least 20 hours a week. We recommend that consideration be given to treating these individuals as having met the work participation rate if they are participating in work activities the maximum number of hours allowed given their medical condition..."^{ix}

States should not be penalized for following the Americans with Disabilities Act, by providing reasonable accommodations and basing participation requirements on individual abilities and physician orders...

- Oregon Department of Human Services

- **New Mexico Human Services Department:** "It is critical that states have maximum flexibility in receiving credit for key rehabilitative and supportive services such as substance abuse, behavioral/mental health and domestic violence treatments in more than one activity. These services are an imperative part of moving recipients, with barriers, to work and retaining employment."
- **Oregon Department of Human Services and Governor Kulongoski:** "Limiting rehabilitation services to the time limits within job search...activity ignores the realities of these barriers and time needed to successfully address them...States should not be penalized for following the Americans with Disabilities Act, by providing reasonable accommodations and basing participation requirements on individual abilities and physician orders...We believe the approach should be modified to recognize clients with disabilities and other severe barriers should be served based on their individual abilities and needs; clients in this category who are participating up to the allowed prescriptive level should be deemed to fully meet the federal participation requirements..."^x

SSI Applicants and Those With Severe Temporary Disabilities Should be Excluded from the Participation Rate Calculation

Many states also commented that recipients who were in the process of applying for SSI benefits and those with serious temporary disabilities who are ineligible for SSI because of the expected duration of their conditions should not be included in the work participation rate calculation. In the interim final regulations, HHS excludes SSI recipients from the definition of "work eligible individual" — a new term that defines which individuals are included in the work rate calculation.^{xi} HHS did not, however, exclude individuals that have applied for SSI and are awaiting an eligibility determination. HHS also did not exclude individuals who have disabilities that are as severe as those that would qualify them for SSI but who are ineligible for SSI because the disability is temporary. States argued in their comments that these two groups of individuals should be excluded from the work participation rate calculation, provided that they have medical documentation verifying the severity of their conditions.

The SSI application process can be very lengthy, even for individuals with serious disabilities who ultimately are found eligible for SSI benefits. And, the SSI program is more suitable — and provides higher benefits which such individuals badly need — for individuals with serious disabilities. Many such individuals will be unable to participate in welfare-to-work activities at all. Including them in the participation rate merely reduces a state's rate in a way that inaccurately reflects the extent to which the state is successful at engaging recipients who do not have severe disabilities in activities that can help them move toward employment.

HHS Could Have Used Its Regulatory Authority to Make the TANF Work Requirements More Flexible for Individuals with Disabilities

Under the ADA and Section 504, states are required to provide individualized treatment and meaningful access to program benefits and services, including work activities. In many instances, a person with a disability can participate in work activities, but may not be able to participate for relevant 20, 30 or 35 hours per week standard because of their disability or may need modifications to the type of activity to which they are assigned.

The interim final rule does not give states credit for engaging such recipients with disabilities in work activities. That is, a state that makes a determination that an individual has a disability, develops a plan for participation for that individual, and engages the individual in work activities will receive no work participation rate credit for these activities if the hourly standard is not met, even if the ADA required the state to modify the hourly requirements as a “reasonable accommodation.” A state that does *nothing* to serve an individual with a disability — providing them with no employment-related services and spending no resources — would also get no credit. While HHS officials have noted that they chose not to define individuals with disabilities as “not work eligible” (the term “work eligible” refers to individuals who are included in the work rate calculation) because they want states to engage such recipients, denying credit toward the participation rate when individuals with disabilities comply with a modified plan provides a strong disincentive to states to engage these individuals in any activities at all.

HHS could have used its regulatory authority to give states credit when recipients with disabilities participate in work activities but need modifications of the standard work requirements due to their conditions. While the federal law sets forth the number of hours required to meet the work rate, Congress specifically delegated to HHS the task of setting rules for how to count hours and define activities. In fulfilling this mandate, HHS recognizes that it has authority to “count” hours toward the required number in some instances even if an individual did not participate for the hours. For example, in these rules HHS deems fewer hours of participation to count as meeting the requirement that individuals participate in “core” activities for 20 hours when an individual participating in work experience cannot be required to participate for 20 hours because of the requirements of another federal statute — the Fair Labor Standards Act (FLSA). The FLSA requires individuals who are working in exchange for their benefits “earn” the equivalent of the minimum wage. HHS could have adopted a similar rule for individuals unable to participate the required number of hours due to a physical or mental impairment. And, HHS could have adopted activity definitions that allowed states credit when recipients needed modifications to standard work activities, such as a longer duration for job readiness or vocational educational training.

Many states commented that recipients with severe disabilities can damage their claim to SSI benefits if they try to comply with work participation requirements, even if their participation is not actually helping them move toward employment and is, indeed, inappropriate. That is because the Social Security Administration may view any participation in work activities as “substantial gainful activity” that can disqualify the individual for SSI benefits.

For example, the Connecticut Department of Social Services wrote in its comments, “...[W]e strongly encourage you to consider creating another category of individuals to be excluded in a similar manner from the work-eligible individuals category. These are parents and other needy caretaker relatives who have presented medical documentation documenting that they are unable to work. This includes both those with permanent and significant disabilities who may be pursuing SSI

benefits, as well as those temporarily unable to work because of an injury or another temporary condition such as complications related to pregnancy.”^{xii}

Other states made similar comments, calling for the exclusion of those applying for SSI or those with medical documentation verifying that they are unable to work due to a medical condition:

- **Iowa Department of Human Services:** “Add to the list of exclusions parents who are disabled to the extent that they cannot be engaged in work activities and have medical documentation to support this determination.”^{xiii}
- **Maryland Department of Human Resources:** “Another group that we would prefer to exclude (or have the option to exclude) from the definition of Work Eligible Individual are TANF or Separate State Program (SP) assistance recipients who are awaiting determination of Supplemental Security Income (SSI) or other federal disability program claims if considered exempt from work activities under State law.”^{xiv}
- **Minnesota Department of Human Services:** “The regulations should explicitly exclude from the definition of work eligible...[p]articipants with severe disabilities who have applied for but not yet been approved for SSI. This would be consistent with the decision on parents caring for a disabled family member.”^{xv}
- **Mississippi Department of Human Services:** “In June 2006, Mississippi had 319 medically-documented exempt incapacitated TANF adults counting against us in the participation rate. The majority of these cases have applied or should be applying for SSI...To be able to exclude these clients from the participation rate would greatly improve our participation rate percentage. These cases could be easily tracked to ensure they are doing everything possible for a final determination to be reached on their application for disability.”^{xvi}
- **New York Office of Temporary and Disability Assistance:** “The definition of work-eligible individuals does not address the fact that states routinely provide interim assistance to individuals who are awaiting a decision regarding eligibility for federal disability benefits, SSI, or Social Security Disability Income...The definition of work-eligible individuals should exclude individuals who states have directed to apply for disability benefits as a condition of eligibility for TANF or a state MOE funded program, and whose application is pending a decision from the Social Security Administration...These individuals have been identified by the State as disabled and, therefore, it would not be appropriate to routinely engage them in work...Additional, the definition of disability is to be “unable to engage in substantial gainful activity.” The paradox here is that while a required SSI application is pending, performing any of the core activities would belie the claim of disability and has proven to jeopardize the individual’s application for disability benefits...Also, assigning persons who appear to be SSI eligible and have a pending SSI application to work activities is likely to result in a high percentage of sanctions...”^{xvii}

Conclusion

TANF programs are implemented at the state and local level and officials at the state and local level are in a good position to understand the real-world complexities associated with helping poor families that include individuals with disabilities move forward toward employment. The conclusion of these state officials — as enunciated in comments submitted to HHS on the TANF Interim Final Rule by the National Governors Association, the American Public Human Services Association, and individual states — is that the current TANF work participation rate structure hinders states efforts to help individuals with disabilities in the most appropriate and effective manner. In their comments, states ask for a common-sense approach that would provide credit toward the work participation rate when recipients with disabilities participate in appropriate work-related activities for the number of hours they are able to given their circumstances. Making this kind of adjustment in the federal TANF work requirements would create a new incentive for states to correctly identify individuals with disabilities and develop appropriate employment plans for them — a stark contrast to the incentive embedded in the current structure to simply deny TANF assistance to such individuals.

States also note that some recipients have severe health conditions that make it impossible, at least for some period of time, for them to work or engage in work activities at all and recommend that such individuals be excluded from the participation rate. This will generally represent a small group of recipients, though the extent to which the TANF caseload consists of such individuals will vary from state to state. Removing them from the participation rate will ensure that the participation rate accurately reflects the extent to which the state is engaging recipients who are able to move toward employment in work activities.

These concerns can be addressed with adjustments to the statutory provisions that govern the TANF work participation requirements. HHS could have used its regulatory authority to make reasonable allowances when recipients with disabilities participate but need accommodations in the kinds of activities they are assigned to or the number of hours they are required to participate. And, HHS could have used its authority to exclude certain recipients with very serious health conditions from the participation rate calculation. The agency chose not to do so and, indeed, nothing in the TANF statute itself compelled them to adopt such positions. While there is a chance that HHS would make such modifications in its final rules, there have been no indications to date that the agency is inclined to do so. Further delay in addressing these problems is itself problematic as states are moving forward to implement the new provisions under the existing regulations as they have been instructed to do.

With modest modifications in the underlying statute, Congress can address these shortcomings and provide states with strong new incentives to engage recipients with disabilities in effective, appropriate welfare-to-work programs.

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- ⁱ Letter to Wade Horn, Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from Jerry Friedman, Executive Director, APHSA, August 28, 2006.
- ⁱⁱ Letter to the Honorable Michael Leavitt, Secretary, U.S. Department of Health and Human Services, from Governor Mike Huckabee and Governor Janet Napolitano, August 26, 2006.
- ⁱⁱⁱ Letter to Wade Horn Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from Kevin Concannon, Director, Iowa Department of Human Services, August 25, 2006.
- ^{iv} Letter to Sidonie Squier, Administration for Children and Families, U.S. Department of Health and Human Services, from Christopher McCabe, Secretary, Maryland Department of Human Resources, August 28, 2006.
- ^v Letter to Wade Horn Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from Jennifer Lange, Florida Department of Children and Families, August 25, 2006.
- ^{vi} Email correspondence to the U.S. Department of Health and Human Services from James Dunn, Indiana Family and Social Services Administration, August 25, 2006.
- ^{vii} Letter to the Office of Family Assistance, U.S. Department of Health and Human Services, from Brenda M. Harvey, Commissioner, Maine Department of Health and Human Services, August 25, 2006.
- ^{viii} Letter to Sidonie Squier, Administration for Children and Families, U.S. Department of Health and Human Services, from Todd Maio, Deputy Commissioner, Massachusetts Department of Transitional Assistance, August 28, 2006.
- ^{ix} Letter to the Office of Family Assistance, U.S. Department of Health and Human Services, from Cal R. Ludeman, Acting Commissioner, Minnesota Department of Human Services, August 28, 2006.
- ^x Letter to Wade Horn Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from Bruce Goldberg (on behalf of himself and Governor Kulongoski), Director, Oregon Department of Human Services, August 28, 2006.
- ^{xi} To be precise, some work eligible individuals are excluded from the work participation rate calculation. These include, at state option on a case-by-case basis, individuals with children under the age of 12 months and individuals who are sanctioned for noncompliance with work activities for up to three months in any 12 month period.
- ^{xii} Letter to Wade Horn Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from, Claudette Beaulieu, Deputy Commissioner, Connecticut Department of Social Services, August 25, 2006.
- ^{xiii} Kevin Concannon, Director, Iowa Department of Human Services.
- ^{xiv} Christopher McCabe, Secretary, Maryland Department of Human Resources.
- ^{xv} Cal R. Ludeman, Acting Commissioner, Minnesota Department of Human Services.
- ^{xvi} Letter to Wade Horn Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from, Donald Taylor, Executive Director, Mississippi Department of Human Services, August 24, 2006.
- ^{xvii} Letter to Wade Horn Assistant Secretary for the Administration for Children and Families, U.S. Department of Health and Human Services, from, Robert Doar, Commissioner, New York Office of Temporary and Disability Assistance, August 25, 2006.