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Reauthorization of the Temporary Assistance for Needy Families (TANF) Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Parts 261, 262, 263, and 265

RIN 0970–AC27

Reauthorization of the Temporary Assistance for Needy Families (TANF) Program

AGENCY: Administration for Children and Families (ACF), Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule implements changes to the Temporary Assistance for Needy Families (TANF) program required by the Deficit Reduction Act of 2005 (DRA) (Pub. L. 109–171). The DRA reauthorized the TANF program through fiscal year (FY) 2010 with a renewed focus on work, program integrity, and strengthening families through healthy marriage promotion and responsible fatherhood. On June 29, 2006, ACF published an interim final rule implementing the required statutory changes with a 60-day comment period that ended on August 28, 2006. We have considered all comments received during this period and made necessary changes as reflected in this final rule.

EFFECTIVE DATE: October 1, 2008.

FOR FURTHER INFORMATION CONTACT: Robert Shelbourne, Director, Division of State TANF Policy, Office of Family Assistance, ACF, at (202) 401–5150.

SUPPLEMENTARY INFORMATION: On June 29, 2006, the Administration for Children and Families published an interim final rule implementing key provisions of the Deficit Reduction Act of 2005. The DRA required States to implement certain work requirements effective October 1, 2006, among which were including families with an adult receiving assistance in a separate State program funded with qualified State maintenance-of-effort expenditures (SSP–MOE) in the work participation rates and revising the base year of the caseload reduction credit from FY 1995 to FY 2005. The law also directed us to issue regulations to ensure consistent measurement of work participation rates, including defining work activities, determining the circumstances under which a parent who resides with a child who is a recipient of assistance should be required to participate in work activities, and requiring States to establish and maintain work participation verification procedures. Congress also explicitly permitted HHS to issue an interim final rule, implicitly recognizing that States may have to revise practices once final regulations were published. Under the interim final rule, States were able to begin planning and implementing necessary changes to their TANF programs and procedures under the new requirements. Under this final rule States are accountable for moving more families to self-sufficiency and independence.

Comment Overview

We provided a 60-day comment period, during which interested parties could submit comments in writing by mail or electronically. During this period, we also held five listening sessions across the country in which State and local officials, legislators and key associations representing them could provide oral comments that were officially recorded and considered in developing this final rule.

We received 470 letters of comment on the interim final rule, representing State human service agencies, State legislators, national associations, advocacy and disability groups, community and faith-based organizations, Indian Tribes and Tribal organizations, educators, and the general public. Most commenters addressed several provisions of the interim final rule. Some comments favored the rule, for example: ''Overall the regulations are very positive and set the correct tone that countable activities need to meet the new federal definitions and be verified.'' But, in general, most commenters had mixed views, supporting some provisions and opposing others. A significant number of commenters expressed concerns about statutory provisions of the DRA or of existing law, over which we have no regulatory discretion. Others expressed concerns about the policies reflected in the rule. In response to these comments, ACF is committed to working with states, particularly with regard to TANF adult recipients living with disabilities, to explore additional approaches and innovative efforts to promote and support their employment.

As discussed in more detail throughout this preamble, the final rule includes a number of important changes to address these policy concerns. These include: Allowing time spent in a bachelor's degree program to count as vocational educational training; allowing up to an hour of unsupervised homework time for each hour of class time in all educational activities; expanding State flexibility by converting the six-week limit on job search and job readiness assistance to an hourly equivalent; adding the flexibility for a State to exclude a parent who is a recipient of Social Security Disability Insurance (SSDI) benefits from the definition of a work-eligible individual, as is the case with a recipient of Supplemental Security Income (SSI); clarifying that excused holidays are limited to 10 days in a year; and enhancing State flexibility by allowing a State to account for ''excused hours'' rather than an ''excused day.'' We have summarized the public comments and our response to them throughout sections III through VIII of this final rule.

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I. The Statutory Framework: TANF and the Deficit Reduction Act of 2005

Enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 (Pub. L. 104–193), the TANF program is a Federal block grant to States designed to provide temporary assistance while moving recipients into work and self-sufficiency. States must help recipients find work and meet work participation rates and other critical program requirements to avoid financial penalties. States have broad flexibility to design and operate their TANF programs and to determine eligibility criteria and the benefits and services that families receive to achieve the four program purposes:

(1) To provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;

(2) To end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(3) To prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for

preventing and reducing the incidence of these pregnancies; and

(4) To encourage the formation and maintenance of two-parent families.

PRWORA initially authorized TANF through September 30, 2002. Congress then funded TANF through a series of short-term extensions until the Deficit Reduction Act of 2005 reauthorized the program through FY 2010 with a renewed focus on work, program integrity, and strengthening families through marriage promotion and responsible fatherhood. Signed into law by President Bush on February 8, 2006, the DRA maintained State flexibility and many provisions of PRWORA, but included important changes to improve the effectiveness of the TANF program.

Some comments on the interim final rule reflected a misunderstanding of the Deficit Reduction Act confusion over which original provisions of TANF Congress retained, which ones it changed, what Congress directed the Department to do by regulation, and how HHS exercised this regulatory authority in the interim final rule. This section explains these distinctions.

The Deficit Reduction Act retained nearly all of the TANF provisions enacted in the original welfare reform law. For example, the law retained the requirement that 50 percent of all families with an adult participate in the 12 allowable work activities for specified hours each week and that 90 percent of two-parent families similarly participate for certain, specified hours. The hourly work participation requirements that adults must achieve to count in the State's work participation rates also did not change. This requires a single custodial parent with a child younger than six to participate for at least an average of 20 hours a week and for all others to participate for at least an average of 30 hours a week to count in the overall participation rate. Similarly, two-parent families must participate for at least an average of 35 hours a week (or an average of 55 hours a week if federally-funded child care is provided) to count in the two-parent participation rate.

The DRA maintained the penalty associated with failing to meet these work requirements. As a result, we made no changes to the regulatory process associated with a State's failure to meet the work participation rate requirement in the interim final or final rule.

Further, the Deficit Reduction Act maintained provisions related to the TANF purposes, State plan requirements, use of grants, administrative provisions, prohibitions, appeals of adverse decisions, Tribal TANF, waivers, charitable choice, application of relevant Federal civil rights laws, and the limitation on Federal authority. Our charge from Congress was to regulate in accordance with the changes made by the Deficit Reduction Act, via an interim final rule if appropriate. Since none of these provisions changed in the statute, the associated regulatory provisions did not change in either the interim final or this final rule.

Congress also made few changes in reauthorizing TANF funding. The law retained the $16.5 billion per year capped entitlement for State Family Assistance Grants and funding for the Contingency Fund. It extended the Supplemental grants for the 17 States with historic low grants per poor person and/or high population growth in the amount of $319 million through FY 2008. Mandatory child care funding was increased by $1 billion over five years. The law eliminated provisions for Federal loans, the High Performance Bonus and the Illegitimacy Reduction Bonus and replaced them with a $150 million-a-year research, demonstration, and technical assistance fund for competitive grants to strengthen family formation, promote healthy marriages, and support responsible fatherhood. The Deficit Reduction Act also expanded a State's ability to meet its maintenance-of-effort (MOE) requirement. A State may now count expenditures that provide certain non-assistance, pro-family activities to anyone, without regard to financial need or family composition, if the expenditure is reasonably calculated to prevent and reduce the incidence of out-of-wedlock births (TANF purpose three) or encourage the formation and maintenance of two-parent families (TANF purpose four).

The new law did make several key statutory changes and also required HHS to promulgate rules in several areas. The statute added separate State program cases receiving assistance funded with qualified State maintenance-of-effort expenditures (SSP–MOE) to the calculation of the work participation rates. This is a new requirement of law, not within the discretion of our regulatory authority. Thus, regardless of how commenters viewed this statutory provision, we could not change it by regulation. The DRA continues to exclude any solely-State-funded (SSF) program, that is, one for which it does not claim the State expenditures as MOE under the TANF program. If a State established a SSF, such cases would not be included in the calculation of a State's work participation rates or subject to other program requirements.

The Deficit Reduction Act also changed the base year of the calculation of the caseload reduction credit from FY 1995 to FY 2005. While the statutory work participation rates did not change, recalibrating the caseload reduction credit has the effect of increasing the work participation requirements. For most States, we estimate that in FY 2007 the overall work participation requirement will be between 40 and 50 percent, depending upon the amount of caseload reduction they had over the course of FY 2006 compared to the new baseline of FY 2005.

Congress required HHS to do a number of things through regulation:

- To define the meaning of each of the 12 countable work activities specified in PRWORA, primarily because a U.S. Government Accountability Office (GAO) study (GAO–05–821) reported that there was great variation in State definitions of work activities. As a result, State participation rates were not comparable. Of the activities, the underlying statute also specified which nine activities count toward meeting the first 20 hours of a 30-hour average weekly requirement; we refer to them as ''core activities.'' Any additional hours needed to meet the requirement can come from any of three ''non-core activities'' or from core activities. Under the statute, non-core activities may not count as core activities.
- To clarify who is a work-eligible individual. In addition to families with an adult receiving TANF assistance, who were already a part of the work participation rates, the DRA required us to include such families receiving assistance under a separate State program and to specify 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 ensure that State internal control procedures result in accurate and consistent work participation information. Each State must establish and maintain work participation verification procedures that are based on regulations promulgated by the Secretary.
- To establish a process for a new penalty in the event that a State fails to establish and maintain adequate procedures to verify reported work participation data.

II. Regulatory Principles and Provisions

To address these new statutory provisions and requirements of the Deficit Reduction Act, the final rule:

1. *Defines each of the 12 countable work activities.* Defining work activities is necessary for consistent measurement and will ensure an equitable and level playing field for the States. Because the statute provides 12 distinct activities, we have tried to define them as mutually exclusive, while still leaving flexibility for States to address the critical needs of families.

2. *Defines the term ''work-eligible individual.''* Generally a ''work-eligible individual'' is: (1) An adult (or minor child head-of-household) receiving assistance under TANF or a separate State program; or (2) a non-recipient parent living with a child receiving assistance. The definition excludes the following non-recipient parents: a minor parent who is not the head-of-household, a non-citizen who is ineligible to receive assistance due to his or her immigration status, or, at State option on a case-by-case basis, a recipient of Supplemental Security Income (SSI) benefits. In addition, the term excludes some parents, whether they are recipients or not: a parent providing care for a disabled family member living in the home, if there is medical documentation to support the need for the parent to remain in the home to provide that care; and, at State option on a case-by-case basis, a parent who is a recipient of Social Security Disability Insurance (SSDI) benefits. We exclude these parents because they either cannot work legally or we believe it would be inappropriate to require them to work.

3. *Clarifies that a State may count only actual hours of participation.* Under the original TANF rule, some States reported scheduled hours of participation, which created an inconsistency among States and reduced incentives to ensure that individuals actually participated for assigned hours. Under the final rule, we clarify that each State must report only actual hours of participation; nevertheless, for individuals in unpaid work activities, we permit States to count up to 10 days of holidays and an additional 80 hours excused absences. To reduce the documentation burden on both employers and workers, we also permit States to report projected hours of employment on the basis of prior, documented actual hours of work. Similarly, to reduce the documentation burden on both educational providers and participants in an educational activity, we also allow States to count up to one hour of unsupervised homework time for each hour of class time.

4. *Recalibrates the caseload reduction credit by updating the base year from FY 1995 to FY 2005.* As under PRWORA, the credit excludes caseload changes due to changes in Federal law or State eligibility criteria since the base year.

5. *Requires each State to establish and maintain work participation verification procedures through a Work Verification Plan.* Each State must: (1) Determine which work activities may count for participation rate purposes; (2) determine how to count and verify reported hours of work; and (3) identify who is a work-eligible individual. The State must also develop and use internal controls to ensure compliance with its procedures and submit them in a complete Work Verification Plan to the Secretary for approval.

6. *Establishes a new penalty for failure to comply with work verification procedures.* The final rule specifies that if a State fails to establish or comply with its work participation verification procedures and fails to correct the compliance deficiency, we will impose a penalty of between one and five percent of the State Family Assistance Grant (SFAG). The rule outlines the criteria under which we will impose this penalty and explains how a State may claim reasonable cause or submit a corrective compliance plan to correct the violation and avoid the penalty.

7. *Allows additional pro-family expenditures to count toward a State's maintenance-of-effort (MOE) requirement.* The final rule allows a State to count expenditures on certain pro-family activities without regard to financial need or family composition, if the expenditure is reasonably calculated to prevent and reduce the incidence of out-of-wedlock births (TANF purpose three), or encourage the formation and maintenance of two-parent families (TANF purpose four), as long as they meet all applicable MOE requirements and limitations. States receiving Healthy Marriage or Responsible Fatherhood grants may count State expenditures for any required match toward the State's TANF MOE requirement, provided the expenditure also meets all applicable MOE requirements and limitations.

Based on the consideration of all timely comments, this final rule reflects adopted changes to 45 CFR Parts 261, 262, 263, and 265 of the interim final rule of June 29, 2006. The comments and changes are discussed in the preamble. Changes to these parts appear in sections IV to VII of this document.

As in the interim final rule, the term ''we'' is used throughout the regulatory text and preamble to mean the Secretary of the Department of Health and Human Services (HHS) or the following individuals or agencies acting on his behalf: the Assistant Secretary for Children and Families, the Regional Administrators for Children and Families, the Department of Health and Human Services, and the Administration for Children and Families. The term ''Act'' refers to the Social Security Act. We use the terms ''Deficit Reduction Act of 2005,'' ''Deficit Reduction Act,'' ''DRA,'' or ''Pub. L. 109–171'' when we refer to the new law. States, the Territories, and the District of Columbia are all subject to the TANF requirements, but a reference to States means this entire group. Except as otherwise noted, we use the term ''TANF'' to refer to TANF and any SSP–MOE programs in a State.

III. Cross-Cutting Issues

Many commenters raised general or cross-cutting issues about the overall impact of the interim final rule or the impact on specific populations. We address these issues in this section, followed by comments on each section of the interim final rule.

A. Individuals With Disabilities

Comment: Many commenters maintained that the interim final rule would hamper State efforts to design programs appropriate for people with disabilities and discourage them from addressing their needs. Commenters expressed concern that States would be much less likely to invest the resources needed to provide the services that families with disabilities need if they are not able to count those families toward the work participation rates.

Some commenters recommended that we broaden work activity definitions to accommodate the participation of people with disabilities. Others urged us to permit lower hourly standards as an accommodation. Otherwise, they recommended that we exclude clients with disabilities from the definition of a work-eligible individual.

Response: We recognize that many individuals with disabilities are capable of participating in productive work activities and encourage States to explore these capabilities, rather than focusing on their limitations. In fact, in the preamble to the interim final rule, we encouraged States to provide self-sufficiency opportunities to individuals with disabilities and to engage them in appropriate work activities. We offered concrete examples, such as specialized work experience sites, that would provide and demonstrate the skills and experience needed to obtain employment. However, given the concern expressed by commenters on this critical issue, we intend to expand our technical assistance efforts in

identifying and sharing effective models that have been developed by vocational rehabilitation agencies and the entire disability community.

Under the TANF statute, the work participation rate calculations generally include all families with an adult receiving assistance. When Congress replaced the Aid to Families with Dependent Children (AFDC) program with TANF, it eliminated a number of statutory exemptions related to incapacity, temporary illness, and age. There was no suggestion in PRWORA that the activities or hours that count toward the work participation rate should vary for clients with disabilities. By limiting the maximum participation rate to 50 percent, Congress recognized that some individuals would not be able to satisfy the full requirements. However, we believe States should work with and provide services to individuals, whether they can participate for enough hours to count toward the work participation rates or not. Because families with adults receiving Federal assistance are subject to time limits, it is important for States to serve the entire caseload so that all recipients progress toward self-sufficiency. States should also provide needed accommodations that can help all individuals reach their full potential.

We believe the regulation provides States with increased flexibility and incentives to work with people with disabilities. In the definition of ''work-eligible individual'' in § 261.2, we give States the option of either including or excluding parents who receive SSI or SSDI benefits and whose children are TANF recipients. If the parent works enough to count in the rate, the State can include the family, but it is not disadvantaged if the parent receiving SSI or SSDI cannot work. In the final rule, we allow States to adjust prior reported data and to back out of the participation denominator any appropriate family with a work-eligible individual whose application for SSI or SSDI was approved retroactively, as long as the adjustment is within the allowable reporting time frame for the fiscal year. Also, we have reaffirmed in the final rule that a parent needed in the home to care for a disabled family member is also excluded from the participation rate.

Comment: Many commenters suggested that the interim final rule makes it difficult for States to meet the work requirements and to comply with the Americans with Disabilities Act (ADA) of 1990 and Section 504 of the Rehabilitation Act of 1973.

Response: We recognize and underscore that States must continue to comply with relevant civil rights laws, including the ADA and Section 504 of the Rehabilitation Act of 1973 (Section 504). We believe that this final rule gives States several ways to count activities that they would be legally required to provide under the ADA and Section 504. It is also important to note that a State may be legally obligated to provide a reasonable accommodation/modification under the ADA and Section 504 even if it will not receive credit toward its Federal work activity requirements for the accommodation/modification. As identified in the preamble of the interim final rule, HHS developed and will develop additional technical assistance related to the application of civil rights laws in the TANF context. Existing tools may be found at the HHS Office for Civil Rights (OCR) Web site at *http://www.hhs.gov/ocr/tanf.* Among other help, the webpage includes guidance entitled ''Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF,'' which addresses the application of the ADA and Section 504 in the TANF context, the legal requirements of ensuring equal access, reasonable accommodations/modifications, nondiscriminatory operational methods, and includes a discussion of promising practices. Complaints alleging violations of these requirements are not infrequent. OCR currently has open TANF complaints, many of which allege that States are denying TANF applicants and beneficiaries with disabilities equal access and/or not providing reasonable accommodations/modifications. Such complaints are often resolved by a State agreeing to implement effective and comprehensive screening and assessment of TANF applicants and beneficiaries.

We were also trying to make one other key point. It is discriminatory to deny a person with a disability the right to participate in or benefit from the aid, benefit, or service provided by a public entity. The benefits and services provided must be equal to those provided to others, and as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as those provided to others. Services, programs, and activities must be administered in the most integrated setting appropriate to the needs of qualified individuals with disabilities. Separate or different aids, benefits, or services are permitted, but only when necessary to ensure that they are as effective as those provided to others. Persons with disabilities must also have the option of declining to accept a particular accommodation. Thus, State agencies must offer people with disabilities an equal right to participate in programs instead of automatically exempting them from participation requirements.

The Supreme Court, in *School Board of Nassau County* v. *Arline* noted, ''* * * society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.'' 480 U.S. 273, 284 (1987).

Provisions of the ADA and the Rehabilitation Act prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, assumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities. Public agencies are required to ensure that their actions are based on facts applicable to individuals and not on assumptions as to what a class of individuals with disabilities can or cannot do.

The ADA covers individuals who vary widely in the severity of their disability, degree of disadvantage, capabilities, and skills, and their appropriate path to self-sufficiency and independence must be assessed on an individual basis, just like everyone else. It is exactly for these reasons that Congress chose not to exclude individuals with disabilities from the participation requirements and the benefits and results that accrue to working individuals and families. We believe that potential danger lies in altered expectations and opportunities, in automatic exemptions, and in exclusions from integrated requirements and services designed to lead to self-sufficiency and independence. TANF agencies must provide programs in the most integrated setting appropriate to the needs of people with disabilities. Agencies should take steps to ensure that individuals with disabilities can participate in all programs and services for TANF clients, not just those programs and services that are designed solely for people with disabilities. In addition, TANF agencies must ensure equal access to programs and services for TANF clients. In ensuring equal access, it is critical that TANF agencies have comprehensive and effective screening and assessment tools in place.

Clearly, a State must provide appropriate accommodations and services when necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, the service, program, or activity, and the opportunity to request such accommodations and services.

States can and must make necessary accommodations in the number of hours and types of activities they require, if needed. But, accommodations that enable clients to work are clearly just as critical. States must ensure that individuals with disabilities are not excluded from services, programs and activities because buildings are inaccessible, and these include the buildings of contractors and providers. Agencies must also provide accommodations to individuals with disabilities, at no additional cost, where necessary to ensure effective communication with individuals with hearing, vision, or speech impairments. (Accommodations include but are not limited to such services or devices as qualified interpreters, assistive listening headsets, television captioning and decoders, telecommunications devices for the deaf [TDDs], videotext displays, readers, taped texts, materials in Braille, and large print materials.)

Comment: One commenter suggested, ''Employment of individuals with mental illness should be a top priority for policy makers at all levels of government. Unfortunately, due to stigma, organizational, financial and other barriers, employment is often a low priority, if it is a priority at all. It's doubtful that the Interim Final Rules, as currently drafted, will result in greater work opportunities for people with psychiatric disabilities.''

Response: We agree that employment of individuals with disabilities should be a priority, and this Administration has made it a priority for all executive agencies. President Bush, in announcing his ''New Freedom Initiative'' in 2001, stated, ''Every American should have the opportunity to participate fully in society and engage in productive work. Unfortunately, millions of Americans with disabilities are locked out of the workplace because they are denied the tools and access necessary for success.'' The number of recipients with disabilities who are currently working significantly understates both the capability and desire of people with disabilities to work. Under significant work participation requirements, States will need to expand preparatory and employment options for individuals with disabilities. We will continue to work closely with our colleagues in the Substance Abuse and Mental Health Services Administration, the Social Security Administration, and the disability community to enhance services to all people with disabilities.

Comment: One commenter noted that the preamble to the interim final rule often encouraged States to engage individuals with disabilities but that the rule did not offer practical ways to assist States in doing so. The commenter urged us to ensure that the final rule includes better mechanisms to allow all TANF recipients with disabilities to meet work participation requirements.

Response: We agree that TANF agencies need to find more effective ways to engage people with disabilities in their caseloads than many have used in the past. Increased efforts should be pursued in a number of areas. For some States, TANF agencies need to re-engage with State rehabilitation agencies to use their proven knowledge and expertise to address the barriers individuals with disabilities face and to help them enter the workplace. Much needs to be done to overcome negative stereotypes and misperceptions among the public. Job developers need to educate employers, since research shows that working individuals with disabilities are very effective employees. Agencies need to improve their marketing of the advantages and benefits of work to individuals with disabilities, while ensuring that benefits, such as medical coverage, are sustained.

In the first 10 years of the TANF program, there has been inadequate attention to engaging individuals with disabilities in work; however, few States raised concerns to us about their ability to serve people with disabilities during this period. Oftentimes, individuals with disabilities face challenges in entering the workforce and pose challenges to State agencies trying to help them enter the workforce. Sometimes, a disability is debilitating enough that a person cannot work. Federal programs such as SSI and SSDI serve such people. But for many others, a disabling condition does not preclude the possibility and the rewards of work, even if it creates challenges.

It is precisely for this reason that we have not categorically removed individuals with disabilities from the definition of work-eligible individual. Individuals who happen to have disabilities should be afforded the same opportunities to engage in work—to find work-related training, work experience, and employment—as those who do not have a disability. By keeping such individuals in the work participation rate, as they have been since the inception of TANF, States have an added incentive to address the needs of people with disabilities.

We look forward to working with States in this area through our technical assistance efforts and anticipate disseminating information about promising approaches to helping individuals with disabilities and establishing linkages between organizations serving the needs of individuals with disabilities. ACF will use its Welfare Peer Technical Assistance Network to disseminate information on promising practices for serving individuals with disabilities. In addition, ACF will work with States to explore additional approaches and innovative efforts to promote and support the employment of TANF adult recipients living with mental, intellectual and physical disabilities.

Comment: Many commenters urged us to permit ''deeming'' for individuals with disabilities. They recommended that we allow States to count recipients who participate in accordance with an employment plan that includes accommodations for disabilities as having met required hours to count in the participation rate. They stressed that this would give States an incentive to engage such individuals to their greatest ability. Similarly, they urged us to let States count recipients who miss scheduled hours of work participation because they were caring for a family member with a disability. They suggested that, in the same way that we permit ''deeming'' to respond to the requirements of the Fair Labor Standards Act, we should allow lesser hours of participation to count for the full required number of hours when needed to make accommodations required under the ADA.

Response: We agree with the commenters' concerns that individuals with disabilities should have appropriate accommodations in their work assignments and believe this regulation provides States with more flexibility and incentives to work with people with disabilities than they have ever had previously. As we noted in response to earlier comments, the TANF work participation rates have always included people with disabilities. States can and must make necessary accommodations in the number of hours and types of activities they require of individuals with disabilities.

As noted earlier, ACF is committed to working with States to explore additional approaches and innovative efforts to promote and support the employment of TANF recipients living with disabilities. As we work with States, we will begin to get a better understanding of the potential promises and logistical challenges of all such approaches.

With respect to individuals caring for people with disabilities, the regulation makes two accommodations. First, the definition of a work-eligible individual excludes a parent caring for a disabled family member living in the home, as long as there is medical documentation

to support the need for that parent to remain in the home to care for the disabled family member. Second, the regulation gives States credit for excused absences for all work-eligible individuals in unpaid work activities. Thus, if a State excuses an individual who misses time because she must care for a disabled family member, the State could count those missed hours as actual participation, within the limits the regulation sets out. Please refer to § 261.60 for further discussion of excused absences.

B. Domestic Violence

Comment: Some commenters asserted that the interim final rule conflicted with the Family Violence Option (FVO). One commenter noted, ''The regulations are also silent on how domestic violence services are allowed and how domestic violence cases are treated.'' Another commenter asserted, ''Women need time to effectively remove the barriers that have prevented them from obtaining quality employment.'' Another suggested that ''the limited time allowed in job search and job readiness for barrier removal activities is inflexible and should not apply to family violence victims.''

Response: Existing provisions in the law address work participation rate issues for States dealing with victims of domestic violence. A State that elects the Family Violence Option under Section 402(a)(7) of the Social Security Act must screen and identify victims of domestic violence, refer such individuals to services and, if needed, waive participation and other program requirements for as long as necessary to escape domestic violence. The rules at Part 260, Subpart B allow States to grant good cause domestic violence waivers to victims of domestic violence that waive various program requirements, including work requirements. States have broad flexibility in determining which program requirements to waive and for how long. Although these recipients remain in the work participation rate calculation, there may be some activities that meet one of the work activity definitions that would make them countable toward the participation rate. If a State fails to meet a work participation rate, we will determine that it had reasonable cause if the State can demonstrate that it failed to meet the rate due to granting federally recognized good cause domestic violence waivers. In this circumstance, we would recalculate the work participation rate taking out any families in which individuals received a federally recognized good cause domestic violence waiver of work participation requirements.

We believe the 1999 TANF final rule regarding the treatment of victims of domestic violence ensures services and waivers for victims and provides adequate ''reasonable cause'' reduction or elimination of penalties for States. Consequently, we did not propose revision to Part 260, Subpart B in the interim final rule; therefore, general concerns related to rules on victims of domestic violence are outside the scope of this rulemaking.

C. General Topics

- Alternative Measures of Performance

Comment: Several commenters suggested shifting the focus of participation from process to outcome measures. One commenter found that the existing participation rates were too limited for purposes of assessing State performance measuring comparability across States. The commenter suggested that we use alternative measures of program success, including measures related to poverty, the employment rates of current and former recipients, and the completion rates for applicants and recipients enrolled in education and training programs. One commenter recommended continuing the High Performance Bonus outcome measures, even though bonuses are no longer available under the DRA. Another commenter urged work participation credit for those families who get jobs and work their way off welfare.

Response: We do not have the regulatory discretion to replace the existing work participation rate requirements with alternative, performance-based measures. Nevertheless, we do continue to track several of the outcome measures from the high performance bonus.

- Negative Consequences and Challenging Standards of Participation

Comment: Several commenters suggested that the interim final rule makes it more difficult for States to design effective programs to move families from welfare to work. Some commenters predicted that States may adopt punitive approaches to reduce the denominator for the work participation rate.

Some commenters suggested that we do not appreciate the need for flexibility and the difficulty of meeting a 50-percent overall participation rate. As an example, one commenter thought that we failed to recognize ''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 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.'' One commenter said that the rules ''would steadily diminish state flexibility through the imposition of rigid federal mandates.'' Another stated, ''The new regulations have eliminated the states' ability to be flexible in determining what they may assess for countable work activities when in reality the needs of the particular participants and states vary vastly.''

Response: We do appreciate the difficulty in engaging a large and varied client population in countable work activities for enough hours to meet the work participation rate. Instilling the work habits and providing the supports that different families need to engage in work is a challenge that all States must strive to achieve. We have given serious consideration to the commenters' concerns and would like to point out certain aspects of statute as well as others of the TANF rule that help States achieve the work participation rate. There are several categories of individuals that continue to be excluded from the calculation of the work participation rate under the new law. One of the largest is the State option to disregard, on a case-by-case basis, single-custodial-parent families caring for a child under the age of one year. A State may also disregard a family subject to a work-related sanction for up to three months in the preceding 12 months. In addition, the interim final rule allowed States to exclude from the definition of ''work-eligible individual'' parents caring for a disabled family member living in the home. Our excused absence policy addresses concerns related to hours missed due to short-term illnesses or emergencies. Finally, States have a special reasonable cause provision if they miss the work participation rate because they serve a large number of families dealing with domestic violence issues.

Also, we would like to emphasize that when States cannot count the participation of some individuals in certain activities because they do not meet one of the work activity definitions or because the hours of participation are not sufficient, the States should still serve these individuals. The requirements and expectations for each family should be set by the State taking into consideration the needs of the family, obligations under the ADA and

Section 504 of the Rehabilitation Act of 1973, and program goals. Thus, in any individual case, a State may require fewer hours of an adult than needed to count toward the Federal participation rate and that family will not help the State meet its work participation rate. Similarly, a State may, and many do, require more hours of an adult than needed to count the family in the participation rate. Moreover, States continue to have the flexibility to allow families to engage in broader and different activities from those that count for the Federal participation rate.

We are convinced that States can and will meet these challenges, thus dramatically improving the lives of families. We also believe that the standards must be challenging to ensure that the maximum number of recipients move toward self-sufficiency. This conviction is based on the well-documented results and achievements made by States in response to PRWORA. We believe the DRA provides the appropriate steps and direction for the next phase of welfare reform.

We are confident that, under the new rule, States that operate effective and efficient welfare-to-work programs will be able to satisfy their work participation rate standards and enhance the services to clients at the same time.

• Partial Credit

Comment: Several commenters suggested that we should give States partial or pro rata credit for individuals who are engaged in work activities for some hours, but not enough to be included in the work participation rate calculation. One commenter pointed out that this would avoid the current ''all-or-nothing'' standard and would permit some individuals who have limitations to be credited with participating. Another maintained that partial credit is not prohibited, even if the rules do not specifically allow it.

Response: Neither PRWORA nor the DRA provided for counting partial participation of a case in meeting the work participation rates; either the adult meets the requirements for being ''engaged in work'' and the family counts in the rate or the adult does not meet the hours requirement and the State does not get credit for that family in the participation rate. We remind readers that the regulations at §§ 261.22(d)(1) and 261.24(d)(1) do provide the flexibility of counting a partial month of assistance as a month of participation if a work-eligible individual is engaged in work for the minimum average number of hours in each full week that the family receives assistance in that month. Please refer to the regulatory text of those sections and to the preamble discussion in the original TANF rule at 64 FR 17771. In addition, the excused absence policy described in § 261.60(b) allows a State to receive credit for short-term excused absences and allows some families that would otherwise fall short of the minimum hourly requirements to count in the participation rate.

• Increased Costs

Comment: Some commenters suggested that the new regulations would require States to increase participation in work activities, which would raise program costs. This, in turn, they thought, would force States to curtail services because TANF is a fixed block grant.

Response: The dramatic decline in welfare caseloads since the 1996 welfare reform has produced savings that far exceed any additional costs from new work requirements. More specifically, TANF funding, measured on a per TANF family basis, was $9,100 in 1996 (inflation-adjusted) compared to $15,977 in 2007 (projected), an increase of $6,877 per family, or 76 percent. While we recognize that States have dramatically extended work services and support benefits to low-income working families, and pre-kindergarten care and education to children that are not receiving ''assistance,'' we believe that States have sufficient resources to allocate among priority programs while implementing these new requirements.

• Child Care Needs

Comment: Some commenters thought that there was not enough child care funding to pay for the added costs associated with implementing the work requirements under the Deficit Reduction Act of 2005, particularly for child care for non-recipient parents.

Response: Since 1996, Federal child care funding through the Child Care and Development Fund (CCDF) has more than doubled—from $2.2 billion in FY 1996 to $4.8 billion in FY 2005. HHS data on Federal and State child care spending in just three programs—TANF, CCDF, and the Social Services Block Grant (SSBG)—show that spending increased by nearly 225 percent between FY 1996 and FY 2005, from $3.6 billion to $11.5 billion. The Deficit Reduction Act increases Federal child care funding in the CCDF from $4.8 billion to $5 billion, effective FY 2006. In addition to increasing child care funding, the Deficit Reduction Act fully funds TANF at $16.5 billion per year for five years. With significantly lower caseloads than in 1996, we believe that States should have adequate funding to provide needed child care under the Deficit Reduction Act requirements.

• Monitoring

Comment: Several commenters suggested that the rule imposes rigid monitoring and reporting requirements. Some expressed concern that frequent demands for proof of participation could overburden providers or cause families to lose assistance.

Response: We believe that the rule simply clarifies what has always been the expectation of law, of the original TANF rule, and of the requirements of 45 CFR part 92: That a State should report only actual participation that it has adequately documented and verified. As a result of numerous single audit findings questioning the validity of participation rates, we decided to clarify this expectation in the rule so that States may avoid potential penalties. In addition, for the four activities involving paid employment, which historically have represented the bulk of State work participation, we have substantially reduced the burden on clients, employers, and States by allowing the reporting of projected actual hours of participation for up to six months based on current, documented hours of work.

• Consultation

Comment: One commenter stated that we did not consult Tribes about the interim final rule and that Tribes were expressly discouraged from providing input because the rule was directed at States and was not intended to impact Tribal TANF programs directly.

Response: The rulemaking process included a period for public comment on the interim final rule. Tribes as well as other organizations and individuals were free to express their opinions and to offer advice on the rule. Several Tribes and Tribal Organizations took the opportunity to submit comments, which we have addressed in the preamble to this final rule. Further, ACF representatives actively participated in a National Summit on State and Tribal TANF in July 2006, at which State and Tribal representatives discussed the provisions of the DRA and the interim final rule in detail and expressed comments. The National Alliance of Tribal TANF, one of the Summit sponsors, summarized these comments and formally submitted them to us. They are also addressed in this preamble.

D. Tribal TANF

Comment: One commenter observed that Tribal TANF programs could be adversely affected by States that fail to meet the work participation rates because the funds that States transfer are critical to the operation of Tribal TANF programs. This commenter also

expressed concern that funding and regulatory changes to State TANF programs will negatively affect various Tribal programs.

Response: State MOE funding plays an important role for Tribal TANF programs. We will continue to encourage States to support the Tribal TANF grantees with MOE funding; however, the decision to provide MOE funding rests solely with the States. States may also impose conditions on Tribal TANF programs on the use of State MOE funds. Primarily, the Federal role regarding State MOE is to ensure that States expend the required amount of funds in compliance with requirements. (For a more detailed discussion of Federal policy on MOE funds provided to Tribal TANF programs, please see our Policy Announcement, TANF–ACF–PA–00–4 dated November 27, 2000.)

We do not think it is likely that State TANF agencies will reduce MOE funding for Tribal TANF programs. If a State does fail a work participation rate, it must meet an 80 percent MOE requirement. States that meet the work participation rates need only spend at the 75 percent MOE level. Any State that may potentially fail either the overall or two-parent participation rate needs to ensure that it has expended 80 percent of its historic level of spending, a five percentage point increase for many States. In addition to the need to expend additional MOE funds, we have heard no State indicate that it is contemplating any reductions in providing funding to Tribal TANF programs.

Comment: A few commenters expressed concern that restrictions imposed by this regulation could create an influx of Tribal clients moving to areas in which Tribal TANF programs exist, thereby increasing the costs to these programs. Because Tribal funding is based on 1994 caseload data, Tribes have substantially limited ability to renegotiate effectively for increased funding.

Response: We understand the commenters' concerns; however, we have seen no evidence that this rule will prompt Tribal members to move into areas served by a Tribal TANF program or that such a potential influx would exceed the 1994 caseload level. In fact, if States effectively implement the DRA provisions, we expect further caseload declines.

Comment: One commenter expressed opposition to any attempt to extend these regulations to the Tribal TANF program regulations.

Response: As we noted in the preamble to the interim final rule, the regulatory changes promulgated in response to the enactment of the DRA only apply to States, the District of Columbia, and the Territories of Guam, Puerto Rico, the Virgin Islands, and American Samoa. We are not planning to amend the Tribal TANF program regulations at 45 CFR part 286 to comport with these DRA 2005 final rules.

IV. Part 261—Ensuring That Recipients Work

Section 261.2 What Definitions Apply to This Part?

This section of the regulation defines work activities and work-eligible individuals. Section 407(d) of the Social Security Act specifies 12 separate and distinct activities. Under the original TANF rule, we chose not to define these work activities to provide maximum program design flexibility to States. We simply listed the 12 work activities in 45 CFR 261.30 in the order they appear in the Act. As GAO found, this led to disparities in State definitions of work activities that resulted in inconsistent work participation measurement and undermined the principle of equitable treatment. In particular, States with narrow definitions were at a disadvantage in meeting the participation requirements compared to States with broader definitions. In addition, the GAO report (GAO–05–821) raised concerns that some States integrated activities to avoid various statutory limitations on some TANF work activities, such as the six-week time limit on counting hours spent in job search and job readiness assistance.

The Deficit Reduction Act of 2005 required HHS to promulgate regulations to ensure consistent measurement of work participation rates. The law specifically required us to determine whether an activity of a recipient of assistance may be treated as a work activity. Thus, in the interim final rule, we defined each of the countable work activities to promote consistency in the measurement of work participation rates and to maintain the integrity of the work participation rates. By defining work activities, we ensure that all States are judged on the same basis that is, that there is a level playing field.

Our definitions follow the order of the list of work activities in section 407(d) of the Social Security Act. For ease of reference, we refer to the nine work activities that count for the first 20 hours of required work or the corresponding 30-hour requirement for two-parent families (or 50-hour requirement for two-parent families receiving federally subsidized child care) as ''core'' activities and the three activities that can only count as participation after the core requirement is met as ''non-core'' activities.

We were guided by four basic principles in developing the work activity definitions in this final rule.

First, we attempted to define each work activity in a common sense way. If a particular activity was not explicitly listed in the statute, we attempted to see if it could fit under one of the 12 activities listed in law. For example, treatment, counseling, and rehabilitation activities, in our judgment, fit best under job search and job readiness assistance, when such activity prepares an individual for work. However, we could not add wholesale categories of work activities to the 12 listed in the law. Our task was to specify whether and where certain activities fit within these already existing statutory categories.

Second, we defined each activity to focus on work and help move families to self-sufficiency. Work activities should help individuals develop the skills necessary to become job ready and go to work. We do not want families to exhaust their time-limited benefits and discover that they are not prepared to support themselves.

Third, we tried, as far as possible, to make the definitions mutually exclusive of one another. Since Congress created 12 distinct activities, we wanted to bring meaning to them as distinct activities.

Fourth, we made supervision an explicit part of each definition. For programs to be successful, it is important that the case manager or provider knows what each person is supposed to be doing and that he or she is accountable on a timely basis for ensuring that the client actually performs such assigned tasks.

Comments and Responses on Cross-Cutting Issues for Work Definitions

We received many comments on this section of the interim final rule. Some comments applied to multiple activities or applied generally to defining the activities at all. We respond to those cross-cutting comments in this section and have grouped the comments and our responses by topic for the ease of the reader. We respond to comments that focus more narrowly on a specific definition in the discussion of each activity below.

General Topics

Comment: Some commenters wrote that the work activity definitions in the interim final rule narrowed the range of what States can count toward their work

participation rates and recommended giving States more flexibility in defining work activities. One commenter recommended allowing States to develop their own definitions.

Response: The DRA directed HHS to define work activities to achieve greater consistency among States. For some States, the new definitions may narrow countable activities, but we believe they actually expand them in other States. For example, under the original rule, some States counted substance abuse and mental health treatment as community service or as job search and job readiness assistance. Some States did not count these activities at all, even if a substantial number of individuals participated in such treatment. Our new definitions make substance abuse treatment, mental health treatment, or rehabilitation activities an explicit part of job search and job readiness assistance. This will allow all States to count individuals participating in these activities and thus could actually increase work participation rates in these States. In general, we believe the work activity definitions specified in the interim final rule were reasonable and consistent with the goals of the TANF program, and thus we have retained them, with appropriate modification, in the final rule. As a practical matter, we do not believe that these definitions have a restrictive effect on what most States currently count because the dominant activity in most States has traditionally been unsubsidized employment, an activity whose definition most commenters did not find restrictive.

Comment: Several commenters expressed the view that the emphasis on mutually exclusive activities restricts State flexibility in developing cost-effective programs by making it more difficult for them to ''blend'' program activities. The commenters recommended that we make the definitions more ''flexible'' and permit program approaches that integrate and combine activities under one work activity definition.

Response: Programs that combine work with training or other services have shown promise in helping TANF recipients make the transition to the labor force and move toward self-sufficiency. We believe that the final rule gives States the flexibility to operate programs of blended activities. Section 407(d) of the Act specifies 12 separate and distinct activities. Thus, we have tried to define each activity to have a specific and distinct meaning, but it was not always possible to make them mutually exclusive. In fact, some types of activities can be categorized under more than one work activity definition. For example, many of the training activities counted under vocational educational training can also count under job skills training directly related to employment and education directly related to employment. The former is a core work activity that is limited to 12 months in a lifetime, whereas the latter are non-core activities that can only count once the core activity requirement has been met.

Comment: Some commenters maintained that the most effective welfare-to-work programs included a variety of employment and education and training activities. In their opinion, mutually exclusive definitions would discourage States from combining work activities. Moreover, they maintained that doing so would require separate tracking of each activity and impose an added administrative burden. In addition, because some activities, such as job search and job readiness assistance and vocational educational training, have statutory limitations on their duration, the commenters thought that States might be reluctant to include these activities in a broader program that blends activities because it would limit the long-term use of those activities. Commenters urged us to allow States to combine activities and report all participation under one activity. Several commenters suggested that States should be allowed to count an individual participating in more than one activity in the activity that makes up the majority of the hours of participation. For example, many of these commenters recommended that we allow States to count a limited number of hours of job search or training as part of another activity, such as work experience, if the other activity represents the majority of the hours of participation.

Response: We strongly support State programs that combine activities and believe that our definitions fit well with such blended programs. It is important that States report the hours of participation for each work activity in the appropriate category to ensure that the data are comparable across States. If an individual has exhausted the time allowed to count an activity, it does not prevent a State from continuing to combine it with other activities; it only affects what a State can report toward the participation rates. We note that a policy that allows some activities to count within others based on standards such as what constitutes a ''significant majority'' of hours would still require States to track the hours of each activity separately to determine which activity is the primary activity. Thus, combining the activities would not achieve the suggested administrative simplification.

Comment: Many commenters expressed general support for education activities or for the ability to count a wider array of educational activities. Several commenters asserted that the regulations will limit access to education and training, and were concerned that this would hinder client access to higher paying jobs and undermine their efforts to become self-sufficient. For those with limited basic skills and language difficulties, some commenters proposed expanding the definitions of various core activities to increase opportunities of countable participation. Commenters also suggested that we expand the definition of vocational educational training to include education directed at achieving a baccalaureate or advanced degree.

Response: We appreciate the value of education and training for all individuals. Some recipients need to develop skills to become employable; others benefit from education and training in order to advance in the workplace. While we cannot add educational categories to the explicit 12 activities listed in the TANF statute, we believe that our definitions permit considerable flexibility to provide a range of education and training services to TANF families. Under vocational educational training, we permit a variety of postsecondary education activities, including associate degree programs, instructional certificate programs, industry skill certifications, and other course work. In addition, the definition of job skills training directly related to employment permits virtually all vocational educational training activities to count under that component as well. States may choose this activity for those individuals who have exhausted their 12-month limit on vocational educational training or to conserve these months for those who have sufficient additional participation in other core work activities. Remedial education and ESL can count under vocational educational training, if they are a necessary and regular part of the work activity, and also can count under education directly related to employment. States have considerable flexibility to mix and match work activities so that they can count a wide range of activities. Although the interim final rule did not permit States to count participation in baccalaureate or advanced degree programs in vocational educational training, we have been persuaded by commenters to allow such participation and have changed the definition accordingly.

Comment: Some commenters thought that the new work activity definitions ''do not allow for the singular economic, cultural, and geographic circumstances'' that characterize some States. For example, they pointed out that the rural nature of some communities makes it difficult to serve some work-eligible individuals, both because the range of activities may be limited and also because various documentation and supervision standards are hard to apply.

Response: We are sympathetic to concerns related to serving remote areas and areas where employment opportunities are limited due to high unemployment or other conditions. However, the statute does not make any allowance for such factors in the calculation of work participation rates, except that it limits the maximum overall rate to 50 percent. Under one of TANF's predecessor programs, the Job Opportunities and Basic Skills Training (JOBS) program, States could exempt individuals living in remote areas, but Congress chose not to continue this exemption when it enacted TANF in 1996. The law does provide penalty relief, though, if a State can demonstrate that high unemployment or regional recession caused or contributed to its failure to meet the work participation rates. Readers should refer to §§ 261.51(d) and 262.5 of this chapter for more information on penalty relief.

Comment: Some commenters suggested that the work activity definitions exceeded our legal authority. One commenter noted, ''Many states have used more expansive definitions over the past 10 years, and HHS has never suggested that they were in violation of the statute.'' Another commenter asserted that there is ''no statutory basis to impose a mutually exclusive list of definitions to what Congress said should be viewed as a whole.'' Some commenters contended that specific regulatory provisions were not consistent with the statute.

Response: The Deficit Reduction Act of 2005 specifically required us to determine ''whether an activity * * * may be treated as a work activity. * * *'' We believe the interim final rule was consistent with Congressional and statutory intent. We did not intend to suggest that States were in violation of the prior statute and rules. Rather, Congress saw a need for uniform definitions and the rule provides them.

Comment: Some commenters wrote that aspects of our definitions were not necessary because they were not required by the statute, for example, the limitation that only supervised homework can count.

Response: The statute is generally silent on what we should include in most definitions. In defining the work activities, we found it necessary to specify what can count as part of an activity and the conditions that must be met to ensure that actual participation in the activity occurs and thus keep definitions consistent across States.

Comment: One commenter urged us to count as part of a work activity the time it takes to travel to and from the work or training site. The commenter thought this was particularly important in rural areas that are isolated and lack public transportation.

Response: Travel time to and from work sites does not count toward the participation rates. We chose not to count commuting time to and from a work site because commuting is not ''engaging'' in the activity for which the State gets credit and because this approach is analogous to the work world, since most employees receive no pay for the time it takes them to commute to their jobs. However, we do allow a State to count the time an individual spends in job search and job readiness assistance traveling between multiple interviews. Please refer to the preamble discussion of that work activity for more detail in this area.

Daily Supervision

Comment: Several commenters asked for clarification regarding the daily supervision requirement for unpaid work activities. Several commenters objected to the requirement that job search and job readiness assistance include daily supervision because they said it is a costly and time-consuming requirement. These commenters generally noted that the time and resources spent on daily supervision should be focused on providing direct services to help families move toward self-sufficiency. Several commenters suggested that we limit the requirement so that ''someone with responsibility for oversight of the individual's participation had contact with the recipient, and that the supervision does not have to be done by the TANF agency itself or an employment services contractor.'' Some commenters recommended eliminating the requirement altogether.

Response: We agree with many of these points and would like to clarify this requirement. Daily supervision means that a responsible party has daily responsibility for oversight of the individual's participation, not necessarily daily, in-person contact with the participant. The goal of such supervision is to ensure that individuals are participating and making progress in their assigned activities. A work site sponsor, classroom instructor, contracted service provider, community-based provider, job search instructor, treatment provider, or even a TANF agency employee could fulfill that role. In addition, the supervision need not involve in-person contact, but can be by telephone or electronic contact where those methods are suitable.

Daily supervision as described above is a central part of the final rule. It ensures that individuals who participate in work activities make progress in their assigned activities. Supervision is part of everyday life in paid employment, despite the cost and time involved, because it provides value. We should expect no less for all TANF work activities.

Comment: One commenter asked for clarification regarding whether ''supervision is only required on days when an individual is scheduled to participate,'' noting that it would not make sense to require supervision on the other days.

Response: We agree and have clarified the final rule to indicate that supervision is only required for days when an individual is scheduled to participate.

Distance Learning Activities

Comment: Several commenters asked whether time spent in distance learning programs could count toward the work participation rates. They noted that this was particularly important in rural areas and that some programs keep track of the time individuals spend on a computer in ways that participants cannot change.

Response: We agree that distance learning is an important way for some families to gain the skills needed to move toward self-sufficiency. We will count time spent in distance learning to the extent that such programs otherwise meet the work activity definitions and include supervision. A State should explain in its Work Verification Plan how it will provide supervision and monitor hours of participation in distance learning.

Good or Satisfactory Progress

Under the definitions in the interim final rule, two of the TANF work activities involving education required that participants make ''good or satisfactory progress'' in order for their hours of participation to count: Education directly related to employment and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence (GED). The preamble to the

interim final rule explained that this includes a standard of progress developed by the educational institution or program in which the individual was enrolled. It also said that good or satisfactory progress should be judged by both a qualitative measure of progress, such as grade point average, as well as a quantitative measure, such as a time frame within which a participant is expected to complete such education. We expressed interest in receiving comments that describe other possible criteria or definitions for what constitutes making ''good or satisfactory progress.''

Comment: Several commenters observed that the preamble to the interim final rule described ''good or satisfactory progress'' somewhat differently for the two activities to which it applied. In the case of ''education directly related to employment'' we wrote that the standard could be developed by either the education institutions or the program. For ''satisfactory attendance at secondary school,'' we allowed the State or the educational institution/program to set the standard. The commenters asked for clarification of this policy and recommended a wide variety of approaches for setting ''good or satisfactory progress'' standards. Some commenters urged us to leave the standards to educational institutions and programs, while others recommended that States establish them. A number of commenters also proposed giving States the flexibility to choose to establish either or both qualitative and quantitative measures.

Several commenters cautioned that the criteria for ''good or satisfactory progress'' should not discourage placing individuals with barriers in education, noting that they may require more time and help in meeting such standards. They suggested that the standards should include appropriate accommodations for individuals with disabilities. Other commenters recommended that we eliminate the requirement of ''good or satisfactory progress'' because many individuals with learning disabilities are often not identified by State agencies and fall through the cracks.

Some commenters recommended creating good cause exceptions for those facing unusual or unexpected circumstances that prevented them from making progress as expected. Good cause exceptions, they maintained, would prevent States from being penalized when individuals participate for the required number of hours but are unable to progress due to various circumstances. Another commenter asked us to clarify that States would not be retroactively denied credit toward the participation rate because a client participated for the required hours but failed to make adequate progress.

One commenter noted that the interim final rule did not specify the frequency with which ''good or satisfactory progress'' should be verified and commented that some measures of progress, such as grade point average, may not be available until the end of a quarter or semester. The commenter also explained that some educational programs, such as Adult Basic Education, may not have testing that produces grades to calculate a grade point average. The commenter recommended that States use ''subjective performance evaluations provided by the instructor to demonstrate progress * * * that simply indicate if academic performance was unsatisfactory or satisfactory.''

Response: The commenters raised many compelling points. We believe that the easiest way to accommodate these concerns is simply to delete the requirement for ''good or satisfactory progress'' from the definitions of education directly related to employment and satisfactory attendance at secondary school or in a course of study leading to a GED. Although we believe such standards are valuable and should be part of any educational activity, based on the input from commenters, we have determined that the appropriate standards can vary based on too many circumstances to mandate their inclusion in these two activities. Educational institutions are generally in the best position to establish standards of progress, but they may not make separate determinations of progress based on the circumstances of individuals, a role a caseworker might best perform. Therefore, the final rule gives States flexibility in deciding whether to set standards of ''good or satisfactory progress'' and, if they do, to develop the standards that are best suited for their clients.

Assessment

Comment: Several commenters recommended that the definition of various work activities include the assessment of participants' skills.

Response: Our work activity definitions permit assessment of an individual's suitability for a particular work activity.

Section 261.2(b) Unsubsidized Employment

In the interim final rule, we defined unsubsidized employment as full-or part-time employment in the public or private sector that is not subsidized by TANF or any other public program. We did not change the definition in the final rule. We have responded to comments concerning self-employment activities in the discussion of § 261.60(c).

Comment: Commenters found our definition of unsubsidized employment to be appropriate.

Response: We agree and have retained the same definition in the final rule.

Sections 261.2(c) and (d) Subsidized Private Sector Employment and Subsidized Public Sector Employment

In the interim final rule, we defined both subsidized private sector employment and subsidized public sector employment as employment 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. We described three possible subsidized employment program approaches: (1) To use TANF funds that would otherwise be paid as assistance to reimburse some or all of an employer's costs; (2) to rely on a third party as the employer of record during the trial employment period, like a temporary staffing agency; and (3) to develop ''supported work'' programs for individuals with disabilities.

In the final rule, we made a minor wording change to the definitions of each of these activities, substituting the word ''individual'' for ''recipient.'' We made this change both for consistency with other definitions and to make clear that these activities are allowable for any work-eligible individual.

Comment: Several commenters asked whether participation in various supportive activities, such as substance abuse treatment, mental health treatment, and rehabilitation activities could count as subsidized private sector or public sector employment. These and other activities are often integrated as part of a supported work program, transitional jobs program, or other subsidized employment activity.

Response: Hours of participation in various supportive activities can count if they are integrated parts of subsidized employment. This means that, in order to count, the individuals must be paid for all of the hours they participate in such activities. For example, some transitional jobs programs are structured to include direct work and 10 to 15 hours of barrier removal or other activities, including mental health and substance abuse treatment, job search, and training. Participants are paid wages for all hours of participation. Otherwise, if the individuals are not paid while participating in these

activities, the participation should be reported as a blend of subsidized employment and another appropriate activity. Most likely this would be job search and job readiness assistance, but could be another activity.

Comment: Several commenters noted that some individuals assigned to subsidized employment soon have earnings that are sufficient to make them ineligible for assistance. They asked whether such individuals could continue to count in the numerator of the participation rate.

Response: Although we understand the commenters' concern, the work participation rate calculations include only families with a ''work-eligible individual.'' (Please refer to the discussion of § 261.2(n) for more detailed information about the definition of ''work-eligible individual.'') If a State wants to count a family participating in subsidized employment that is ineligible for a regular assistance payment, it could create and pay an alternative assistance grant. The State could then count the family toward the rate. Of course, since the family retains assistance, this would not generate a caseload reduction credit, as might be the case otherwise.

Comment: Several commenters asked whether employers would be required to hire and retain individuals engaged in subsidized employment once the subsidy period ended. The preamble guidance to the interim final rule stated, ''At the end of the subsidy period, the employer is expected to retain the participant as a regular employee without receiving a subsidy.'' Some commenters explained that many transitional jobs programs place participants in short-term subsidized employment to provide experience, training, and guidance that enable that individual to obtain unsubsidized employment elsewhere, even though it may not result in a permanent position with the same employer. Other commenters recommended that we limit the expectation of continued employment to private sector employers to avoid creating a ''revolving door'' of subsidized employees.

Response: The preamble language in this regard was a suggestion, not a requirement. We continue to caution that States should not allow employers to recycle TANF recipients in subsidized employment slots simply to reduce their competitive labor costs. The positions should lead to ongoing, stable employment or prepare individuals for such employment.

Comment: Several commenters asked whether they must limit the duration of subsidized employment positions. They noted that the preamble to the interim final rule suggested ''that States generally limit the duration of subsidized employment programs to six to twelve months.''

Response: The limited duration is a recommendation, not a requirement. Longer placements may be appropriate, for example, in supported employment of individuals with disabilities or for other participants based on their individual circumstances, economic conditions, or other factors.

Comment: One commenter noted, ''Congress listed public and private sector subsidized employment as separate work activities; therefore it is reasonable to have different expectations depending on the sector of the employer.'' In particular, the commenter suggested that it may be appropriate to limit the duration of the employment subsidy to private sector employers ''where there is an expectation of continued employment with that employer,'' but that such limits should not be placed on public sector (and non-profit) employment.

Response: We agree that durational limits help ensure that the primary benefit of the subsidy is to the employee, but do not see the need to apply different standards to the private and public sectors. We leave it to States to determine such limits regardless of whether they apply to private sector or public sector employment.

Comment: One commenter recommended that States describe in their Work Verification Plans how a subsidized employment program will lead to unsubsidized employment ''where there is an expectation of continued employment with the same employer, and how the program will avoid displacement of current workers.''

Response: We agree that the ultimate goal of subsidized employment is to move the individual to unsubsidized employment and off welfare. However, the purpose of the Work Verification Plan is to ensure that States report participation data that is consistent with the law and regulations and that States adequately verify the accuracy of that participation data. The Work Verification Plan does require States to describe how their services and programs meet the definition of a work activity.

There is a statutory prohibition on displacement for all work activities in section 407(f) of the Act and the existing regulatory provision at § 261.70. Thus, we do not believe the Work Verification Plan needs to include this information.

Comment: One commenter recommended that HHS ''design the payment structure'' to reflect the range of services offered under subsidized employment.

Response: We believe the details of program design should be left to the States because the circumstances of individuals and the effectiveness of program activities may vary based on a number of factors.

Section 261.2(e) Work Experience

In the interim final rule, we defined work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available, as 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. We reminded readers that work experience participants continue to receive their TANF grants and that they do not receive wages or compensation by virtue of participating in the activity. Nonetheless, they may be considered employees for the purpose of the Fair Labor Standards Act (FLSA), which means that they must be compensated at no less than the higher of the Federal or State minimum wage.

Comment: Several commenters suggested that work experience could sometimes be considered a ''paid'' activity. Others thought that the definition should exclude the phrase ''performed in return for welfare.''

Response: We considered these views carefully but chose to retain the definition of work experience we published in the interim final rule, keeping it as an unpaid activity to distinguish it from the four ''paid'' activities that already exist. In our view, the purpose of work experience is to gain the skills needed to acquire a paid position. States that have work experience programs that involve the payment of wages should reclassify them as subsidized employment or on-the-job training. The fact that there may be an employer-employee relationship in a work experience assignment, triggering the minimum wage requirements of the FLSA, does not make the work activity ''paid.'' Rather, the individual is receiving compensation from the family's TANF grant in lieu of wages.

Comment: Several commenters asked us to clarify that not all work experience activities are subject to the FLSA. One commenter asked for clarification on who the employer is with respect to work experience positions—the State or the work site sponsor (if other than the State). The commenter was unsure

because the State provides worker's compensation.

Response: It is the responsibility of the Department of Labor to determine whether or not the FLSA applies to an activity and who the employer is. We recommend that readers direct any questions regarding the FLSA to the Wage and Hour Division of the U.S. Department of Labor at 1–866–4–USWAGE, TTY 1–877–889–5627 or the following Web site: *http://www.dol.gov/esa/whd/flsa/index.htm.*

Comment: Several commenters asked whether the definition of work experience precludes a State from counting a participant who combines unsubsidized employment with work experience because the statutory language limits work experience to situations where ''sufficient private sector employment is not available.'' In addition, the interim final rule defined the purpose of work experience as improving the employability ''of those who cannot find unsubsidized employment.''

Response: The statutory language does not prevent States from using work experience for those who are in paid employment. We recognize that there may be circumstances in which an individual's employment is not sufficient to meet the work activity requirement and a State may place such an individual in another work activity. In this circumstance, work experience could be appropriate because sufficient employment may not be available for ''full-time'' work. Although we cannot strike the statutory phrase, ''if sufficient private sector employment is not available,'' we are clarifying that ''sufficient'' means enough for full-time employment.

Comment: Several commenters recommended that the definition of work experience (and community service) include ''background checks and assessment of participants'' skills as they related to a job site and required by a specific work experience slot.''

Response: Our definition permits background checks and the on-site assessment of an individual's suitability for a particular work experience slot. States must assess each recipient of assistance over 18 years of age or who has not finished high school (or the equivalent).

Comment: Some commenters suggested that we consider training, education, and vocational educational training to be part of work experience. They noted that the preamble discussion of community service programs in the interim final rule offered a rationale for providing training within that activity, citing the example of an individual assigned to clerical support who needs to attend a computer training class. They suggested that a similar provision should apply to work experience and that we should expand it to include other forms of educational or vocational educational training activities.

Response: States may wish to supplement work experience with training, but we do not believe that formal training, education, and vocational educational training programs should be considered part of work experience. Work experience is defined as work performed in return for welfare and is intended to provide an individual with an opportunity to acquire the general skills, knowledge, and work habits necessary to obtain employment. We make an exception in community service because that activity involves a service that is of direct benefit for the community and limited training may count if it is an integral part of the activity. We have deleted the reference to ''training'' in the definition of ''work experience'' to clarify this point, as that reference referred to training in general workplace skills, not to formal instruction that can be provided through other TANF work activities.

Comment: Several commenters asked whether short periods of job search and job readiness assistance or vocational educational training could be embedded and counted within work experience. These commenters suggested that such programs are more effective than work experience alone and that not permitting such embedded activities to count would discourage States from combining work experience with activities designed to move TANF recipients into unsubsidized jobs. Other commenters contended that ESL should be included as part of work experience because the ability to speak English is a prerequisite for employment.

Response: As we have noted before, we fully support State efforts to integrate and combine work activities. Reporting hours of work separately for the different activities should not impede a State's ability to offer integrated services or encourage individuals to combine activities. We attempted to define activities so that they are mutually exclusive because the law provides 12 distinct activities, so in general, including activities that meet one of the other work activity definitions would be inappropriate, particularly in the case of activities with established limitations in statute, i.e., job search and job readiness assistance and vocational educational training. ESL is an educational activity that can count under vocational educational training, if it is a necessary and regular part of the work activity, and also can count under education directly related to employment. However, we note that States can count short absences from various activities to participate in, for example, a job search activity under the excused absence policy (described in § 261.60(b) of this chapter). In addition, as we describe in the section on job search and job readiness assistance, we give States greater flexibility to count sporadic hours of participation in job search and job readiness assistance without triggering a full week in that activity that would otherwise count against its durational limits.

Comment: One commenter recommended that we require States to ''consider TANF workers as employees of the state, eligible therefore for all state employee benefits and covered by all worker protection statutes.''

Response: The DRA did not change the worker protections or employee benefits available to work activity participants, so the final rule does not make any changes to existing policy in this regard. The original TANF rule clarified that, notwithstanding specific language limiting the scope of the TANF rules, TANF programs are subject to Federal employment and non-discrimination laws. These protections continue to apply under the final rule. Since there is no statutory basis for a requirement such as the commenter suggested, we do not believe we have the authority to require TANF workers to be considered employees of the State. State law generally governs whether an individual must be considered an employee or may be considered an employee for purposes of State employee benefits. Also, the worker protection statutes themselves define the situations that they cover, many of which apply to individuals participating in TANF work activities.

Comment: One commenter asked for clarification that work experience positions could be created with private sector employers. The commenter stated that this would expand the number of placement opportunities and the chances for individuals to transition into unsubsidized employment.

Response: Work experience positions may be created with public sector, private sector, community-based, faith-based, or nonprofit employers or work site sponsors.

Section 261.2(f) On-the-Job Training

In the interim final rule, we defined on-the-job training (OJT) as 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 the full and adequate performance of the job. In the preamble to the interim final rule we invited comments on whether the definition of OJT should be broadened ''beyond paid employment to include other aspects of training.''

Comment: Several commenters suggested that we expand the definition to include unpaid training, such as occupational training, basic skills remediation, and English language instruction, as well as pre-employment skill upgrading. Several commenters noted that many employers provide both on-site and off-site training to employees. The commenters maintained that including unpaid training positions would help ensure that recipients receive needed work skills and would simplify reporting. Other commenters recommended including unpaid internships or externships, arguing that participants would have an opportunity to learn in a work setting that could lead to employment opportunities.

Response: We considered all of these suggestions carefully in writing the final rule. Ultimately, we chose not to expand OJT to include unpaid training activities. We made this decision because, first, we could not reconcile the notion of unpaid training with being ''on-the-job,'' and second, such unpaid training can count under a variety of other work activities, including vocational educational training and job skills training directly related to employment. We think this is the most common-sense way to bring meaning to the 12 distinct work components. Regarding the location of training, we would like to emphasize that paid training, whether provided off-site or at the work site, fits the definition of OJT.

Comment: Several commenters recommended expanding the definition of OJT to include training for prospective employees in addition to paid employees.

Response: We have not included training for prospective employees under OJT because they are not yet ''on-the-job.'' Instead, such training could count under other work activities, including vocational educational training or job skills training directly related to employment, depending on the nature of the training.

Comment: Several commenters recommended including barrier-removal activities in OJT if integrated into the program.

Response: We fully support the use of barrier-removal activities for individuals who need these services. States may generally include such services as part of a job search and job readiness assistance activity. Also, such activities can count as unsubsidized or subsidized employment if the individual is paid during the time of participation in such activities.

Comment: Several commenters asked whether an employer was expected to hire an OJT participant, based on the statement in the preamble: ''Upon satisfactory completion of the training, we expect the employer to retain the participant as a regular employee. * * *''

Response: The preamble language was a suggestion, not a requirement. As with subsidized employment, we expect employers to provide training, guidance, and direction to help employees obtain unsubsidized employment, whether with the employer providing the training or with another employer. As long as the position is designed to lead to unsubsidized employment, the activity would meet the primary goal of the program.

Section 261.2(g) Job Search and Job Readiness Assistance

In the interim final rule, we defined job search and job readiness assistance as 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. We retained the general framework of the definition in the final rule, but deleted the requirement that an individual be ''otherwise employable'' because the term was confusing and raised concerns that it could potentially deny treatment to those who have a disability or face multiple barriers to employment. We also deleted the term ''certified'' because it too created some confusion. The final rule requires that there must be a documented need for treatment or therapy determined necessary by a qualified medical, substance abuse, or mental health professional.

The preamble to this section of the interim final rule also defined a ''week'' for purposes of counting no more than six weeks per fiscal year (or 12 weeks, for qualifying States) of job search and job readiness assistance, no more than four of which may be consecutive. We explained that the most commonly understood and simplest way to answer this question was to use the ordinary definition of a week: seven consecutive days, regardless of which day participation starts. We received many comments on this provision. Most commenters contended that six weeks was not enough time to help individuals with barriers to employment. Many others urged us to consider an hourly equivalent to these limitations to increase State flexibility.

In order to respond adequately to the comments we received, we determined that it was necessary to include § 261.34, which specifies the limitations on counting job search and job readiness assistance, in this final rule, despite the fact that it was not in the interim final rule. Based on these comments, we have adopted an hourly equivalent for purposes of the six-week (or 12-week) limit, giving States more flexibility to provide job search and job readiness assistance services, especially when such services are only needed for a few hours per week. We describe the policies on these limitations in more detail in the discussion of § 261.34, but also respond to comments on this topic here.

For the ease of the reader, we have grouped the comments and our responses by topic within this section.

Treatment of Barrier Removal Activities

Comment: Many commenters welcomed the inclusion of substance abuse treatment, mental health treatment, and rehabilitation activities as countable activities. However, many commenters also expressed concerns about limiting these specific activities to the category of job search and job readiness assistance alone, an activity that can count for only six weeks in a fiscal year (or 12 weeks, for qualifying States). They said that these barriers to work are prevalent among the TANF population and that States need more time to address them than the durational limits allow. A number of commenters recommended that we allow these activities to count under community service, job skills training directly related to employment, or education directly related to employment.

Response: Under the final rule, we generally limit the counting of substance abuse treatment, mental health treatment, and rehabilitation activities to the job search and job readiness assistance activity. In defining work activities, we tried to determine whether such services appropriately fit in any work component. The statute does not specifically name substance abuse treatment, mental health treatment, and rehabilitation activities as work activities or even otherwise refer to these services. Because these are activities designed to make somebody work-ready, we count them as job

readiness activities. We realize this means that counting participation in these activities is limited to six weeks (or 12 weeks, for qualifying States) in the preceding 12-month period, of which no more than four weeks may be consecutive, but this was the only category where it made sense to include them. However, if a portion of substance abuse treatment, mental health treatment, or rehabilitation service meets a common-sense definition of another work activity, then the hours of participation in that activity may count under the appropriate work category, such as work experience. In addition, if hours in unsubsidized, subsidized private sector, and subsidized public sector employment include treatment or rehabilitation services, a State may count those paid hours under that work category.

Because counting participation in job search and job readiness assistance is time-limited by statute, we caution States to assess carefully the use of treatment, counseling, and rehabilitation activities so that they count participation in these activities only when they are needed to prepare recipients for work.

Comment: Several commenters objected to the requirement that a qualified medical or mental health professional must determine when treatment or therapy is necessary. One commenter maintained that it could discourage some individuals from acknowledging the presence of such barriers and delay or prevent the State from addressing them. In addition, the commenter thought that the certification process would pose an administrative burden for the States.

Response: Substance abuse treatment, mental health treatment, and rehabilitation activities are important activities that can help individuals overcome serious barriers to employment. We eliminated the requirement for a ''certification'' but we believe that States must document the need for such treatment or therapy by a qualified medical, substance abuse, or mental health professional to ensure that a proper diagnosis is made and an effective remedy is prescribed.

Otherwise Employable

Comment: Several commenters recommended that substance abuse treatment, mental health treatment, and rehabilitation activities should not be limited to those who are ''otherwise employable.'' They suggested that such a limitation may be a violation of the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 because States could use it to deny such treatment to those who have a disability or face multiple barriers to employment. The commenters noted that such individuals may need a broad range of services beyond job search and job readiness, such as subsidized employment or vocational educational rehabilitation, before they are employable. One commenter suggested that individuals who are not ''otherwise employable'' should be excluded from the definition of a ''work-eligible individual.'' Some commenters also claimed that the determination of who would be employable and who would not would create an added administrative burden. Finally, they noted that job search and job readiness assistance is already limited to six weeks per fiscal year and that this language was more restrictive than needed and could discourage States from providing these kinds of services to individuals facing barriers to work.

Response: We think the commenters raised reasonable concerns. We never intended the phrase ''otherwise employable'' to exclude individuals who need more than one form of service or training before they could become employed from counting via participation in mental health or substance abuse treatment or rehabilitation activities. Our intention was to ensure that the necessary services that work-ready individuals may require were delivered in a logical and sequential fashion. Too frequently, an applicant or new recipient is automatically assigned to job search and job readiness assistance, regardless of the needs identified in the client's initial assessment or in the individual responsibility plan. Because the counting of this activity is time-limited by statute, we wanted to ensure that such services were available and appropriately provided at the time they would do the most good in preparing for and finding work for participants. However, we agree that this phrase may be confusing or could be misconstrued. Thus, we have deleted it from the final rule; however, we still encourage States to develop and deliver services based on the individual needs of clients, rather than in automatic sequential steps.

Domestic Violence Activities

Comment: Some commenters recommended that we expand the definition of job search and job readiness assistance to include participation in domestic violence resolution activities. One commenter suggested that we should classify such activities as ''rehabilitation activities.'' The commenter noted that victims of domestic violence often require job readiness activities akin to rehabilitation activities to transition to self-sufficiency, citing the following examples of domestic violence resolution activities: ''having to relocate due to the violence, apply for court orders of protection, attend court hearings, address children's needs for trauma counseling or other supports, attend counseling and support groups at a domestic violence program, meet with case managers at domestic violence programs, etc.'' One commenter explained that these were important activities that were apparently consciously omitted from the interim final rule. Another recommended allowing a certified domestic violence professional to certify the need for such activities. A number of commenters indicated that counting domestic violence resolution activities would address a problem noted in the preamble to the interim final rule, notably the concern that ''States have been less effective in placing clients with multiple barriers in work, including * * * those subject to domestic violence.'' They contended that the limitations of job search and job readiness assistance ''exacerbate the difficulty victims have in participating and advancing towards financial stability.''

Response: We fully support the efforts of States to identify victims of domestic violence and to assist them in accessing appropriate services to abate ongoing violence, to recover from physical and emotional trauma, and to help children cope with the effects of domestic violence. In the original TANF rule, all of Part 260, Subpart B was devoted to the special provisions for victims of domestic violence. Those rules are unchanged and continue to offer the same protections they have since their promulgation. The interim final rule did not make modifications to that part of the regulation, in part because it was outside the scope of our interim final rule authority, but also because we stand by those protections. We continue to encourage States to adopt the Family Violence Option (FVO), to implement comprehensive strategies to identify and serve domestic violence victims, and to grant federally recognized good cause domestic violence waivers where victims need them.

Many domestic violence resolution activities should already meet the definition of job search and job readiness assistance because they accomplish the very goal of that work component: To help individuals go to work. Any domestic violence service that directly relates to preparing for

employment could be considered a job readiness activity. A State should describe the activities it will offer in its Work Verification Plan and explain how it prepares someone for employment. If the State provides domestic violence services as ''rehabilitation activities,'' they should be included in a service plan developed by a trained individual and must be designed to lead to work. We note that few States counted domestic violence resolution activities under the original rules, despite the flexibility they had to do so.

In addition, as we noted in the cross-cutting issues section of this preamble, existing provisions in the law address work participation rate issues for States dealing with victims of domestic violence. In particular, section 402(a)(7) of the Social Security Act and the rules at Part 260, Subpart B allow States to grant good cause domestic violence waivers to victims of domestic violence. States have broad flexibility to determine which program requirements to waive and for how long. Although these families remain in the work participation rate calculation, there may be some activities that meet one of the work activity definitions that would make them countable toward the participation rate. If a State fails to meet a work participation rate, we will determine that it had reasonable cause if the State can demonstrate that its failure was due to granting federally recognized good cause domestic violence waivers. As a matter of course, when we determine the amount of a penalty for failure to meet the work participation rate requirements, we recalculate the work participation rate taking out any families in which individuals received a federally recognized good cause domestic violence waiver of work requirements. This may result in no penalty or a reduction in the penalty associated with failure to meet the work participation rate. Please refer to § 261.51 for more information about the formula for calculating the work participation rate penalty.

Comment: One commenter asserted that the interim final rule conflicted with the Family Violence Option in Federal law, which provides for waivers of requirements that would place victims of domestic violence at increased risk. The commenter added, ''As those situations are going to have to be determined on a case-by-case basis, the limited time for barrier removal activities is inflexible and should not apply to barrier removal for family violence victims.''

Response: As the commenter noted, a State that elects the FVO must screen and identify victims of domestic violence, refer such individuals to services and, if needed, waive participation and other program requirements for as long as necessary to escape domestic violence. However, in providing this option to States, Congress did not remove such families from the denominator of the participation rate during the period of the domestic violence waiver. We believe the original rules concerning victims of domestic violence explained above ensure services and waivers for victims and provide necessary ''reasonable cause'' reduction or elimination of penalties for States.

Other Activities

Comment: Some commenters recommended expanding the definition of job readiness to include activities such as English as a Second Language (ESL) and remedial education—activities that the preamble to the interim final rule indicated would not be countable. Other commenters suggested new activities, such as behavioral health services and parenting skills training.

Response: As we indicated in the preamble to the interim final rule, only programs that involve seeking and preparing for work can meet the definition of job search and job readiness assistance. Although some of the activities commenters recommended are valuable and may be medically appropriate, they do not constitute work or direct preparation for work. Some activities meet the definition of one of the other 11 work activities. For example, ESL would more closely fit the definition of education directly related to employment and should be counted under that activity.

Comment: One commenter expressed appreciation for ''the ability to count the time spent in a substance abuse treatment facility or halfway house doing work activities such as preparing meals, housecleaning, or scheduling group activities.'' The commenter suggested extending this to ''persons living in supported residential facilities for both mental health and domestic violence reasons.''

Response: We do not distinguish between countable work activities based on whether an individual lives in a residential facility or not. As long as the activity fits within an approved definition, it can count for participation rate purposes.

Comment: Several commenters indicated that six weeks may not be long enough for a homeless person to find a job, implying that looking for housing might be a job readiness activity.

Response: We appreciate the added challenges that homeless individuals face in entering and participating in the workforce. We encourage States to develop strategies that best meet the needs of their various client populations, including the homeless. Although a person with stable housing may have an easier time finding a job and performing well on the job, the act of looking for a home is not an employment activity. A job search and job readiness assistance activity must have a direct connection to improving employability or finding employment.

Comment: One commenter suggested that we allow travel time required to complete job search activities to count. Travel is an integral part of job search, the commenter explained, as clients go from one interview to another, especially in large metropolitan or rural areas.

Response: A State may count travel time between interviews as part of a job search and job readiness assistance activity, but not the travel time to the first job search interview or the time spent returning home after the last one. We make this distinction so that it is consistent with the treatment of other work activities and analogous to the work world, since most employees receive no pay for the time it takes them to commute to and from their jobs.

Using Job Interviews as Proxy for Hours

Comment: Several commenters urged allowing States to use a job application as a proxy for a standard set of hours of participation, *e.g.*, completing one application or going on one interview would constitute two hours of participation. They contended that this approach is easier to administer and more consistent with existing State practice.

Response: While we sympathize with the commenters'' desire to minimize administrative burdens, we believe the most effective welfare-to-work programs incorporate close supervision and careful monitoring. This allows program administrators to track actual hours. Thus, we explicitly require States to report the actual hours of participation for each work activity. The rule does not allow a State to report estimated hours of participation based on the number of job search contacts an individual makes.

Four-, Six-, and 12-Week Limits

Comment: Several commenters suggested eliminating the six-week and other durational limits on job search and job readiness assistance because six weeks is not sufficient to address the

barriers faced by some recipients. Some commenters suggested limiting such extensions to those with short-term disabilities that need more than six weeks of treatment.

Response: The six-week and other durational limitations are statutory and cannot be changed through regulation.

Comment: Several commenters recommended not counting participation in job search and job readiness activities against the various durational limits under certain circumstances, including situations in which the participant does not have enough hours to count in the work participation rate or has enough hours to count in the rate without counting the hours in job search and job readiness assistance. Some commenters noted that States could simply fail to report such hours so as to avoid triggering the durational limits or report them under the category ''Other Work Activities'' on the TANF and SSP-MOE Data Reports, which reflects the hours of participation but does not apply them in determining the work participation rates or the durational limits. The commenters noted, however, that this would understate their true level of participation and could be construed as violating the ''complete and accurate'' data reporting standard. Instead, they recommended allowing States to submit this information, but not to count participation if it were not needed to meet the work participation rate.

Response: We understand the commenters'' concerns regarding the durational limits on job search and job readiness assistance, but these limits are set forth in the statute and we do not have the legal authority to ignore hours of participation reported under this activity. We strongly encourage States to report hours of job search and job readiness assistance that they do not wish to count toward the participation rate (and thus count against the various limits that apply to that activity) under the category ''Other Work Activities'' on their data reports, rather than to fail to report them at all because using the ''Other'' category gives better information on the overall engagement levels of individuals, even though those hours do not contribute to State achievement in the work participation rates. However, we do not consider either using the category ''Other Work Activities'' or failing to report such hours at all as a violation of the requirement for complete and accurate data.

Converting Weeks to Hours for the Six-Week (or 12-Week) Limit

Comment: Several commenters contended that the definition of a week in the interim final rule was too rigid. It specified that even one hour of participation in job search and job readiness assistance triggered a week for the six-week (or 12-week) limit on the activity. They suggested defining a week in terms of countable hours for job search and job readiness assistance, that is, an hourly equivalent of six weeks. For example, one commenter recommended that we define six weeks as 120 hours for a single custodial parent with a child under six years of age and 180 hours for all other work-eligible individuals. This recommendation was based on the fact that such families need an average of 20 and 30 hours, respectively, to count toward the overall work participation rate. The commenters asserted that an hourly conversion would give States more flexibility to structure work activities to meet the needs of the participants.

Response: In defining work activities and related terms, we had to balance legitimate practical concerns with statutory language. The statute limits job search and job readiness assistance to six weeks (or, under certain conditions, 12 weeks), with no more than four consecutive weeks. These limitations were specifically included, in large part because, under the former JOBS program, unstructured and ongoing job search was the primary or only activity for many participants. We share the commenters'' interest in increasing State flexibility and have redefined a ''week'' of job search and job readiness assistance for the six-week (or 12-week) limit based on the average number of hours required for an individual's family to count in the overall work participation rate. For this purpose, one week equals 20 hours for a work-eligible individual who is a single custodial parent with a child under six years of age and equals 30 hours for all other work-eligible individuals. Thus, six weeks of job search and job readiness assistance equates to 120 hours for the first group and 180 hours for all others. For those months in which a State can count 12 weeks of this activity, these limits are 240 hours and 360 hours, respectively. To ensure consistency with other provisions in this rule, we have modified the requirements under § 261.34 to make these limits apply to the preceding 12-month period, rather than each fiscal year. For example, the statute allows States to disregard from the work participation rate calculation families that have been subject to a work-related sanction for up to three months in ''the preceding 12-month period.'' Similarly, this same time frame is used for the ''excused absence'' policy.

Defining a week in this way allows States to provide job search and job readiness assistance activities incrementally and stretched over an entire year or in six actual weeks, depending upon how the State chooses to structure its particular work program for an individual. Defining a week in this manner is consistent with Congressional intent because it provides an overall cap on the amount of job search and job readiness assistance that States can count as work participation, while still giving States the ability to provide recipients with meaningful job search and job readiness assistance activities.

Counting Sporadic/Episodic Periods of Job Search and Job Readiness Assistance

Comment: Some commenters objected to counting limited periods of participation in job search and job readiness assistance as a full week of participation in the activity. They contended that this would discourage States from engaging individuals in this activity or sending them on job interviews. They suggested giving States flexibility to integrate short periods of participation in this activity with other countable activities. They noted that even a single hour of job search reported in a week would ''constitute a full week for purposes of the limitation [on counting job search and job readiness assistance].'' They maintained, ''The statutory time limit on these activities was designed to prevent clients from being left to languish indefinitely in unproductive job search, not to create barriers to helping recipients move into unsubsidized employment after participating in other services.'' Several commenters suggested alternative methods of counting job search and job readiness assistance. One commenter recommended excluding ''weeks in which less than half of the hours of countable participation are from job search and job readiness assistance.'' Some commenters used terms like ''significant majority'' to refer to the hours needed to constitute the primary activity.

Response: We understand the concern that an individual participating for one hour in job search and job readiness assistance could use up an entire week of this limited activity. By defining six weeks as 120 hours for a single custodial parent of a child under age six or 180 hours for all other work-eligible

individuals (and 12 weeks as 240 hours or 360 hours, respectively) States can now engage individuals for limited periods of time without using a entire week for purposes of the six-or 12-week limit. This approach provides sufficient flexibility for States to structure their job search and job readiness assistance activities and obviates the need for alternative methods, such as excluding weeks in which a minority of hours of participation come from job search and job readiness assistance activities. Moreover, States continue to have the flexibility to conserve these weeks by reporting sporadic hours under ''Other Work Activities'' on the TANF Data and SSP-MOE Data Reports (though these hours would not count toward the participation rates) or to count such hours under our excused absence policy as part of another countable activity. Please refer to § 261.60 for more detail about excused absences.

Flexibility in Counting Hours of Participation

Comment: Several commenters suggested giving States the flexibility to count hours of participation in job search and job readiness assistance as a non-core activity without triggering any of the durational limitations on this activity, if the individual meets the core hours participation requirement through some other activity. The commenters explained that this would not undermine the core activity requirement, but would allow some individuals to benefit from additional time spent in a job search and job readiness assistance activity. Also, several commenters suggested that, if we use an hourly equivalent, then any hours that exceed the 20 or 30 hours per week required to meet the participation rate should not count against the hourly limitation on this activity.

Response: We do not have the statutory authority to disregard hours of participation in job search and job readiness assistance if the hours are counted toward the calculation of the work participation rate. Moreover, ''core activity'' is simply a term we use to indicate that hours of participation in that activity can count toward the first 20 hours of participation; an activity does not become ''non-core'' once an individual meets the core requirement and durational limits do not cease to apply to them. Of course, once a family meets the minimum hours required to count in the work participation rate, a State may assign an individual to whatever activity it chooses, including job search and job readiness assistance. However, any hours reported under this activity count toward the six-week limit. We encourage States to report hours of participation that they do not wish to have counted against the durational limits under the category ''Other Work Activities'' on their TANF Data and SSP-MOE Data Reports, which reflects the hours of participation but does not apply them in determining the work participation rates. This would also apply to hours that are beyond the TANF statutory requirements to count toward the participation rates. In fact, under the final rule, a State should report only those hours of job search and job readiness assistance that are needed to meet the work requirements, because reporting ''extra'' hours would not help a State meet the rate and would draw down the time-limited hours for the six-week (or 12-week) limit. In contrast, under the interim final rule, it did not matter whether a State reported one hour or 40 hours for an individual—either would trigger a week toward the durational limits. We have written the rule this way to give States the most flexibility possible while maintaining the spirit of the law.

We would also like to point out that States have the additional flexibility to count short absences from various activities to participate in a job search activity under the excused absence policy (described in § 261.60(b) of this chapter).

Defining Four Consecutive Weeks

Comment: As with the six-week (or 12-week) limit, some commenters suggested converting the four-week limit to an hourly equivalent.

Response: In the final rule, we have modified this definition. For the six-week (or 12-week) limit on counting participation in job search and job readiness assistance, we define a week as 20 hours for a work-eligible individual who is a single custodial parent of a child under six years of age and as 30 hours for all other work-eligible individuals. However, for the limit of no more than four consecutive weeks of job search and job readiness assistance we have retained the definition in the interim final rule: seven consecutive days. In other words, any hours of participation in job search and job readiness assistance during the course of a seven-day period triggers a week for the four-week limit. Once an individual has four consecutive weeks of participation, that individual's participation in job search and job readiness assistance may not count for one week, i.e., seven consecutive days.

In order to bring meaning to the statutory language, we had to interpret ''four consecutive weeks'' in this manner. Under the hourly conversion the rule permits for the total limitation on job search and job readiness assistance, a State could meet this limit while counting hours over the course of multiple calendar weeks. However, because the four-week limit is specifically a ''consecutive'' week restriction, we think an hourly conversion in this instance would not meet the very clear bounds set by Congress. If we used an hourly accrual system here, it might take many calendar weeks to reach 80 or 120 hours and they would in no way be ''consecutive.'' Thus, we think it is reasonable to use the more rigorous definition of a week in this context to meet the legislative requirement but incorporate overall flexibility in counting job search and job readiness assistance hours.

We would also like to address the concern that the limit of counting no more than four consecutive weeks of participation in this activity would lead States to disrupt treatment regimens for individuals who need short periods of substance abuse treatment, mental health treatment, or rehabilitation activities each week. We stress that this limitation applies to what a State may count for participation purposes, not on what an individual can or should do; thus, the law does not require an individual to take a week's break from an activity, but does constrain what the State may report for that week. The requirements and expectations for each family should be set by the State taking into consideration the needs of the family, obligations under the ADA and Section 504 of the Rehabilitation Act of 1973, and program goals, as opposed to what counts for participation rate purposes. While we cannot remove this statutory limit, we suggest that States have several options in how to treat such situations. We urge States to consider these options carefully to take full advantage of the flexibility in the law and our final rule in this area. If an individual has sufficient hours from other activities or other weeks in the month, the State will be able to count that individual's family in the participation rate without worrying about the fifth consecutive week in treatment. A State could consider using the excused absence policy, which, under the final rule is also available as an hourly equivalent, to accommodate short periods of treatment. In addition, given that the overall work participation rate is never more than 50 percent of the caseload and likely less, we do not anticipate a significant impact on the ability of States to meet the work

participation rate because of the four consecutive weeks limitation.

Three or Four Days as a Week of Participation

Comment: Several commenters contended that the statute requires that participation in job search and job readiness assistance should not be considered a week unless it is for more than four days in a seven-day period. One commenter explained that section 407(c)(A)(2)(ii) allows a State to count, not more than once per individual, participation in job search and job readiness activities ''for 3 or 4 days during a week'' as having participated for the week. The commenter contended that the ''clear implication'' of this was that an individual would have to participate for more than four days during a seven-day period to count as a week.

Response: There are several possible interpretations of the statute's reference to a week. In the interim final rule, we defined a week as seven consecutive days. We disagree with the commenter's interpretation that the statute requires all other weeks of job search and job readiness to consist of more than four days of participation in the activity. However, these comments led us to reexamine the meaning of a week under the various limitations of this activity, including the ''3 or 4 day'' provision. We have concluded that this provision allows a State to apply the average hours that an individual participates during three or four days to the remaining days in the week. In this context, we consider a week to be five days rather than seven, because the standard work week is a five-day week. We used a seven-day standard in other contexts to account for the fact that typical week includes five working days and two weekend days.

To illustrate this policy, consider the following example. If an individual participated an average of five hours per day in job search and job readiness assistance for three days in a week, a State could assume that such individual participated the same five hours the remaining two days of that week and thus, a State could assume and count total participation of 25 hours in this activity for that week. In our example, this would also use up 25 hours of the client's hourly limitation under the six-week limit for job search and job readiness assistance.

Qualifying for 12 Weeks

Comment: Several commenters asked for clarification regarding how a State can qualify to count up to 12 weeks of participation in job search and job readiness assistance per fiscal year due to high unemployment or by qualifying as a ''needy State.'' Several commenters suggested that HHS clarify that a State that qualifies in one month qualifies for the extended counting of job search and job readiness assistance for the entire year.

Response: A State with an unemployment rate that is at least 50 percent greater than the national rate or that qualifies as a ''needy State'' may count up to 12 weeks of participation in job search and job readiness assistance in the preceding 12-month period. Prior to publication of this final rule, the regulation applied the 6- or 12-week limit on a fiscal year basis, but under this final rule we now use the preceding 12-month period as the basis for this durational limit to make it more consistent with the treatment of other work participation rate related provisions. Program Instruction TANF–ACF–PI–2006–04 explains the criteria to qualify for 12 weeks, how a State finds out if it does, and in which months it can count extended participation in job search and job readiness assistance. The Program Instruction is available at: *http://www.acf.hhs.gov/programs/ofa/pi-ofa/pi200604.htm.*

Comment: One commenter asked for clarification regarding whether a State actually had to access the Contingency Fund before counting up to 12 weeks of participation in job search and job readiness assistance.

Response: No, a State does not have to receive contingency funds to count 12 weeks of participation. If a State qualifies to receive contingency funds for a month, it may also count 12 weeks of job search and job readiness assistance for that month. Please refer to Program Instruction TANF–ACF–PI–2006–04 available at: *http://www.acf.hhs.gov/programs/ofa/pi-ofa/pi200604.htm.*

Section 261.2(h) Community Service Programs

In the interim final rule, we defined community service programs as structured programs in which TANF recipients perform work for the direct benefit of the community under the auspices of public or nonprofit organizations. We limited community service programs to projects that serve a useful community purpose and those that are designed to improve the employability of recipients. These two criteria were and continue to be important because we do not want someone to reach the time limit and discover that the family is no longer eligible for a cash benefit under the TANF program but the adult is no more employable than when he or she started in community service.

We made a technical change to the wording of the definition in the final rule to clarify that all work-eligible individuals can count for participation in this activity. The language in the interim final rule limited it to TANF recipients only.

Comment: The preamble of the interim final rule described the purpose of community service as improving the employability ''of recipients not otherwise able to obtain employment.'' Several commenters asked whether this precluded a State from counting a participant who combined paid employment with community service.

Response: The preamble was not meant to preclude States from using community service for those who are employed. We recognize that there may be circumstances in which an individual's employment is not sufficient to count for participation and a State would need to place such an individual in another work activity to count the family for that month. In such a circumstance, community service could be appropriate because sufficient employment may not be available for full-time work.

Comment: One commenter asked us to clarify that the term ''program'' does not preclude self-initiated community service activities.

Response: Self-initiated community service activities can count as long as they are approved by the State, described in the Work Verification Plan, and meet the two key elements of the definition, i.e., that they provide a direct benefit to the community and improve the employability of the participant.

Comment: Several commenters recommended that we expand the definition of community service to include barrier removal activities such as substance abuse treatment, mental health treatment, rehabilitation activities, and domestic violence counseling and related services. Otherwise, they insisted, States will discontinue providing these services. These commenters contended that counting these activities under job search and job readiness assistance is too restrictive and does not permit States to provide these services in a meaningful way.

Response: Community service activities must meet the two key elements of the activity's definition, i.e., that they provide a direct benefit to the community and improve the employability of the participant. Generally, they would not include activities that primarily benefit a family or the individual participant, such as

substance abuse treatment, mental health and rehabilitation activities, and family violence counseling. While these activities are important and beneficial, they are not primarily directed to benefiting the greater community. Moreover, we believe that States can provide treatment services in meaningful ways under our rules. We refer readers to the preamble discussion of the definition of job search and job readiness assistance.

Comment: One commenter recommended that we count a range of non-traditional work activities as community service in remote areas with high unemployment. This would include traditional subsistence hunting and fishing activities, as well as other culturally relevant activities. The commenter explained that hunting and fishing affect the community because, they emphasize, ''a significant element of cultural and spiritual values that emphasize collective efforts in harvesting and sharing of the harvest throughout the community.'' The commenter also noted that these activities ''promote self-sufficiency by reducing reliance on non-traditional foods that are imported at high cost. * * *'' The commenter added that these and other activities ''strengthen and reinforce cultural and community values that, in the long term, benefit individuals and families.''

Response: Various non-traditional activities may count if they meet the definition of one of TANF's 12 activities. It is possible, for example, that some of the activities described would meet the definition of community service programs, if the items produced are shared by the community and collected as part of a structured and supervised activity. Although we sympathize with the commenter about difficulties presented by high unemployment and remoteness, we do not have the authority to add new activities. And, as we explained earlier in the preamble, the statute does not make any allowance for such factors, except that it limits the maximum overall work participation rate to 50 percent. Whereas TANF's predecessor program, AFDC, allowed States to exempt individuals living in remote areas, the TANF law did not continue this exemption.

Comment: Several commenters asked us to clarify whether or not all community service activities are subject to the FLSA.

Response: The determination of whether or not the FLSA applies to an activity is a decision for the Department of Labor. We recommend that readers direct any questions regarding the FLSA to the Wage and Hour Division of the U.S. Department of Labor at 1–866–4–USWAGE, TTY 1–877–889–5627 or the following Web site: *http://www.dol.gov/esa/whd/flsa/index.htm.*

Comment: Several commenters maintained that ''caring for a disabled family member'' should be considered community service, if it includes activities designed to improve the employability of participants. They contended that, in some cases, caring for a disabled family member could prepare individuals for jobs or ''home health care certification or nursing credits through partnerships with community colleges.'' In such circumstances, the commenter recommended that we allow States to count the individual in the numerator and the denominator. This, they suggested, would make the policy similar to the treatment of parents receiving Supplemental Security Income (SSI) benefits in our definition of a work-eligible individual. Another commenter added that counting parents caring for a disabled family member as community service reduces public costs by keeping some individuals out of a nursing home.

Response: Caring for a disabled family member cannot count as a community service program, even if it improves the employability of the caregiver, because the activity does not provide a direct benefit to the community. However, to the extent that the activity is part of a certification or degree program, it could likely count under another activity, such as vocational educational training or job skills training directly related to employment. We have no data on whether counting caring for a disabled family member as a community service activity would reduce some public costs, but we note that the policy in the final rule allowing a State to exclude families in which a parent is caring for a disabled family member from the denominator of the work participation rate calculation would likely have a similar effect on public costs.

Comment: One commenter questioned the requirement that community service must involve work for the direct benefit of the community. The commenter added, ''No other TANF activity has such a requirement.'' The commenter disagreed with our interpretation that the term ''program'' following the listing of community service in the statute meant that the activity should involve structure and supervision.

Response: We adopted what we believe is a common-sense definition that limits community service programs to projects that serve a useful community purpose. We agree that no other TANF activity has such a requirement, but that is because the primary purpose of the other activities is to help individuals move toward self-sufficiency. Although that is also an objective of this activity, we give meaning to the term ''community service.'' The DRA directed the Secretary of Health and Human Services to define work activities, suggesting that, while Congress did not have a specific definition in mind, it deferred to the Department's judgment. Moreover, we believe all 12 TANF activities should have structure and supervision, regardless of whether the term ''program'' is used in the name of the activity.

Comment: Several commenters questioned the need for community service to improve the employability of participants. One commenter found that the interim final rule's definitions of work experience and community service are substantially similar and violate the principle of ''mutually exclusive'' activities. The commenter recommended making a distinction between these activities by removing the requirement that community service be designed to promote employability.

Response: Under our definitions, the principal distinction between work experience and community service programs is that the latter activity must serve a useful community purpose. We believe that participation in a community service program should improve the employability of recipients to prevent an individual from reaching the time limit without becoming more employable than when he or she started in that program. We have therefore retained this feature of the definition in the final rule.

Comment: One commenter objected to the ''daily supervision'' requirement for TANF work activities with respect to community service, arguing that some community service activities are ''intrinsically difficult to supervise,'' such as Big Brother/Big Sister programs or visiting the elderly.

Response: In response to comments, we have revised the regulatory language relating to daily supervision in the final rule. As described in the preamble to § 261.2, ''Daily supervision means that a responsible party has daily responsibility for oversight of the individual's participation, not necessarily daily, in-person contact with the participant.'' Thus, many organized community service programs could meet this criterion. However, all community service programs must be structured programs that provide a direct benefit to the community and improve the employability of the participant. It is unclear whether the

programs the commenter describes meet all of these criteria.

Comment: One commenter said, ''Very few community service sites are equipped to handle either large numbers of volunteers for the 20 or 30 hours required for a primary activity or in our rural areas, to provide the supervision.''

Response: Many community service providers have programs that meet our definition of community service for the number of hours required to satisfy the work participation requirements. If an individual's hours fall short of the minimum hours needed, a State should be prepared to find time in another activity to make up the shortfall. This is not different from past TANF policy.

Section 261.2(i) Vocational Educational Training

In the interim final rule, we defined vocational educational training (not to exceed 12 months with respect to any individual) as 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.

Postsecondary Education

Comment: Several commenters recommended expanding the definition of vocational educational training to include postsecondary education. One commenter asked that we specify that an associate degree program is a countable vocational activity.

Response: The definition of vocational educational training in the interim final rule already permitted a wide range of postsecondary educational activities, including programs that consist of both academic and vocational for-credit course work. Completion of these programs can provide an associate of arts (AA), associate of science (AS), or associate of applied science (AAS) degree in fields defined as vocational. Common fields of study include: business, computer and information science, health-related professions, communication technologies, personal services, protective services, construction, automotive technology, and transportation. Associate degree programs can take two or more years to complete. Because they generally combine coursework with actual work, some portion could count as vocational educational training, while some could count as on-the-job training (if paid) or work experience (if unpaid). The only type of postsecondary education that was excluded in the interim final rule was education directed at receiving a baccalaureate or advanced degree, which the final rule permits.

Baccalaureate Degrees

Comment: Several commenters objected to the definition of vocational educational training because it specifically excluded education directed at receiving a baccalaureate or advanced degree. They recommended striking the phrase ''requiring training other than a baccalaureate or advanced degree.'' They explained that people with baccalaureate degrees, on average, earn significantly more than those with a high school diploma. In addition, they noted that the number of individuals likely to be enrolled in such programs would be small and States should therefore have the flexibility to determine whether or not to count them. Others suggested that we make an exception to the restriction on counting participation in a baccalaureate or advanced degree program where the client is 12 months away from completing such a degree because the earnings gain from completing the degree would increase the chances of permanently leaving welfare.

Response: We agree with the commenters and have expanded the definition of vocational educational training. In the interim final rule, we searched for other Federal definitions, especially in the U.S. Department of Education, of vocational education and related terms. In particular, we examined the regulatory definition of vocational education governing the Carl D. Perkins Vocational and Applied Technology Act (34 CFR 400.4(b)). That definition provided for a range of educational and training programs preparing individuals for employment ''in current or emerging occupations requiring other than a baccalaureate or advanced degree.'' However, since the publication of the interim final rule, this terminology has changed. The Carl D. Perkins Career and Technical Education Improvement Act of 2006 (Pub. L. 109–270) was signed into law on August 12, 2006. The new law changed the definition of ''vocational education,'' now called ''career and technical education,'' to eliminate the restriction against participation in a baccalaureate, master's or doctoral degree program.

In view of these changes and the comments we received, we are expanding the definition of vocational educational training to include organized educational programs that lead to a baccalaureate or advanced degree. We continue to caution that, given the statutory 12-month limitation on participation in vocational education, States can only count one year of participation in vocational educational training for any individual toward the work participation rate. Education leading to a baccalaureate or advanced degree also counts under job skills training directly related to employment (a non-core activity), as long as it is directly related to a specific job or occupation.

Comment: Several commenters thought that the preamble to the interim final rule was inaccurate when it stated, ''the TANF program was not intended to be a college scholarship program for postsecondary education.'' The commenters noted that TANF provided broad flexibility in use of TANF funds, including funds for higher education.

Response: We agree that expenditures for higher education are allowable uses of funds, even under the interim final rule. In addition, under the final rule, participation in a baccalaureate or advanced degree program can count toward the work participation rate.

Remedial/ESL

Comment: Several commenters expressed support for the inclusion of basic skills education as a component of vocational educational training. However, some expressed concern because the preamble indicated that it would count only if it were of ''limited duration.'' These commenters noted that participation in vocational educational training is, by definition, of limited duration—12 months in a lifetime. They also noted that some programs combine basic skills education and vocational training for the entire duration of the program. They recommended eliminating the restriction related to the duration of this component.

Response: We agree that there may be circumstances in which some individuals require basic skills education as an ongoing and regular part of the vocational educational training activity. As a result of these comments, we have reconsidered our stance on the ''limited duration'' requirement set forth in the preamble to the interim final rule. Therefore, basic skills education may count as vocational educational training as long as it is a necessary or regular part of the vocational educational training. Each State should describe in its Work Verification Plan how it integrates basic skills education into its definition of vocational educational training and how it will ensure that vocational training remains the primary focus of the program.

Comment: Some commenters asked for clarification regarding whether ESL could be integrated into vocational educational training in the same way that ''basic skills'' training can be. They

explained that ESL may be a prerequisite for employment and that it is especially important due to the increase in the number of immigrants. As with basic skills training, they contended that there should be no limit on counting participation in this activity, as long as the individual has not exhausted the 12 months that this activity can count in total.

Response: As we noted in the response above with respect to basic skills education, ESL can also be integrated within a vocational educational training activity as long as it is a necessary or regular part of the vocational educational training. The State need not demonstrate that the training is of limited duration as long as it integral to the vocational education, not a stand-alone program. Each State should describe in its Work Verification Plan how it integrates ESL or other language instruction into its definition of vocational educational training and how it will ensure that vocational training remains the primary focus of the program. For example, a vocational educational training provider could provide a statement indicating that a participant in an otherwise approved vocational educational training activity requires such instruction to participate in the program and that such instruction is integrated into the activity.

Comment: Some commenters suggested that we allow States to adopt a range of approaches to providing vocational educational training programs, including programs that ''frontload'' these activities for those who are not ready for the vocationally-oriented training. They pointed out that after a few months of intensive instruction, participants can improve their basic skills to take full advantage of a vocational educational training program. Thus, they recommended that we consider these activities to qualify if they are part of a sequence of activities leading to a vocational educational training activity, even if the initial period of participation involves no vocationally-oriented training.

Response: We do not believe that a sequenced approach fits within a definition of vocational educational training. Although basic skills education and English language instruction may help prepare individuals for vocational educational training, the programs must be provided in combination with vocational instruction. Otherwise, the definition of this activity would essentially permit any stand-alone educational activities to count in this category. Stand-alone educational activities may count as either education directly related to employment or job skills training directly related to employment.

Comment: Some commenters suggested amending the definition of vocational educational training to include adult basic education and ESL even if they do not prepare individuals for a specific job. They asserted that such basic skills are needed to compete in the workplace and are crucial for making an individual more employable. For example, one commenter urged us to count English language instruction as vocational educational training when an individual needs such instruction to succeed in the workplace. Some commenters indicated that this was especially important for refugees, noting that it is very difficult for refugees who do not speak English to become employed.

Response: We understand the commenters' concerns, but we do not believe it would be appropriate to expand the definition of vocational educational training to allow these stand-alone activities. They may count as either education directly related to employment or job skills training directly related to employment. We believe that Congress intended these activities to count as non-core activities. When Congress created TANF, it listed 12 allowable work activities. Of these, nine were what we refer to as ''core activities'' that count toward meeting the first 20 hours of a 30-hour average weekly requirement. The only educational activity among these was vocational educational training. Since neither Congress nor the U.S. Department of Education included basic education and ESL as part of its definition of vocational education, we believe it is clear that these activities must be part of one of the three non-core educational activities.

Comment: One commenter suggested that we consider pursuit of a high school diploma, such as GED testing, to be vocational educational training. The commenter noted that such participation is consistent with the definition of the activity in the interim final rule, which defined this activity as ''organized educational programs that are directly related to the preparation of individuals for employment in current and emerging occupations * * *.''

Response: We do not agree that such education should count as vocational educational training. Even when vocational education is provided in high school, minor parents attending high school in a vocational education track count as participating in ''satisfactory attendance in secondary school or in a course of study leading to a certificate of general equivalence.'' This avoids triggering the 12-month lifetime limit on participation in vocational educational training. For older adults, pursuit of a high school degree or GED would more appropriately be classified as education directly related to employment.

Comment: Several commenters asked whether vocational rehabilitation activities were considered ''vocational educational training.''

Response: We would consider vocational rehabilitation activities that are organized educational programs directly related to preparing individuals for employment in current or emerging occupations to be vocational educational training. Any vocational rehabilitation activities that do not meet these criteria might meet the definition for job search and job readiness assistance or job skills training directly related to employment and should count under those activities, as appropriate.

Other Training

In the preamble to the interim final rule, we asked for comments on how States currently implement their vocational educational training programs and whether we should broaden the definition we used in the interim final rule. We noted that the current definition of vocational educational training ''could overlap with other TANF work activities that provide training, including on-the-job training and job skills training.''

Comment: One commenter cautioned us not to narrow the definition of vocational educational training just to distinguish it from on-the-job training or job skills training. The commenter pointed out, ''it is easy to imagine the same training being provided under vocational educational training as that provided by an employer through on-the-job training or job skills training directly related to employment, particularly for lower-skilled TANF participants.''

Response: We agree and have not narrowed the definition. The allowable overlap among various work activities can help States structure their programs to maximize learning opportunities for participants. In particular, many forms of vocational educational training may take two or more years to complete, beyond the 12-month lifetime limit under the program. By carefully structuring participation, States can count participation under several of the existing work activities. For example, obtaining a degree to become a licensed practical nurse usually takes about two years to complete and usually involves a combination of classroom instruction and clinical activities. Clinical training

in a hospital or other setting could count as work experience or community service because if, in the course of their training, individuals are providing a service to the community through a hospital or an elderly center, such participation would meet the definition of those activities. If participants are paid, they might count under unsubsidized employment or on-the-job training. Once they have met the core activity requirement through these activities, additional classroom instruction could be reported under job skills training directly related to employment.

Specific Occupation

Comment: Several commenters did not believe we should limit the definition of vocational educational training to ''activities that give individuals the knowledge and skills to perform a *specific occupation*—as opposed to more generally preparing them to become more employable in a range of occupations.'' The commenters contended that basic and remedial education should count as vocational educational training.

Response: Basic and remedial education clearly fall under the category of education directly related to employment, and so cannot serve as a stand-alone activity under vocational educational training. However, as we explained in the preamble to the interim final rule, such education can count as part of vocational educational training as an embedded activity as long as it is a necessary and regular part of the program.

Comment: Several commenters contended that the description of vocational educational training in the preamble to the interim final rule unnecessarily limited it to specific occupations. They maintained that this was not good policy and that it was not consistent with the TANF statute, noting that some activities in the statute included the phrase ''directly related to employment,'' but that vocational educational training was not one of them. They urged that, on this basis, we expand the definition to include training and education activities that were not related to a specific occupation, but that improve employability more generally.

Response: Our definition of vocational educational training was originally based on the Department of Education's description of the term. This definition clearly related the term to educational programs directly related to employment in ''current or emerging occupations.'' However, this does not mean that the activity is limited to a specific job, but rather to a broadly defined job category.

12-Month Limit

Comment: One commenter suggested that time spent in vocational educational training should only count against the 12-month limit ''when hours in this activity, either alone or in combination with hours from other activities, enable a recipient to meet the work rates. If an individual does not have the overall necessary hours to meet the rate, time spent in this activity should not count against the 12-month limit.''

Response: The statute places a lifetime 12-month limit on participation in vocational educational training. As with durational limits for job search and job readiness assistance, we do not have the statutory authority to disregard hours of participation reported in this category from counting against the lifetime 12-month limit. We encourage States to include hours of work participation in this category that do not count toward the work participation rates under the category ''Other Work Activities'' on their TANF and SSP–MOE Data Reports or to count such hours under our excused absence policy as part of another countable activity. Please refer to § 261.60 for further discussion of excused absences.

Deeming

Comment: Several commenters suggested that individuals who attend vocational educational training programs be ''deemed'' to meet the work rate as long as they are full-time students and are making satisfactory progress. One commenter also suggested options for dealing with less than full-time participation, including a proportional counting methodology.

Response: The interim final rule made explicit a long-standing ''actual hours'' standard and we retain that policy in the final rule. We do not deem full participation simply because someone is a full-time student and makes good or satisfactory progress. However, the final rule allows States to count up to one hour of unsupervised homework for each hour of classroom time. Thus, as a practical matter, many individuals who attend school full-time would, in fact, satisfy the work participation standards.

Section 261.2(j) Job Skills Training Directly Related to Employment

In the interim final rule, we defined job skills training directly related to employment as 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 can include customized training to meet the needs of a specific employer or it can be general training that prepares an individual for employment. This can include literacy instruction or language instruction when such instruction is explicitly focused on skills needed for employment or combined in a unified whole with job training.

Comment: Several commenters suggested that the interim final rule defined this activity too narrowly by excluding ''barrier removal activities such as substance abuse counseling and treatment, mental health services, and other rehabilitative activities.'' The commenters asserted that these activities should be considered like other training activities because they are needed to prepare an individual for employment. One commenter contended that because barrier removal activities were not explicitly excluded from the definition of job skills training directly related to employment, it is within our authority to interpret this activity to include them.

Response: As we indicated in the preamble to the interim final rule, we tried to look for appropriate categories for each activity. We explained that it would not be appropriate to include barrier removal activities, such as substance abuse counseling and treatment, mental health services, and other rehabilitative activities under the category of job skills training directly related to employment. Under our definitions, barrier removal activities are job readiness activities, not job skills training directly related to employment. States continue to enjoy flexibility to serve individuals, but in some cases are limited in what they can count. We encourage States to work with individuals with multiple barriers, but they should keep in mind that the definition of job skills training focuses on education or training that is designed specifically to help individuals move into employment.

Section 261.2(k) 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

In the interim final rule, we defined 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, as education related to a specific occupation, job, or job offer. This definition included courses designed to provide the knowledge and skills for specific occupations or work

settings, but may also include adult basic education and ESL. Where required as a prerequisite for employment by employers or occupations, this activity may also include education leading to a GED or high school equivalency diploma.

We made a minor change to the wording of this definition in the final rule, adding the words ''work-eligible'' before ''individual.'' We made this change both for consistency with other definitions and to make clear that this activity is allowable for any work-eligible individual. Although the statutory name of the activity refers to a ''recipient'' who has not received a high school diploma or certificate of equivalency, we think that a work-eligible individual who is not a recipient of assistance could also participate in this activity and have those hours count for participation rate purposes.

Comment: One commenter noted that the situation of immigrants and refugees who hold a high school diploma from overseas but do not have an American high school diploma or GED should warrant an exception to the requirement that individuals not have these credentials as a prerequisite for participating in the activity. The commenter explained, ''These individuals may lack the skills and credentials employers require from native high school graduates.'' The commenter urged a clarification that such individuals could participate in this activity and that such participation include English language instruction.

Response: The statute limits participation in this activity to individuals who have not received a high school diploma or a certificate of high school equivalency. We recognize that some individuals may have received a high school diploma from other countries that may not be directly comparable with an American high school diploma. Moreover, it would be difficult for TANF agencies to verify whether or not individuals have or have not obtained degrees or credentials from overseas. We therefore give States the flexibility to determine on a case-by-case basis whether such individuals qualify for this activity. A State that uses this option should describe in its Work Verification Plan how it will make such a determination.

Comment: One commenter recommended that we allow States to deem individuals who make ''good or satisfactory progress'' as having met ''the minimum hours of independent study recommended by the educational program.'' Those with unsatisfactory performance would receive credit for only the verified and documented hours of classroom time.

Response: States must report actual hours of participation. We have eliminated the requirement for ''good or satisfactory progress'' as part of the Federal definition of this work activity. We encourage States to monitor progress using both qualitative and quantitative measures, but do not impose a specific standard. Please refer to the cross-cutting issues related to the definitions at the beginning of this section of the preamble for further discussion of this issue.

Comment: Several commenters recommended allowing this activity to count for high school graduates or those with a certificate of high school equivalency, but who score low on reading or math assessments.

Response: We do not have the statutory authority to expand the scope of this activity to include those with a high school degree or a certificate of high school equivalency.

Section 261.2(l) Satisfactory School Attendance 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

In the interim final rule, we defined this activity to mean 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. The former is aimed primarily at minor parents still in high school, whereas the latter could apply to recipients of any age. Unlike ''education directly related to employment,'' this activity is not restricted to those for whom obtaining a GED is a prerequisite for employment. However, it may not include other educational activities, such as adult basic education or language instruction unless they are linked to attending a secondary school or a GED program.

As in education directly related to employment, we made a minor change to the wording of this definition in the final rule, replacing ''recipient'' with ''work-eligible individual.'' We made this change both for consistency with other definitions and to make clear that this activity is allowable for any work-eligible individual. Again, although the statutory name of the activity refers to a ''recipient'' who has not received a high school diploma or certificate of general equivalence, we think that a work-eligible individual who is not a recipient of assistance could also participate in this activity and have those hours count for participation rate purposes.

Comment: One commenter noted that with respect to ''good or satisfactory progress'' for this activity to count, the standard ''must'' include both a qualitative and quantitative measure of progress.

Response: We have eliminated the requirement for ''good or satisfactory progress'' as part of the Federal definition of this work activity. We encourage States to monitor progress using both qualitative and quantitative measures, but do not impose a specific standard. Please refer to the cross-cutting issues related to the definitions at the beginning of this section of the preamble for further discussion of this issue.

Section 261.2(m) Providing Child Care Services to an Individual Who Is Participating in a Community Service Program

In the interim final rule, we defined providing child care services to an individual who is participating in a community service program as providing child care to enable another TANF recipient to participate in a community service program. In the final rule, we have clarified that this is an unpaid activity and must be a structured program designed to improve the employability of individuals who participate in it. Alternatively, if an individual receives payment for providing child care, the State should report that individual's hours as unsubsidized employment.

Comment: One commenter recommended counting providing child care for a TANF recipient in community service as extending to two-parent families in which one parent stays home with the children while the other participates in community service. The commenter stated that children that have more time with their parents, especially during their early years, have better outcomes. This would also reduce public costs for child care and other services.

Response: We agree that parental time with children is extremely important. However, in a two-parent family, one parent cannot count as participating by providing child care for his or her own child while the other parent participates in community service because the activity neither involves supervision nor helps the parent providing child care prepare for employment.

Comment: Several commenters noted that it would be difficult to apply a daily supervision standard for an

individual who is participating as a child care provider for a TANF recipient in community service. Some of the commenters recommended counting this activity as self-employment and allowing States to develop methods for projecting a typical number of hours per week.

Response: We have clarified in the final rule that this activity is both unpaid and structured to improve an individual's employability. The degree of supervision and methods for reporting hours would depend on how the State structures this activity. Because it is an unpaid activity, projecting hours would not be appropriate.

Comment: One commenter recommended expanding the definition of the activity to include providing child care not only to a TANF recipient in community service, but also to someone in a MOE-funded program.

Response: We agree with the commenter that this activity should include providing child care for a recipient of TANF or SSP–MOE assistance in community service.

Section 261.2(n) Work-Eligible Individual

The DRA required us to include families receiving assistance under a separate State program (SSP) in the work participation rates if the funding for those programs is counted towards the State's maintenance-of-effort (MOE) requirement, and to specify the circumstances under which a parent living with a child receiving assistance should be included in the work participation rates.

In the interim final rule, we used the new term *work-eligible individual* to describe anyone whose participation in work activities is required in the calculation of the work participation rate. We drew the term from the heading to the statutory provision requiring us to include families receiving assistance under a SSP–MOE program and to specify the circumstances under which a parent residing with a child recipient of assistance should be included in the work participation rates.

We have made modifications to the definition of a work-eligible individual, but we have not changed our general approach to who is included in the final rule. We continue to define a work-eligible individual as either: (1) An adult (or minor child head-of-household) *receiving assistance* under TANF or a separate State program; or (2) a *non-recipient parent* living with a child receiving assistance. There continue to be exclusions that apply specifically to the non-recipient parents and others that apply more broadly to the definition.

As under the interim final rule, a non-recipient parent living with a child receiving assistance is *not* a work-eligible individual if the parent is: A minor parent who is not a head-of-household; a non-citizen who is ineligible to receive assistance due to his or her immigration status; or, at State option on a case-by-case basis, a recipient of Supplemental Security Income (SSI) benefits. We deleted the phrase ''or spouse of the head-of-household'' in the minor parent exclusion of the interim final rule because such individuals are not required to participate when they do receive assistance. Thus, only a minor parent who is the head of household is required to be included in the participation rate, whether she is receiving assistance or is a non-recipient. We have also added a case-by-case exclusion for recipients of Aid to the Aged, Blind, or Disabled under Title XVI of the Social Security Act, which, in the Territories of Puerto Rico, Guam, and the Virgin Islands, is analogous to SSI. 42 U.S.C. 1381 note *et seq.*

More broadly, the definition excludes a parent, whether or not a recipient of assistance, who is caring for a disabled family member living in the home. The State must provide medical documentation to support the need for the parent to remain in the home to care for the disabled family member. We have eliminated the interim final rule provision that permitted a parent to be excluded only if the disabled family member *did not attend school on a full-time basis.* We have also added a State option to exclude on a case-by-case basis a parent who is a recipient of Social Security Disability Insurance (SSDI) benefits. As with a parent caring for a child with a disability, the SSDI exclusion applies regardless of whether the parent receives TANF or not.

As in the interim final rule, we do not consider an adult in a family served under an approved Tribal TANF program using State MOE funding to be a work-eligible individual, unless the State includes the family in calculating work participation rates, as permitted under § 261.25.

Unless excluded for one of the reasons outlined above, the term work-eligible individual includes all non-recipient parents living with a child receiving assistance and all adult recipients of assistance.

We received many comments suggesting that we exclude additional groups of individuals from the definition of a work-eligible individual. We considered each of these suggestions carefully as we developed the final rule. We appreciate the concerns the commenters raised, both about a State's ability to engage certain groups of individuals and about the appropriateness of encouraging States to engage other individuals in work by including them in the work participation calculation. We address these concerns below.

Comment: Some commenters asked us to clarify that non-parental caretakers in child-only cases continue to be excluded from the work participation rate calculation. One commenter recommended excluding all non-parental caretakers, even those ''who were sufficiently needy that they qualified for TANF.'' The commenter asserted that not excluding them could discourage non-parental caretakers from taking custody of children.

Response: Child-only cases in which a parent does not reside with the child, such as when a grandparent cares for the grandchildren, do not include work-eligible individuals. In such cases, the grandparents or other non-parental caretakers are not recipients of assistance themselves and thus do not meet the first part of the work-eligible individual definition. Neither do they meet the second part of the definition because they are not non-recipient *parents* living with recipient children. If a grandparent or other caretaker does receive assistance, then that adult would be a work-eligible individual; we do not have the authority to exclude non-parental caretaker relatives receiving assistance from the work participation rate calculation. The DRA limited our authority to determine whether a *parent* living with a child receiving assistance should be included or excluded from the work participation rate. Cases where a caretaker relative receives assistance have been included in the work participation rate since the inception of TANF and continue to be under the final rule.

Comment: Some commenters wanted us to exclude fugitive felons and parole violators from the definition of work-eligible individual; others contended that convicted drug felons and those ineligible because of past fraud should not be work-eligible individuals. They maintained that States are prohibited from using TANF dollars or counting State MOE dollars for serving these felons and thus it is unfair to require their inclusion in the work participation rate calculation.

Response: Similar to a parent that incurs a work sanction, a case in which a parent is a fugitive felon, parole violator, or a drug felon is subject to a reduced grant by virtue of the behavior

of that parent. We think it would be inappropriate to treat such cases differently from parents who abide by the law. More importantly, we strongly believe that it is in the best interest of the children in such families if States engage the parents in work activities, helping them off welfare and out of poverty. Thus, we have not made the suggested changes.

We would also like to clarify a State's limitations and flexibility with regard to funding fugitive felons, drug felons, and individuals convicted of fraudulently misrepresenting residence. Fugitive felons and parole violators may not, by statute, receive federally funded ''assistance,'' as defined at 45 CFR 260.31. An individual who is convicted of fraudulently misrepresenting his or her place of residence in order to receive assistance simultaneously from two or more States may not, by statute, receive federally funded ''assistance'' for ten years after his or her conviction. That includes ''assistance'' paid with pure Federal funds or with commingled State and Federal funds. That individual may receive ''assistance'' using segregated State TANF funds or separate State program funds. He or she may also receive non-assistance benefits, i.e., benefits that are outside the regulatory definition of ''assistance,'' such as non-recurrent benefits that do not extend beyond four months or supportive services for the employed. An individual convicted of a drug felony may not, by statute, receive TANF-funded ''assistance,'' regardless of whether the funds are all Federal, commingled Federal and State, or segregated State funds, unless the State opts out of or limits the duration of the prohibition by passing a State law; however, that individual may receive ''assistance'' using separate State program MOE funds and may receive TANF-funded non-assistance benefits. Thus, while restrictions apply, there are opportunities to use TANF or certain MOE funds to support the family and engage the individuals in work.

We remind readers that the law does not prohibit spending Federal or State funds on an individual who commits ''an intentional program violation.'' States may choose to impose such penalties against individuals who commit program fraud, or for other reasons, but they are not prohibited from spending Federal funds on these cases.

Comment: A couple of commenters urged us to exclude for a limited time period from the definition of work-eligible individual refugees and certain other legal immigrants who cannot speak English, have little education, and low levels of literacy. The commenters explained that it may take time to improve their English proficiency to a level that enables them to participate fully in the labor market.

Response: We have not excluded refugees from the definition of work-eligible individual. TANF recipients who happen to be refugees should be treated like other TANF recipients. States should determine the most appropriate activities, which may be English language skills or a combination of language training and other services, and then engage the clients in those activities to the greatest extent possible. We refer readers to the discussion of vocational educational training, which clarifies that we have modified the definition of that activity to permit ESL to count for the entire 12 months that the activity may count under the law, as long as the language training is a necessary or regular part of the vocational educational training.

Comment: A few commenters urged us to exclude from the definition of ''work-eligible'' all parents who are not in the assistance unit. Some asserted that not doing so creates an incentive to impose full-family sanctions and ignores the impact such policies have on children.

Response: We did not exclude all parents who are not in the assistance unit because Congress specifically directed HHS to specify the circumstances under which a parent residing with a child who is a recipient of assistance should be included in the work participation rates. Since parents who were themselves recipients of assistance were already part of the rates (other than those subject to either of two special statutory exclusions), it was apparent that Congress intended us to look at families in which the parent did not receive TANF assistance but the child did. In addition, as we explained in the preamble to the interim final rule, we considered in turn each type of family in which a parent resides with a child recipient of assistance to determine whether it was appropriate to include that group of families in the calculation of the work participation rates. We believe that our definition appropriately focuses on those parents who can benefit from work activities and whose participation will help move the family into employment and out of poverty.

We appreciate the commenters' concern about the well-being of families in which the adult is subject to a sanction. We note that States have other options when a family refuses to comply with work requirements. A State that does not wish to use a full-family sanction need not do so.

We repeat that not all ''work-eligible individuals'' are required to engage in work for a specified number of hours. The State still determines what each individual must do in accordance with its laws and policies. The definition of a work-eligible individual defines the denominator, and is a guideline of who should be engaged in work activities. We believe that our definition creates reasonable expectations of States. But, Congress established an overall work participation rate of 50 percent. This leaves room for a State to decide if an individual should be excused from work requirements, whether because of a disability, lack of access to transportation, the need for other services, or some other reason, regardless of whether they are in the assistance unit or not.

Comment: Some commenters asserted specifically that adults whose needs are removed from the assistance unit due to a sanction should not be considered work-eligible individuals, because the family's grant has already been reduced and it is difficult to get such adults to comply with the work requirements.

Response: To ensure consistent treatment, we believe it is appropriate to include all of the sanctioned parents of child-only cases in the definition of ''work-eligible individual.'' A State may either reduce the grant by a fixed percentage or fixed dollar amount or remove the needs of the adult; only the latter approach results in a child-only case. In the interim final rule, we clarified specifically why we included as work-eligible individuals sanctioned cases in which the adult's needs are removed from the case due to a work-related sanction, but the child continues to receive assistance. The effect on a family's grant of removing a parent's needs from the assistance unit is similar to the effect of a fixed percentage or dollar amount sanction. Yet, under the original TANF rule, these cases without an adult were excluded from the calculation of work participation rates as child-only cases. Cases in which the grants were reduced by a fixed percentage or dollar amount due to a work-related sanction were, by law, excluded for a maximum of only three months in a 12-month period. The final rule treats all cases with a work-related sanction in the same manner.

Comment: Some commenters recommended excluding the non-recipient parents of children who continue receiving assistance after their parents have received 60 months of Federal assistance. One commenter explained that States cannot require

such parents to participate and, as a result, including them would lower work participation rates. Another stated that, because the State can no longer assist the parent with TANF funds, it is unfair to impose a work requirement.

Response: The final rule continues to include as work-eligible individuals parents that are no longer included in the assistance unit because they have exhausted their time-limited benefits, but for whom the State has chosen to extend benefits on behalf of their children. We made this decision for several reasons. First and foremost, it provides an incentive for States to work with every case right from the beginning. Then, clients can preserve as much of their time-limited benefit as possible. Second, we are very concerned about the negative consequences for children living in families with reduced benefits for long periods. The adults in families whose needs have been removed from the grant are the most likely to be ignored. They face long-term poverty and other negative consequences because States are no longer helping them acquire work skills and find employment. Third, we do not believe the only alternative to including such families in the work participation rate is to impose a full-family sanction and ignore the family completely. One alternative for those who reached the Federal time limit is to use the law's flexibility to provide Federal assistance to up to 20 percent of the caseload via a hardship extension. If a family still needs help after 60 months, then the hardship extension is the Federal safety net designed for that very purpose. Finally, we included parents that have reached the time limit because we think it is the best way to make the participation rates consistent across States, one of our charges under the law.

We also remind readers that States have considerable flexibility in deciding which families to assist with Federal versus State funds, even when it comes to families reaching the 60-month time limit. The time limit applies only to families receiving Federal or commingled funds, not to all funds. A State could use either segregated or separate State funds to assist families that have received 60 months of Federal assistance.

Comment: A couple of commenters maintained that the definition of work-eligible individuals should not include persons served in a separate State program funded with MOE dollars who would not be eligible for TANF, including non-qualified non-citizens. Some commenters suggested that States should decide whether or not to include as work-eligible individuals non-citizens receiving SSP assistance so as not to penalize a State for humanitarian efforts.

Response: We appreciate the concerns that the commenters expressed for State flexibility in deciding which families to assist through separate State programs. However, we include these non-qualified individuals because the participation rates are based on all adults who receive assistance, either in the TANF program or in a SSP. Since these non-qualified non-citizens receive assistance, they are included by the statute. As with other non-recipient parents included as work-eligible individuals, we believe that the children in such families will be better off if States engage the parents in work activities, helping them increase their incomes and move off welfare.

Comment: A number of commenters suggested we give States the option to exclude an individual served under SSDI or under a State-funded disability program from the definition of work-eligible individual. The commenters reasoned that our rationale for including SSI recipients on a case-by-case basis applied equally well to non-recipient parents served by these other disability programs.

Response: We agree with the arguments the commenters made with respect to SSDI recipients. Unlike SSI recipients, SSDI recipients often are also TANF recipients; therefore, we have modified the rule to allow a State to exclude on a case-by-case basis a parent who is recipient of SSDI from the definition of work-eligible individual.

We did not find the commenters' arguments as persuasive with respect to State disability programs. Because State disability determinations and eligibility could vary so widely from one jurisdiction to the next, we think that making this exclusion would not meet our mandate to make the work participation rates more consistent. Rather, we think it more appropriate to rely on a Federal standard of disability for the purpose of excluding parents from the definition of work-eligible individual.

Comment: Many commenters urged us to exclude from the definition cases in which a parent's SSI or SSDI application is pending a decision (including the appeal of an adverse decision). Some suggested that we should exclude applicants who meet the disability standard. They argue that parents whose disabilities are sufficiently grave to qualify them for SSI or SSDI but do not yet receive it would have as much difficulty working as someone whose application has been approved. Commenters also urged us to exclude individuals who would qualify for SSI or SSDI but for the durational requirements of those programs, *i.e.*, that the physical or mental impairment can be expected to result in death or has lasted or can be expected to last for a continuous period of at least 12 months.

Response: We appreciate that individuals with disabilities may have limitations in their ability to work. When the limitations are severe enough, an individual may qualify for and receive SSI or SSDI. However, applying for either program is no guarantee that the Social Security Administration (SSA) will find that the applicant meets its definition of disability and will approve the application. In fact, the majority of initial applicants are denied benefits. The SSI and SSDI approval process involves not just a simple determination that an individual suffers from a disability on an approved list, but also a determination that the individual cannot engage in any substantial gainful activity. We believe that a Federal standard of disability is appropriate to ensure consistency in excluding parents from the definition of work-eligible individual. Since SSI and SSDI applicants have not yet met that standard, the regulation does not exclude them from the definition of work-eligible individual. However, as we explain later, States may retroactively exclude adults in these families from the TANF Data and SSP–MOE Data Reports once they are approved for SSI or SSDI benefits and thus are no longer considered to be work-eligible individuals. This partly addresses the concerns raised by the commenters.

We do want to clarify the status of TANF parents who ''meet the SSI or SSDI criteria for severity.'' In some cases, SSA makes a presumptive disability determination for SSI or SSDI benefits, based on the nature of an applicant's impairment and other considerations. In such a case, SSA pays expedited benefits while the applicant awaits a final decision. These individuals are in fact receiving SSI or SSDI benefits and thus the State would have the option to include or exclude them from the definition of work-eligible individual. If subsequently, SSA denies the application, the individual would no longer be receiving SSI or SSDI benefits and thus would qualify as a work-eligible individual.

Parents in TANF cases who do not qualify for SSI or SSDI due to the durational requirements are not excluded from the definition of work-eligible individual because they do not receive benefits under those programs. It is not appropriate to exclude them, due

to the temporary nature of their disabilities. For example, States should prepare an individual who is recovering from an accident or heart attack for work, examples several commenters cited as temporary disabilities. The participation rate that Congress established provides ample room for States to exempt individuals with temporary illnesses or incapacities from participating in work activities. Indeed, under TANF's predecessor program, JOBS, States could exempt individuals who were ill or temporarily incapacitated, but the 1996 TANF law did not include these exemptions.

Comment: Many commenters asked us to permit States to exclude applicants for SSI or SSDI from the definition of work-eligible individual retroactively back to the date of their applications once those applications are approved. They explained that the SSI/SSDI disability determination process can be lengthy and, once a determination is made, benefits are paid retroactively for earlier months.

Response: We agree with many of the comments and, within limits, have amended the rule to allow States to revise work participation data—including information on which individuals are or are not work-eligible—after initially reporting it. Quarterly TANF and SSP–MOE Data Reports are due within 45 days of the end of the quarter. States are free to, and often do, revise data relating to previous quarters within the fiscal year. Because a State is not liable for a reporting penalty until the end of the quarter after the end of a fiscal year, a State may, until December 31, submit its final data for the previous fiscal year. Thus, a State that learns that a former work-eligible individual has been approved for SSI or SSDI and for whom prior State TANF or SSP–MOE benefits are reimbursed may revise its data for that individual by December 31 for the months in the preceding fiscal year in which the individual received benefits under one of those programs. If the individual's application for SSI or SSDI predates the beginning of the previous fiscal year, the State could not revise data back to the date of application because only data from the previous fiscal year may be revised by December 31. Please refer to § 265.7(b) for further discussion of the timing for revising work participation and caseload data and to §§ 265.4 and 265.8 for more information on when quarterly reports are due and when penalties apply.

Comment: Some commenters recommended giving States longer than until December 31 to amend TANF and SSP–MOE Data Reports for determining work-eligible individual status due to the lengthy approval process for disability benefits. One commenter suggested that we give States until the point at which we finalize the participation rate calculations for a fiscal year. Another suggested March 31, six months after the end of the fiscal year, as an appropriate deadline.

Response: While it is true that disability determinations can be lengthy, we have clarified that the deadline for retransmitting data is December 31 because after that date, States are liable for data reporting penalties.

Comment: One commenter urged us to exclude recipients of the programs offered by ''209(b) States'' from the definition of work-eligible individual in the same way we do SSI recipients. The commenter contended that those programs have criteria that are stricter than SSI and thus should also be excluded.

Response: The designation ''209(b) State'' refers to a mechanism by which the State determines eligibility for Medicaid, not eligibility for SSI or any other disability program. Most States, known as ''1634 States,'' provide automatic Medicaid coverage for recipients of SSI, but they have the option of continuing to apply standards that predated the SSI program and are more restrictive than those of the SSI program. Those States are called ''209(b) States,'' a reference to a provision in the 1972 law that created the SSI program. While such a State may have more restrictive criteria for Medicaid, this provision does not affect eligibility for SSI in the State and thus has no bearing on our definition of work-eligible individual.

Comment: One commenter urged us to clarify that supported work for individuals with disabilities (as discussed in the preamble concerning subsidized employment) is a countable activity for work-eligible individuals receiving SSI or SSDI whom the State opts to include in the work participation rate.

Response: Any activity that can count toward the work participation rate for other work-eligible individuals can also count for SSI and SSDI recipients whom the State opts to include, including those participating in a supported work program for individuals with disabilities. Except where the statute explicitly imposes a restriction (*e.g.*, for certain educational activities), we do not limit countable activities to any subset of work-eligible individuals.

Comment: One commenter thought the way we structured the definition of work-eligible individual with respect to SSI recipients was inequitable because it subjects individuals to the requirements of both TANF and SSI. The commenter maintained that by including SSI recipients within the definition of a work-eligible individual and allowing States to exclude them on a case-by-case basis we created an inequity. The commenter urged us to exclude all such individuals as a class and allow States to include them on a case-by-case basis.

Response: We think the commenter misunderstood the purpose of this provision. First, the definition of work-eligible individual only includes a SSI recipient when a State opts to include such an individual. A State must make a choice in each case and report data on the case accordingly. Because there is a child receiving assistance, a TANF case exists and the State must report data on that family, including information on the work status of the adult or adults in the family. No case is automatically included; the State reports the data to us for each case. Second, the rule does not subject individuals to the requirements of both SSI and TANF. Presumably, a State would not choose to include a SSI recipient as a work-eligible individual unless that individual had sufficient hours of work to allow the family to count in the numerator of the participation rate. Moreover, this option does not subject the SSI recipient to additional rules of the TANF program. The family is already subject to the applicable rules of TANF, because a child is receiving assistance. The SSI parent has no further work obligation because the State chooses to use the hours that individual works in the participation rate calculation.

Comment: Some commenters recommended that we exclude from the definition of work-eligible individual those ''who are refugees, asylees, or legal permanent residents who may qualify for TANF or MOE-funded assistance but are ineligible for SSI based on their immigration status.''

Response: While some refugees and asylees are in fact eligible to receive SSI under current law, we do not believe the recommendation to exclude parents ineligible for SSI due to their immigration status is practical. Because these parents are ineligible for SSI, the Social Security Administration will not process their disability determinations. We, therefore, cannot ascertain whether or not they would have met the appropriate disability standards and qualified for SSI.

Comment: One commenter urged us to provide the same exclusion for recipients of Title XVI benefits (Aid to

the Aged, Blind or Disabled in the Territories) as we do for SSI recipients.

Response: We agree with the commenter and have modified the rule accordingly.

Comment: A couple of commenters thought our approach to individuals with disabilities and the definition of a work-eligible individual did not make sense. They pointed out that we exclude a parent caring for a disabled family member living in the home but not the disabled family member that needs full time care.

Response: The exclusion for a parent caring for a disabled family member living in the home primarily affects cases in which a parent cares for a disabled child. Obviously, a disabled child would not be subject to work requirements. While in some cases the disabled family member may be a second parent, we did not want to broaden the exclusions from the work participation rates beyond those that already exist in the statute.

Comment: One commenter objected to the way the work-eligible individual definition addressed two-parent families in which one parent has a disability. The commenter pointed out that if the State finds that a parent has a disability but the individual does not yet receive SSI or SSDI, the family would not be part of the two-parent participation rate but would be included in the overall rate. If there is medical documentation to support it, the parent without a disability will be exempted from the work-eligible category because she is needed in the home to care for a disabled family member. However, the family would still be in the work participation rate because the parent with a disability would still be a work-eligible individual obligated to engage in work for 30 hours per week to count for participation.

Response: We believe the final rule addresses most of the commenter's concerns. This is a confusing area because one provision relates to disability in general and is a State determination, and another relates specifically to qualifying for SSI or SSDI, a Federal determination. If a State finds that one parent in a two-parent family has a disability then, by statute, the family comes out of the two-parent work participation rate. If the parent that the State found to have a disability does not receive SSI or SSDI, then he or she would continue to be a work-eligible individual, just as a single parent waiting for SSI or SSDI determination would be, and the family would continue to be part of the overall rate. In all other respects, the two-parent family is treated the same way as the single-parent family for determining whether the parents are work-eligible individuals. If both parents receive either SSI or SSDI, then both would be excluded from the definition of a work-eligible individual. As we noted above, within limits States may retroactively revise their data when individuals meet SSI or SSDI criteria.

Comment: Several commenters recommended that we exclude parents on TANF who are caregivers of family members with disabilities, regardless of whether the family member with a disability lives in the same home as the parent. The commenters explained that the burden of providing care for family members living elsewhere may be just as great or greater.

Response: The purpose of the TANF program is to enable parents or relatives to care for children ''living in the home'' and to take necessary steps to become self-sufficient. While we appreciate the burden that having a family member outside the home that needs care places on a family, the TANF program is not designed to provide such care. Parents of TANF families face significant challenges to care for everyone in their immediate household, and to prepare for or maintain employment that will allow them to provide for their family. Given these critical responsibilities and the time-limited nature of TANF assistance, we do not agree that parents should be excluded from the definition of a work-eligible individual in order to provide care for someone outside the home.

Comment: Some commenters also suggested that we exclude from the definition of work-eligible individual extended family members such as aunts, uncles, and grandparents who were both receiving assistance and caring for a disabled family member.

Response: We are sympathetic to the situation of non-parental relatives who are both receiving assistance and caring for a disabled family member. The statute (section 407(i)(1)(A)(i)(IV) of the Act) only gives us the authority 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''; thus, a non-parental relative who receives assistance must be a work-eligible individual. Since we do not have the authority to exclude non-parents from the participation rate, this provision only excludes *parents* caring for a disabled family member living in the home. A relative would only be a work-eligible individual if he or she received TANF assistance (the first part of the work-eligible individual definition) or were a parent of another child recipient of assistance (the second part of the definition).

Comment: Many commenters took issue with the fact that the exclusion under the interim final rule for parents caring for a disabled family member living in the home applied only when the family member with a disability did not attend school full-time. Some said that parents with children with disabilities in school should be treated the same as other TANF participants who must care for a disabled family member not in school. They pointed out that children with severe disabilities often cannot attend school regularly due to medical care needs, even if they are enrolled full time. Others noted that after-school care and care during school holidays (especially the summer) is difficult to find for children with disabilities, even if they attend school on a full-time basis. Some asked us to modify the exclusion so that a parent would not be ''work-eligible'' if the child's disability-related needs prevent the parent from working. Another proposed that we give the State the option to include the hours of such a parent in the work participation rate on a case-by-case basis, based on criteria it set out in its Work Verification Plan. Some asked for clarification regarding whether the exclusion applied to children with disabilities who are full-time students but must be tutored at home or are home-schooled.

Response: We appreciate the difficulties of caring for a disabled family member, even when he or she is enrolled in school full time. The commenters raised many compelling arguments about the need for a parent's care even when a family member with a disability goes to school full time. Based on these comments, we have expanded the exclusion to apply when a family member's disability requires care-giving that prevents the parent from working, whether or not the family member is enrolled or attending school. Please refer to § 261.2(n)(2)(i). Our intent had been to ensure that only parents who would be unavailable during working hours because they were caring for family members would be excluded from the definition. To that end, we have also revised the medical documentation requirement, which is now included in the regulation itself (also at § 261.2(n)(2)(i)). Medical documentation must show that a parent caring for a disabled family member cannot engage in work because he or she is needed in the home to provide that care. Thus, under the final rule, any parent caring for a disabled family member will not be considered ''work-eligible'' as long as there is

documentation to show that it is medically necessary for the parent to provide the care and, as a result, cannot engage in work. We believe the policy in the final rule will be both simpler to administer and more equitable.

The rule does not permit parents who have such medical documentation to be included in the participation rate calculation on a case-by-case basis if they are working. If a medical professional has documented that the parent needs to be in the home to care for a disabled family member, then we believe it is inappropriate for these parents to be working. Thus, there is no need for a case-by-case option. Clearly, if the medical status of the disabled family member or the living arrangements of the family changes, the State should then report the parent as a work-eligible individual and engage the parent in work. States should regularly reassess the status of excluded parents who are caring for disabled family members. Closely monitoring family situations will enable parents, who are no longer needed in the home, to gain the skills and work experience that leads to independence.

We would like to stress that this exclusion for a parent caring for a disabled family member does not absolve the State of its responsibility to help TANF recipients find appropriate child care, including care for children with disabilities. We recognize that the special care that some children with disabilities need may be less available and may be more expensive. States should take these considerations into account as they develop and budget for their child care programs. A State may not exclude a child who has a disability from available child care, if doing so would prevent the parent from gaining needed skills, finding work, and moving the family out of dependency.

Comment: One commenter recommended that the definition of work-eligible individual allow for the exclusion of individuals who are unable to participate in activities for the required number of hours due to a disability.

Response: The regulation does not exclude such individuals from the definition of work-eligible. We refer readers to the discussion of individuals with disabilities in the cross-cutting issues section that appears earlier in this preamble.

Subpart B—What Are the Provisions Addressing State Accountability?

PRWORA required States to meet two separate work participation rates—the overall rate that has been 50 percent since FY 2002 and the two-parent rate of 90 percent since FY 1999. A State that fails to meet the required participation rates is subject to a monetary penalty. The Deficit Reduction Act of 2005 retained the 50-percent participation requirement overall and the 90-percent requirement for two-parent families, but included families in separate State programs in the calculation of the respective work participation rates.

In the interim final rule, we modified the provisions of this subpart to reflect the new statutory requirements to include separate State program families, as well as the requirement to determine when to include non-recipient parents residing with children who receive TANF assistance in the calculation of the work participation rates. We did so using the new definition of ''work-eligible individual'' discussed in detail in the preamble to § 261.2(n) of this part.

Section 261.20 How will we hold a State accountable for achieving the work objectives of TANF?

Under the interim final rule, as under the original TANF rule, this summary section outlined how we held a State accountable for meeting work requirements. We did not receive comments on this section and have made no changes to it in the final rule.

Section 261.21 What overall work rate must a State meet?

This section of the interim final rule incorporated in regulatory text the statutory requirement for a State to achieve an overall work participation rate of 50 percent, minus any caseload reduction credit to which it is entitled. We did not receive comments on this section and have made no changes to it in the final rule.

Section 261.22 How will we determine a State's overall work rate?

The Deficit Reduction Act of 2005 modified the work participation rate calculation to include families with an adult or minor child head-of-household in SSP-MOE programs and required us to determine the circumstances under which a family in which a parent residing with a child receiving TANF should be included in the calculation. The interim final rule modified the prior language in this section to reflect the new calculation and adopted the use of the term ''work-eligible individual'' for that purpose. It also continued the policy established under prior rules of allowing a State to count a family that received assistance for only a partial month in the work participation rate if a work-eligible individual is engaged in work for the minimum average number of hours in each full week that the family receives assistance.

We corrected one typographical error but made no other changes to the regulatory text of this section.

Comment: One commenter asked for clarification regarding whether the addition of families in separate State programs was effective in FY 2006 or FY 2007.

Response: Families receiving assistance through a separate State program are added effective FY 2007. While the interim final rule as a whole took effect with its publication on June 29, 2006, all the provisions relating to the work participation rate—including the revised caseload reduction credit, the new work definitions, and the revisions to which cases are part of the calculation itself—take effect in FY 2007 (October 1, 2006), the first fiscal year that begins after the law and regulations came into existence.

Comment: One commenter asked us to exclude families residing in Alaska Native villages from the work participation rate calculation, due to ''the state's unique circumstances and the challenges inherent in serving needy families in Alaska's most remote and economically depressed communities.''

Response: The law does disregard from the 60-month time limit on the receipt of Federal assistance any months that an adult receives assistance while living in Indian country or in an Alaska Native Village where at least 50 percent of the adults are not employed. We do not have the authority under the statute to make a similar exclusion from the work participation rate calculation.

Comment: One commenter asked us to exclude from the denominator families ''during their first 30 days of eligibility.'' The commenter noted that it takes several weeks to process an application, as well as additional time to learn program requirements and develop a work plan. ''It is unrealistic to expect that this process can be completed quickly enough for new participants to engage in sufficient hours of work activities during their initial 30 days to meet the work participation rate.'' Another commenter stated that the rule does not provide a State option to count participation for families that receive an initial partial month of assistance.

Response: As we noted in the preamble to the original TANF final rule, ''* * * we cannot simply decide that some period of time for which an individual receives assistance—such as time prior to assignment in a work activity or a partial month of assistance—should not be considered a

period of assistance and therefore exclude the individual's family from the participation rate for that month. On the contrary, if a family receives assistance for any portion of a month, then we must include the family in the denominator of the participation rate for that month. * * *'' (See 64 FR 17774.) However, §§ 261.22(d) and 261.24(d) do provide the flexibility to count a partial month of assistance as a month of participation if a work-eligible individual is engaged in work for the minimum average number of hours in each full week that the family receives assistance in that month.

Comment: One commenter suggested that, if a State opts to count in the work participation rate a family in which a parent receives SSI (or SSDI), we should allow the State to exclude the family from the denominator of the rate, counting it only in the numerator.

Response: We do not think we should include any family in the numerator that we do not also include in the denominator. To do so would skew the participation rate. The State has the flexibility to decide on a case-by-case basis whether to include it or exclude it, but any case that the State wants to count in the numerator must also be in the denominator.

Comment: A couple of commenters asked about the meaning of § 261.22(b)(2), which permits a State to exclude from the work participation rate calculation for up to three months in a 12-month period a case that is subject to a penalty for refusing to work. Specifically, the commenters wanted clarification on whether ''subject to a penalty'' means the State has reduced or terminated a family's grant or whether it could refer to a family that the State has notified of its intent to penalize but whose benefits it has not yet reduced or terminated. After notification, the commenters pointed out that due process or conciliation period requirements in the State often cause a lag of one or two months before the State actually reduces or terminates the family's grant. The commenters explained that, if we use the former interpretation, as we have when asked by States for policy clarification, then States that impose a full-family sanction ''receive little practical value from this provision'' compared to States that impose a penalty by reducing a family's grant.

Response: This rule does not change our long-standing interpretation of when a family is ''subject to a penalty.'' During a conciliation or notice period, before the State actually reduces or terminates the family's grant, a family is not ''subject to a penalty.'' Before that time, the family is at risk of a penalty but not subject to it. We think this is the most reasonable interpretation of the statute. In the original TANF rule, we included the following language at § 261.22(b)(3): ''If a family *has been sanctioned* for more than three of the last 12 months, we will not exclude it from the participation rate calculation.'' (Emphasis added.) Further, in the interim final rule, we reiterated this concept in § 261.22(b)(2) as well, specifying that ''if a family with a work-eligible individual *has been penalized* for refusal to participate in work activities for more than three of the last 12 months, we will not exclude it from the participation rate calculation.'' (Emphasis added.) In both instances, this language makes clear that the State must actually have imposed the penalty before we exclude the family from the participation rate calculation.

We have applied this interpretation since the beginning of TANF because it encourages a State to take action to resolve the problem that led to the sanction in the first place. If we were to consider a family ''subject to a penalty'' when the State had merely notified the family of the possibility that it would reduce or terminate benefits, it could benefit from disregarding the family from the participation rate regardless of whether it provides services to address barriers to employment or works to resolve a dispute.

With respect to the effect of our interpretation of this provision on a State that chooses to impose a full-family sanction instead of reducing the family's benefits, our interpretation treats the period before actual imposition of a sanction in the same way for all States, regardless of whether a State's policy choice is for a full or partial sanction. If a State chooses a full-family sanction, then the family is removed from the work participation calculation indefinitely and as a result benefits from an indefinitely smaller denominator.

Comment: One commenter asked for clarification on ''whether the 'other sanctioned' individuals who now will be considered work-eligible participants will have the same exclusion from the count for three months out of twelve as those sanctioned for participation failure.''

Response: If the family of a work-eligible individual is subject to a penalty for refusing to work, the State may exclude that family from the work participation calculation for that month as long as the family has not been penalized for more than three of the last 12 months. If the family's sanction is for a different cause, such as failure to cooperate with child support enforcement, then the case stays in the work participation rate.

Comment: We received a comment concerning §§ 261.22(c)(1) and (c)(2). The first section provides a State with the option not to require a single custodial parent of a child under age one to engage in work and the second allows it to disregard such a family from the work participation rate. The commenter noted, ''The preamble to the final TANF regulations in the April 12, 1999 **Federal Register** indicates that these two provisions are not dependent on each other, but rather, a state can exclude such a case from the work participation rate calculation without having to exclude it from engaging in work activities.'' The commenter urged us to include the same clarification in this preamble to avoid any confusion.

Response: The commenter is correct that the preamble to the original TANF rule clarified that point. We wrote, ''Based on the comments and after reexamining the statutory provision, we agree that we need not link the State's option not to require a single custodial parent of a child under 1 to work to the exclusion of such parents from the rate calculations. The State can make separate decisions about exempting and excluding a family from its rate. The statute describes a certain individual, that is, 'a single custodial parent caring for a child who has not attained 12 months of age' and then separately indicates that 'such an individual' may be disregarded in calculating the participation rates. We have rewritten the regulation to allow disregard of a family with such an individual, since the rates actually measure families and not individuals.'' The overall framework of this provision did not change in this rule, including the distinct natures of these two points.

Section 261.23 What two-parent work rate must a State meet?

This section of the interim final rule incorporated in regulatory text the statutory requirement for a State to achieve a two-parent work participation rate of 90 percent, minus any caseload reduction credit to which it is entitled. We did not receive comments on this section and have made no changes to it in the final rule.

Section 261.24 How will we determine a State's two-parent work rate?

This section of the rule is analogous to § 261.22 but applies to the two-parent rather than the overall work participation rate. The interim final rule modified the calculation of the two-parent rate to include families served in

SSP–MOE programs. The Deficit Reduction Act, as we noted before, required us to determine the circumstances under which a family in which a parent living with a child receiving TANF should be included in the work participation rates, which we did in the definition of ''work-eligible individual'' in § 261.2(n). The interim final rule provided a minimum definition of a two-parent family for the two-parent work participation rate calculation.

We made no changes to this section in the final rule.

Comment: One commenter asked for clarification regarding whether the addition of two-parent families in separate State programs was effective in FY 2006 or FY 2007.

Response: Two-parent families receiving assistance through a separate State program are added effective FY 2007. While the interim final rule as a whole took effect with its publication on June 29, 2006, all the provisions relating to the work participation rate including the revised caseload reduction credit, the new work definitions, and the revisions to which cases are part of the calculation itself take effect in FY 2007 (October 1, 2006), the first fiscal year that begins after the law and regulations came into existence.

Comment: One commenter stated that when a two-parent family is included in the overall participation rate it is counted as if it were two separate households, rather than as a single family or household and thought that was unfair, because ''all the benefits in being a married or stable two-parent family are lost.''

Response: The overall participation rate includes each family once. A two-parent family counts in the overall rate in the same way that any other family does: based on the hours of participation of one work-eligible individual. If the second parent has hours of participation, those count only toward the two-parent participation rate, which, by statute, can combine the hours of both parents.

Section 261.25 Do we count Tribal families in calculating the work participation rate?

We would like to clarify existing policy with respect to counting Tribal families in the State TANF work participation rate. During our listening tour sessions around the country, it came to our attention that some readers may not fully understand the requirements of this section of the rule.

In the preamble to the original TANF regulation, we explained that a State has the option to include or exclude families receiving assistance under a Tribal TANF or Tribal Native Employment Works (NEW) program from the denominator of the State TANF participation rates. But to count any family in the numerator of the *State's* participation rate for a month, the family must meet the standards for counting a family in the *State* rate, both with respect to hours of participation and countable activities. We went on to stress that this was true regardless of whether the family received assistance under a State TANF program, a Tribal TANF program, or a Tribal NEW program.

This standard continues to apply under the final TANF rule. To count toward a State's participation rate, the family must meet the standards of that rate. Therefore, if a Tribe offers activities that meet the definition of countable State work activities and engages individuals for the requisite hours to meet the State rate, the State may choose on a case-by-case basis to include such families in the calculation of the State's participation rate. However, if the Tribal program defines and includes countable activities that do not meet the work activity or work-eligible individual definitions of this final rule, such activities may not count toward the State's participation rate. Of course, any family that the State wishes to count in the numerator must also be included in the denominator.

We received few comments on this section and have not changed the regulatory text from the interim final rule.

Comment: A couple of commenters took issue with the phrase ''at State option'' in this section of the rule, arguing that the State cannot opt to include Tribal TANF families without the consent of the Tribe. The commenters thought that the wording ignored Tribal sovereignty and they urged us to change it.

Response: This regulatory wording comes from section 407(b)(4) of the Act and remains unchanged from the original TANF rule. While the law and regulations give States the option to include Tribal TANF or Tribal NEW participants in the State work participation rates, Tribal sovereignty is not at issue because States will need to confer with Tribes to know whether individuals are participating in activities and meeting standards that comport with the requirements of the State's work participation rate. This provision does not give States control over Tribal programs or governments. A State cannot opt to include families unless they are already participating in accordance with State TANF participation standards. If the Tribe's program does not meet that standard, the State simply would not be able to opt to include those families.

Comment: One commenter pointed out that the Federal regulations governing Tribal TANF and NEW programs allow flexibility in defining work activities and the hours of participation. State TANF programs working with Tribal populations not covered by the Tribal TANF or NEW programs do not have the same flexibility. The commenter thought this was inequitable and urged us to grant States the same flexibility when providing services to American Indians living on reservations.

Response: We do not have the authority to implement the commenter's suggestion. The difference between State and Tribal TANF work participation requirements is statutory. Section 412(c) of the Social Security Act allows Tribal TANF programs to negotiate work activities and hours of participation, whereas section 407 of the Act, which specifies State work requirements, does not permit such flexibility.

Subpart C—What Are the Work Activities and How Do They Count?

The interim final rule did not change the structure of this subpart but did make some important additions to §§ 261.31 and 261.32. In particular, the rule added provisions to allow States to ''deem'' participation in core hours when the minimum wage laws of the Fair Labor Standards Act (FLSA) preclude an individual that works the maximum allowed from participating for all of the required core hours. The final rule maintains this basic policy of the interim final rule but we have modified the regulatory text in response to comments.

Section 261.31 How many hours must a work-eligible individual participate for the family to count in the numerator of the overall rate?

We received many comments relating both directly and indirectly to this subpart of the regulations.

Dozens of readers offered comments about individuals with disabilities, urging us to provide relief in the hours they must engage in work activities and generally to structure the regulations to encourage States to work with the people with disabilities. We refer readers to the cross-cutting issues section of this preamble for an overarching discussion of how the regulations address the needs of individuals with disabilities. We

respond to specific issues related to hours of participation for people with disabilities in that cross-cutting section as well. We have grouped the comments and our responses by topic for the ease of the reader.

We received numerous comments about the provisions in the interim final rule that permit a State to ''deem'' participation when an individual is restricted by the minimum wage laws from engaging in sufficient hours to meet the core hours requirements of the participation rates.

The interim final rule allowed States to ''deem core hours'' for TANF families with a work-eligible individual participating in work experience or community service who works the maximum number of hours permitted under the minimum wage requirements of the Fair Labor Standards Act (FLSA), but still falls short of the core hours requirement. The final rule continues this general policy. As in the interim final rule, it limits deeming to States that combine TANF (or SSP–MOE) and food stamp benefit amounts when calculating maximum hours. A State can achieve this by adopting the mini-Simplified Food Stamp Program (mini-SFSP), an option that simply permits States to count the value of food stamps in determining maximum hours. In accordance with the FLSA and the applicable regulations at 29 CFR 531.29–531.32 and guidance issued by the Department of Labor (DOL) this can include facilities such as child care and transportation subsidies but might include other subsidies. We recommend that any questions regarding the FLSA should be directed to Office of the Assistant Secretary for Policy, Office of Compliance Assistance Policy. Their Web site is: *http://www.dol.gov/compliance.*

Food Stamp Issues

Comment: Several commenters raised questions about what is involved to implement a food stamp workfare program and questioned why it is necessary.

Response: To ''deem core hours,'' the preamble of the TANF interim final rule required States to adopt a food stamp workfare program and conform TANF and Food Stamp Program (FSP) exemption policies under the SFSP. Since then, we have been informed by the Food and Nutrition Service (FNS) at the U.S. Department of Agriculture that neither of these is necessary. A mini-SFSP alone allows a State to count the value of food stamps with the TANF (or SSP–MOE) benefit in determining the maximum number of hours permitted under the FLSA. The TANF work experience or community service program then automatically serves in place of the food stamp workfare program.

Comment: Several commenters asked about the preamble guidance that said the SFSP ''must be structured to match food stamp exemptions to those of the TANF program so that work requirements could be applied to as many work-eligible individuals as possible.'' One commenter suggested that we ''clarify that states do not need to make parents of young children *mandatory* Food Stamp Employment and Training (FSET) participants in order to include food stamp benefits in the calculation of countable hours and qualify them for the deeming provision.'' The commenter noted that the FSP exempts parents with children under six years of age from mandatory participation and that changing the food stamp exemptions to match those of the TANF program would require States to impose food stamp sanctions on such parents when they do not comply with TANF's work requirements.

Response: Since the publication of the interim final rule, the FNS has explained that a State can create a mini-SFSP that will allow it to count the value of food stamps toward this FLSA calculation but that it does not need to conform the exemption for the age of youngest child between food stamps and TANF or expand the use of food stamp sanctions. For additional information see the Food and Nutrition Service's Web site at: *http://www.fns.usda.gov/fsp/whats_new.htm.* Under the heading, ''What's New,'' item 25 for Fiscal Year 2006 provides a sample letter for States to request a mini-SFSP and additional questions and answers on implementing the mini-SFSP.

Comment: Several commenters asked whether the SFSP is required.

Response: Yes, a State must implement at least a mini-SFSP in order to combine food stamp and TANF (or SSP–MOE) benefits for the purpose of calculating maximum hours. ACF intended to allow States to qualify for deeming only if they combine food stamp and TANF benefits. The State should notify FNS of its desire to implement a mini-SFSP that replaces the FSP work obligation rules with TANF rules. A State that has not implemented a mini-SFSP cannot deem core hours for participation rate purposes, but must still combine TANF with allowable facilities, in accordance with applicable DOL guidance and regulations in order to maximize the number of work hours permitted under the FLSA. Allowable facilities usually include child care and transportation subsidies, but might include other subsidies. We recommend that any questions regarding the FLSA should be directed to Office of the Assistant Secretary for Policy, Office of Compliance Assistance Policy. Their Web site is: *http://www.dol.gov/compliance.*

Comment: Some commenters objected to the requirement to include food stamp benefits in the calculation of the number of hours needed to satisfy the work participation rate. They asserted that this undermined State flexibility and created inequities because some families would have to work off a food stamp grant, while others would not, because of variations in circumstances, such as the receipt of child support and family size. Some contended that including food stamp benefits in the requirement was punitive.

Response: We considered the comments carefully but have retained the requirement to include food stamp benefits in order to deem core hours of participation. The main effect of the commenters' recommendation would be to reduce the number of hours that a State could require an individual to participate in work activities while still counting in the work participation rate. We believe that participation in work activities is crucial for families to move from dependence on public support to increased self-sufficiency. Further reducing the hours required is contrary to the goals of the TANF program. We do not believe that the policy generates inequities, because the number of hours that a family must participate to count in the work participation rate is directly based on the value of the combined benefits, up to a maximum. If a family has a reduced work obligation because of deeming, it is because that family receives less support from the government than a family with a higher work obligation—just as someone who works fewer hours in paid employment earns less than someone who works more hours at the same wage.

The new policy is not intended to be punitive. Rather, it gives States the opportunity to count a family in the participation rate with fewer hours of real participation than the State would otherwise need. We adopted the policy so that a State would not have to place an individual in another core activity once that individual worked the maximum hours possible under the FLSA rules. This makes it more likely, not less likely, that a person would meet the participation rates.

Comment: Several commenters asked whether the SFSP provisions apply to

families receiving assistance through a separate State program.

Response: FNS does not distinguish between TANF and SSP–MOE programs; therefore, the mini-SFSP provisions can apply to a SSP. As long as a State combines a family's SSP–MOE grant with its food stamp allotment, we will permit deeming in a SSP in the same way as we do TANF.

Fair Labor Standards Act (FLSA) Issues

Comment: One commenter asked ACF to approach the Department of Labor (DOL) to specify the benefits package a State can use in the FLSA calculation and requested that the list of such benefits include child care and transportation costs. Another commenter recommended that we include other Federal benefit programs, such as subsidized housing assistance and Medicaid.

Response: The determination of whether or not the FLSA applies to an activity and which benefits must be used in the minimum wage calculation are matters that must be resolved by each State with the Department of Labor. The final rule does not require the inclusion of these benefits for the purpose of deeming core hours. We chose not to require States to include these benefits because doing so would further complicate the calculation of deemed core hours. We recommend that any broader questions regarding the FLSA should be directed to the Office of the Assistant Secretary for Policy, Office of Compliance Assistance Policy. Their Web site is: *http://www.dol.gov/compliance.*

FLSA Deeming Issues

Comment: Several commenters recommended that we expand the deeming policy from satisfying the core work activity requirement to the entire work requirement. The commenters were concerned that even if some individuals were deemed to meet the 20-hour requirement, they would not be able to find other activities to meet the remaining 10 hours needed to satisfy the average weekly participation requirements. Some commenters asserted that requiring additional participation in non-core activities would create logistical and transportation problems for TANF administrators and families alike. They also noted that it may be difficult to find programs that offer additional activities for an average of just 10 hours per week.

Response: We adopted the deeming policy so that States would be able to count participants toward the core activity requirement if they participated in a work experience or community service activity as much as permitted under the FLSA rules. Work experience and community service programs are often reserved for individuals who have difficulty participating in TANF's other core work activities. In the absence of the deeming policy, work experience and community service participants who were prevented by the FLSA from meeting the core hours requirement and could not find paid employment would have to participate in vocational educational training or job search and job readiness assistance to count them in the rate. But, oftentimes States are reluctant to engage individuals in these activities when they need only a few hours to count because they are subject to durational limits. We chose not to expand deeming to the required non-core hours because many of these participants can benefit from one of TANF's non-core activities, primarily either job skills training directly related to employment or education directly related to employment. A State would not have to engage a client in only 10 hours per week of the non-core activity. If a program and an individual's needs call for more hours, the State could still place the individual in that program.

We would also like to point out that allowing States to deem does not impose any new or additional logistical or transportation problems. On the contrary, the new deeming policy provides additional flexibility and in doing so significantly reduces logistical and transportation problems. For example, a family with a 20-hour requirement that the State deems under this provision will count with just one activity. Under prior rules, the State would have had to find that family another core activity.

Comment: One commenter asked whether the deeming policy could apply in Puerto Rico because it does not participate in the Food Stamp Program and thus cannot adopt a SFSP.

Response: The final rule permits deeming in States that have adopted the SFSP. Puerto Rico operates the Nutrition Assistance Program which is funded by a block grant in lieu of the Food Stamp Program. This block grant provides sufficient flexibility so that the value of food stamps, or their equivalent, could count without the need for the SFSP. Therefore, Puerto Rico may deem core hours, when necessary, as long as it counts the value of Nutritional Assistance Program benefits in determining the individual's work obligation.

Comment: One commenter asked if our reference to the 30 or 50 hours for two-parent families was a mistake in drafting the regulation.

Response: The reference to the 30 or 50 hours is not a mistake. Under the statute, the core hours requirement for the two-parent rate is 30 or 50 hours, depending on whether or not the family receives federally subsidized child care.

Child Support Collections and the FLSA Minimum Wage

Comment: Several commenters suggested that we remind States that the TANF assistance benefit used in the FLSA calculation must be the net amount of assistance provided after subtracting from the benefit the amount of any current child support collection retained by the State and Federal governments to offset the cost of providing that assistance.

Response: We agree. In determining the maximum number of hours of work experience and/or community service that may be required of a recipient to meet the minimum wage requirements of the FLSA, States should calculate the amount of assistance net of any child support collections received in the month and retained to reimburse the State or Federal government for the current month's assistance payment.

Under the community work experience provisions of the former JOBS program, the portion of child support collection, if any, used to reimburse the amount of AFDC was explicitly excluded by law. Section 482(f)(1)(B)(i) of the Social Security Act outlining the minimum wage formula specified that ''* * * (and the portion of a recipient's aid for which the State is reimbursed by a child support collection shall not be taken into account in determining the number of hours that such individual may be required to work).''

This prior provision of law is no longer in effect, but we believe that States should use the amount of assistance, net of the retained child support collection so that they do not require a parent to ''work off'' assistance amounts that the non-custodial parent has repaid. We are not specifying the operational procedure that States must follow to determine the benefit amount, net of retained child support. Under the prior law, States generally used one of two approaches. Under retrospective budgeting, States used the income less child support collections received in the budget month to determine the benefit amount used to calculate the work experience obligation for the payment month. Under prospective budgeting, States used the ''best estimate'' of income less child support collections for the month, based on prior experience. This works better in wage

withholding cases where regular child support collections may be predicted.

The Deficit Reduction Act of 2005 created incentives to States to send more child support collected on behalf of families on TANF to the families themselves in both current and former assistance cases. Beginning October 1, 2009, or as early as October 1, 2008, at State option, a State may elect to pay the family a portion of the assigned support obligation. The State will not be required to pay to the Federal Government the Federal share of the ''excepted portion'' of such collections if the State pays the excepted portion to the family and disregards it in determining TANF assistance. The ''excepted portion'' may not exceed $100 per month, or in the case of a family that includes two or more children, $200 per month.

Under this new DRA provision, the State should *not* deduct the State and Federal portions of assigned support collections that it ''passes-through'' to the family in calculating the ''net'' payment to the family that can be counted in determining the number of hours an individual can be required to work. For example, if a family with two children receives $500 in TANF and the State collects assigned child support in the amount of $250 and elects to ''pass-through'' $150 to the family, the ''net'' payment that can be counted for FLSA purposes would be $400. *See* OCSE–AT–07–05 for further information concerning pass-through payments in former as well as current assistance cases. The State could also, of course, claim its share of the pass-through toward its MOE requirement.

Other ''Deeming'' Issues

Comment: Several commenters proposed expanding the ''deeming'' concept to work-eligible individuals who work the maximum number of hours allowed by a doctor to receive full credit for their participation. Other commenters recommended that we allow States to deem individuals who are working ''as many hours as their medically documented reasonable accommodation plans allow as meeting the federal work requirement.'' Another commenter suggested that States be ''allowed to count recipients who participate in work activities for the number of hours required under an employment plan that includes accommodations for disabilities (or accommodations based on a recipient's need to care for a family member with a disability) as having met the federally required number of hours of participation.'' The commenter went on to note that this approach is consistent with the treatment of families in work experience or community service who were working ''less than the minimum number of hours to satisfy the participation rates.'' The commenters asserted that these options would encourage States to do more to engage these individuals.

Response: We extended the deeming option to participants in work experience and community service because the FLSA provisions may actually prevent a State from meeting the ''core'' work requirement using these two activities. We did not extend the deeming option to other groups because we believe that Congress, in setting the maximum 50 percent participation rate, recognized that some families might not be able to work the full hours required. We encourage States to continue to work with these families to help move them to work and self-sufficiency. Our final rule does allow States to exclude recipients of Federal disability programs and those caring for a disabled family member from the definition of work-eligible individual. For more discussion of how the rules affect individuals with disabilities, readers should refer to the cross-cutting issues section at the beginning of this preamble.

Section 261.32 How many hours must a work-eligible individual participate for the family to count in the numerator of the two-parent rate?

We did not receive any comments that were directed strictly at this section of the regulations; however, the comments that we addressed in the previous section, § 261.31 of this subpart, often applied equally to this section. We refer readers to the discussion there and to the preamble about the definition of work-eligible individual in § 261.2 of this subpart for further discussion of counting two-parent families toward the two-parent participation rate.

Section 261.34 Are there any limitations in counting job search and job readiness assistance toward the participation rates?

In the interim final rule, we did not make any changes to the various limitations in counting job search and job readiness assistance. Indeed, we did not include this section of the TANF rules in the interim final rule at all. After reviewing the comments we received, we have concluded that it is necessary to include this section in order to clarify how States should apply the various limits on counting job search and job readiness assistance.

In the final rule, we define a week for each of the limits in this section. For the six-week (or 12-week) limit on participation in job search and job readiness assistance, we define one week as 20 hours for a work-eligible individual who is a single custodial parent with a child under six years of age and as 30 hours for all other work-eligible individuals. Thus, six weeks of job search and job readiness assistance equates to 120 hours for the first group and 180 hours for all others. For those months in which a State can count 12 weeks of this activity, these limits are 240 hours and 360 hours, respectively.

To make this section more consistent with other work participation rate provisions, we modified the six-week (or 12-week) limit to apply to ''the preceding 12-month period,'' rather than to a fiscal year. We also define ''four consecutive weeks'' and clarified the provision that allows an individual who participates in job search and job readiness assistance for ''3 or 4 days during a week'' to count ''as a week of participation in the activity.''

Subpart D—How Will We Determine Caseload Reduction Credit for Minimum Participation Rates?

PRWORA created a caseload reduction credit that reduces the required work participation rate that a State must meet for a fiscal year by the percentage that a State reduces its overall caseload in the prior fiscal year compared to its caseload under the Title IV-A State plan in effect in FY 1995. The calculation excludes reductions due to Federal law or to State changes in eligibility criteria. The Deficit Reduction Act of 2005 recalibrates the credit by changing the base year to FY 2005.

We received only a handful of comments relating to subpart D. We made one change to the regulatory text in § 261.42 and we also clarified our policy with respect to excluding ''excess MOE'' in § 261.43. We explain both of these below.

Section 261.40 Is there a way for a State to reduce the work participation rates?

Comment: A few commenters questioned the effective date of the regulations governing the caseload reduction credit with the recalibrated base year. They asked us to clarify that the original base year of FY 1995 applies to the FY 2006 credits and that the new base year of FY 2005 applies to the FY 2007 credits.

Response: The commenters are correct that we will not use the new base year of FY 2005 until we calculate the FY 2007 caseload reduction credits. For that year's credits, we will compare FY 2005 to FY 2006 to determine the

caseload reduction credit to which States are entitled. The FY 2005 base will apply from that point forward. While the interim final rule as a whole took effect with its publication on June 29, 2006, all the provisions relating to the work participation rates—including the revised caseload reduction credit, the new work definitions, and the revisions to which cases are part of the calculation itself—take effect in FY 2007 (beginning October 1, 2006), the first fiscal year that begins after the law and regulations came into existence.

Comment: One commenter suggested that we allow the caseload reduction credit to apply in ''real time,'' as opposed to applying it ''backward-looking'' as it currently does. The commenter contended that rewarding a State for ''present reductions'' would give it an incentive to keep working to reduce the caseload rather than ''resting on past laurels.''

Response: The statute establishes the structure of the caseload reduction credit and thus is beyond our authority to change. We think that Congress chose to update the base year of the calculation for precisely the reason that the commenter noted, finding it no longer appropriate to reward a State in its participation rate for caseload declines it achieved many years earlier.

Section 261.41 How will we determine the caseload reduction credit?

This section of the interim final rule specified the method that we use for calculating the caseload reduction credit. In the final rule, we corrected two typographical errors in paragraph (c) that erroneously referred to ''the FY 2005 comparison-year'' caseload when they should have read ''the FY 2005 base-year'' caseload.

Comment: One commenter requested clarification of the data a State should report to establish the FY 2005 base-year caseload for two-parent families in which one parent receives TANF and the other does not. The commenter stated, ''The interim final rule defines a non-recipient parent living with a child receiving assistance as a work-eligible individual. Under this definition, single-parent households with non-recipient second parents will be included in the two-parent caseload.'' The commenter suggested that the FY 2005 baseline include these two-parent cases to ensure caseloads are comparable when calculating caseload reduction credit.

Response: The commenter raises a valid point. Under this rule, the minimum definition of a two-parent family has changed. Since the old definition applied to FY 2005, a State submitting a caseload reduction report based on the two-parent caseload would have caseload data based on the old definition for FY 2005 and the new one for the comparison-year caseload. We have changed the rule at § 261.40(d) to provide for adjusting data in this kind of situation. To correct such an inconsistency, a State may adjust its FY 2005 two-parent caseload data as part of its caseload reduction report. A State that wishes to make such an adjustment should explain in its report how it arrived at the adjusted number. Please refer to the instructions to form ACF–202, the Caseload Reduction Report, for further information.

Section 261.42 Which reductions count in determining the caseload reduction credit?

Comment: A couple of commenters noted that we deleted part of this section that listed types of eligibility changes a State might make and for which it cannot receive a caseload reduction credit. One thought this deletion was inadvertent; another believed that the language remains relevant as States consider new program designs. All commenters urged us to restore the language.

Response: We have restored the language in the final rule. We had removed the text in the interim final rule because it was strictly illustrative and we thought States had enough experience with the caseload reduction credit to know the types of changes in eligibility criteria that they need to include on the caseload reduction report. We also did not want to suggest that the list in the original rule was exhaustive; States must report all changes in eligibility between the base year and the comparison year. However, since commenters found the language particularly useful, we restored the language with the clarification that the list is not comprehensive.

Comment: One commenter urged us to permit eligibility changes that increase the caseload to count for credit above and beyond offsetting the effect of changes that decrease the caseload. The commenter reasoned that, since we had established the offset by regulation, rather than implementing a statutory provision, we have authority to expand it in this way. Further, the commenter suggested that failing to do so would be fundamentally unfair.

Response: It is our longstanding policy to permit caseload expansions from eligibility changes to offset changes that decrease the caseload. We originally established this policy to allow the caseload reduction credit to reflect a more accurate picture of the change in the caseload. However, we have never allowed caseload increases to do more than offset decreases, in other words, to credit a State for greater caseload reduction than it actually experienced. The interim final rule incorporated that policy in § 261.42(a)(3) and the final rule retains that provision.

Section 261.43 What is the definition of a ''case receiving assistance'' in calculating the caseload reduction credit?

When we published the interim final rule, this section remained largely unchanged from the original TANF rules. Subsection (a) explains that we calculate the caseload reduction credit using cases that receive assistance, either TANF or SSP–MOE assistance. In the final rule we have made minor wording changes to this subsection to remove extraneous language and thereby improve the clarity and understanding of exactly which cases are included in the calculation. We have made no substantive change in the definition of cases used in the calculation.

Subsection (b) allows a State to exclude from the caseload reduction credit calculation cases on which the State has spent ''excess MOE,'' that is, MOE in excess of the amount it needs to meet its MOE requirement. If a State applies this provision, for the comparison-year caseload we would use the sum of the State average monthly TANF and SSP–MOE assistance caseloads, minus cases whose receipt of assistance is attributable solely to MOE funds in excess of the State's 80- or 75-percent MOE requirement. Since the publication of the interim final rule, this ''excess MOE'' provision has drawn considerable attention. In our listening sessions across the country, it was a topic of considerable discussion and also elicited formal comments on the interim final rule. Prior to issuing these rules, only one State had ever made use of it since its inception in the original TANF regulation.

Because of this new interest in the excess MOE provision, we thought it would be helpful to specify the methodology for calculating excess MOE and have revised this subsection to incorporate the specifics of this calculation. If a State wishes to have us take its excess MOE spending into account in the caseload reduction credit calculation, it needs to follow this methodology as part of its Caseload Reduction Report (form ACF–202).

One problem in calculating excess MOE is that a given dollar of MOE spending cannot track to a given case.

Since the caseload reduction credit considers only cases receiving ''assistance'' and not all cases, it is nonetheless important to develop an approach for determining the share of State spending on assistance that is in excess of its MOE requirement. Some methodologies would over-represent the amount of spending on ''assistance'' that was indeed excess MOE. For example, a methodology that assumed that all spending on two-parent families came from excess MOE would, in effect, artificially manipulate the credit, especially the two-parent credit. Therefore, we think that the only fair and reasonable approach is to consider average costs per case when determining how many cases were funded with excess MOE and thus should be excluded from the caseload reduction credit calculation. In fact, the only method we have approved prior to this final rule used average costs per case.

Our method divides the total TANF (Federal and State) and SSP–MOE spending on assistance for the comparison year by the State's average monthly assistance caseload (combined TANF and SSP–MOE) for the comparison year to arrive at an average annual assistance cost per case for the fiscal year. The method then computes total spending on assistance as a percentage of total spending. We use total spending because spending with Federal and State MOE funds on assistance are largely interchangeable. If we based the calculation solely on MOE funds, the size of the credit would vary not based on the amount of excess State MOE spending, but rather on the distribution of assistance spending between State MOE and Federal funds. We then subtract the required 80 percent of historic State expenditures (80-percent MOE requirement) from the State's actual MOE expenditures and multiply the remaining ''excess MOE'' by the percentage of spending on assistance. Finally, we divide this excess MOE spending on assistance by the average annual assistance spending per case to determine how many cases were funded with excess MOE. If the excess MOE calculation is for a separate two-parent caseload reduction credit, we multiply the number of assistance cases funded with excess MOE by the average monthly percentage of two-parent cases in the State's total (TANF plus SSP–MOE) average monthly caseload. All financial figures in the methodology must agree with data reported on the State's ACF–196 TANF Financial Report and all caseload data must agree with information reported on the ACF–199 TANF Data Report and ACF–209 SSP–MOE Data Report.

The following example illustrates our methodology. In this example we are calculating a FY 2007 caseload reduction credit, which will reduce the State's FY 2007 required participation rate, and thus the comparison year is FY 2006. Assume that the State's total MOE for FY 2006 equals $100 million and its Federal spending in FY 2006 equals $175 million for a combined total of $275 million. Of this amount, total spending on assistance (combined Federal and State) equals $110 million. This means spending on assistance equals 40 percent of total spending ($110 million divided by $275 million). The State's combined TANF and SSP–MOE average monthly caseload, as reported on the TANF Data and SSP–MOE Data Reports for FY 2006, equals 20,000. Therefore, the average spending on assistance per case equals $5,500 ($110 million divided by 20,000). The State's 80-percent MOE requirement equals $80 million, so it spent $20 million above that level. Of that ''excess MOE,'' we attribute that $8 million, or 40 percent, to assistance spending. Finally, we divide that $8 million by the average assistance spending of $5,500 per case to conclude that 1,455 of 20,000 average monthly cases were funded with excess MOE and should be subtracted from the FY 2006 caseload in the caseload reduction credit calculation.

We require the use of 80 percent MOE rather than 75 percent because the statutory requirement is for 80 percent MOE spending unless a State meets the work participation requirements for the year. If a State meets both participation rates for the comparison year, and thus its required MOE drops to 75 percent, it may revise its caseload reduction credit to reflect the lower required MOE level. It is possible that we will already have that information for the comparison when we calculate the caseload reduction credit; if so and the State met both rates, we will use 75 percent at that time.

We have revised the Caseload Reduction Report (form ACF–202) to include a new worksheet and made some other changes to the form to assist a State in claiming excess MOE as part of the caseload reduction credit.

Comment: Several commenters noted that we retained the provision that allows a State that spends MOE funds in excess of its required level to report for the caseload reduction credit only the pro rata share of cases receiving assistance that is required to meet the basic MOE requirements. The commenters urged us to retain the provision in the final rule.

Response: The final rule does retain the provision allowing a State to receive caseload reduction credit for excess MOE spending. During our listening tour for the interim final rule, we expressed doubts about this provision and suggested that we might not retain it. Our concerns were and remain that: (1) The provision has not proved effective in encouraging States to spend additional MOE funds, as most States spend only to the level required; and (2) the interaction between this provision and the new flexibility in the DRA concerning the types of expenditures that can count for MOE, particularly that a State can spend MOE on non-needy families, could result in large, artificial caseload reduction credits.

We do want to clarify that, if a State uses this provision and receives caseload reduction credit for excess MOE spending, it may not subsequently revise its reported financial data to reduce the level of State MOE expenditures for which it received such credit and replace those expenditures with Federal ones. It would be inherently unfair to credit a State for expenditures of State funds that it later reports did not come from State funds.

Section 261.44 When must a State report the required data on the caseload reduction credit?

Comment: One commenter asked us to put back language that the interim final rule deleted stating that we would issue the caseload reduction credits by March 31 of the fiscal year to which the credit applied. The commenter stated, ''We understand that negotiations sometimes result in the notification to an individual state being delayed past this date, but think it is important that states have the general expectation that the information be received by March 31.''

Response: We did not make the change in the final rule that the commenter recommended. We deleted the March 31 date that was part of the original TANF rule because, after many years of experience with the caseload reduction credit, we did not find that it served a useful purpose. Moreover, there is no statutory basis for this or any other specific issuance date. Nevertheless, we will continue to endeavor to issue the credits within the fiscal year to which they apply.

Subpart F—How Do We Ensure the Accuracy of Work Participation Information?

The Deficit Reduction Act of 2005 requires HHS to issue rules that ensure

the consistent measurement of work participation rates, including information with respect to: (1) Determining whether the activities of a recipient of assistance may be treated as a work activity; (2) establishing uniform methods for reporting hours of work of a recipient of assistance; (3) identifying the types of documentation needed by the State to verify reported hours of work; and (4) specifying 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.

We received many comments about this subpart. Several readers offered general comments about the increased burden that the interim final rule placed on administrators and clients, particularly with respect to reporting actual hours and documenting participation in work activities. Others provided specific comments and suggestions, which we address below.

Section 261.60 What hours of participation may a State report for a work-eligible individual?

The interim final rule made explicit in regulation our long-standing policy of counting only actual hours of participation and not scheduled hours. It required that each State have in place a system for determining whether the hours it reports for the participation rates correspond to hours in which work-eligible individuals actually participate in work activities. The final rule continues this same actual hours standard.

In conjunction with the actual hours policy, the interim final rule also introduced to the regulations the concept of giving States credit for excused absences for TANF participation in unpaid activities. Under the interim final rule, a State could define and count reasonable short-term, excused absences for days missed due to holidays and a maximum of 10 additional days of excused absences in any 12-month period, no more than two of which may occur in a month. To count an excused absence as actual hours of participation, the individual must have been scheduled to participate in a countable work activity for the period of the absence that the State reports as participation.

In the final rule, we have clarified the holidays policy, limiting it to 10 days in a year. Because we did not specify in the interim final rule the number of holidays, States proposed counting widely varied holidays in their Work Verification Plans, some proposing impossibly long lists of the days they would excuse and count toward the participation rates. We realized that we had not provided adequate guidance in the regulation and that, as written in the interim final rule, the holidays policy would not meet the spirit of our mandate to make work participation rate calculations consistent across States. We deliberated at length about the appropriate number, considering the number granted on average by private companies, the average number of State paid holidays, and the number of Federal holidays. Ultimately, we chose to limit it to 10 to be consistent with the number of Federal holidays. Each State must designate the days that it wishes to count as holidays for those in unpaid activities in its Work Verification Plan. It may designate no more than 10 such days. The State is free to excuse an individual on other days for religious or other reasons, but it may not count other days for participation rate purposes as holidays. It may also exercise the additional excused absences policy.

During our listening tour and in written comments many people expressed misgivings about the way we structured credit for additional excused absences. Many urged us to permit a State to implement an hourly equivalent to the 10 days, since individuals sometimes need to be excused for only a portion of a day. Others thought that the number of additional excused days was insufficient and objected to the restriction on counting no more than two per month.

In writing the final rule, we struck a balance between our responsibility to ensure State accountability for the work participation rates in the law and giving States participation credit for occasional absences due to circumstances beyond an individual's control. We were persuaded by the comments that excused hours makes more sense than excused days because some situations require an individual to be absent for only part of a day. The final rule permits a State to count up to 80 hours of additional excused absences in a year for each work-eligible individual. It may not report more than 16 of these hours in any month. As in the interim final rule, the State must describe its excused absence policy (including holidays) in its Work Verification Plan.

Readers should note that we have modified the title of this section for clarity of comprehension. We think it should now be more readily apparent that this section addresses the hours that can count for participation, while § 261.61 speaks to documentation requirements to support hours of participation, and § 261.62 specifies how States should verify the hours that they report and document.

In keeping with this clarification, this section of the final rule incorporates the provision permitting a State to report projected hours of employment for up to six months on the basis of current, documented actual hours of work. In the interim final rule, this provision appeared in § 261.61. We have made no change to the text of the provision but moved it to this section because it fit better under the rubric of reporting hours than it did under documenting hours.

This section of the interim final rule also specified the hours that a State could count for self-employed individuals. The final rule does not change this provision.

Finally, the interim final rule limited the counting of homework and study time for individuals participating in vocational educational training or any other educational work activity to supervised settings. The final rule allows a State to count unsupervised homework time, subject to certain limitations.

Reporting Hours of Each Activity Separately

Comment: In conjunction with comments we received about our effort to draft mutually exclusive definitions of work activities, a number of commenters objected to the requirement to report actual hours for each activity separately. They maintained that separate tracking would discourage States from combining work activities and would impose an added administrative burden. They urged us to allow States to combine activities and report all participation under one activity. For example, one commenter suggested that we allow States to count an individual's hours from several activities in the activity that ''constitutes the majority of the hours of participation.''

Response: We strongly support State programs that combine activities. Having States report hours for each work activity in the appropriate category will help ensure that the data are comparable across States. Reporting participation by activity is required by section 411 of the Social Security Act and does not prevent a State from creating integrated programs. Moreover, a policy that allows some activities to count within others based on standards such as what constitutes a ''significant majority'' of hours would still require States to track the hours of each activity separately to determine which activity is the primary activity. Thus, combining the activities for purposes of reporting hours of participation would not

achieve the suggested administrative simplification.

The main effect of these recommendations would be to allow States to bypass statutory limitations on counting participation in certain activities, most notably the six-week limit on job search and job readiness assistance and the lifetime 12-month limit on vocational educational training, or to count educational activities during core hours.

Actual Hours versus Scheduled Hours

Comment: Some commenters recommended we allow States to report scheduled hours. One commenter thought that we should allow school districts to count scheduled hours with excused absences for good cause because it would ''benefit the client and these districts.'' Another maintained that requiring a State to develop a ''system for reporting/counting of actual hours instead of scheduled hours is an unfunded mandate.'' Another commenter wrote that it will ''require a significant investment of program resources in activities and systems to measure the number of actual hours of participation.''

Response: Our current policy simply extends the previous policy. Under TANF, States have always been required to report actual hours and not scheduled hours. Although the regulations did not explicitly state it, the instructions to the TANF Data Report (Form ACF–199, transmitted via Program Instruction TANF-ACF-PI–99–3, dated October 27, 1999) state, ''For each work activity in which an adult or minor child head-of-household participates, States are to collect *actual* hours of participation for each week in the report month. * * *'' Thus, States should already have had systems in place to capture and report actual hours of participation.

Holidays and Additional Excused Absences

Comment: Some commenters thought that 10 days per year (a maximum of two days per month) of excused absences beyond holidays was not sufficient to accommodate the needs of TANF recipients. One commenter thought that our policy was ''not a commonly accepted or reasonable standard.'' Commenters asserted that low-income, single parents often needed extra time to deal with court or agency mandated appointments, school appointments, meetings with child protective caseworkers, and caring for sick children, as well as to attend to personal needs that arise. Several commenters wrote that it is ''unreasonable to require caregivers to ignore emergencies or fail to take handicapped children to the doctor during work hours when the doctor is available so that the State can get credit for their participation in a work requirement.'' Some recommended specific standards to replace the excused absence policy described in the interim final rule (e.g., up to 120 hours per year, with a maximum of 30 hours per month, or 2 days per month but 24 days per year), while others suggested we allow unlimited excused absences as long as States can ''verify the reason for excused absence'' and it is in their approved Work Verification Plans.

Some commenters argued that there should be exceptions to the excused absence policy for specified reasons. They recommended that we grant extensions for various reasons, such as job interviews, meetings required by other governmental agencies (e.g., child welfare, child support, schools, courts, or other assistance programs), and illness, either of the participant or the participant's child. They suggested that we count these absences toward participation without limit and not as part of the regular excused absence allotment because such appointments are beyond the control of the individual and, in some cases, it is not possible to make up the hours for some activities because they do not fit a provider's schedule. A number of commenters suggested that we use the providers'' definition of holidays and other excused absences for individuals in education and training programs, as long as they make satisfactory progress.

Response: The TANF work participation rate has always been based on actual hours. Congress did not include an excused absence policy, in part because the hourly standard has always been well below the customary 40-hour work week; it is 20 hours per week for a single-parent family with a child under six years of age. As a result, most individuals already had a built-in excused absence policy of 10 to 20 hours per week. This gives States the flexibility to work around hours that a client misses and to allow the individual to make them up where feasible. Notably, it also means that TANF clients have more time to address the kinds of issues the commenters raised than many non-TANF, low-income, working parents.

The interim final rule expanded this statutory flexibility by including holidays and up to 10 additional days per year (no more than two days per month) of excused absences to count as participation, a first in the history of the TANF program. Now, under the final rule, we have expanded flexibility further to excuse up to 10 holidays and up to 80 additional hours of excused absences in a year, not more than 16 of which can be reported in a month.

Equally important, we remind readers that there is a distinction between the allowances a State or service provider may choose to make for an individual and the participation allowances we are granting to States in excused absences. The State determines how many hours an individual must engage in work and what it considers a good cause excuse for missing those hours. The law and regulations determine what a State gets credit for in the work participation rate. We established the limits on excused absences based on a reasonable standard derived from common employment practices. Nevertheless, those limits on counting for participation do not preclude States from excusing additional absences without penalty to the individual.

Comment: Some commenters thought that our excused absence policy conflicted with ''the intent and spirit of the Family Violence Option (FVO) by punishing individuals who have experienced domestic violence.''

Response: For the first time under TANF, we have given States participation credit for allowing clients to address emergencies. Rather than conflicting with the FVO, the excused absence policy provides another avenue, in addition to granting program waivers, for States to respond to needs of victims of domestic violence.

Comment: Many commenters recommended that the regulations count as excused absences hours missed due to the disability of an adult TANF recipient or due to caring for a family member with a disability. For example one commenter stated, ''Disabilities and responsibility for caring for a disabled person clearly result in an overall greater frequency of absences from work activities than would otherwise be necessary.'' One commenter noted that the standard excused absence policy on which the interim final rule is based makes exceptions for disability-related absences. The commenter explained that ''employers are actually required by the federal Family Medical Leave Act to allow individuals to take up to three months of leave if related to the employee's health or the employee's need to care for an ill family member.'' The commenter recommended that we allow States ''to count all excused absences related to verified medical purposes.''

Response: We have addressed the commenters'' concerns about the need for excused absences due to caring for a child with a disability by excluding

such individuals from the definition of work-eligible individual. Please refer to the preamble discussion of § 261.2(n) for more detail about the definition of a work-eligible individual.

With respect to the Family and Medical Leave Act, States must comply with its mandate that ''eligible employees'' are entitled to 12 weeks of unpaid leave during any 12 month period for reasons of childbirth, adoption, in order to care for an ailing family member, or a serious health condition that impedes the employee from performing her job. 29 U.S.C. § 2612(a)(1). The term ''eligible employee'' is defined at 29 U.S.C. § 2611(2). The State's responsibility to comply with the FMLA does not expand the hours of excused absence for which the State can get credit under the TANF work participation rate. We anticipate that a State would give a good cause exception from any State work requirement to an individual who is entitled to leave under the FMLA during such a period of leave, but the family would still be included in the calculation of the participation rate. For further information regarding how to comply with the FMLA, we refer readers to the Department of Labor and the applicable statutes and regulations.

Comment: Several commenters stated that our excused absence policy would ''reduce State credit'' toward meeting the work participation rates. Another asserted that our policy would ''not only hurt States'' efforts to meet the work rates, but will mean that the work participation rates themselves give policymakers and the public an inaccurate picture of the extent to which recipients are actively engaged in work activities.''

Response: We would like to stress again that allowing States to count excused absences in the participation rates does not hurt State efforts to meet the work participation rates or ''reduce State credit''; it does exactly the opposite. This is a policy of expanded credit, where prior rules did not count excused absences. We appreciate that some readers think we should have expanded credit even further, but we crafted an excused absence policy we think is reasonable and derived from common employment practices.

Comment: Many commenters recommended changing the standard from a daily one to an hourly one. They argued that this would more closely approximate typical employment policies where those who miss work typically take off some number of hours rather than a full day. They thought that a policy of daily excused absences would reduce incentives for individuals to participate in work activities before or after required appointments because such participation would not affect their countable hours of participation. Most commenters recommended converting our 10-day excused absence policy for purposes of the participation rate to 80 hours of excused absences in any 12-month period, no more than 16 of which they could use in a month. One commenter emphasized that a day should be ''fixed at 8 hours, regardless of the number of hours a participant is required to participate.'' Otherwise, a single day's absence could consume more than one day's worth of excused absences.

Response: We agree that excusing hours rather than days gives greater flexibility and more closely approximates a work experience. As we noted above, we considered several approaches for converting days to hours. The final rule permits up to 80 hours of excused absences for a work-eligible individual in a 12-month period, no more than 16 of which may be reported in a month.

Comment: Some commenters objected to the two-day per month limit on counting excused absences. One commenter argued that this did not reflect employment practices in the real world and that States should be allowed to count individuals for as many excused absences as needed in a given month, up to the total allowed for the year.

Response: We realize that some employers may permit employees to take more than two excused absence days (or the hourly equivalent) per month. However, most employers also require employees to accrue these days (or hours). It may take a full year for an employee to earn the equivalent of 10 days of leave, so, as a practical matter, the amount of leave many new employees are entitled to is restricted as well. More important, however, is that this policy applies only to what States can count, not to what they can allow for individual participants as a matter of policy. Also, since most TANF recipients face participation requirements of either 20 or 30 hours per week, there is room to make up the missed hours, which would not be so easy for someone working full-time.

Comment: Several commenters suggested that we extend the excused absence policy to individuals participating in paid as well as unpaid activities. They noted that many low-income workers do not receive paid leave for holidays or other absences. In addition, they argued that this holds many of those who are working to a higher standard than those in unpaid activities.

Response: We considered extending the excused absence policy to give States credit for individuals in paid employment, but ultimately decided to retain the policy in our interim final rule. As a practical matter, the State would already be getting credit for the client's hours of work, including excused absences, whether paid or not, because a State can project the hours of participation for individuals in paid employment for up to six months (based on documented, actual hours).

Comment: One commenter asked for clarification regarding the activity under which it should count excused absences it grants to allow an individual to search for a job. The commenter asked whether such an excused absence should count as job search and job readiness assistance or as part of the activity from which the individual was excused.

Response: States should report hours of excused absences as hours of participation in the activity from which the individual was excused. For example, if an individual were participating in a community service program but needed to be excused for two hours to go to a job interview, the State should report those excused hours as hours of community service, not as hours of job search and job readiness assistance.

Comment: Several commenters expressed concern over the fact that some excused absences may not be verified until after the State submits its participation data. They recommended allowing States to correct attendance records retroactively to reflect excused absences up until the date on which the data report becomes final.

Response: Because a State is not liable for a reporting penalty until the end of the quarter after the end of a fiscal year, a State has until December 31 to submit its final data for the previous fiscal year.

Projecting Hours of Employment

Comment: One commenter recommended allowing States to project hours in certain non-employment activities for up to three months ''based on a history of successful participation.'' The commenter stated that this would reduce stigma and the burden of attendance sheets.

Response: We have allowed projected reporting of actual hours of participation in paid work activities because an employer has both a fiscal interest and a stewardship responsibility to ensure that employees work for the hours of pay. A similar situation does not exist in the other

activities; therefore, we have not adopted this suggestion.

Self-Employment Hours

Comment: Several commenters proposed allowing States to project employment hours for up to six months for individuals who are self-employed. They argued that these approaches recognize the inherent challenges of verifying the hours of self-employment.

Response: The option to project hours of participation for a maximum of six months does apply to self-employment. Self-employment is a form of unsubsidized employment and therefore may be projected for up to six months based on prior, documented hours of actual employment.

Comment: Some commenters expressed concern because the regulations limit the hours a State can count for self-employed recipients to the number derived by dividing the individual's self-employment income (gross income less business expenses) by the Federal minimum wage. They explained that some types of self-employment take time before income is generated. Another commenter noted that some types of self-employment are affected by seasonal factors, so that income is only generated in some months, even though the work is ongoing. They recommended various approaches that would take into account hours needed to prepare for employment and sporadic work schedules, including criteria based on self-attestation, earnings, and preparation time.

Response: We think the best approach for calculating hours of self-employment is to rely on the net income (gross income minus business expenses) of the individual. We adopted this method because States already calculate net income when determining the eligibility of the self-employed for TANF benefits and thus our approach minimizes the administrative burden on States. We do not believe it is necessary to modify the rule to address these suggestions. The regulation allows a State to ''propose an alternative method of determining self-employment in its Work Verification Plan.'' This description should indicate how the State plans to monitor and supervise this activity to ensure that it reports actual hours and that the self-employment progresses to the point where the individual can effectively earn more than the minimum wage. We will not approve alternative plans that provide for an individual's self-reporting of participation without additional verification. We believe the rule's provision for approximating hours using the Federal minimum wage is a reasonable approach and minimizes administrative burdens.

Comment: One commenter suggested that the calculation of hours for self-employment be based on the higher of the applicable Federal or State minimum wage.

Response: The final rule retains the calculation based on the Federal minimum wage. We consciously chose the Federal minimum wage because it allows States with higher State minimum wages to count more hours of employment than if the calculation were based on the higher of the two. This also provides consistency in the treatment of self-employment hours across States.

Homework Time

Comment: Several commenters suggested that limiting homework or study time to supervised settings does not reflect the way educational programs work. They noted that most adult education and training programs require significant out-of-class homework and study time, but, unlike secondary school where supervised ''study halls'' are common, many postsecondary programs do not have supervised study settings. They explained that students who do not finish their homework cannot make satisfactory progress and successfully complete their courses of study; thus, they maintained, a supervised homework policy is not necessary. In addition, they thought that requiring formal study periods creates administrative burdens on educational institutions and increases program costs related to providing supervision and child care for parents who must stay longer in study sessions rather than completing the work at home. Finally, commenters contended that singling TANF recipients out for special study sessions might increase stigma by identifying them as welfare recipients. Some commenters did not like the implication of the preamble language, saying that it suggested that TANF participants in educational activities cannot be trusted to complete homework assignments and to study the material as needed to succeed in the training or educational program.

Several commenters emphasized the administrative value of having an easy way to determine the number of hours of participation that can count for homework. They noted that most educational programs have a ''rule of thumb'' for the number of homework hours associated with each class hour and suggested that State education agencies can assist TANF programs in assessing the appropriate number of homework or study hours. Commenters proposed a wide range of ratios of class time to homework time, generally ranging from a half hour to two hours of homework time for every hour of class time.

Some commenters expressed concern that the daily supervision requirement for unpaid work activities would mean that program administrators or some other responsible third-party would have to monitor homework on a daily basis.

Response: We agree with many of these comments. In § 261.60(e) of the final rule, we have expanded State flexibility in counting homework time. The rule now permits a State to count supervised homework time and up to one hour of unsupervised homework time for each hour of class time. Total homework time counted for participation cannot exceed the hours required or advised by a particular educational program. It was never our intent in the interim final rule to have an individual participate in more hours of supervised homework than the program actually requires, but the rule was not explicit on this point. Where the State opts to count homework time, it must document what the homework or study expectations of the program are to ensure it does not exceed those hours.

Section 261.61 How must a State document a work-eligible individual's hours of participation?

This section of the interim final rule described the documentation standards that a State must meet for its work participation data. In particular, it included an explicit requirement that a State verify through documentation in the case file all hours of participation that it reports. It also specified the types of documentation we expected a State to require for each activity. The preamble to the interim final rule stated that a State may not report data to us on the basis of ''exception reporting'' where it assumes that clients participate in all scheduled hours unless it receives a report to the contrary from a service provider.

The interim final rule also permitted States to report projected actual hours of unsubsidized or subsidized employment or OJT for up to six months at a time on the basis of prior, documented actual hours of work. Although this section did not address the frequency of documentation for other activities, the preamble to § 261.62 of this subpart explained that we expected a State's Work Verification Plan to describe the documentation it uses to monitor participation and ensure that it reports actual hours of participation. We explained that we were establishing a

range of documentation guidelines that vary by type of activity. We expected job search and job readiness assistance to be documented daily and other unpaid work activities to be documented no less than every two weeks.

In the final rule we have reiterated our position that all hours of participation must be reported affirmatively and supported by documentation in the case file, but we no longer require daily documentation of job search and job readiness assistance or biweekly documentation of other unpaid work activities. All paid activities must include written documentation of hours of employment. Wage stubs and other employer-produced documents are the best sources of verifiable documentation of paid hours. All unpaid activities should rely on written, signed documents to support hours of participation. Generally, documents verifying actual hours of participation should include: the participant's name; actual hours of participation; the name of the work site supervisor, educational provider, or other service provider; and the name and phone number of the person verifying hours.

We also moved the provision permitting projection of hours that was formerly at § 261.61(c) to § 261.60(c) because it fit better under the rubric of reporting hours than it did under documenting hours. However, we have incorporated in this section a provision specifying the documentation standards when a State projects hours of employment. We have also explained that the documentation for homework must include a statement about the amount of homework or study time advised by the particular educational program. Finally, we reorganized the section for clarity.

Documenting All Hours of Participation

Comment: Several commenters objected to the interim final rule's prohibition on the use of ''exception reporting.'' They explained that this is not the same as reporting scheduled hours and noted that many States have contracts with providers that include exception reporting and that such reporting ''reduces the administrative burden of reporting while maintaining accountability.''

Response: We continue to believe that a State should affirmatively determine that an individual participates in an activity in order to count such participation toward the work participation rates. Exception reporting systems may operate effectively in automated or well-documented reporting situations; however, we prohibited their use on the basis of concerns raised by single audits. Without an adequate system of recordkeeping or documentation, it is impossible to determine whether reports are appropriately filed when a client fails to show up or meet the day's participation requirements.

Documenting Paid Employment

Comment: Most commenters supported the interim final rule's provision allowing States to project actual hours of employment for up to six months based on current, documented actual hours of unsubsidized employment, subsidized employment, and OJT. Most commenters appreciated that this significantly reduced the burden on employers and recipients and was less stigmatizing for recipients. One commenter noted that the description of this provision at § 261.61(b) seemed to limit this policy to ''unsubsidized employment,'' rather than all forms of paid employment.

Response: We have retained this provision in the final rule and clarified that the documentation requirements described apply to all forms of paid employment, whether unsubsidized or not.

Documenting Unpaid Activities

Comment: Some commenters said that the rules impose rigid monitoring and burdensome reporting requirements for individuals in unpaid activities. One commenter asserted, ''Frequent demands for proof of participation subject families to loss of assistance.'' Another commenter explained, ''The goal of these requirements is to ensure that the data reported about work participation is accurate, not to create administrative burdens on recipients that create barriers to participation and aid receipt for families.''

Response: We believe the final rule provides a reasonable balance between the need for accurate information and the burden inherent in documenting hours of participation. For example, under the final rule, we allow States to count an hour of unsupervised homework time for each hour of class time, thereby reducing the reporting and monitoring requirements for those individuals in various educational activities. Moreover, while the rule does require States to document participation through methods beyond client self-reporting, these have been requirements all along. We appreciate that such procedures may pose challenges in some situations, but they serve to substantiate actual hours of participation and protect the State in the event of an audit.

Comment: Many commenters opposed the daily and two-week documentation requirements. They noted that the statute requires States to report information on a monthly basis and recommended that documentation requirements conform to the same monthly time frame. They suggested that the standards of documenting participation ''daily'' and ''every two weeks'' in the interim final rule were ''too prescriptive and will be onerous for activity providers and local TANF program administrators.'' They observed, ''Increasing reporting requirements will force providers to dedicate additional resources to data tracking, often at the risk of depleting resources from another program function such as case management. The more time staff must spend compiling data, the less time they have to assist clients.'' In addition, several commenters asked for clarification regarding the specifics of what must be in the case file, including whether each file must include a hard copy of all individual attendance records. The commenters recommended allowing States to ''create a central or electronic file that would meet the purpose of documenting attendance.''

Response: We agree with the commenters and have changed our policy accordingly. The documentation must be available in the case file to support all the actual hours of participation it claims in the monthly work participation data it reports. A State should describe in its Work Verification Plan the documentation it uses to monitor participation and ensure that it reports actual hours of participation. This may include electronic records.

Comment: One commenter asked us to ''clarify that, while job search and job readiness participation must be supervised and recorded daily, the documentation of participation does not need to be submitted to the State agency more frequently than monthly.''

Response: We agree with this comment. While supervision of participation must occur on a daily basis, States report monthly participation data for job search and job readiness assistance with all other participation data and the documentation in the case file must support what the State reports.

Comment: Several commenters asked us to clarify the types of documentation needed to substantiate homework time.

Response: The final rule allows a State to count up to one hour of unsupervised homework for each hour

of class time, if the educational program calls for such homework time. The only documentation that is required for unsupervised homework time is a statement from the educational program indicating the amount of homework required. For supervised homework, we require this same documentation along with a time sheet or record of attendance signed by the individual supervising the activity.

Comment: One commenter urged us to use the same verification standards for self-employment as we allow for other forms of employment. Another commenter noted that States have developed a variety of mechanisms for monitoring self-employment and that ''all or nearly all of these mechanisms rely on various types of self-reporting by the participant.'' The commenter asserted that ''the issue is not self-reporting, but rather the type of self-reporting documentation and level of detailed required,'' expressing concern that additional verification requirements would impose a significant administrative burden on States.

Response: We believe a different standard is warranted because self-employment is not analogous to other forms of employment. With self-employment, there is no pay stub, no supervisor, and no employer whose interests are distinct from the employee. It is because self-employment differs so dramatically from other forms of employment that we required States to explain in their Work Verification Plans how they will document hours of work and preclude the use of self-reporting.

Section 261.62 What must a State do to verify the accuracy of its work participation information?

The interim final rule described the requirements for a Work Verification Plan. Although some commenters expressed concern about the burden associated with meeting these requirements and the timeframe for doing so, we did not change the final rule. We explained that States should already have verification, documentation, and internal control procedures in place to support the work participation data they report and that the new requirements should not pose a significant administrative burden.

Comment: We received several comments concerning the burden the Work Verification Plan and the underlying documentation and verification requirements placed on States.

Response: States should already have verification, documentation, and internal control procedures in place to support the work participation data they report. The Work Verification Plan requirements reflect the Congressional mandate in the DRA that States report to us in a Work Verification Plan what those procedures are. This should not represent an undue burden for States.

Comment: One commenter recommended that we avoid recreating a quality control system as we ensure State compliance with the work verification requirements of the DRA. The commenter expressed concern that such a system could focus State efforts more on reducing documentation errors than on helping recipients enter the workforce.

Response: One goal of TANF is to enable recipients to prepare for and enter employment leading to self-sufficiency. Documentation and verification requirements should never detract from that goal. However, accurate documentation is key to determining whether States are meeting this goal. We think we have structured a rule that minimizes the burden of documentation while meeting our responsibility to be good stewards of Federal funds and programs.

Comment: One commenter urged us to correct regulatory language that requires States to describe how they determine the number of countable hours of self-employment under each countable work activity. The commenter noted that this appeared to be a drafting error, since self-employment cannot count under all the activities.

Response: The commenter is correct and we have modified the rule accordingly. States must only describe how they determine self-employment hours under unsubsidized employment. Nevertheless, the Work Verification Plan must describe how the State determines countable hours for each activity.

Comment: One commenter noted there was ''Insufficient time for states to retool and meet new requirements by October 1, 2006. New documentation, monitoring, and reporting requirements place heavy burdens on caseworkers, providers, and our state's computer tracking system. States were informed of the interim rules and new requirements on June 29, 2006.''

Response: For many States, the Work Verification Plan that was due on October 1, 2006, was a description of longstanding documentation, verification, and internal control systems and did not require new procedures. We do not have the authority to modify the statutory deadline for States to submit the Work Verification Plan; however, we have delayed imposition of a penalty for failure to maintain adequate documentation, verification, or internal controls until FY 2008.

Comment: Several commenters suggested that States use information contained in the National Directory of New Hires (NDNH) not only for the purpose of tracking work participation rates, but also for additional purposes. For example, one commenter suggested that we require States to use NDNH information to identify circumstances in which actual hours of work change. Another commenter recommended that we make each State's NDNH match results available to all States for comparison purposes.

Response: While we appreciate these recommendations, the uses of the NDNH are restricted by law. The law prohibits the use or disclosure of information in the NDNH, as well as information resulting from NDNH comparisons, except as expressly provided. The use of NDNH information for verification of work participation purposes is a permissible use, as it is a program responsibility of the State TANF agency. Matches for this purpose may occur only to the extent and with the frequency that the Secretary of HHS determines to be effective in assisting States to carry out their responsibilities under the TANF program. Access to confidential information in the NDNH is restricted to authorized persons and the use of such information is limited to authorized purposes. Any misuse of NDNH information is subject to penalty.

Comment: One commenter questioned the benefit of using NDNH data to calculate work participation rates. The commenter stated that a pilot in two urban counties of one State indicated that NDNH data were not useful for the intended purpose, because not all employers provided NDNH data and the data pertain to new employees only, not ongoing employment. The commenter urged us to acknowledge that the NDNH is not a panacea.

Response: We agree that the NDNH has limitations in contributing to work participation data, particularly because it does not collect the number of hours of employment. However, we would like to note that the NDNH does contain quarterly wage data about individuals engaged in ongoing employment, as well as information about newly hired employees, which the State may not be able to obtain as quickly and efficiently from any other source. The Federal Office of Child Support Enforcement, which manages the NDNH, is committed to working closely with State TANF agencies to help agencies understand the NDNH and how the data may be used for optimal results. To conduct a data match between its data

and NDNH data, for purposes of verifying work participation, a State TANF agency must enter into a written Memorandum of Understanding (MOU) with the Federal Office of Child Support Enforcement. The MOU addresses the terms and conditions governing the data match and the security measures required for safeguarding NDNH match results. NDNH data may only be used for certain narrowly defined purposes, including assisting States in carrying out their responsibility under the federally-funded TANF program to establish and maintain work participation procedures. NDNH data may not be used to determine eligibility in State MOE or solely State-funded programs.

Section 261.63 When is the State's work verification plan due?

In accordance with the Deficit Reduction Act of 2005, our interim final rule required each State to submit an interim Work Verification Plan that included procedures for validating reported work activities to the Secretary no later than September 30, 2006. A State must submit revisions requested by the Department within 60 days of receipt of our request, and must submit and operate under an approved Work Verification Plan no later than September 30, 2007. If a State modifies its verification procedures for TANF or SSP–MOE work activities or internal controls for ensuring a consistent measurement of the work participation rate, then the State must submit for approval an amended Work Verification Plan by the end of the quarter in which the State modifies the procedures or internal controls. We have retained these provisions in the final rule.

We received no comments on this section, so we have not made any substantive changes to the provision.

Section 261.64 How will we determine whether a State's work verification procedures ensure an accurate work participation measurement?

The DRA added a new penalty to section 409(a)(15) of the Social Security Act for a State that fails to establish or maintain adequate work participation verification procedures. The interim final rule outlined the two-part penalty. First, a State will be liable for a penalty if it fails to submit an interim Work Verification Plan by September 30, 2006, and a plan that we have approved by September 30, 2007. Second, effective October 1, 2007, States must maintain adequate internal controls and verification procedures to ensure that reported work participation data is accurate.

We will use the single audit under OMB Circular A–133 in conjunction with other reviews, audits, and data to determine whether the State's controls and procedures result in accurate data. A State must maintain case documentation and pertinent findings of its verification process for use by the single audit or other reviews.

Readers should note that we revised the title of this section and of § 261.65 of this part to be more concise.

Comment: We received a couple of comments that expressed concern over the burden imposed by maintaining case file documentation and findings until a single audit is resolved.

Response: The DRA and our interim final rule did not change the record retention and record access rules that apply to TANF. These separate rules are in 45 CFR 92.42. These requirements apply to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or sub-grantees. Records must be retained for three years, or longer, if any litigation, claim, negotiation, audit, or other action involving the records has been started before the expiration of the three-year period. If extended, records must be retained until all issues have been resolved. We issued Program Instruction TANF–ACF–PI–2003–1, dated January 28, 2003, to clarify the start date of the three-year record retention period for Federal TANF funds and State MOE expenditures. For Federal TANF awards, the record retention period starts on the day the grantee submits its final expenditure report showing that all the funds awarded in the particular Federal fiscal year have been expended. For State MOE expenditures, the record retention period starts on the day the State submits its final expenditure report for a Federal fiscal year.

Comment: One commenter asked whether HHS or the single audits will use a threshold or a specified percentage to determine whether the State had inadequate controls and procedures for accurate work participation data.

Response: As under the original rule, we will not impose a penalty based on isolated failures to document and verify work participation information reported to HHS. We will impose a penalty if the audit or review identifies a systemic problem or weakness. To ensure that our conclusion is not based on incorrect information, it is critically important for States to dispute ''questioned'' audit findings and refute the allegation with appropriate documentation. States also have the opportunity to dispute our penalty finding, to claim reasonable cause, and to submit a corrective compliance plan to correct the deficiency.

Comment: One commenter expressed concern that a State that submits participation data for the universe of cases would be at a disadvantage in an audit or review compared to a State that submits sample data. The commenter suggested that ''States reporting on all participants be allowed to pull their own samples for audit based on general ACF guidelines.''

Response: Auditors must follow prescribed procedures for conducting audits regardless of whether the State submits universe or sample data. They use the sample standards of the American Institute of Certified Public Accountants (AICPA) and the GAO auditing standards. In addition, we provide them with a compliance supplement to guide their review of our programs.

Section 261.65 Under what circumstances will we impose a work verification penalty?

Under our interim final rule, the penalty amount is based on the State's degree of noncompliance and is equal to an amount of not less than one percent and not more than five percent of the State's adjusted SFAG. We will impose the maximum penalty of five percent if a State fails to submit its interim Work Verification Plan by the due date of September 30, 2006, or if it fails to revise its procedures based on Federal guidance and submit the complete plan by September 30, 2007. This is because the State will not have complied with the fundamental requirement to establish a Work Verification Plan. But, States must also implement the procedures. If we determine that a State fails to maintain adequate documentation, verification, and internal control procedures, we will impose a penalty based on the number of years of noncompliance, i.e., one percent of the adjusted SFAG for the first year, two percent for the second year, three percent for the third year until a maximum of five percent is reached. If, after any failure, a State demonstrates effective work verification procedures for two consecutive years, then we will consider any future failure to be the first occurrence.

Readers should note that we revised the title of this section and of § 261.64 of this part to be more concise.

We only received a few comments on this section of the interim final rule. The comments mainly concerned the distinction between this penalty and the penalty for failing the work participation rate(s) and the criteria that a State must meet to comply with the

work verification requirements for any given year.

Comment: One commenter asked whether the work verification penalty applies if a State operates its work participation verification system poorly.

Response: If we determine that any of the State's procedures is inadequate, a penalty could result. Once a State has an approved Work Verification Plan, the penalty is based on whether the internal controls and verification procedures ensure consistent and accurate work participation rates. A State's system of internal controls and verification procedures includes a whole array of activities, such as: ensuring that it counts only work activities that are consistent with the Federal definitions; verifying and monitoring actual hours of participation; identifying work-eligible individuals; and validating the accuracy of the data reported. All of these factors contribute to an effective internal control system.

Comment: Some commenters asked us to clarify the distinction between the penalty for failure to meet the work participation rate and the work verification penalty.

Response: These are two completely separate penalties established by the statute. A State could meet its required work participation rates and still risk imposition of the work verification penalty as a result of inadequate work verification procedures and/or internal control procedures. Similarly, a State could fail a work participation rate but meet the work verification requirements. We expect States to review and monitor their processes and procedures regularly to ensure the accuracy of the data used in calculating the work participation rates.

Comment: Several commenters asked about the criteria that a State must meet to be found in compliance with the work verification requirements for any given year. For example, one commenter inquired whether a State must be error-free or, alternatively, required to stay below a specific threshold. The commenter also asked whether a State that responded to errors appropriately and timely in an agreed-upon manner would be considered to be in compliance.

Response: States must maintain adequate documentation, verification, and internal control procedures to ensure the accuracy of the data used in calculating the work participation rates. We will determine through audits or other reviews whether the State has adequate controls. Our penalty determinations will be made only after fully considering the auditor's findings, the State's reply, if any, to the auditor's findings, and any other reports, audits, and data sources, as appropriate. We will also consider the controls the State has in place and actions the State takes to review and to address any problems so that the State's work verification procedures and internal controls are working properly. We will not impose a penalty based on non-systemic errors.

Comment: Some commenters suggested alternative penalty structures, finding the structure in the interim final rule to be too severe. For example, one commenter suggested that ''ACF apply a 2nd or subsequent year penalty only for the repetition of an error penalized in the 1st year. In other words, if ACF determined that a state's internal control procedures were inadequate and imposed a 1% penalty in the 1st year, and then found that the state did not maintain adequate documentation in the 2nd year, the 2nd year penalty would again be 1% since it involved a separate error. Any penalty should be lifted after the state has complied with the work verification procedures for one full year, not two.''

Response: While we understand the commenter's concern, the work verification requirements were imposed by Congress to ensure that States implement procedures to ensure accurate and consistent work participation data. We also note that the requirement to document and verify work participation information is not new. States were always required to comport with the accurate and complete data standard at § 265.7 under the existing regulations. Our penalty structure represents a reasonable, graduated approach, increasing only by the number of years of failure (degree of noncompliance). We do not believe it would be appropriate to treat a subsequent year of failure for another reason as if the prior failure had not occurred. Therefore, we have not accepted this recommendation.

V. Part 262—Accountability Provisions—General

The DRA added an additional penalty at section 409(a)(15) of the Social Security Act for States that fail to establish or comply with work participation verification procedures. The interim final rule clarified that if a State failed to comply, we would reduce the adjusted SFAG payable for the immediately succeeding fiscal year by not less than one percent and not more than five percent. A State that fails to meet the work verification requirements may claim reasonable cause or submit a corrective compliance plan under the procedures described in §§ 262.4–262.7 of this chapter. If we impose the penalty, we will reduce the SFAG payable for the immediately succeeding fiscal year.

Section 262.1 What penalties apply to States?

We received no comments on this section, so we have made no changes to the provision.

Section 262.2 When do the TANF penalty provisions apply?

The penalty for failing to establish and submit a Work Verification Plan takes effect on October 1, 2006. The penalty for failing the ongoing requirement to maintain adequate work verification procedures takes effect on October 1, 2007.

Comment: Several commenters noted that many States will not have time to legislate the changes needed to comply with the new rules by October 1, 2006, and urged ACF to withhold penalties until States have a reasonable amount of time to pass legislation. For example, one commenter noted that, in order for the State to comply fully with the requirements may take both legislative and automation changes. Since that State's legislature does not meet until January 2007, the commenter encouraged ACF to take these factors into consideration.

Response: We are sensitive to the fact that some States must make both legislative and automation changes to implement the new DRA requirements. There are several recourses available to States to avoid or mitigate financial penalties. Under this rule, we have delayed the imposition of a penalty for inadequate work verification procedures until FY 2008 as one way to address this concern. Under prior, continuing law and regulations, there are a number of remedies available to a State that is potentially liable for a penalty. If we issue a penalty notice to a State, the State may submit a reasonable cause argument outlining the specific legislative provisions that it needed and the impact of the delay in getting such provisions through the legislative process. We will consider granting a reasonable cause exception if a State can demonstrate that it was impossible to meet the requirements absent such legislation. Also, the State may submit a corrective compliance plan to meet the requirements at a future time. This will allow States additional implementation time. We look forward to working cooperatively with States to help them operate effective programs, ensuring that they can submit timely, accurate data and avoid financial penalties.

Section 262.3 How will we determine if a State is subject to a penalty?

In the interim final rule, we explained that we would use the single audit under OMB Circular A–133 in conjunction with other reviews, audits, and data sources to assess whether the State maintained adequate controls and procedures to ensure accurate data are reported to calculate work participation rates.

We received no comments on this section, so we have made no changes to the provision.

Section 262.6 What happens if a State does not demonstrate reasonable cause?

Comment: A significant number of commenters proposed that we grant reasonable cause exemptions to States that have not completed a legislative session since the publication of the interim final TANF regulations on June 29, 2006, both for failure to meet the work participation rates and failure to maintain adequate work verification procedures. One commenter contended that elements of the Work Verification Plan will require more staff, resources, and additional system support than are currently funded within the State's existing budget. Others suggested that the rule should provide ''phase-in time'' to comply with the new requirements or to respond to delays in adjusting the participation requirements or adding parents to the requirements.

Response: We do not have the authority to adjust or modify the statutory participation requirements or rates. While we recognize that this rule may impose new requirements on States, few of them require actual legislative action. With respect to work verification requirements, our rule permits the Work Verification Plan to be phased-in over time and to be revised in future months. But, to give meaning to the participation rate requirements, the State must have adequate procedures and internal controls in place by October 1, 2007. The State may amend its Work Verification Plan at any time during the course of the fiscal year in accordance with § 261.63(c) of this chapter. While we have not created an automatic reasonable cause exemption, any State that fails the work participation requirements or work verification requirements may avail itself of the penalty resolution process described in §§ 262.4–262.7 of this chapter. This allows a State to outline the basis of its request for a reasonable cause exception for failing to meet a requirement, including the argument that lack of timely State legislation caused it to fail to meet the requirement.

VI. Part 263—Expenditures of State and Federal TANF Funds

Subpart A—What Rules Apply to a State's Maintenance of Effort?

Section 263.2 What kinds of State expenditures count toward meeting a State's basic MOE expenditure requirement?

The Deficit Reduction Act of 2005 retained the same MOE spending levels required in PRWORA; however, it also added a new provision, ''Counting of Spending on Certain Pro-Family Activities'' at section 409(a)(7)(B)(I)(V) of the Social Security Act. We included this provision in § 263.2(a)(4) of the interim final rule to allow States to count non-assistance expenditures on pro-family activities if the expenditure is reasonably calculated to prevent and reduce the incidence of out-of-wedlock pregnancies (TANF purpose three), or to encourage the formation and maintenance of two-parent families (TANF purpose four). Under this provision, non-assistance, pro-family expenditures for benefits and services were not limited to ''eligible'' families (as defined in § 263.2(b)), which under prior rules, was a limitation on all MOE spending. Instead, States could claim qualified pro-family expenditures for non-assistance benefits and services provided to or on behalf of an individual or family, regardless of financial need or family composition.

In developing the final rule, based on comments we received, we reconsidered the scope of the pro-family claiming provision. We have concluded that ''Counting of Spending on Certain Pro-Family Activities'' within TANF purposes three or four means counting of non-assistance expenditures on only the activities enumerated in the healthy marriage promotion and responsible fatherhood section of the DRA (sections 403(a)(2)(A)(iii) and 403(a)(2)(C)(ii) of the Act)—unless a limitation, restriction or prohibition under this subpart applies. For other allowable expenditures within TANF purposes three or four, States may only claim toward their MOE requirement the portion expended for or on behalf of eligible families. We have amended the pro-family claiming provision at § 263.2(a)(4) to specify which non-assistance, pro-family expenditures within TANF purposes 3 or 4 are *not* limited to eligible families.

With the exception of the pro-family claiming provision discussed above, States must continue to limit the provision of all other MOE-funded assistance and non-assistance benefits to eligible families as defined at § 263.2(b), regardless of the TANF purpose. We remind readers that Federal TANF assistance is also limited to eligible families, regardless of the TANF purpose.

Congress also created new TANF discretionary funding streams (Grants for Healthy Marriage Promotion and Responsible Fatherhood) in the DRA. These funds are in Title IV–A, sections 403(a)(2)(A)(iii) and 403(a)(2)(C)(ii) of the Social Security Act. Under MOE, States may count qualified expenditures that are made as a condition of receiving Federal funds under Title IV–A toward their MOE requirement. For FY 2006, Healthy Marriage Promotion and Responsible Fatherhood grantees had to contribute a matching share of the total approved costs of a project as a condition of receiving any of the Federal discretionary funds. Thus, a State may count these State expenditures, when made on allowable activities under the Healthy Marriage Promotion and Promoting Responsible Fatherhood programs, toward its MOE requirement, unless a limitation, restriction, or prohibition under this subpart applies. This provision is outlined in § 263.2(g).

The regulations at 45 CFR part 92 on matching or cost-sharing requirements permit States to count toward their MOE requirement qualified, non-Federal, cash or in-kind expenditures by a third party. For example, this may include Healthy Marriage and Responsible Fatherhood providers in a State. As set forth in the policy announcement, TANF–ACF–PA–2004–01, dated December 1, 2004, and repeated in the interim final rule at § 263.2(e), we require an agreement in writing between the State and any third party allowing the State to count such expenditures toward its MOE requirement. This policy was initially explained in a policy announcement, TANF–ACF–PA–2004–01, dated December 1, 2004 and repeated the policy in the interim final rule at § 263.2(e).

Comment: We received several comments of concurrence and appreciation for clarifying these provisions. One commenter asked us to clarify whether ''pro-family'' expenditures are limited to TANF eligible families, or whether it is broader and may include other low-income families. Other commenters wondered whether countable expenditures for activities like pre-K or after-school programs fall under the new pro-family claiming provision.

Response: When Congress created the expanded pro-family spending provision, it limited the provision to ''certain pro-family activities.'' Moreover, it created this new provision

as part of the section of the DRA titled ''Grants for Healthy Marriage Promotion and Responsible Fatherhood.'' In reevaluating our rule to respond to these comments, we have concluded that this placement signaled Congressional intent that ''certain'' pro-family activities means the healthy marriage promotion and responsible fatherhood activities it described in this section of the DRA. Thus, the final rule limits pro-family activities for the purposes of this new provision to the healthy marriage activities listed in section 403(a)(2)(A)(iii) of the Act and the responsible fatherhood activities listed in section 403(a)(2)(C)(ii) of the Act, unless a limitation, restriction, or prohibition under this subpart applies to any such activity. These are the only expenditures within TANF purposes three or four that are *not* limited to eligible families.

We recognize that this additional claiming provision became effective on October 1, 2005 (FY 2006). We further recognize that, since publication of the interim final rule, States may have been claiming toward their MOE requirement a whole array of non-assistance expenditures—e.g., after-school programs, pre-K programs, college scholarship programs—as a result of this new provision. This is because we presented this new claiming provision in the interim final rule in a general way. As a result, we have advised States that, until we publish the final rule, they may draw their own reasonable conclusions as to the sort of pro-family expenditure within TANF purpose three or four to claim under this new provision. Therefore, this amended provision will be effective with the effective date of this final rule.

In summary, with the exception of the pro-family, non-assistance expenditures described above, States may only claim toward their MOE requirement expenditures for or on behalf of eligible families. We remind readers that an eligible family is a financially needy family that consists of, at a minimum, a child living with a caretaker relative or consists of a pregnant woman. Please see § 263.2(b) for further information on eligible families.

Section 263.5 When do expenditures in State-funded programs count?

Due to an oversight on our part, we did not include this section in the interim final rule. It addresses the MOE ''new spending'' limitation in section 409(a)(7)(B)(i)(II) of the Social Security Act, which continues to apply. States may only count, for MOE purposes, expenditures in pre-existing State or local programs that exceed the amount expended in such programs during FY 1995. The original TANF rule provides that the new spending amount is determined by comparing total FY 1995 expenditures in the pre-existing program with total qualified expenditures for or on behalf of eligible families during the current fiscal year. The State may claim the excess, if any, toward its MOE requirement. This new spending limitation does not apply to expenditures under State or local programs that had been previously authorized and allowable under the State's former title IV–A programs in effect as of August 21, 1996.

Comment: A commenter noted an inconsistency between § 263.2 of the interim final regulations and this ''new spending'' section. One allows States to claim as MOE, expenditures for pro-family activities, regardless of whether a family is financially ''eligible'' or not, but, the ''new spending'' test still refers only to ''eligible'' families. The commenter suggested that the new spending calculation needed to be changed to count qualified, pro-family, non-assistance expenditures within TANF purposes three or four.

Response: We agree with the commenter. This was an oversight. We have amended the new spending provision at § 263.5(b). The amount of expenditures that may be claimed for MOE purposes is limited to the amount by which total current fiscal year expenditures for certain non-assistance, pro-family activities within TANF purposes three or four exceed total State expenditures in the program during FY 1995. Readers should refer to the discussion of § 263.2 for more detail on counting these pro-family expenditures.

Section 263.6 What kinds of expenditures do not count?

As we stated in the preamble of the interim final regulations, the Deficit Reduction Act of 2005 did not change the prohibition at section 409(a)(7)(B)(iv)(IV) of the Social Security Act. This provision prohibits States from counting expenditures made ''as a condition of receiving Federal funds *''other than under this part''* toward its TANF MOE requirement. Because paragraph (c) of our original rule did not accurately reflect this prohibition, we corrected it to say that the prohibition only applies to expenditures that a State makes as a condition of receiving Federal funds under another program that is not in Part IV–A of the Act. States may count the non-Federal share of expenditures on allowable activities under the healthy marriage promotion or promoting responsible fatherhood programs in sections 403(a)(2)(A)(iii) or 403(a)(2)(C)(ii) of the Act, unless a limitation, restriction or prohibition under this subpart applies.

We received no comments on this section; thus, it has been retained without change in the final rule.

VII. Part 265—Data Collection and Reporting Requirements

Section 411(a) of the Social Security Act imposes specific data reporting requirements on States to provide information about program effectiveness and to assure State accountability for key requirements, including work participation. Section 411(a)(7) permits the Secretary to prescribe such regulations as may be necessary to define the data elements required in the reports mandated by section 411(a). The Deficit Reduction Act of 2005 added these same data collection requirements for cases receiving assistance in separate State programs.

Section 265.1 What does this part cover?

We received no comments on this section and made no changes to it in the final rule.

Section 265.2 What definitions apply to this part?

We received no comments on this section and made no changes to it in the final rule.

Section 265.3 What reports must the State file on a quarterly basis?

Section 265.3(b) TANF Data Report

We have made some changes to the TANF Data Report—Section one. In order to implement the policy on deeming core hours for the overall work participation rate and the two-parent work participation rate, we are adding two data elements to the TANF Data Report—Section one. The new data elements are: (1) ''Number of Deemed Core Hours for the Overall Rate''; and (2) ''Number of Deemed Core Hours for the Two-Parent Rate.'' Tennessee is the only State with an ongoing 1115 welfare reform waiver and the waiver ends on June 30, 2007. Thus, we are removing two data elements from the TANF Data Report—Section One that we no longer need. The data elements are: (1) ''Additional Work Activities Permitted Under Waiver Demonstration''; and (2) ''Required Hours of Work Under Waiver Demonstration.''

Comment: One commenter stated that we require extensive and detailed disaggregated data in the TANF Data Report—Section One, including individual social security numbers, and commented that collecting social

security numbers does not serve any useful research purpose. The commenter expressed concern for the privacy of individuals and further suggested that we should be collecting data on the well-being of children.

Response: Collecting social security numbers is an existing requirement. We have been collecting the social security numbers for TANF family members since October 1999. This information is protected by the safeguards under the Privacy Act. The TANF recipient social security numbers are encrypted during data transmission, maintained in a secure location and use and access to them is limited. We have found them very useful in our research, especially as it relates to the use of the National Directory of New Hires database to assess the impact of welfare reform on TANF recipients using such measures as job entry, job retention, and earnings gain. We do not have statutory authority to collect additional data on the well-being of children; the statute limits the data that the Department can collect.

Comment: One commenter requested that we make the new data file layouts and caseload reduction forms available as quickly as possible due to the reprogramming needs of our State reporting. The commenter further requested that, following the sorting of participation reports, we give States a spreadsheet showing which participants did not meet the participation rates so that they can better manage participation and address particular areas of need.

Response: We already have made the data file layouts and caseload reduction credit forms, based on the interim final rule, available to the States in a timely manner. We will also make available to States any changes to these forms based on the final rule as quickly as possible. We have in the past made available and will continue to make available in the future a file showing on a case-by-case basis which families are counted as participating and which ones are not, upon request from a State.

Comment: One commenter noted that the adult work participation activities fields in Section 1 of the TANF Data Report did not have enough significant digits to determine whether someone meets the work participation requirements. The commenter wrote, ''If a person participates for 1 or 2 hours a month in an activity, the field for that activity will contain average weekly hours of 0. Those 1 or 2 monthly hours, in combination with other countable activities may result in successful participation. For example, 2 monthly hours in Work Experience plus 83 monthly hours in Unsubsidized Employment result in 85 monthly hours, or 19.6 total average weekly hours. That rounds to 20 average weekly hours. That is successful participation for a single parent with a child less than age 6. This case should be in the numerator and denominator of the overall work participation rate. However, under current reporting protocol, this case is not included in the numerator because the sum of the individual activities is only 19.''

Response: If we use more significant digits to collect the data, there would be no need to round the final result to the nearest whole number. The commenter is using the 4.33 weeks per month. The 2 hours converts to 0.4618 hours per week and the 83 hours converts to 19.1686 hours per week. If we had collected the data with two digits after the decimal place, the State would have reported 0.46 and 19.17 hours per week. The sum would be 19.63 hours per week, which is less than the 20 hours per week required. Requiring States to report the average hours per week of participation with more digits would increase reporting burden and not provide us with an additional benefit.

Section 265.3(d) SSP–MOE Data Report

We received no comments on this subsection of the regulation.

Section 265.4 When are quarterly reports due?

We received no comments on this section, so we have made no changes to the provision in the final rule.

Section 265.7 How will we determine if the State is meeting the quarterly reporting requirements?

Although the interim final rule did not include this section of the TANF regulations, we have added it to this final rule in order to respond to requests we received as part of the comment period to clarify the period of time during which States may revise work participation and caseload data.

The original TANF regulations at § 265.7(b) defined the ''complete and accurate'' standard for reporting disaggregated data for the TANF Data Report. In describing this standard in the preamble to that April 12, 1999 final rule, we recognized the necessity for States to revise their quarterly data submissions occasionally. In practice, a number of States submit revised data after each quarterly submittal up to the due date for the final data submittal for the fourth quarter data for a fiscal year, i.e., December 31. We have decided to amend these final DRA regulations to recognize this practice. We are taking this action for two reasons. First, we want States to provide us with complete and accurate data and we recognize that States often receive data from a variety of sources that require correction of submitted quarterly data. Second, we define a ''work-eligible individual'' under rule at § 261.2(n)(iii) to exclude at State option a recipient of Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI). States have informed us that the SSI/SSDI application approval process is lengthy. We have advised States that they can remove retroactively work-eligible individuals that they included in the quarterly data submittal for a fiscal year who subsequently are approved for SSI or SSDI, so long as the data correction occurs by the end of the reporting for the fiscal year, i.e., December 31.

Section 265.8 Under what circumstances will we take action to impose a reporting penalty for failure to submit quarterly and annual reports?

We received no comments on this section, so we have made no changes to the provision in the final rule.

VIII. Paperwork Reduction Act of 1995

This final rule contains information collection requirements that have been submitted to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995. Under this Act, no persons are required to respond to a collection of information unless it displays a valid OMB control number. If you have any comments on these information collection requirements, please submit them to OMB within 30 days. The address is: Office of Management and Budget, Paperwork Reduction Project, 725 17th Street, NW., Washington, DC 20503, Attn: ACF/HHS Desk officer.

This final rule incorporates our response to comments regarding the reporting burden that we received in response to the interim final rule and Paperwork Notice we published on June 29, 2006. The rule requires States to submit a TANF Data Report, SSP–MOE Data Report, Work Verification Plan, and, if a State wants to request a caseload reduction credit, a Caseload Reduction Report. In addition, States must provide documentation in support of the caseload reduction credit, work verification, and the reasonable cause/corrective compliance documentation processes.

We considered comments by the public on these collections of information in:

- Evaluating whether the collections are necessary for the proper performance of our functions, including

whether the information will have practical utility;

- Evaluating the accuracy of our estimate of the burden of the collections of information, including the validity of methodology and assumptions used, and the frequency of collection;
- Enhancing the quality, usefulness, and clarity of the information to be collected; and
- Minimizing the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technology, e.g., the electronic submission of responses.

We received only two comments from one individual specifically addressing the hour burden stated in the interim final rule. The commenter believed that we understated the burden associated with these new data reporting requirements, especially with respect to work verification requirements. In calculating the additional burden associated with the preparation and submission of State data verification procedures, we considered that States already had procedures in place to comport with the complete and accurate requirements under § 265.7 of the regulations.

The commenter also thought that we were requiring an unnecessary paper burden when electronic reporting would suffice. The commenter stated that § 261.61(a) of the interim final rule would, for example, require for 50 job search participants the copying and filing of 50 separate daily attendance sheets into individual case files, while a central or electronic file would meet the purpose of documenting attendance. We did not intend to preclude the use of a central or electronic file. States may use these kinds of files as long as they are available for the single audit and other reviews. Our burden estimates in the interim final rule took this into consideration.

In addition to considering the comments, we also made some changes to the TANF Data Report based on the need to implement the deeming of core hours in the final rule. As discussed in § 265.3, we are adding only two new data elements. Some burden hours will be required for programming of the State systems, but actual additional reporting burden hours should be minimal. In addition, total burden will be slightly offset by elimination of two data elements related to waivers. We estimate that the net additional burden averaged out over a period of a year will result in a net increase of eight hour per quarter per respondent for each of the two data reports. We show the adjustment in the following table.

The estimated burden hours for these information collections are:

Instrument or requirement	Number of respondents	Yearly submittals	Average burden hours per response	Final rule total annual burden hours	Interim rule total annual burden hours
Preparation and Submission of Data Verification Procedures—§§ 261.60—261.63	54	1	640	34,560	34,560
Caseload Reduction Documentation Process, ACF–202—§§ 262.4, 262.6, & 262.7; § 261.51	54	1	120	6,480	6,480
Reasonable Cause/Corrective Compliance Documentation Process—§§ 262.4, 262.6, & 262.7; § 261.51	54	2	240	25,920	25,920
TANF Data Report—Part 265	54	4	2,201	475,416	473,688
SSP–MOE Data Report—Part 265	29	4	714	82,824	82,824

Estimated total burden hours: 625,200.

Copies of an information collection may be obtained by e-mailing the ACF Reports Clearance Officer at *robert.sargis@acf.hhs.gov* or by writing to the Administration for Children and Families, Office of Administration, Office of Information Services, 370 L'Enfant Promenade, SW., Washington, DC 20447, Attn: ACF Reports Clearance Officer. All requests should be identified by the title of the information collection.

IX. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 605(b)) requires the Federal government to anticipate and reduce the impact of rules and paperwork requirements on small businesses and other small entities. Small entities are defined in the Act to include small businesses, small non-profit organizations, and small governmental entities. This rule will affect primarily the 50 States, the District of Columbia, and certain Territories. Therefore, the Secretary certifies that this final rule will not have a significant impact on small entities.

X. Regulatory Impact Analysis

Executive Order 12866 requires that regulations be reviewed to ensure that they are consistent with the priorities and principles set forth in the Executive Order. The Department has determined that this final rule is consistent with these priorities and principles. These regulations primarily implement statutory changes to TANF included in the Deficit Reduction Act of 2005.

XI. Unfunded Mandates Reform Act of 1995

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year.

If an agency must prepare a budgetary impact statement, section 205 requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule consistent with the statutory requirements. Section 203 requires a plan for informing and advising any small government that may be significantly or uniquely impacted.

The Department has determined that this final rule, in implementing the new statutory requirements, would not impose a mandate that will result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of more than $100 million in any one year. The DRA maintains the basic funding structure and flexibility of the TANF program. For the next five years, the TANF block grant provides States with $16.5 billion in Federal funds and requires States to expend around $11 billion a year in State Maintenance of Effort (MOE) funds. Along with available, unobligated TANF balances, we believe States have adequate resources to achieve the DRA requirements. Fixed funding for States is based on welfare spending at the time of historic high caseloads, which have been reduced by half. States retain wide latitude to design their programs, to establish

eligibility criteria, benefit levels and the type of services and benefits to provide to TANF clients.

The Department estimates that between FYs 2008 and 2012, States will incur penalties of $62 million due to failure to meet work requirements. Our estimate assumes that most States will meet the work participation rates through a renewed focus on work and internal control systems. We do not anticipate assessing penalties under new requirements until FY 2009. States may also claim reasonable cause or enter into a corrective compliance process to eliminate or reduce the penalty amount. We estimate issuing penalties amounting to $0 in FY 2008, $20 million in FY 2009, $19 million in FY 2010, $19 million in FY 2011, and $4 million in FY 2012. Accordingly, we have not prepared a budgetary impact statement or prepared a plan for informing impacted small governments.

XII. Congressional Review

This regulation is not a major rule as defined in 5 U.S.C. Chapter 8.

XIII. Assessment of Federal Regulations and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may negatively affect family well being. The Department has conducted this assessment and concluded that these final rules will not have a negative impact on family well being. This final rule promotes activities leading to work and self-sufficiency for low-income families and will thus have a positive impact on family well being.

XIV. Executive Order 13132

Executive Order 13132, Federalism, requires that Federal agencies consult with State and local government officials in the development of regulatory policies with federalism implications. Consistent with Executive Order 13132, we specifically solicited comment from State and local government officials in the interim final rule. In addition, in concert with the National Governors Association (NGA), the American Public Human Services Association (APHSA), the National Conference of State Legislators (NCSL), and the National Association of Counties (NACo), we held five ''listening sessions'' across the country to which State and local executive and legislative officials were invited. During the ''listening sessions,'' ACF outlined the statutory and regulatory provisions associated with the DRA and offered the opportunity for attendees to ask questions and to submit comments which were recorded and considered in the final rule.

We seriously considered all comments in developing the final rule. We considered and carefully assessed each of the options and suggestions of commenters. In the end, we adopted those suggestions that we believe promote effective programs leading to self-sufficiency, while also reducing inconsistency in work measures. At the same time, the policies reflected in the final rule provide enough flexibility to States to address the varying needs and characteristics of TANF clients, including those with disabilities. To count and verify allowable work activities, States are offered guidelines that permit different types of documentation based on the type of work activity.

List of Subjects in 45 CFR Parts 261, 262, 263, and 265

Administrative practice and procedure, Day care, Employment, Grant programs—social programs, Loan programs—social programs, Penalties, Public assistance programs, Reporting and recordkeeping requirements, Vocational education.

Dated: January 29, 2008.

Daniel C. Schneider,

Acting Assistant Secretary for Children and Families.

Approved: January 29, 2008.

Michael O. Leavitt,

Secretary of Health and Human Services.

■ For the reasons stated in the preamble, the interim final rule amending 45 CFR chapter II published on June 29, 2006, (71 FR 37454) is confirmed as final with the following changes:

PART 261—ENSURING THAT RECIPIENTS WORK

■ 1. The authority citation for part 261 continues to read as follows:

Authority: 42 U.S.C. 601, 602, 607 and 609.

■ 2. Revise § 261.2 to read as follows:

§ 261.2 What definitions apply to this part?

(a) The general TANF definitions at §§ 260.30 through 260.33 of this chapter apply to this part.

(b) *Unsubsidized employment* means full-or part-time employment in the public or private sector that is not subsidized by TANF or any other public program.

(c) *Subsidized private sector employment* means 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 an individual.

(d) *Subsidized public sector employment* means 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 an individual.

(e) *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, knowledge, and work habits necessary to obtain employment. The purpose of work experience is to improve the employability of those who cannot find unsubsidized full-time employment. This activity must be supervised by an employer, work site sponsor, or other responsible party on an ongoing basis no less frequently than once in each day in which the individual is scheduled to participate.

(f) *On-the-job training* means 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 the full and adequate performance of the job.

(g) *Job search and job readiness assistance* means 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. Such treatment or therapy must be determined to be necessary and documented by a qualified medical, substance abuse, 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 once each day in which the individual is scheduled to participate.

(h) *Community service programs* mean structured programs and embedded activities in which individuals 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 individuals not otherwise able to obtain

unsubsidized full-time employment, and must be supervised on an ongoing basis no less frequently than once each day in which the individual is scheduled to participate. 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.

(i) *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. Vocational educational training must be supervised on an ongoing basis no less frequently than once each day in which the individual is scheduled to participate.

(j) *Job skills training directly related to employment* means 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 once each day in which the individual is scheduled to participate.

(k) *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* means 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 once each day in which the work-eligible individual is scheduled to participate.

(l) *Satisfactory attendance at 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* means 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 work-eligible individual who has not completed secondary school or received such a certificate. This activity must be supervised on an ongoing basis no less frequently than once each day in which the individual is scheduled to participate.

(m) *Providing child care services to an individual who is participating in a community service program* means providing child care to enable another TANF or SSP recipient to participate in a community service program. This is an unpaid activity and must be a structured program designed to improve the employability of individuals who participate in this activity. This activity must be supervised on an ongoing basis no less frequently than once each day in which the individual is scheduled to participate.

(n)(1) *Work-eligible individual* means an adult (or minor child head-of-household) receiving assistance under TANF or a separate State program or a non-recipient parent living with a child receiving such assistance unless the parent is:

(i) A minor parent and not the head-of-household;

(ii) A non-citizen who is ineligible to receive assistance due to his or her immigration status; or

(iii) At State option on a case-by-case basis, a recipient of Supplemental Security Income (SSI) benefits or Aid to the Aged, Blind or Disabled in the Territories.

(2) The term also excludes:

(i) A parent providing care for a disabled family member living in the home, provided that there is medical documentation to support the need for the parent to remain in the home to care for the disabled family member;

(ii) At State option on a case-by-case basis, a parent who is a recipient of Social Security Disability Insurance (SSDI) benefits; and

(iii) An individual in a family receiving MOE-funded assistance under an approved Tribal TANF program, unless the State includes the Tribal family in calculating work participation rates, as permitted under § 261.25.

■ 3. Revise subpart B to part 261 to read as follows:

Subpart B—What Are the Provisions Addressing State Accountability?

Sec.

§ 261.20 How will we hold a State accountable for achieving the work objectives of TANF?

(a) Each State must meet two separate work participation rates in FY 2006 and thereafter, one—the two-parent rate based on how well it succeeds in helping work-eligible individuals in two-parent families find work activities described at § 261.30, the other—the overall rate based on how well it succeeds in finding those activities for work-eligible individuals in all the families that it serves.

(b) Each State must submit data, as specified at § 265.3 of this chapter, that allows us to measure its success in requiring work-eligible individuals to participate in work activities.

(c) If the data show that a State met both participation rates in a fiscal year, then the percentage of historic State expenditures that it must expend under TANF, pursuant to § 263.1 of this chapter, decreases from 80 percent to 75 percent for that fiscal year. This is also known as the State's TANF ''maintenance-of-effort'' (MOE) requirement.

(d) If the data show that a State did not meet a minimum work participation rate for a fiscal year, a State could be subject to a financial penalty.

(e) Before we impose a penalty, a State will have the opportunity to claim reasonable cause or enter into a corrective compliance plan, pursuant to §§ 262.5 and 262.6 of this chapter.

§ 261.21 What overall work rate must a State meet?

Each State must achieve a 50 percent minimum overall participation rate in FY 2006 and thereafter, minus any caseload reduction credit to which it is entitled as provided in subpart D of this part.

§ 261.22 How will we determine a State's overall work rate?

(a)(1) The overall participation rate for a fiscal year is the average of the State's overall participation rates for each month in the fiscal year.

(2) The rate applies to families with a work-eligible individual.

(b) We determine a State's overall participation rate for a month as follows:

(1) The number of TANF and SSP-MOE families that include a work-eligible individual who meets the requirements set forth in § 261.31 for the month (i.e., the numerator), divided by,

(2) The number of TANF and SSP–MOE families that include a work-eligible individual, minus the number of such families that are subject to a penalty for refusing to work in that month (i.e., the denominator). However, if a family with a work-eligible individual has been penalized for refusal to participate in work activities for more than three of the last 12 months, we will not exclude it from the participation rate calculation.

(3) At State option, we will include in the participation rate calculation families with a work-eligible individual that have been penalized for refusing to work no more than three of the last 12 months.

(c)(1) A State has the option of not requiring a single custodial parent caring for a child under age one to engage in work.

(2) At State option, we will disregard a family with such a parent from the participation rate calculation for a maximum of 12 months.

(d)(1) If a family receives assistance for only part of a month, we will count it as a month of participation if a work-eligible individual is engaged in work for the minimum average number of hours in each full week that the family receives assistance in that month.

(2) If a State pays benefits retroactively (i.e., for the period between application and approval of benefits), it has the option to consider the family to be receiving assistance during the period of retroactivity.

§ 261.23 What two-parent work rate must a State meet?

Each State must achieve a 90 percent minimum two-parent participation rate in FY 2006 and thereafter, minus any caseload reduction credit to which it is entitled as provided in subpart D of this part.

§ 261.24 How will we determine a State's two-parent work rate?

(a)(1) The two-parent participation rate for a fiscal year is the average of the State's two-parent participation rates for each month in the fiscal year.

(2) The rate applies to two-parent families with two work-eligible individuals. However, if one of the parents is a work-eligible individual with a disability, we will not consider the family to be a two-parent family; i.e., we will not include such a family in either the numerator or denominator of the two-parent rate.

(b) We determine a State's two-parent participation rate for the month as follows:

(1) The number of two-parent TANF and SSP–MOE families in which both parents are work-eligible individuals and together they meet the requirements set forth in § 261.32 for the month (i.e., the numerator), divided by,

(2) The number of two-parent TANF and SSP–MOE families in which both parents are work-eligible individuals during the month, minus the number of such two-parent families that are subject to a penalty for refusing to work in that month (the denominator). However, if a family with a work-eligible individual has been penalized for more than three months of the last 12 months, we will not exclude it from the participation rate calculation.

(3) At State option, we will include in the participation rate calculation families with a work-eligible individual that have been penalized for refusing to work no more than three of the last 12 months.

(c) For purposes of the calculation in paragraph (b) of this section, a two-parent family includes, at a minimum, all families with two natural or adoptive parents (of the same minor child) who are work-eligible individuals and living in the home, unless both are minors and neither is a head-of-household.

(d)(1) If the family receives assistance for only part of a month, we will count it as a month of participation if a work-eligible individual in the family (or both work-eligible individuals, if they are both required to work) is engaged in work for the minimum average number of hours in each full week that the family receives assistance in that month.

(2) If a State pays benefits retroactively (i.e., for the period between application and approval of benefits), it has the option to consider the family to be receiving assistance during the period of retroactivity.

§ 261.25 Do we count Tribal families in calculating the work participation rate?

At State option, we will include families with a work-eligible individual that are receiving assistance under an approved Tribal family assistance plan or under a Tribal work program in calculating the State's participation rates under §§ 261.22 and 261.24.

■ 4. Revise § 261.31 to read as follows:

§ 261.31 How many hours must a work-eligible individual participate for the family to count in the numerator of the overall rate?

(a) Subject to paragraph (d) of this section, a family with a work-eligible individual counts as engaged in work for a month for the overall rate if:

(1) He or she participates in work activities during the month for at least a minimum average of 30 hours per week; and

(2) At least 20 of the above hours per week come from participation in the activities listed in paragraph (b) of this section.

(b) The following nine activities count toward the first 20 hours of participation: unsubsidized employment; subsidized private-sector employment; subsidized public-sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training; and providing child care services to an individual who is participating in a community service program.

(c) Above 20 hours per week, the following three activities may also count as participation: job skills training directly related to employment; education directly related to employment; and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence.

(d)(1) We will deem a work-eligible individual who participates in a work experience or community service program for the maximum number of hours per month that a State may require by dividing the combined monthly TANF or SSP–MOE grant and food stamp allotment by the higher of the Federal or State minimum wage to have participated for an average of 20 hours per week for the month in that activity.

(2) This policy is limited to States that have adopted a Simplified Food Stamp Program option that permits a State to count the value of food stamps in determining the maximum core hours of participation permitted by the FLSA.

(3) In order for Puerto Rico, which does not have a traditional Food Stamp Program, to deem core hours, it must include the value of food assistance benefits provided through the Nutrition Assistance Program in the same manner as a State must include food stamp benefits under subsection (d)(1).

■ 5. Revise § 261.32 to read as follows:

§ 261.32 How many hours must work-eligible individuals participate for the family to count in the numerator of the two-parent rate?

(a) Subject to paragraph (d) of this section, a family with two work-eligible parents counts as engaged in work for the month for the two-parent rate if:

(1) Work-eligible parents in the family are participating in work activities for a combined average of at least 35 hours per week during the month, and

(2) At least 30 of the 35 hours per week come from participation in the activities listed in paragraph (b) of this section.

(b) The following nine activities count for the first 30 hours of participation: unsubsidized employment; subsidized private-sector employment; subsidized public-sector employment; work experience; on-the-job training; job search and job readiness assistance; community service programs; vocational educational training; and providing child care services to an individual who

is participating in a community service program.

(c) Above 30 hours per week, the following three activities may also count for participation: job skills training directly related to employment; education directly related to employment; and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence.

(d)(1) We will deem a family with two work-eligible parents in which one or both participates in a work experience or community service program for the maximum number of hours per month that a State may require by dividing the combined monthly TANF or SSP–MOE grant and food stamp allotment by the higher of the Federal or State minimum wage to have participated for an average of 30 hours per week for the month in that activity.

(2) This policy is limited to States that have adopted a Simplified Food Stamp Program option that permits a State to count the value of food stamps in determining the maximum core hours of participation permitted by the FLSA.

(3) In order for Puerto Rico, which does not have a traditional Food Stamp Program, to deem core hours, it must include the value of food assistance benefits provided through the Nutrition Assistance Program in the same manner as a State must include food stamp benefits under paragraph (d)(1) of this section.

(e)(1) Subject to paragraph (f) of this section, if the family receives federally funded child care assistance and an adult in the family does not have a disability or is not caring for a child with a disability, then the work-eligible individuals must be participating in work activities for an average of at least 55 hours per week to count as a two-parent family engaged in work for the month.

(2) At least 50 of the 55 hours per week must come from participation in the activities listed in paragraph (b) of this section.

(3) Above 50 hours per week, the three activities listed in paragraph (c) of this section may also count as participation.

(f)(1) We will deem a family with two work-eligible parents in which one or both participates in a work experience or community service program for the maximum number of hours per month that a State may require by dividing the combined monthly TANF or SSP–MOE grant and food stamp allotment by the higher of the Federal or State minimum wage to have participated for an average of 50 hours per week for the month in that activity.

(2) This policy is limited to States that have adopted a Simplified Food Stamp Program option that permits a State to count the value of food stamps in determining the maximum core hours of participation permitted by the FLSA.

(3) In order for Puerto Rico, which does not have a traditional Food Stamp Program, to deem core hours, it must include the value of food assistance benefits provided through the Nutrition Assistance Program in the same manner as a State must include food stamp benefits under paragraph (d)(1) of this section.

■ 6. Revise § 261.34 to read as follows:

§ 261.34 Are there any limitations in counting job search and job readiness assistance toward the participation rates?

Yes. There are four limitations concerning job search and job readiness assistance.

(a) Except as provided in paragraph (b) of this section, an individual's participation in job search and job readiness assistance counts for a maximum of six weeks in the preceding 12-month period.

(b) If the State's total unemployment rate is at least 50 percent greater than the United States' total unemployment rate or if the State meets the definition of a ''needy State'', specified at § 260.30 of this chapter, then an individual's participation in job search and job readiness assistance counts for a maximum of 12 weeks in that 12-month period.

(c) For purposes of paragraphs (a) and (b) of this section, a week equals 20 hours for a work-eligible individual who is a single custodial parent with a child under six years of age and equals 30 hours for all other work-eligible individuals.

(d) An individual's participation in job search and job readiness assistance does not count for a week that immediately follows four consecutive weeks in which the State reports any hours of such participation in the preceding 12-month period. For purposes of this paragraph a week means seven consecutive days.

(e) Not more than once for any individual in the preceding 12-month period, a State may count three or four days of job search and job readiness assistance during a week as a full week of participation. We calculate a full week of participation based on the average daily hours of participation for three or four days and will prorate participation at that level for the remaining one or two days to determine the total hours for a five-day week. Any prorated hours of participation must be included in the calculation of total hours permitted under the limitation in this section.

■ 7. Revise subpart D to part 261 to read as follows:

Subpart D—How Will We Determine Caseload Reduction Credit for Minimum Participation Rates?

Sec.

§ 261.40 Is there a way for a State to reduce the work participation rates?

(a)(1) If the average monthly number of cases receiving assistance, including assistance under a separate State program (as provided at § 261.42(b)), in a State in the preceding fiscal year was lower than the average monthly number of cases that received assistance, including assistance under a separate State program in that State in FY 2005, the minimum overall participation rate the State must meet for the fiscal year (as provided at § 261.21) decreases by the number of percentage points the prior-year caseload fell in comparison to the FY 2005 caseload.

(2) The minimum two-parent participation rate the State must meet for the fiscal year (as provided at § 261.23) decreases, at State option, by either:

(i) The number of percentage points the prior-year two-parent caseload, including two-parent cases receiving assistance under a separate State program (as provided at § 261.42(b)), fell in comparison to the FY 2005 two-parent caseload, including two-parent cases receiving assistance under a separate State program; or

(ii) The number of percentage points the prior-year overall caseload, including assistance under a separate State program (as provided at § 261.42(b)), fell in comparison to the FY 2005 overall caseload, including cases receiving assistance under a separate State program.

(3) For the credit calculation, we will refer to the fiscal year that precedes the fiscal year to which the credit applies as the ''comparison year.''

(b)(1) The calculations in paragraph (a) of this section must disregard caseload reductions due to requirements of Federal law and to changes that a

State has made in its eligibility criteria in comparison to its criteria in effect in FY 2005.

(2) At State option, the calculation may offset the disregard of caseload reductions in paragraph (b)(1) of this section by changes in eligibility criteria that increase caseloads.

(c)(1) To establish the caseload base for FY 2005 and to determine the comparison-year caseload, we will use the combined TANF and Separate State Program caseload figures reported on the Form ACF–199, TANF Data Report, and Form ACF–209, SSP–MOE Data Report, respectively.

(2) To qualify for a caseload reduction, a State must have reported monthly caseload information, including cases in separate State programs, for FY 2005 and the comparison year for cases receiving assistance as defined at § 261.43.

(d)(1) A State may correct erroneous data or submit accurate data to adjust program data or to include unduplicated cases within the fiscal year.

(2) We will adjust both the FY 2005 baseline and the comparison-year caseload information, as appropriate, based on these State submissions.

(e) We refer to the number of percentage points by which a caseload falls, disregarding the cases described in paragraph (b) of this section, as a caseload reduction credit.

§ 261.41 How will we determine the caseload reduction credit?

(a)(1) We will determine the overall and two-parent caseload reduction credits that apply to each State based on the information and estimates reported to us by the State on eligibility policy changes using application denials, case closures, or other administrative data sources and analyses.

(2) We will accept the information and estimates provided by a State, unless they are implausible based on the criteria listed in paragraph (d) of this section.

(3) We may conduct on-site reviews and inspect administrative records on applications, case closures, or other administrative data sources to validate the accuracy of the State estimates.

(b) In order to receive a caseload reduction credit, a State must submit a Caseload Reduction Report to us containing the following information:

(1) A listing of, and implementation dates for, all State and Federal eligibility changes, as defined at § 261.42, made by the State since the beginning of FY 2006;

(2) A numerical estimate of the positive or negative average monthly impact on the comparison-year caseload of each eligibility change (based, as appropriate, on application denials, case closures or other analyses);

(3) An overall estimate of the total net positive or negative impact on the applicable caseload as a result of all such eligibility changes;

(4) An estimate of the State's caseload reduction credit;

(5) A description of the methodology and the supporting data that a State used to calculate its caseload reduction estimates; and

(6) A certification that it has provided the public an appropriate opportunity to comment on the estimates and methodology, considered their comments, and incorporated all net reductions resulting from Federal and State eligibility changes.

(c)(1) A State requesting a caseload reduction credit for the overall participation rate must base its estimates of the impact of eligibility changes on decreases in its comparison-year overall caseload compared to the FY 2005 overall caseload baseline established in accordance with § 261.40(d).

(2) A State requesting a caseload reduction credit for its two-parent rate must base its estimates of the impact of eligibility changes on decreases in either:

(i) Its two-parent caseload compared to the FY 2005 base-year two-parent caseload baseline established in accordance with § 261.40(d); or

(ii) Its overall caseload compared to the FY 2005 base-year overall caseload baseline established in accordance with § 261.40(d).

(d)(1) For each State, we will assess the adequacy of information and estimates using the following criteria: Its methodology; Its estimates of impact compared to other States; the quality of its data; and the completeness and adequacy of its documentation.

(2) If we request additional information to develop or validate estimates, the State may negotiate an appropriate deadline or provide the information within 30 days of the date of our request.

(3) The State must provide sufficient data to document the information submitted under paragraph (b) of this section.

(e) We will not calculate a caseload reduction credit unless the State reports case-record data on individuals and families served by any separate State program, as required under § 265.3(d) of this chapter.

(f) A State may only apply to the participation rate a caseload reduction credit that we have calculated. If a State disagrees with the caseload reduction credit, it may appeal the decision as an adverse action in accordance with § 262.7 of this chapter.

§ 261.42 Which reductions count in determining the caseload reduction credit?

(a)(1) A State's caseload reduction credit must not include caseload decreases due to Federal requirements or State changes in eligibility rules since FY 2005 that directly affect a family's eligibility for assistance. These include, but are not limited to, more stringent income and resource limitations, time limits, full family sanctions, and other new requirements that deny families assistance when an individual does not comply with work requirements, cooperate with child support, or fulfill other behavioral requirements.

(2) At State option, a State's caseload reduction credit may include caseload increases due to Federal requirements or State changes in eligibility rules since FY 2005 if used to offset caseload decreases in paragraph (a)(1) of this section.

(3) A State may not receive a caseload reduction credit that exceeds the actual caseload decline between FY 2005 and the comparison year.

(4) A State may count the reductions attributable to enforcement mechanisms or procedural requirements that are used to enforce existing eligibility criteria (e.g., fingerprinting or other verification techniques) to the extent that such mechanisms or requirements identify or deter families otherwise ineligible under existing rules.

(b) A State must include cases receiving assistance in separate State programs as part of its FY 2005 caseload and comparison-year caseload. However, if a State provides documentation that separate State program cases overlap with or duplicate cases in the TANF caseload, we will exclude them from the caseload count.

§ 261.43 What is the definition of a ''case receiving assistance'' in calculating the caseload reduction credit?

(a) The caseload reduction credit is based on decreases in caseloads receiving TANF- or SSP-MOE-funded assistance (other than those excluded pursuant to § 261.42).

(b)(1) A State that is investing State MOE funds in excess of the required 80 percent or 75 percent basic MOE amount need only include the pro rata share of caseloads receiving assistance that is required to meet basic MOE requirements.

(2) For purposes of paragraph (b)(1) of this section, a State may exclude from the overall caseload reduction credit calculation the number of cases funded

with excess MOE. This number is calculated by dividing annual excess MOE expenditures on assistance by the average monthly expenditures on assistance per case for the fiscal year,

(i) Where annual excess MOE expenditures on assistance equal total annual MOE expenditures minus the percentage of historic State expenditures specified in paragraph (v) of this section, multiplied by the percentage that annual expenditures on assistance (both Federal and State) represent of all annual expenditures, and

(ii) Where the average monthly assistance expenditures per case for the fiscal year equal the sum of annual TANF and SSP–MOE assistance expenditures (both Federal and State) divided by the average monthly sum of TANF and SSP–MOE caseloads for the fiscal year.

(iii) If the excess MOE calculation is for a separate two-parent caseload reduction credit, we multiply the number of cases funded with excess MOE by the average monthly percentage of two-parent cases in the State's total (TANF plus SSP–MOE) average monthly caseload.

(iv) All financial data must agree with data reported on the TANF Financial Report (form ACF–196) and all caseload data must agree with data reported on the TANF Data and SSP–MOE Data Reports (forms ACF–199 and ACF–209).

(v) The State must use 80 percent of historic expenditures when calculating excess MOE; however if it has met the work participation requirements for the year, it may use 75 percent of historic expenditures.

§ 261.44 When must a State report the required data on the caseload reduction credit?

A State must report the necessary documentation on caseload reductions for the preceding fiscal year by December 31.

■ 8. Revise subpart F to part 261 to read as follows:

Subpart F—How Do We Ensure the Accuracy of Work Participation Information?

Sec.

§ 261.60 What hours of participation may a State report for a work-eligible individual?

(a) A State must report the actual hours that an individual participates in an activity, subject to the qualifications in paragraphs (b) and (c) of this section and § 261.61(c). It is not sufficient to report the hours an individual is scheduled to participate in an activity.

(b) For the purposes of calculating the work participation rates for a month, actual hours may include the hours for which an individual was paid, including paid holidays and sick leave. For participation in unpaid work activities, it may include excused absences for hours missed due to a maximum of 10 holidays in the preceding 12-month period and up to 80 hours of additional excused absences in the preceding 12-month period, no more than 16 of which may occur in a month, for each work-eligible individual. Each State must designate the days that it wishes to count as holidays for those in unpaid activities in its Work Verification Plan. It may designate no more than 10 such days. In order to count an excused absence as actual hours of participation, the individual must have been scheduled to participate in a countable work activity for the period of the absence that the State reports as participation. A State must describe its excused absence policies and definitions as part of its Work Verification Plan, specified at § 261.62.

(c) For unsubsidized employment, subsidized employment, and OJT, a State may report projected actual hours of employment participation for up to six months based on current, documented actual hours of work. Any time a State receives information that the client's actual hours of work have changed, or no later than the end of any six-month period, the State must re-verify the client's current actual average hours of work, and may report these projected actual hours of participation for another six-month period.

(d) A State may not count more hours toward the participation rate for a self-employed individual than the number derived by dividing the individual's self-employment income (gross income less business expenses) by the Federal minimum wage. A State may propose an alternative method of determining self-employment hours as part of its Work Verification Plan.

(e) A State may count supervised homework time and up to one hour of unsupervised homework time for each hour of class time. Total homework time counted for participation cannot exceed the hours required or advised by a particular educational program.

§ 261.61 How must a State document a work-eligible individual's hours of participation?

(a) A State must support each individual's hours of participation through documentation in the case file. In accordance with § 261.62, a State must describe in its Work Verification Plan the documentation it uses to verify hours of participation in each activity.

(b) For an employed individual, the documentation may consist of, but is not limited to pay stubs, employer reports, or time and attendance records substantiating hours of participation. A State may presume that an employed individual participated for the total number of hours for which that individual was paid.

(c) The State must document all hours of participation in an activity; however, if a State is reporting projected hours of actual employment in accordance with § 261.60(c), it need only document the hours on which it bases the projection.

(d) For an individual who is self-employed, the documentation must comport with standards set forth in the State's approved Work Verification Plan. Self-reporting by a participant without additional verification is not sufficient documentation.

(e) For an individual who is not employed, the documentation for substantiating hours of participation may consist of, but is not limited to, time sheets, service provider attendance records, or school attendance records. For homework time, the State must also document the homework or study expectations of the educational program.

§ 261.62 What must a State do to verify the accuracy of its work participation information?

(a) To ensure accuracy in the reporting of work activities by work-eligible individuals on the TANF Data Report and, if applicable, the SSP–MOE Data Report, each State must:

(1) Establish and employ procedures for determining whether its work activities may count for participation rate purposes;

(2) Establish and employ procedures for determining how to count and verify reported hours of work;

(3) Establish and employ procedures for identifying who is a work-eligible individual;

(4) Establish and employ internal controls to ensure compliance with the procedures; and

(5) Submit to the Secretary for approval the State's Work Verification Plan in accordance with paragraph (b) of this section.

(b) A State's Work Verification Plan must include the following:

(1) For each countable work activity:

(i) A description demonstrating how the activity meets the relevant definition at § 261.2;

(ii) A description of how the State determines the number of countable hours of participation; and

(iii) A description of the documentation it uses to monitor participation and ensure that the actual hours of participation are reported;

(2) A description of the State's procedures for identifying all work-eligible individuals, as defined at § 261.2;

(3) A description of how the State ensures that, for each work-eligible individual, it:

(i) Accurately inputs data into the State's automated data processing system;

(ii) Properly tracks the hours though the automated data processing system; and

(iii) Accurately reports the hours to the Department;

(4) A description of the procedures for ensuring it does not transmit to the Department a work-eligible individual's hours of participation in an activity that does not meet a Federal definition of a countable work activity; and

(5) A description of the internal controls that the State has implemented to ensure a consistent measurement of the work participation rates, including the quality assurance processes and sampling specifications it uses to monitor adherence to the established work verification procedures by State staff, local staff, and contractors.

(c) We will review a State's Work Verification Plan for completeness and approve it if we believe that it will result in accurate reporting of work participation information.

§ 261.63 When is a State's Work Verification Plan Due?

(a) Each State must submit its interim Work Verification Plan for validating work activities reported in the TANF Data Report and, if applicable, the SSP–MOE Data Report no later than September 30, 2006.

(b) If HHS requires changes, a State must submit them within 60 days of receipt of our notice and include all necessary changes as part of a final approved Work Verification Plan no later than September 30, 2007.

(c) If a State modifies its verification procedures for TANF or SSP–MOE work activities or its internal controls for ensuring a consistent measurement of the work participation rate, the State must submit for approval an amended Work Verification Plan by the end of the quarter in which the State modifies the procedures or internal controls.

§ 261.64 How will we determine whether a State's work verification procedures ensure an accurate work participation measurement?

(a) We will determine that a State has met the requirement to establish work verification procedures if it submitted an interim Work Verification Plan by September 30, 2006 and a complete Work Verification Plan that we approved by September 30, 2007.

(b) A ''complete'' Work Verification Plan means that:

(1) The plan includes all the information required by § 261.62(b); and

(2) The State certifies that the plan includes all the information required by § 261.62(b) and that it accurately reflects the procedures under which the State is operating.

(c) For conduct occurring after October 1, 2007, we will use the single audit under OMB Circular A–133 in conjunction with other reviews, audits, and data sources, as appropriate, to assess the accuracy of the data filed by States for use in calculating the work participation rates.

§ 261.65 Under what circumstances will we impose a work verification penalty?

(a) We will take action to impose a penalty under § 262.1(a)(15) of this chapter if:

(1) The requirements under §§ 261.64(a) and (b) have not been met; or

(2) We determine that the State has not maintained adequate documentation, verification, or internal control procedures to ensure the accuracy of the data used in calculating the work participation rates.

(b) If a State fails to submit an interim or complete Work Verification Plan by the due dates in § 261.64(a), we will reduce the SFAG payable for the immediately succeeding fiscal year by five percent of the adjusted SFAG.

(c) If a State fails to maintain adequate internal controls to ensure a consistent measurement of work participation, we will reduce the adjusted SFAG by the following percentages for a fiscal year:

(1) One percent for the first year;

(2) Two percent for second year;

(3) Three percent for the third year;

(4) Four percent for the fourth year; and,

(5) Five percent for the fifth and subsequent years.

(d) If a State complies with the requirements in this subpart for two consecutive years, then any penalty imposed for subsequent failures will begin anew, as described in paragraph (c) of this section.

(e) If we take action to impose a penalty under §§ 261.64(b) or (c), we will reduce the SFAG payable for the immediately succeeding fiscal year.

PART 263—EXPENDITURES OF STATE AND FEDERAL TANF FUNDS

■ 9. The authority citation for part 263 continues to read as follows:

Authority: 42 U.S.C. 604, 607, 609, and 862a.

■ 10. Revise § 263.2 to read as follows:

§ 263.2 What kinds of State expenditures count toward meeting a State's basic MOE expenditure requirement?

(a) Expenditures of State funds in TANF or separate State programs may count if they are made for the following types of benefits or services:

(1) Cash assistance, including the State's share of the assigned child support collection that is distributed to the family, and disregarded in determining eligibility for, and amount of the TANF assistance payment;

(2) Child care assistance (see § 263.3);

(3) Education activities designed to increase self-sufficiency, job training, and work (see § 263.4);

(4) Any other use of funds allowable under section 404(a)(1) of the Act including:

(i) Nonmedical treatment services for alcohol and drug abuse and some medical treatment services (provided that the State has not commingled its MOE funds with Federal TANF funds to pay for the services), if consistent with the goals at § 260.20 of this chapter; and

(ii) Pro-family healthy marriage and responsible fatherhood activities enumerated in part IV–A of the Act, sections 403(a)(2)(A)(iii) and 403(a)(2)(C)(ii) that are consistent with the goals at §§ 260.20(c) or (d) of this chapter, but do not constitute ''assistance'' as defined in § 260.31(a) of this chapter; and

(5)(i) Administrative costs for activities listed in paragraphs (a)(1) through (a)(4) of this section, not to exceed 15 percent of the total amount of countable expenditures for the fiscal year.

(ii) Costs for information technology and computerization needed for tracking or monitoring required by or under part IV–A of the Act do not count towards the limit in paragraph (5)(i) of this section, even if they fall within the definition of ''administrative costs.''

(A) This exclusion covers the costs for salaries and benefits of staff who develop, maintain, support, or operate the portions of information technology or computer systems used for tracking and monitoring.

(B) It also covers the costs of contracts for the development, maintenance, support, or operation of those portions of information technology or computer systems used for tracking or monitoring.

(b) With the exception of paragraph (a)(4)(ii) of this section, the benefits or services listed under paragraph (a) of this section count only if they have been provided to or on behalf of eligible families. An ''eligible family'' as defined by the State, must:

(1) Be comprised of citizens or non-citizens who:

(i) Are eligible for TANF assistance;

(ii) Would be eligible for TANF assistance, but for the time limit on the receipt of federally funded assistance; or

(iii) Are lawfully present in the United States and would be eligible for assistance, but for the application of title IV of PRWORA;

(2) Include a child living with a custodial parent or other adult caretaker relative (or consist of a pregnant individual); and

(3) Be financially eligible according to the appropriate income and resource (when applicable) standards established by the State and contained in its TANF plan.

(c) Benefits or services listed under paragraph (a) of this section provided to a family that meets the criteria under paragraphs (b)(1) through (b)(3) of this section, but who became ineligible solely due to the time limitation given under § 264.1 of this chapter, may also count.

(d) Expenditures for the benefits or services listed under paragraph (a) of this section count whether or not the benefit or service meets the definition of assistance under § 260.31 of this chapter. Further, families that meet the criteria in paragraphs (b)(2) and (b)(3) of this section are considered to be eligible for TANF assistance for the purposes of paragraph (b)(1)(i) of this section.

(e) Expenditures for benefits or services listed under paragraph (a) of this section may include allowable costs borne by others in the State (e.g., local government), including cash donations from non-Federal third parties (e.g., a non-profit organization) and the value of third party in-kind contributions if:

(1) The expenditure is verifiable and meets all applicable requirements in 45 CFR 92.3 and 92.24;

(2) There is an agreement between the State and the other party allowing the State to count the expenditure toward its MOE requirement; and,

(3) The State counts a cash donation only when it is actually spent.

(f)(1) The expenditures for benefits or services in State-funded programs listed under paragraph (a) of this section count only if they also meet the requirements of § 263.5.

(2) Expenditures that fall within the prohibitions in § 263.6 do not count.

(g) State funds used to meet the Healthy Marriage Promotion and Responsible Fatherhood Grant match requirement may count to meet the MOE requirement in § 263.1, provided the expenditure also meets all the other MOE requirements in this subpart.

■ 11. Amend § 263.5 by revising paragraph (b) to read as follows:

§ 263.5 When do expenditures in State-funded programs count?

* * * * *

(b) If a current State or local program also operated in FY 1995, and expenditures in this program would not have been previously authorized and allowable under the former AFDC, JOBS, Emergency Assistance, Child Care for AFDC recipients, At-Risk Child Care, or Transitional Child care programs, then countable expenditures are limited to:

(1) The amount by which total current fiscal year expenditures for or on behalf of eligible families, as defined in § 263.2(b), exceed total State expenditures in this program during FY 1995; or, if applicable,

(2) The amount by which total current fiscal year expenditures for pro-family activities under § 263.2(a)(4)(ii) exceed total State expenditures in this program during FY 1995.

PART 265—DATA COLLECTION AND REPORTING REQUIREMENTS

■ 12. The authority citation for part 265 continues to read as follows:

Authority: 42 U.S.C. 603, 605, 607, 609, 611, and 613.

■ 13. Amend § 265.7 by revising paragraph (b) to read as follows:

§ 265.7 How will we determine if the State is meeting the quarterly reporting requirements?

* * * * *

(b) For a disaggregated data report, ''a complete and accurate report'' means that:

(1) The reported data accurately reflect information available to the State in case records, financial records, and automated data systems, and include correction of the quarterly data by the end of the fiscal year reporting period;

(2) The data are free from computational errors and are internally consistent (e.g., items that should add to totals do so);

(3) The State reports data for all required elements (i.e., no data are missing);

(4)(i) The State provides data on all families; or

(ii) If the State opts to use sampling, the State reports data on all families selected in a sample that meets the specification and procedures in the TANF Sampling Manual (except for families listed in error); and

(5) Where estimates are necessary (e.g., some types of assistance may require cost estimates), the State uses reasonable methods to develop these estimates.

* * * * *

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