

ANALYSIS OF NEW INTERIM FINAL TANF RULES

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Introduction

On June 29, the Department of Health and Human Services (HHS) issued regulations regarding the Temporary Assistance for Needy Families (TANF) program. These regulations define the activities that are countable toward the work participation rate requirements, describe how the states must monitor and verify the hours that TANF recipients participate, and add some categories of parents who only receive benefits on behalf of their children to the work participation rate calculation.¹ These regulations were required as part of the Deficit Reduction Act of 2005 (DRA; PL 109-171), which also substantially increased the effective targets for the proportion of TANF recipients who participate in federally countable work activities for a specified number of hours each week.

These regulations were issued on an interim final basis which means that they are effective immediately. While HHS is accepting comments on the regulations until August 28 — and we strongly encourage interested parties to submit such comments — the regulations remain effective as published until HHS revises them. Therefore, states must consider what changes they will need to make to their programs in order to bring them into conformity with the regulations. (The preamble recognizes that, in some states, legislative action is necessary in order to change the states' TANF program to reflect the new regulations. HHS invites states that believe it will be impossible to meet the required participation rates without state legislative action to submit comments explaining why and to make suggestions on how HHS should use the reasonable cause exemption to provide penalty relief.)

This analysis provides an overview of the major regulatory provisions (though not every regulation is discussed) and the implications for state implementation of the changes in the DRA. In some cases, however, it is not entirely clear what HHS intended by a provision, or whether a certain program model would fall within the range of allowable activities. More information about these areas of uncertainty may become available as HHS conducts outreach on the regulations and

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¹ The regulations were published at 71 Federal Register 37454–37483, and are available online through GPO Access at: <http://www.gpoaccess.gov/fr/index.html>

provides additional guidance to states on the information that must be submitted for purposes of the Work Verification Plans.

Most, if not all, states will be revising their TANF programs in response to the changes made by the Deficit Reduction Act and this regulation. In this process, it is critical that states maintain focus on the overall goal of helping low-income families improve their employment outcomes and support their families, not just on achieving the required participation rates. As states examine the set of work-related activities that they offer to welfare recipients, they should ensure that they are providing effective work-focused activities that are appropriate for the characteristics of individuals in their caseload as well as the supportive services needed to enable recipients to participate. While a full discussion of these choices is outside the scope of this paper, the Center and CLASP will soon be updating our guide, *Implementing the TANF Changes in the DRA: “Win-Win” Solutions for Families and States*, to reflect the new regulations. The previously issued guide is available from both the Center and CLASP websites.

This memo includes the following sections:

- I. Definitions of Work Activities (page 2)
- II. Implications of Work Activity Definitions on Services to Address Certain Barriers to Employment (page 19)
- III. Definition of “Work-Eligible Individual” (and the Treatment of Child-Only Cases) (page 21)
- IV. How Hours of Participation Must be Counted, Tracked, and Verified (page 25)
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I. Definitions of Work Activities

The TANF work participation rate is a measure of the proportion of TANF recipients who are engaged in a specified set of work activities for at least a minimum number of hours. The TANF statute lists 12 work activities that can count toward the work participation rate. Some of these activities — known as “core” activities — can count toward all hours of participation, while others — known as “non-core” activities — can only count for some of the required hours of participation (hours after the first 20 for single parents and after 30 for most parents in a two-parent family):

- **Core Activities:** Unsubsidized employment, subsidized private sector employment, subsidized public sector employment, work experience, on-the-job training, job search and job readiness assistance (with limitations on duration), community service programs, vocational educational training (with limitations on duration and the proportion of recipients who can participate), and providing child care assistance to an individual in a community service program.

- **Non-Core Activities:** Job skills training directly related to employment, education directly related to employment (in the case of a recipient who has not received a high school diploma or its equivalent), and satisfactory school attendance at a secondary school² (for those who have not completed high school).

The statute does not define these activities but the DRA gives HHS the authority to do so in regulations and the interim final rule includes definitions of each activity. In general, the regulations provide narrow definitions of these activities — narrower than many states have utilized over the last ten years when the legal authority to establish definitions (subject to HHS oversight) rested with states. The new federal definitions limit the set of work activities states can get credit for toward their participation rate. In particular, the regulations include limits on the extent to which activities designed to address barriers to employment — such as substance abuse treatment, mental health counseling, and physical therapy — can count toward the participation rates and impose significant limitations on education and training, such as precluding postsecondary education that leads to baccalaureate or advanced degrees as well as basic education or English as a Second Language (ESL) programs, when not part of employment or vocational educational training, from counting toward the work participation rate.

These new, more restrictive definitions of work activities are particularly important when considered in conjunction with the other changes to the work participation rate included in the DRA that serve to increase the effective work participation rate that states must meet. States may be less willing than in the past to allow recipients to participate in activities that are not federally countable because of the overall difficulty of meeting the federal work rates.

For each of the twelve work activities, the discussion below provides the new definition of the activity, the key ways in which the new definition limits the kinds of programs that can fit within the definition, and the regulations’ implications for program design options.

Definitions §261.2

A. Work Activities in Which Recipients are Paid Employees: *Unsubsidized Employment, Subsidized Employment, and On-the-Job Training*

Unsubsidized Employment

Full-or part-time employment in the public or private sector that is not subsidized by TANF or any other public program.

How does this activity count toward the participation rate? (unchanged by regulations)

- **Core Activity:** No limitations.

² This can be a core activity for teen parents.

Discussion

The preamble explains that tax credits (including the Work Opportunity Tax Credit and the Welfare-to-Work Tax Credit) paid to the employer are not considered subsidies for purposes of this definition. The category includes self-employment. When determining the number of hours a self-employed individual worked for purposes of the work participation rate calculation, the total number of hours the state can claim may not exceed the individual's gross income less business expenses divided by the Federal minimum wage. States may propose using an alternative methodology for calculating hours.

Under the regulations, states may determine the number of hours an individual works based on the number of hours for which s/he is paid, including paid leave. (§261.60(b)). In addition, a state may use information from pay stubs or other sources to determine the number of hours the individual is currently working and use that to project the number of hours worked for the following six months. (For a full discussion of tracking and verifying hours of participation for employed individuals, see page 25.)

Subsidized Private Sector Employment

Subsidized Public Sector Employment

Employment in the private sector for which the employer receives a subsidy from TANF or other public funds to offset some or all of the wages and costs of employing a recipient.

Employment in the public sector for which the employer receives a subsidy from TANF or other public funds to offset some or all of the wages and costs of employing a recipient.

How do these activities count toward the participation rate? (unchanged by regulations)

- **Core Activity:** No limitations.

Discussion

The preamble reiterates current policy that subsidized jobs are subject to Fair Labor Standards Act (FLSA) provisions and therefore must pay participant wages that equal or exceed applicable Federal or State minimum wage. The preamble also draws a distinction between subsidized jobs and work experience, noting that subsidized jobs pay wages and employees receive the same benefits as a non-subsidized employee who performs similar work. A work experience participant, by contrast, works in exchange for assistance, not wages and benefits.

Like those working in unsubsidized jobs, states can project the number of hours an individual will work for a six month period based on current information about hours worked (see page 29 for more discussion of this provision) (§261.61(c)).

The preamble discusses three approaches to subsidized employment, though these are not necessarily the only kinds of programs that could meet the definition of subsidized employment:

1. Use TANF/MOE funds to reimburse an employer for some or all of the wages, benefits and other costs of employing a recipient (previously called grant diversion or work supplementation).
2. Use TANF/MOE funds to subsidize the wages paid through a temporary staffing agency which serves as the employer of record.
3. Use TANF/MOE funds for supported work programs for individuals with disabilities, for which the regulations refer to the definition of supported work used in the Rehabilitation Act of 1973. Under that definition, a supported work program must be in an integrated setting, where people with and without disabilities work side by side, and where the individuals with disabilities receive wages consistent with those paid to non-disabled workers with similar jobs. In the section on on-the-job training, the preamble notes that if supported work includes a training component, it should be considered “on the job training” rather than subsidized employment. Since both activities are fully countable for all hours of participation, the distinction is not particularly important.

The preamble explains that in subsidized jobs programs there should be an “expectation” that the employer will retain the participant in regular employment at some point. This issue has caused concern among states and others that a subsidized jobs program that helps individuals gain job skills and experience that lead to unsubsidized employment *but not necessarily with the same employer* would not be permissible under the regulations. This issue was discussed at a recent American Public Human Services Association (APHSA) meeting. At that meeting, HHS officials noted that their intention was to ensure that TANF funds were not merely being used to subsidize employers without improving employment prospects for recipients and appeared open to reconsidering the precise preamble language.

Implications for Program Design

Because subsidized work often offers an avenue to employment and affords recipients the benefits of real wages, it is preferable to work experience, where there often is no clear pathway to unsubsidized work. Transitional jobs programs, which combine time-limited subsidized employment with a comprehensive set of services, are a particularly useful form of subsidized employment to help participants with barriers to employment build work-related skills and transition into unsubsidized employment. As paid employees, participants in subsidized employment pay into the Social Security system (thus building quarters of work needed for future eligibility) and may qualify for federal and state Earned Income Tax Credits (EITC) and Unemployment Insurance, leading to increased long-term economic security.

On-The-Job Training

Training in the public or private sector that is given to a paid employee while he or she is engaged in productive work and that provides knowledge and skills essential to full and adequate performance of the job. On-the-job training must be supervised by an employer, work site sponsor, or other responsible party on an ongoing basis no less frequently than daily.³

How does this activity count toward the participation rate? (unchanged by regulations)

- **Core Activity:** No limitation.

Discussion

Unlike subsidized employment, on-the-job training (OJT) subsidizes the employer to offset the cost of training provided to the participant. The preamble to the regulations makes clear that the training can be fully subsidized; that is, there is no requirement that the employer pay a portion of the cost of the training. There is an expectation that the employer will continue to employ the individual as a regular employee without a subsidy after training completion. (The regulations do not limit on-the-job training to unsubsidized employees, though it is unclear whether on-the-job training in subsidized employment settings should be recorded as subsidized employment or OJT. Since both are “core” activities, the answer to that question will not affect the extent to which the activity is countable.)

As in other components in which recipients are working in paid jobs, states may project hours working or in OJT for six months based on information on employment and training participation at a point in time.

HHS specifically seeks comments on whether on-the-job training should encompass other training that is not associated with paid employment. Those wishing to comment might consider whether OJT should be expanded to encompass such associated services as incumbent worker training (on- or off-site), and training provided in an unpaid work environment (such as work experience or a school-based enterprise created to help students learn about production processes), thereby expanding the options states have to create programs that combine a work focus with skill building activities.

Implications for Program Design

Given the restrictions on other educational activities, OJT is an attractive option for providing job-related basic skills, ESL and occupational skills training for newly hired TANF recipients or recipients in subsidized jobs to help them upgrade their skills and progress in the labor market. In

³ It is not entirely clear what is intended by “daily supervision,” a phrase which is used in many of the work activity definitions. We assume that daily supervision here and elsewhere in the regulations refers only to those days on which the recipient is assigned to the activity. When asked at a recent APHSA conference whether telephone calls or other contact would be acceptable, HHS officials said that they might be, and that states would have to describe their supervision procedures as part of their Work Verification Plans. HHS indicated that the key question was whether the recipient received “constructive guidance” on a daily basis.

addition to on-the-job learning provided by a supervisor, a reasonable interpretation of the regulations (and preamble discussion) suggests that OJT could be expanded to include orientation and classroom instruction in such things as use of computers and ESL that is provided at the employer's behest either in the workplace or elsewhere. Although OJT has been little-utilized by the TANF system, the workforce system has extensive experience with OJT. TANF agencies may be able to tap this expertise. It is important to note, however, that under the Workforce Investment Act, OJT typically is used for the most job ready participants, so states will need to adapt the workforce system's approach to the TANF population.

B. Job Search and Job Readiness Assistance

The act of seeking or obtaining employment, preparation to seek or obtain employment, including life skills training, and substance abuse treatment, mental health treatment, or rehabilitation activities for those who are otherwise employable. Such treatment or therapy must be determined to be necessary and certified by a qualified medical or mental health professional. Job search and job readiness assistance activities must be supervised by the TANF agency or other responsible party on an ongoing basis no less frequently than daily.

How do these activities count toward the participation rate? (unchanged by regulations)

- **Core Activity:** This set of activities is limited by statute to 6 weeks per fiscal year — or 12 weeks in states that meet the definition of a “needy state” as defined for purposes of the contingency fund — of which no more than 4 weeks can be consecutive. One of the “needy state” criteria is defined as having food stamp caseloads that are at least 10 percent higher than food stamp caseloads (with some adjustments) in 1994 and 1995. Data from HHS show that currently more than 30 states⁴ meet the “needy state” criteria and, thus, would be permitted to count up to 12 weeks of job search/readiness activities. However, the four consecutive week limitation remains.

The time limit is applied to the activity as a whole, not to job search and job readiness separately. In the preamble, HHS explains that a “week” means a seven-day period, and that any amount of counted participation in job search and job readiness assistance within such a period uses up a week that may be counted.

Implications for Program Design

This is the activity under which the broadest set of activities can fit, including activities designed to address barriers to employment such as substance abuse treatment, mental health counseling, or physical therapy. The limitation on the length of time these activities can count toward the participation rate — and the regulations that state that a single day of participation constitutes a full week for purposes of the limitation — makes it of very limited use. (See page 19 for a full discussion of the implications of these definitions for persons with barriers to employment.)

⁴ Currently the following states/territories meet the needy state criteria: Alabama, Alaska, Arizona, Arkansas, Delaware, District of Columbia, Florida, Guam, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Washington, and Wisconsin.

While this time limit applied in the past, it was not as problematic for two reasons. First, many states counted job search and job readiness activities under other work activities in some circumstances. For example, under the prior rules, a state might include a job search component in its work experience program as a mechanism for ensuring that work experience participants had an opportunity to try to translate the experience they had gained in the program to unsubsidized, wage-paying jobs. The new regulations, however, explicitly exclude job search and job readiness activities from the definitions of other activities. Second, because the effective work participation rates were much lower under prior law, states often allowed individuals to participate in these activities for longer than the federal limit on the number of weeks that can be counted toward the participation rate.

As with other activities, job search and job readiness assistance are only countable for the actual number of hours that clients participate. To the extent that job search and barrier removal activities occupy less than the required number of hours, states will have to make other activities available to recipients. Training in work place expectations (including attire and behavior) and life skills training (such as communication skills or financial education) could also fall under the definition of job search and job readiness assistance. The preamble explicitly states that activities that do not involve seeking or preparing for work, such as smoking cessation, taking a child to the doctor or parenting skills classes, may not count under this activity.

Because the regulations limit the number of weeks in which a state can claim any hours of participation in job search/readiness activities, states may want to not claim hours of participation in these activities in months in which the recipient will not meet the federal hourly standards for the participation rate. For example, suppose Ms. Smith's application for assistance is approved at the end of May and she is assigned to a job search/readiness program that begins June 15th. Even if Ms. Smith completes all required hours for the last two weeks of June, she will fall short of the total number of hours she is required to participate because she did not commence participation until the middle of the month. The state does not have to claim the two weeks of job search/readiness participation for federal participation rate purposes. By not claiming those hours in June, the state has not used any of the limited weeks of job search/readiness allowable under the federal rules. Note that the state can still claim these hours as "other state defined activities" in its federal data reporting to minimize criticism that too large a share of recipients are "doing nothing."

The requirement that job search and job readiness activities be supervised daily may force states to redesign their current programs substantially. Up until now, many states have considered recipients to be participating in "job search and job readiness" activities if they make a certain number of job contacts every week, and show documentation of those job contacts at the end of the week. This does not appear to be countable under the new regulations. More frequent contact and structure in job search programs can improve the effectiveness of those programs, but only if the additional contact with program staff results in job seekers getting more help finding employment. Simply requiring recipients to attend more meetings with caseworkers to document that they have been looking for work everyday is unlikely to improve employment outcomes and may simply lead to more opportunities to sanction recipients.

Conducting job search through WIA one stops may be an option, but supervision and verification procedures will have to be negotiated. Low-cost verification procedures such as sign-in sheets should be considered, but states should consider how not to stigmatize TANF recipients in the process.

Finally, many states do not currently provide child care for recipients engaged in individualized job search. This can limit the effectiveness of recipients' job searching. If recipients are going to be required to be at a job search *program* for specific, scheduled hours, they will need child care in order to comply. Moreover, the child care protection in the TANF statute which prohibits states from sanctioning recipients that fail to comply with work requirements because of a lack of child care would apply to such structured programs.

C. Unpaid Work: *Work Experience, Community Service and Child Care for Community Service Participants*

Work Experience

Work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available means a work activity, performed in return for welfare, that provides an individual with an opportunity to acquire the general skills, training, knowledge, and work habits necessary to obtain employment. The purpose of work experience is to improve the employability of those who cannot find unsubsidized employment. This activity must be supervised by an employer, work site sponsor, or other responsible party on an ongoing basis no less frequently than daily.

How does this activity count toward the participation rate? (unchanged by regulations)

- **Core Activity:** No limitations.

Discussion

The preamble states that if a work experience program includes components that provide broader types of activities — including job search, job readiness, or vocational education activities — the hours in these broader activities cannot be counted as hours in work experience. This limitation is seemingly at odds with the statement in the definition itself that the purpose of these programs should be to increase the employability of recipients. (See below for more discussion of these limitations.)

The preamble also reiterates current policy that work experience recipients are covered by the Fair Labor Standards Act (when they are employees under the FLSA definition, which is typically the case) and, thus, cannot work off their grant at a wage rate of less than the minimum wage. However, to make it easier to implement work experience activities in low benefit states, the interim regulations allow states in which participation is less than 20 hours per week because of the FLSA provisions to count these hours as equal to 20. (Similar provisions apply to the two-parent rate.) To take advantage of this provision, the state must implement a simplified food stamp program and food stamp workfare requirements. This option is discussed in more detail on hs 21-23.

Implications for Program Design

Even though the definition states that the purpose of work experience is to improve the employability of those who cannot find unsubsidized employment, the preamble excludes job search, job readiness, barrier removal activities and training from the definition of work experience, even when done in conjunction with substantial participation in standard work-in-exchange-for-

benefits activities. This approach may discourage states from implementing programs that combine such activities, because hours in work experience and other activities will have to be tracked separately. Moreover, even a few hours of job search or job readiness claimed toward the participation rate will use up a full week of the limited number that can be counted, and the time spent in these activities will not be countable toward the federal participation rate once the participant has reached the six-week limit on job search and job readiness, which most recipients are likely to hit in the first several months of aid receipt.

States that choose to operate work experience programs should examine research that suggests that work experience programs by themselves have not had a positive effect on employment outcomes, nor have they led to reductions in welfare payments or welfare receipt. Therefore, any states operating work experience programs should consider, at a minimum, including job development and placement components, so that clients do not remain trapped in make-work jobs, but are able to transition to real jobs. Work experience programs should also excuse without penalty absences that are due to job interviews or participation in needed job readiness activities. States may still claim these hours as work participation, subject to the limitations on “excused absences” described on page 26.

Community Service Programs

Structured programs and embedded activities which TANF recipients perform work for the direct benefit of the community under the auspices of public or nonprofit organizations. Community service programs must be limited to projects that serve a useful community purpose in fields such as health, social service, environmental protection, education, urban and rural redevelopment, welfare, recreation, public facilities, public safety, and child care. Community service programs are designed to improve the employability of recipients not otherwise able to obtain employment, and must be supervised on an ongoing basis no less frequently than daily. A State agency shall take into account, to the extent possible, the prior training, experience, and skills of a recipient in making appropriate community service assignments.

How does this activity count toward the participation rate? (unchanged by regulations)

- **Core Activity:** No limitations

Discussion

The preamble states that community service programs must provide *structured* activities designed to improve employability of those not otherwise able to obtain employment. The examples provided in the preamble include work performed for a school, Head Start program, church, or government or nonprofit agency, as well as participation in volunteer organizations such as AmeriCorps and VISTA. These are only illustrative examples and other options are allowable.

The preamble makes clear that this work activity excludes substance abuse treatment, mental health and family violence counseling, life skills classes, parenting classes, job readiness instruction, and caring for a disabled household member. These are all activities that some states had included within their definitions of community service under the prior rules.

The preamble also notes that short-term training or “similar activities” may be counted as community service if the activities are of limited duration and are necessary to the performance of the community service activity. For example, someone doing administrative work at a non-profit organization could receive short-term word processing training and that training could count as “community service” rather than another activity.

The requirement that these activities be supervised on a daily basis represents a significant change from current practice in many states.

The preamble and regulations related to how hours are counted recognize that in some circumstances someone performing community service could meet the definition of an employee under the Fair Labor Standards Act. (71 Fed. Reg. 37464 and §§261.31, 261.32.) Under the structured community service program approach in the definition, participants may meet the definition of employee under the FLSA. In that case, the same FLSA-hourly rules apply as apply to work experience recipients. (See discussion on page 27.)

Implications for Program Design

Many activities that states have previously allowed under community service are not permitted under the new regulations. For example, barrier removal activities, which some states had counted as community service previously, are no longer allowed (for discussion of the implications of the regulations on barrier removal activities, see page 19). Caring for family members with disabilities also cannot count as community service, but the regulations permit such families to be removed from the participation rate, if the disabled family member does not attend school on a full-time basis and the need for the care is medically documented. (For a discussion of this provision, see page 24.)

The regulations also specify that all community service must be conducted as part of a “program” and must be supervised no less frequently than daily. This suggests that volunteer activities in school or a community center are likely to be countable, but that unscheduled, informal volunteer activities are no longer allowable.

The requirement that these programs be structured and supervised makes community service more similar to work experience programs than these activities have been in the past. Because these programs will be more structured and recipients will be expected to participate according to a program schedule, many families will need child care assistance in order to participate.

Providing Child Care Services to an Individual Who Is Participating in a Community Service Program

Providing child care to enable another TANF recipient to participate in a community service program. This activity must be supervised on an ongoing basis no less frequently than daily.
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How does this activity count toward the participation rate? (unchanged by regulations)

- **Core Activity:** No limitation

Discussion

This activity is limited to those cases in which the parent or caretaker of the child receiving child care is participating in community service. Note that recipients who are paid wages to provide child care should be counted as being engaged in employment (in the case of a self-employed child care provider, subject to the limits of counting self-employment). Providing child care in exchange for assistance benefits as part of a structured and supervised program could be counted under work experience or community service. HHS solicits comments on how this activity might be distinguished from other activities.

Implications for Program Design

As discussed under work experience, unpaid work without additional training and supports is unlikely to help someone move to self-sufficiency. Furthermore, there are obvious concerns about the extent to which recipients with little or no early childhood training can provide quality child care. And, it may be difficult to provide daily supervision and monitor hours for people providing child care in their homes. The preamble cautions states to implement this activity “responsibly” and to ensure that this activity is effective in helping move the provider toward self-sufficiency, through activities such as training, certification or mentoring

D. Education and Training: *Vocational Educational Training, Job Skills Training, Education Related to Employment, and School Attendance*

Vocational Educational Training

Vocational educational training (not to exceed 12 months with respect to any individual) means organized educational programs that are directly related to the preparation of individuals for employment in current or emerging occupations requiring training other than a baccalaureate or advanced degree. Vocational educational training must be supervised on an ongoing basis no less frequently than daily.

How does this activity count toward the participation rate? (unchanged by regulations)

- Counts toward all required hours of participation, but the statute imposes a lifetime 12 month limit on counting of vocational educational training toward the participation rate. Activities that are considered vocational educational training may still be countable after 12 months for an individual if they fit into another category, such as job skills training or education related to employment, which are “non core” activities.
- Only 30 percent of recipients counting toward participation can do so through participation in vocational educational training or by being a teen head of household deemed as participating based on satisfactory school attendance or progression toward a General Educational Development (GED) degree.

Discussion

Both the definition itself and the preamble state that postsecondary education programs that result in a baccalaureate degree or an advanced degree — even when the degrees themselves prepare individuals for particular occupations or industries — cannot be considered vocational educational

training. The preamble also indicates that stand-alone basic skills programs and English as a Second Language (ESL) programs cannot be considered vocational educational training and that vocational educational training programs must give individuals knowledge and skills to perform a specific trade, occupation or “vocation.”

The preamble does note that basic skills education may be included, provided that it is of limited duration and is a necessary or regular part of the vocational educational training.

The preamble clarifies that vocational educational training must be provided by education and training organizations, including (but not limited to) vocational-technical schools, community colleges, postsecondary institutions, proprietary schools, non-profit organizations, and secondary schools that offer vocational education.

Finally, the preamble states that only *supervised* study hours can count toward meeting participation requirements. Time recipients spend completing homework and studying cannot count toward the participation rate unless the state develops a way to monitor study sessions and document the hours of participation.

Implications for Program Design

Although the definition of vocational educational training excludes baccalaureate and advanced degree postsecondary education, the interim final rule allows the pursuit of occupational oriented postsecondary education below the baccalaureate level, including associate degree and certificate occupational programs and non-credit workforce or vocational training. Such programs may be delivered through community colleges or other institutions. For example, occupational programs that are part of “career pathways programs” up through the associate degree level — programs which link education and job opportunities in specific sectors to enable workers to combine education and work and advance over time can be counted as vocational educational training. Similarly, bridge programs — programs that prepare adults who lack basic skills and/or English language proficiency to enter and succeed in occupationally oriented postsecondary education — qualify under the new regulatory definition of vocational education.

It is important to note that the preamble specifically says that basic skills education may be counted as vocational education training when it is of limited duration and a necessary or regular part of the training. Neither the regulations themselves nor the preamble state that basic skills education must be contextualized or integrated to be part of a vocational education training program.

Job Skills Training Directly Related To Employment

Training or education for job skills required by an employer to provide an individual with the ability to obtain employment or to advance or adapt to the changing demands of the workplace. Job skills training directly related to employment must be supervised on an ongoing basis no less frequently than daily.

How does this activity count toward the participation rate? (unchanged by regulations)

- **Non-Core Activity.**

Discussion

A fairly broad range of education and training activities can count under this activity, including training in preparation for job entry and upgrade training for those already employed to “adapt to the changing demands of the workplace.” Literacy programs and ESL can count under this definition, if these activities are focused on skills needed for employment or combined with job training.

The preamble makes clear that activities designed to address barriers to employment, such as substance abuse treatment, cannot count under job skills training.

Education Directly Related to Employment, in the Case of a Recipient Who Has Not Received a High School Diploma or a Certificate of High School Equivalency

Education related to a specific occupation, job, or job offer. Education directly related to employment must be supervised on an ongoing basis no less frequently than daily.

How does this activity count toward the participation rate? (unchanged by regulations)

- **Non-Core Activity.**

Discussion

The preamble clarifies that this activity can include education programs that lead to a GED or high school equivalency diploma, when required as a prerequisite by employers or occupations, as well as adult basic education, and ESL.

The preamble states that participants must make “good and satisfactory progress” for hours to count using standards of progress that are developed either by the state or the educational institution in which the recipient is enrolled; such standards must include quantitative (i.e., time frame) and qualitative (i.e., grade point average) measures of progress. (This language does not appear in the rule itself.)

As in the other education components, only supervised study time can count toward the participation requirements.

Satisfactory Attendance at Secondary School or in Course of Study Leading to a Certificate of General Equivalence, in the Case of a Recipient Who Has Not Completed Secondary School or Received Such a Certificate

Regular attendance, in accordance with the requirements of the secondary school or course of study, at a secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate. This activity must be supervised on an ongoing basis no less frequently than daily.
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How does this activity count toward the participation rate? (unchanged by regulations)

- **Non-Core Activity:** Except for teen parents.

Discussion

This activity can be used for recipients pursuing a GED or attending secondary school. Other related educational activities, such as adult basic education or language instruction, that are not linked toward the pursuit of a GED or attending secondary school are not permitted.

The preamble states that participants must make “good and satisfactory progress” for hours to count using standards of progress that are developed either by the state or the educational institution in which the recipient is enrolled; such standards must include quantitative (i.e., time frame) and qualitative (i.e., grade point average) measures of progress.

As in the other education components, only supervised study time can count toward the participation requirements.

Cross-Cutting Issues in the Regulations Related to Education and Training

Research shows that higher levels of education are closely associated with increased earnings and lower rates of unemployment, but most welfare recipients lack the education needed to successfully compete in the labor market. Close to half of TANF recipients lack even a high school diploma, and thus lack the qualifications that are increasingly necessary to gain employment in good jobs that provide family-supporting wages and benefits.⁵ In general, steady work alone is not enough for lower-skilled TANF participants to achieve the “career development and wage progression” that the DRA regulation’s preamble expresses as a goal. One recent study found that while low earners experience some earnings gains over time, only about a fourth or fewer permanently escaped their low-wage status.⁶ While many factors affect whether low-wage workers move up to better jobs over time, one of the observable categories that appears to matter most is the skills of the individual. Higher basic skills and postsecondary credentials are linked to higher wages. They also improve the likelihood of finding a better job initially and wage growth over time.⁷ Employers are willing to pay a premium for higher-educated workers.⁸ And research shows that those with postsecondary education and training (and the credentials they impart) earn substantially more and work more hours than those with just a high school education or less. Businesses pay about 10 percent higher wages for each additional year of schooling beyond high school and this premium is increasing over

⁵ U.S. Department of Health and Human Services. Fiscal Year 2002 Characteristics and Financial Circumstances of TANF Recipients.

⁶ Andersson, F., Holzer, H., and Lane, J. *Moving Up or Moving On: Who Advances in the Low-Wage Labor Market?* Russell Sage Foundation. 2005.

⁷ Poppe, N., Strawn, J., and Martinson, K. “Whose Job Is It: Creating Opportunities for Advancement.” *Workforce Intermediaries in the 21st Century*. Robert Giloth (Ed.). Temple. 2003.

⁸ Mishel, L., Bernstein, J. and Allegretto, S. *The State of Working America 2004-2005*. Economic Policy Institute. 2005.

time.⁹ According to the Bureau of Labor Statistics, between 2004 and 2012, 24 of the fastest-growing occupations are predicted to be filled by people with postsecondary education or training (either a vocational certificate or a degree).

Two decades of research show us that the most effective welfare-to-work programs used a range of services to help recipients succeed in the labor market, including substantial access to education and training because higher skills lead to higher wages. For example, the experimental National Evaluation of Welfare-to-Work Strategies (NEWWS) found that of 11 programs studied, the program in Portland, Oregon was most successful at increasing recipients' employment rates and earnings, the likelihood that recipients would find jobs with benefits, and the likelihood that they would remain employed. The Portland program (which is operated by local community colleges) made substantial use of education and training, as well as job search and other activities, and increased the number of recipients who received education and training credentials, including both high school diplomas and occupational certificates.

Non-experimental research provides evidence that even one year of education or training that results in a certificate pays off in the labor market. And research from Washington state suggests that participating in basic skills and English language instruction integrated with technical training can be an important step toward completion of occupation certifications with real labor market payoffs. If left unchanged, the new regulations will present new challenges for states that want to provide skill building opportunities for recipients.

Experience has shown that it is difficult for adults to balance work, family and educational commitments. Therefore states should work with educational institutions to create flexible schedules to allow students to combine education and work, and provide opportunities for qualified recipients to pursue full-time vocational educational training to the extent possible to enable them to advance as far as possible in their educational program before they are required to go to work.¹⁰

- **To ensure access to needed basic skills and English language training, states will likely need to consider how to integrate these activities into vocational training programs, and after twelve months, to combine ABE/ESL with other work activities.** As shown in Table I, it appears that recipients may participate in basic skills training and count toward the rates in a number of different core and non-core activities. However, the primary way that basic skills training can count toward the core hours participation requirement is through vocational educational training. The preamble states that basic skills training (including adult basic education and English language instruction) and GED or pre-GED programs may count as vocational education when it is of limited duration and is a necessary or regular part of an occupational program. Neither the preamble nor the regulations require that basic skills or

⁹ Barrow, L. and Rouse, C. Do Returns to Schooling Differ by Race and Ethnicity? Working Paper. Federal Reserve Bank of Chicago and Princeton. 2005

¹⁰ This and other strategies related to providing education and training for TANF recipients are discussed in *Strategies for Increasing Participation in TANF Education and Training Activities*, available at: http://clasp.org/publications/tanf_ed_training.pdf.

TABLE 1: HOW CERTAIN EDUCATIONAL ACTIVITIES COUNT IN THE NEW WORK ACTIVITIES DEFINITIONS

	Is it countable as: vocational educational training?	Is it countable as: job skills training?	Is it countable as: education directly related to employment for someone without high school diploma or GED	Is it countable as: satisfactory school attendance?	Is it countable as: on-the-job training
ESL	Yes-- if included as preparation for specific occupation	Yes-- if instruction is explicitly focused on skills for employment or combined with job training	Yes	Yes-- if linked to attending a secondary school or leading to a GED.	Yes-- if provided by employer in the workplace.
Basic Education	Yes-- if included as preparation for specific occupation	Yes-- if instruction is explicitly focused on skills for employment or combined with job training	Yes	Yes-- if linked to attending a secondary school or leading to a GED.	Yes-- if provided by employer in the workplace.
High School Equivalency	No	Yes-- if prerequisite for a job or occupation.	Yes-- if prerequisite for a job or occupation.	Yes	No
Post-secondary Education	Yes-- if related to an occupation, excluding a BA or advanced degree.	Yes	No	No	No

Vocational educational training may only be counted for 12 months per individual, but is a "core" activity and can be used for all hours of participation. Individuals counted based on participation in vocational educational training and teen parents deemed as participating based on satisfactory school attendance together may constitute no more than 30 percent of the individuals counted as participating.

Job skills training and education directly related to employment are "non-core" activities and only count toward hours after the first 20. Satisfactory school attendance is also a "non-core" activity except for teen parents.

Note: Specific models of the education activities described above may not be countable, depending on the interpretation of the regulations.

English language instruction must be contextualized for an occupation or integrated into occupational training, though clearly this would be allowed if a state or provider chose to do so.

The preamble makes it clear that On-the-Job Training (OJT) overlaps with vocational educational training, and invites comments as to whether the definition in the regulations should be broadened beyond paid employment to include other aspects of training that are not employment. Under the current interim final rules, any kind of training provided to a paid employee while engaged in productive work that “provides knowledge and skills essential to the full and adequate performance of the job” qualifies as OJT. This suggests that basic skills or ESL training may be incorporated into a program of OJT. The regulations would appear to

allow activities such as workplace orientation sessions and classroom instruction in such things as use of computers, literacy and ESL that is provided by the employer in the workplace as OJT, if those skills would assist the participant to complete his or her assigned duties. Given the preamble language, HHS also appears open to comments that argue for broadening the OJT definition to also count as OJT preemployment training necessary to qualify for a specific position. Extending the definition of OJT to apply to unpaid work environments also would substantially increase states' flexibility to operate programs that combine work experience with training.

Literacy, English language, and other basic skills are of great value in even the lowest-skilled job, and are important stepping stones to other skill-building activities. Basic skills training, including ESL, is countable under several non-core categories of work activities. To take advantage of this option, states should consider developing educational programs that are offered at times and places that are convenient for working adults and providing child care assistance for participants. In addition, some states may need to improve their tracking systems in order to capture work activities from two different sources. Basic skills training can be combined successfully with a range of work and educational activities. In some cases, it may be appropriate to provide intensive basic skills or ESL training to recipients to help them meet the requirements of daily life or to meet the minimum qualifications for entry into an occupational training course. Thus, the basic skills instruction would be unconnected to employment or to a vocational education program. States should consider allowing such recipients to participate in activities even if the participation is not countable toward the federal requirements.

- **Study time is integral to successful completion of any educational program.** At the post-secondary level, it is common for courses to require two or more hours of preparation time for each hour of class time. The regulations limit states' ability to count recipients' time spent on class preparation, and allow states to count only "monitored" study time. This is an area of significant concern in the current regulations and a change from prior HHS policy. If this rule is left unchanged, states should explore with community colleges and other education and training partners whether structured study-time programs can be established and participation in them documented. As with other structured activities, many families will need child care assistance in order to attend structured study sessions and the time spent commuting to the study space.

As states explore how to structure study sessions, they should build on current and past experience organizing such sessions. A few states currently have supervised study time, and a number of states had a structure for supervising study time under the AFDC JOBS program, which operated between 1989 and 1996. The JOBS program had a policy similar to that of the interim final rule, requiring states to supervise study time in order for it to count toward participation.

- **Tracking study hours and attendance in certain education and training activities may be challenging for states.** States should work with their partners to establish monitoring systems that do not burden educational institutions or TANF recipients. By October 2007, states must have a system in place for determining whether the reported hours correspond with the actual hours worked, which could involve timesheets, service provider attendance records and school attendance records. Many community colleges and other providers do not have systems in place to track attendance. State agencies should work with their education and

training partners to establish systems to track attendance, without stigmatizing welfare recipients or unduly burdening providers.

- **States should be careful when defining “good or satisfactory progress.”** As noted above, the preamble states that to count as participating in education directly related to employment or satisfactory attendance at secondary school, participants need to be making “good or satisfactory progress.” States should be careful to avoid developing criteria for monitoring “satisfactory progress” that will discourage serving people with barriers. Such individuals may require a longer time than others to reach benchmarks or complete programs.

II. Implications of Work Activity Definitions on Services to Address Certain Barriers to Employment

The new federal rules may hinder state efforts to serve families with disabilities or other significant barriers to employment in the most effective and appropriate manner. Research consistently documents that a large percentage of TANF recipients have physical and mental health problems or low cognitive functioning. While many of these recipients are often able to move toward employment, they sometimes need more specialized rehabilitative services — including mental health treatment, substance abuse treatment, and occupational or physical therapy — to help them prepare for employment.

There were many ways in which HHS could have promulgated rules that would have made it easier for states to serve families with barriers and to comply with their obligations under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504 hereafter). In March, the National Governors’ Association and the American Public Human Services Association asked HHS to provide flexibility to states so these specialized programs can count toward the participation rate. But HHS has declined to do so, noting that it does not have the authority to add to the list of countable activities. However, this argument ignores the ways in which HHS could have provided flexibility to states under the statute. For example:

- **HHS could have adopted a broader definition of vocational educational training, job skills training, and community service for individuals with disabilities as defined under the ADA or Section 504 that would have allowed states to get credit when they engage recipients with disabilities in appropriate activities designed to help them prepare for employment and full participation in the community.** Over the past decade of TANF implementation, HHS has never ruled that states that adopted broader definitions for individuals with disabilities acted *contrary to the statute*, suggesting that while the statute does not compel broad definitions, it does allow them.
- **The rules could have taken an approach that deemed a recipient to have met the required number of hours of participation in circumstances in which a recipient is assigned (and completes) fewer hours of participation because s/he has a disability that for which reasonable accommodations were needed.** This is similar to the approach that the rules take with respect to reconciling state obligations under another federal law – the Fair Labor Standards Act – and is discussed further below at page 27.

- **The rules also could have identified that an individual with severe disabilities – for example a person who is applying for but not yet approved for SSI – should not be considered a "work-eligible individual" for purposes of participation rate calculations.** HHS used its legal authority under the provision that allows it to determine “the circumstances under which a parent who resides with a child who is a recipient of assistance should be included in the work participation rates” to recognize that a parent caring for a disabled family member is not a “work-eligible individual” and should not be counted in the work rate in some circumstances. It could have used the same legal authority to define parents who themselves have disabilities that limit their ability to participate in work activities as not “work eligible.”

While not facilitating states efforts to serve recipients with disabilities, HHS reaffirms that states are required to do so and cites HHS Office of Civil Rights guidance previously issued. The preamble discussion recognizes that states must balance the goals of the program, the needs of the family and the obligations under the ADA and Section 504. HHS’s answer to the question of how states can balance these goals notwithstanding the rigidity of the rules is to simply state, “That is why the participation requirement is only 50 percent.” (71 Fed. Reg. 37466.)

This statement ignores the reality that reaching a 50 percent participation rate is difficult in large part because of the many legitimate reasons why a recipient may not meet the full hourly participation requirements in any particular month, including illness, temporary gaps between work program components, and family emergencies such as trying to forestall an eviction, the need to find new housing, the need to care for an ill relative who may not live with the recipient, or the need to attend to a domestic violence issue.

Nonetheless, as the regulations currently stand, states will need to find ways to balance the goals of serving families with barriers effectively, meeting their obligations under the ADA and Section 504, and work rate pressures.

- **When appropriate, serve families with barriers through activities that can count under the definitions of the work activities.** While the regulations adopt narrow definitions of the work activities, barrier-removal activities can count within the job readiness definition. It is important to note that there are short time limits on participation in this activity — this activity (combined with job search) can count only for four consecutive weeks, and for six or 12 weeks in total each fiscal year (depending on whether the state meets the “needy state” criteria). Effective activities for families with barriers to employment can also fall within other countable activities. These include: transitional jobs programs (falls within subsidized employment category), supported work (could fall within OJT, subsidized employment, or work experience depending on the design of the program), and vocational educational training programs. Similarly, if a portion of substance abuse treatment, mental health treatment or a rehabilitation program contains activities that fall under the countable work activities, then the hours associated with the activity may count under the appropriate work category. The preamble offers an example of a resident of a halfway house who is required to prepare meals, clean public rooms, or perform clerical duties.
- **Engage recipients in appropriate work activities, even if the activity will not count toward the work participation rate.** States should recognize that participation in non-countable activities may be the best first step toward participation in countable activities. In addition, states should recognize that barriers or a disability limit the number of hours that

some individuals can participate; an appropriate requirement for some individuals may be fewer hours than the number required to meet the federal work rates. If a recipient has a disability as defined under ADA and Section 504, states may be legally required to make such accommodations. As HHS notes, states have some flexibility with a 50 percent work rate target to provide activities that may not count toward the work rates.

- **Consider serving some families with disabilities or barriers to employment outside of the TANF/MOE structure.** States should consider whether some families — such as those that are exempt from work under the state policies — are best served by a program outside of the TANF or MOE structure. California’s legislature recently enacted such an approach, providing state-funded assistance (that does not count toward the MOE requirement) to families exempt from work requirements under California law.

Unfortunately, HHS has increased the incentive for states to restrict access to assistance for poor families with the greatest needs by disallowing credit for the very activities that help these families the most. If such recipients are assigned to activities that they are unable to participate in, there is a high likelihood that they will wind up sanctioned and in severe financial distress.

III. Definition of "Work-Eligible Individual" (and Treatment of Child-Only Cases)

The DRA requires HHS to issue rules identifying the circumstances under which a parent who resides with a child receiving assistance should be included in the work participation rate calculation. The new rules at 45 CFR §261.2(n) create a new term “work-eligible individual,” which is used to define those individuals who now will be included (and excluded) in the work participation rate calculation. This new term replaces the prior approach under which families that include an adult receiving assistance were included in the work rate calculation and those that did not include an adult recipient were excluded.¹¹

Under the regulations, a “work-eligible individual” is:

- **An adult (or minor head-of-household) who is included in the assistance grant, unless she meets an exception listed below.** Note that the adult recipient could be a parent or a relative; these cases have always been included in the work rate. The exceptions under which an adult receiving assistance is *not included* in the work rate are as follows:
 - an individual receiving MOE-funded assistance under an approved Tribal TANF plan (unless the state chooses to include such families in the work participation rate) and
 - parents caring for a family member with a disability who is living in the home and who does not attend school on a full-time basis (this is discussed more below).

¹¹ The term “work-eligible individual” is the basis for, but is not identical to, the work rate denominator. Two additional groups of work-eligible individuals can be excluded in reaching the denominator: 1) families with a child under the age of one (for a total exemption of not to exceed 12 months for any particular parent) can be excluded on a case-by-case basis; and 2) families that are sanctioned for refusal to participate in work activities for no more than three of the last 12 months can be excluded. These exclusions were in the prior law and regulations and have not changed.

- **A non-recipient parent living with a child receiving assistance, unless specific exceptions — set forth in the rule — apply.** The exceptions are discussed below. (Child-only cases in which the children live with a non-recipient *relative* — other than a parent — are not included in the definition of work-eligible individual, are not included in the work rate, and are not affected by these rules.) Note that the new rules do *not* alter the law that months in which a family that does not include an adult receives assistance does not count against the federal 60-month time limit on TANF-funded assistance.

Parents Who Are Not Receiving Assistance

The general rule under the “work-eligible individual” concept is that when a parent who is not receiving assistance resides with a child who is receiving assistance, the parent is *included* in the work rate calculation unless specified exceptions are met. The three exceptions under which the case is *not included* in the work rate calculation are:

- **An alien parent who is ineligible to receive assistance due to his or her immigration status.** This would include immigrants who are ineligible because they are not “qualified” under PRWORA as well as qualified immigrants who are ineligible due to the five-year bar on federal TANF assistance. (If a state is providing assistance to parents subject to the five year bar through an MOE-funded state replacement program, the case now will be included in the work participation rate calculation because *all families* with an adult receiving assistance in MOE-funded programs are now part of the work rate calculation. Some state replacement programs have provided MOE-funded assistance within their TANF-funded program and have always included these families in their work rate.)
- **At state option on a case-by-case basis, a parent receiving Supplemental Security Income (SSI).** Although disabled, some SSI recipients may be employed or participating in work-related activities. A state can thus choose to include an individual case when it would increase the state’s participation — that is, when the parent is participating for sufficient hours in a countable activity — without making an across-the-board decision to include all cases in which a parent receives SSI recipients. A question was raised at the recent APHSA meeting about whether or not a state can retroactively define a TANF (or MOE) assistance recipient as “not work eligible” on the basis of being an SSI recipient for the time period between when the individual applied for SSI and when those benefits are approved (on a retroactive basis back to the date of application). HHS officials did not give a clear answer to this question. Since SSI benefits are provided retroactively to the date of application, it would seem reasonable to define individuals as SSI recipients for the months that the retroactive benefit covers for purposes of this exclusion from the definition of work eligible but further clarification from HHS is needed on this issue.
- **A minor parent who is not the head (or the spouse of a head) of household.** While the drafting is a bit unclear, it appears that HHS intended to exclude all minor parents from the work rate calculation — including those who are recipients on another adult’s case — who are not heads or spouses of their own cases. HHS notes it does not include them in the work rate because it wants to encourage them to stay in school and complete their education.

Under the new rule, any other non-recipient parent residing with a child receiving assistance will be counted in the work rates. The following are types of cases that will *now be included* in the work rate due to this rule change:

- **Partial sanction cases:** Several states take the parent off of the grant as a partial sanction for non-cooperation with work or other requirements, and have not included these cases in their work rate calculation. In other states, partial sanctions are imposed by a dollar or percentage reduction of the grant, and states have included these cases in the work rate calculation, at least after three months. HHS notes that under the law sanctioned cases can be excluded from the calculation for up to three months in a 12-month period and suggests that the approach in the new rule brings consistency across all sanctioned cases. The new rule, however, does create an inconsistency between partial and full-family sanctioned cases — a state that terminates all assistance to a family do not have to count that family in its work participation rate calculation, but a state that terminates assistance to the parent only must now include that family in its work rate. While work-related sanctions generally are the largest share of sanctioned cases, sanctions that remove a parent from the grant for child support non-cooperation are also covered by this policy change. These child support sanction cases, while fewer in number than work sanctions, may affect cases in more states.
- **Time-limited cases:** A handful of states continue assistance to children when their parents reach a time limit. These child-only benefits often are provided with MOE funds.
- **Disqualified parents:** There are a number of other disqualifications that can result in a parent, but not a child, being ineligible for assistance in a TANF-funded program. These include disqualifications for fleeing felons, drug-related felons (although states can opt out), and persons ineligible because of past fraud. Based on questions raised at the APHSA meeting, it appears possible that HHS did not intend this result and HHS may revisit the provision. Because states cannot provide assistance in TANF-funded programs to disqualified individuals, it would be difficult for a state to provide supports for participation in work-related activities, and unfair to penalize a state for the individual's non-participation. For example, child care or transportation for persons who are *not* employed is considered assistance and states could not use TANF funds to enable participation for these persons.

In some states, there are significant numbers of time-limited or partial sanctioned families where benefits are provided to the children. These states will be significantly impacted by this rule change and are likely to find meeting work rates more difficult. A positive way that states could respond to this requirement would be to conduct improved outreach to sanctioned families to identify their reasons for non-participation and to re-engage them in work activities. However, some in these states may instead propose changes to the policies that extend benefits to the children even if the parent is ineligible. For example, there may be an increased push to revisit time limit policies or to adopt gradual or immediate full-family sanctions in a state that is affected by this change. In other states, which do not convert sanctioned or time limited cases into child-only cases, there will be little impact from these rule changes.

Families added to the work rate by the new definition of work-eligible individuals will need employment services and access to work programs. In some states, parents who are excluded from the grant have not been eligible or encouraged to participate in work activities; now states will need to modify their programs to serve these families. As states require non-recipient parents to

participate in work activities, these families may be newly subject to penalties such as full-family sanctions. In other instances, the ineligible parent may already be working but earning very low wages so that even with the earnings deemed to the children, the family continued to receive aid.

Two-Parent Families

HHS notes that the new definition of work-eligible individual does not only affect households where no adult receives assistance. For some two-parent families, with one eligible and one ineligible parent, this could result in adding the ineligible parent to the work rate. With the second parent added to the work rate, the case would be considered a two-parent family and subject to the higher work rate target of 90 percent and the higher number of hours that two-parent families must participate to be counted as meeting the two-parent rate. (Under prior rules, these cases were *not* considered two-parent family cases for work participation rate purposes.)

The new regulations do not change the prior regulatory provision under which two parent families in which one parent has a disability are considered single-parent families. (For purposes of this provision, states are permitted to determine what constitutes a disability.)

Exclusion for Parent Receiving Assistance If Caring for a Disabled Family Member

The rules acknowledge that parents caring for a family member with a disability may have limitations in their ability to participate in work because of caretaking duties. Under the rules, such parents (even if receiving assistance) can be excluded from the definition of “work-eligible individual” — and, thus, excluded from the work rate calculations — if certain conditions are met. (Under the language of the rule, this exception only applies to a *parent* caring for a disabled family member and is not triggered if a caretaker relative is providing such care.)¹² To qualify for the exclusion:

- **The disabled family member must be living in the home.** This exemption would not apply, for example, to someone who is caring for an elderly or ill parent who did not live with the recipient.
- **The need for such care must be supported by medical documentation.** The preamble discusses that the documentation must support the need for the parent to remain in the home.
- **The family member may not attend school on a full-time basis.** It is unclear what “attending” school full-time means. Depending upon how it is interpreted, this requirement could significantly undermine the beneficial impact of the exclusion. Some parents of school-age children with disabilities will be unable to participate in work activities to the same extent as other adults, particularly since these parents will be required to participate for 30 hours per week in order to count toward the participation rate, unless there is a younger child also in the family. There are a number of reasons that meeting the full participation requirement may be difficult or even impossible for parents caring for children with disabilities who are in school:

¹² While the policy reasons for granting this exclusion from the work rate to parents logically should extend to any caretaker adult receiving assistance (i.e., caretaker relatives), the rule as currently written does not do so. This may be because HHS the language of the DRA directed HHS to determine when a “parent” should be included in the work rate.

- **The disabled child may have many medical appointments and school absences due to their disability, and parents may need to attend frequent school appointments related to IDEA plans and be available for emergencies and classroom participation.** It is possible that, under these regulations, children who are *enrolled* in school on a full-time basis but who have significant absences due to their disabilities could be classified as *not attending* school on a full-time basis, but the language of the rule is not clear. Indeed, a school district would run afoul of IDEA if it did not enroll a child with a disability in school full-time if full-time is considered appropriate for a child of that age.
- **Appropriate after-school care may be unavailable for some children with disabilities.** Since school typically only meets for 30 hours or less each week and parents need time to commute back and forth to work activities (and, in some cases, transport their children to and from school), it could be impossible for some parents to meet a 30 hour work participation requirement.

HHS notes that it specifically declined to allow caring for a household member with a disability as a countable work activity; a number of states previously considered this as community service. HHS also specifically invites comments on the approach it took in the regulations and the extent to which it addresses the needs of families in which there is an individual with a disability. This policy could be much more useful to families and states if it more broadly covered parents of schoolchildren with disabilities.

It should be noted that the *same legal reasoning* HHS used to define parents caring for family members with disabilities as “not work eligible” — namely, its authority to determine when a parent of a child receiving assistance should be included in the participation rate calculation — could have been used to exclude parents who themselves have disabilities that limit their ability to participate in work activities from the definition of “work eligible” — including, for example, those awaiting an SSI determination or those with serious but shorter-term disabilities. Excluding such individuals from the work rate calculation is only one of the ways in which these regulations could have been more responsive to the needs of recipients with disabilities.

IV. How Hours of Participation Must Be Counted, Tracked, and Verified

This set of regulations in Subpart F – How Do We Ensure the Accuracy of Work Participation Information (§§261.60 – 261.65) – describes how states must collect information about the hours a recipient participates in activities, the documentation that must be provided to verify the hours participated, the “Work Verification Plan” states must develop describing how they will document and verify hours of participation, and the penalties that states can incur if they fail to develop and follow this plan. This set of regulations:

- establishes rules for when an hour can be considered an hour of participation,
- discusses the impact of the Fair Labor Standards Act on counting hours of participation in community service or work experience,

- establishes documentation standards for verifying hours of participation, and
- includes provisions on the Work Verification Plan including when the plan must be filed and what must be included in it, when states must comply with the plan, and the penalties associated with failing to meet these requirements.

When an Hour Can be Considered an Hour of Participation

The regulations make clear (though the preamble states that this is a reiteration of current policy) that states must report *actual hours* of participation, not scheduled hours. The rules also prohibit states from reporting hours using a method they call “exception reporting” which means that states cannot assume that a recipient participated in scheduled activities and report those hours of participation unless they learn otherwise; states instead must affirmatively determine that a recipient participated in an activity in order to report it.

There are two instances in which hours can be counted toward the participation rate even if the recipient was absent from scheduled work/participation. First, for employed recipients, hours for which they are *paid* — including paid leave — can count toward the participation rate. Second, for individuals in unpaid work activities, up to 2 days per month of missed participation — with a limitation of 10 days per year — can be counted toward the participation rate, if the state considers them “excused absences.” States have flexibility to define what constitutes an excused absence, and should consider a wide range of circumstances, including sick days, medical appointments for the recipient and family members, required appointments with other service providers, court dates, and job interviews to ensure that the state gets credit for the broadest possible set of absences that will occur. For the hours to count the absence must have occurred on a date that the recipient was scheduled to participate in an activity.

Similarly, holidays can count as actual hours toward the participation rate calculation, provided that the holiday falls on a day of scheduled participation. HHS does not define “holidays” — states are required to describe the holidays for which they want hours to count toward the participation rate in their Work Verification Plans (discussed below) and HHS will then approve that list or request changes to it. States should carefully consider the holidays they intend to use and should take particular note of days during the year that work experience sites and training providers are likely to be closed and be sure that the list is as comprehensive as possible before submitting it to HHS. At the APHSA meeting, HHS seemed willing to consider comments suggesting that this policy be extended to recipients who are employed but do not receive paid leave from their jobs.

The regulations note that while the regulations limit the number of excused absences that can be counted as actual participation, states are permitted to consider someone to have an excused absence for other purposes (such as determining sanctions for noncompliance) under any state rules they wish to have. The regulations note that further excused absences might be required to meet a state’s obligation under the Americans with Disabilities Act, stating, “An individual’s requirements are set by the State balancing the goals of the program, the needs of the family, and obligations under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973.” (71 Fed. Reg. 37466.)

Note that, once again, HHS had the legal authority to grant a broader excused absence policy for all recipients or for any subset of recipients. It could have, for example, provided for a broader sick leave policy or said that states could count a larger number of excused absence days if those absences had to be granted to comply with states' obligations under the ADA or Section 504. While the principle of allowing excused absences is a step in the right direction, the tight restrictions on the number of days that are allowable limit the policy's value. Under the new rules, if a child gets the flu and is sick for a week, the parent is unlikely to be countable toward the work participation rate for that month, even if she faithfully participates for all scheduled hours the rest of the month.

Impact of Fair Labor Standards Act on Counting Hours of Participation

Both the community service and work experience activities involve TANF recipients in unpaid work-like activities, in effect, "working off" their grant. Since the minimum wage protections of the Fair Labor Standards Act apply to TANF recipients as to other workers, states cannot require recipients to "work off" their grants at an hourly wage of less than minimum wage. Because TANF benefits are sometimes quite low, a number of states will not be able to require recipients to engage in unpaid work activities for a sufficient number of hours to meet the relevant 20, 30, or 35 hour requirements. Even if the value of food stamp benefits is added in, the combined benefit when divided by minimum wage still may not result in the required number of hours in some states for some household sizes.

The rules address this situation by allowing states, under certain circumstances, to count any family that participates for the maximum hours allowed under the minimum wage requirements of the FLSA as having satisfied the required number of hours in core activities. (45 CFR § 261.31; 45 CFR § 261.32.) The maximum hours permissible under the FLSA must be based on both the value of the TANF benefits and any food stamp benefits the family receives. Preamble language suggests that the maximum permissible hours of work would be calculated using the state minimum wage for states with a higher state minimum wage.

Under the regulation, this provision would affect the hours calculation in the following manner:

- **For meeting the "all-families" work rate (i.e., the 50 percent rate):** The number of hours allowed under the FLSA can count as meeting the 20-hour per week core requirement, even if actual participation falls short of 20 hours. (§ 261.31(d)) For those families with a 30 hour requirement (that is, those who are not a single parent with a child under age six), the additional 10 hours of required work activities must be satisfied in another activity in order for the family to count toward the work rate.
- **For two-parent families without subsidized child care and who must participate a combined 35 hours per week for purposes of the two-parent work rate (i.e., the 90 percent rate):** The number of hours allowed under the FLSA can count as meeting the core 30-hour per week requirement, even if actual participation falls short of 30 hours. (§ 261.32(d)) Additional hours to reach the 35-hour TANF requirement must be satisfied in another activity.
- **For two-parent families that receive federally-funded child care assistance and who must participate a combined 55-hours per week for purposes of the two-parent work rate:** The number of hours allowed under the FLSA can count as meeting 50 of these hours

even if actual participation falls short of 50 hours. (§ 261.32(e)(4)) Additional hours to reach the 55 hour TANF requirement must be satisfied in another activity.

Under the regulations, in order to use this provision a state must adopt a food stamp workfare program and a Simplified Food Stamp Program. The food stamp workfare program provides the authority for the state to require food stamp recipients to “work off” their food stamp benefits. 7 CFR § 273.7(m).

- The Department of Labor has issued guidance permitting states to combine TANF cash grant allotments and the value of food stamp benefits in order to meet workfare FLSA requirements.
- The mechanism by which states combine the grant allotments is a Simplified Food Stamp Program. (§ 273.25) SFSPs have a number of requirements such as cost neutrality and must be approved by the Secretary of Agriculture. States that seek simply to combine TANF and FS grant allotments for work requirement purposes have typically received a quick approval.

The Food Stamp implications of this approach and adoption of a Simplified Food Stamp Program raise a number of complicated questions. We are continuing to analyze these issues.

Implications of the FLSA provisions for TANF program design

Allowing states to count a recipient who participates for the hours allowed under the FLSA but less than those typically required under the rules toward the work participation rate likely will provide only modest help to states, and may be complicated to administer. When the value of TANF is combined with the average food stamp benefit and the sum is divided by the federal minimum wage, a family of three in every state (and a family of two in all but a handful of states) already could be required to participate in 20 hours of unpaid work experience or community service. The 20-hour provision generally would only make a difference for households of one (in nearly all states), for households with unearned income that results in smaller TANF and food stamp benefits, or for households that do not receive food stamps. For two-parent households needing to meet 35 or 55 hours of participation, the rules could provide a greater benefit. Even with this provision, however, states will have great difficulty meeting the 90 percent work rate for these families.

Finally, in many cases, wrap around services will still be needed to reach the relevant 30 or 35 hours of participation required in many instances. For example, for two parent families, this provision would allow a family to be deemed to be participating for 30 hours and a state would still have to provide additional activities to satisfy the 35-hour work requirement. The additional five or ten hours of activity required each week could be in useful non-core jobs skills training or basic skills activities.

FLSA Legal Reasoning Could Have Been Applied to Modify Hourly Requirements for Recipients with Disabilities

HHS presumably determined that it had the legal authority to define a recipient who participates for less than 20 hours as having met the 20 hour core hourly requirement under the FLSA provision described above because of the broad regulatory authority the DRA gave to HHS to promulgate regulations to establish “uniform methods for reporting hours of work by a recipient

of assistance.” (Section 7102(c) of the Deficit Reduction Act.) HHS chose to use this authority to make the TANF statute comport with the FLSA which requires that individuals not be paid less than the minimum wage.

HHS could have used this same legal reasoning to deem recipients whose disabilities preclude participating in countable work activities for the full federal hourly participation standards to have met the hourly participation requirement. This would have made the TANF statute comport with the ADA and Section 504, which require states to establish work participation requirements for individuals with disabilities that are appropriate based on the individual’s condition.

Documentation Standards for Verifying Hours of Participation

The rules state that “A State must support each individual’s hours of participation through documentation in the case file.” (§261.61(a)) The rules then provide states with examples of how the documentation standard can be met but notes that the examples they provide are not exhaustive. As noted below, states have to describe the documentation they are going to use to verify hours of participation in their Work Verification Plan, so HHS has the opportunity to approve or disapprove alternatives. The examples provided in the rules include:

- **Employed recipients:** Pay stubs, employer reports, time and attendance records. For recipients who are employed (e.g. work in an unsubsidized or subsidized job or participate in OJT), the state can allow the documentation of current hours to act as documentation of hours worked over a *six month period*. (If a state learns that the recipients’ hours have changed, the state must change the hours it reports to HHS.) This rule should alleviate the need for employers or employed recipients to report repeatedly to the agency about the hours of employment. Note that HHS has provided far less specificity on how to track hours for self-employed recipients, asking states to describe how they intend to do so in their Work Verification Plans.
- **Individuals who are in other activities:** Time sheets, attendance records provided by the work activity program, or school attendance records. The regulations and comments by HHS officials suggest that *all hours* of participation the state wishes to claim toward the participation rate must be documented in some fashion in the case file. The regulations note that for job search/readiness participants, the documentation must be done “daily” while for participants in other activities, the requirement can be met every two weeks. At the APHSA meeting, HHS officials acknowledged that this language was confusing. The every-two-weeks requirement seems to mean that when a recipient is participating in a program that is facilitated by someone other than the TANF agency or its designee — such as a work experience site or a community college — that the TANF agency or its designee must *receive* the documentation of the recipient’s participation at least every two weeks.

Implications for Program Design

- **The rules related to employed recipients can fit together nicely with already-in-place eligibility reviews and simplified (also known as semi-annual) reporting rules in the Food Stamp Program.** (Note: This refers to the reporting rules in the Food Stamp Program that describe

the circumstances under which families must report changes in their circumstances to the eligibility office, not the so-called “Simplified Food Stamp Program.”) For employed recipients, some states even may be able to *reduce* paperwork burdens on families by using current information from a pay stub or employer record to “lock in” hourly participation for the next six months. When the family comes in for an eligibility review in *any* benefit program or when it completes a semi-annual report for food stamps¹³ (in those states with semi-annual reporting and twelve month food stamp certification periods), the state typically would require income verification. The state can verify current hours of employment at that time and then set the hours of participation for a new six month period. If a state becomes aware that the individual’s work situation has changed — because, for example, the recipient reports that s/he has lost her job and s/he needs her benefits adjusted — the state again would typically verify the new earnings and can again use that opportunity to gather new information about hours.

Some states currently require employed recipients to report their hours of employment *more frequently* than would be required under the federal regulations. This is one of the few areas in which states can now reduce administrative burdens on TANF caseworkers and families.

Moreover, this new rule removes one of the concerns that has been raised about expanding assistance to working families through either an expanded earnings disregard or through a separate “worker support” program. Expanding assistance to working families can help states meet their work rates both by increasing work incentives and by increasing the number of working families that count toward the work participation rate. If the regulations had required working recipients to submit verification of their hours weekly or monthly, the benefits provided by the program might have been more than offset by the hassle of complying with the paperwork requirements. Because the regulations do not require very burdensome verification requirements for working families, and can match the food stamp reporting requirements that working families may already have, these programs become more attractive for both states and families.

- **Welfare-to-work program providers will need resources and training to comply with the reporting and verification rules.** These regulations will place a heavy burden on those entities that operate welfare-to-work programs — whether those entities are public or private — who will be on the “front lines” in documenting hourly participation. In states that do not now require the level of documentation that appears required under the regulations, the welfare-to-work program providers will need clear instructions on how to collect and submit to the agency the needed information. Some may need additional resources; without those resources, those programs may divert staff time from the job of helping recipients succeed in the labor market to monitoring hourly participation and ensuring that the paperwork requirements are met.
- **There is a danger that reporting and verification requirements could pose new burdens on recipients already trying to juggle participation in work activities and their family responsibilities.** States may be able to reduce these burdens by ensuring welfare-to-work programs with direct relationships to the state agency — through contracts or provider agreements — submit the required information about recipients’ attendance directly to the

¹³ Most states utilize semi-annual reporting in the Food Stamp Program under which food stamp recipients must provide updated eligibility information to the state every six months but are not then required to report other changes in their circumstances that occur within the six month window unless income exceeds 130 percent of the federal poverty line.

agency, rather than requiring the parent to keep track of their own hours and seek signatures from program providers to document that they did in fact attend. Developing mechanisms for recipients in work activities that are not limited or primarily geared toward TANF recipients — such as those in community colleges, WIA-operated programs, etc. — that are not burdensome to parents and do not stigmatize the recipient will take careful consideration.

Work Verification Plan: Filing, Compliance and Penalties

The rules include a series of provisions concerning the new Work Verification Plan requirement. This set of regulations:

- **Requires states to submit a Work Verification Plan to HHS by September 30, 2006.** For each countable work activity the state plans to utilize in its program, the state must include in the plan a description of how its programs under each of the activities comports with the new federal definitions of those activities laid out in the regulations. (In other words, if a state is going to utilize vocational educational training, it must describe the programs it will put people in and how those programs fall within the new federal definition of vocational educational training.)

The plan also must include a description of how the state will determine whether an adult recipient is “work-eligible” (for a discussion of “work-eligible” see the discussion at page 21) and how the state will accurately input data, how the state will track and report hourly participation through its automated data processing system, and how the state will ensure that only hours in activities that meet the relevant federal definition for a countable activity will be reported. The plan also must include how self-employed recipients’ hours will be measured and the documentation the state will use to verify actual hours of participation.¹⁴ Finally, the plan must describe how the state will monitor its system for reporting and verifying hours of participation to ensure its accuracy.

States must submit an interim plan by September 30, 2006. HHS will then review it and either approve it or require that the state make changes to the plan. States must submit revisions to the plan within 60 days of being notified by HHS that the plan requires changes and states must be operating under an approved plan starting October 1, 2007 (i.e., FY 2008). This later implementation date for following the plan allows states to finalize their plans before implementing them and provides states some additional time to make computer system changes, develop procedures, and train staff.

- **Describes how HHS will determine if the state is adhering to its Work Verification Plan.** This part of the regulations is somewhat vague, noting that it will use the Single Audit Act along with “other reviews, audits, and data sources, as appropriate.” This leaves HHS with significant flexibility to conduct reviews of state procedures and request information from states. The preamble makes clear that HHS will require auditors or reviewers to pull a sample of cases to check to see if the required documentation is in the case file.

¹⁴ The regulations literally state that these provisions regarding self-employment must be repeated under each countable work activity, but it seems implausible that this was intended.

- **Describes how HHS will impose a work verification penalty for failure to submit a work verification plan or failure to maintain adequate procedures to ensure a consistent measurement of the work participation rate.**
 - HHS will impose the full five percent penalty if a state fails to submit an interim or complete Work Verification Plan by the respective due dates. (§ 261.65(b))
 - HHS will impose a partial penalty if the state fails to maintain adequate internal controls to ensure consistent measurement of the work participation rates. Under the partial penalty, HHS will reduce the block grant by one percent for the first year of noncompliance, and by an additional percentage point for each additional subsequent year up to a five percent penalty for five consecutive years of non-compliance. If a state complies for two consecutive years, the partial penalty sequence would begin anew. (§ 261.65(c),(d))
 - The penalty for failing to submit an interim plan takes effect on October 2006. The penalty for noncompliance verification procedures has a delayed effective date; it does not take effect until October 1, 2007. States are not subject to penalties for noncompliance with verification procedures during the first year (October 2006 to October 2007) in which they implement and establish these procedures. (§ 262.2)
- **Describes how HHS will provide relief from a work verification penalty.** States will have an opportunity to claim reasonable cause and/or submit a corrective compliance plan. If a state elects to submit a corrective compliance plan, HHS adopts the same corrective compliance plan timeline for penalty relief that it already uses for penalties for failure to meet the work rate or comply with time limit restrictions. Therefore, a state must discontinue or correct its noncompliance *fully* by the end of the first fiscal year ending at least six months after receipt of a corrective compliance plan. (§ 262.6) HHS also may require modification to the state's verification plan.

Implications for Program Design

The authority to approve — and reject — state Work Verification Plans gives HHS a great deal of power over state program design, even beyond the new regulations. At the APHSA meeting, HHS declined to answer many questions about whether specific program models fall within the work activity definitions or whether certain documentation would be acceptable. Instead, HHS encouraged states to make proposals in their draft Work Verification Plans, and indicated they would provide feedback after reviewing them. HHS did state that they expect to provide written guidance in July that will provide more information about what they expect in the plans. The guidance will apparently include an optional template that states can use to ensure that they have included all of the required elements.

If a state has a program model or tracking system that it believes is effective, it makes sense for it to include this model in its interim Work Verification Plan, even if there is some uncertainty about whether HHS will allow this approach. There is no penalty for having to revise the Work Verification Plan, as long as it is complete by September 30, 2007. Similarly, a state should consider including a broad set of acceptable forms of documentation in its plan to give itself the broadest

possible flexibility as it seeks to develop documentation arrangements with the myriad providers of employment services that work with TANF recipients in the state.

V. Implications of the Regulations on Child Care Programs

Research shows that child care assistance is critical to helping families move from welfare to work and helping working families remain employed and make ends meet. For states to increase TANF work participation to the levels required by the DRA, they will have to expand access to child care subsidies for many of the newly participating recipients. However, the DRA provided only a modest increase in federal child care funding (\$200 million a year as compared to the nominal funding levels in 2005). While the regulations do not directly make changes to how states can provide child care to TANF recipients, some regulatory provisions will have the effect of increasing the demand for child care. As states consider what changes they will have to make to their TANF programs, they should consider how the demand for child care will change as well. In particular, to the extent that states require recipients to participate in activities such as job search, community service, and study hours associated with educational activities, at monitored out-of-home sites, they will now need to provide increased child care assistance.

In addition, the inclusion of certain non-recipient parents in the work participation rate and, thus, the need for states to engage these parents in work activities also may increase states' child care costs.

VI. Changes in the Maintenance-of-Effort Requirement

The Interim Final Rule also implements changes that the Deficit Reduction Act made to the rules regarding which state expenditures may be counted toward the Maintenance of Effort (MOE) requirement. Under prior law, TANF funds could be spent on activities that further any of the four purposes of TANF (or that were allowable under the predecessor programs). While spending under the first two purposes was limited to needy families, services could be provided to non-needy families or individuals under goal 3 of TANF, reducing out-of-wedlock pregnancies and goal 4, promoting two-parent families. However, MOE spending was limited to needy families.

The DRA added a provision at 409(a)(7)(B)(i)(V) of the Social Security Act that allows spending on goals 3 and 4 of TANF to count toward the MOE requirement, regardless of financial need or family composition. § 263.2 implements this provision, and clarifies that only "non-assistance" benefits and services may be provided to non-needy families. In other words, states can not provide ongoing payments to childless individuals or non-needy families. This provision removes an inconsistency between TANF and MOE rules and may make it easier for states to meet the required level of MOE spending.

The regulations also implement the DRA provision allowing states to count toward the MOE requirement funds that are used to match funds received from the Healthy Marriage Promotion and Responsible Fatherhood grants under 403(a)(2)(A)(iii) and 403(a)(2)(C)(ii) of the Social Security Act. This represents a legislative exception to the general rule that the same funds can not be used to match or provide MOE for two different federal programs. Finally, the regulations clarify the

circumstances under which third-party cash or in-kind contributions may be counted toward the MOE requirement, reflecting a policy previously included in an ACF policy announcement.