Comments on HHS's Proposed TANF Regulations
(45 CFR chapter II, Parts 270-275)

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I. General Overview

The Statutory Context for the Proposed Regulations

The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 ended the Aid to Families with Dependent Children (AFDC) program enacted sixty years ago as part of the Social Security Act. In its place, Congress created the Temporary Assistance for Needy Families (TANF) block grant which provides capped funding to states to use for programs that meet the purposes of the Act.

The PRWORA establishes a legal and fiscal framework substantially different from the former AFDC program. Under the PRWORA, states receive a block grant that does not generally adjust based on changes in need or inflation. Block grant dollars may be used to fund a single program or multiple programs, as long as the funds are used to further the broad purposes of the Act in ways that are consistent with the restrictions and prohibitions included in the Act. States establish virtually all of the eligibility criteria for the programs funded with the block grant and are not required to serve all families that meet those eligibility standards. States, therefore, determine which families will be served, the type and level of assistance they will receive, the requirements families must meet to be eligible for aid, and the length of time families may receive assistance.

In exchange for this broad flexibility, the PRWORA imposes a set of requirements and accountability measures on states:

- The law requires states to place an escalating proportion of adults in families receiving assistance in a TANF-funded program in a proscribed set of work activities for a specified number of hours each week.

- States are required to maintain a specified level of financial commitment to programs serving needy families with children. States are permitted to use these maintenance-of-effort (MOE) funds within programs that receive federal TANF funding or in separate programs.

- With limited exceptions, federal funds may not be used to provide assistance to families with an adult that have received federally-funded aid for 60 months.

- States must submit to HHS a series of disaggregated case-record data on families receiving assistance and families that no longer receive assistance.

These data will be used both to determine whether states have met specific requirements in the law and to examine how states are meeting the broader objectives of the law, such as helping parents find and retain employment.

- States that fail to meet the statutory requirements are subject to significant fiscal penalties.

Because the PRWORA largely gives states the authority to design their TANF and MOE-funded programs, the statute does not allow HHS to regulate in many areas related to program structure and eligibility criteria. For example, HHS does not have the authority to define which members of a household must be part of the assistance unit or to proscribe the types of income that should be excluded when determining whether a family is eligible for assistance. Instead, HHS's regulatory authority largely stems from its responsibility to hold states accountable for meeting the law's specific requirements — such as the work participation and MOE requirements — and the law's broader objectives, such as helping parents find and retain employment. The two principle mechanisms that Congress provided HHS to carry out these responsibilities are the imposition of penalties and the data reporting requirements.

These proposed regulations, therefore, relate principally to penalties and data reporting. HHS's implementation of the penalty and data reporting provisions, however, could have a substantial affect on state programmatic decisions. Thus, it is particularly important that as HHS exercises its limited regulatory authority under the law it does so in a manner that considers the broad flexibility granted to states under the law, the new fiscal structure, and the incentives to not serve families that can result if regulatory pressure is exerted in ways that do not adequately take account of all of the purposes of the Act. In light of the broad purposes of the Act and the nature of HHS's regulatory responsibilities, the regulations should assure:

- that states continue to have the flexibility provided under the law to design and implement programs that further the purposes of the Act;

- that new incentives for states to deny or limit aid and work-related services to poor families are not created; and

- that states are held accountable for meeting the requirements and objectives of the law.

The proposed regulations must strike a balance between these sometimes competing objectives. In some cases, there is little question of how a provision in the law should be applied because the law itself is clear; in such cases, HHS should not

interpret the law or attempt to adjust the balance struck in the legislation. In other cases, agency interpretation is appropriate, and in many of these cases the proposed regulations reach a thoughtful and reasonable result. In some important areas, however, the proposed regulations do not strike an appropriate balance between competing goals. As a result, state flexibility is unduly hampered and new incentives for states not to serve poor families are created.

Assuring States Have the Flexibility Provided under the Law to Design Programs That Further the Purposes of the Act

One of the primary objectives of the PRWORA was to grant states significantly more flexibility in designing programs to assist needy families than existed under prior law. In large part, the proposed regulations recognize this broad flexibility — there is no attempt to limit states' ability to establish eligibility criteria or to impose behavior-related requirements on program recipients. In addition, the regulations provide states a reasonable degree of flexibility by permitting them to define the terms that comprise "countable work activities" — such as the term "vocational educational training." In two important areas, however, the regulations significantly curtail flexibility granted to states under the statute.

- The proposed regulations provide strong disincentives for states to use their state MOE funds in programs that receive no federal TANF funds.

- The proposed regulations impede states' ability to continue the welfare reform policies they had previously implemented pursuant to AFDC waivers despite the statutory mandate that HHS "encourage" states to continue those waiver policies.

By limiting states' flexibility in these areas, the proposed regulations suppress the creation — or continuation — of innovative programs that can best meet the broad welfare reform goals embodied in the law.

Curtailing States' Ability to Use MOE Funds Outside of TANF-Funded Programs

The discussion in the preamble to the proposed regulations makes clear that HHS was concerned that states would use their statutorily permitted flexibility to provide assistance to needy families using state MOE funds outside of TANF-funded programs to avoid the law's work participation and child support requirements. Under the PRWORA, states are required to place a specific proportion of adults in families *receiving assistance in a TANF-funded program* in countable work activities. Similarly, under the statute, states are required to send the federal government a portion of all

child support collected on behalf of families *receiving assistance in a TANF-funded program*. There is no dispute that Congress did not apply these requirements to families receiving assistance in "separate state programs" — that is, programs that receive state MOE funds but no TANF funds. However, based on the concern that states would use this flexibility to avoid TANF-related requirements, the proposed regulations would deny penalty relief otherwise available to states failing to comply fully with the law's requirements to a state if HHS decides the state used a separate state program to avoid TANF-related work and child support requirements. There is no indication in the proposed regulations that HHS will give proper weight to states' legitimate policy reasons for serving families in separate state programs when making this determination.

By denying statutorily-authorized penalty relief in such cases, HHS is significantly readjusting the balance struck by the PRWORA between the broad flexibility granted to states over the use of their state MOE funds and the work goals of the law. In doing so, HHS strongly discourages states from using the flexibility given to them by Congress to provide assistance and services in ways that states determine could best meet the broad welfare reform goals embodied in the law.

Separate state programs offer states an important vehicle to use the more flexible state MOE funding to develop or expand innovative programs for certain families that may not be served effectively under the restrictions that apply to TANF funds and TANF-funded programs. States may also use separate state programs to provide assistance or services to TANF-eligible families through programs that serve a broader group of people or to provide families with forms of assistance to which the TANF-related requirements should not appropriately attach.

- *Some families may be more appropriately served outside a TANF program.* Because the federal TANF rules allow only a relatively narrow range of activities to count toward the work participation rates, a state may decide that persons in need of substance abuse counseling, training, education, or other activities that may not count toward participation rates would be better served in a separate state program. When work participation rates reach higher levels in later years, a state may find that it has little or no flexibility to provide the most appropriate services for particular families through the TANF-funded program. A state could legitimately determine that a separate state program is a more effective means of assisting certain groups of families and helping some groups of parents to find and retain employment.

- *A state may use a separate state program to provide types of assistance or services to which it is inappropriate to attach TANF-related work and child support*

requirements. A state might determine, for example, that families served in a state-funded food assistance program for legal immigrants or a state earned income tax credit — both allowable uses of MOE funds — should not be subject to the TANF statute's work and child support assignment requirements.

- *States may use MOE funds to fund part of a program that serves a broader population than TANF-eligible families.* A state might, for example, use MOE resources to fund part of a transportation subsidy program available to a broader group of low-wage workers including people who are not TANF-eligible and do not belong in a TANF-funded program. A state should not be required to run two different transportation subsidy programs — one that serves TANF-eligible families and another that does not — simply because HHS is concerned that this "separate state program" may have been established to avoid TANF-related requirements, such as the requirement that persons receiving assistance under a TANF-funded program assign their child support rights to the state.

It appears that HHS is most concerned that states will provide assistance through a separate state program to groups of families for which the state determines the TANF requirements and restrictions are inappropriate, such as families in which the parents face significant barriers to employment due to disability or very low job-skill levels. Discouraging states from using MOE funds to assist such families in a separate state program is inappropriate. First, the statute clearly allows states to use MOE resources to fund programs that include different benefits, services, and requirements than those in a TANF-funded program. In addition, discouraging such programs inhibits states' ability to pursue legitimate policy goals and develop innovative approaches to assisting so-called "hard-to-serve" families and to helping parents find and retain employment. Moreover, denials of penalty relief based on a states' use of MOE funds outside of TANF-funded programs is likely to create a chilling effect on *all* such programs.

While there is currently no evidence that states are using their flexibility to avoid TANF-related requirements rather than pursue legitimate policy objectives, it would be appropriate for HHS to monitor states' actions in this area. If states do abuse this broader flexibility afforded them under the statute, HHS could develop legislative proposals to address the abuses. However, because Congress explicitly permitted states to serve families through separate state programs, HHS is unjustified in imposing restrictions on state flexibility in this area and closing off important opportunities for state innovation.

Discouraging the Continuation of Waiver Policies

Prior to the enactment of the PRWORA many states had already designed and implemented state-based approaches to welfare reform pursuant to waivers. States that developed these waiver policies often did so after an extended process at the state-level in which a wide range of policy issues were debated, negotiated and ultimately enacted into state law. Prior to and since the enactment of the PRWORA, these state-initiated waiver policies have been heralded by the Administration as well as Congressional leaders as breaking new ground in welfare policy and demonstrating the value of state innovation.

In light of the emphasis throughout the PRWORA on promoting state flexibility and encouraging state innovation and experimentation, the law included a provision explicitly allowing states to continue their waiver policies and directing HHS to "encourage" states to maintain their waivers. Specifically, section 415 of the PRWORA provides that, at state option, for the duration of a state's waiver, a state may follow its waiver even if its waiver policy is inconsistent with other provisions in the law.

Although the statute does not impose any limitations on a state's ability to continue its waiver policies (other than a limitation relating to the date when the waiver was submitted and approved), the regulations propose a series of restrictions limiting the circumstances under which states can rely on their waiver rules if the rules are inconsistent with a provision in the PRWORA. Some of these restrictions apply to only a few states while others would interfere with many states' ability to continue to rely fully on their waiver policies. For example, states that set the number of hours of work required for non-exempt individuals or that established rules for determining which groups of parents were required to participate in work activities would generally not be able to follow their state policies under the proposed regulations if these policies diverge from provisions in the PRWORA.

Moreover, it is likely that the proposed regulations would discourage states from continuing their waivers even if their policy did not run afoul of any of the proposed limitations. This is because the regulations also would deny states relief from work participation rate and time limit penalties if they continue to rely on their waiver policies rather than follow specific provisions in the PRWORA. Few states will be willing to risk the loss of potentially substantial penalty relief that they may need in the future due to changes in their economy or other factors that may make it difficult for them to comply fully with TANF time limit rules or work participation rates. Thus, rather than encouraging states to maintain their waivers and pursue their state-determined course of welfare reform as required by the statute, the regulations actively discourage states from continuing these policies and are likely to prompt many states with waivers to "play it safe" and conform to standard rules.

Ensuring That New Incentives for States to Deny Aid and Work-Related Services to Poor Families Are Not Created

The PRWORA does not require states to provide assistance or work-related services to any group of needy families and includes incentives for states to deny such assistance to poor families. For example, the fixed block grant funding provides a strong fiscal incentive for states to deny aid to some poor families during times in which need increases and their federal block grant funds are inadequate to cover rising costs. Additionally, the caseload reduction factor can reduce a state's work participation rate based on the extent to which a state has reduced its caseload.

Given the statutory incentives to restrict the availability of assistance to poor families, HHS should ensure that the regulations do not add new such incentives or exacerbate those already in the law. In important ways, however, the proposed regulations would provide states with new reasons to not serve needy children and their families.

The Narrow Interpretation of the Circumstances in Which Penalty Relief Will Be Granted Creates an Incentive Not to Serve Families

The statute requires HHS to reduce the penalty imposed on a state that fails to meet the work participation requirements based on its "degree of noncompliance." The law also requires HHS to waive the penalty for failing to meet the work participation rates entirely if the state has "reasonable cause" for failing to meet the requirements. The proposed regulations would limit the availability of these forms of penalty relief to states meeting very narrow criteria.

For example, under the proposed regulations, only those states that achieve a participation rate that exceeds 90 percent of their required rate would be eligible for *any* level of penalty reduction based on the state's "degree of noncompliance." States that achieve significant levels of participation but fall short of the 90 percent threshold, would receive no relief. Thus a state that achieved only 10 percent of its requirement and a state that achieved 85 percent of its requirement would both receive the maximum penalty. Under the proposed regulations, factors such as caseload increases and the extent to which a state had improved its performance would not be considered when determining a state's "degree of noncompliance."

By interpreting these two penalty relief mechanisms so narrowly, HHS has increased the incentive for states not to serve needy families. For example, consider a state whose caseload is expanding due to an economic downturn. If the state chooses to

extend assistance to the growing number of needy families and, as a consequence, fails to meet the work participation requirements applied to its increased caseload, it is likely to be subject to the maximum penalty under the proposed regulations.

In addition to providing an incentive to deny aid altogether to needy families, the proposed regulations in this area also provide states that are unable to comply fully with the work participation requirements (or meet the 90 percent threshold) with a disincentive from putting forward substantial effort in placing adults in countable work activities. As currently designed, the regulations would treat similarly a state that ignores altogether the work requirements and states that put forth substantial effort toward meeting the work requirements, such as a state that fails to meet the requirements by a relatively modest amount or a state that fails to meet the requirements but demonstrates substantial improvement in the number of parents participating in work activities. By treating these states similarly, the penalty policies in the proposed regulations signal to states that putting forward substantial effort to increase the number of parents participating in work activities or to enforce work requirements on a growing caseload will not be rewarded unless the state can meet — or miss by a small amount — the actual work participation rates.

Denying Penalty Relief to States That Serve Families in Separate State Programs Also Provides States With Incentives to Deny Aid to Poor Families

As discussed above, one reason states may want to use MOE funds outside of a TANF-funded program is that the TANF requirements and restrictions may be inappropriate for some groups of families. If a state that uses separate state programs to serve very disadvantaged families — such as families in which the parent needs substance abuse counseling, families in which a parent is disabled and not expected to be able to work, or families in which the parent has serious job skill deficiencies — is denied all forms of penalty relief, the state may simply choose not to serve such families at all.

The Caseload Reduction Factor Approach is Generally Reasonable But the Treatment of Families Subject to a Full-Family Sanction Should be Addressed

Under the statute, a state that reduces its caseload from 1995 levels may receive a "caseload reduction factor" that reduces the state's work participation rates. Caseload reductions that result from eligibility changes, however, cannot be considered when determining the extent of a state's caseload decline. Determining the extent to which a state's caseload decline results from eligibility changes is a difficult task, and the methodology for making such a determination will necessarily be state-specific based on the particular types of eligibility changes a state makes. Thus the approach outlined in the regulations which require states to submit estimates of the impact of eligibility

changes on their caseloads and a description of the methodology used is appropriate. It would be nearly impossible for HHS to develop a sound methodology that could be used in every state.

A threshold issue, however, is what will be considered an eligibility change. The proposed regulations should, but do not, explicitly address, how caseload reductions resulting from the imposition of "full-family" sanctions — that is, policies that terminate all assistance to a family based on a failure to comply with program rules — will be treated for purposes of the caseload reduction factor. A state that imposes full-family sanctions (and did not have such a policy in place in 1995) should not get credit for resulting caseload reductions; a full-family sanction is an eligibility change from prior law. If caseload reductions resulting from the imposition of full-family sanctions "count" toward the caseload reduction factor, states will have a strong incentive to impose such sanctions rather than take other actions that could improve compliance with program requirements, such as helping families remove barriers to participation. The caseload reduction factor regulations should be neutral on the issue of whether states adopt full-family sanctions rather than unintentionally providing an incentive for states to adopt such sanctions.

Regulations Generally Adopt Reasonable Approaches That Lessen Disincentives to Serve Two-Parent Families and Provide Appropriate Services to Victims of Domestic Violence

The proposed regulations address the potential disincentive to aid two-parent families. Under the PRWORA, states must ultimately place an adult in 90 percent of two-parent families in countable work activities for 35 hours per week. States failing to meet this requirement are subject to a fiscal penalty. Using its regulatory authority in this area, HHS appropriately limited the maximum penalty that will be imposed for failing to meet the two-parent work participation rate based on the percentage of a state's caseload that consists of two-parent families. This is a reasonable resolution of an important issue, although the comments offer further suggestions of ways in which the strong disincentive to serve two-parent families could be further limited while still promoting the law's work goals.

The regulations also took a reasonable approach by granting full penalty relief to states that would have met the work participation requirements if those adults granted a good cause domestic violence waiver were not considered when calculating the state's work participation rate. This approach will lessen the incentive not to provide appropriate services to victims of domestic violence. The comments do indicate areas in which these regulations should be modified, however. In particular, partial penalty relief should be available to states that would have qualified for such relief if those adults granted a domestic violence waiver were not considered in the state's work

participation rate calculation.

Ensuring State Accountability for Meeting Requirements and Objectives of the Law

While the PRWORA grants states wide discretion in the design of their programs, it also holds them accountable for their performance in meeting the objectives of the law. The law does this through two different, though related, mechanisms.

- First, the law imposes penalties on states that fail to meet various requirements or performance standards such as achieving the work participation rates, properly implementing the 60-month time limit on federally funded assistance, requiring teen parents to live with an adult and attend school, and meeting the MOE requirement.

- Second, the law requires states to provide data on families receiving assistance and those that become ineligible for aid. These data will enable HHS to determine whether some program requirements are met and penalties should be assessed. Just as important, the data will allow policymakers, researchers, and the public to understand basic characteristics of a state's programs — who the programs serve, the characteristics of families served, the services and assistance families receive, the requirements imposed on recipients — and consider a state's performance on a variety of outcome measures such as the number of parents working, the number of families subject to a sanction, the types of families affected by time limits, and the reasons families leave assistance.

The proposed regulations require states to report two types of data — data on families applying for, receiving and leaving assistance and financial information about both TANF and MOE expenditures. The data states must report on families includes both disaggregated case-record data and aggregate information.

In general, the proposed regulations translate the statutory non-financial data requirements into concrete data elements states must report in a manner that ensures that policymakers and researchers will be able to answer key questions about welfare reform. Moreover, the regulations appropriately seek to ensure that states report comparable data so that families, programs, and outcomes can be compared across states. There are specific areas in which the regulations on the data collection requirements can be improved, particularly the data collection requirements on families leaving assistance and on families applying for aid.

The financial reporting requirements are, however, more problematic. The proposed regulations would not require states to report enough descriptive or financial information to ensure that the MOE requirement has been met or that TANF funds are spent in accordance with the law. The deficiencies with respect to maintenance-of-effort enforcement are particularly troubling. The proposed regulations require too little information to determine whether expenditures claimed by a state toward its MOE requirement meet the "new spending test" that is intended to prohibit states from using MOE funds to supplant existing state spending in programs serving low-income families with children. In addition, the proposed regulations would require too little information from the states to determine whether expenditures claimed toward a state's MOE requirement are spent on "eligible families." By requiring too little information to enforce the requirement effectively, the proposed regulations may send a signal to states that HHS will exert little effort in determining whether states spending claimed toward the MOE requirement meets the statutory requirements.

Conclusion

The comments explain in greater detail these and other concerns raised by the proposed regulations and suggest ways in which the regulations could be modified to ensure the Act's broad welfare reform goals can be achieved.

II. The Regulations Should Not Discourage States from Deciding to Use Their Own State Funds in Separate State Programs.

Statutory and Regulatory Framework

When Congress replaced the AFDC, JOBS and Emergency Assistance programs with the TANF block grant, it also substituted a state maintenance-of-effort (MOE) requirement in place of the AFDC system of state and federal matching funds. Under the PRWORA, states are required to maintain 80 percent (or in some cases, 75 percent) of historic state welfare spending, but they are not required to use state funds to match TANF expenditures or even to use state funds within the same program as TANF funds. In order to count toward the maintenance-of-effort requirement, state expenditures must be spent on benefits or services for families that meet the financial eligibility rules of the state's TANF program. Both the federal TANF funds and the required state MOE funds are more appropriately viewed as funding streams rather than as programs. The law does not create nor require states to create a single or specific program with these funds.

The welfare law gives states significant flexibility over the design and operation of the welfare and work programs which they create with federal TANF and state MOE funds. An important aspect of this flexibility is the greater control that Congress permitted states over their state MOE spending. Since separate state programs do not receive any TANF funds, the restrictions and prohibitions that apply to TANF-funded programs — including TANF work participation rates and TANF child support assignment and collection requirements — do not apply to these solely state-funded programs. Thus the federal welfare statute gives states broad flexibility in using these state dollars to establish programs tailored to serve specific groups of families for whom the TANF requirements may be inappropriate or to provide benefits or services for which the attachment of TANF restrictions may be inappropriate.

The proposed regulations recognize that the statute gives states clear authority to use MOE funds in separate state programs and that certain TANF rules and restrictions do not apply to these programs. In the preamble to the proposed rules, however, HHS expresses its concern that states might use a separate state program to avoid federal work participation rates or to avoid sharing child support collections with the federal government. In regard to work participation requirements, for example, HHS appears to be concerned that a state would place a significant portion of its "hard-to-serve" cases in a separate state program so that it would be easier to meet the work participation rates in its TANF-funded program. HHS also appears to be concerned that a state might put those cases with large child support collections in a separate state program to avoid paying a share of child support collected to the federal government.

In an effort to discourage such actions, the proposed TANF regulations provide that HHS will not apply the penalty relief provisions of PRWORA if it determines that a state has diverted families to a separate state program with the effect of avoiding participation rates or federal child support collection requirements. Specifically:

- If HHS determines that a state set up a separate state program to avoid a work participation rate penalty, a state that was subject to any of a set of TANF penalties (relating to work participation rates, the 60-month time limit, maintaining assistance when child care is not available, reducing assistance for families that fail to work) would be ineligible for relief from the penalty based on a "reasonable cause" penalty waiver or on any other basis upon which a reduction in the amount of the penalty would otherwise be available.

- If HHS determines that a state set up a separate state program to avoid child support collections, a state that was subject to any of a set of TANF penalties (relating to work participation rates, child support cooperation requirements, the 60-month time limit, maintaining assistance when child care is not available, reducing assistance for families that fail to work) would be ineligible for relief from the penalty based on a "reasonable cause" penalty waiver or on any other basis upon which a reduction in the amount of the penalty would otherwise be available.

Moreover, the proposed regulations appear to set up two different standards by which HHS determines whether or not states that establish separate state programs will be ineligible for penalty relief. In some provisions (e.g. proposed sections 271.51 and 271.52), the state must demonstrate that "it has not diverted cases to a separate state program for the *purpose* of avoiding the work participation requirements [or avoiding child support collections]." [Emphasis supplied.] In other provisions (e.g. proposed section 272.5(c) and (d)), a state will not qualify for penalty relief if HHS detects "a significant pattern of diversion of families to a separate state program that achieves the *effect* of avoiding the work participation rate [or diverting the federal share of child support collections]." [Emphasis supplied.] The regulations do not provide any clarification regarding whether these standards are different from each other or any guidance as to how HHS will determine whether either or both of these standards has been met.

Analysis and Recommendations

By denying statutorily-authorized penalty relief in cases in which a state uses some of its MOE funds in a separate state program in a manner wholly permissible

under the statute, HHS is significantly readjusting the balance established by the PRWORA between state flexibility over its own funds and the work goals of the TANF program. Despite a state's clear authority to use MOE funds in separate state programs that do not receive TANF funds — authority that HHS does not dispute — the proposed TANF regulations impose significant barriers for a state to use its state MOE funds in this manner. It is inappropriate for HHS to take this action given that Congress knowingly decided what requirements should be placed on TANF-funded programs and programs funded entirely with state resources. By threatening to deny states penalty relief, HHS strongly discourages states from using the flexibility explicitly permitted to them under the law to provide assistance and services in ways they determine could best meet the needs of poor families and children in their state.

Separate state programs offer states an important vehicle to use the more flexible state funding stream to develop innovative programs for certain families that may not be served effectively under the restrictions that apply to TANF funds and TANF-funded programs. The reasons why a state might choose a separate state program and the purpose and operation of these programs could vary tremendously in their range and scope, but fall generally into four categories.

- *Programs that serve a broader population.* A state may want to use its state funds to set up a program serving a broader group of families than just those that are eligible for TANF. For example, a state might set up a food program for legal immigrants excluded from the federal food stamp program that serves families as well as elderly and disabled adults. A state could also use a separate state program to provide various types of assistance to poor working families, including child care, income supports, job-retention services, or a state earned income tax credit (EITC).

  If states want to serve groups of families that meet the TANF eligibility requirements along with other groups of individuals who do not meet the TANF eligibility requirements (for example, in a state EITC program some families would have income above TANF income standards), the state must do so through a separate state program.[1] States can count state spending on TANF-eligible persons who are served in broader programs towards their MOE requirement (assuming other MOE requirements are met). Thus, states that seek to serve a broad group of families under one

[1]It is not necessarily impossible to serve persons who are not eligible for TANF assistance in the state's TANF-funded program. A state could use segregated state MOE funds or other state funds within the TANF program to serve those ineligible for TANF. However, it is generally not reasonable for a state to serve people who are not TANF-eligible in the state's TANF-funded program because certain TANF requirements such as child support assignment and work participation rates apply to all those who receive assistance within the TANF-funded program.

program have legitimate structural reasons for setting up separate state programs and serving some TANF-eligible families in these programs rather than as part of its TANF-funded program.

- *TANF requirements are not appropriate given the nature of the services or benefits that the program provides.* Because of the nature of the assistance or services provided under a separate state program, there could be an independent policy reason to establish a separate state program. For example, a state might determine that a food program for legal immigrants or a state EITC should not logically be subject to the TANF statute's work and child support assignment requirements. Similarly, a state might reasonably conclude that a program that provides only transportation subsidies to low-wage workers should not be subject to TANF child support assignment requirements. Under the statute, states are allowed to use their MOE funds to support low-wage workers in this manner without requiring that the families give up the child support payments they receive.

- *TANF requirements or restrictions are not appropriate for the population served by the program.* Because the TANF rules allow only a relatively narrow range of work-focused activities to count toward the work participation rates, a state may decide that persons in need of substance abuse, counseling, training, education, or other activities that do not always count toward participation rates would be better served in a separate state program. Particularly, when participation rates reach higher levels in later years, a state may find that it has little or no flexibility to provide the most appropriate services for particular families through the TANF-funded program.[2] The services provided under a separate state program could be the more effective means of helping certain groups of recipients to find and retain employment.

  This may be particularly true if a state decides to use state funds to provide services and assistance to families who reach the time limit. A

[2]The TANF work participation rates are less than 100 percent, but nonetheless studies by the Manpower Demonstration Research Corporation (MDRC) have shown that to achieve a given participation rate, programs must work with many more families than the target indicates. For example, these studies indicate that to achieve monthly participation rates that were lower than those ultimately required in TANF (i.e. less than 50 percent), programs were required to direct their entire caseload into countable activities. The research shows that some individuals will participate less than the required number of hours in a given month because of illness, scheduling problems, and other reasons. Thus, states do not have the flexibility to provide services that do not count toward the work requirements if they expect to meet participation rates of this magnitude.

state might reasonably determine that disadvantaged families who have been under the TANF rules for a significant time period may legitimately require a different set of services than those provided in the state's TANF-funded program. Similarly, there may also be some recipients who have not yet reached the time limit but who cannot reasonably be expected to work — such as families with disabled parents or elderly caretaker relatives — whom a state might decide to serve through a separate state program. A state might conclude that it wants to target limited resources and choose not to expend any resources to place elderly caretaker relatives in work activities. The statute clearly allows states to use state MOE funds in separate state programs for these groups of families.

- *Expanding existing state programs.* States may decide to serve some families through an existing state program. For example, a state may choose to serve disabled parents and their families through the state disability program. A state may choose to provide benefits to families or at least to children beyond 60 months through its state general assistance program. New York State, for example, has decided to continue benefits beyond the 60-month TANF time limit by expanding and changing somewhat its pre-existing general relief program. As more states approach time limits, they may find that exempting 20 percent of its caseload from the time limit may not be adequate, especially if the caseload continues to decline and a higher percentage of those remaining on assistance are those with the most significant barriers to employment. A state may choose, for example, to continue benefits to more than 20 percent of the caseload or to all children and may find, like New York State, that expanding an existing state program is the most effective method to do so. Again, the statute explicitly permits states to use their own funds in these ways.

These are all legitimate policy reasons why states might consider spending their state MOE funds in separate state programs, yet in at least some of the cases described above it could be argued that one consequence of serving people in a separate state program is that it will be easier for the state to meet its work participation rates in its TANF-funded program. Indeed, in virtually all cases where a separate state program serves families with an absent parent that are not also served in a TANF-funded program there is likely to be some diminution of child support collections paid to the federal government. Thus, under the proposed regulations states will be threatened with the loss of penalty of relief in situations where whey have a legitimate policy reason for establishing a separate state program and clear legal authority to do so.

Recommendation 1: HHS should eliminate the provisions in the proposed TANF regulations that threaten denial of penalty relief to states that use MOE funds in separate state programs.

HHS should not pursue this very troubling approach and should not threaten states with loss of penalty relief for serving families in separate state programs as is clearly permitted by the federal welfare law. As discussed above, states have many legitimate reasons for serving recipients through new or existing separate state programs and undisputed authority to do so. Yet the proposed regulations would inappropriately discourage states from using their MOE dollars in an otherwise permissible manner by threatening denial of statutorily-authorized penalty relief if a state uses its own dollars in a separate state program. Any prudent state should be concerned about possible future access to penalty relief given the uncertainty of economic cycles and local economic conditions. Despite the best faith efforts of a state to comply with federal requirements, a state cannot now anticipate whether it may need penalty relief in the future, particularly when faced with a recession and rising caseloads.

These proposed penalty provisions could discourage states from pursuing promising strategies with state funds and provide states with an incentive not to serve certain groups of families rather than serving them through separate state programs. For example, under the proposed regulations a state that is considering whether to provide assistance to specific groups of families (e.g., disabled parents, immigrants, children who have reached the 60-month time limit) using its own dollars in a separate state program must accept the risk of the loss of penalty relief. Alternatively, the state could protect itself against unforeseen events and assure that it remained eligible for penalty relief by refraining from providing assistance for these families altogether. The policy proposed in these regulations could push states to limit the assistance they provide — or at least to forego opportunities to establish innovative programs — in order to avoid any controversy regarding the purpose and effect of their actions.

The proposed regulations place undue restrictions on state flexibility and could have significant negative consequences for poor families and children. It is particularly troubling that the regulations seek to penalize states for aiding people in separate state programs when a likely consequence of the policy proposed by these regulations would be that some states would refrain from aiding certain groups of people altogether. A more appropriate and reasonable alternative would be for HHS to monitor the operation of separate state programs funded with MOE dollars in order to understand the extent to which they appear to lead to outcomes viewed as contrary to the purposes of the law with respect to work requirements and child support payments. HHS can use this information to consider whether, based on states' actions, the law needs to be changed and if necessary, to develop a legislative proposal for Congress. While HHS's monitoring efforts may convince federal policymakers that a change in the law is needed, they may show instead that states have used the flexibility of separate state programs to meet the needs of poor families consistent with the purposes of the legislation.

Recommendation 2: In absence of the elimination of this proposal, HHS should clarify that it will use the "purpose" rather than the "effect" standard in evaluating whether a state diverted cases from its TANF program to a separate state program to avoid work participation rates or child support requirements.

If the final regulations retain the very troubling policy of threatening states with the loss of penalty relief if they establish separate state programs, HHS should clarify the standard for determining when penalty relief will be withheld. HHS appears to have established two standards for judging separate state programs — one based on the *purpose* of the program and one based on the *effect* of the program. If the program's purpose is legitimate, a state should not suffer any negative consequences even if the ultimate "effect" of the program is to exclude individuals from the TANF work requirements or reduce the federal share of child support payments. Any references to an "effect" standard should be eliminated.

There are many instances where a program could be designed with specific policy purpose that had nothing to do with the TANF work or child support requirements, but the program may inevitably also have an effect on one or both of these requirements. The regulations should eliminate any reference to an "effect" test so that states with legitimate policy goals need not fear pursuing such policies through a separate state program. For example, it is impossible to serve some recipients in a separate state program instead of the TANF-funded program without having the effect of removing some families from the state's work participation rate calculation.

Recommendation 3: In the absence of the elimination of this proposal, the regulations should clarify that a state does not face the risk of loss of penalty relief if it has a reasonable policy basis for using MOE funds in a separate state program.

The proposed regulations do not give states adequate guidance on how HHS will evaluate the validity of a state's policy purpose in using state dollars in a separate program from TANF. Because no guidance is provided regarding how HHS will interpret these provisions, a state has no basis for determining if a proposed separate state program will cause the state to be denied penalty relief even if the purpose of the program has nothing to do with avoiding the work requirements or avoiding child support payments. If HHS maintains its proposal to limit or deny penalty relief, it should provide states more guidance in the regulations as to ways state funds may be used outside of the TANF-funded program without risking the denial of penalty relief.

If the penalty relief policy is retained, the regulations should state that a state faces no risk of penalty denial if it has a reasonable policy basis for using its MOE funds in a separate state program other than the avoidance of penalties. HHS should set forth in the regulations or the preamble factors it will consider or examples of legitimate

policy bases. HHS should indicate that it considers reasonable and legitimate policy bases for separate state programs to include the following:

- Using MOE funds in a separate state program that serves a population broader than just those who are TANF-eligible

- Using MOE funds to expand an existing state program to address the needs of certain groups of TANF-eligible families with characteristics similar to others whom the state serves served through the state program.

- Using MOE funds in a separate state program that provides services or imposes requirements that are *appropriate* to the families in that program. The goals of the services and requirements in separate programs do not necessarily have to be related to immediate employment, but instead they could be focused on the long-term self-sufficiency and the well-being of families. For example, programs focused on mental health, education, job retention, family safety, and homelessness services should not face negative consequences if the state can demonstrate that the services were necessary for individual to be employed in the long-run. Strategies to move working families closer to or above the poverty line would be acceptable purposes for using MOE in separate state programs since they would improve the well-being of families.

- Using MOE funds in a program that serves families for whom the state has decided that minimal requirements are appropriate because the adult in the family cannot reasonably be expected to work (i.e., families with disabled parents or elderly caretaker relatives) or families on whom considerable effort has already been expended without appreciable results.

- Using MOE funds in a separate state program if the nature of the benefit or services provided (e.g. transportation subsidies) is not appropriate for triggering requirements attached to TANF funds.

Recommendation 4: If the regulations do threaten denial of penalty relief to states with a separate state program, HHS should allow a state to get an up-front determination of whether its separate state program is acceptable.

If it retains this policy, HHS should allow states to get an up-front determination from HHS of whether their separate state program will be deemed acceptable for the purposes of the penalty relief provision. Instead of waiting until HHS is considering whether a state can qualify for a reasonable cause exception or a penalty reduction,

states should have the option of submitting a description of their separate state program along with their policy rationale for the program to HHS for an up-front assessment of whether HHS would deny the state penalty relief based on the design of the separate state program. States should be able to rely on this assessment at a later time if they should have the need to seek penalty relief.

Recommendation 5: If the regulations do deny relief from a penalty to some states with a separate state program, any denial of relief should be based to the relationship between the state's use of MOE funds in its separate state program and the TANF requirement the state failed to meet.

The proposed regulations would deny penalty relief even in situations where there is no direct relation between the penalty at issue and the conduct of the state. A state's eligibility for a reasonable cause exception or a penalty reduction should be based on the state's conduct in relation to the penalty at issue, not solely on whether the state operated a separate state program. For example, if Maine is unable to meet the work requirements because of the massive disruption and power outages from the recent ice storm, a natural disaster, it should not be denied penalty relief simply because it set up a small separate state program that allows some parents to participate in post-secondary education.

HHS should limit any denial of penalty relief to situations where there is a direct relationship between the penalty at issue and the conduct of the state. Specifically, if it were determined that a state established a separate program for the purpose of avoiding the work participation rates, the state only should be denied penalty relief with respect to the work participation penalty and then only to the extent of the advantage it received. Similarly, if it were determined that a state established a separate program to avoid paying the federal share of child support, the state should only be denied relief from the penalty relevant to child support and only to the extent of the advantage it received. A state should not be denied relief from a work requirement penalty based on substantial compliance or a natural disaster merely because it set up a child support assurance pilot program. There is no rational reason to deny relief for other unrelated penalties as suggested in the proposed rule.

III. The Regulations Should Not Unreasonably Deny Penalty Relief to States That Do Not Meet the Work Participation Rates.

Statutory and Regulatory Framework

The welfare law establishes significant penalties for states that do not meet the work participation rates. Section 409(a)(3) of the PRWORA specifies that a state that fails to meet the required work participation rate will face a maximum penalty of five percent of their block grant. This penalty escalates two percent per year in each immediately subsequent year the state fails to meet the rates. The total penalty for failing to meet the work participation rates may not exceed 21 percent. Under the law, states that fail to meet the rates but that meet certain other criteria will be granted partial or full penalty relief.

The statute requires HHS to reduce the penalty that is imposed on the state "based on the degree of non-compliance" and grants HHS complete authority to determine how this provision should be operationalized. In addition, the statute allows HHS to reduce a state's penalty if it becomes a "needy" state as defined for purposes of the contingency fund. Under section 409(b) of the PRWORA, HHS may not impose a penalty upon a state if the Secretary determines the state has "reasonable cause" for failing to comply with the work requirement. The statute provides HHS discretion in defining the circumstances under which a "reasonable cause" penalty waiver will be granted.

The statute also requires that the states' maintenance-of-effort requirement be set at 80 percent of historic state spending if the work participation rates are not achieved and reduces this requirement to 75 percent if the rates are achieved.

The proposed regulations provide detail in a number of areas regarding how penalties for failing to meet the work participation rates will be applied. In general, the proposed regulations would limit penalty relief to states that meet a very narrow set of criteria.

- *Penalty Reductions Based on Degree of Non-compliance.* Under the proposed regulations, a state would not qualify for a penalty reduction based on the "degree of non-compliance" unless its work participation rate exceeded 90 percent of the required rate. For example, a state required to meet a 30 percent work participation rate would be subject to the *maximum* penalty unless it achieved a participation rate that exceeds 27 percent. Stated another way, if two states are required to meet a 30 percent work

participation rate and one state places only 10 percent of its caseload in countable activities while the other state places 25 percent in activities, both states will be subject to the same penalty despite the substantial difference in the two states' "degree of non-compliance." The proposed regulations outline no other circumstances under which a state would qualify for a penalty reduction based on the degree of non-compliance.

- *Reasonable Cause*. The regulations contain a narrow set of criteria that HHS will use to determine when a state will be granted a "reasonable cause" penalty waiver for not meeting the work participation rates. These include natural disaster and other calamities (e.g. hurricanes, earthquakes, fire), formally issued federal guidance that provided incorrect information, isolated non-recurring problems of minimal impact that are not indicative of a systemic problem, and situations in which work rates would have been achieved but for those individuals who were granted good cause domestic violence waivers and in which the failure to meet the work rates is due to the provision of certain assistance to refugees. The proposed regulations do not indicate that HHS will consider any additional factors a state might wish to claim constitute "reasonable cause" for failing to meet the work participation rates.

- *Two-Parent Families.* The proposed regulations offer significant and appropriate penalty relief for states that fail to meet the two-parent work participation rates. The regulations would limit the maximum penalty that would be applied to states that meet the all-families participation rate but do not meet the two-parent participation rate. In these circumstances, the penalty would be based on the proportion of two-parent families in the state's overall caseload. Several additional steps could be taken to improve the manner in which penalties are imposed on states failing to meet the two-parent work participation requirements.

- *Separate State Programs.* The regulations provide that a state may not qualify for a reasonable cause penalty waiver or a reduction in its work penalties based on the state's "degree of non-compliance" if it uses MOE funds in a separate state program. (Comments on this issue are covered in the preceding section on separate state programs.)

Analysis and Recommendation

The PRWORA gives HHS substantial discretion in determining the circumstances under which states will be granted penalty reductions based on the

"degree of non-compliance" and full penalty waivers based on the state having "reasonable cause" for failing to meet the work participation rates. The statute does not define either the mechanism by which HHS should determine a state's "degree of non-compliance" nor does it define "reasonable cause." In the proposed regulations, however, HHS uses its discretion to define very narrow circumstances under which states will be eligible for either a penalty reduction or a reasonable cause penalty waiver. The regulations do indicate that states that fail to meet the work participation requirements can enter into a corrective compliance plan and receive a reduced penalty if they are able to increase substantially the number of adults in work activities during the compliance period. Penalty relief should be more broadly available, however, to a state that demonstrates a substantial degree of compliance in the year in which it fails to meet the requirements.

While the proposed regulations adopt a narrow view of the circumstances under which states should be granted penalty relief based on their "degree of non-compliance" or a reasonable cause penalty waiver, nothing in the statute suggests that Congress intended HHS to take such a limited view of the circumstances under which states should qualify for some level of penalty relief. Had Congress intended such an approach be taken, it could have defined the terms itself or it could have included either report language or a "Sense of the Congress" section indicating that Congress intended for penalty relief to be available only in extraordinary situations.

When determining the circumstances under which states that fail to meet the work participation rates should be granted some level of penalty relief, it is important to consider the purpose of fiscal penalties. If the intent of fiscal penalties is to provide states with a strong incentive to take the requirements of the law seriously — rather than "punish" errant states — then the circumstances under which states will be granted some level of penalty relief should be broadened.

For example, as currently designed, the regulations would treat similarly a state that ignores altogether the work requirements and states that put forth substantial effort toward meeting the work requirements — such as a state that fails to meet the requirements by a relatively modest amount; a state that fails to meet the requirements but demonstrates substantial improvement in the number of parents participating in work activities; a state that experiences significant caseload increases; and a state for which complying with both the statutory hourly work requirements of the PRWORA and the Fair Labor Standards Act is problematic. By treating these states similarly, the penalty policies outlined in the proposed regulations signal to states that putting forward substantial effort to increase the number of parents participating in work activities, to enforce work requirements on a growing caseload, or to impose work requirements consistent with the FLSA will not be rewarded unless the state can meet — or miss by a small amount — the actual work participation rates.

Moreover, by creating a structure in which failing to meet the work participation requirements by even a modest amount has severe negative consequences for states, the proposed regulations provide states with a strong incentive not to serve needy families. A state may be more likely to choose not to serve particular groups of "hard-to-serve" families — either through explicit eligibility policies or by creating barriers that make it difficult for some families to access assistance — if the penalty system imposes full penalties on states that miss the participation rates by small amounts.

The comments below suggest an approach that would allow states that exert significant effort in placing parents in work activities to receive penalties commensurate with that effort. The comments address the following specific areas:

- *Penalty reductions based on "degree of non-compliance"* — The comments address the 90 percent threshold the proposed regulations would establish which denies penalty relief to states that fail to achieve more than 90 percent of the required work participation rate. The comments also focus on additional criteria — such as the extent to which the state has increased the number of parents participating in work activities and the extent to which states experience significant caseload growth — which should be factored into the determination of states' "degree of non-compliance."

- *Reasonable cause penalty waivers* — The comments discuss the need for HHS to retain the discretion to consider reasonable cause waivers based on criteria not specified in the regulations.

- *Special issues related to the two-parent work participation rate* — These comments address the way in which penalties on states that fail to meet the two-parent work participation rate should be calculated, the circumstances under which such states should be granted additional penalty relief, and the manner in which the caseload reduction credit is applied to the two-parent work participation rate.

- *Clarification that only those states that achieve both the all-families and the two-parent work participation rates are subject to the lower 75 percent maintenance-of-effort requirement* — The regulations should clarify that states that fail to meet the participation requirements are not eligible for the lower maintenance-of-effort standard even if they receive a penalty reduction or reasonable cause penalty waiver.

Recommendation 1: Reduce the threshold below which states receive no penalty relief based on their "degree of non-compliance."

The 90 percent threshold states are required to meet to be eligible for any penalty reduction based on the "degree of non-compliance" is inappropriately high. In FY 1998, when the overall rate is 30 percent, a state with a participation rate under 27 percent would not qualify for any penalty reduction. While under HHS's interpretation very few states would qualify for a penalty reduction based on their "degree of non-compliance," nothing in the statute or legislative history suggests that Congress intended penalty relief granted on the basis of "degree of non-compliance" to be available only to those states that very nearly meet the work participation rate. In fact, a plain reading of the statute suggests this provision was intended to ensure that states that achieved widely varying participation rates would not be subject to similar penalties. Under the proposed regulations, however, a state that achieves only five percent of the required rate and a state that achieves 85 percent of the required participation rate are treated identically — both are subject to the maximum penalty allowed under the statute.

While treating states that attain such differing levels of compliance in a similar manner, the proposed regulations would subject states that achieve very similar levels of compliance to widely varying penalties. Consider two states that both face a 40 percent work participation requirement. Under the proposed regulation, a state that achieves a 35 percent work participation rate is subject to the maximum penalty while a state that achieves a 38 percent rate receives a 50 percent penalty reduction. That is, a difference of just three percentage points in two states' work participation rates leads to a 50 percent difference in the penalty rate imposed.

Finally, establishing such a high threshold means that a small error in the estimate of a state's work participation rate will result in large differences in the level of penalty imposed. Small errors in the measurement of states' participation rates are inevitable if the estimates are computed from a sample of families instead of all families receiving assistance. In fact, the appendix to the proposed regulations indicates that the sampling methodology will lead to small inaccuracies in the measurement of states' work participation rates. In a discussion of the rationale for the requirement in the proposed regulations that states include at least 3,000 families in their sample, Appendix H states, "We established the minimum required sample sizes to provide reasonable precise estimates (e.g., a precision of about plus or minus 2 percentage points at a 95% confidence level.)" This statement means that, in a statistical sense, two states with identical *actual* work participation requirements could have *measured* participation rates that differ by up to four percentage points. Consider again two states that are both required to meet a 40 percent work participation rate. Suppose both states have identical *actual* participation rates of 38 percent, but one state has a measured rate of 36 percent while the other state has a measured rate of 40 percent. Under the proposed regulations, the state with the measured rate of 36 percent would

be subject to the maximum penalty while the state with the measured rate of 40 percent would not be subject to a penalty at all. Measurement error is inevitable when estimates are based on a sample. However, by setting the threshold so high, the proposed regulations create a structure in which small measurement errors can have a large impact on the level of penalties imposed on states.

One way to ensure that small differences in performance (measured or actual) do not lead to large differences in the level of penalties imposed — and to ensure that large differences in performance are recognized — would be to grant proportional penalty reductions to all states based on the work participation rates they achieved. For example, a state that achieved 50 percent of the required rate, would be subject to a penalty equal to 50 percent of the maximum and a state that achieved 10 percent of the required participation rate would receive a 10 percent reduction in its penalty. While this is an allowable reading of the statutory provision to base penalties on the "degree of non-compliance," it is also reasonable to assume that Congress did not intend to grant penalty relief — albeit a small amount of relief — to a state that achieved a four percent work participation rate when it was required to meet a 40 percent rate. Thus, it is an appropriate interpretation of the statute to establish a threshold level below which a state would not be eligible for any penalty relief based on their "degree of non-compliance."

A threshold of between 50 and 75 percent is more reasonable than the 90 percent threshold included in the proposed regulations. A 50 percent threshold recognizes that states must place a significant number of parents in countable work activities before any penalty relief is granted but also recognizes that a state that places two-thirds or three-quarters of the number of parents required to participate in countable activities has put forward substantially greater effort — and achieved a substantially higher "degree" of compliance — than a state that places only one-quarter of the required number of parents in work activities. A 75 percent threshold also represents a significant improvement from the proposed 90 percent threshold, although a 75 percent threshold would not recognize a state that achieved three-quarters of the requirement as different from a state that achieved only one-third of its requirement.

Recommendation 2: The extent to which a state has increased the number of parents participating in countable work activities should be considered when determining the state's "extent of non-compliance."

The PRWORA requires states to meet escalating work participation rates suggesting that one Congressional goal is for states to increase, over time, the number of parents participating in work activities. For some states, meeting the statutory work participation rates will require a far more significant increase in the number of parents

participating in work activities than in other states. States for whom an emphasis on "work first" strategies is new and states that receive little benefit from the caseload reduction factor will need to increase the number of parents participating in countable work activities to a much larger extent than many other states.

Since increasing the number of parents participating in work activities is a goal of the escalating work participation rates, it would seem appropriate to consider the extent to which a state has increased the number of parents in work activities when determining a state's "degree of non-compliance" for the purpose of determining penalty reductions. Such an approach would give greater penalty relief to a state that substantially increased participation than to a state that achieves a similar participation rate but does not expand its program.

Suppose two states both achieve a participation rate equal to 80 percent of the required rate but one state did not increase the number of parents participating in work activities as compared to the prior year while the other state increased the number of participants by 20 percent. It is a reasonable interpretation of the statute that when determining these two states' "degree of non-compliance" for purposes of awarding penalty relief, the state that increased its effort substantially should be viewed as having exerted more effort to meet the work requirements — and, thus, demonstrated a higher degree of compliance — than the state that did not increase its effort to place parents in work activities at all.

There are many ways to operationalize the concept of providing greater penalty relief to states that increase substantially the number of parents participating in work activities. For example, the regulations could reduce the threshold compliance level for eligibility for penalty reductions (set at 90 percent in the proposed regulations) based on the extent to which a state increased the number of parents participating in work activities. If such an approach were adopted, it would be reasonable to require states to increase the number of parents participating in work activities above a minimum level before reducing the threshold based on this factor.

Alternatively, the regulations could compute an adjusted work participation rate for the purpose of determining a state's degree of non-compliance. In such a calculation, states could be given "credit" in the numerator based on the extent to which they increased the number of families participating in work activities.

As noted, there are many ways to implement a policy that rewards states that achieve a significant increase in the number of parents participating in countable work activities. Whatever formulation is used, however, it is important that the measure of "improvement" be based on the extent to which the state has increased the *number* of parents participating in work activities, not the extent to which the state's work

participation rate increased. If states are rewarded based on the increase in their work participation *rate*, states in which the participation rate increased because the caseload fell — as opposed to states that increased the size of their work programs — will be granted penalty relief. Similarly, states that significantly expand their work programs but simultaneously experience a substantial caseload increase might not achieve a significantly higher work participation *rate* despite substantial "improvement."

Recommendation 3: The extent to which a state's caseload has increased should be considered when determining the state's "degree of non-compliance."

When determining a state's "degree of non-compliance," the extent to which the state has experienced significant caseload increases should be considered. A state that experiences a sharp increase in its caseload as compared to the prior year may have difficulty expanding its work program quickly enough to meet the work participation rates (or even the threshold for penalty reductions). States may not be able to expand their work programs rapidly enough for several reasons — the appropriation for work funds, which may have been based on a lower caseload projection, may not be sufficient to fund additional work program slots, states and localities may not be able to find additional work placements quickly enough, and additional resources may need to be diverted from work activities to the provision of basic benefits. Because a quick adjustment to an unanticipated caseload increase likely will be difficult for many states, when determining a state's "degree of non-compliance" for the purpose of granting some reduction in the penalty imposed, caseload increases should be one factor considered. Without penalty relief based on caseload increases, states will have a strong incentive to deny or limit assistance to eligible families when caseloads rise significantly to avoid work penalties.[3]

Again, consider two states that both reach 80 percent of their required work participation rate, but one state experienced a significant caseload increase as compared to the prior year while the other state's caseload did not rise. It seems a reasonable interpretation of the statute that the state that experienced a significant caseload increase be considered to have achieved a higher "degree" of compliance than the state that failed to meet the work participation rate by the same percentage but did not have to respond to an increasing caseload.

There are several ways to implement a policy of providing additional penalty relief to states that experience significant caseload increases. For example, the regulations could reduce the threshold level of participation required for penalty

[3]The magnitude of this incentive is based, in part, on the threshold level of participation a state must achieve to be eligible for penalty reductions based on "degree of non-compliance."

reductions (set at 90 percent in the proposed regulations) based on the extent to which a the state's caseload increased. This is similar to the concept discussed above with respect to providing penalty relief to states that increase significantly the number of parents participating in work activities. Alternatively (and also similar to a concept discussed above), states with substantial caseload increases could be given "credit" in the numerator of an adjusted work participation rate that is calculated for the purpose of evaluating a state's "extent of non-compliance." An adjusted rate for penalty reduction purposes also could be calculated using an adjusted denominator in which the denominator of a state with a significant caseload increase would be reduced.

Recommendation 4: Provide penalty relief to states that, based on prior year's caseload increases, must increase very substantially the number of adults that must participate in work activities.

States that experience caseload increases will ultimately be required to place a larger proportion of their caseload in work activities because they will lose some or all of their caseload reduction factor.[4] Thus, a state that experiences caseload increases will ultimately be required to place a substantially larger number of parents in work activities for three reasons — first, the state will lose some or all of its caseload reduction factor; second, the statutory work requirements increase each year; and third, the caseload to which the increased work participation rates are applied has increased. Thus, HHS should also consider granting a penalty reduction to states that may not experience a large caseload increase in the current year, but based on a prior year's caseload increase and its impact on the state's caseload reduction factor are required to increase the total number of adults in work activities very substantially.

For example, suppose a state that previously had a 10 percentage point caseload reduction credit experienced a 10 percent caseload increase between 1999 and 2000. In the year 2000, the state's work participation rate was 30 percent. In 2000, the state's work participation rate would rise to 45 percent. Thus due to the loss of the caseload reduction factor and the rising statutory work rates, between 2000 and the year 2001, the state would be required to increase the number of parents participating in work activities by 50 percent. This is a far larger increase in the number of adults required to participate in work activities than is implied by the escalation in the statutory work participation rates. A state that fails to meet the work participation rates because it can not expand the size of its work program by such a large amount in a single year should be eligible for a penalty reduction. As discussed in the recommendations above, there are different ways to operationalize this concept. Again, the threshold could be

[4]An increase in a state's caseload does not affect its caseload reduction factor until the year following that increase. For example, if a state's caseload increases between 1998 and 1999, its caseload reduction factor will not be affected until the year 2000.

reduced for states required to increase the number of adults in work activities dramatically or such states could be given "credit" in the numerator of an adjusted participation rate based on the extent to which they were required to expand the number of participants. Only states required to expand their program more than a threshold amount should be eligible for penalty relief on this basis.

Recommendation 5: States that do not meet the work participation rates because, based on the Fair Labor Standards Act, they could not require parents to work as many hours as required by the statute should be granted penalty relief.

The Fair Labor Standards Act (FLSA) prohibits states to require TANF recipients in certain work activities (e.g., unpaid work experience) to work more hours than is computed by dividing cash assistance and food stamp benefits by the minimum wage. For states with historically low cash assistance levels, there is a tension between the statutory work requirements in the PRWORA and the FLSA. That is, in some states with very low benefit levels, a substantial portion of adults receiving assistance cannot be required to work the number of hours set forth in the PRWORA and comply with the FLSA without raising benefit levels substantially.

While some states may be able to increase benefits in order to comply with both the work requirements and the FLSA, others may not be able to do so. Since block grant levels are largely fixed (with the exception of a small population adjustment for some states), additional federal financial participation is no longer available — as it was under the AFDC match-rate structure — to a low-benefit state that chooses to raise benefit levels. Thus, the regulations should provide a reasonable cause penalty waiver to states that would have met the work participation rates if the adults participating in countable activities for the maximum number of hours allowable under the FLSA and adults that "made up" the additional hours required in non-countable activities were counted toward the work requirements. Similarly, penalty reductions based on the state's "degree of non-compliance" should be available to states which would have achieved the threshold participation level needed to qualify for penalty reductions if these parents were counted toward the work participation requirements. Such policies would allow states with low per-poor-child block grants to avoid substantial work penalties without increasing grant levels or violating the FLSA while still requiring such states to increase the proportion of adults participating in work activities. Granting penalty relief to such states also recognizes the more difficult burden the FLSA places on states with low per-poor-child block grant allocations.

Recommendation 6: When determining a state's "degree of non-compliance," the number of adults that participated in countable work activities but for modestly fewer hours than required

by the statute should be considered.

When determining the "degree of non-compliance" of a state that fails to meet the work requirement, the regulations should consider the extent to which adults in the state participate significantly in countable activities but fall short of the hourly requirement by a modest amount. For example, consider two states that both achieved a work participation rate equal to 80 percent of the required rate. Suppose that one state had an additional 10 percent of the adult caseload participating in countable work activities but for just under the number of hours the statute requires in order to count toward the rate. The other state, by contrast, did not have a significant number of additional adults participating in work activities. It is reasonable that the regulations would view the state that had an additional 10 percent of its caseload participating for a significant number of hours in countable work activities as having achieved a higher degree of compliance as compared to the other state.

One way this could be implemented would be to give partial credit to a state in an adjusted work participation rate formula used to determine a state's degree of non-compliance for each recipient who was within five hours of the average weekly hourly work requirement.

Recommendation 7: The amount of penalty relief a state is eligible for based on the additional factors discussed above —such as caseload increase or the extent to which a state increased the number of participants in work activities —should be determined in an objective and formulaic manner.

If HHS determines that the additional factors described in the recommendations above should be considered when determining a state's "degree of non-compliance," the factors should be considered in an objective, formulaic manner, not based on the Secretary's discretion. By creating a formulaic approach to the levels of penalty relief granted states in different circumstances, states will understand the implications of achieving various levels of compliance based on their circumstances. For example, a state that is unable to meet the participation rates but is able to increase substantially the number of adults participating in work activities will know the level of penalty relief it can expect. Similarly, a state experiencing rapid caseload growth that is considering whether to continue to serve all eligible families will understand the level of penalty forgiveness it will be eligible for if it serves its growing caseload but fails to fully meet the participation rates.

As noted in the recommendations above, there are many ways to structure a formula or formulas that calculate a state's "degree of non-compliance," and thus the amount of penalty relief for which it is eligible, based on factors such as caseload

increases, the extent to which the state increased the number of adults participating in work activities, and the extent to which the state was required to increase its work program substantially. The Center would like to work with the Department to develop an objective, formulaic approach to calculating penalty relief based on these factors.

Recommendation 8: The proposed regulations should indicate that HHS will use its discretion to consider state requests for "reasonable cause" penalty waivers based on criteria not specified in the regulations.

The proposed regulations inappropriately foreclose the Secretary's ability to grant reasonable cause penalty waivers in situations other than natural disasters or regional recessions. All of the circumstances which might appropriately qualify a state for a reasonable cause penalty waiver can not be determined prospectively. Therefore, the Secretary should retain discretion to grant reasonable cause penalty waivers if such circumstances arise.

Recommendation 9: Regulations on work requirements for two-parent families could provide greater opportunities for penalty relief.

In the proposed TANF regulations, HHS has taken a reasonable approach in limiting the penalty imposed on states that achieve the all-families rate but fail to meet the two-parent participation requirement. Under the proposed regulations, the penalty imposed on such a state would be based on the proportion of its total caseload that are two-parent families. This approach is appropriate, although additional policies, discussed below, could improve the regulations in this area significantly.

- *Modify the way in which the limit on two-parent work participation rate penalties is calculated.* Instead of basing the two-parent work participation rate penalty on the proportion of two-parent families in the *state's* overall caseload, the penalty should be based on the proportion of two-parent cases *nationally*. If the penalty is based on the state's two-parent caseload as a proportion of its overall caseload, the policy could give states an incentive to reduce — or decide not to take steps to expand — the availability of assistance to two-parent families in order to reduce their penalty exposure if they fail to meet the two-parent participation rate. Using the national two-parent caseload level to determine the amount of the penalty would largely eliminate these inadvertent incentives.

- *When determining a state's "degree of non-compliance" with the two-parent work participation rate, the extent to which the state had more parents than required to*

meet the "all-families" participation rate should be considered. In the context of considering a state's degree of non-compliance, HHS should impose a smaller penalty on a state that fails to meet the two-parent work participation rate if the state had more adults in work activities than required to meet the "all-families" participation rate. Consider two states that both fail to meet the two-parent participation rate but one places more adults in work activities than is needed to meet the all-families participation rate while the other does not similarly "over-achieve" its all-families participation requirement. It is reasonable for HHS to deem the state that places more parents than required in countable work activities to have achieved a higher degree of compliance than a state that achieved a similar two-parent work participation rate but did not place more adults than required overall to meet the all-families participation rate. Again, this concept can be operationalized several ways. For example, the threshold participation level a state must achieve to be eligible for penalty relief could be adjusted for states that place more parents overall in work activities than is required. Alternatively, states could be given "credit" in the numerator of an adjusted work participation based on the number of adults participating in work activities in excess of the number required in order to meet the all-families participation rate.

- *HHS should use its considerable authority to structure the caseload reduction factor to permit states to apply the caseload reduction factor based on their overall caseload decline to their two-parent work participation rate.*

Recommendation 10: The proposed regulations should clarify that only those states that actually meet the work participation rates for both "all-families" and two-parent families will be subject to the lower 75 percent maintenance-of-effort requirement.

Section 409(a)(7)(B)(ii) of the PRWORA makes clear that only those states that meet both participation rates (as adjusted by the caseload reduction factor) will be subject to the 75 percent — as opposed to the 80 percent — maintenance-of-effort requirement. The regulations should clarify the states granted partial or full penalty relief but that failed to meet the participation requirements must still meet the 80 percent maintenance-of-effort requirement.

IV. The Regulations Should Clarify That Full-Family Sanctions and Requirements that Applicants Engage in Certain Activities as a Condition of Eligibility Are Eligibility Changes for the Purposes of Determining a State's Caseload Reduction Factor.

Statutory and Regulatory Framework

The welfare law contains a provision — commonly known as the caseload reduction factor — which reduces a state's work participation rate based on reductions in a state's welfare caseload since 1995. In determining how much of a reduction of the work participation rate each state will receive, the statute specifies that states are not to receive credit for caseload reductions that are due to federal requirements, such as time limits, or state eligibility changes.

The proposed TANF regulations provide necessary guidance regarding how the caseload reduction factor will be determined. HHS has proposed a procedure under which each state will be able to apply for a reduction of the rates based on this caseload reduction factor. In order to qualify for the reduction, each state must specify the eligibility changes that may have affected the caseload, provide its own estimate of how each eligibility change has affected the caseload, and describe the method(s) by which it arrived at these estimates. HHS will then review the methodology to determine whether it is reasonable and appropriate and, if necessary, may require adjustments to the caseload reduction factor that the state will receive.

The proposed TANF regulations reflect the statutory requirement that HHS will not give credit for caseload reductions when those reductions arise from changes in eligibility rules that affect a family's eligibility for benefits. HHS gives specific examples of eligibility changes that would not count toward the caseload reduction credit, including more stringent income and resource limitations, time limits, grant reductions, and restrictions in categorical eligibility requirements based on residency, age or other factors. The regulations also indicate that states do not have to factor out reductions in caseload that result from enforcement mechanisms or procedural requirements that are used to enforce existing eligibility criteria (such as fingerprinting or other verification techniques). (Proposed 45 CFR §§ 271.41-271.44.)

Analysis and Recommendation

The general approach for determining the caseload reduction factor outlined in the proposed TANF regulations is both thoughtful and sensible. While it will be difficult for states to determine the proportion of any caseload decline that is due to a

specific eligibility change, the approach outlined by HHS is reasonable given the complexity and nature of the task. It is reasonable to allow states in the first instance to establish the basis for the rate reduction that is allowed based on the claimed caseload reduction factor. This approach furthers the goals HHS is trying to achieve in implementing the provision, particularly the effort to avoid inadvertent incentives for state policy changes that are harmful to vulnerable families. However, in order to avoid creating adverse incentives for poor families through the caseload reduction factor, there are several important clarifications that should be made to the proposed caseload reduction factor regulations. There are two types of eligibility changes that are not explicitly addressed in the regulations as eligibility changes that should not count in calculating the caseload reduction factor: full-family sanctions and requirements that applicants engage in certain activities as a condition of eligibility. These policy changes should be specifically included as eligibility changes.

Recommendation 1: The regulations should specify that full-family sanctions are eligibility criteria and the effect of such changes will be excluded in calculating the caseload reduction factor.

In enacting the caseload reduction factor, and in excluding from the factor those families that are not on the welfare rolls due to state eligibility changes, Congress wanted to give states credit for strategies that lead more families to leave welfare because the parent found employment. It recognized, however, that states should not be rewarded for adopting or given incentives to adopt eligibility changes that simply reduce caseloads by denying aid to families that otherwise would have been eligible for TANF. Many states have adopted full-family sanctions and have required applicants to engage in certain activities before a case is approved for assistance. These are among the eligibility changes that may be significantly impacting the caseload decline most states are currently experiencing or have experienced since 1995.

It is critical that the imposition of full-family sanctions — sanctions in which a family loses all TANF assistance due to non-compliance with a program requirement such as a work requirement — be explicitly identified as an eligibility change so that the resulting caseload declines do not count toward the caseload reduction factor. First, a full-family sanction is an eligibility policy. For the majority of states which have adopted such policies since the passage of the PRWORA, the policy clearly constitutes an eligibility change. Under the prior AFDC law, unless a state had a waiver, a sanction could never lead to case closure, that is, to a loss of eligibility. Instead, the grant could be reduced by the parent's portion and the benefits would continue for the children through a protective payee. In such cases under the prior AFDC law, the family remained eligible for assistance. In contrast, when a state institutes a full-family sanction, the sanctioned family is no longer *eligible* for assistance, at least until compliance and usually only after a minimum period of disqualification has elapsed.

Second, states should not be given incentives to exclude families from assistance rather than to help them find work. Both the statute and HHS already recognize this. In a separate provision, Congress has provided that states should not be given credit for placing a family in work if the family is not in a work activity but is instead under sanction. Except for an initial three month period, states cannot exclude a family receiving reduced assistance due to a sanction from the work participation rate calculation because they are in sanction status.[5] In other words, Congress has drawn a distinction between sanctioning a family and being successful at placing that family in work. Similarly, states should not receive as great a benefit in meeting their work participation rates through the caseload reduction factor for imposing full-family sanctions as for helping parents find jobs.

Finally, a state should not receive a greater benefit in meeting its work participation rate if it imposes a full-family sanction than if it imposes partial sanctions. Many of the states with full-family sanctions initially apply lesser sanctions to promote compliance with work requirements from the family before the full-family sanction is imposed. Without the clarification that the full-family sanction is an eligibility change that would not count toward the caseload reduction factor, states would have a strong incentive to immediately subject families to a full-family sanction in order to increase their caseload reduction factor, without necessarily undertaking other efforts to help ensure the individual complies with the program rules and finds work.

Recommendation 2: The regulations should specify that new requirements that applicants engage in certain activities and the effect of such requirements will be excluded in calculating the caseload reduction factor.

Applicant conduct requirements also should be explicitly identified as a eligibility changes so that the caseload declines which result would not count toward the caseload reduction factor. Some states now require the completion of a stringent set of requirements as a condition of eligibility before a family can actually qualify for TANF assistance — such as a set number of hours of job search or a required number employer contacts — sometimes without the guidance or support services applicants may need to comply with the requirements. If the individual, usually a parent, does not comply, benefits to the entire household can be denied. Under prior AFDC law, states were not permitted, in the absence of a waiver, to impose such pre-application approval

[5]Section 407 (b)(1)(B)(II) of PRWORA. This would arise when a family is receiving assistance which has been reduced due to a sanction. In these cases the family is counted in the denominator of the work participation rate calculation after being excluded for an initial three months. A family that is terminated from assistance due to a full-family sanction would not be considered in the work participation rates.

requirements and to make them conditions of eligibility for the entire household. These types of requirements are the kind of eligibility changes the PRWORA excludes from the caseload reduction factor calculation. The exclusion of caseload changes that result from pre-application approval eligibility requirements is consistent with the stated goals of the caseload reduction factor.

Recommendation 3: The regulations should clarify that the state's methodology for computing the caseload reduction factor must account for the ongoing effects of an eligibility change beyond the initial year in which a family is excluded from assistance based on that eligibility change.

It is important that HHS take seriously its role in reviewing the methodology that states submit in support of their claimed caseload reduction factor. One particular area for scrutiny is whether states are adequately accounting for the on-going effects of eligibility changes. Because the caseload reduction factor measures a state's caseload decline relative to 1995, states' methodologies should account for the cumulative effect of eligibility changes on caseloads over time. That is, when a family is excluded from assistance due to a change in eligibility policy, the state's caseload is reduced not only in the year the family was initially excluded, but for as long as that family otherwise would have been receiving assistance under the prior law.

For example, if a family is no longer eligible for assistance because the state makes a policy change to consider the SSI benefits of a disabled parent and this SSI income makes the family ineligible for TANF, the family will remain ineligible for TANF on an ongoing basis. The state's caseload reduction factor methodology must not only estimate how many families were denied or terminated from TANF due to this policy during the year, but it must also estimate how many families excluded in prior years due to the policy change would have otherwise been receiving assistance during the year at issue. Without such a requirement, the caseload reduction credit will not accurately capture an important and on-going element of the reduced caseload.

Another example arises from the ongoing effects of a state's time limit. Consider a state that imposes a two-year lifetime time limit which results in 1,000 families losing benefits in the year they reach the time limit. In the subsequent year, additional families are terminated due to reaching the time limit. But the state's caseload is also reduced because of the families terminated due to the time limit in the prior year. The state's caseload reduction methodology must take into account the cumulative effect of the time limit eligibility change in the subsequent years. In other words, the proposed regulations should require states to estimate the impact for the current year relative to the policy for FY 1995 understanding that many policy changes will have cumulative effects.

HHS should be explicit that a state using a methodology that does not take into

account the ongoing effects of eligibility changes in reducing its caseload in subsequent years will not be eligible for a caseload reduction factor based on its use of a faulty methodology.

V. The Regulations Should Assure That States Are Accountable for the Funds They Receive and Spend.

Background

The proposed regulations (section 275.3) would require states to submit a quarterly TANF Financial Report. In this report, states would report the level of TANF resources transferred to the child care block grant (CCDF) and the Social Services Block Grant (SSBG), the level of TANF and MOE expenditures in areas such as cash assistance, child care, and administrative costs, and the level of TANF and MOE expenditures on "non-assistance." The proposed regulations also would require states to submit an addendum to their fourth quarter financial data report. In this addendum, states would be required to describe the purpose and eligibility rules of their "separate state programs" — that is, programs funded in whole or in part with MOE funds that receive no federal TANF resources. For activities that had not been authorized under the state's former AFDC-related programs, states would also have to report the level of spending in these programs in fiscal year 1995.[6] This would serve to help determine whether the reported expenditures meet the statutory requirement that expenditures claimed toward the MOE requirement be new spending — that is, spending above 1995 levels.

Analysis and Recommendations

The preamble indicates that the data states submit in the TANF Financial Report and the fourth quarter addendum will serve as the basis for enforcing the maintenance-of-effort requirement and determining whether states have appropriately spent TANF resources. As currently drafted, however, the TANF financial report and the fourth quarter addendum will not include key information necessary to enforce the MOE requirement effectively or to ensure that states have used their TANF funds appropriately.

When determining the types of financial information states should be required to report, it is important to recognize that the PRWORA does not establish a "TANF program." Instead, the law creates a funding stream — the TANF block grant — that can be used to fund a variety of activities. While some states may choose to operate a single program that receives all of the TANF block grant funds allocated to the state, other

[6] AFDC-related programs include AFDC, JOBS, Emergency Assistance, and the IV-A child care programs including child care for AFDC recipients, the At-Risk Child Care program, and the Transitional Child Care program.

states will use — as some already have — the flexibility of the block grant structure to fund a number of different programs with TANF funds. Without information about the nature of the programs and activities states are funding with TANF resources, HHS will not be able to determine whether TANF funds have been spent in accordance with the law. Moreover, in many cases states will use both state MOE resources and TANF resources to fund a variety of programs. Without information about the families served in programs receiving both TANF and MOE funds and the states' historic spending in such programs, HHS will be unable to enforce the requirement that funds claimed toward the MOE requirement be spent on "eligible families" and assure that the MOE funds claimed do not supplant other state funds.

In addition, to ensure that TANF funds are being spent to further the purposes of the block grant as outlined in the PRWORA and to ensure that MOE funds are "qualified state expenditures," HHS must gather both comprehensive financial data about program expenditures and information on the eligibility rules and services provided under programs being funded by both TANF and MOE funds. Such programmatic data, while needed to enforce these provisions, are not collected elsewhere.

While the proposed regulations would require states to report substantial financial and descriptive information on separate state programs, they would require little information on the programs funded in whole or in part with TANF funds:

- The proposed regulations would not collect information on state spending for programs that receive both TANF and MOE funds adequate to enforce the maintenance-of-effort requirement. Under the statute, state spending claimed toward the MOE requirement generally must meet the "new spending test" — that is, funds the state spent in 1995 that now meet the definition of "qualified state expenditures" may not be counted toward the MOE requirement.[7] The proposed regulations, however, would not require states to report 1995 spending levels in programs that receive both TANF and MOE funds thereby making a determination of whether the MOE funds being claimed meet the new spending test impossible. Similarly, states are not required to provide any information showing that the families that receive MOE-funded assistance in a program that receives both TANF and MOE funds meet the state's definition of "eligible family."

- While the proposed regulations would require more significant

[7]More precisely, under the PRWORA, states may only claim state spending on programs that were operating in 1995 and were not former AFDC-related programs toward their MOE requirement if that spending is in excess of what the state spent on that program in 1995.

descriptive and financial information on MOE funds spent in separate state programs (i.e., programs that receive no TANF funds), the proposed regulations would not collect enough information even on these programs to determine whether the spending claimed toward the MOE requirement meets the new spending test. Specifically, the proposed regulations would not require states to report total current year spending on programs funded with MOE funds making a comparison of 1995 spending and current year spending impossible. States also would not be required to report for either the current fiscal year or 1995 the level of state spending *on eligible families* as opposed to the total spending in a program funded in whole or in part with MOE funds. Without this information, HHS will be unable to determine the extent to which increased state spending in an existing program represents spending on *eligible families.*

- The regulations would not require states to submit any descriptive information about programs receiving federal TANF funds or the way in which TANF funds were used in those programs. The desegregate case-record data on families receiving *assistance* will provide information on those families and the benefits and services they receive. Under the proposed regulations, however, HHS, Congress, and the public will have little information on how federal TANF funds spent on "non-assistance." are used including whether they are spent in accordance with the Social Security Act.[8]

- The proposed regulations would not require states to report how they define "TANF eligible families" or to provide a description of how this definition meets the statutory requirement that assistance be provided for "needy families." This information is needed to determine whether funds claimed toward the MOE requirement are spent on "eligible families." In addition, since the statute requires that TANF assistance be directed toward "needy families," but leaves the definition of "needy" up to the state, policymakers and the public should know how the state has chosen to define need. Because HHS has authority to impose penalties on states that misspend TANF resources, it arguably can assess penalties on states that define "needy" in an unreasonable manner.

Recommendation 1: Require states to report similar descriptive and financial information for a

[8]The regulations propose a definition of "non-assistance" that would include benefits in services that do not have direct monetary value to the family or that one non-recurring cash payments. See comments, at section XII.

program that receives both TANF and MOE funds as the regulations require for a separate state program.

The regulations would require states to submit information on separate state programs needed to determine that funds claimed toward the MOE requirement are spent on "eligible families" and meet the new spending test. Similar information on any program that receives both TANF and MOE funds is not, however, required. The regulations should require states to submit the following information in the fourth quarter addendum to the TANF Financial Report:

- *Historic (1995) state spending levels for all programs in which state spending is claimed toward the maintenance-of-effort requirement, including programs that receive TANF funds.* Without this information, the new state spending test cannot be enforced for programs that also receive TANF funds. Suppose a state used some of its TANF resources to provide transportation assistance within an existing state transportation program. The state might also claim some state spending in this program toward the MOE requirement. The state should not be able to claim all of the state spending in this program toward the MOE requirement since the state was already spending state dollars on this program in 1995. Under the proposed regulations, HHS will not know the 1995 level of state spending in this program.

  In addition, the regulations need to clarify how the new state spending test will be enforced in state programs that existed in 1995 (and were unrelated to former AFDC programs) and that now receive both TANF and MOE funding. For the new state spending test to be meaningful in programs that receive both MOE and TANF funds, the level of MOE funds a state can claim in such a program should be equal to the difference between current year state spending on eligible families in the program and the sum of fiscal year 1995 state spending on eligible families and the TANF dollars now used in the program. If this interpretation is not adopted, a state can render the new spending test virtually meaningless. Consider a state that spent $1,000 in a transportation assistance program in 1995. Now suppose the state opts to spent $100 of TANF funds in that program and total spending in the program rises to $1,100. If the interpretation recommended above is not adopted, the state could claim $100 as MOE spending by arguing that the TANF dollars supplanted prior state spending and that the additional $100 spent in the program is new state spending.

  Congress made clear that state spending in existing state programs (other

than former Title IV-A programs) could not count toward the maintenance-of-effort requirement unless that spending was in excess of 1995 spending levels. In the example above, the state is still spending $1,000 in state funds on the transportation program. Since no state funds in excess of 1995 levels were expended, the state should not be able to claim any spending in this program toward the MOE requirement.

- *A description of the TANF-funded programs for which state spending is being counted toward the MOE requirement and the state is claiming that such spending is **not** required to meet the new spending test because it would have been eligible for a "payment under section 403 (as in effect immediately before such date of enactment) with respect to such expenditures." (Section 409(a)(7)(B)(I)(bb) of the PRWORA.)* The proposed regulations would require states to indicate whether activities funded with MOE resources in a separate state program "had previously been authorized and allowable as of August 26, 1996 under section 403 of prior law." (Appendix D, section 3, proposed regulations.) There is nothing in the statute that requires a state to use its TANF funds only in programs for which federal financial participation under former section 403 of the Social Security Act would have been available. Therefore some programs that receive both TANF and MOE funds will be required to meet the new spending test while others will not. Thus the regulations should require states to describe those programs that it believes were authorized under former section 403.

- *For programs that receive both TANF and MOE funds, the regulations should require states to submit a description of the MOE-relevant eligibility criteria used for families that receive assistance or services with MOE funds and a certification that these families meet the state's definition of "eligible families."* Under the proposed regulations, states would be required to provide this information for programs that receive no TANF funds but are funded, at least in part, with MOE funds. Similar information is also needed for programs that receive both TANF and MOE funds. A program that receives some TANF funding might provide state-funded assistance or services to families that do not meet the definition of "eligible families" but such funding may not be counted toward the MOE requirement. For example, consider a state that uses TANF and state funds in an emergency assistance program. To the extent the state funds are spent on "eligible families," the expenditures may count toward the MOE requirement. However, if the state also uses some state resources to provide emergency assistance to single individuals without children, those expenditures may not count toward the MOE requirement.

This information is also needed because TANF funds may be appropriately used in a program in which state spending could not be counted toward the MOE requirement. A state could properly use TANF dollars to fund a program that provides counseling services (which are not within the definition of "assistance") to help "encourage the formation and maintenance of two-parent families" — one of the purposes of the TANF block grant. State funds used to provide such counseling can only be counted toward the MOE requirement, however, if the families served meet the state's definition of "eligible families."

Recommendation 2: Even for separate state programs, some additional information is needed to enforce the "new spending test" for maintenance-of-effort spending.

The fourth quarter addendum to the quarterly financial reports in the proposed regulations requires states to report detailed information on programs funded only with state funds (separate state programs) including information needed to ensure that spending claimed toward the MOE requirement meets the new spending test.

Yet for two reasons, the proposed regulations do not require sufficient information to determine whether the state is meeting the new spending test. (As has already been discussed, MOE-related information needed to enforce the new spending test must be collected on both separate state programs and certain programs that are funded with both TANF and MOE funds.)

- To determine the amount of *new* spending, the state must be required to report total state spending for a program for which MOE spending is being claimed in the current fiscal year in addition to total spending in FY 1995. For example, HHS would not have enough information if a state claims $1,000 in MOE funds for a separate state and reports that it spent $500 for that program in 1995, unless the state also reports that total state spending in the current year is $1,500. The proposed regulations do not require states to report the total spending on separate state programs in the current year.

- Even if states report that total spending for programs for which MOE funds are being claimed in the current fiscal year is higher than in FY 1995, it is not clear whether the additional funding is being spent on *eligible families*. While the statute is somewhat unclear on this point, it would appear that the intent of the new spending test and the general requirement that MOE funds be spent on "eligible families" is that

spending may only count toward the MOE requirement if it represents an increase, over 1995 levels, of *spending on eligible families.* If this is indeed the intent, the requirement in the regulations that states report the number of eligible families served in separate state programs is insufficient.

In order to document whether spending above 1995 levels is being used to serve eligible families, HHS must require states to report spending *on eligible families* in 1995 as well as spending on eligible families in the current fiscal year. An example helps illustrate this. Consider a state that spent $500 on a state program in 1995 and $1,500 this year. Under the proposed regulations, if the state shows that it is spending $1,000 of the current program funds on eligible families, it would to be able to count the entire $1,000 toward MOE. But if the state had spent the entire $500 of 1995 program spending on eligible families, then the actual level of *new spending on eligible families* would be $500 ($1,000 in the current year minus $500 in 1995).

In cases in which the state does not know the precise level of 1995 spending that was on "eligible families," the regulations should permit states to use a reasonable estimating methodology. If the state is unable to determine or estimate the amount of spending on eligible families in 1995, it would need to otherwise demonstrate that *all* of the increase in spending relative to 1995 funding levels the state is claiming toward the MOE requirement has been targeted on eligible families.

Recommendation 3: Additional information is needed to ensure TANF funds are spent in accordance with federal law.

While states have broad flexibility in the way they spend TANF funds, those funds must still be spent in ways that meet the broad purposes of the law. Specifically, the funds must be spent to "provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;" "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;" "prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies;" and "encourage the formation and maintenance of two-parent families." To ensure TANF funds are spent to further these purposes, HHS should require the following:

- *A description of each program that receives TANF funds.* The description should include the programs' purposes, an explanation of the population

served by the program, and a description of the services and assistance provided through the program and, if applicable, the part of the program funded with TANF funds. The description should also include the state's definition of "eligible families" and an explanation of how this definition meets the statutory requirement that assistance be provided for "needy families."

- Without this information, HHS, policymakers and the public will have little way of knowing how TANF funds are used, particularly TANF funds used for "non-assistance." No descriptive programmatic information is required for TANF-funded programs providing "non-assistance" and no disaggregated case-record data are required on recipients of "non-assistance." For example, if the state were to create a new domestic violence counseling program using TANF funds, the spending would be listed under "non-assistance, other" on the proposed form and HHS would have no information on how these funds were used. More troubling, if a state spends funds in an impermissible manner, it could simply list that funding in the "non-assistance, other" category. In such a case, it would be difficult for HHS, policymakers and the public to discover that the state had spent funds in violation of the law. Such descriptions will also ensure that the appropriate TANF-related requirements have been applied to TANF-funded programs and that states have reported desegregate case-record data on all TANF-programs that provide "assistance" to families.

- *The level of TANF and the level of MOE funding each TANF-funded program receives.* Additionally, HHS may want to require states to report the level of TANF funds and MOE funds spent on the various forms of assistance and non-assistance specified in the financial report (Form ACF-196) included in Appendix C. This would enable policymakers and the public to understand how TANF funds are distributed across different programs within a state.

Recommendation 4: HHS should gather information on legislated TANF rainy day reserves.

Under PRWORA, states are not required to spend all of their TANF block grant funds for a given fiscal year within the 12 months of that fiscal year. Any funds that are unspent at the end of the fiscal year do not lapse. On the contrary, states can draw their TANF funds for a given fiscal year at any point in the future. Consistent with this provision, the proposed financial reporting form includes a line for "unobligated federal balances."

There are a number of reasons why a state would not spend all of its TANF block grant in a given year. For example, a state could have unobligated balances if it budgets all of its block grant funds but spends less during the year because demand for services or cash assistance falls below budgeted projections. A balance might also arise if a state does not appropriate all of its TANF funds because it does not need the full block grant amount for the level of services it wishes to provide that year.

States also may choose to use less than the full block grant amount because they wish to reserve some federal funds for future use. For example, states may face increasing spending demands over the next few years as the required work participation rate rises to 50 percent, as states struggle with the families that are hardest to serve, or as the need for child care funding grows sharply. States also may wish to reserve federal TANF funds for unexpected increases in need resulting from an economic downturn. Given that TANF block grant funds are fixed and will not increase should need increase, it is a prudent strategy for states to reserve some TANF funds for future needs.

In such cases, states may reserve TANF funds in a legislated "rainy day" fund.[9] The legislation may set conditions for the expenditure of these funds, such as a need to increase the work participation rate or specified signs of economic downturn, or the legislation may allow the state to spend the funds at any time they are appropriated by the legislature.

While such TANF rainy day funds do not reflect actual TANF expenditures and are not an obligation of federal funds, they are not fully unobligated funds from the state's perspective. Thus, while it is not mandatory for financial reporting purposes that HHS gather information on TANF rainy day reserves, it still would be useful information to collect for the purpose of monitoring state activities under PRWORA. This could be accomplished by adding one line to the quarterly financial reporting form after "line 10. Unobligated Balance" that identifies the amount of this balance set aside in a legislated TANF reserve account. Because HHS may not have statutory authority to *require* states to report this information, the regulations could request states provide the information but make clear that states will not be subject to a fiscal penalty for failing to report the information.

[9]When a state legislates a rainy day fund, the state can not actually draw down the funds from the federal Treasury Department and put those funds in a state bank account. The Cash Management Act prohibits this. Thus, if a state legislates a rainy day fund, the funds remain with the federal government, but based on the state's law, the state can only access those funds under the conditions specified in its state statute.

VI. Data Reporting Requirements Should Assure That Policymakers and the Public Have Adequate Information on Families Applying for, Receiving, and Leaving Assistance.

Background

The proposed regulations would require states to collect and submit data about the families they serve in their TANF-funded programs and programs funded with MOE funds but not TANF funds. States would be required to collect two types of data — disaggregated case-record data on families receiving assistance and families whose cases have closed and aggregate information on the number of applications submitted and approved, the number of recipients, and the number of closed cases.

The PRWORA grants states broad flexibility to use TANF funds as well as state MOE resources to design and operate programs that meet the broad objectives of the law — such as providing assistance to needy families and assisting parents prepare for, find, and retain employment — as well as the specific requirements of the law such as meeting the work participation rates. While the PRWORA grants states wide discretion, it also seeks to hold them accountable for their performance in meeting both the broad objectives and the specific requirements of the law. The data states are required to collect and report on families are the primary mechanism by which states will be held accountable for meeting such specific requirements as the work participation rates and broader welfare reform goals such as helping parents find employment.

The regulations translate the statutory data requirements into concrete data elements states must report in a manner that ensures that the data states report will enable policymakers and researchers to answer key questions about welfare reform. The regulations appropriately seek to ensure that states report comparable data so that families, programs, and outcomes can be compared across states. HHS appropriately uses its regulatory authority to ensure that broad concepts on which Congress requires states to report — such as "unearned income" — are defined within the data collection requirements so that the data will be consistent across states that may define such concepts differently within their programs. HHS has also appropriately defined "family" for purposes of the data collection requirements to ensure that differences in states' definitions of the assistance unit do not make cross-state comparisons difficult.

The comments below seek to improve the proposed regulations and address the following areas:

- *Data on Closed Cases* — These comments focus on the way in which states

report reasons for case closure as well as provide technical comments on the month for which states should report information on closed cases.

- *Data on Applicants* — These comments seek to ensure that HHS has basic information on the reasons for application denials.

- *Disaggregate Case-Record Data on Separate State Programs* — Because some of the data required on separate state programs may go beyond HHS's regulatory authority, these comments discuss the data that are needed in order for HHS to meet its regulatory responsibilities. This section also discusses the need for more state flexibility in data collection on such programs in cases in which the design of a separate state program makes the standard data collection requirements unreasonable.

- *Technical Comments on Particular Data Elements* — These comments focus on specific disaggregate case-record data items that need revision.

A. Disaggregate Case-Record Data on Closed Cases[10]

Section 411 of the PRWORA requires states to report the reasons for case closure for a sample of families that no longer receive assistance in a TANF-funded program. The proposed regulations would require states to also provide information about characteristics and financial circumstances of families that no longer receive aid.

Analysis and Recommendations

Among the most important data collection requirements in the PRWORA is the requirement that states report disaggregated information on closed cases. Over time, these data will help policymakers and the public understand the reasons family leave assistance and the characteristics of those families. The proposed regulations appropriately interpret section 411 of the PRWORA as providing HHS the authority to require states to report not only the reasons for case closure but demographic and financial information about families leaving assistance.

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[10]These comments apply to the disaggregate case-record data the regulations would require states to collect on families receiving assistance and families no longer receiving assistance under a TANF-funded program. To the extent that similar information is being collected on families receiving assistance (or no longer receiving assistance) under a separate state program, these same comments apply. Particular issues related to HHS's authority to require these data on separate state programs are addressed below.

Three important changes, however, need to be made to the proposed regulations on these data collection requirements:

- The list of reasons for case closures needs to be expanded and the categories made more specific in order for policymakers and the public to understand the circumstances under which families leave assistance.

- The regulations should clarify that the data collected on closed cases should generally reflect the family's circumstances *at the time a termination decision is made*. That is, states should not be required to gather information on families in the month after the decision is made by the state (or by the family in the case of a family that voluntarily closes its case) to terminate assistance to the family. Moreover, the regulations should provide additional guidance to states on how these data should be reported in the case of a family whose case is closed because the family fails to respond to procedural or verification requirements — such as a case in which aid is terminated because a family fails to attend redetermination appointments and, therefore, the state may not have current information about all aspects of the family's circumstances.

- States should be given guidance on the circumstances under which a family subject to a "full-family" sanction should be considered a "closed case" and when it should be considered an open case under sanction.

Recommendation 1: HHS should improve the list of reasons for case closures.

Section 411 of the PRWORA requires states to provide information on the reasons for case closure on a sample of closed cases. The statute specifies that states must report on the number of cases closed due to employment, marriage, the five-year time limit, sanction, and state policy. The proposed regulations would add two additional categories – "minor child absent from the home for a significant period of time" and "transfer to Separate State MOE program." The seven specific case closure reason categories in the proposed regulations will not provide information policymakers and the public need to understand why families leave assistance. For example, based on the proposed reasons for case closure, policymakers will not know how many cases close due to a state time limit that differs from the federal time limit, how many cases close because the youngest child "ages out" of the program, or how many cases close because a parent failed to meet work requirements as opposed to other requirements, such as an immunization requirement.

While Congress specified five broad reasons for case closure, HHS has the regulatory authority to define, and where necessary divide into several categories, the broad case closure reasons in the statute. The statute sets out broad categories of case closure reasons that are not appropriate for actual data collection if the data are to be informative and comparable across states. In fact, HHS used this regulatory authority to add the categories "minor child absent from the home for a significant period of time" and "transfer to Separate State MOE program" — two reasons included in the proposed regulations but not in section 411 of the PRWORA. Similarly, HHS has used this authority elsewhere in the data collection requirements. For example, the statute mandates that states report families' level of "unearned income." HHS used its regulatory authority to include several data elements that ask about families' levels of different types of unearned income.

Below is a list of case closure reasons that would provide more specific information on the circumstances under which families leave assistance programs:

- Family exhausted the state time limit (if state time limit differs from federal 60 month limit)
- Family exhausted the federal 60-month limit on assistance
- Family became ineligible for assistance because youngest child was too old to qualify for assistance
- Family became ineligible for assistance due to child support collected on its behalf
- Family became ineligible for assistance due to other unearned income
- Family became ineligible for assistance due to earnings
- Family voluntarily closes case
- Family became ineligible due to work-related sanction
- Family became ineligible due to child-support-related sanction
- Family became ineligible due to teen parent failing to meet school attendance requirement
- Family became ineligible due to "other" sanction

- Family became ineligible base on its failure to appear at a redetermination appointment or submit required verification materials

- Family became ineligible because the parent married and, despite remaining categorically eligible, the spouse's income placed the family above the income-eligibility limit

- Family became ineligible because the parent married and the family became categorically ineligible for aid

The reason for case closure is the most important data element in the set of disaggregated case record data on closed cases. This element will provide an important part of the answer to the question, "How are families being affected by welfare reform?" Without more specificity on the reasons families leave the rolls, however, policymakers and the public will have limited information about the effects of various policies on families' continued eligibility for aid. It should be noted that making the case closure reasons more specific should not increase significantly the data collection burden on states. When terminating a family from assistance, a state should be able to classify the reasons it took that action into more specific categories.

Recommendation 2: HHS should clarify the reference time period for the data collection requirements on closed cases and provide further instructions to states on how to report information when verified information is unavailable.

The preamble and appendices to the proposed regulations leave unclear whether the information states must report on families that leave assistance should reflect the family's situation in the month the termination decision is made or in the first month in which the family receives no assistance. The preamble suggests the intent was for states to report information about families in the month the decision to terminate them from assistance is made. The preamble states, "...we only expect States to collect these data at the time the families are leaving the rolls..." Appendix H, however, seems to suggest that the information must refer to the first month in which families receive no assistance. In the discussion on sampling methodology, Appendix H states "For closed cases, the monthly TANF sample frame must consist of an unduplicated list of all families who[se] assistance under the State TANF Program was terminated *for the reporting month...but received assistance under the State's TANF Program in the prior month.*" [Emphasis added.] This suggests that the "reporting month" refers to the first month in which the family received no assistance. Therefore, when the instructions for the data element on subsidized housing (item 11, Appendix B) state, "Enter the one-digit code that indicates whether or not the TANF family received subsidized housing for the *reporting month",* the implication is that the state should report this information for the

first month in which the family did not receive assistance. [Emphasis added.]

This confusion may lie in the difference between how the sample of closed cases should be constructed and the month to which information reported should refer. The sample should be constructed in the manner described in Appendix H — only families that did not receive assistance in the sample month but received assistance in the prior month should be included. With one important exception discussed below, however, it will be difficult for states to report accurate information on the circumstances of families in a month in which they receive no assistance and, therefore, may have no contact with the TANF-administering agency. Therefore, while the sample should be constructed from the set of families that receive no assistance in a particular month but received aid in the prior month, the data states report should reflect families' circumstances in the last month they received aid.

While states will generally have difficulty reporting data on families in the month they receive no assistance, states can and should report "prospective" income and resource information for families whose assistance is terminated based on a prospective determination of income and resources. That is, if a state determines that a family will no longer be eligible for assistance in the following month based on a prospective estimate of the family's income and resources (for example, the income estimated when a parent reports that she has found employment), the state should report those prospective estimates as well as the family's income and resources in the final month it received aid.[11]

Consider the following example: Suppose a state determines that a family that received assistance in January will no longer be eligible in February based on a prospective estimate of the family's February income. The state will readily have both the family's January income information as well as the estimate of its February income upon which the determination was made that the family would no longer be eligible for aid in February. Because states have this information, it would be useful if they were required to report prospective income (or resources) for those families for which the decision to terminate their benefits is based on a prospective estimate of the family's income (or resources.)

HHS should also instruct states that terminate a family's assistance based on retrospective budgeting to use as their best estimate of the family's income in the last month it received assistance the income upon which the state based its termination

[11]If HHS decides not to require both income measures, it is more important to know the income upon which the termination decision was based than the family's income in the last month it received assistance. The states must, however, indicate whether they are reporting prospective income or income in the final month assistance was received so data users understand the information provided.

decision. For example, suppose a family reported to a state in early February that its January income had increased and, based on that income level, the state decided to terminate the family's assistance effective in March. The last month in which the family received assistance would be February; however, the state might not have a verified income level for February because it employs retrospective budgeting. In such a case, the state should use the family's January income as its "best estimate" of its February income.

Finally, the regulations should provide instructions to states on how data on a family that is terminated for failing to appear at a redetermination appointment or submit required verification materials should be reported. Many families are terminated from assistance for such reasons. In these cases, states may not have accurate information on the circumstances of the family in the month in which the termination decision is made precisely because the family has not provided that information to the state. While there is nothing in the proposed regulations that would instruct states to do otherwise, HHS should clarify that in such a case, the state should simply report the best information it has on the family for the last month the family received assistance.

Recommendation 3: HHS should provide instructions to states on the circumstances under which a family subject to a "full-family" sanction should be treated as a "closed case."

Some states that impose a full-family sanction on a family close the family's case while other states consider the family a "recipient family" receiving no grant due to a sanction. To ensure uniformity, HHS needs to clarify how such families should be treated for purposes of the data requirements. The regulations could mandate that all states treat a family receiving no assistance due to the imposition of a full-family sanction as a "closed case" for purposes of data reporting requirements. If this approach is adopted, however, one data element included in the case-record data on open cases but not on closed cases — "Is the current month exempt from the State's Time Limit" — should be included so that the number of families receiving no assistance but for whom the time limit "clock" is running can be determined.

Alternatively, the regulations could instruct states on the circumstances under which families subject to full-family sanctions should be treated as recipients for data collection purposes. The following would be one reasonable way to provide such guidance to states:

- If the state keeps the "time limit clock" running for a family that is ineligible for assistance because it is subject to a full-family sanction, the family should be treated (for data reporting purposes) as a "recipient

family" that receives no grant due to a sanction. Such families should be part of the sample of families "receiving assistance." If this approach is adopted, however, a family that receives no assistance due to a full-family sanction should *not* be included in any aggregate information or tabulations states or HHS report on families "receiving assistance."

- If a state closes the case of a family subject to a full-family sanction — that is, if the family would be required to reapply to receive assistance again — *and* if the "time limit clock" is not running, the family should be treated as a closed case.

If states are going to be given discretion in this area, it is important that each state that imposes a full-family sanction provide a description of the circumstances under which it has included families subject to a full-family sanction as a "recipient family" and as a "closed case." These descriptions should be published by HHS as part of its documentation that will accompany the public release of these data.

B. Data on Applicants

Overview

Under the proposed regulations, states would provide information on "applicants" for assistance in the following ways:

- In the disaggregated case record data on families receiving assistance under a TANF program, states must specify whether the family receiving assistance did not receive aid in the preceding month. That is, states must indicate which families are "new recipients."

- In the aggregate data on TANF-funded programs, states must report on a monthly basis the number of applications submitted, the number approved and the number denied.

- States submitting data on families receiving assistance in a separate state program would indicate in their disaggregated case record data which families were new recipients and would report the total number of applications submitted, the number approved and the number denied.

The primary statutory basis for these requirements stems from section 411(b) of the PRWORA which requires HHS to submit an annual report to Congress on the characteristics of families applying for (as well as receiving and leaving) assistance.

Analysis and Recommendations

These data will provide HHS little information about the characteristics of families *applying* for assistance. The disaggregated case record data will only provide information on the characteristics of new *recipients* who are likely to differ in important ways from families that apply for assistance but do not become recipients. The preamble recognizes this shortcoming and indicates that HHS will also undertake special studies to learn more about the characteristics of families applying for aid.

While special studies can provide important information about the characteristics of applicants as well as the effects of policies such as formal and informal "diversion" programs that seek to reduce the number of applicants that become recipients, some additional basic data about applicants and policies affecting applicants should be collected from every state if HHS is to meet its responsibility to Congress under section 411(b).

Recommendation 1: *States should be required to submit information to HHS on withdrawals applications and reasons for denials of applications.*

- *Aggregate information on how many families voluntarily withdrew their applications in addition to the number of applications approved and denied.*

- *Aggregate information on the number of applications denied due to specific reasons*. The list of reasons for application denials should include: the number of families whose applications were denied based on failing to meet specific applicant conduct requirements imposed by the state,[12] the number denied for failing to meet categorical eligibility requirements, and the number denied for failing to meet income-eligibility and/or resource standards, and "other." Without information on the reasons for application denials, the data HHS would collect on applicants — the number submitted, accepted and denied — will be much less informative. The policy implications of a high denial rate are different if those denials stem from large numbers of families failing to meet financial eligibility criteria rather than for families failing to meet applicant conduct

[12]If the state imposes several such conduct requirements — such as a required number of employer contacts, a requirement that the children be immunized, and a requirement that the parent attend an orientation — the state should report the number of applications denied based on families' failures to meet *each* of these requirements. This will enable policymakers and the public to understand the extent to which failing to meet particular conduct requirements led to application denials.

requirements.

This information will enable HHS to include in its annual report to Congress information about the reasons for application denials. In addition, these data will help HHS design its special studies on applicant characteristics. For example, by looking at these data, HHS can determine the states in which conduct requirements placed on applicants lead to a large number of application denials. If this is an area that seems to warrant investigation based on the information states submit, HHS could choose to conduct a special study on the implications of applicant conduct requirements in a set of states representative of the national variation in the extent to which applicant conduct requirements affect application denials.

C. Disaggregated Data Collection on Families Receiving Assistance and Families No Longer Receiving Assistance in a Separate State Program

Overview

Under the proposed regulations, states that wish to receive a caseload reduction credit or a high performance bonus must submit disaggregated case record data on families receiving assistance in "separate state programs" and on families that leave such programs. A "separate state program" is defined as one which receives no federal TANF funds but is funded, in whole or in part, with state expenditures that count toward the maintenance-of-effort requirement.

As discussed in the preamble, HHS does not assert that it has the regulatory authority to *require* all states to collect disaggregate case-record data on families receiving assistance (or families no longer receiving assistance) in a separate state program. Instead, HHS maintains that it does have the authority to require states to submit information needed to compute the caseload reduction factor in accordance with the statutory requirement that "The regulations...shall not take into account families that are diverted from a State program funded under this part as a result of differences in eligibility criteria under a State program funded under this part and eligibility criteria under the State program operated under the State plan approved under part A (as such plan and such part were in effect on September 30, 1995)." (Section 407(b)(3)(B) of the PRWORA.) Placing families in a separate state program could represent an "eligibility change" that reduces a state's TANF caseload. In such a case, the extent to which the state's TANF caseload was reduced must be taken into account when calculating the caseload reduction factor. Because families served with MOE funds must meet the state's definition of "eligible families," it is reasonable for HHS to pay particular attention to whether these families should be considered part of the caseload for

purposes of the caseload reduction factor.

Analysis and Recommendations

Questions have been raised about whether HHS has the authority to require states wishing to benefit from the caseload reduction credit or the performance bonus to report disaggregate case-record data on families receiving or no longer receiving assistance in separate state programs. The assertion that HHS needs some disaggregate case-record data on separate state programs to implement the caseload reduction credit properly is, however, reasonable. In addition, HHS arguably has the authority to require some disaggregate case-record data on separate state programs from *all* states. This authority would stem from its authority to enforce the maintenance-of-effort requirement that MOE funds must be spent on "eligible families." HHS can use this regulatory authority to require enough disaggregated information about families receiving assistance in a separate state program to ensure that families meet the state's definition of an "eligible family." In the proposed regulations, HHS only requires states to report its eligibility criteria for a separate state program and to certify that funds claimed toward the MOE requirement were spent on "eligible families." It is reasonable for HHS to take the position that a mere certification by the state that it had obeyed the law was not adequate and that disaggregated case-record information on families receiving assistance in separate state programs is required to enforce effectively the requirement that MOE funds be spent on "eligible families."[13]

HHS should exercise regulatory authority under either, or both, of the bases described above to require some disaggregated case-record data on families receiving assistance (or leaving assistance) in separate state programs. This information will assist policymakers in understanding the structure of states' welfare systems, how MOE funds are spent, and how states use the increased flexibility separate state programs afford them to meet the needs of low-income families. However, the value these data will provide must be weighed against the burden the requirements place on states and the extent to which unreasonable data collection requirements could limit states' ability or willingness to use the greater flexibility a separate state program (or programs) — allowable under the statute — affords states in meeting the needs of low-income families.

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[13] A state's description of the eligibility criteria used in the program is also not sufficient. A state may fund a program in part with MOE funds and in part with other state resources. The eligibility criteria of the program may, in fact, be broader than is allowed under the definition of "eligible families." Even if the state's eligibility criteria for the separate state program are not broader than the definition of "eligible families," it would still be reasonable for HHS to require disaggregate case-record data on families served under a separate state programs to ensure MOE funds are spent on "eligible families."

Based on these competing goals — the importance of having comprehensive information about states' welfare systems versus a reasonable data collection burden on states — the following modifications should be made to the requirements that states report disaggregated case-record data on families receiving (and leaving) assistance in separate state programs:

- The list of required data elements should be narrowed by excluding data elements unrelated to determining how families served in a separate state program should be considered for purposes of the caseload reduction factor and whether the family meets the definition of "eligible family."

- States should be permitted to submit an alternative data collection plan if the design of their program makes the collection of the required elements unreasonable. As discussed above, states may use MOE funds within programs that serve a broader range of families or programs that provide benefits that are quite different from traditional cash assistance benefits. (See separate state program discussion in section II.) The regulations should recognize that the data states may have available to them may differ based on varying program structures.

Recommendation 1: HHS should narrow the list of required data elements.

When considering whether a data element should be included in the disaggregate case-record data on families receiving assistance in separate state programs, two criteria should be considered. First, does the element provide information needed to determine how the family should be considered when evaluating the state's caseload reduction credit? Second, does the data element provide information which will help HHS determine whether the family meets the definition of "eligible family"? If either of these criteria are met, the data element should be included.

Based on these criteria, the following sets of data elements should be included in the disaggregated case-record data on families receiving assistance in separate state programs:

- *Data on family's income and resources and an indication of who within the family is part of the "assistance unit" for purposes of receiving assistance in the separate state program.* These elements provide information needed to determine whether the family meets the definition of "eligible families" and whether some or all of the families served by MOE funds in a separate program should be "added-back" to the state's TANF caseload for purposes of

calculating the caseload reduction factor.

- *Data on the type and level of benefits and services provided to the family*. These data will help HHS determine whether some or all of the families served in a separate state program should be considered part of the "caseload" when determining the state's caseload reduction credit. HHS has indicated, for example, that low-income working families receiving certain types of benefits and services would not be "added" to the state's caseload when determining the caseload reduction credit. Section 271.42 of the proposed regulations state that cases that meet certain criteria — including "cases made ineligible for federal benefits by Pub. L. 104-93 that are receiving only State-funded cash assistance, nutrition assistance, or other benefits" and "cases that are receiving only State earned income tax credits, child care, transportation subsidies, or benefits for working families that are not directed at their basic needs" — do not need to be included when determining the state's caseload for purposes of calculating the caseload reduction credit.

- *Data on reasons for case closure.* The regulations suggest that the disaggregated data on case closures will help HHS determine whether the state's caseload reduction factor estimating methodology is reasonable. If these data are to be used in this manner, information on case closures in both types of programs is needed. The extent to which the caseload in a separate state program is reduced due to eligibility changes (as compared to the former AFDC rules in the state) should be considered when determining the number of families that should be "added-back" to the state's TANF caseload for purposes of calculating the caseload reduction factor.

  For example, suppose a state provides assistance to families with a disabled parent in a separate state program and that these families are generally included in the state's "caseload" when determining the state's caseload reduction factor. Suppose that in both the state's TANF program and its separate state program, the state lowers cash assistance eligibility levels (below former AFDC levels) to families that receive aid for more than 12 months. Under the proposed regulations (and the statute), caseload reductions in the state's TANF program due to the lowering of the income-eligibility limit at the 12-month point must be factored out of the caseload decline calculation when determining the caseload reduction credit. If those families in the separate state program would have been eligible for AFDC, the caseload declines in the separate state program due to the reduction in eligibility standards should also be factored out of the

caseload decline calculation.

To the extent that HHS decides to consider the nature, purpose, and performance of a separate state program when determining states' eligibility for a performance bonus, data on why families leave such programs could be needed.[14] For example, if one of the performance indicators HHS uses to determine eligibility for the performance bonus is the number of families that leave assistance due to an increase in earnings, information about case closure reasons in separate state programs would be needed.

- *Demographic characteristics.* To the extent that HHS decides to consider the nature, purpose, and performance of a separate state program when determining states' eligibility for a performance bonus, basic demographic information will be needed. For example, data about parents' education level or the geographic region in which families live would provide HHS information about the job-readiness of families served in the separate state program and the economic characteristics of the areas in which they live.

Recommendation 2: HHS should permit states to submit an alternative data collection plan in cases in which the basic data collection requirements for separate state programs are unreasonable given the design of their separate state programs.

While collecting uniform information on all states' separate state programs would make cross-state comparisons easier, the design of some separate state programs may make the collection of some information nearly impossible. For example, consider a state which funds part of a state earned income tax credit with MOE funds. Such a state will not have monthly income information or information on the number of people in the "family" as HHS has defined "family" for purposes of the data collection requirements. In such a case, the state should be permitted to submit an alternative data plan that describes alternative disaggregate data the state proposes to submit in lieu of the standard requirements. Subject to the approval of the Secretary, the state would be permitted to collect data in accordance with the alternative plan. The state would be responsible for providing adequate documentation describing each data element. A state that uses some MOE funds for a state EITC could, for example,

[14]Under the PRWORA, HHS is supposed to determine eligibility for the performance bonus based on "State performance in operating the *State program funded under this part* so as to achieve the goals set forth in section 401(a)." [Emphasis added.] Because the statutory language specifically refers to a state's performance in its TANF-funded program, it is unclear whether HHS has the regulatory authority to consider performance in a separate state program when determining which states qualify for a performance bonus.

provide disaggregated data that comprised of information taken off the tax form such as annual income (as measured under the state's income tax laws), the number of people in the tax filing unit (as opposed to the "family" as defined by HHS for purposes of data collection), the EITC awarded, and the total state taxes paid.

While the data states submit under an alternative data plan will not be consistent with the data other states submit, with adequate documentation, HHS and the public can use the information to understand the characteristics of families served by separate state programs, and to determine whether the families whose benefits are financed with MOE funds meet the definition of "eligible families."

D. Technical Comments On Disaggregated Data Elements

Below are comments on specific data elements and their coding. In cases in which the element is included in multiple data reports (such as the TANF Data Report on families receiving assistance, and the TANF MOE Data Report on families receiving assistance), the item number in the TANF Data Report on families receiving assistance is listed. The comments, however, apply equally to each data report in which they appear.

1. Receives Subsidized Child Care (Item 17 in TANF Data Report —Cases receiving assistance).

Section 411 of the PRWORA requires states to provide data on whether families receiving assistance also receive subsidized child care. The regulations would require states to report the source of funding for that child care assistance. While knowing the source of funding for child care assistance could be useful to policymakers, it is unlikely that states can accurately report this information. Caseworkers filling out a form with the remaining data items are very unlikely to have any way of ascertaining the source of funding for any particular family's child care subsidy. Moreover, HHS will have information from the TANF Financial Report on the level of TANF and MOE spending on child care and the amount of TANF funds transferred to the Child Care and Development Fund. This data element should be changed so that states are not required to report the funding source of a family's child care subsidy.

2. Social Security Number (Item 17 in TANF Data Report —Cases receiving assistance)

Adults in families receiving assistance in either a TANF-funded program or a separate state program may not have social security numbers for a variety of reasons. For example, there will be some adults who have applied for, but not yet received, a

social security number. In addition, there may be some adults who will not be in the assistance unit — but who are included in HHS's definition of "family" for purposes of the data reporting requirements — who are ineligible for a social security number based on their immigration status. The instructions to this data element need to make clear that there are a variety of reasons why an adult might not have a social security number and that providing a social security number is not a federal substantive eligibility requirement. In a case where no social security number available, the state should simply enter a "dummy code."

3. Receives Medical Assistance (Item 14 in TANF Data Report — Cases receiving assistance).

There are two issues relating to this data element. First, it is unclear from Appendix A to the proposed regulations whether states are to report whether the family is *eligible* for Medicaid or whether the family is actually *enrolled* Medicaid. The appendix instructs states to report this information in the following manner, "Enter '1' if, for the reporting month, any TANF family member is *eligible* to receive (i.e., a certified recipient of) medical assistance under the State plan approved under Title XIX or '2' if no TANF family member is *eligible* to receive medical assistance under the State plan approved under Title XIX." [Emphasis added.] The statutory requirement is to report whether families *"receive"* Medicaid and, therefore, states should report whether families are actually enrolled in the program not whether they are eligible for the program regardless of whether they are actually enrolled.

In addition, in the proposed regulations, this data element is a "family-level" characteristic rather than a person-level characteristic. That is, states report whether anyone in the family is enrolled in Medicaid, not whether each person in the family is enrolled. Information on the receipt of Medicaid, however, should be collected at the person level because all members of a family receiving assistance under a state TANF program may not be eligible (or ineligible) for Medicaid. This is true for two reasons. First, and most important, the receipt of TANF-funded assistance and Medicaid are not "linked" as receipt of AFDC and Medicaid were under prior law. Second, a "TANF family" for purposes of the data reporting requirements may not correspond to the TANF assistance unit in a state. Even if a state aligned its program rules so that all TANF recipients were eligible for Medicaid, some individuals included in the "TANF family" for data collection purposes may not be receiving TANF-related assistance.[15]

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[15]The statute does include receipt of medical assistance on a list of programs in which states must report whether *families* participate. Information on two of those programs — housing assistance and food stamps — is appropriately collected at the family level. The additional type of assistance on the list is child care assistance. Under the proposed regulations, HHS used its regulatory authority to

(continued...)

If this element is changed according to these recommendations, policymakers, researchers and the public will be able to determine:

- The extent to which individuals in families receiving TANF-related assistance are enrolled in Medicaid.

- The extent to which individuals in families receiving TANF-related assistance meet the Medicaid eligibility rules which can be determined based on the other information collected about the families and individuals but are not enrolled in the program.

The "de-linking" of Medicaid eligibility from receipt of cash assistance has raised concerns that some individuals who would have been automatically enrolled in Medicaid under prior law will not be enrolled in the program despite their eligibility. This might occur because the family is not given adequate information about Medicaid or the state inappropriately denies Medicaid to children in families in which the parent is being sanctioned in the cash assistance program. Data collected through the TANF data requirements could provide important information about the extent to which this concern has, or has not, been realized.

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[15](...continued)
require states to report family-level information about child care subsidies as well as additional person-level child care information. In a manner similar to the treatment of the receipt of child care subsidies, the regulations should be changed so that states report whether each member of the family is enrolled in Medicaid.

VII. The Regulations Should Not Limit the States' Ability to Aid Children in "Child-Only" Assistance Units.

Statutory and Regulatory Framework

The PRWORA measures a state's compliance with work participation rates and TANF time limits with respect to *families receiving assistance that include an adult*. Congress recognized that time limits and work requirements were not appropriate in child-only cases, that is, cases with no adult in the assistance unit. While making it clear that time limits and work requirements do not apply to child-only cases, the federal welfare law does not define situations in which a family receiving assistance could be defined as a "child-only" case.

The proposed federal regulations prohibit states from defining a "family receiving TANF assistance" in a manner that excludes an adult from the family, that is, as a child-only case, solely for the purpose of avoiding penalties. This prohibition is included in the regulations because HHS is concerned that states will create child-only cases (by excluding parents or caretakers from the assistance unit) in order to avoid including certain cases in the calculation of work participation rates or for purposes of measuring compliance with time limit requirements. Thus HHS proposes that it will not necessarily follow the state's definition of child-only cases in measuring compliance. Specifically, when measuring compliance with time limit or work participation rate requirements, the regulations propose to count those families that the state has defined as child-only cases if HHS finds that a state has defined families as child-only for the purpose of avoiding penalties for non-compliance. The proposed regulations also require states to report annually on the number of child-only families and the "circumstances underlying each exclusion." (Proposed 45 CFR §§ 271.22(2), 271.24(2) and 274.1(a)(3).)

Analysis and Recommendations

There are many legitimate reasons for states to define a child-only case as the family receiving TANF assistance. Historically, about 17 percent of the AFDC caseload has been child-only cases, that is, cases in which there is no adult in the assistance unit. Although the child must live with a family, the parent or caretaker relative was not always included in the AFDC assistance unit and for the same reasons should not necessarily be included in the TANF assistance unit.

The most common types of child-only cases are those in which a child lives with a non-needy caretaker relative, such as a grandmother receiving Social Security

benefits. States have always been permitted to treat these as child-only cases and they should be allowed to continue to do so. Another common group of child-only cases are those in which a child or children live with a parent who receives SSI. Under the AFDC program, states were not permitted to include an SSI recipient in the assistance unit. Most states are continuing the policy of excluding a parent on SSI from the TANF assistance unit and should be permitted to do so.

Another common group of child-only cases are those in which a child lives with a parent who is not eligible to receive assistance because of federal statutory restrictions. For example, a parent may be an ineligible immigrant with a citizen child or may be excluded due to a recent drug-related felony conviction. States must be able to treat these as child-only cases and HHS does not suggest otherwise.

Similarly, a state may decide to establish its own eligibility policies that exclude a parent or caretaker relative. For example, prior to passage of the PRWORA several states imposed limits on the length of time that an adult could receive assistance pursuant to waivers and continued benefits for the child-only unit after the time limit was reached. These adult time limits were not for the purpose of evading the time limits or work requirements of PRWORA (which did not then exist), but came about because the state made a legitimate policy decision to limit the duration of assistance to an adult but to continue to aid children.[16] The identical policy decision should be no less legitimate if another state makes it in 1998. In other words, states have legitimate reasons to provide aid to child-only cases that are not related to avoiding penalties. Another example would be a state policy decision to serve disabled a parent in its state disability program and provide benefits for the children through its TANF program.

In light of the legitimate reasons for and significant history of child-only cases, HHS should not place any limits on a state's definition of a child-only case as a family receiving assistance. No such limit is imposed by federal law. The proposed regulations unreasonably limit a state's discretion to define who constitutes "families receiving assistance" and are likely to deter states from serving needy children in child-only cases even when they have a legitimate policy basis that should meet HHS's standard.

The uncertainty of knowing whether their policy basis will be considered legitimate and how work participation rates and time limit compliance will be measured by HHS could simply lead states to avoid serving children as child-only cases even if the result is not to serve the children at all. If HHS nonetheless imposes limits on states' discretion in this area, the regulations should articulate a standard that defers

[16]HHS acknowledges in the preamble discussion of section 274.1 that it would accept the states' definition of child-only cases for these waiver states.

to state policy judgments and accepts any reasonable policy rationale of the state.

Another problem is that states will not know in advance whether HHS will accept the validity of the states' definition and its child-only categories. Because no HHS determination is made until compliance is measured and HHS is considering imposing penalties, a state will not know in advance whether its child-only cases will be added back in when measuring its compliance with time limit and work participation rate requirements. This is likely to cause states to be very cautious about pursuing legitimate policy options because they would be unable to ascertain early on whether the policy will be accepted.

Recommendations

Recommendation 1: HHS should not restrict states' ability to define "child-only" cases.

The definition of a child-only case as a "family receiving assistance" should be left to the state without any of the limitations or restrictions set forth in the proposed regulations. The federal law imposes none of these restrictions or limitations.

Recommendation 2: If the regulations do limit a state's ability to define "child-only" cases, they should articulate a standard that defers to state policy judgments by accepting any reasonable policy rationale of the state and provide guidance on the application of the standard.

The regulations should set forth that a state's definition of child-only cases as "families receiving assistance" will be used in measuring compliance with time limit requirements and work participation rates as long as the state has any reasonable policy rationale for its definition. This means that HHS would not add back child-only cases in measuring compliance unless HHS determined that there was no reasonable policy basis for the exclusion of the parent or caretaker and the state undertook its policy solely to avoid penalties.

There is variation in the proposed regulatory language which refers to impermissible exclusions as those which are "solely for the purpose of avoiding penalties" at some times and simply "for the purpose of avoiding penalties" at other times. (Proposed 45 CFR §§ 271.22(2), 271.24(2) and 274.1(a)(3).) If the final regulations retain this approach, they should specify the "solely"standard will be relied on for all occasions.

HHS should also provide factors to consider or examples as to what would constitute permissible basis for excluding the adult and establishing child-only cases. Certainly a permissible basis for exclusion exists when the adult is not eligible for

TANF-funded assistance under federal restrictions. Another example of a permissible basis for excluding the adult should exist when the state is serving the adult in another program more appropriate to his or her needs (e.g. a program for disabled adults). In addition, HHS should clarify that any circumstances which were permissible child-only cases under the AFDC program will be considered permissible child-only cases in TANF. These include cases in which a non-parent caretaker is the adult in the household or in which the parent or caretaker is not included in the TANF assistance unit because of receipt of SSI benefits. These should also include policies that were available under former law or waivers such as a time limit on the period of time for which assistance will be provided to an adult. Such formerly permissible categories of child-only cases should be available for any state, even if the particular state did not previously use this aspect of the prior law to create child-only units.

Recommendation 3: If the regulations do limit a state's ability to define "child-only" cases, they should include a process that allows a state to know at the outset that its categorization of child-only cases is permissible.

HHS should provide states with up-front guidance and its determination on permissible child-only cases. In order to provide states with some certainty with respect to work participation rates and time limit policy, the regulations should provide a state report at the outset to HHS the circumstances under which its definition of child-only cases would count as "families receiving assistance." HHS should then notify states promptly and with particularity if it determines that the state does not have a reasonable policy basis for any part of its categorization and finds that the state has created a category of child-only cases solely for the purpose of avoiding penalties.

The proposed regulations require states to report annually on the number of child-only families and the circumstances underlying their exclusion. A state should only be required to report the number of cases which fall into the category that HHS had already determined were impermissible child-only cases. HHS should also clarify that it is not requiring states to report on the circumstances of each individual case that is excluded. (The language in the proposed regulations on this point as drafted is confusing.) Rather, HHS should clarify that it is requiring the state to report on the number of cases in the different categories of child-only cases, or preferably, in the impermissible categories of child-only cases.

VIII. The Regulations Should Not Narrow the Congressional Commitment That States Can Continue the Policies Adopted Through Their Welfare Reform Waivers.

Statutory and Regulatory Framework

Prior to the enactment of the PRWORA many states had already developed and implemented state-based approaches to welfare reform pursuant to waivers. In enacting the federal welfare law Congress decided that states should be able to continue their waiver programs and specifically mandated HHS to "encourage" states to do so. Section 415 of PRWORA provides that, for the duration of the state's waiver, provisions of the PRWORA shall not apply to the state to the extent that the provisions are inconsistent with the state's waiver.

In enacting section 415, Congress recognized that many states were already in the midst of ambitious waiver demonstrations and evaluations of their waiver programs. States had been using waivers to shape and test their own approach to welfare reform. Often a state's waiver program resulted from an elaborate public or political process with a significant local commitment to the agreed-upon approach taken in reforming welfare. Section 415 enables states to continue these state-based initiatives even if particular aspects of state waiver policies are inconsistent with TANF provisions. Section 415 also allows states to continue to evaluate the results of their waivers.

In the proposed regulations, HHS defines "waiver" and "inconsistency." It recognizes that the term "waiver" could include aspects of the prior law that technically, under the AFDC law, did not need to be waived but were integral and necessary to the state's policy objective for the waiver. It proposes that "inconsistent means that complying with a TANF requirement would necessitate that a State change a policy reflected in an approved waiver." (Proposed 45 CFR § 270.30.) The proposed regulations, however, further provide that a state's time limit waiver will not be considered to be inconsistent with the TANF time limit unless the state's waiver provides for termination of assistance to individuals or families. (Proposed 45 CFR § 274.1(e)(1).) This would mean that states that imposed a time limit and required work by the end of the time limited period would not be able to continue their waiver policies even though the policies were "inconsistent" with TANF provisions as that term is defined as the proposed regulations.

The proposed regulations recognize that the work participation rate provisions of section 407 of PRWORA do not apply to the extent they are inconsistent with the waiver. However, the regulations then propose standards for when a waiver program

will be considered to be inconsistent in the context of the work participation rate. When the state's waiver-based definition of work for the purposes of countable activities in determining the work participation rate is different from the countable work activities set forth in the PRWORA, the state can use its different waiver definition. However, when the minimum hours required for participation under the state's waiver are different from those of the PRWORA, a state only can follow its waiver policy in limited situations, if the state specified an individual's mandated hours of participation are based on his or her particular circumstances. The regulations also do not recognize waiver-based exemptions from work participation. Instead, a state is required to comply with a work participation rate which is calculated based on all families which include an adult rather than on the group of families that are required to participate in work pursuant to the state's waiver policy. (Proposed 45 CFR § 271.60.)

The regulations require the Governor to certify to HHS which inconsistent waivers provisions the state is retaining in lieu of following the TANF requirements. Under the regulations states relying on waivers will be denied relief from specific penalties even if the state otherwise meets the criteria for penalty relief simply because the state chooses to continue its waiver policies. Specifically, HHS proposes that such a state is never eligible for a penalty reduction or reasonable cause exception to a time limit or work participation rate penalty. (Proposed 45 CFR § 272.8.) In the preamble discussion of this regulation, HHS suggests that states retaining their alternative waiver policies will have an advantage in meeting requirements and therefore should not be able to obtain any penalty relief if it fails to meet requirements.

Analysis

It is appropriate for the regulations to provide clarification and explication on when a waiver is inconsistent. This was needed to provide the states clear guidance in evaluating which waiver provisions are "inconsistent." However, some of the specific policies proposed in the regulations unduly limit a state's ability to continue its waivers policies by narrowing the circumstances under which a waiver that seems to meet the definition of "inconsistent" can be considered inconsistent with respect to time limits or work participation. The result is contrary to the Congressional language and intent that states should be able to, and indeed "encouraged" to, continue their waiver policies.

In addition, denying states relief from penalties without regard to the extent of any advantage they may have received or its relationship to the basis for seeking penalty relief is not reasonable and improperly discourages states from continuing their waiver policies.

Definitions

HHS defines the term "waiver" to include provisions of prior law that were not specifically included in the waiver (because no waiver of a provision of the prior law was required) but were an integral part of the state's policy objective for the waiver. The general approach taken by HHS that the term "waiver" should include some parts of the unwaived underlying law is reasonable. It reflects the reality that states only sought to waive portions of the AFDC law that needed to be changed, and implicitly assumed the remainder of the law as the context for the demonstration. Often a state legislature or agency had a broad vision of the welfare reform program it wanted to run. It may have needed a waiver of federal law only for several aspects of the program. The welfare reform program's aspects that matched AFDC law may have been an integral part of the program implemented by the waiver, but not technically a part of the waiver itself.

The concern here is not with the proposed definition of "waiver" but with the discussion and application of that definition in the preamble. The preamble discussion unreasonably circumscribes a state's ability to determine the policy objectives of its waiver.[17] In the preamble comments to the proposed 45 CFR § 271.60, HHS gives an example of a waiver to implement a program which required single parents with a child under age one and pregnant women to participate in the JOBS program, while maintaining the prior law exemptions for elderly and disabled persons. The preamble suggests that prior law exemptions for elderly and disabled individuals would not be part of the "waiver" as defined in the regulations because they are not necessary to achieve the objective of the waiver.

The waiver policy example discussed in the preamble could just as reasonably be framed differently by a state with such a waiver. The state's view of its policy objectives might be that it had sought a waiver to implement a work program that targeted resources on those able to work so it mandated participation for parents of young children but decided to continue exemptions for those who were unable to work due to disability or age. Because such exemptions existed in prior law, it did not need to seek a waiver. Nonetheless, the scope of the work requirements — including the exemptions for elderly and disabled individuals — were an integral part of the policy objectives of the waiver. For example, Minnesota is continuing its prior waivers in its MFIP-S program. In its TANF plan, Minnesota articulates that its exemption policy is an attribute that contributes to the program's success. "Use of exemptions focusses the

[17]The state is required to certify which inconsistent waiver provisions it will follow in lieu of TANF requirements that are part of the state's waiver. (Proposed 45 CFR § 272.8.) The state's determination of what policies are inconsistent waiver provisions hinges in part on the state's own assessment of the policy objectives of its waiver.

work agenda on those cases, i.e. the majority of the case load, where that agenda then defines MFIP-S. Exemptions mean that limited administrative resources are targeted to the cases where impact is more probable."

A state's reasonable view of the objectives of its waiver should be accepted. The particular example given by HHS in the preamble distorts its own definition of "waiver" because it rejects out-of-hand a reasonable view of the policy objective of the waiver such as the one articulated by Minnesota.

The definition and the preamble discussion of the term "inconsistent" is also problematic. A waiver is considered inconsistent with a TANF requirement only if compliance with a TANF requirement would *necessitate* the state to change its waiver policy. If it is possible theoretically for a state to comply with a TANF requirement and follow its waiver policy, the waiver is not judged to be inconsistent under these regulations. This standard puts states in a difficult situation. A state needs to determine if it has an inconsistent waiver at the outset and certify such to HHS. A state may not know, however, at that point whether it definitely will have to change its waiver program in order to meet TANF requirements, that is, whether the TANF requirement *necessitates* that the state change its waiver because it would otherwise be impossible to meet the TANF requirement.

A state can only make a reasonable and good faith *projection* as to whether its current waiver policy presents any risk that it may not be able to comply with a TANF provision such as the time limit requirements or work participation rates. A state's waivers should be considered inconsistent if, based on a reasonable project, the state believes it will be unable to meet the TANF requirements if it continues its waiver policies. In such a case, section 415 of the PRWORA should mean that states can continue their waiver policy in lieu of the TANF policy during the period of the waiver without risk of a penalty.

Time Limits

The proposed regulations further limit the circumstances under which the federal 60-month time limit would be inconsistent with a state's waiver, beyond the determination of whether the waiver policy meets the proposed definition of "inconsistent." In 45 CFR § 274.1(1), HHS proposes that an inconsistency with a TANF provision can only exist with respect to time limits when the waiver provides for terminating cash assistance to individuals or families because of receipt of assistance for a period of time. (Presumably this would include a waiver that reduces assistance to a family by terminating a parent from the grant; if this provision is retained, the preamble should clarify that such "reduction" waivers would be considered inconsistent with the

federal time limit.)

State waivers have adopted a range of approaches with respect to time limits in waivers. Some impose a time limit but impose a work requirement when a time limit is reached. For example, a central feature of Vermont's Family Independence Project was its time limit on welfare receipt. This is not a situation where the waiver had nothing to do with a time limit; it was the essence of the waiver program. However, because Vermont's time limit is a work requirement time limit rather than a termination time limit, it would not be considered inconsistent under the proposed regulations. Although such a waiver is otherwise inconsistent with TANF requirements, as "inconsistent" is defined in section 270.30 because the TANF requirement necessitates that Vermont change its waiver-based time limit policy, HHS limits the state's ability to follow the waiver by adding the additional condition in section 274.1(e)(1)(i) that a time limit must reduce or terminate benefits. This additional requirement impermissibly and unreasonably limits a state's ability to follow its own waiver policy contrary to the letter and intent of section 415 of PRWORA.

The proposed regulations also address the question of whether the federal TANF clock is running concurrently during the waiver period. HHS reasonably takes the approach that the federal TANF clock should not run during the period of the waiver for those recipients for whom the state's time limit does not apply. (Proposed 45 CFR § 274.1(e).) The regulation provides that the clock does not run concurrently while an adult is *exempt* from the state's time limit under the waiver. However, the federal clock does run if an adult continues to qualify for aid under a waiver-established extension policy. Proposed 45 CFR § 272.8(a)(3)(ii) requires states to set forth the standards it will use to determine time limit exemptions (for which the TANF clock does not run concurrently) and time limit extensions (for which the TANF clock runs concurrently).

The problem is that a state's approach to time limits might not always use the terms "exemption" or "extension" precisely as HHS does in this particular regulatory provision. Some states do not look at whether a person should be subject to time limits until the time limit is reached. At that time, if a person fits into a category of persons who the state has determined are not subject to a time limit, an extension will be granted. For example, in Indiana disabled persons are not subject to the state time limit but this is determined at the time the time limit is reached and is labeled an extension. In contrast, in Connecticut, disabled persons are not subject to the state's time limit; this is labeled an exemption and is determined at the outset so that the time clock does not begin to run.

While the terminology and the sequence of decisions is different, the result is the same. The state has made a policy choice that time limits should not apply to a person with a disability. HHS should clarify that a state's approach to who is subject to time

limits is determinative, regardless of when the determination is made or whether the state uses the term "exemption" or "extension." Because these terms are sometimes used interchangeably,[18] the distinction relied on in these regulations could lead to treating similarly situated persons differently simply because of a difference in terminology or in the state's procedure.

Work Requirements

As with time limits, the proposed federal regulations at 45 CFR § 271.60(b) narrow a state's ability to follow portions of its waivers with respect to work requirements beyond HHS's own definition of the term "inconsistent." While the proposed regulations define an "inconsistent" waiver as one that would require a state to change its policies to comply with TANF requirements, HHS adds additional conditions which limit the state's ability to use an inconsistent waiver. The proposed regulations allow a state to continue to rely on its waiver definition of countable work activities, but they limit the state's ability to follow its waiver on the hours of participation and on work activity exemptions.

The regulations explicitly refuse to recognize that the required hours of participation under PRWORA can be inconsistent with a waiver (unless the waiver provided for an individualized determination of the hours of participation required) even if a state would have to change the program it was operating under its waiver in order to comply with the PRWORA provisions. For example, Massachusetts has a waiver policy that requires all non-exempt participants to work 20 hours a week within 60 days of receiving aid. Massachusetts has determined that it will insist on a very quick work attachment, but it limits the hours parents are required to work. This policy is inconsistent with TANF provisions that require single parents to work up to 25 hours per week in 1999 and up to 30 hours per week thereafter. The TANF provision on the minimum hours required is inconsistent because Massachusetts would have to change its waiver-based policy in order to comply with the TANF requirement. Under the proposed regulations, however, Massachusetts would not be able to continue its waiver policy. In enacting section 415, Congress intended states to be able to continue with the programs they implemented pursuant to waivers and not to have to change them.

The regulations also refuse to recognize the exemptions from work participation used in the state's waiver program with respect to the denominator in the participation

[18]For example, Congress uses the term "exemption" when referring to extending benefits beyond 60 months for up to 20 percent of the caseload in section 408(a)(7(C)(ii) of PRWORA. The proposed HHS regulations also sometimes use the term "exemption" when referring to an "extension" after 60 months, e.g., proposed 45 CFR § 274.3(b)(ii)(B).

rates. This also could necessitate that a state would need to change its waiver program to comply with aspects of section 407. As discussed above, Minnesota considers its exemption policy an instrument of targeting resources to cases where impact is more probable. Similarly, Virginia has a VIEW demonstration project which sets forth exemption policies. During the initial phases, 46 percent of the caseload met Virginia's exemption criteria. Both of these states would have to change their waiver programs substantially if they were required to comply with the participation rates of section 407 without regard to their waiver-based exemption policy. These should be regarded as situations where the waiver program and the PRWORA are inconsistent, and the state should be able to follow its waiver policies. They meet the definition of inconsistent in the proposed regulations, but again, HHS is adding conditions which limit the circumstances under which states can continue their waiver programs.

Another result of HHS's limiting the ability of states to continue their waiver policies is that it undermines using the waiver demonstrations to learn what policies are effective. Congress specifically stated in section 415 that HHS should encourage states to continue to evaluations of waiver-based approaches. While the proposed regulations do allow states to continue their inconsistent policies for the evaluation control and research groups, they would not allow the same waiver policy (e.g. exemptions from work) to be used for the rest of the caseload. States may be less likely to continue an evaluation (i.e., with research and control groups) if the policies imposed on the "research group" are not the same rules that are applied to a broader set of families. While states want to learn, they may not be willing to handle the logistics of having three different programs running simultaneously — treatment, control, and permissible waiver policies under the federal regulations.

In its preamble discussion, HHS indicates that it is attempting to balance the legislative emphasis on work with the intent to allow states to continue their prior welfare reform activities. As the language of Congress on this specific point is clear, there is no basis for HHS to modify or narrow the waiver provision based on its sense of how to balance the goals in the PRWORA. Congress has stated that for the duration of the waiver states can follow their waiver policies if they are inconsistent with other provisions in the law. In fact, the law directs HHS to encourage continuation of waivers and their evaluations.

Penalties

The proposed regulations at 45 CFR § 272.8(b) deny relief from penalties to states that continue to use their waivers in lieu of provisions of PRWORA. Specifically, HHS proposes that such a state is never eligible for a reasonable cause exception to a time limit or work participation rate penalty. (There appears to be a typo referring to

272.2(a)(4) or (a)(9) instead of 272.1.(a)(4) or (a)(9).) The regulations also would deny any reduction of the work penalty that is otherwise available for states which face high unemployment, a natural disaster or a regional recession and for states that meet the proposed 90 percent compliance threshold. Additionally, the proposed regulation requires a state which fails to meet work participation or time limit requirements to consider dropping or modifying its waiver, and further penalizes the state if it declines to abandon the waiver by denying a penalty reduction otherwise available to states that do not achieve full compliance with a corrective action plan due to a natural disaster or regional recession or that has made substantial progress in correcting the non-compliance.

The rationale given by HHS for withholding penalty relief from states with waivers is that these states are presumed to have an advantage meeting time limit and work requirements compared to other states operating under the TANF rules. The preamble discussion cites the example that a state with a waiver allowing unlimited job search has more options on how it can assign work and training activities to meet work participation rates. But the denial of relief from penalties is arbitrary because it bears no relation to an actual advantage the waiver may have given the state in meeting the requirements. The regulations propose a blanket denial of relief from penalties *without regard* to what the state's basis for relief may be and without regard to any advantage the state may have received. For example, a state should not lose an ability to claim relief for not meeting time limit requirements due to a regional recession or a natural disaster merely because, pursuant to its waiver, it has counted eight consecutive weeks of job search as a countable work activity. Whether the waiver policy gave the state an advantage with respect to the requirements it failed to meet, and the extent of any such advantage, are relevant *factors* in determining whether a reasonable cause exception or a penalty reduction should be available. The fact that the state continues to rely on its waiver should not, in and of itself, preclude relief.

The arbitrary denial of relief from penalties for a state that elects to continue its alternative waiver policies directly discourages states from doing so. It is, therefore, directly contrary to the Congressional mandate in section 415 that HHS "encourage" any state operating a waiver to continue to do so.

Recommendations

Recommendation 1: The definition of "inconsistency" should be changed to reflect the fact that states cannot project with certainty that they would be unable to meet a TANF requirement if they continued their waiver policy.

As a state may not know at the outset, when it needs to certify which inconsistent

waiver provisions it is retaining, whether it would absolutely be necessary to change its waiver policy in order to comply with a TANF requirement. The regulations should state that an "inconsistency" would exist whenever a state has a reasonable concern that continuation of a waiver policy could place the state at risk of a TANF penalty.

Recommendation 2: The regulations should not limit a state's ability to follow its waiver policy in lieu of related provisions of the PRWORA which are inconsistent with the waiver.

The regulations should not add additional restrictions on when a state can follow an inconsistent waiver. The definition of inconsistency should be the sole measure of whether the state can follow its waiver policy in lieu of a TANF provision. Specifically, states should be able to follow the policies of their time limit waivers which are inconsistent with the provisions of the PRWORA even if the waiver does not terminate assistance to an individual or a family when the time limit is reached. Similarly, states should be able to follow the policies of their waivers concerning work requirements which are inconsistent with the provisions of PRWORA. A state should be able to assert an inconsistency based on its definition of countable work activities; its hourly work requirements; its exemption policies or based on the fact that compliance with the work participation rates would force the state to alter its basic waiver approach.

Recommendation 3: The regulations should clarify that the federal TANF time clock does not run concurrently under a waiver for persons who are not subject to the state's time limit.

HHS should clarify that a state's waiver-based approach as to who is subject to time limits is determinative, regardless of whether the determination is made before or after a family reach the state's time limit or whether the state uses the term "exemption" or "extension."

Recommendation 4: The regulations should not penalize a state that continues its waiver policy by a blanket denial of relief from penalties under the reasonable cause exception or penalty reduction provisions.

To the extent that the state has gained any advantage from following the waiver policy with respect to complying with statutory requirements that it still failed to meet, that advantage, and the extent of the advantage, is a relevant factor to consider when determining whether the state should receive any relief from penalties. Reliance on waiver policies should not, in and of itself, preclude penalty relief.

IX. The Regulations Should Not Narrow the Protections Congress Provided for Victims of Abuse in Enacting the "Family Violence Option."

Statutory and Regulatory Framework

In the PRWORA, Congress explicitly provided that, in appropriate cases, compliance with specific TANF requirements could be excused for victims of domestic violence. The family violence option (FVO) of the PRWORA authorizes states to "waive, pursuant to a determination of good cause, other program requirements such as time limits (for so long as necessary) . . . in cases where compliance with such requirements would make it more difficult for individuals receiving assistance under this part to escape domestic violence or unfairly penalize such individuals who are or have been victimized by such violence, or individuals who are at risk of further domestic violence." (42 U.S.C. § 402(a)(7) amended by section 103 of PRWORA.)

Since the PRWORA was enacted questions have been raised as to how the FVO provisions should be read together with the TANF requirements that states must meet, such as the work participation rates or the 20 percent limit on families that include an adult which may receive TANF-funded assistance beyond 60 months. How would a state's compliance with specific TANF requirements be measured with regard to cases which it excuses from TANF requirements based on the family violence option? Would a state be at risk of incurring penalties if it excused individuals from compliance with requirements based on the family violence option?

HHS's proposed regulations address these issues by providing that in certain circumstances states will not risk penalties for failing to meet work participation rates and the 20 percent limit on TANF-funded assistance benefits beyond 60 months because it has granted waivers pursuant to the FVO. The proposed regulations specify that FVO cases will be counted when measuring a state's compliance with the work participation rate or the 20 percent limit on TANF assistance beyond 60 months. However, HHS will grant "reasonable cause" relief from any penalty for failure to meet work participation rates or time limit restrictions if the state demonstrates that the failure to meet these requirements is attributable to its use of the family violence option. (Proposed 45 CFR §§ 271.52, 274.3.) A state must show that it would have met the applicable requirement *but for* those cases which received good cause waivers pursuant to the family violence option. HHS defines a "good cause domestic violence waiver" in 45 CFR § 270.30 as one that is granted appropriately based on an individualized assessment, is temporary for a period up to six months, and is accompanied by an appropriate service plan to provide safety and lead to work.

Analysis

The general approach adopted by these proposed regulations — that states should not be penalized for bona fide family violence option waivers — is a reasonable way to give effect to the Congressional language. However, the proposed regulations unreasonably limit the protection from penalties in three ways that are inconsistent with both the letter and the intent of the federal law. First, the regulations define a FVO good cause waiver too narrowly. Second, the regulations limit access to penalty relief to only those states that would have achieved 100 percent compliance but for the FVO cases. Third, the regulations narrow the circumstances under which a waiver from time limit extensions can count in a manner that is inconsistent with the Congressional language.

HHS defines a "good cause domestic violence waiver" too narrowly in 45 CFR § 270.30. Under the proposed regulations, an FVO waiver is temporary, lasting for a period up to six months. The six month limit is inconsistent with the federal law which recognizes that waivers may be granted "for so long as necessary." While preamble language suggests that the waivers could be renewed after the six month period, this is absent from the text of the regulations. The regulation should not set a time limit or it should specify that the six month periods are renewable. Because HHS only allows reasonable cause relief from penalties when the FVO waivers meet this narrowed definition, it is limiting the circumstances under which states will use the family violence option.

Second, the proposed regulations also limit the protection states receive from being penalized for granting FVO waivers by using a "but for" test to decide whether the state has reasonable cause for not meeting the requirement. The proposed regulations only allow reasonable cause penalty relief based on FVO waivers if the state would have met the applicable work rates or the 20 percent limitation on assistance beyond 60 months *but for* the FVO waivers. If a state does not meet the work rates or 20 percent limit when the cases with FVO waivers are excluded, it receives no other consideration for penalty relief with respect to those FVO cases. For example, suppose a state reaches 90 percent compliance with the work participation requirements when its FVO cases are included (the threshold that triggers consideration of penalty relief based on the degree of a state's non-compliance), and reaches 95 percent when the FVO cases are excluded. Under the proposed regulations the state would not qualify for any reduction of penalty based on exceeding a 90 percent threshold pursuant to section 271.51(b)(3). Once it fails to reach 100 percent compliance, all the FVO waiver cases are added back in for determining penalties. In other words, such a state will be penalized for not meeting TANF requirements based in part on cases that it excused from requirements based on FVO good cause waivers.

HHS should modify the regulations to provide that states that would have qualified for a penalty reduction based on any criteria otherwise available to states if the families exempted due to the family violence option were not considered in the work participation rate or time limit calculations should still be eligible for a penalty reduction. When determining the extent of the penalty reduction, the level of compliance the state achieved when those recipients exempted due to the family violence option are excluded from the calculation should be used.

Finally, proposed section 274.3 raises additional concerns with respect to the limits it places on the interaction of FVO waivers and the TANF time limit. The proposed regulation recognizes only those waivers of the time limit based on the individual's inability to work and only based on her circumstances at the time that the 60-month limit is reached. The regulation significantly narrows the statute in two distinct ways. The statute allows states to waive requirements, including time limits, based on circumstances that may have occurred at a time prior to the time at which the 60-month time limit is reached and based on circumstances other than inability to work.

The two ways in which the regulation narrows the statute here are demonstrated by two examples. Consider the situation of a woman who may be able to work and is working, but needs to flee in order to escape a domestic violence situation. The need to flee may require that she give up her job even though she is able to work. She may need TANF assistance and an FVO waiver of the time limit in order to escape from domestic violence. Consider also another case example in which a woman was unable to work or prepare for work for two years due to recurring family violence but is finally able to participate in work activities when her family reaches the 60-month time limit.

In each of these cases, the FVO statutory language allows a state to waive the time limit in her case because the victim would be unfairly penalized for her past inability to work or because the victim needs to escape domestic violence. The proposed regulations do not allow a FVO waiver of time limits in either of these examples because the victim is not unable to work. If a woman is presently able to work, she cannot receive an FVO waiver of a time limit under the regulation even though her extensive bout with domestic violence interrupted her ability to prepare for and find employment or if she needs to flee. Although the victim in each example falls within the statutory FVO protection, the proposed regulation excludes her from an extension of the time limit based on an FVO waiver.

In addition, proposed section 274.3 appears to require that the victim of domestic violence have received both a hardship extension from the 60-month time limit and a separate FVO waiver based on inability to work. The effect of this requirement is that a state wishing to use the FVO must include domestic violence as a part of the hardship

extension criteria rather than retain it as a separate category. This is not supported by federal law which allows payment of benefits beyond 60 months based on hardship *or* if the family includes an individual who has been battered or subjected to extreme cruelty.

The unintended result of this requirement that the family receive a hardship extension as well as an FVO waiver — is that some states may not be able to benefit from the penalty relief HHS is trying to provide here. If a state has limited its hardship extension slots to 20 percent of the caseload, it must deny extensions to some cases that otherwise meet the hardship criteria (whether based on domestic violence or other hardship reasons) and would never be able to exceed the 20 percent limit because of FVO waivers. This result is contrary to what HHS is trying to accomplish in recognizing reasonable cause for states exceeding the 20 percent limit on assistance beyond 60 months when necessary to implement the family violence option. There is no reason for HHS to require this extra step that an FVO waiver can only be granted if the state has also granted a hardship extension. It is a device for administering FVO waivers that goes beyond, and is inconsistent with, the statute. A state may want to keep its FVO extensions as a separate category from its hardship waivers precisely so it can track its FVO waivers for the purposes of reasonable cause penalty relief. HHS should not penalize states for granting FVO waivers that are consistent with the statutory language or make FVO waivers less available to victims of domestic abuse.

Recommendations

Recommendation 1: The regulation should not set a six month limit on Family Violence Option waivers or it should specify that the six month periods are renewable for so long as needed.

Recommendation 2: HHS should modify the regulations to provide that states that would have qualified for a penalty reduction based on any criteria if the families exempted due to the family violence option were not considered in the work participation rate or time limit calculation should still be eligible for penalty reductions.

When determining the extent of the penalty reduction, the level of compliance the state achieved when those recipients exempted due to the family violence option are not considered should be used.

Recommendation 3: Time limit waivers should be available regardless of whether a woman is unable to work at the time the waiver is granted if imposing the time limit would unfairly penalize her or prevent her escaping from domestic violence. The language requiring that the state also have granted a hardship exemption should be eliminated.

X. The Regulations Should Not Deny Penalty Relief to States That Fail to Sanction Individuals for Refusal to Participate in Work Activities.

Statutory and Regulatory Framework

The PRWORA requires states to sanction individuals who are required to participate in work activities and refuse without good cause to do so by imposing a pro rata (or more) reduction of assistance. The Balanced Budget Act added a penalty on states for failing to impose sanctions on persons who refuse to participate in work activities without good cause. The BBA imposes a penalty from one to five percent of the state's family assistance grant based on the degree of the non-compliance.

The proposed regulations basically reiterate the statutory requirement that states sanction individuals. In addition, proposed 45 CFR § 271.55 indicates what factors HHS will consider in determining the amount of the penalty if a state does not properly impose penalties on individuals. HHS proposes to consider whether a state has a control mechanism to ensure that grants are reduced when individuals refuse to engage in work and to consider the percentage of cases for which grants are not appropriately reduced. In addition, HHS proposes to deny relief from this penalty even if a state meets the reasonable cause criteria of section 272.5 (natural disaster, incorrect information in a formal guidance or due to isolated non-recurring problems). Similarly, HHS proposes to deny relief from this penalty based on a corrective compliance plan.

Analysis and Recommendations

Recommendation 1: HHS should not deny relief from this penalty based on reasonable cause or pursuant to a corrective compliance plan.

Section 409 (b) and (c) of the PRWORA provide for penalty relief based on reasonable cause or corrective compliance plans. PRWORA explicitly listed the penalties for which this relief should not be available. Congress later expanded the list of penalties for which reasonable cause and corrective compliance plan relief should not be available in section 5506 of the Balanced Budget Act. Congress never included sanctions on individuals as a penalty which was excluded from the mandatory penalty relief provisions. Therefore, HHS has no statutory authority to exclude these forms of penalty relief in the regulations.

Recommendation 2: HHS should clarify that states have the flexibility to define pro rata sanction.

In the preamble, HHS should confirm that the states have flexibility under the PRWORA to establish their policies for defining and implementing the requirement that states reduce the assistance by a pro rata amount or more. Any penalty and penalty relief based upon the degree of non-compliance should be measured against the state's policies regarding sanctions.

Recommendation 3: The regulations should deem 80 percent compliance as full compliance with the requirement that a state sanction individuals who refuse to participate in work activities.

If a state demonstrates that it has appropriately imposed sanctions in at least 80 percent of cases, it should not be subject to any penalty. The statutory penalty is from one to five percent; there is no provision for a penalty of less than one percent. A linear percentage reduction in the degree of penalty imposed upon states would set a one percent penalty at 80 percent compliance. When compliance exceeds 80 percent, HHS should consider this as full compliance and not impose a penalty. Following this method, a two percent penalty would be imposed at 60 percent compliance and a full 5 percent penalty when there has been no compliance. Given the significant fiscal penalties to be imposed upon states in relation to the amount of benefits available, the full penalty should only be imposed when there is full non-compliance.

XI. The Regulations Should Be Clarified in Order Not to Limit States from Using State Maintenance-of-Effort Funds to Serve Aliens Who Are Lawfully Present in the United States.

Statutory and Regulatory Framework

The PRWORA requires that states spend 80 percent (or 75 percent in some cases) of their historic state spending or face a reduction in their TANF block grant. Congress gave states greater flexibility in spending MOE dollars than in spending TANF dollars. MOE funds must be spent on families that are eligible for TANF assistance or those families that are ineligible due to time limit or immigrant status restrictions. As amended by section 5506(d) of the Balanced Budget Act of 1997, the federal welfare law specifically allows a state to count as MOE those funds it spends on "families of aliens *lawfully present* in the United States that would be eligible for such assistance but for the application of title IV." [Emphasis added.] (Title IV of the PRWORA contains the restrictions on immigrants' eligibility for various state and federal programs.)

Under the proposed regulations, states cannot always count monies spent on lawfully present immigrants toward their maintenance-of-effort requirements despite the statutory authorization to do so. Proposed 45 CFR § 273.2(b)(1) limits "eligible families" for MOE purposes to sub-groups of aliens who are lawfully present in the United States. The non-citizens on which MOE funds can be spent under the regulations are "qualified" aliens (as defined in PRWORA), non-immigrants under the Immigration and Nationality Act, aliens paroled into the U.S. for less than one year, or aliens who are not lawfully present if the State enacted a law after August 22, 1996 that affirmatively provides for eligibility.

Analysis

The proposed HHS regulation at 45 CFR § 273.2(b)(1) erroneously narrows (probably inadvertently) the statutorily recognized uses of MOE funds for lawfully present immigrants. This list of "eligible families" in the proposed regulation leaves out some immigrants who are ineligible for assistance due to the application of title IV and are lawfully present in this country. The omitted aliens are those commonly referred to as persons who are permanently residing under color of law (PRUCOL). Examples of persons who are lawfully present in the United States but do not fall within the narrowed language of the proposed regulation are applicants for asylum or adjustment of status, and persons granted family unity status. (To be eligible for family unity status, a person must have been a spouse or child as of May 5, 1988 of a person granted legal permanent residency under the Immigration Reform and Control Act of 1986, and must

have been in the country as of that date.)

Recommendation

Recommendation 1: The regulation should track the federal statutory language to allow state expenditures on families of aliens lawfully present in the United States who would be eligible for TANF assistance but for title IV to count toward the state's MOE requirement.

XII. The Definition of "Assistance" Should Not Include Wage Subsidies Paid to Employers and Should Not Limit the Exclusion of One-time, Short-term Payments to Once in 12 Months.

Statutory and Regulatory Framework

The PRWORA authorizes states to use TANF block grants funds and maintenance-of- effort funds to provide "assistance" to eligible families. The PRWORA also attaches many requirements on or prohibitions to the uses of "assistance" such as time limits, child support assignment and work participation rates. The federal welfare law does not provide a general definition of the term assistance. In order to comply with these requirements, states need to know which expenditures constitute assistance.

The proposed TANF regulations define "assistance" as "every form of support provided to families under TANF (including child care, work subsidies, and allowances to meet living expenses)" except for services not involving income support that have no direct monetary value and "one-time, short-term assistance (i.e. assistance paid within a 30-day period, no more than once in any twelve-month period, to meet needs that do not extend beyond a 90-day period, such as automobile repairs to retain employment and avoid welfare receipt and appliance repair to maintain living arrangements)." (Proposed 45 CFR § 270.30.)

Analysis and Recommendations

Given the significant requirements that attach to TANF assistance it is useful that the regulations set forth a definition of assistance and the proposed definition is a reasonable one for the most part. However, two particular aspects of the specific definition are problematic: the inclusion of wage subsidies and the limitations placed on one-time, short-term assistance.

Recommendation 1: Wage subsidies should be excluded from the definition of "assistance."

The inclusion of wage subsidies as "assistance" in the proposed regulation is misguided and inappropriate. Individuals who are employed in subsidized jobs by private or public employers are doing precisely what Congress intended — they are leaving the public assistance rolls and earning wages through work. The earnings should not be considered welfare. In this context, wage subsidies, which are payments to an employer and not to the worker, are intended to defray all or part of employer costs in hiring hard-to-employ individuals, including the costs of providing training, and the reduced productivity typically associated with the initial employment of such individuals.

Expenditures of this nature should be treated in the same manner as those for training activities or tax incentives to enhance employability and promote entry into the labor market. They should not be considered "assistance" to the individual, and receipt of wages from a subsidized employer should not subject the worker to a month being counted against the TANF five-year time limit or lead to child support assignment. For example, a person who works in a job for an employer who receives a wage subsidy should not be treated differently than a person who works for an employer who does not receive a wage subsidy. The person working for a subsidized employer should not be required to assign his or her child support payments to the state while the person working for an unsubsidized employer is can retain any child support payments received.

Recommendation 2: Non-recurrent short term payments should not be considered within the definition of "assistance" just because such payments may occur more than once in 12 months.

The limitation of "one-time, short-term" assistance to aid received once within a 12-month period is unnecessary to achieve the purposes set forth by HHS as justification for its proposed definition, and is unwise as a matter of policy. In the preamble to the proposed regulations, HHS states that its purpose in narrowing the uses of TANF funds that may be considered "non-assistance" is to prevent states from circumventing the work requirements, time limits, case record data and child support assignment requirements of the PRWORA. This purpose can be achieved without a rigid 12-month rule by specifying that "one-time, short-term" payments must not be aid which is of a significant and ongoing nature. In addition, HHS could retain the specification that the aid must be paid within a 30 day period in order to qualify as "non-assistance."

It is both unnecessary and unwise to impose the limitation that the aid must only be provided once in a 12-month period. For example, a state may wish to establish a variety of programs to alleviate emergency situations that may otherwise result in low-income working families losing their jobs and needing ongoing cash assistance. Under such programs, a family not receiving ongoing TANF aid could obtain a payment of rental arrearages to prevent an eviction. Eight months later, the same family could require a one-time payment for a car repair. Both of these are truly one-time, short-term forms of aid. By their nature, they are not ongoing payments. In neither situation would it make sense to require a family to assign child support payments, as the duration of their aid is literally the one day they [or a vendor] receive the check to meet their emergency needs. There is no avoidance of the work participation requirements, because the family is already working — that is why they are not receiving ongoing TANF benefits.

Further, the limit that the aid cover only a 90-day period is problematic. For

example, a state may want to provide one-time payments that cover a *retrospective* period in which the "need" accumulated, as is the case with rent or utility arrearage payments. It should be up to the states to determine the duration of the retrospective period that they are willing to cover to avert the emergency. The selection of a 90-day cut-off period is arbitrary. If a family has accumulated four or five months' worth of arrears, over what may have been a several-year period, before a landlord has chosen to pursue eviction or a utility company has moved to terminate service, they would be ineligible for a one-time payment that is not subject to TANF restrictions or prohibitions under the rigid limitation proposed by the regulations. A state should be free to design a program that actually averts the emergency, so long as the state is not subverting the goals of the TANF program.

XIII. Penalties Should Be Imposed If the State TANF Agency Fails to Inform Parents That They Are Exempt from Work-related Sanctions If Child Care Is Unavailable.

Statutory and Regulatory Framework

Section 407 of PRWORA generally requires states to penalize individuals who do not participate in required work activities except that states may not reduce or terminate assistance for a refusal to work when a single parent of a child under age six demonstrates that needed child care is unavailable. Section 409(11) of PRWORA mandates that HHS penalize states, based on degree of non-compliance, that violate the provision exempting a single parent of a young child from work sanctions if child care is unavailable.

The proposed TANF regulations require the states to establish (and submit to HHS) criteria setting forth the procedures by which a state will determine if a parent has demonstrated an inability to obtain needed child care and definitions of selected relevant terms. (Proposed 45 CFR § 271.15.) The regulations also indicate that HHS will impose the maximum penalty allowed under the law if the state does not have a process in place or if there is a pattern of substantiated complaints of impermissible sanctions on individuals. (Proposed 45 CFR § 274.20.)

The proposed TANF regulations do not specifically address which agency of the state must inform the parent of the exemption from sanction if child care is unavailable and have a process for a parent to establish the unavailability of child care. HHS has also issued proposed Child Care and Development Funds regulations which address these provisions and require the child care lead agency to inform parents of the availability of this work penalty exemption and of the procedures for demonstrating an inability to obtain child care.

Analysis and Recommendations

Recommendation 1: The regulations should specify that states in which the TANF agency (as well as the lead child care agency) does not have procedures in place to inform recipients about the exception to the work penalty if child care in unavailable will also be subject to a penalty.

Portions of HHS's proposed regulations reflect a commitment to these provisions and a recognition of the pivotal role child care plays in making welfare reform work. HHS does this by imposing the maximum penalty on a state if it does not have procedures in place for parents to demonstrate unavailability of child care. The

proposed regulation does need to be modified, however, to ensure that all families that are unable to find child care understand that they should not be subject to a penalty for failing to comply with work requirements. Specifically, the regulations should require that *TANF agency* (in addition to the child care lead agency) provide information to families about the exemption. If a recipient is never referred to the lead child care agency by the TANF agency, she would not receive assistance in obtaining child care or information about the protections from sanction if the needed child care is unavailable.

XIV. HHS Should Modify the Numbers of the Proposed Regulations to Avoid Confusion with Food Stamp Regulations.

If retained in the final rules, the numbering system of the proposed regulations is likely to cause significant confusion with the food stamp program. Particularly in light of the "de-coupling" of Medicaid, no program is likely to be more closely coordinated with TANF than food stamps. In federal agencies, among state administrators, in non-governmental organizations, among journalists and researchers interested in programs for low-income people, and in the courts, many of the same people are likely to be interested in the two programs. Most of the food stamp program's more significant requirements are in parts 271 through 274 of title 7 of the Code of Federal Regulations.

Having TANF adopt similar numbering systems for its very different regulations is likely to engender considerable confusion. At present, it is relatively common to see mistaken references such as "7 CFR § 233.20" or "45 CFR § 273.2." With the current numbering systems, it is immediately obvious that a mistake has been made. If these two closely related sets of regulations adopt broadly similar numbering systems, readers may be confused or may have to waste time referring back to the CFR before catching an error. This confusion can be readily avoided by having the TANF regulations adopt numbers in the 280s (where their numbering would correspond only to relatively unimportant food stamp rules). To be sure, there are doubtless other federal programs with regulations numbered in the 280s. None, however, interact nearly as closely with TANF as does the food stamp program.

XV. List of Recommendations

The Regulations Should Not Discourage States from Deciding to Use Their Own State Funds in Separate State Programs.

Recommendation 1: HHS should eliminate the provisions in the proposed TANF regulations that threaten denial of penalty relief to states that use MOE funds in separate state programs.

Recommendation 2: In absence of the elimination of this proposal, HHS should clarify that it will use the "purpose" rather than the "effect" standard in evaluating whether a state diverted cases from its TANF program to a separate state program to avoid work participation rates or child support requirements.

Recommendation 3: In the absence of the elimination of this proposal, the regulations should clarify that a state does not face the risk of loss of penalty relief if it has a reasonable policy basis for using MOE funds in a separate state program.

Recommendation 4: If the regulations do threaten denial of penalty relief to states with a separate state program, HHS should allow a state to get an up-front determination of whether its separate state program is acceptable.

Recommendation 5: If the regulations do deny relief from a penalty to some states with a separate state program, any denial of relief should be based to the relationship between the state's use of MOE funds in its separate state program and the TANF requirement the state failed to meet.

The Regulations Should Not Unreasonably Deny Penalty Relief to States That Do Not Meet the Work Participation Rates.

Recommendation 1: Reduce the threshold below which states receive no penalty relief based on their "degree of non-compliance."

Recommendation 2: The extent to which a state has increased the number of parents participating in countable work activities should be considered when determining the state's "extent of non-compliance."

Recommendation 3: The extent to which a state's caseload has increased should be considered when determining the state's "degree of non-compliance."

Recommendation 4: Provide penalty relief to states that, based on prior year's caseload increases, must increase very substantially the number of adults that must participate in work activities.

Recommendation 5: States that do not meet the work participation rates because, based on the Fair Labor Standards Act, they could not require parents to work as many hours as required by the statute should be granted penalty relief.

Recommendation 6: When determining a state's "degree of non-compliance," the number of adults that participated in countable work activities but for modestly fewer hours than required by the statute should be considered.

Recommendation 7: The amount of penalty relief a state is eligible for based on the additional factors discussed above — such as caseload increase or the extent to which a state increased the number of participants in work activities — should be determined in an objective and formulaic manner.

Recommendation 8: The proposed regulations should indicate that HHS will use its discretion to consider state requests for "reasonable cause" penalty waivers based on criteria not specified in the regulations.

Recommendation 9: Regulations on work requirements for two-parent families could provide greater opportunities for penalty relief.

Recommendation 10: The proposed regulations should clarify that only those states that actually meet the work participation rates for both "all-families" and two-parent families will be subject to the lower 75 percent maintenance-of-effort requirement.

The Regulations Should Clarify That Full-Family Sanctions and Requirements that Applicants Engage in Certain Activities as a Condition of Eligibility Are Eligibility Changes for the Purposes of Determining a State's Caseload Reduction Factor.

Recommendation 1: The regulations should specify that full-family sanctions are eligibility criteria and the effect of such changes will be excluded in calculating the caseload reduction factor.

Recommendation 2: The regulations should specify that new requirements that applicants engage in certain activities and the effect of such requirements will be excluded in calculating the caseload reduction factor.

Recommendation 3: The regulations should clarify that the state's methodology for computing the caseload reduction factor must account for the ongoing effects of an eligibility change beyond the initial year in which a family is excluded from assistance based on that eligibility change.

The Regulations Should Assure That States Are Accountable for the Funds They Receive and Spend.

Recommendation 1: Require states to report similar descriptive and financial information for a program that receives both TANF and MOE funds as the regulations require for a separate state program.

Recommendation 2: Even for separate state programs, some additional information is needed to enforce the "new spending test" for maintenance-of-effort spending.

Recommendation 3: Additional information is needed to ensure TANF funds are spent in accordance with federal law.

Recommendation 4: HHS should gather information on legislated TANF rainy day reserves.

Data Reporting Requirements Should Assure That Policymakers and the Public Have Adequate Information on Families Applying for, Receiving, and Leaving Assistance.

A. Disaggregated Case-Record Data on Closed Cases

Recommendation 1: HHS should improve the list of reasons for case closures.

Recommendation 2: HHS should clarify the reference time period for the data collection requirements on closed cases and provide further instructions to states on how to report information when verified information is unavailable.

Recommendation 3: HHS should provide instructions to states on the circumstances under which a family subject to a "full-family" sanction should be treated as a "closed case."

B. Data on Applicants

Recommendation 1: States should be required to submit information to HHS on withdrawals applications and reasons for denials of applications.

C. Disaggregated Data Collection on Families Receiving Assistance and Families No Longer Receiving Assistance in a Separate State Program

Recommendation 1: HHS should narrow the list of required data elements.

Recommendation 2: HHS should permit states to submit an alternative data collection plan in cases in which the basic data collection requirements for separate state programs are unreasonable given the design of their separate state programs.

The Regulations Should Not Limit the States' Ability to Aid Children in "Child-Only" Assistance Units.

Recommendation 1: HHS should not restrict states' ability to define "child-only" cases.

Recommendation 2: If the regulations do limit a state's ability to define "child-only" cases, they should articulate a standard that defers to state policy judgments by accepting any reasonable policy rationale of the state and provide guidance on the application of the standard.

Recommendation 3: If the regulations do limit a state's ability to define "child-only" cases, they should include a process that allows a state to know at the outset that its categorization of child-only cases is permissible.

The Regulations Should Not Narrow the Congressional Commitment That States Can Continue the Policies Adopted Through Their Welfare Reform Waivers.

Recommendation 1: The definition of "inconsistency" should be changed to reflect the fact that states cannot project with certainty that they would be unable to meet a TANF requirement if they continued their waiver policy.

Recommendation 2: The regulations should not limit a state's ability to follow its waiver policy in lieu of related provisions of the PRWORA which are inconsistent with the waiver.

Recommendation 3: The regulations should clarify that the federal TANF time clock does not run concurrently under a waiver for persons who are not subject to the state's time limit.

Recommendation 4: The regulations should not penalize a state that continues its waiver policy by a blanket denial of relief from penalties under the reasonable cause exception or penalty reduction provisions.

The Regulations Should Not Narrow the Protections Congress Provided for Victims of Abuse in Enacting the "Family Violence Option."

Recommendation 1: The regulation should not set a six month limit on Family Violence Option waivers or it should specify that the six month periods are renewable for so long as needed.

Recommendation 2: HHS should modify the regulations to provide that states that would have qualified for a penalty reduction based on any criteria if the families exempted due to the family violence option were not considered in the work participation rate or time limit calculation should still be eligible for penalty reductions.

Recommendation 3: Time limit waivers should be available regardless of whether a woman is unable to work at the time the waiver is granted if imposing the time limit would unfairly penalize her or prevent her escaping from domestic violence. The language requiring that the state also have granted a hardship exemption should be eliminated.

The Regulations Should Not Deny Penalty Relief to States That Fail to Sanction Individuals for Refusal to Participate in Work Activities.

Recommendation 1: HHS should not deny relief from this penalty based on reasonable cause or pursuant to a corrective compliance plan.

Recommendation 2: HHS should clarify that states have the flexibility to define pro rata sanction.

Recommendation 3: The regulations should deem 80 percent compliance as full compliance with the requirement that a state sanction individuals who refuse to participate in work activities.

The Regulations Should Be Clarified in Order Not to Limit States from Using State Maintenance-of-Effort Funds to Serve Aliens Who Are Lawfully Present in the United States.

Recommendation 1: The regulation should track the federal statutory language to allow state expenditures on families of aliens lawfully present in the United States who would be eligible for TANF assistance but for title IV to count toward the state's MOE requirement.

The Definition of "Assistance" Should Not Include Wage Subsidies Paid to Employers and Should Not Limit the Exclusion of One-time, Short-term Payments to Once in 12 Months.

Recommendation 1: Wage subsidies should be excluded from the definition of "assistance."

Recommendation 2: Non-recurrent short term payments should not be considered within the definition of "assistance" just because such payments may occur more than once in 12 months.

Penalties Should Be Imposed If the State TANF Agency Fails to Inform Parents That They Are Exempt from Work-Related Sanctions If Child Care Is Unavailable.

Recommendation 1: The regulations should specify that states in which the TANF agency (as well as the lead child care agency) does not have procedures in place to inform recipients about the exception to the work penalty if child care in unavailable will also be subject to a penalty.