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SUMMARY OF FINAL TANF RULES
Some Improvements Around the Margins

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Overview

The final TANF rule implementing changes due to the Deficit Reduction Act of 2005 was published in the Federal Register on February 5, 2008 at 73 Fed. Reg. 6772. The new rule finalizes, with some changes, the Interim Final Rule published on June 29, 2006. The Final Rule is effective October 1, 2008.

The Deficit Reduction Act (DRA) provided HHS with broad new regulatory authority to define the work activities listed in the TANF statute, to craft rules on how states must count, track, and verify hours of participation, and the circumstances in which parents of children receiving assistance should be considered in the work participation rate calculations. This new regulatory authority came as part of a set of statutory changes to the TANF block grant that, by themselves, will require states to meet much higher effective work participation rates.

In the view of many states, analysts, and advocates, the Interim Final Rule set forth restrictive definitions of work activities that would count toward the work participation rates and rigid requirements for documenting hours of participation. HHS received 470 sets of comments on the Interim Final Rule and many commenters — including state agencies that operate the TANF cash assistance program in their state — expressed concerns over the provisions in the rule. Many commenters focused on the ways in which the requirements set forth in the Interim Final Rule were not a good match for the types of activities that might be appropriate to help individuals with disabilities or other barriers move toward employment. Moreover, many noted that the burdensome documentation requirements failed to strike an appropriate balance between holding states accountable for accurately reporting work participation and ensuring that the documentation requirements do not divert state energy and resources away from helping families secure employment.

Overall, the new Final Rule contains some improvements that provide states with some additional flexibility with respect to the activities that can count toward the work participation rate and how states must count and document hours of participation. However, the changes are fundamentally "around the edges" and do not address some of the core concerns that states and others had raised with respect to the Interim Final Rule. The marginal improvements include:

- The Final Rule expanded the circumstances under which a person with a severe disability (applying for or receiving SSI or Social Security Disability Insurance) or a person caring for a disabled family member could be excluded from the work participation rate calculation;

- The Final Rule includes a number of changes that will make it easier for states to get credit toward the work rates when an individual participates in post-secondary education; and

- The Final Rule includes greater flexibility in counting hours of participation with respect to excused absences and participation in job search or job readiness activities.

Moreover, the new Final Rule contains one significant and new restriction on how states can spend their "maintenance of effort" funds — the state funds they must spend to qualify for federal TANF funds. In our view, this new restriction is contrary to the clear language of the statute and to Congressional intent.

This paper summarizes the key concerns that we and other commenters raised about the Interim Final Rules and describes the extent to which HHS made changes in response to these concerns in the Final Rule. The report also highlights the changed regulatory provisions.

Serving Individual with Disabilities

Research conducted over the past decade has shown that a significant share of families receiving TANF assistance include an individual with a disability. In most cases, these disabilities are not so severe that the individual is unable to work at all or engage in any activities to help them move toward employment. But, in many cases, individuals with disabilities — and parents caring for family members with disabilities — need specialized services and accommodations of standard work requirements to successfully participate. These accommodations may include modified activities, modified hourly requirements, or both.

During the first decade of the Temporary Assistance for Needy Families Block Grant, states had a fair amount of flexibility to serve families containing an individual with a disability (or to exempt these families from work activities) even if the family could not participate in federally countable activities for the prescribed number of hours and, thus, did not count toward the state's work participation rate. This flexibility was due to three aspects of the federal statute and regulations: (1) the work participation rates that states had to meet were typically low because the state received credit for caseload declines, and those declines were large; (2) states were permitted to use state MOE funds to provide assistance to families without the work participation rates applying to those families; and (3) states were permitted to decide what types of activities could count as one of the 12 "countable" work activities set forth in the statute.

In the wake of the DRA — which did not specifically make changes on the rules that apply to individuals with disabilities — the landscape in which states serve families with disabilities is changed. Effectively higher work rates (due to no longer receiving credit for past caseload declines), state MOE funds now being subject to the work participation rates, and new regulatory authority that HHS define work activities and set policies for counting hours all contribute to the new landscape. Therefore, state flexibility to serve families with disabilities appropriately rests, in part, on

how HHS exercises its new regulatory authority and whether — within the framework dictated by statute.

The Interim Final Rules included provisions which meant that states would not get any credit toward the work participation rate if they successfully engaged a recipient with a disability in job preparation activities, if those activities fell outside the narrow definitions of the work activities in the rules or if the individual needed an accommodation on the number of hours of participation because of his/her disability. As HHS acknowledges, many commenters expressed concern that, despite state obligations under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504), states would be less likely to invest the staff and financial resources necessary to develop appropriate services to help these families move toward employment whenever possible if they do not get credit toward the federal work participation rates for their efforts. Many commenters made concrete suggestions for ways that HHS had authority within the statutory framework to improve the rules on this issue.

In the Final Rule, HHS made a number of small improvements in this area, but for the most part, chose to disregard the suggestions states and other commenters made to provide broader flexibility to states in the definitions of countable activities and in the standards for meeting the hourly participation requirements when they serve individuals with disabilities. The preamble to the Final Rule discusses at length why it did *not* incorporate the suggestions for broader flexibility. (73 Fed. Reg. 6774-6777.) In that preamble discussion, HHS reiterates that states are required to make accommodations in the work requirements for people with disabilities and suggests they have flexibility to do so since the work participation rate is 50 percent, not 100 percent. In the preamble discussion of state ADA obligations, HHS emphasizes that it is "critical that TANF agencies have comprehensive and effective screening and assessment tools in place." HHS did not, however, change the definition of the work activities in any significant way, continuing to designate most barrier-removal activities to the time-limited job search and job readiness category.

Final Rule Includes Some Modest Improvements in this Area

The Final Rule increases flexibility in the counting of hours in several ways that are relevant for state efforts to serve individuals with disabilities or caring for family members with disabilities. As discussed further in subsequent sections below, the Final Rule allows the six-week period of job search and job readiness activities (12 weeks in "needy" states) to be measured on an hourly basis rather than a daily basis and allows the 10 days of excused absences to be measured in hours rather than days. These changes will make it somewhat easier for states to combine job readiness activities with other countable activities and to excuse hours of participation when recipients have to miss partial days of participation due to doctors or school appointments or other circumstances.

HHS also made several small changes related to when individuals with disabilities are and are not considered "work-eligible individuals." Persons who are considered "not work-eligible" are not included in the denominator for purposes of calculating the work participation rate. In the Interim Final Rule, HHS excluded SSI recipients from this definition, but did not exclude recipients of Social Security Disability Insurance or applicants for SSI or SSDI. It also excluded parents needed in the home to care for a family member with a disability who resides in the household and does not attend school on a full-time basis. The Final Rule makes the following changes to these provisions:

- **The rule allows state to exclude individuals receiving Social Security Disability Insurance (Title II benefits) from the definition of work-eligible individual and thus from the work rate; see 45 CFR § 261.2(n)(2)(ii).** As noted, the Interim Final Rule had allowed state to exclude SSI recipients but not SSDI recipients from the work-eligible individual definition. The same disability standard is used for SSI and SSDI eligibility. Thus, while as a practical matter, most families receiving SSDI have income above TANF income limits, where the family is needy enough to receive TANF and SSDI, the change recognizes that the SSDI recipient should be treated the same way as an SSI recipient with respect to their ability to engage in work activities.

- **While HHS does not exclude SSI or SSDI *applicants* from the definition of work-eligible individual, it allows states to revise data retroactively to exclude individuals whose SSI or SSDI applications are approved within the reporting year; see 45 CFR § 265.7(b) on data reporting.** After an individual is approved for SSI or SSDI, the state may revise its work participation data by December 31 for the preceding fiscal year (that ended September 30) to exclude persons who whose SSI or SSDI applications were approved. Often the time period for approval of an application for SSI or SSDI may take longer than a year, particularly if an appeal to an administrative hearing is required. In light of the limited window during which an SSI or SSDI applicant can be excluded retroactively after benefits have been authorized by the Social Security Administration, states may want to enhance or initiate projects that that assist families with the SSDI and SSI application process. If an application is approved initially, rather than requiring a lengthy appeal, the state will be able to exclude the family from the work participation rate sooner, and for more (perhaps all) of the time period during which the application was pending.[1]

- **The rule continues to define a parent needed to remain home to care for a family member with a disability as "not work-eligible" but removes the requirement that the family member with the disability must not be attending school full-time; see 45 CFR § 261.2(n)(2)(i).** The Final Rule drops the provision of the Interim Final Rule which only allowed states to exclude from the work rate calculation those recipients needed to care for a family member with a disability when the individual was not attending school full-time.

Specific Activities and Counting of Hours

The DRA did not make any change in the provisions of the TANF statute that list the 12 categories of work-related activities or in the minimum hours of weekly participation required in these activities for a family to count toward meeting the work participation rates. Congress, however, granted HHS broad new regulatory authority to define the work activities listed in the TANF statute and to craft rules on how states must count, track, and verify hours of participation.

The Interim Final Rule set forth a number of policies that made it harder for a state to get credit for a family's participation in various work-related activities. These included restrictions on when educational programs or barrier-removal activities could count towards meeting the work rates. The

[1] For additional information about facilitating SSI enrollment of TANF recipients, see materials and audio file of a conference call on this issue at http://www.cbpp.org/tanf-call.htm#call3.

rules also included requirements for how states must verify the hours that each recipient participated. Many commenters noted that these requirements were cumbersome and would divert significant resources to tracking hours of participation rather than helping recipients move toward employment..

The Final Rule includes some modest improvements in these areas.

Education and Training Activities
45 CFR § 261.2; 45 CFR § 261.60; 45 CFR § 261.61

In the Interim Final Rule, HHS imposed a number of restrictions on the types of educational activities or hours that would count toward the work rates, particularly with respect to the "vocational education training" category. In its definition of vocational education training, the rule excluded baccalaureate programs and limited the circumstances under which basic skills training or English-as-a-Second-Language classes could count as vocational education training. Vocational education training is the primary educational activity that is a "core" activity under the federal TANF law. (The TANF law established two sets of work activities — "core" activities that can count for all hours of participation and "non-core" activities which can only count once a recipient has participated in core activities for 20 hours in the case of the all-families rate and 30 or 35 hours in the case of the two-parent work participation rate.) Other educational activities such as jobs skills training are non-core activities. Under the TANF statute, vocational educational training can only count for up to 12 months (for each recipient), a state can get credit for full-time (stand-alone) participation during this period.

The Interim Final Rule allowed study time to count for educational activities only if the time was *supervised*. Preamble language also required burdensome documentation of all hours of class time (as well as supervised study time) with biweekly submittals from the education provider or recipient to the state agency.

The Final Rule eases some of these restrictions and documentation requirements. As with the Interim Final Rule, some of the discussion is solely in preamble rather than in rule language.

- **The Final Rule allows participation in a bachelor's degree or an advanced degree program (as well as two-year degree programs and vocational certificate programs) to count as vocational educational training; see 45 CFR § 261.2(i).** In the Interim Final Rule, BA and advance degree programs were specifically excluded. Under federal law, participation in vocational educational training can only count for 12 months. In preamble discussion, HHS confirms prior statements that those who are in programs longer than 12-months may be counted as participating in non-core job skills training if they are participating in a core activity for sufficient hours. (See 73 Fed. Reg. 6793.)

- **The Final Rule allows states to count supervised homework time plus up to one hour of <u>un</u>supervised homework time for each hour of class time; see 45 CFR § 261.60**. The Interim Final Rule only allowed states to count *supervised* homework time. Under the Final Rule, total homework time counted for participation cannot exceed the hours required for or advised by the program. The preamble discussion indicates that a state counting homework time must

document the homework or study expectations of the program to ensure that it does not exceed them. (See 73 Fed. Reg. 6812.)

- **HHS clarifies the circumstances in which basic skills or ESL can be part of vocational education training (which is a core activity).** In the preamble discussion, HHS backs away from preamble language in the Interim Final Rule which had suggested that basic skills or ESL could only be considered under vocational educational training when "of limited duration." In the preamble to the Final Rule, HHS states that basic education or ESL can count as long as it is a necessary and integral part of the vocational education training and notes that further restrictions are not necessary because of the 12-month limit already imposed by the statute on counting vocational education training. (See 73 Fed. Reg. 6792.)

- **The Final Rule drops the requirement that states monitor good and satisfactory progress.** The preamble to the Interim Final Rule suggested that students in certain non-core basic education activities must be making good and satisfactory progress in order for their participation to count toward the work participation rate. In the preamble to the Final Rule, HHS indicates that it is deleting this requirement and states can elect whether or not they want to set standards for good and satisfactory progress. (See 73 Fed. Reg. 6781.)

- **Documentation of participation does not need to be submitted biweekly.** In the preamble to the Interim Final Rule, HHS suggested that documentation for unpaid work activities was required no less than every two weeks. In the preamble to the Final Rule, HHS has backed away of this statement, noting that monthly participation data must be supported by documentation in the file. Effectively, this means that states will need monthly documentation for educational activities, but can set its own timetable for collecting that information. (See 73 Fed. Reg. at 6813.)

Job Search and Job Readiness
45 CFR § 261.2(g); 45 CFR § 261.34; 45 CFR § 261.62

In the Interim Final Rules, HHS defined the work activities in such a way so that the Job Search/Job Readiness was the only category in which barrier-removal activities, such as mental health or substance abuse treatment or other rehabilitation activities, could count toward the federal work participation rates. By contrast, in the decade since the TANF program was established, some states had reported these types of activities in other statutory categories (such as community service or work experience). Because the Job Search/Job Readiness category is limited under federal law to six weeks (12 weeks in states that can qualify as "needy") a year, limiting barrier-removal activities to this time-limited category means that states will not be able to get work credit for extended periods of participation in treatment or other barrier removal activities.

Many commenters noted that the preamble to the Interim Final Rule interpreted the six (or 12) week limit in a particularly restrictive way — stating that any hour of job search/job readiness activity reported for a week used up an entire week of the limited period for which this activity could count. The "one hour equals one week" formulation greatly restricted states' ability to get credit in cases where a state wanted to use a “blended” strategy that paired some hours of treatment or job search with other core work and training activities.

In the Final Rule, HHS eliminates the "one hour equals one week" formulation and, instead, converts the six and 12 week limitations to an hourly standard, described in more detail below. This allows states to incorporate shorter weekly assignments in job search/job readiness activities over a greater number of weeks. The Final Rule also makes a number of other clarifications or changes relating to the time limits for this activity and the circumstances under which barrier-removal activities can count toward the work participation rates. While these generally are improvements over the Interim Final Rule — particularly counting job search/job readiness deadlines as hours — the overall effect of the new rules is to limit the extent to which states can get credit for a recipient's participation in barrier-removal activities as compared to the flexibility states had prior to the promulgation of the Interim Final Rule.

- **Treatment and other barrier-removal activities remain in the job search and job readiness category; see 45 CFR § 261.2(g).** The definition is tweaked in several ways. The Final Rule deletes a limitation from the Interim Final Rule that required individuals to be "otherwise employable" in order for participation in treatment and other barrier removal activities to count toward the state's work rate. The regulation states that the need for treatment must be documented by a qualified mental health, substance abuse or medical profession, but HHS has deleted the Interim Final Rule requirement that the professional be "certified." In the preamble discussion of another work activity category — subsidized employment — HHS repeats prior informal statements that certain barrier-removal activities could count in that category if they are integrated parts of the subsidized employment, specifically, if the recipient is paid for the treatment hours as part of the subsidized employment program. (73 Fed. Reg. 6782 discussing subsidized employment.)

- **The Final Rule allows states to measure participation in job search or job readiness activities against the six (or 12) week limitation on an hourly, rather than weekly, basis.** Under federal law, participation in job search or job readiness can only count toward the participation rate for six weeks per year (or 12 weeks for states that meet the definition of "needy" states) and for no more than four consecutive weeks. HHS had previously indicated in the preamble to the Interim Final Rule that it would count any hour of job search or job readiness activity in a week as using up a full week toward this limitation. The Final Rule adopts an hourly equivalent for the six (or 12) week limit hourly, defining a week of participation in this activity as 20 hours for a single-parent with a child under age six and 30 hours for all other work-eligible individuals.

    - **Four "consecutive" week limitation will still be measured on a weekly basis.** The rule retains, however, the interpretation that even one hour of job search in a week uses up a week of job search/job readiness toward the four consecutive week limit. The result is that a state cannot count participation in job search if any hour has been counted in the four consecutive weeks. Keeping the "one hour equals one week" formulation for the measurement of four consecutive weeks undercuts the improved measurement of the durational limit and may be complicated for states to track. HHS suggests in the preamble that, for short periods of treatment, a state could report the fifth week hours as excused absence hours. (73 Fed. Reg. 6789.)

- **The four and six (or 12) week limitations will now apply to the preceding 12-month period, not the fiscal year.** Under the prior rules (adopted in 1999), these limitations were applied to a fiscal year. (The June 2006 Interim Final Rule did not include changes to this section, 45 CFR 261.34.) This change results in consistent measurement of the 12-month period for several TANF standards but it may be a slight disadvantage to a state getting credit for participation and it may complicate tracking of these limits. States submit work participation data on a fiscal year basis and these limitations will now have to be tracked *across* fiscal years.

- **Daily documentation of participation in job search is no longer required.** In the preamble to the Interim Final Rule, HHS suggested that documentation for job search or job readiness activities must be reported on a daily basis. In the preamble to the Final Rule, HHS has removed such a statement and simply notes that that monthly participation data must be supported by documentation in the file. (73 Fed. Reg. at 6813.)

Tracking of hours in job search may create some complicated reporting issues. To maximize credit for hours of job search, states should design their systems so that they *do not* report hours for job search (and thus use up the annual allotments or consecutive weeks) if the hour will not increase the participation rate the state achieves. Thus, if an hour is not needed because sufficient hours are already reported for the recipient in other activities, or if an hour would not increase the state's measured work rate because the participant would not meet the total number of required hours even with the job search/readiness hour counted, the state should not report the hour as job search or job readiness to HHS. HHS suggests that states report these hours as "other work activities," acknowledging that participation in non-countable activities does not increase a state's work participation but will allow policymakers and the public to understand that the participant was participating in some work-related activity. To be sure, this is a layer of complexity that has little to do with helping families move toward employment.

Counting and Documenting of Hours
45 CFR § 261.60; 45 CFR § 261.61

The DRA signaled Congressional intent for HHS to step up its monitoring of the extent to which states are engaging recipients in countable work activities, but the statute gave HHS broad authority to craft those accountability measures. Many commenters noted that Interim Final Rule imposed inflexible requirements related to monitoring participation and documenting hours of participation The Final Rule generally retains the documentation and monitoring requirements in the Interim Final Rule, but it did include some modest improvements.

- **The Final Rule allows 80 hours of excused absences over the course of a year — with no more than 16 in any given month — to count as hours of participation in unpaid activities.** Under the Interim Final Rule, a state could count no more than 10 days of excused absences per year as days of participation toward the work rate (no more than two per month) and states could not count partial days as excused absences without using up a full day. HHS has changed their approach based on many comments urging that excused absences should be measured in hours rather than days. The 80 hours are measured for the preceding 12-month period.

- **The Final Rule specifies a limit of 10 holidays per year.** In the Interim Final Rule, HHS did not impose any limit on the number of holidays that a state could recognize. However, in subsequent guidance on the Work Verification Plan, HHS indicated that it would not approve a plan that included more than 10 holidays per year. Thus, this rule change reflects the policy that HHS has already imposed. The policy, however, leaves no room circumstances where the institution providing the work activity is closed for a period of time, such as a semester break or a week off between Christmas and New Years Day.

- **The Final Rule continues to allow states to project hours for paid work activities for up to six months based on current information on work hours.** One bright spot in the Interim Final Rule allowed states to project hours for up to six months for paid work activities including unsubsidized employment, subsidized employment, and OJT. Nearly all states have taken this projection option and HHS retains it in the Final Rule. This option allows states to get credit for families who are working by checking in on their circumstances twice a year; this approach can dovetail nicely with the Food Stamp Simplified Reporting option (also used by nearly all states) in which food stamp recipients generally must provide wage information only twice a year to the agency (as long as their income remains below 130 percent of the poverty line).

- **As discussed above, the Final Rule allows states to count supervised homework time plus up to one hour of <u>un</u>supervised homework time for each hour of class time**. The Interim Final Rule only allowed states to count *supervised* homework time.

- **Documentation of participation need not be submitted daily or bi-monthly for unpaid activities.** In the preamble to the Interim Final Rule, HHS stated that: "Job search and job readiness assistance should be documented daily due to the short-term nature of this activity. Other unpaid work activities, including work experience, community service programs, vocational educational training, and providing child care to participants in community service programs, require documentation of hours of participation no less than every two weeks." (71 Fed. Reg. 37468). As discussed above, HHS no longer is requiring daily documentation of job search/job readiness activities or biweekly submission of other unpaid work activities. It notes that participation in unpaid activities is reported monthly and documentation in the case file must support what the state reports. HHS reiterates that all unpaid activities should relay on written, signed documents to support hours of participation and notes that this may include electronic records. (73 Fed. Reg. at 6813.) The rule states that documentation "may consist of, but is not limited to, time sheets, service provider attendance records, or school attendance records." 45 CFR § 262.62(e).

State Maintenance-of-Effort Spending

Under the federal TANF law, states are required to maintain a share of historic state spending; this is known as the maintenance-of-effort (MOE) requirement. HHS made two significant changes in the Final Rule with respect MOE: one codifies a prior agency pronouncement with respect to the Caseload Reduction Credit methodology and one is a reversal of the Interim Final Rule with respect to permissible state MOE spending. The new restriction on the permissible uses of state MOE funds is the change in the Final Rule that represents the largest *restriction* in state flexibility.

Codifying Caseload Reduction Credit Methodology
45 CFR § 261.43(b)

The higher effective work rates that states must meet under the DRA has increased attention to a little-used provision in the 1999 TANF rules. The 1999 rule allowed a state that spent state funds in excess of its MOE require to subtract a pro-rata share of cases from its caseloads for purposes of calculating the Caseload Reduction Credit, with the effect of reducing the work participation rate that a state must achieve. This "excess MOE" provision of the prior rule — and exactly how a state can use it — has been the subject of considerable discussion between HHS and states in the last two years. Initially, HHS had expressed some doubts about whether it would retain provision, which was unchanged in the Interim Final Rule. The Final Rule, however, retains the provision, but amends it to set forth a methodology that it will use to approve any state requests for caseload reduction credit based on spending in excess of the MOE requirement. Including this methodology in the Final Rule is significant as it formally imposes by rule the HHS methodology and it puts to rest concerns that HHS was going to stop allowing states to claim excess MOE, at least for the foreseeable future.

The methodology included in the Final Rule is the same as the one previously set forth informally by HHS with respect to 2007 and 2008 caseload reduction credit claims. Under this approach, a state can only obtain caseload reduction credit for the share of "excess MOE" — that is, state spending in excess of 80 percent of the MOE requirement, or if the state has met the work rates, 75 percent— that represents the share of total TANF and MOE spending on "assistance" cases. HHS reasons that the caseload reduction obtained by excess MOE is applied only to "assistance" cases and thus only a share of the excess MOE a state claims should be considered. (The assistance portion is based on the ratio of total state MOE and federal TANF assistance spending to total state MOE and TANF spending.) The assistance portion of the excess MOE is then divided by an average cost per case (for assistance) to arrive at the number of cases that can be subtracted from the caseload of the most recent completed fiscal year (which is compared to the caseload of the 2005 base year).[2]

Restrictions on MOE Spending Under TANF Purpose 3 and 4
45 CFR § 263.2(a)(4)(ii)

The Deficit Reduction Act expanded the scope of state spending under TANF purposes 3 and 4 that can count toward the maintenance-of-effort (MOE) requirement.[3] Under the TANF statute *prior to the DRA*, state spending on activities that fell under Purposes 3 or 4 (reducing nonmarital childbearing and promoting two-parent families) could only count toward the MOE requirement if it was spending on activities or programs for "eligible families." Under the statute and regulations in

[2] While this methodology is a reasonable approach, it is not the only reasonable approach that HHS could have accepted for implementing 45 CFR § 261.43(b). HHS has indicated, however, that this is the only approach it will approve for Caseload Reduction Credit submissions for FY 2007 and FY 2008, even though those reports were due to be submitted and approved prior to the effective date of the new rule specifying the methodology. For FY 2007, some states used a different approach which resulted in a larger caseload reduction credit; HHS has indicated that it will revise these to match the result of its approach.

[3] The four permissible spending purpose for TANF and MOE are set forth at 42 U.S.C. § 601 (a). Purpose 3 relates to preventing and reducing the incidence of out-of-wedlock pregnancies and Purpose 4 relates to encouraging the formation and maintenance of two-parent families.

place at the time, an “eligible family” had to be “needy” as defined by the state, had to contain children living with parents or relatives, and had to meet other specified requirements.[4] Federal TANF funds did not have this limitation — states could spend federal TANF funds on activities under purposes 3 and 4 regardless of whether the recipients of those services were a part of an “eligible family.” (States could not use TANF funds to provide *assistance* to families that did not meet the definition of an “eligible family,” but that is rarely an issue with respect to purposes 3 and 4). The DRA added a provision that allows states to count all expenditures reasonably calculated to accomplish either purpose 3 or purpose 4 toward the MOE requirement without regard to the "eligible family" test. Specifically, the DRA included a provision that states:

> The term 'qualified State expenditures' [state spending that can count towards MOE] includes the total expenditures by the State during the fiscal year under all State programs for a purpose described in paragraph (3) or (4) of section 401(a)." (42 U.S.C. § 609(a)(7)(B)(i)(V))

In the Interim Final Rule, both the preamble and the rule language set forth the widely-understood position that the "eligible family" test was no longer required for MOE expenditures for non-assistance under TANF purposes 3 and 4. In the Final Rule, HHS reverses course and imposes a new and restrictive reading of the statute: it states that the “eligible families” test applies to spending under purposes 3 and 4 *except* to those activities enumerated in the new Healthy Marriage Promotion and Responsible Fatherhood provisions set forth by the DRA.

HHS suggests that the *title* of the DRA statutory provision — “Counting of spending on certain pro-family activities” — signals Congress’s intent to limit the authority to limit the use of MOE funds for only “certain” activities that fall under purposes 3 and 4. HHS's approach ignores the unambiguous language of the statute. In our view and the view of many others, HHS' interpretation is inconsistent with both the Congressional language and intent.

The re-introduction of the "eligible family" restrictions on MOE for state expenditures under purpose 3 and 4 could have significant impact on some states that have (or, in the absence of the rule change, might have in the future) claimed certain types of state spending as MOE under the DRA provisions and the Interim Final Rules. It is important to note, however, that, states can use federal *TANF* funds for any non-assistance under purposes 3 and 4 and thus may be able to swap TANF funding for MOE funding in order to achieve the same outcome. In addition, like the rules in general, this provision is not effective until October 1, 2008, that is, for spending in FY 2009. Thus, for FY 2008, states may continue to claim expenditures under purposes 3 and 4 as MOE without regard to the new restriction. Moreover, as Caseload Reduction Credit for 2009 is based on caseloads and spending in FY 2008, states will be able to receive credit toward their 2009 work participation rates based on the under the excess MOE provision discussed above based upon their permissible MOE spending from 2008.

[4] 42 U.S.C. § 609(a)(7)(B)(i)(IV).

Other Issues of Interest

Unpaid Work Activities and the FLSA

Under the Fair Labor Standards Act, states cannot require participation in an unpaid work activity — such as most work experience or community service positions — for a greater number of hours than equal to the benefits received divided by the higher of the state or federal minimum wage. In the Interim Final Rules, HHS provided that, if the number of hours of work permitted under the FLSA was less than the required core hours (20 or 30 or 35), the state could deem the core hour requirement as met. To use this deeming option, the Interim Final Rule required a state to include the value of food stamps in the minimum wage calculation and adopt a mini-Simplified Food Stamp Program to allow them to consider food stamps in this manner. The preamble to the Final Rule makes several key clarifications relevant to this provision.

- **The FLSA calculation of hours must use the TANF grant *net* of any child support collections received in the month and retained to reimburse the state or federal government; 73 Fed. Reg. 6508-9.** HHS has explicitly reminded states of this longstanding requirement in the preamble to the Final Rule. This "net benefit" provision clarifies that recipients can only be asked to "work off" the net amount of the benefit they receive — they can not be asked to work off the portion of their grant that is offset by child support paid by a noncustodial parent. HHS suggests that states can choose precisely *how* to calculate the net TANF benefit and suggests that states can either use a prospective method which calculates an expected level of child support collections based on past collections or a retrospective method that uses a past month of child support collections to compute the net benefit — and, thus, required hours — for the current month.

- **The preamble to the Final Rule also clarifies that a state a state need not adopt a food stamp workfare program or conform TANF and food stamp exemption policies in its Simplified Food Stamp Program; 73 Fed. Reg. 6504.** The Interim Final Rule had included some requirements that FNS has since indicated were not required. The Final Rule removes these unnecessary restrictions and clarifies that a state can continue to use (broader) food stamp work exemptions with its mini-SFSP. Since many TANF recipients are exempt from food stamp work requirements, the result here is that states can take advantage of the deeming option without increasing food stamp penalties on TANF recipients.

Date for Implementing the Changed Provisions

The new Final Rule provisions are effective October 1, 2008 for Federal Fiscal Year 2009. It is likely that all states will want to amend their Work Verification Plans that have been approved by HHS by the effective date to take advantage of the ways in which the rule now permits counting of hours and participation in activities that HHS would not approve under the Interim Final Rule and other guidance and memos issued prior to the Final Rule. Depending on how HHS decides to approach the effective date issue, it may be possible for states to submit revised Work Verification Plans, obtain approval and begin following some aspects of the revised plans *as of a date earlier than* October 1, 2008.

HHS appears to draw a line between clarifications of existing policy which can be implemented

before October 1, 2008 and changes in policy which cannot be implemented before October 1, 2008. It is not clear where this line is drawn for issues that are not inconsistent with the Interim Final Rules but for which HHS imposed sub-regulatory guidance governing approvable Work Verification Plan provisions. In addition, HHS clarification may be needed on how states handle the transition to measuring limits on certain hours of participation (such as excused absences or job search) for the prior 12-month period when the limit is measured in days for FY 2008 and in hours for FY 2009, with the prior 12-month period straddling the fiscal years during the transition year. Ultimately, the details of transition will depend on how HHS approaches this issue.

Conclusion

In the Interim Final Rule, HHS put in place many requirements that restricted the flexibility states have historically had in the TANF program to design their welfare-to-work programs. Unfortunately, the Final Rule makes only modest changes to the Interim Final Rule. Despite these restrictive rules, states still are the final arbiters of how they want to operate their basic assistance programs for very poor families with children. Over the past two years, many states have adopted creative approaches that seek both to improve outcomes for families and meet the federal work participation rate requirements.