NLWJC - Kagan
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Welfare-Work Regulation [1]

WR-work regulation

Cynthia A. Rice 03/23/99 01:01:12 PM

Record Type: Non-Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

cc: Andrea Kane/OPD/EOP, Karin Kullman/OPD/EOP
Subject: TANF Rule

Just a point of clarification on what I said this morning -- OMB assures me that we can send the rule to the federal register and still control timing of when it's on public view and when it's published. The reason to send it to the register is so they could get it all formatted (this is a very long rule) and all ready to go when we say go. We may still want to hold it, but we have more options than I realized.

Re the governors -- I take it you wouldn't want to invite them to a radio address but would want to brief key ones so they could respond intelligently? For a taped Friday radio address, does that we brief selectively on Friday and then do a full roll-out on Monday?

WR-Work regulat

DRAFT

260.31 What does the term "assistance" mean?

(a) (I) The term "assistance" includes cash, [~~subsidies~~] payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food clothing, shelter, utilities, household good, personal care items, and general incidental expenses).

(ii) It includes such benefits ~~even when they are~~ provided in the form of payments by a TANF agency, or other ~~public~~ agency ~~on its behalf~~ for a TANF agency, to individual recipients as part of ~~and conditioned on~~ their participation in a work activity as defined in Sec 407(a) of TANF ~~work experience or community service activities~~.

(b) It excludes:

(1) ~~One-time,~~ short-term benefits (such as payments for rent deposits or appliance repairs) that:

(i) ~~(I)~~ Are designed to deal with a specific crisis situation or episode of need; and

(ii) Are not intended to meet ongoing or recurring needs;

(2) Work subsidies or other payments ~~paid~~ to employers to help cover the costs of employee wages, benefits, supervision, ~~and~~ training, or services to help an individual succeed in employment;

(3) ~~Benefits designed to defray the costs of an individual recipient for work, education, training and related activities (~~ Supports for working families, (such as transportation, ~~and~~ child care~~)~~, and education and training related to job retention or advancement);

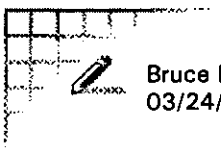
(4) Earned income tax credits; (in subsidized or unsubsidized employment

(5) Contributions to, and distributions from, Individual Development Accounts;

(6) Services such as counseling, case management, peer support, child care information and referral, transitional services and other employment-related services that do not provide basic income support;

(7) Transportation benefits provided under an Access to Jobs or Reverse Commute project, pursuant to section 404 (k) of the Act, to an individual who is not otherwise receiving assistance.

WR-welfare regulation



Bruce N. Reed
03/24/99 11:02:49 AM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP, Andrea Kane/OPD/EOP, Karin Kullman/OPD/EOP
Subject: Re: TANF Rule

Yes, brief key ones Friday (govs and Hill), do the rest Monday. By the way, Donna called this morning to say that our welfare team has done an absolutely spectacular job on this rule. We're going to let you handle all relations with HHS from now on.

WR-work regulati-

SCHEDULING PROPOSAL
3/23/99

TODAY'S DATE:

_____ACCEPT _____REGRET _____PENDING

TO: Stephanie Streett
Assistant to the President
Director of Presidential Scheduling

FROM: Bruce Reed
Assistant to the President for Domestic Policy and
Director of the Domestic Policy Council

REQUEST: Radio Address to Announce the Release of the Final Rule Implementing Welfare Reform

PURPOSE: To celebrate the success to date of welfare reform, and to highlight the welfare rule's provisions to help families go to work and support low income working families. The President could also use the opportunity to promote his welfare reform budget initiatives and possibly announce grants.

BACKGROUND: During his first four years in office, the President granted waivers to 43 states to reform welfare and in August 1996 signed into law the Temporary Assistance for Needy Families (TANF) program which requires work in exchange for time-limited assistance. Since the President took office, the welfare rolls have dropped by 44 percent and the number of welfare recipients working has tripled.

To ensure the millions of people who have left the welfare rolls stay in the workforce, these final welfare regulations provide states with additional flexibility to use TANF funds to provide supports for working families such as child care, transportation, and job retention services. At the same time, the rules hold states accountable for ensuring at least half of all recipients are working by the year 2002, federal assistance is limited to five years, and required state spending levels are maintained so adequate funds are invested in

families moving from welfare to work.

PREVIOUS PARTICIPATION: On November 17, 1997 the President released the proposed TANF rule at an event at Cessna in Wichita, KS.

DATE AND TIME: April 9, 1999 Radio Address Taping

BRIEFING TIME: 15 minutes

DURATION: 30 minutes

LOCATION: The White House

PARTICIPANTS: TBD

REMARKS REQUIRED: Yes, to be provided by speechwriting.

OUTLINE OF EVENTS: The President would tape the radio address and greet guests.

MEDIA COVERAGE: Closed.

FIRST LADY'S ATTENDANCE: N/A

VPOTUS ATTENDANCE: N/A

SECOND LADY'S ATTENDANCE: N/A

RECOMMENDED BY: Bruce Reed
Cynthia Rice

CONTACT: Karin Kullman
X61732

ORIGIN OF THE PROPOSAL: Domestic Policy Council

WR-work regulati-

DRAFT

260.31 What does the term "assistance" mean?

(a) (I) The term "assistance" includes cash, ~~subsidies~~ payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food clothing, shelter, utilities, household good, personal care items, and general incidental expenses).

(ii) It includes such benefits ~~even when they are~~ provided in the form of payments by a TANF agency, or other ~~public~~ agency ~~on its behalf~~ for a TANF agency, to individual recipients as part of ~~and conditioned on~~ their participation in a work activity as defined in Sec 407(a) of TANF ~~work experience or community service activities~~.

(b) It excludes:

(1) ~~One-time~~, short-term benefits [may be defined further] (such as payments for rent deposits or appliance repairs) that:

(i) Are designed to deal with a specific crisis situation or episode of need; and

(ii) Are not intended to meet ongoing or recurring needs;

(2) Work subsidies or other payments ~~paid~~ to employers to help cover the costs of employee wages, benefits, supervision, ~~and~~ training, or services to help an individual succeed in employment;

(3) ~~Benefits designed to defray the costs of an individual recipient for work, education, training and related activities (~~ Supports for working families, (such as transportation, ~~and~~ child care), and education and training related to job retention or advancement) in subsidized or unsubsidized employment;

(4) Earned income tax credits;

(5) Contributions to, and distributions from, Individual Development Accounts;

(6) Services such as counseling, case management, peer support, child care information and referral, transitional services and other employment-related services that do not provide basic income support;

(7) Transportation benefits provided under an Access to Jobs or Reverse Commute project, pursuant to section 404 (k) of the Act, to an individual who is not otherwise receiving assistance.

(c) The definition of the term assistance specified in paragraphs (a) and (b) does not apply to the use of the tern assistance at part 263, subpart A, of this chapter. [HHS needs to explain

why MOE treated differently]

260.32 What does the term "WtW cash assistance" mean?

For the purpose of 264.1 (b) (1) (iii) of this chapter, WtW cash assistance only includes benefits that:

(A) Meet the definition of assistance at 260.31 and

(B) Are provided in the form of cash payments, checks, reimbursements, electronic funds transfers, or any other form that can legally be converted to currency.

ISSUES

1) Resolves wage subsidy/work subsidy issue by making payments to individuals assistance and payments to employers "nonassistance". We could not find a meaningful way to draw the line within payments to employers. By broadening from community services and work experience to any work activity under 407(a), we've included all the situations that are already covered in (a)(I), but made it clear that if someone is getting a check from the welfare agency for any of these work activities, that's always assistance.

May want to explain in preamble how intermediaries would be treated.

2) NOTE: I added the edits to (b) (2) because if we've resolved the subsidy issue, then it makes sense to just clarify that any employer payments or excluded from assistance

3) Clarifies in (b)(3) that education/training for someone who is working (and the child care and transportation they receive) is not assistance.

(4) Payments for education and training services could be covered under "other employment-related services" in (6), but we've left HHS' language intact which is consistent with the 1/97 guidance and NPRM on this issue. The preamble currently mentions education and training as an example of an employment-related service. The definition could mean that someone who only gets education services but no other assistance would not count towards the work rates or time limits, but if they got child care and transportation then they would count (since they are not working). However, this does not seem like a big enough risk to justify carving out a specific exception to the exclusion (which would further highlight it).

(5) The term subsidies in 260.31(a)(i) could cause confusion -- may be interpreted as wage subsidies. Suggest substituting another term.

(6) OMB had suggested adding "directly to the employer" after "provided" in 260.32 but that's no longer necessary given the proposed revised definition for 260.31 (a) (ii).

(7) Might be better to use "Short-term payments" rather than benefits. Had already agreed to strike one-time. Further definition of short-term is being reviewed by HHS.

(8) Unintended consequences:

- could pay for education under employment-related service for someone not working or receiving cash and have this not count toward work requirements or time limits.

- child care/transportation for someone doing applicant job search -- if not working, it's not clear where this falls in proposed definition. Makes policy sense for this to be excluded from assistance. Options: either include as a short-term benefit or expand (3) to include job search under certain circumstances.

- proposed definition for a(ii) could make it harder to draw the line that working families in b(3) are just those in a job.

(9) Consequences:

- States will be able to provide supports for working families without having the time limits, work requirements or data collection apply.

- Individuals participating in subsidized employment where they are getting a wage from the employer rather than a payment from the welfare agency are not subject to time limits, work requirements or data collection. Individuals are already working so they're not avoiding work requirements. To the extent removing subsidized employment from assistance makes it more attractive, states may create more. This may create an incentive for states to put more people in subsidized employment (vs. workfare or just getting a check). It doesn't make subsidized employment more attractive than unsubsidized employment.

- Caseloads: narrowing definition of assistance could result in lower caseloads (because only those receiving assistance are counted as a case).

- Work participation rates: may be tougher to meet because individuals who are in unsubsidized employment and those in subsidized employment where the check goes to the employer will likely be excluded from the numerator and denominator. At the same time, because they are not part of the caseload, states will get caseload reduction credit.

- Data: we will lose participant level data on individuals who are not receiving assistance, although we will get aggregate financial data.

	Cash only	Working and cash	Working and no cash	Not working and no cash
Cash, vouchers etc to meet ongoing basic needs	A	A	--	--
Benefits paid to individual for a work activity, i.e. workfare (and all other activities counted toward the work rate)	A	A	--	--
Short-term payments (diversion)	--	--	Not A	Not A (but usually tied to employment)
Subsidized employment where payment goes to employer	--	NA (but requirements apply to the cash)	NA	--
Child Care	--	NA (but requirements apply to the cash)	NA	not specified but not likely to occur
Transportation	--	NA (but requirements apply to the cash)	NA	not specified but not likely to occur
Services (counseling, case management, child care I&R, transitional services, other employment related [includes education and training] services that do not provide basic income support)	NA (but requirements apply to the cash)	NA (but requirements apply to the cash)	NA	NA

WR-work regulation

cc: EK
CR
AK
+return

STATE OF MINNESOTA

OFFICE OF GOVERNOR JESSE VENTURA

130 State Capitol • 75 Constitution Avenue • Saint Paul, MN 55155

March 1, 1999

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The State of Minnesota is often ahead of the rest of the country. Before comprehensive welfare reform was passed, you gave us a waiver to operate our own welfare reform program.

Minnesota's success flourished under this flexibility. We were allowed to operate a unique welfare reform program that supports Minnesota families as they work their way out of poverty. We have been successfully operating our own program, MFIP, for over one year.

I strongly believe that folks who are struggling must make smart decisions and take personal responsibility for their choices. The role of government, in my view, is to provide opportunities for self-sufficiency. The State of Minnesota has been successfully providing folks the opportunity to pull themselves up by the bootstraps and enter the workforce.

I am concerned that some of the proposed TANF (Temporary Assistance for Needy Families) regulations that your Administration is currently finalizing will take away some of the flexibility that has made our program successful. As a former governor, you understand that when a program is working well at the state level, it should be allowed to succeed without unnecessary federal regulation.

The enclosed letter from my Commissioner of Human Services, Michael O'Keefe, further outlines Minnesota's concerns about the TANF regulations.

Mr. President, we share the goal of helping more and more families work and become self-sufficient. Please help us ensure that our success in welfare reform continues.

Sincerely,

Jesse Ventura
Governor

P.S. Terry and I want to thank you and Mrs. Clinton for your warmth and hospitality during our first, unforgettable experience at the White House. Please extend our gratitude to Hillary.

Voice: (651) 296-3391 or (800) 657-3717 • Fax: (651) 296-2089 • TDD: (651) 296-0075 or (800) 657-3598
Web site: http://www.governor.state.mn.us

Minnesota Department of **Human Services**

March 2, 1999

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

Minnesota has been operating our welfare reform program, the Minnesota Family Investment Program (MFIP), for just over a year. We are very pleased with our early success, with more families working, becoming self-sufficient, and leaving poverty. We believe MFIP is exactly the type of state innovation that the administration and Congress had in mind when the Temporary Assistance for Needy Families (TANF) legislation was passed into law in 1996.

However, we are concerned that the proposed TANF regulations will hamper Minnesota's ability to operate MFIP effectively. As your administration works on finalizing the regulations, I would like to emphasize some key areas that are of great concern to Minnesota.

The hallmark of the TANF legislation is flexibility for states. This is especially true with regard to the provisions that allow states to continue waivers that predated TANF if the waivers are "inconsistent" with TANF. Congress and the administration recognized that supporting flexibility also meant supporting efforts states had initiated on their own, prior to TANF. Minnesota is one of many states operating under a waiver that predates the TANF changes. The waiver permitted Minnesota to develop our unique approach that supports families as they work their way out of poverty.

We are concerned that the proposed regulations would define "inconsistency" very narrowly, undermining state initiatives that began under waivers. The proposed regulations would also set up artificial road blocks to meeting the TANF work participation standards for states with waivers. Minnesota is committed to moving families to self-sufficiency, and we are rigorously monitoring our progress. It is arbitrary and contrary to true welfare reform to treat waiver states differently from other states. I hope you will support state flexibility, whether it came as a result of TANF or as a result of state efforts that predated TANF. The National Governors' Association proposal sets forth an acceptable definition of "inconsistent."

The second issue that concerns us is the very broad definition of TANF "assistance" in the proposed regulations. The proposed regulations would include work supports like transportation assistance in the definition of TANF assistance; this means that transportation assistance like bus tokens would count toward the 60-month lifetime limit. This seems to push states in the wrong direction, discouraging investments in exactly the kind of services that families need to become self-sufficient. If we are to truly transform programs that support nonworkers into programs that support families' efforts to become self-sufficient, we need to be able to invest in these supports without penalizing families. Again, I hope you can assist Minnesota and other states in ensuring that the final regulations define "assistance" as cash or its equivalent (like vendor payments) for basic subsistence, not as assistance for work-related costs.

Finally, the proposed regulations go too far in their requirements for data collection by the states. Minnesota is firmly committed to measuring our performance in welfare reform as evidenced by our aggressive and comprehensive evaluation agenda. However, the proposed regulations require efforts that cannot be considered reasonably necessary to ensure the success of welfare reform. While it might seem like a small administrative matter, taking on these burdensome requirements will divert the energy of administrators and front-line staff from the real goal of welfare reform: moving families into work.

I am excited about the success of welfare reform not only in Minnesota but across the country. I admire the extraordinary effort you, Congress, and the Governors put into the 1996 reform. I hope we can continue the spirit of that effort, maintaining our commitment to a system that thrives on creativity and innovation--not one that is constrained by unnecessary regulation.

Sincerely,

Michael O'Keefe
Commissioner

cc: The Honorable Donna E. Shalala
Secretary, Department of Health and Human Services

Mr. Bruce Reed
Assistant to the President for Domestic Policy

WR - work regulation

AFSCME®

American Federation of State, County and Municipal Employees, AFL-CIO

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Website: http://www.afscme.org

November 20, 1998

cc: REED / KAGAN
TRAMONTANO

Mr. John Podesta
Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Podesta:

It is my understanding that HHS has delivered to the White House their proposed regulations for implementing the TANF welfare reform law. In your deliberations on this matter, I wanted you to be aware of concerns that we conveyed to HHS about those regulations. If you have any questions, please do not hesitate to call.

Sincerely,

GERALD W. McENTEE
International President

GWMcE:mr
Enclosures

AFSCME®

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September 30, 1998

Ms. Olivia Golden
Administration for Children
and Families
Office of Family Assistance
U.S. Department of Health and
Human Services
370 L'Enfant Promenade, SW
Suite #600
Washington, D.C. 20447

Dear Ms. Golden:

I am writing to clarify the comments AFSCME submitted on the TANF proposed regulations on February 18, 1998. In our comments we urged the Department to exclude from the definition of TANF assistance compensation for work performed. We also urged you to enforce the requirement that states establish a grievance procedure for people alleging displacement as a result of welfare work programs.

Specifically, we urge you to exclude wage subsidies (unsubsidized private or public sector employment) from the definition of assistance. The wage subsidy program consists of payments to an employer, not to the worker. Payments to the employers should not be considered TANF assistance attributable to workers. Although on principle workfare should also be excluded from the definition of assistance for many of the same reasons as wage subsidies, we understand that workfare presents greater difficulty fitting into what might be excluded. In contrast, you have a sound legal basis for excluding wage subsidies.

In the wage subsidy program, the payments to the employer are intended partially to cover the costs of providing training to the worker and to provide incentives for employers to hire. The wage subsidy is similar to tax incentives paid to employers to stimulate hiring. The person for whom the wage subsidy is paid receives wages based on the number of hours worked.

Although there was no discussion of what constitutes assistance in the 1996 welfare debates, there is no suggestion that Congress intended assistance to include what is not traditionally thought of as welfare. Congress was concerned mainly about welfare dependency. The wage subsidy program eliminates welfare dependency because the person is working and receiving wages rather than a welfare grant. Wage subsidies, like child care and transportation expenses, support work and can be distinguished from welfare payments. Thus, wage subsidies should not be considered assistance.

The HHS Instructions on the Distribution of Child Support issued August 19, 1998 exclude from TANF assistance, for child support assignment purposes, money paid to an employer who pays it out in salary to recipients. This position supports our arguments.

Therefore, for the reasons expressed above, the wage subsidy program should not be considered TANF assistance.

Many states have not established or refuse to establish a grievance procedure for redress of violations of the TANF displacement provisions. This is contrary to the law. HHS should take whatever steps necessary, including imposition of penalties, against states choosing to implement requirements they consider convenient and ignore other requirements in the law. The law also requires the state plan to "set forth objective criteria for the delivery of benefits, the determination of eligibility, and for fair and equitable treatment..." [Sec. 402(1)(B)(iii)] The requirement for fair and equitable treatment should cover both welfare recipients and other people such as displaced workers who are treated unfairly as a result of the operation of the TANF program.

Operating a TANF work program without establishing a grievance procedure for people alleging displacement as a result of the state's work program also constitutes an improper expenditure of TANF funds. Refusal to establish a grievance procedure constitutes an intentional improper expenditure of TANF funds. It is your duty to ensure states adhere to TANF requirements; otherwise, the requirements in the law are meaningless. Section 409(a)(1)(A)) of the law gives HHS the authority to impose a penalty for improper expenditures of TANF funds. Section 409(a)(1)(B) of the law also permits HHS to impose additional penalties if the improper expenditure is intentional. We urge you to exercise your authority in this area and penalize states for not establishing a grievance procedure.

Finally, you could add a requirement that states establish a grievance procedure to the High Performance Bonus measures.

If you have any questions or need additional information, please feel free to contact me.

Sincerely,

Marie D. Monrad

Marie D. Monrad
Director
Public Policy Department

MDM:pb
pec\hhsassis.doc

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February 18, 1998

Ms. Olivia Golden
Administration for Children and Families
Office of Family Assistance
5th Floor East
370 L'Enfant Promenade, SW
Washington, D.C. 20447

Dear Ms. Golden:

Attached are comments on the proposed rule for the Temporary Assistance for Needy Families Program (TANF), 45 CFR Part 270, *et. seq*, submitted on behalf of the 1.3 million members of the American Federation of State, County and Municipal Employees (AFSCME). AFSCME represents unionized workers in state and local government and health care facilities around the country.

Many of our members work in welfare offices and will be implementing the final regulations. Additionally, many of our members work in sites where welfare recipients are currently working and/or will be placed to fulfill their TANF work requirements. Therefore, our comments reflect on work place issues for welfare recipients required to work and for incumbent workers on site.

It is important that workers who will be working along side welfare recipients have job security and do not view welfare recipients as a threat to their job security. If workers do not feel their jobs are threatened, they will be more likely to serve as mentors and coaches to welfare recipients and can be a valuable asset in making welfare reform work. It is also important that welfare recipients required to work be afforded the same rights, protections and benefits as other workers.

In addition, we are commenting on the proposed regulations pertaining to the Family Violence Option. AFSCME has a long track record developing workplace programs to prevent domestic violence and assisting employees suffering from domestic violence. As a result of this work, we offer our recommendations on how the barriers to seeking and retaining employment which domestic violence victims face can be reduced.

Sincerely,

Marie Monrad

Marie Monrad
Director
Public Policy Department

MM:pg
Enclosures

in the public service

Comments on the Proposed Rule for the Temporary Assistance for Needy Families Program (TANF) 45 CFR § 270 *et.seq.* Submitted by The American Federation of State, County and Municipal Employees (AFSCME)

Displacement Protections § 271.70(a)

The Preamble states "We are confident that States will develop procedures for working with employers to protect against displacing other employees." AFSCME does not have such confidence. There are many examples of displacement both under the AFDC program and now under TANF where employers violate the law and lay off regular employees to replace them with welfare recipients. Without effective enforcement mechanisms for the displacement protections that exist, unscrupulous employers will take advantage of access to a pool of subsidized or free labor.

While the displacement protections in the proposed TANF regulations track the language in the federal law, AFSCME urges HHS to reference the displacement language of the Welfare-To-Work (WtW) Interim Rules issued by the U.S. Department of Labor (DOL) on November 18, 1997, or the final WtW rules if they are promulgated prior to the final TANF regulations. In many cases, welfare recipients will be working under grants funded by both the TANF and WtW programs. Therefore, the WtW displacement protections should apply in those cases since they provide stronger protection by prohibiting partial displacement (reduction in hours) in addition to the full job loss. The WtW Interim Rules also prohibit using WtW funds in a manner that violates existing contracts for services or collective bargaining agreements. Where the work activity would violate a collective bargaining agreement, the appropriate labor organization and employer must agree in writing before the work activity can begin.

To simplify operation of the program, HHS should recommend to states that they have one set of displacement protections for incumbent workers and one grievance procedure for persons alleging displacement in either or both programs. It would be administratively burdensome to have a distinct set of rules for the TANF program and another for the WtW programs. States should be encouraged to make the necessary administrative changes to comply with WtW provisions and simplify program operations. As explained in the next section, the grievance procedure must not preempt other legal remedies in collective bargaining agreements or applicable federal, state or local law.

Employers also will benefit from having to comply with only one set of regulations. Having two sets of regulations for the operation of one welfare-to-work program is burdensome and complicated. This could potentially discourage employers from hiring welfare recipients.

HHS should require states to provide notice at workplaces where welfare recipients work so incumbent workers are aware of the anti-displacement protections afforded them in the regulations. HHS should also require the notice to include the remedies available to workers who are displaced. This policy will promote good working relations between incumbent workers and welfare recipients working side-by-side, and alleviate fear of job loss. The ongoing workforce will be more willing to train and serve as mentors to welfare recipients if they do not feel their jobs are being threatened by placement of welfare recipients in the work place.

AFSCME Recommendation: HHS should reference the displacement language in the U.S. Department of Labor Welfare-to-Work Interim Guidance dated November 18, 1997, in the TANF Regulations Preamble and § 272.70(a), and recommend states have one set of displacement protections for current workers. HHS also should require states to provide notice to current workers at welfare work sites informing them of their displacement protections and available remedies.

Grievance Procedure § 271.70(b)

The proposed TANF regulations require a grievance procedure for alleged violations of the displacement provisions but fail to set any guidelines on the structure and nature of state grievance procedures. At a minimum, these TANF regulations should require that state procedures provide for a fair and expeditious decision making process. The regulations also should enumerate possible remedies. Many states have not established a grievance procedure for redress of violations of the TANF displacement provisions.

In contrast to the TANF proposed regulations, the WtW Interim Guidance provides specific language on what constitutes a grievance procedure and suggests remedies. The WtW grievance procedure serves as a model for states that are uncertain how to set up a grievance procedure for violations of the TANF displacement rules. The WtW Interim Guidance requires a hearing upon request if there is no informal resolution of the alleged violation. The state must specify the time period and format for the hearing portion of the grievance procedure and a time frame for a written decision. The regulations require an appeal within 30 days to an agency which is independent of the TANF or WtW administrative agency The state must provide a final written determination within 120 days of the appeal. Remedies may include suspension of payments to the employer, prohibition of additional placements to an employer violating the law, and reinstatement of a displaced employee, including payment of lost wages and benefits, and re-establishment of other relevant terms, conditions and privileges of employment. The weakness in the WtW grievance procedure is it does not specify the time period or format for the hearing portion and written decision, nor does it guarantee a right to union representation at the grievance hearing. These two failings should be remedied in final regulations. Additionally, the final regulations should recommend the same grievance procedure for alleged violations of state displacement protections. TANF

displacement protections do not preempt stronger state protections, and many states have enacted laws that strengthen them. HHS should encourage states to have one grievance procedure for the same program efficiency reasons noted previously for displacement language.

Finally, the grievance procedure established under the TANF and WtW programs should not be the exclusive remedy or procedure for violations of displacement provisions. Persons alleging violation of the displacement provisions should have the option to choose the grievance procedure, use the procedures established by a collective bargaining agreement if applicable, or access adjudicatory proceedings established pursuant to any applicable federal, state or local law.

AFSCME Recommendation: HHS should set guidelines on the structure and nature of state grievance procedures, encourage states to have one grievance procedure for both TANF and WtW programs, and ensure the grievance procedure does not preempt other legal remedies.

Ensuring that Recipients Work (§ 271) and Applying Employment Law Protections to Welfare Recipients

Under § 271, there is no reference to application of federal employment laws to work positions funded by TANF. The U.S. Department of Labor (DOL) issued guidance last year clarifying that federal employment laws, such as the Fair Labor Standards Act and the Occupational Safety and Health Act, apply to many welfare recipients in work activities. The Equal Employment Opportunity Commission (EEOC) determined that the laws it administers (such as Title VII of the Civil Rights Act of 1964) apply to participants in most welfare work programs in Guidance issued on December 3, 1997. HHS should incorporate the DOL and EEOC Guidance in the final regulations both in the Preamble and in parts of § 271. Specifically § 271.13 (governing penalties for persons not complying with their individual responsibility plans) and § 274.14 (governing penalties for persons refusing to engage in work) should include good cause exemptions from penalties for persons alleging employment law violations.

In § 271.13, persons who have not complied with their individual responsibility plans can be penalized. Under § 274.14, persons can be penalized for failure to engage in work. Each section has a good cause exception that is not defined. HHS should state that penalties do not apply if a person does not comply with these two sections due to an employer's violation of employment standards.

Also, § 271.16 permits a state to sanction welfare recipients by reducing recipients' welfare grants but not reduce the number of work hours they must work. This provision provides a perverse incentive to welfare offices to impose penalties to avoid having to comply with minimum wage requirements. This may be more wide-spread as the work requirements increase. HHS should monitor implementation of this provision

by requiring states to report the number of persons sanctioned under this provision, the amount of reduction in their benefits, the amount of the benefits they receive after imposition of sanctions, and the number of hours they had to work for those benefits. States should also be required to report the number of persons erroneously sanctioned and still required to work the same number of hours as before imposition of the sanction.

AFSCME Recommendations: HHS should include reference to the DOL and EEOC Guidance in the Preamble, in Sections 271.12 and 272.13, and include violation of employment standards as a good cause exemptions for non-compliance with § 271.12 and § 271.13. HHS should also require states to report data on imposition of penalties under 272.16.

Definition of assistance § 270.30

The proposed definition of assistance is overly broad. In the Preamble, HHS indicates it intends that the starting point for defining assistance is to identify types of benefits or services that would be included in the definition. The proposed regulations define assistance as "every form of support provided to families under TANF (including child care, work subsidies and allowances to meet living expenses)..." The proposed definition includes some limited exceptions to the definition of assistance that should be expanded to include compensation for work.

Compensation for work performed should specifically be excluded from the definition of assistance for the purposes of the time limits. To the extent a work position is partially or wholly funded through a welfare grant, the grant should not be considered assistance attributable to the welfare recipient. TANF recipients required to work receive compensation for work performed. Including compensation for work in the definition of assistance is a harsh measure since the subsidy the employer receives in the form of subsidized or free labor is counted as assistance to a TANF recipient for purposes of the time limit. While employers would benefit from a pool of free or subsidized labor, welfare recipients required to work for the employer should not be using up their 60 month lifetime limit to assistance. HHS should not support a policy which would cause welfare recipients to lose months or years on their TANF lifetime clock while they are working.

AFSCME Recommendation: HHS should exclude compensation for work performed by a welfare recipient in the definition of TANF assistance.

State Penalties § 271.50, § 271.52 and § 274.20

While § 271.50 imposes penalties on states for not meeting the work participation rates, § 271.52 permits waiving the penalty if states have reasonable cause for failure to meet the rates. HHS should add two new sections (3 and 4) to expand reasonable cause for failure to meet work participation rates. Section (3) should expand reasonable cause to include good faith efforts for state compliance with the employment laws. The efforts should include monitoring work programs for violations of employment laws, directing participants whose rights have been violated to the proper enforcing agency, providing welfare recipients with notice of their employment rights and remedies, and denying employers who violate employment laws future work assignments. Section (4) would expand reasonable cause to include efforts to enforce displacement protections. The efforts could include strict monitoring of placements to prevent displacement, denying placements with employers violating the displacement provisions, and providing workers in sites where welfare recipients are placed with notice of their protections and remedies.

Under § 274.20, HHS will impose the maximum penalty for states not in compliance with the TANF child care protection for single parents of children under age six. The proposed regulations would permit HHS to impose the penalty to states that do not have a statewide process in place for families to demonstrate they have been unable to obtain child care. However, this provision should be expanded to apply if the state does not have a statewide process in place to insure that families are informed of the extent and nature of the child care protection.

HHS can also impose a maximum penalty if there is a pattern of substantiated complaints from parents or organizations verifying a state has reduced or terminated assistance. HHS would impose a reduced penalty if the state demonstrates the violations were isolated or they affected a minimal number of families. This provision could be modified to impose a reduced penalty under these circumstances, but only if the state had a statewide process in place for families to demonstrate they could not get care and the statewide process informs families of the extent and nature of the child care protection.

AFSCME Recommendation: Expand reasonable cause for a state's failure to meet work participation requirements to include good faith efforts to comply with employment laws applicable to welfare recipients and displacement protections for current workers. The penalty under § 272.20(b) should be extended to apply if the state does not have a process to inform families of the child care protection, and reduced only if the state had a statewide process to inform families of the child care protection.

State Funded Programs and Penalties § 271.51 and § 272.5

The proposed regulations acknowledge that states can use state maintenance of effort (MOE) dollars to create a separate state program that might not be subject to some of the restrictions applicable to TANF-funded programs. However, § 271.51 permits a

penalty reduction for not meeting the work requirements only if states prove they have not diverted cases to a separate state program to avoid the work participation rates. The regulations emphasize the potential improper motives to the exclusion of other goals state might have to operate state-funded programs. Under § 271.51, HHS can waive the penalty if HHS determines that a state had reasonable cause for failure to comply with the work requirements. A pre-requisite for this wavier is a demonstration that a state has not diverted cases to a separate state program to avoid work participation rates. Again, states will be deterred from setting up separate state-funded programs if they have to prove their intent to HHS. Thus, innovative state-funded programs become suspect.

Under § 272.5, HHS would not forgive a state penalty, even based on reasonable cause, if they "detect a significant pattern of diversion of families to a separate State program that achieves the effect of avoiding the work participation rates..." This is a far reaching rule. HHS would be viewing virtually all state funded programs with suspicion. The tone of the regulations might have a chilling effect on states experimenting with innovative programs requiring work activities distinct from those required by the federal mandatory participation rates.

AFSCME Recommendations: HHS should base its calculation of meeting work participation requirements on a state's TANF program only and eliminate the effects test from the regulations on reasonable cause exceptions to the penalties.

Administrative Costs § 273.0 (b) Administrative Costs

The Preamble states that the 15% cap on administrative costs would apply to subgrantees, contractors, community service providers and other third parties. However, there is no reference to this in the proposed regulations. The final regulations should make clear the 15% cap applies to all costs and it is irrelevant whether costs are incurred by the TANF agency directly or by other parties.

The Preamble also recognizes there may be instances where individuals are performing work that is administrative (i.e. eligibility determination) and also work that should be viewed as a program cost (i.e. case-management functions or delivering services to clients). The Preamble indicates that costs could be allocated to respective categories. This guidance should be in the final regulations.

Family Violence Option (FVO) ə 271.52(b)(1)

AFSCME applauds HHS for clearly outlining the problem of domestic violence and encouraging states to adopt the family violence option. The proposed regulations help states with this mission by ensuring that they will not face penalties for using this option. However, there are several areas in the proposed regulations which need to be modified in

order to maintain consistency with the statute and ensure that the goals of the statute to screen, identify, and refer victims of domestic violence to needed services are achieved. These areas are discussed below:

- HHS' definition of the good cause domestic violence waiver is not consistent with the FVO. The statutory language allows states to grant waivers of program requirements for "so long as necessary." However, the proposed regulations allow only a six-month waiver, and the preamble and the regulations are at odds about whether the waivers are renewable. Those who work with victims of domestic violence know that each case is individual and recovery times will vary enormously. It is inappropriate and inconsistent with the law to set an arbitrary six-month limit.

AFSCME Recommendation: No time limit should be applied to waivers under the Family Violence Option. Rather, caseworkers should have the discretion to determine the length of the waiver.

- The proposed regulations do not adequately address the issue of confidentiality which is paramount to domestic violence victims. Without safeguards ensuring confidentiality, the safety of victims will be needlessly jeopardized, and as a result, victims will be more hesitant to seek services or waivers.

AFSCME Recommendation: HHS should require states to implement procedures to ensure confidentiality of all information related to domestic violence. These confidentiality protections should be included in HHS' definition of "good cause domestic violence waivers".

- The proposed regulations require waivers to be accompanied by a services plan, but the statute requires no such plan. This is an additional condition imposed by the regulations which will make it more difficult for states to administer the FVO and may make it more difficult for victims to receive waivers or assistance if they are unable to follow their service plan.

AFSCME Recommendation: The service plan requirement should be deleted from the regulations, and HHS should make it clear that domestic violence victims will not be penalized for failing to meet all conditions of a service plan, nor should they have additional requirements placed on them that are not imposed on other TANF recipients.

- With respect to time limits, the regulations inappropriately link time limit waivers with the ability to work. However, many victims of domestic violence who are working may need assistance in order to adequately protect themselves from their abuser. The FVO was designed, in part, to protect women who have exhausted their time limits, and states should be held harmless for protecting women regardless of their ability to work. In addition, time limit waivers should be available throughout a recipient's stay on welfare, not just at the end of the five year time limit.

AFSCME Recommendation: HHS should drop the language linking time limit waivers to ability to work. Furthermore, HHS should allow states to "stop the clock" for domestic violence with respect to the five-year lifetime limit on TANF assistance.

PEC\tanfreg.doc

WR - work participation rates

Cynthia A. Rice 12/08/98 10:57:57 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP

cc: Andrea Kane/OPD/EOP
Subject: TANF Participation Rates

We'll get you a more complete right up soon, but to answer your question from yesterday --

The five states that failed the two parent work participation rate and did not meet the 80 percent maintenance of effort requirement are Arizona, Nebraska, New Jersey, Oklahoma, and Virginia. To avoid the larger MOE penalty, these states will be given the opportunity to report additional MOE expenditures they may have made during the reporting period. (They may very well have additional state spending for the time period that will count as MOE. Since four of the five states reported MOE of exactly 75 percent, they may have reported only as much MOE as they thought they needed to meet the requirement).

WR - welfare regulation

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COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON HUMAN RESOURCES

#205 duplicate

February 18, 1998

Olivia Golden, Assistant Secretary
Administration for Children and Families
Office of Family Assistance
5th Floor East
370 L'Enfant Promenade, SW
Washington, DC 20447

Dear Assistant Secretary Golden:

I extend my compliments to the Department for the solid draft regulation on welfare reform that you made available to the public last November. The proposed rule is thorough, well written, and thoughtful. I find myself in agreement with most of the specific requirements set forth in the regulation.

There are, however, a few issues I hope you will consider before publishing the final rule. The broadest issue involves the assumption, which seems to underlie several of your proposals, that states will take advantage of every opportunity to foil the 1996 welfare reform legislation.

I confess that many of us in Congress, based on experience with a number of previous programs, assumed more or less the same thing. But I have now somewhat changed my views. In the first place, there is no question that the welfare reform movement was receiving substantial energy from the waiver experiments states had been conducting since the late 1980s. By the time we passed the welfare reform law in 1996, more than 40 states were already implementing their own reforms, some of them quite original and far-reaching. Although a few states may resist some features of the welfare reform law, most states show no signs of resistance -- and indeed seem in some respects to be ahead of the federal requirements.

In addition, since the welfare law was signed in August 1996, I have experienced something between shock and amazement at the progress states have made in changing the old AFDC program and the bureaucracies that supported it. Like you, we have been visiting program sites, reading reports, talking with others who are conducting systematic studies of state programs, and watching the remarkable decline in the welfare rolls. As a veteran of efforts to reform various federal and state social programs, nearly all of which came to little or nothing, I am astounded at the rapidity of change we are now witnessing.

The most obvious example is the spectacular decline in welfare rolls. Although newspapers and scholarly papers are full of reports about the decline, two facts are especially noteworthy. First, nearly every state has had substantial declines -- 30 states, for example, had

declines of over 20 percent between 1994 and 1997. Second, the rate of decline is still increasing. The caseload decline for the 6-month period ending in January 1995 was a little over 1 percent. By July 1996, the 6-month decline was nearly 4 percent, the fastest rate of decline in the program's history. Even so, the 6-month declines for the periods ending in January 1997 and July 1997 were greater still -- about 8 percent and 12 percent respectively. I believe we can conclude the caseload declines will continue for the foreseeable future.

Finally, despite all the scrutiny state reforms are receiving, I am not aware of evidence that states are attempting to undermine the major provisions of the welfare reform law. Race to the bottom, severe reductions in state spending, cutting benefits, avoiding work programs, setting up separate programs to foil federal requirements -- none of these dire predictions have come true.

In short, states initiated the welfare reform movement and, as far as anyone can tell, they are continuing their spirited efforts to reform their welfare programs. I take comfort from the very concrete results states are now producing and believe their performance has earned them more leeway than I was willing to give a mere 18 months ago.

In this regard, I now have mixed emotions about the waiver provision we placed in section 415 of the Social Security Act. Those of us working on the legislation were greatly concerned that states would use their section 1115 waivers to preempt essential features of the legislation. We were particularly concerned that states would weaken the work requirements of section 407 and the time limits specified in section 408(a)(7). Given the growing evidence of successful reform in most states, plus the lack of evidence that states are using their waivers to preempt federal requirements, I would now recommend that we let the waivers run their course. If states do use their waivers to avoid the work requirements or time limits, they will in all likelihood experience a serious jolt when their experiment ends and they must immediately comply with federal rules. In addition, they may find that such moves will make them a magnet for recipients from surrounding states that continue to operate aggressive reforms.

Similar suspicions about state intentions are raised by the separate programs a few states are establishing and many more are contemplating. In discussions with states and advocates, we have noted the consistent concern that the draft regulation's data reporting requirements and restrictions on penalty reductions and corrective compliance are likely to discourage states from setting up separate programs. Like those at HHS who drafted the regulations, I am greatly concerned that by establishing separate programs, states could avoid the data reporting, mandatory work, time limit, and child support requirements imposed on regular programs by federal rules. Even so, useful separate programs might be imagined -- programs for noncitizen children or for addicts, for example.

We understand that a number of individuals and organizations favor combining the report of separate state programs with the 4th quarter report that is required by the regulation. The problem with this approach is that the regulation requires reporting of state-level data and the 4th

quarter report is aggregate data. The issue, of course, is whether we need case-level data on separate state programs. I have tried to conclude that we do not because I am sympathetic with state complaints about data reporting. On the other hand, we won't know much about the recipients in these programs if we have only aggregate data. We have been informed by the Congressional Research Service that Colorado, Hawaii, and Illinois have already established separate programs and that these programs involve 25 percent, 50 percent, and 8 percent respectively of their maintenance-of-effort funds. If three states, including two large states, have already established separate programs, it seems likely that more states will do so in the future. Thus, I cannot avoid the conclusion that we need to have case level data in order to know precisely who is participating in these programs. Moreover, it may be difficult for either HHS or the Congress to determine whether separate programs have been established to avoid federal requirements unless we have case-level data.

Given that case-level data seem necessary, perhaps you can respond to the state concern about the high level of data reporting by reducing the number of data elements that must be reported about separate programs.

One more point about separate state programs. I sympathize with your intention to deny penalty relief if the Department detects a "significant pattern" of diverting families into separate programs in order to evade federal rules and goals. The first point to make here is that you are correct to threaten penalties if states use separate programs to avoid federal rules. But my concern, which is widely shared, is how the Department will know that the state program is deliberately designed to avoid federal rules on work, time limits, child support, data reporting, or other matters? I cannot answer this question, but I would suggest that if the Department is not confident that it can make this determination with a high degree of accuracy, then we should err on the side of allowing more state flexibility. Once again, the achievements states have posted so far give me confidence that most states will use separate programs for constructive and appropriate purposes. If a few states try to take advantage of the flexibility that is the heart of the welfare reform law, Congress and the Department can work together to figure out an effective way to stop them. In fact, the need to carefully monitor separate state programs is a major justification for requiring states to report case level data.

Here is one suggestion that might be acceptable to all sides in this debate. Perhaps you can develop guidelines that require full, case-level reporting for some types of separate state programs and less complete, perhaps even aggregate data for other types of state programs. For example, if states established a separate program to subsidize private-sector employment by using a wage subsidy or an EIC-like mechanism, I would be much less concerned about misuse of these funds. On the other hand, if a state set up a separate program and put most of its 2-parent caseload in the program, I would be concerned and would want to know more about both the program and the people participating in the program.

The problem of how much flexibility states should have in implementing their programs also arises with the use of child-only cases. In effect, the draft regulation would disallow the

"conversion" of regular cases into child-only cases if the Department finds that the conversion was performed to avoid federal rules. As in the case of separate state programs, the issue here is judging state motivation. How can the Department develop a reliable method for detecting the state's true motivation in allowing cases to be treated as child-only cases? Again, I cannot answer this question. I recommend that, unless the Department has a compelling answer to this question, the regulations err on the side of allowing more state flexibility. Once again, we can work together to discover and deal with states that try to subvert federal rules.

A final issue I want to mention is the draft regulation on work participation rates in 2-parent families. On its face, the statutory requirement that states involve 90 percent of the 2-parent caseload in work activities seems reasonable. However, we have searched the literature and have not found any work programs that were successful in achieving a 90 percent participation rate. Moreover, our discussions with state officials and scholars who study welfare have left us with the clear impression that many families in the 2-parent caseload have serious barriers to work. I applaud your proposal to adjust the penalty for failure to meet the 2-parent requirement so that the penalty reflects the proportion of the entire TANF caseload in 2-parent families, but would support other measures to modify the work requirement for this group. One possibility would be to allow states to count families above the number required to meet the work requirement in the 1-parent caseload toward fulfilling the 2-parent requirement. Thus, for example, if a state exceeded by 100 cases the number of families required to meet the 1-parent work requirement in a particular year, they could count these 100 cases toward fulfilling the 2-parent requirement.

Again, I congratulate you on a fine job on the proposed regulation. I am confident that you will carefully consider the many thoughtful recommendations you are certain to receive and make appropriate adjustments in the draft rule. In so doing, I hope you will find ways to expand even further the substantial flexibility states are now using to such good effect in reforming their welfare programs.

Sincerely,

E. Clay Shaw, Jr.
Chairman

ECS/rhm

WR - work regulation

2/18/98 #34

NATIONAL GOVERNORS' ASSOCIATION

APWA
AMERICAN PUBLIC WELFARE ASSOCIATION

February 18, 1997

Olivia Golden, Assistant Secretary
Administration for Children and Families
Department of Health and Human Services
5th Floor East, 370 L'Enfant Promenade, S.W.
Washington, DC 20447

Dear Assistant Secretary Golden:

On behalf of the National Governors' Association and the American Public Welfare Association, we are pleased to provide the following comments on the proposed rule governing the Temporary Assistance for Needy Families (TANF) block grant, issued Nov. 20, 1997, by the U.S. Department of Health and Human Services' (HHS) Administration for Children and Families. The comments set forth in our document were developed after a series of meetings in which state agency administrators and governors' policy advisors discussed the proposed rules' probable effect on state TANF programs designed to serve America's most vulnerable children and families. We are grateful to the Department for conducting extensive consultations with states throughout the development of these proposed rules, and offer our continued commitment to work with the Administration to revise and finalize these critical rules.

Since enactment of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193), states have achieved remarkable success in the development of programs and policies to move welfare clients off assistance and into employment. Absent any federal rules, states have developed innovative and effective welfare reform programs guided by their reasonable interpretation of the law. States have been successful in large part because they are no longer bound by past rigid federal regulations that once compelled 48 states to seek time-consuming and resource-depleting waivers to implement promising ideas. Just as the architects of the TANF statute had envisioned, freedom from restrictive federal regulations has sparked new ideas and strategies to move clients from welfare to work and to avoid welfare dependency.

Some states have devolved considerable authority to localities, and in the process have established performance goals and outcomes rewarded with increased funds for local human service programs. Others have developed creative state interagency partnerships linking public human service departments with economic development, labor, transportation, and education to leverage program resources to attain the goals set forth in the act. These cross-program collaborations are producing improved services and opportunities for families. New state partnerships with the private sector and community-based, religious, and charitable organizations are changing the design and delivery of public human services throughout the country. A heightened focus on measuring program outcomes and performance, a departure from the payment accuracy systems of the past, is providing state agencies with new tools to periodically assess and refine their welfare reform strategies.

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The emphasis on work, coupled with the imperative to make families self-sufficient within a five-year time limit, has hastened the pace of state performance. Thousands of clients have moved into private, unsubsidized employment often supported with government-subsidized child care, medical, and transportation services. As President Clinton has often noted, the dramatic decline in the nation's welfare caseloads during this period is unprecedented. As recent financial reports have shown, all states have met and many have exceeded their maintenance-of-effort (MOE) requirements—marking a period of record investments in critical services such as child care to support clients in their transition to the world of work.

States are changing their welfare reform strategies to meet the needs of their clients—whose needs are changing as well. States no longer administer static systems of entitlement and income maintenance, but rather dynamic programs tailored to match client skills with evolving employment opportunities and services designed to meet the needs of children and families making the transition to work. The program that serves families today may change tomorrow because the needs and characteristics of caseloads may be different, because the economy may slow, or because the original plan may need to be refined. For these reasons, the federal rules applied to TANF must stand the test of time, preserving the enhanced state flexibility afforded in the law that is so critical to maintaining this impressive record of achievement.

After all, the individuals with the most at stake are the children and families we serve. Accordingly, states need to be allowed to focus their time and resources on serving these children and families. While federal regulations are obviously necessary, they should not hinder or cripple state programs in the process. We need a strong federal-state partnership with the shared objective to minimize unnecessary interference so we can maximize the chance that families will succeed.

The proposed rules, therefore, are critical to the future administration of TANF. Definitions and restrictions on program design and operation in the proposed regulations could dramatically alter each state's TANF plan. This would be especially unfortunate because states have completed one fiscal year and a quarter guided by their reasonable interpretations of the law. Clients have been notified of the rules the state has elected to apply to their programs, devolution to the counties has occurred, and programs are underway.

States wholeheartedly endorse a number of provisions in the proposed rules, either because they comport with the guidance HHS released in January 1997 or because they edify the states' reasonable interpretations of the statute. For example, we are pleased with the proposals to simplify the TANF financial reporting form; the interpretation that six weeks of job search applies to the fiscal year and not to a lifetime limitation; the ability of states operating under waivers to use their work definitions in calculating the participation rates; the pro-ration of the penalty for failure to meet the two-parent work rate penalty; the application of the family violence option to the work penalties and hardship exemption; and other provisions noted throughout the attached document.

However, we have a number of serious concerns with the proposed rules. The basic, foremost concern is that the rules would greatly limit the state flexibility that was at the heart of the TANF statute. We were disappointed with the overall tone and approach of the proposed rules that presumes states will behave dishonorably and either "game" the system or treat welfare recipients unfairly. We believe this approach is unfair and unwarranted—effectively punishing states for actions that have not occurred. Absent any compelling findings of such behavior, we believe the regulations should support, rather than discourage, state flexibility and innovation. Should problems arise in the future, we would be happy to work with the Administration to resolve them.

Based on extensive conversations and meetings, state officials came to a consensus on the following priority concerns:

- restrictions on separate state-only programs and MOE
- limitations on child-only cases
- provisions that discourage continuation of waivers
- new data collection requirements
- application of the administrative cost cap
- definition of assistance and eligible families
- work and related penalties

Our comments are divided into three sections: The first section represents state consensus on the priority concerns with the proposed rules and recommendations for changes deemed most critical by states. The second section provides comments on remaining issues. The final section contains detailed recommendations for changes to Appendix A.

We appreciate the opportunity to comment on these proposed rules and hope that the final regulations will include many of our recommendations so states can continue to effectively implement their programs and move families toward self-sufficiency.

Sincerely,

George V. Voinovich
Governor of Ohio
Chairman, National Governors' Association

Thomas R. Carper
Governor of Delaware
Vice Chairman, National Governors' Association

Cornelius D. Hogan
Secretary, Vermont Agency of Human Services
President, American Public Welfare Association

Gary J. Stangler
Director, Missouri Department of Social Services
Chairman, National Council of State Human Service Administrators

NGA AND APWA COMMENTS ON PROPOSED TANF REGULATIONS

SECTION 1: PRIORITY AREAS OF CONCERN

I. INTRODUCTION

We are greatly concerned that key sections of the proposed rule seriously erode state flexibility and, if implemented without substantial revision, would impede the progress states have made to date. The law is clear: the Department must adhere to Section 417 of the Temporary Assistance for Needy Families (TANF) statute that "No officer or employee of the Federal Government may regulate the conduct of states under this part or enforce any provision of this part, except to the extent expressly provided in this part." In numerous instances, we contend that the Secretary has exceeded her authority, regulating program design and administration when the statute gives her no legal right to do so. We are particularly concerned about the proposed rules related to separate state programs, child-only cases, data collection and waivers.

In other areas, it is hard to understand how the Department could have interpreted the law so as to enable the Secretary to condition and link a state choice of TANF program design and optional report submissions to eligibility for penalty relief, caseload reduction credits and bonuses. For example, the statute does not give the Secretary authority to deny the caseload reduction credit to any state and yet the proposed rules would deny states the credit for failure to submit a separate state program maintenance-of-effort report (MOE). We detail our concerns in each section of this document.

Finally, we are disappointed with the tone of the preamble and the fact that the Department makes no reference to a federal-state partnership in achieving the goals of the Act. To the contrary, throughout the proposed rule, we find policies cast in suspicion that states would make every effort to avoid the work participation rates, evade the life time limit and undermine the goals of child support enforcement. And, yet, the Department provides no evidence to support its suspicion or justify this assumption. The rule ignores the fact that the majority of states are requiring clients to move to work immediately, not waiting the two years the statute permits. Nearly half the states have chosen shorter lifetime time limits than the five-year maximum as a way of encouraging clients to move to work more swiftly. And even the Administration has touted the record improvement states have achieved in recent years through rigorous enforcement and collection of child support for needy families.

II. SEPARATE STATE PROGRAMS

We are very concerned about and disappointed by the negative and distrustful tone of the preamble to the proposed regulations regarding separate state programs. We hoped the Department would not seek to limit the flexibility provided in the statute that will allow states to develop innovative and outcome-oriented programs.

In a number of sections of the proposed rules, the Department, assuming the worst behavior from all states, threatens to limit penalty reduction or reasonable cause exemption if a state operates a separate state program. The proposed rules also add substantial new and burdensome reporting requirements to monitor state behavior in the area of separate state programs and ties the submission of these "optional" reports to eligibility for the high performance bonus, the caseload reduction credit and a work penalty reduction. We believe that the combined effect of these provisions will be to discourage state innovation—to the detriment of the well-being of families.

We believe that the statute is clear: states are permitted to serve eligible families in separate state-funded programs and have the spending in these programs count toward the maintenance-of-effort requirement. As outlined in the January 1997 policy announcement (TANF-ACF-PA-97-1), states may expend state MOE funds in three different configurations: 1) co-mingled with TANF dollars; 2) segregated but within the TANF program; and 3) expended in separate state programs. The preamble and proposed regulations, as well, confirm that separate state programs are a legitimate option under the law and that states are to have more flexibility with these funds. At 62Fed.Reg.62129, the Department writes "We recognize that States have more flexibility in spending State MOE funds than federal funds, especially when they expend their MOE funds in separate State programs."

We also firmly believe that the MOE requirement under TANF represents a financial commitment to spending on needy families, not a specific program commitment. As recognized in the January policy announcement referenced above, TANF requirements do not apply to these separate state programs. This enables states to design programs for targeted populations that have special needs or to create innovative approaches to support work such as state earned income credits.

Currently, several states have created separate programs to serve the most vulnerable families—legal non-citizens with poor language and literacy skills, single parents taking care of a disabled child, clients not disabled enough to qualify for SSI but unable to work 20 to 30 hours a week, and victims of domestic violence. With the flexibility available under separate programs, states are able to set individualized participation requirements—which may include substance abuse treatment, ESOL, education and work —appropriate to the unique circumstances of the family. States have also created separate state programs to provide enhanced access to education and training activities and to provide food assistance to immigrant children. These programs serve very legitimate purposes and are not designed to evade the work requirement or time limit but rather to

provide the flexibility needed to meet the families' special needs. According to the statute, state spending in these programs on eligible families counts toward the MOE.

Recently, the Department released financial data on FY 1997 TANF and MOE spending. The reports showed that in FY 1997, states spent just slightly more than 2 percent of MOE spending in separate state programs. Spending in separate programs, then, is not a significant amount of total MOE and there is no evidence of widespread abuse. We urge the Department to monitor state activity and only propose regulations when and if a problem truly arises.

The specific separate state program provisions that are of concern include the following:

Data Report, Section 275.3 (d)

This section conditions eligibility for the high performance bonus, caseload reduction credit, and a work penalty reduction on the state providing a quarterly TANF—MOE Data Report containing detailed aggregated and disaggregated case information on families served in separate state programs. We believe that the request for this information and its linkage to penalties, bonuses, and caseload credit exceeds the Department's regulatory authority under the Act. Further, much of the data requested can not even feasibly be collected for some separate state programs—such as diversion programs in which the clients have only limited contact with the state or state earned income credit programs which are administered through the tax system.

Under Section 273.7 (b) states are required to file an annual addendum to their fourth quarter TANF financial report providing information on expenditures, activities provided and individuals served in state-only programs for the purpose of counting MOE expenditures. We believe this report will provide sufficient information to the Department for monitoring of spending in separate state programs and no further reporting is necessary. Additionally, since the vast majority of MOE spending is expended in the TANF program, client data on most MOE-funded families will be included in the TANF Data Report. Therefore, we recommend that the TANF-MOE Data Report be eliminated.

Penalty Reduction, Section 271.51

This section makes states ineligible for a penalty reduction for failure to meet work participation rates unless the state demonstrates it has not diverted cases to a separate program for the purpose of avoiding work participation rates. By adding a new conditional requirement, the rule is in conflict with the law which states that the Secretary "*shall*" impose reductions in penalties based on the *degree of noncompliance*. This noncompliance relates to the states' performance in its TANF program—the statute makes no reference to MOE spending in a separate state program. Additionally, while a state

may have an unrelated policy purpose in establishing a separate program, the Secretary may erroneously determine that the state's intent is to avoid the work rates. We do not believe that the state should be put in the situation of having its intent or purpose challenged by the Secretary. It is unclear how the Secretary can accurately make an assessment of the state's purpose: the reasons for state decisions are complex and often based on many factors. This provision creates a circular debate about intent—one that will be impossible to fairly and definitively resolve.

Reasonable Cause and Corrective Compliance, Section 272.5

Sections 272.5(c) and (d) prohibit a reasonable cause exemption from a number of penalties if the Department detects a significant pattern of diversion of families to a separate state program that achieves the effect of avoiding the work participation rate or diverting the federal share of child support. We believe that if a reasonable cause for a penalty waiver exits—such as a recession, then the Secretary should grant the relief—regardless of the existence of a separate program. Section 272.6(i)(2) similarly limits penalty reduction under a corrective compliance plan "unless the state corrects the diversion." This would effectively require states to discontinue their separate state programs. If so, the special needs of these families will go unmet. These provisions place states with separate programs at greater risk of penalties even though the law does not speak to "a significant pattern of diversion"—an arbitrary and imprecise standard created in the proposed rule. In fact, it is virtually inevitable that some diversion of the federal share of child support will occur. For example, for some separate state programs, such as a program to provide food assistance to non-citizen children, the state may not feel it's appropriate to trigger the assignment of child support rights.

States also object because these provisions are so far-reaching, not only would a state be denied penalty relief from the work participation rate but also from the time limit, work sanction and child care penalties—issues unrelated to the work rate.

We believe that these provisions are based on unfounded assumptions that separate state programs would be used for purposes other than to serve families. Indeed, if states truly wanted to "avoid the work participation rate," the simplest approach would be to eliminate benefits altogether for certain families. The vast majority of states have been administering TANF programs for 15 months and there is no compelling evidence to suggest that states have structured or operated their programs to avoid work penalties or avoid remitting the federal share of child support collections.

We firmly believe that HHS should not issue regulations to address problems that do not exist. Regulating to prevent some potential, future actions by states may have the unintentional result of discouraging states from adopting innovative and progressive strategies to assist TANF families. Again, we must underscore that the law places no such restrictions on separate state programs. We believe that the maintenance of effort requirement is a financial commitment, not a program commitment. As long as the

Department determines that the state-funded programs are qualified expenditures under the law, then the state program design should not be regulated further.

Recommendation. We urge the Department to strike any reference to separate state programs when determining penalty reductions, reasonable cause exemptions or corrective compliance. The Secretary should not treat states with separate state programs any differently than those without them. Additionally, as discussed above, the rules should not require detailed data reporting on separate state programs.

III. WAIVERS

Central to the intense negotiations over the design and application of the PRWORA law was the states' ability to continue federally-approved welfare waiver research and demonstration projects after the enactment of welfare reform. Governors fought for the inclusion of Section 415 of the TANF statute that explicitly allows states to continue their waivers until their expiration date, even if they are inconsistent with the new law. Congress allowed states to continue these waivers because it knew that welfare reform--undertaken by the states long before the passage of PRWORA-- was achieving extraordinary, unprecedented success in moving families off of welfare and into work. Indeed, the innovations and policies included in state waivers provided a model for the new federal welfare reform law.

Congress respected the fact that states had dedicated considerable resources to develop waiver demonstration projects; achieved federal approval only after an exhaustive application process; committed resources for a rigorous evaluation of their waivers and adopted state laws to undertake their waiver experiments. That is why Congress permitted states to continue their successful policies and practices and specifically instructed the Secretary to "*encourage* any State operating a waiver to continue the waiver." It is confounding that, in direct contradiction to the expressed intent of the law, the cumulative effect of this proposed rule is to *discourage* states from continuing their waivers.

The proposed rule sets forth a narrow and incomprehensible definition of waiver "inconsistencies," denies waiver states any reasonable cause exception or penalty reduction, and pressures states to discontinue their waiver as part of their corrective compliance plans. The Secretary once again has exceeded her authority in the regulation of waivers. Section 415 of the TANF statute grants her no such authority.

The preamble (62 Fed. Reg. 62143-44) states that with respect to the waivers and the work requirements of the new law, the Department "wanted to draft a regulation that would balance the legislative emphasis on helping recipients find work quickly with the intent to allow States to continue reform activities they had already undertaken." This statement is odd for a number of reasons; first the statute does not instruct the Secretary to "balance" these objectives and second , the Department wrongly assumes the states with waivers do not have welfare to work as a primary objective. In fact, work is the centerpiece of these waiver demonstrations. States are well aware that when their waivers

expire and cannot be renewed, they must immediately meet all the provisions of the TANF statute, including the work participation requirements.

Definition of Inconsistency, Section 270.30

The proposed rule introduces a new standard not found in the law by stating in Section 270.30 "Inconsistency means that complying with a TANF requirement would necessitate that a State change a policy reflected in an approved waiver." This standard of necessity is far too restrictive. More fundamentally, Section 417 of the TANF statute limits the Secretary's authority to regulate the conduct of States "except to the extent expressly provided" in the law. The TANF statute grants the Secretary no such authority to regulate Section 415 with respect to defining waiver inconsistency.

Recommendation. The authority rests with the state, not the Secretary, to determine if a waiver provision is inconsistent with the law. In their TANF state plans, states identified waiver inconsistencies and whether they intended to continue or discontinue their waivers. We recommend that states continue to have the authority to do so.

Application to Work Requirement, Section 271.60(b)(1)

Second, the application of the proposed definition of inconsistency creates more confusion than clarity, particularly with respect to work participation requirements. We agree with the policy in Section 271.60 (b)(1) that permits states to use the work activity definitions contained in their waivers. Clearly, states would need to "change a policy reflected in their approved waiver" if they were compelled to follow the TANF work definitions. We were perplexed when the application of the inconsistency definition to the hours of work and exemptions, Section 271.60 (b)(2) and 271.60(c) respectively, produced a different outcome.

Some states would need to change their waiver policies to comply with the hours of work defined in the work participation rate requirement in TANF statute or they would be penalized for failure to meet the work rate. Yet, under the proposed rules, some would not be permitted to defer to their waiver hours in this instance. Some state waivers contain exemptions for certain clients from work requirements, yet under the proposed rule, those exemptions would not be recognized as inconsistencies. Again, these states would have to change their policy in order to meet the work rates and avoid a penalty. As with allowable work activities, we believe hours and exemptions represent inconsistencies.

In Section 415(a)(2)(B) of the TANF statute pertaining to waivers granted states after enactment of the PRWORA, states that "a waiver granted under section 1115 or otherwise which relates to the provision of assistance under a State program funded under this part *shall not affect the applicability of section 407 to the State*." Presumably, then the applicability of section 407 should be affected with respect to waivers granted prior to the enactment of the law.

Recommendation. We interpret this section of the law to mean that the intent of Congress was that all states must meet work participation rates. States with waivers could continue to use their hours, definitions of work activities and exemptions in calculating work rates. We believe the required hours, exemptions and definitions of work are often inextricably linked and therefore, states should be permitted to assert inconsistencies for all of these.

Lack of Encouragement of Waivers, Section 272.8(b) (1), (2) and (3)

Section 415 (c) of the TANF statute states that the Secretary "shall encourage any State operating a waiver described in subsection (a) to continue the waiver and to evaluate...the result or effect of the waiver." Unfortunately, Section 272.8(b) (1), (2) and (3) of the proposed rule discourages states from maintaining their waivers if they fail the work participation rate or time limit requirements by a) making those states ineligible for a reasonable cause exception from the penalty as well as a reduction in the work penalty under Section 272.51(b)(3); b) requiring States to "consider modifications of its alternative waiver requirements as part of its corrective compliance plan;" and, c) denying a reduced penalty to states who continue their waiver and fail to correct a violation under a compliance plan. This section is unduly punitive and harsh. It would cause important evaluations and experimentation to be discontinued if states are forced to make these alterations in their waiver designs.

Similar to the treatment of separate state programs, the proposed rules add a new conditional requirement to penalty reduction under Section 272.51 relating to waivers. Rather than following Section 409 of the TANF statute, the proposed rule adds waiver status to the conditions for penalty reduction. As in the case of separate state programs, the proposed rule is in conflict with the law.

The Department explains these proposed penalty provisions in the preamble (62 Fed. Reg. 62150) by pointing to the waiver states' "advantage compared to States operating fully under TANF rules." If these states find themselves in penalty status, the waiver evidently did not provide them with that advantage. The proposed penalty ignores the fact that waiver states that experience a recession or a natural disaster may not be able to meet the work participation rate, notwithstanding any "advantage" work definitions might afford. Yet, waiver states experiencing these extreme circumstances would not receive any relief. The treatment of waiver states with respect to penalties is unjustified.

Recommendation. We recommend the elimination of these sections of the proposed rule. We believe waiver states should be treated no differently than non-waiver states with respect to the application of the reasonable cause exception, work penalty relief and the corrective compliance plan.

Application to the Time Limit, Section 274.1(e)(2)(i)

The proposed rule specifies that "a State will count toward the five-year limit all the months for which the adult is subject to a State waiver time limit." The proposed rule raises serious client notice issues. Some states operating under waivers informed clients that their time on assistance did not count toward the federal lifetime time limit. These states viewed the time limit as inconsistent with their waivers, based on their reasonable interpretation of the statute. Under this proposed rule and due to the lack of Department guidance on this issue, clients and their families would lose a year or more of TANF eligibility.

Recommendation. We recommend that the Secretary follow the law and allow states to continue their waivers that are inconsistent with the law. As noted above, some states operating their reasonable interpretation of the law, notified clients that their time limits would not begin immediately. In those instances, we believe the lifetime time clock for those clients should begin on the date these rules are finalized.

IV. CHILD-ONLY CASES

We strongly oppose the child-only case policy outlined in the proposed rule. Just as in the Separate State Programs section, we see the sentiment of distrust and suspicion about state behavior emerge once again. It is particularly ironic that the preamble states that the Department has "become concerned" that states would avoid the penalties by excluding the adult from the cases, yet, provides no evidence that any state has "converted" any cases in order to avoid work or time limit requirements. The preamble states that "such conversions would seriously undermine these critical provisions of welfare reform." However, states fearing the risk of penalty may discontinue providing funding for these child-only cases. The effect of this proposed rule may violate the first "purpose" found in Section 401 of the TANF act; "to provide assistance to needy families so that *children may be cared for in their own homes or in the homes of relatives.*" We urge the Department to reverse this policy that would force states to decide whether to fund these children or be exposed to severe penalty.

Prohibitions on Child-Only Cases, Section 271.22 and Section 274.1

These sections of the proposed rule would prohibit states from converting TANF cases to child-only cases solely for the purpose of avoiding the work participation rate and time limit penalties. Further, the proposed rule would "add-back" those cases into a states' denominator to calculate the work participation rate and hardship exemption, if the Secretary determines those cases have been "converted" or the state has adopted a definition of family solely for the purpose of penalty evasion. Finally, Section 271.22 (b)(2)(i) requires states to "report to us annually on the number of families excluded because of the State's definition and the circumstances underlying each exclusion." States

strongly object to the proposed rule pertaining to child-only cases for the following reasons:

First, it is critical to note that there has been no widespread change in state policy with respect to the funding of child-only cases. The percentage of the child-only cases to the total number of cases was increasing prior to the enactment of the TANF statute due to factors unrelated to work participation rates and time limits. Child-only cases serve "citizen children" born to non-citizen parents, children in households with adults receiving SSI benefits, children who have avoided entering the child welfare system and instead are cared for by relatives and in some states, children whose parents lose benefits due to sanctions or time limits. The percentage of child-only cases continue to rise due to these aforementioned factors and due to the number of adult headed households exiting the welfare rolls for work. The funding of child-only cases was permissible under AFDC and there is no reason why states should not continue to fund these cases under TANF.

Second, the TANF statute neither prohibits nor discourages states from making only the children—and not the adult caretaker—eligible for benefits providing that the children are in the care of an adult. The Secretary has exceeded her authority by proposing to determine state motivation for creating a child-only case and to add-back cases in the denominator in determining work participation rates and hardship exemptions from the time limit. The Secretary has no authority to regulate the type of child-only cases that can be funded in a state TANF program.

Third, the proposed rule introduces an arbitrary and vague "sole purpose" standard that the Department would use to determine whether the state "converted" cases or defined families to avoid penalties. Given the complex factors involved in these children's lives, it is difficult to imagine how the Secretary could attribute evasion of the penalties as the "sole" motivation for creating a child-only case. The Department apparently had difficulty in developing a clear and enforceable standard to use, such as specific criteria it might use in determining the state's motivation. The absence of any problem always makes it difficult to advance a solution. The Department should not regulate in this area until a problem arises.

Finally, the proposed rule seeks to determine the motivation of the state for creating each child-only case by creating a vague standard that would be impossible to administer and even more difficult to prove. Moreover, the requirement that states report on the circumstances underlying each exclusion would be extremely burdensome on states and yield little useful information to enable the Secretary to determine state "motivation." Since this determination would result in the adding-back of cases in the denominator, states, fearing federal penalties, may discontinue benefits to child-only cases.

Recommendation. Absent any evidence of a problem, there should be no federal regulation of child-only cases or special reporting requirements on child-only cases.

V. WORK-RELATED ISSUES

Caseload Reduction Credit--Subpart D, Sections 271.40-271.44

Under the TANF statute, states will receive a pro rata reduction to their work participation rates based on caseload reductions compared to FY 1995. This provision "rewards" states for successfully moving families off the caseload and into employment and self-sufficiency. The caseload reduction credit compensates for the fact that work participation rates are essentially process measures, counting only those who are on welfare and working and failing to measure the desired outcome of leaving welfare for work.

The law requires that the caseload reduction credit must not reflect any caseload changes that resulted from either Federal requirements or state changes in eligibility. The statutory language placed the burden on the Secretary to demonstrate "that such families were diverted as a direct result of differences in such eligibility criteria." The proposed rule at Section 271.41, however, effectively transfers this burden to states by requiring states to submit an application that specifies all eligibility changes since the beginning of FY 1995, estimates the impact of each change that affected the caseload and describes the estimating methodologies. States generally support this approach because they are in a better position to make these calculations. However, they have expressed concerns about the difficulty in clearly identifying the effects of individual policy changes. They also believe that the timeframe established in the rules is not sufficient time given the complexity of the undertaking. State must submit a caseload credit application within 45 days after the end of the fiscal year (Section 271.44) and have only two weeks to respond to any followup questions from the Department (Section 271.41(d)(2)). Since the Department recognizes the difficulty in determining these factors, as well, we hope the Department will work with the states and be open to evolving methodologies.

States have raised a number of concerns with the methodology for determining the caseload reduction factor as outlined below.

First, the proposed regulation at, Section 271.41, requires the calculation of two separate caseload reduction factors – one for *all families*, and one for *two-parent families*. This two-part distinction was not in the statute. It will disadvantage many states that, consistent with the goals of promoting work and two parent family formation, have adopted policies that have resulted in an increase in the two-parent caseload, while their all-families caseload has declined. These state policies include the expansion of the earned income disregard, and the elimination of the hundred hour for two-parent families rule. We recommend that states have the *option* to either use separate caseload reduction factors or use a total caseload reduction factor for both the two-parent and the all-family work participation rates.

Second, the proposed rules at Sections 271.40 and 271.41 require that states compare their FY 1995 AFDC caseloads with all TANF and MOE cases in the state receiving

assistance, including those in separate state programs. States have noted a number of concerns about this comparison:

- The FY 1995 caseload figure will exclude cases that received emergency assistance and At-Risk and transitional child care benefits—however, these cases may be included in the TANF caseload (unless they are excluded from the definition of assistance.) Excluding recipients of these benefits from the FY 1995 base year could create an undercount of the total population served in FY 1995 and will offset legitimate caseload reductions. A more appropriate comparison may be individuals in the caseload (for both the base year and current year) receiving *cash* assistance.

- For the two-parent caseload reduction factor, the proposed rule would require a state to compare its two-parent caseload to its FY 1995 AFDC UP caseload. However, these data are not necessarily comparable. For example, two-parent families with a disabled child were excluded from the UP definition but are included in the two-parent caseload under the TANF statute. Also, while the TANF law permits states to exclude from the two-parent caseload those individuals with a *disabled* spouse, the AFDC program excluded families with an *incapacitated* spouse. States my define disability differently from the definition of incapacity under the AFDC program.

- Finally, states report that they have made a number of "positive" policy changes—such as increasing earnings disregards, eliminating the deprivation factor, increasing need standards— that have resulted in caseloads being larger than they would have been in the absence of these eligibility changes. As currently written, the proposed rules do not permit any sort of adjustment to the base year or for eligibility changes that increase the current caseload.

At Section 271.42, the rule outlines the reductions that count in determining the caseload reduction factor. We believe that the Department has generally created a reasonable distinction between factors that directly affect a family's eligibility for assistance, such as income and resource limits, and time limits, and those that are enforcement mechanisms and procedural requirements. While the proposed rules are silent on the issue, we do not believe that the behavioral requirements such as the requirement to participate in work activities or cooperate with child support authorities should be considered an eligibility rule.

Recommendation. To improve the calculation of the caseload reduction credit, we recommend that states be permitted to make adjustments to either their base-year caseload numbers or their current year caseload numbers to take into account the kinds of factors mentioned above. We propose that the Department use the concept of *net decrease* to adjust for caseload increases due to federal and state eligibility changes. Without this flexibility, states may be disinclined to adopt policies that are consistent with the intent of the law and secondarily result in caseload increases. These include policies that make work more attractive and/or support the formation of two-parent families. We strongly urge the Department to work with our organizations and states to develop a consistently fair net caseload reduction credit methodology that would permit

states to make adjustments either in their base year figure or current year caseload data so that states will truly be comparing "apples to apples."

Additionally, as previously discussed, the rules should allow states to have the option of applying their total caseload reduction credit to both the all-families and two-parent work participation rates. We also recommend a more reasonable time frame for states to provide information to receive a caseload reduction credit and specifically recommend that states be given at least 30 days to respond to any followup questions from the Department. Finally, the rules should clarify that requirements that individuals perform certain activities in order to receive or continue to receive assistance should not be considered an eligibility requirement for the purpose of determining the caseload reduction credit.

State Work Penalties—Subpart E

The TANF statute established tough, new work participation rate requirements upon the states and stiff penalties for failure to meet the rates. At the same time, recognizing the substantial challenge of meeting these work rates, the law permits the Secretary to reduce the penalty based on the severity of the failure and/or other circumstances and to waive the penalty altogether if the state had a reasonable cause for failure to comply. The statute grants the Secretary substantial latitude in making these decisions because legitimate reasons for failure could vary widely. Thus, we are concerned by some provisions in the proposed regulations that would limit penalty relief to a narrow set of circumstances.

Penalty Reduction for Failure to Meet the Work Participation Rate, Section 271.51

The statute, at Section 409(a)(3)(C), requires the Secretary to reduce a state's penalty for failure to meet the work participation rate based on the "*degree of noncompliance.*" The proposed rules have interpreted this in two ways.

First, at Section 271.51 (b)(2), the proposed rule provides that a penalty for failure to meet the two-parent rate will be assessed proportional to the size of the two-parent caseload relative to the all-families caseload. Given that the two-parent caseload is generally quite small relative to the entire caseload, the imposition of a full penalty if the state failed to meet the two-parent rate—while meeting the all-families rate—would be excessive. We believe the proportional penalty is consistent with "the degree of noncompliance" and are very supportive of this provision.

Second, the rules propose that states must meet the 90 percent of the work rate in any fiscal year in order to qualify for penalty reduction. This is an arbitrary threshold without any statutory basis and an inadequate approach for many reasons:

- It fails to distinguish between states that have made a substantial effort and those that have not.
- It may fail to give relief to a state that has made significant progress even if it hasn't met the 90 percent threshold.
- It creates a disincentive for improvement if a state does not believe it can realistically meet the 90 percent threshold.
- It fails to give relief to states that have high participation in countable work activities but may have missed meeting the work participation rate because not all participating individuals met the hourly requirement.
- It fails to provide any consideration for increases in the caseload, whereby a state may be faced with an even higher work participation rate because the caseload reduction credit will be less.
- It fails to account for the changing composition of the caseload—overtime, a higher proportion of a state's caseload will be those individuals with the most significant barriers to employment.
- It fails to account for the fact that states are starting from different baselines.
- It fails to recognize that the two-parent work rate will be much harder to achieve, and that overtime the all-families work rate will be harder to achieve as well.

Recommendation. Clearly, the use of a single measure—a 90 percent threshold—can not address the complexities of the "degree of noncompliance." In fact, "degree of noncompliance" would most logically be interpreted as a proportional reduction without any threshold. Most states believe every state should be given some degree of credit for progress achieved in meeting the work rate. For example, a state with 40 percent non-compliance, i.e. having an 18 percent work participation rate when the standard was 30 percent, would receive a 40 percent penalty reduction. If the Department retains the threshold approach, we strongly urge that it be reduced it to a more reasonable level. As states universally agree that the 90 percent threshold is too high. Additionally, given that the two-parent participation rate is widely recognized as being much more difficult to meet, the threshold should be lower for the two-parent rate than for the all-families.

We believe that there are a number of options that could be considered together or in lieu of a threshold and that the opportunity for penalty reduction need not be limited to a single measure of degree of noncompliance. The Secretary should be required to reduce penalties if a state meets one of several criteria or measures that address some of the issues raised above. For example, the penalty could be reduced if:

- The state demonstrates that significant progress occurred as indicated by the percentage increase from the previous year. Significant progress could be defined by the percentage increase in the work participation rate requirement compared to the previous year under the statute. For example, the increase between the FY 1998 all-families requirement of 30 percent and the FY 1999 all-families requirement of 35 percent is 16.7 percent. A state would receive a penalty reduction if it increased participation by 16.7 percent in FY 1999 compared to FY 1998.
- The state achieves high levels of work participation in countable work activities even though the hours of required work are not met. For example, if a state meets 75

percent of the work participation rate based on individuals in countable work activities the state would receive a lesser penalty. (Or the measure could be individuals in countable work activities who participated for at least 50 percent of the required hours.)

- A state experiences a significant caseload increase but would have met the criteria for penalty reduction if its work participation rate were computed based on the prior year's caseload.
- A state fails to meet the two-parent rate but exceeds the all-families rate. The number of single-parent families participating in excess of the required number could be added to the two-parent participants. If the sum of the excess single parents and the two-parents that meet the work rate exceed the required number to meet the two-work rate, then the state would have its penalty reduced.
- A state would have met any of the criteria for penalty reduction but for the provision of good cause domestic violence waivers.

Under the proposed regulations, Section 271.51(c), the Secretary may also grant penalty relief a state meets the definition of a needy state or if the state submits objective evidence that the noncompliance is due to extraordinary circumstances such as a natural disaster or regional recession. We believe that examples of extraordinary circumstances should also include sub-state, state or regional recessions or economic downturns, wide-spread economic disruption (i.e., a plant closing or a significant number of layoffs), chronic high unemployment, and caseload increases. We also recommend that the definition of natural disaster include severe bad weather, such as ice storms which prevent people from getting to work.

Reasonable Cause Waivers of Work Penalties Section, 271.52

Under the proposed rules, the Secretary is permitted to grant reasonable cause waivers of a number of penalties, including failure to meet the work participation rate requirements. The Secretary may apply the reasonable cause criteria specified at Section 272.5 which apply to a number of penalties. The factors a state may use to claim reasonable cause are limited to 1) natural disasters and other calamities, 2) formally issued federal guidance that provided incorrect information, and 3) isolated, non-recurring problems of minimal impact that are not indicative of a systemic problem. Additionally, specifically with respect to the work requirement states may also claim reasonable cause if failure to meet the rate was attributable to its provision of good cause domestic violence waivers or the provision of assistance to certain refugees.

Recommendation. While we believe the factors outlined in the proposed rule would be reasonable causes for penalty waiver, states also believe that the proposed list is too limited and narrow. Under Section 409(b) of the statute, the Secretary was granted broad authority to make reasonable cause determinations, however the proposed rule unnecessarily restricts the Secretary's discretion to a few criterion. We recommend that the Secretary be permitted to consider a number of factors or combination of factors and

that the proposed rule should provide a list reasonable cause factors by way of example. However, the Secretary's determination need not be limited to these factors. For example, the Secretary should be able to consider as reasonable cause any unexpected events that are beyond the state agency's control that the state couldn't reasonably anticipate and plan for.

We recommend that additional factors be provided in the proposed rule as examples of reasonable cause including sub-state, state or regional recessions or economics downturns, wide-spread economic disruption, chronic high unemployment, caseload increases, natural disasters (including severe bad weather), and court orders or legal challenges that prohibit compliance. These factors are similar to those we believe the Secretary should be permitted to consider for a penalty reduction. Thus, the Secretary could determine whether the circumstances warranted a complete waiver of the penalty or a reduction.

Corrective Compliance Plan, Section 272.6

Under the proposed rules, states not claiming or awarded a reasonable cause exemption for a penalty or receiving a penalty reduction under the work requirement may enter into a corrective compliance plan with the Secretary to correct or discontinue the violation. The rule proposes that corrective action must be completed with six months. The preamble explicitly asks for comments on the six-month limitation.

States hold the view that the six-month timeframe will not be realistic or feasible in many circumstances and they are particularly concerned with respect to the work participation rate penalty. In order to come into compliance, a state may have to make changes to its underlying statute, reprogram computers or change state regulations—all of which may take longer than six months to achieve. For example, a state may not be able to meet the work participation rate unless it changes its exemption policies—which would likely require a change in the state's law. And six months could pass before the state legislature even came into session again. States with county-administered systems particularly believe six months will not be adequate.

Recommendation. We recommend that the timeframe for the corrective compliance plan be proposed by the state in its plan and, as such, would be subject to review and consultation during the HHS process to reach mutual agreement on the plan. In this manner, the timeframe could be designed to take into account the particular needs or circumstances of the state.

Additionally, with respect to the corrective compliance plan and a state's failure to meet the work participation rate, a state should be considered in compliance if, in the year the state implements the compliance plan (penalty year), it achieves the work participation rate of the year for which it is subject to a penalty. The proposed rules, however, would require states to meet a new target for compliance—the work participation rate in the

penalty year. While states will obviously strive to meet the new work participation rate requirement, they should not be held accountable to that standard in their corrective compliance plan.

The rule also provides for a penalty reduction if the state achieves significant progress in correcting the non-compliance and sets a 50 percent threshold, Section 271.53(b). We believe this is unnecessarily arbitrary threshold. We recommend that identification of a level of progress or benchmark appropriate to the individual state's situation be part of the development of the corrective compliance plan.

Finally, as mentioned in the separate state program discussion, we do not believe that the Secretary has the statutory authority to deny a penalty reduction under a corrective compliance plan because the state operates a separate state program. The TANF statute gives clear authority to the state to establish these programs to serve eligible families. Therefore, we recommend that the Department eliminate any reference to separate state programs when granting penalty relief under a corrective compliance plan.

Good Cause Domestic Violence Waiver , Sections 270.30, 271.52 and 274.3

States are generally supportive of the Department's approach to provide a reasonable cause exemption to a state for failure to meet the work participation rate requirements and to comply with the 60 month time limit if a state can demonstrate that failure to do so was attributable to the granting of good cause domestic violence waivers. (Section 271.52 and Section 274.3.) We believe that it is only reasonable that states be granted penalty relief if they choose the Family Violence Option. As mentioned in the discussion on penalty reduction, we recommend that states also have the opportunity to receive a penalty reduction if it would have met the reduction criteria but for the provision of domestic violence waivers.

However, states are concerned that the definition of Good Cause Domestic Violence Waivers, Section 270.30, establishes some prescriptive requirements that will have the effect of discouraging states from choosing this option, notwithstanding the penalty relief. First the proposed regulation states that the good cause domestic violence waiver must be temporary—not to exceed six months. In contrast, the law at Section 402 (a)(7) provides that the waivers may be for "for so long as necessary." States with experienced in working with victims of domestic violence report that six months is generally not long enough to resolve their problems. While the preamble language explains that the waiver may be renewed, this is not explicit in the proposed rules. While we agree that the waiver should not be permanent, states should be permitted to determine the appropriate length on a case-by-case basis, as permitted in the statutory language.

The provision requiring "an appropriate services plan designed to provide safety and lead to work" also concerns states. Again, the provision goes beyond the statutory language which requires the state to "refer such individuals to counseling and supportive services." The services plan implies that the individual would be expected to participate in specified

activities and could be sanctioned for non-compliance. This overlooks the fact that participation—independent of the nature of the activity—puts the individual at risk in a domestic violence situation. Thus, this provision could result in more harm than good. Additionally, based on the language of the statute, states have moved ahead and created referral mechanisms, developed screening forms and have trained caseworkers. The proposed rules would require that states revamp much of their efforts to date.

Recommendation. In summary, we urge the Department to modify the proposed rules regarding the good cause domestic violence waiver in several areas. First, the definition at Section 270.30 should remove any reference to any time limit and return to the statutory language "for so long as necessary." Similarly, rather than requiring "an appropriate services plan ..." the definition again should reflect the statutory language which requires referrals to counseling and supportive services.

Finally, with respect to penalties for failure to meet the work participation rate, we believe that the granting of domestic violence waivers ought to be a criterion for penalty reduction as it is for a reasonable cause exemption.

VI. DEFINITION OF ASSISTANCE

The definition of assistance is critical to the states' ability to administer their TANF programs, their flexibility in designing innovative new approaches to supporting a family's transition to work, and ending dependence on welfare. States are concerned about the proposed definition of assistance included in the proposed rule, particularly as it relates to child care, work subsidies, transportation and the stricter definition of "one-time, short term assistance." The preamble describes the proposed definition as "additional clarifications" to the January 31, 1997 ACF policy announcement (TANF-ACF-PA-97-1). However, the proposed definition of assistance in Section 270.30 would dramatically alter the lifetime time limits for thousands of TANF families receiving child care and work subsidies and require states to significantly alter or discontinue welfare avoidance or diversion programs now underway in 30 states.

The Department correctly acknowledges in the preamble (62 Fed. Reg. 62132) that "a state may provide some other forms of support under TANF that would not commonly be considered public assistance." And we agree that "short-term, crisis-oriented support" should not be defined as "assistance." However, we believe that the emphasis the proposed rule places on "direct monetary value" as a criterion to distinguish between assistance and non-assistance is not the right approach.

We recommend the Department place the emphasis on other forms of support "directly related to the work objectives of the Act" described in the preamble. We recommend that you consider the distinction drawn in Section 271.42(b)(3) that excludes cases in determining the caseload reduction factor such as "cases that are receiving only State earned income tax credits, child care, transportation subsidies or benefits for working families that are not directed at their basic needs" for further guidance. Applying a work-

focused criterion would produce a clearer line between families receiving on-going cash assistance, more commonly considered "welfare" and TANF support services enabling families to transition to and retain employment.

States strongly oppose the inclusion of child care in the definition of assistance. We do not believe working low-income families who have transitioned off of welfare should be treated the same as welfare clients receiving traditional cash assistance. Working middle-income families, who receive federally-subsidized child care in the form of tax credits or discounted child care services, are not considered to be receiving "welfare" nor are they subject to a lifetime limit on benefits. Working low-income families receiving subsidized child care should be treated no differently than working middle-class families receiving tax credits. Child care is a critical service to support clients as they enter the work force. These families ought not to have their lifetime time clocks ticking simply because they are receiving federally-supported TANF child care.

We cannot understand how the Department arrived at the conclusion that child care was not a form of support "directly related to the work objectives of the Act" (62 Fed. Reg. 62132). Under the proposed definition, clients who work and receive child care services under the TANF program would be subject to time limits while clients served with Child Care and Development Funds (CCDF) are not. Therefore, we believe TANF-funded child care should be excluded from the assistance definition. The preamble seeks to assuage concerns by pointing out that states could transfer up to 30 percent of their funds to the CCDBG and serve clients without applying the lifetime time limit. However, this transfer is not easy to do in states that require legislative approval for such transfers, particularly in states with legislatures meeting biennially. We oppose requiring additional administrative and legislative efforts to transfer these funds, when the federal rule could reasonably exclude child care from the definition of assistance. Similarly, states are concerned that under the proposed definition transportation assistance, in the form of vouchers, might be considered assistance because it has "direct monetary value." This assistance, needed to move people to work, should not be considered assistance.

Second, Section 270.30 provides that the definition of assistance would not include "assistance paid within a 30 day period, no more than once in any twelve month period, to meet needs that do not extend beyond a 90 day period." States believe this definition is to too narrow. The January 1997 guidance provided states broad discretion to design welfare avoidance programs, such as diversion. As a result, states have adopted different approaches and applied their own definitions of short-term assistance tailored to meet the needs of the families seeking support services. Some states have permitted local governments to develop their own definitions as well. These innovative new programs provide critical services, divert families from a lifetime of dependency and move them toward new employment opportunities. With 30 states providing some type of diversion program, the narrow definition in the proposed rule would force states to either radically redesign their programs or discontinue providing multiple support services altogether.

The proposed definition limits states from providing assistance to families "no more than once in any twelve month period." In state diversion programs, clients may be provided with a variety of forms of assistance to enable them to work, such as automobile repair, temporary housing, etc. There may or may not be any limit on the number of times a client would seek and be provided support services in a given year. Forms of assistance in a given year could vary as well. We believe states should be permitted the flexibility to provide diversion assistance to clients seeking to obtain or retain employment or achieve self-sufficiency without limitation.

We interpret the proposed definition limiting assistance "to meet the needs not to exceed 90 days" to apply to the duration not the aggregate amount or value of non-assistance provided to the client. States would object to the proposed rule placing a limitation on the value of the non-assistance provided.

Recommendation. We believe the proposed definition is insufficient . The January 1997 guidance on this topic was better in that it excluded child care and transportation assistance from the definition and granted states greater flexibility in providing short-term assistance. We support the January 1997 guidance with respect to those provisions. In crafting the final rule, we urge you to drop the criterion of "direct monetary value" and instead apply the test of whether the support is "directly related to the work objectives of the Act." We recommend replacing the "one-time, short term" limitations with short-term, episodic support to families in discrete circumstances that can be solved with specific actions aimed at addressing a crisis situation or preventing clients from going on or returning to welfare.

VII. ADMINISTRATIVE COSTS

The TANF statute prohibits states from spending more than 15 percent of their TANF grant for administrative purposes. A similar restriction applies on state MOE expenditures. Given these limitations, the definition of administrative costs is extremely important. The definition must recognize that under a work-focused system of time limited assistance, traditional lines between administration and services are blurred, that welfare programs are evolving, and that states will be experimenting with alternative forms of service delivery. Upon reviewing the proposed rules regarding administrative costs, Sections 273.0 (b) & 273.12 and the preamble explanation for those sections, states have identified a number of serious concerns with the proposed rules.

First, while the actual rule is silent on the matter, the preamble (62Fed.Reg.62151) states that eligibility determination would be an administrative cost and the portion of a worker's time spent on this activity must be allocated accordingly. This conclusion overlooks the fact that as the role of front-line workers is changing, eligibility determination is no longer a clearly defined activity but more often integrated with and sometimes indistinguishable from other activities such as assessment, case management, counseling and job placement. It would be extremely problematic, costly and

burdensome for states to attempt to track and cost allocate these functions. Moreover, front-line eligibility determination is arguably a direct service, consistent with the first goal of TANF "... to provide assistance to needy families..."

The preamble suggests that the definition has the advantage of being consistent with the definition of administration under JTPA and would therefore facilitate coordination of Welfare-to-Work (WtW) and TANF activities. We disagree. We believe that a more compelling model is the definition of administration under the Child Care and Development Fund, which excludes eligibility. The WtW funds will be administered at the local level through PICs and according to the interim final rules for this program, the state TANF agency will have little authority to influence how these funds are spent. On the other hand, significant coordination is already occurring in many states between the state TANF agency and the state child care agency, which are often housed in the same state department and eligibility determination for both services is often done by the same case manager. In these circumstances, the proposed rules would treat these costs differently.

Second, states are concerned that the proposed rule will discourage community-based, for-profit and non-profit organizations and local entities from participating in welfare reform efforts. Under the proposed rule, organizations operating under contract or grant with the state would be required to monitor and track administrative spending. These costs would then be counted toward the state's total administrative cap (62Fed.Reg. 62151). These organizations have proven to be highly effective partners with states in delivering employment-related, post-employment and support services to recipients. This requirement will create a significant burden on providers due to paperwork and tracking costs and is likely to discourage the participation of community or private entities. In fact, it's likely that administrative costs of contractors or grantees would actually increase due to the burdens of this requirement. Additionally, states will be reluctant to pursue these innovative partnerships for fear of hitting the 15 percent administrative cap. We do no believe the definition of administrative costs proposed in the rule meets the criteria stated in the preamble that "We thought it was very important that any definition be flexible enough not to unnecessarily constrain state choices on how they deliver services."

This provision is also inconsistent with current procedures whereby states consider that they are purchasing a service—often under a performance contract with payment conditioned on successful achievement of specified outcomes. We recommend that the tasks or services performed under contract or grant be defined as a direct or program cost--not administration--so that states can focus on innovation and results.

Third, states are also very concerned about the language in the preamble that suggests that the 15 percent administrative cap is applied to a state's TANF grant net of transfers to the Social Services Block Grant (SSBG) or Child Care and Development Fund (CCDF). This appears inconsistent with the statutory language which imposes the 15 percent cap on a state's TANF grant provided under Sec. 403 and makes no reference to any

adjustments. This provision may provide a disincentive for states to transfer funds for fear of exceeding the cap. Additionally, this cap calculation is in contradiction to the application of penalty percentages to the grant without adjusting for transfers.

Fourth, states oppose the structuring of the 15 administrative cap as being calculated separately for state TANF and separate state program MOE. Certain separate state programs such as state EITC's have low administrative costs while running a TANF program can be more labor intensive. The instructions to the "Temporary Assistance to Needy Families (TANF) ACF 196 Financial Report (62Fed.Reg.62215) indicate that "For state expenditures reported in columns (B) and (C), the 15 % administrative cost cap applies to the amount of Total Expenditures (line 8) in each of these columns." While the wording is confusing, this instruction appears to suggest that a distinct and separate cap exists for state-TANF expenditures (column B) and separate state programs (column C) rather than applying a single cap against the combined expenditures. This is clearly not supported by the statute which imposes the 15 percent administrative cap on qualified state expenditures in total at Section 409(7)(B)(i)(I)(dd). Thus, the 15 percent cap should be calculated against the sum of lines 8(B) and 8(C).

Recommendation. In summary, we recommend that the regulations clarify that activities related to eligibility determinations are not considered administrative activities for purposes of the cap. We urge the Department to use the definition of administrative costs under the Child Care and Development Fund as a model. Additionally, administrative costs incurred by subgrantees, contractors, community services providers, and other third parties should not be included in the administrative cost cap. Third, the 15 percent calculation should be applied to a state's TANF grant without adjusting for transfers to the SSBG or CCDF. Finally, the 15 percent administrative cap should be calculated based on the combined total of the required state MOE expenditures rather than separately by category.

VIII. MAINTENANCE-OF-EFFORT REQUIREMENT AND ELIGIBLE FAMILIES

At Section 273.2(b), the proposed rule requires that in order for state spending to count towards the MOE requirement, the services must "have been provided to or on behalf of eligible families." The rule provides further at Section 273.2(b)(3) that eligible families "must be financially eligible according to the TANF income and resource standards established by the State under its TANF plan." States have expressed a number of concerns with these provisions which appear to be more restrictive than the statutory language.

First, the TANF law allows states to claim MOE for spending on qualified activities "with respect to eligible families," Section 409(a)(7)(B)(i). The law does not require that spending be made to or on behalf of an eligible family. The proposed regulation would appear to make it very difficult to count as MOE those activities that benefit TANF eligible families in general, but do not involve a specific payment to or on behalf of a specific eligible families. For example, activities related to two of the major purposes of

the Act, in particular—preventing and reducing the incidence of out-of-wedlock pregnancies and encouraging the formation and maintenance of two-parent families—could well involve the development of materials, pamphlets, videotapes, etc. These MOE expenditures benefit all TANF eligible families but do not necessarily benefit any one family in particular.

Second, the language seems to suggest that states have a single income and resource standard. However, states may vary eligibility according to the services provided. For example, some states may use more "streamlined" standards when determining eligibility for diversion assistance. Additionally, some states are considering eliminating resource standards. The January 31, 1997 guidance (TANF-ACF-PA-97-1) only made reference to income standards established by the state under its TANF program and is preferable in this respect. Moreover, because states may provide a different set of services to individuals with special needs in separate state programs, the income and resources standards in the TANF program may not be appropriate. For example, considering that families with disabled members often face higher costs, the state may want to raise the income eligibility for these families if they are served in a separate program.

This provision would also seem to exclude state expenditures for transitional services such as child care, transportation and on-going case management as counting toward MOE, as these services are provided to families that are no longer income eligible for assistance due to earnings. However, these services are clearly consistent with the intent of the law. Similarly, At-Risk child care expenditures were included in the calculation of a state's MOE requirement, yet according to the rule, state spending on families at-risk of going on welfare would not be considered qualified expenditures.

Recommendation. The statutory intent of the TANF program is to serve needy families—as defined by the state. The statute permits states to determine eligibility with no reference to income or resource standards in the discussion of qualified state expenditures. We recommend that the proposed rules be revised to allow states to have different income standards for different services or for families served in separate programs and provide that spending on transitional benefits is countable toward MOE. Further, the proposed rules must clarify that spending on behalf of eligible families could include expenditures for services provided for TANF eligible families in general.

IX. DATA COLLECTION

States believe information collection is critical to successfully implement and manage state welfare reform programs as well as to assess the effectiveness of the programs in achieving the desired results. Indeed, many states are continuing waiver evaluations, investing in evaluations requested by their state legislatures and adopting new outcome and performance measures to guide their policy decision-making. States understand that they must be accountable to the federal branch for the expenditure of federal funds and subject to penalties if they fail to meet the requirements of the federal TANF law. States are also anxious to share their experiences so that they can assess the effectiveness or the imperfections of this new approach to welfare reform.

Meeting Shared Objectives

The cost of collecting, reporting and verifying data as identified in the proposed rule is prohibitive and will absorb significant TANF resources that could more appropriately be used to fund programs and services to benefit children and families. That is why states want to provide data to the Secretary in ways that meet the dual objectives of providing all the information necessary for the Department to determine state compliance with the law while generating these data in the least burdensome and least costly way. We believe these objectives can be met if the Department:

1) limits the number of elements required to be collected to those explicitly called for in Section 411(a)(1)(A) of the TANF statute;

2) develops a mutually agreed to list of elements needed to enable the Secretary to accurately assess compliance with the statute;

3) recognizes the states' authority, provided under Section 411(a)(1)(B)(i) of the TANF statute, to comply with the general reporting requirements by submitting "a sample estimate which is obtained through scientifically acceptable methods approved by the Secretary;"

4) allows the states to avoid costly reporting by permitting states to use their existing data to satisfy requests for additional information;

5) minimizes the burden on clients and caseworkers as well as the need to make costly state information systems changes;

6) limits the number of state reports to those explicitly called for in the statute; and,

7) conducts a national sample to prepare an annual report to Congress (Section 411(b)) rather than shifting the burden of data collection to the states.

Assessing the Burden

In assessing the scope and burden of the data collection requirements and new state reports, the proposed rule fails to meet the objectives described above. States have universally expressed deep concern about the data collection requirements contained in the proposed rule; indeed, it is one of their priority concerns. Rather than being substantially similar to the TANF Emergency Data Report (ACF Transmittal No. TANF-ACF-PI-97-6) issued on September 30, 1997, the data elements required under the proposed rule are significantly expanded and overall the reporting requirements are much more complex than under the previous AFDC program. We believe the administrative burden of reporting these data is *five to 20 times greater* than the Department's estimated 241,128 "burden hours." As the Department encouraged us to do, our organizations, along with the majority of states, sent detailed comments to the Office of Management and Budget on January 15, 1998 commenting on this burden assessment.

Overall, the data collection requirements and new state reports will entail significant systems overhaul and redesign that will require substantial investments in staff and

resources as well as create costly on-going operation and reporting efforts. To meet all the requirements, many states will have to divert staff from providing direct services such as case management, job creation and placement and supportive services to families.

In addition to increased costs and the burden of the data collection and required state reports created by the proposed rule, states are greatly concerned that the Secretary has exceeded her authority. The proposed rule requires reporting of the client characteristics of those served in separate state MOE programs; "conversion" reports of each child-only case; detailed case closure information and client characteristics; and expansive definitions of Section 411 caseload characteristics, to name just a few. Also, in a number of instances where the law instructs the Secretary to prepare annual reports to Congress, the Secretary has effectively shifted this burden to the states by requiring additional annual quarterly reports. Yet, under Section 417 of the TANF law, the Secretary is prohibited from regulating the State "except to the extent expressly provided" in the statute.

Recommendation. In the past two months, our organizations have convened a series of meetings and conference calls with state agency staff expert in the data collection requirements under former AFDC and TANF law to analyze the proposed rule and to prepare detailed recommendations. What follows is a summary of our recommendations with respect to data collection. It should be noted that many of the elements we recommend for deletion should be available either through existing means (such as other federal agencies) or could be gathered with relative ease and economy via national samples.

State Sampling, Section 275.5.

The sampling option contained in the proposed rules is unnecessarily restrictive and fraught with problems. The proposed rules would mandate a sample size of 3,000 active cases and 800 closed cases on both the federally-funded program and the MOE program. These numbers are far in excess of the sample (1,200 or less) many states were allowed to use for their AFDC caseloads. The large proposed sample would dramatically increase state data collection workloads. In some small states and tribal programs, drawing such a sample would *equal or exceed* the entire caseload.

The proposed rules also mandate in detail the parameters of the state sampling plan, specifically in Appendix H. These requirements place unacceptable limitations on the ability of states to effectively provide valid samples through means other than those outlined in the rules. For example, one state has pointed out that innovative designs including stratification by counties and panel studies would not be allowed, or may not be allowed, under the proposed regulations.

Recommendation. The monthly sample size requirement specified in Appendix H should be eliminated because it restricts state flexibility, expressly provided in the TANF statute. States should be allowed to use alternative sampling methodology when it can be demonstrated that other methods produce equally valid samples. States should be

permitted to transmit part of the data via sample and the balance for all members of the universe when that method is most efficient for them.

Complete, Accurate and Timely, Section 275.8

The proposed rule in Section 275.8 and other sections throughout the rule hold states to the standard of "complete and accurate information" reported on a "timely basis." This definition raises serious concerns that the state would not be permitted to submit revised data nor does it seem to allow a reasonable margin of error. In addition, Section 275.8 (f) states that "for each quarter for which the State fails to meet a reporting requirement" the state's TANF grant will be reduced by an amount equal to four percent of the adjusted grant. Based on early state experience in transmitting the data called for in the TANF Emergency Data Report, states interpreted terms differently and were subsequently asked by the Department to revise their submissions based on the clarifications they received. Clearly, data collection will be an evolving process requiring many future discussions between the Department and states.

Recommendation. In light of the severe penalty attached to the reporting requirements for each quarter, which could result in a cumulative annual loss of 16 percent of the adjusted State Family Assistance Grant, we urge the Department to revise the "complete, accurate and timely" standard affording states greater flexibility to report and subsequently revise their data in a reasonable time period and to allow for some reasonable margin of error. States should not be penalized for failure to provide data that are not necessary to determine compliance with TANF requirements.

Secretary's Report to Congress

States should not be required to collect data and prepare new quarterly reports to fulfill the Secretary's obligation under Section 411(b) of the TANF statute. This is an unfunded mandate imposed on states through regulation, particularly Appendix B.

Recommendation. A national sample could be conducted by the Department, in cooperation with the states, to collect these data in a more efficient, statistically valid and least costly way.

Transition Period

States are concerned that once the final rule is issued they will be required to report the new required data immediately without a period of transition necessary to make the appropriate adjustments in their computer system programming or data collection procedures. The changes to state information systems will be extensive and all states are also challenged by the need to make their systems Year 2000 compliant.

Recommendation. We urge the Department to give states at least 12 months to comply with the new data collection requirements.

Appendix A, TANF Data Report—Section One—Disaggregated Data Collection for Families Receiving Assistance Under the TANF Program

Our analysis of Appendix A determined that most states could report the majority of the required elements. However, some new elements not required by the TANF Emergency Data Report or in law, will require states to provide a level of detailed information not currently collected by the TANF agency. For example, states object to the additional child care reporting requirements and new categories of alienage because they are not required to be reported under the TANF statute and are burdensome to collect.

Recommendation. We are recommending the modification or deletion of a number of the elements in Appendix A to meet the requirements of Section 411(a)(1)(A) of the TANF statute. In many cases, the modification can be accomplished by collapsing multiple elements into one category. (See Section 3 which provides a detailed list of these recommendations.)

Appendix B, TANF Data Report—Section Two—Disaggregated Data Collection for Families No Longer Receiving Assistance Under the TANF Program

Section 411(b) of the TANF statute requires the Secretary to report to Congress on the demographic and financial characteristics of "families who become ineligible for assistance." The requirement that the Secretary report on these families does not justify the extensive new data reporting requirement on the states called for in Appendix B.

States should not be required to collect data and prepare new quarterly reports to fulfill the Secretary's obligation under Section 411(b) of the TANF statute. This is an unfunded mandate imposed on states through regulation. A national sample could be conducted by the Department, in cooperation with the states, to collect these data in a more efficient, statistically valid and less costly way.

In the TANF Emergency Data Report, the Department asked states to simply report "Reason for Closure," providing eight categories. There is no need to gather data on closed cases in the same manner as families receiving assistance; a 3,000 case sample for each state is unnecessary when a statistically valid sample of a smaller size should suffice.

There appears to be an error in the drafting of the Appendix B, Question 9. Reason for Closure (62 Fed. Reg. 62208) when it asks for information on "A closed case is a family whose assistance was terminated for the reporting month, but received assistance under the State's TANF Program in the prior month." The Appendix requires the state to collect information on families in the reporting month –the first month they are not receiving assistance. We do not believe the Department intends for states to contact families in the

month after they have left the assistance rolls in order to collect these data. Any collection of information on previously closed cases would be highly problematic, since many clients want nothing to do with the agency after case closure, clients move or are otherwise difficult to locate, and the additional cost to meet this requirement is prohibitive. States see no justification for the separate reporting of this information. All the proposed information can be retrieved from the case's file from the former quarter. The absence of a given case from a subsequent quarter's report will indicate that it is no longer active.

Recommendation. We recommend that to produce the information required under Section 411(a)(1)(A)(xvi) of the TANF law, a question on reason for case closure be added to Appendix A, similar to the format used in the TANF Emergency Data Reporting Requirements. A number of states are conducting followup studies to evaluate the circumstances of clients after they have left TANF assistance. Instead of requiring this extensive data collection in the regulations, we suggest that the Department collect these reports prepared by states.

Appendix C, TANF Data Report—Section Three—Aggregated Data Collection for Families Applying for, Receiving, and No Longer Receiving Assistance Under the TANF Program

We recommend changing the following elements in Appendix C:

16. Total Number of Minor Child Heads-of-Household

This information can be derived from data reported in elements #45 and #47 of Appendix A.

17. Total Number of Births

This information can be determined from the date of birth reported in element #90 of Appendix A.

18. Total Number of Out-of-Wedlock Births

This information can be derived from data reported in element #90 coupled with element #56 of Appendix A.

19. Total Number of Closed Cases

This information can be derived by adding a case closure question, such as in the TANF emergency data report.

Appendix D, (TANF) ACF-196 Financial Report

We commend the Department for the simplicity of Appendix D—the TANF Financial Reporting Form. The form has generated few complaints or requests for clarification during the FY 1997 reporting period. As noted earlier in the section on Administrative Costs, we believe one further clarification is needed. The instructions to the TANF ACF 196 Financial Report appears to suggest that a distinct and separate cap exists for state TANF expenditures (column B) and separate state programs (column C). The statute clearly specifies that the 15 percent administrative cap is on total qualified state expenditures. Therefore, the 15 percent cap should be calculated against the sum of lines 8(B) and 8(C).

Appendix E, TANF MOE Data Report—Section One—Disaggregated Data Collection for Families Receiving Assistance Under the Separate State Programs, Appendix F, TANF MOE Data Report—Section Two—Disaggregated Data and Appendix G, TANF MOE Data Report—Section Three—Aggregated Data

In conformance with the definitions provided in January 1997 guidance (TANF-ACF-PA-97-1), states contend that the Secretary has authority to collect information only on the "Programs Funded Under this Part" and not on the remaining, state-funded-only activities in the other categories. The guidance defined state programs funded under this part to include co-mingled or segregated state dollars spent within a state's TANF program. The vast majority of state MOE funds are expended as part of the TANF program and therefore the vast majority of MOE case characteristics are already being reported under Appendix A.

Beyond the requirement to report MOE dollars in the state's TANF program, there is no statutory authority for the Department to request data collection on separate state programs. Under the law, states must meet a financial requirement-- the maintenance of effort-- ensuring that these funds are "qualified expenditures" and represent new state spending. States already report these financial data under Appendix D—Section 3. There is no statutory basis for the reports called for in Appendices E, F and G.

Furthermore, it is unreasonable to ask states to report detailed client characteristics on state MOE programs operated in whole or in part by entities outside the human service agency. For example, under the proposed rule, data collection on those receiving a state Earned Income Tax Credit or receiving transportation assistance from a Transit Authority would be very difficult if not impossible to collect with any degree of economy or accuracy. States emphatically oppose this very costly, new, unfunded federal mandate created in Appendices E, F and G.

Recommendation. We urge the elimination of Appendices E, F and G. Section 3 of Appendix D requires "Information To Be Reported as an Addendum to the Fourth

Quarter TANF Financial Report" with respect to separate state programs. This information should suffice.

WR - welfare regulations

TOMMY G. THOMPSON

Governor
State of Wisconsin

CC EK/CR/AK
- Another disgruntled liberal...
- BR

November 5, 1998

Mr. Bruce Reed
Assistant to the President for Domestic Policy
White House, 1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear Mr. Reed:

I am writing in regards to the proposed Temporary Assistance for Needy Families (TANF) program regulations submitted to you by the Administration for Children and Families (ACF). In February 1998, Wisconsin, along with other states, submitted comments to the ACF, federal Department of Health and Human Services, regarding their proposal. One of our major concerns was that flexibility given to states by the enactment of welfare block grants would be negatively impacted by these proposed regulations.

I understand the ACF recently submitted its version of the proposed final TANF regulations to the White House and the Office for Management and Budget (OMB) for approval. I appreciate that the ACF responded to some of the expressed concerns by making changes in the proposed regulations. However, I have been informed that many of the areas of concerns noted by Wisconsin and other states have not been addressed.

Specifically, I am concerned the definition of assistance has not been modified. Under the proposed regulations, transportation subsidies (such as a monthly bus pass) and TANF-funded child care would count against the 60-month lifetime eligibility limit. Wisconsin, as you know, has been very successful in moving families from welfare to work. Support services such as transportation and child care are critical to helping these families remain employed. Excluding child care assistance transportation subsidies, or benefits for working families that are not directed at their basic needs, from the definition of assistance, would allow states more flexibility in serving low-income families. This will allow Wisconsin and other states to effectively help individuals reach and maintain self-sufficiency.

In addition, data collection requirements under the proposed regulations impose a significant workload on states. The proposed federal reporting requirements are more than double those required under the Emergency TANF Data Report and go far beyond the statutory mandates. To meet these data collection requirements, considerable resources will be directed toward dealing with systems issues rather than direct services which help move families to self-sufficiency.

In general, ACF's proposed regulations significantly limit states' flexibility granted under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Modification of these proposed regulations to reflect states' concerns will restore the spirit of state and federal partnership in welfare reform initiated with the enactment of PRWORA.

Room 115 East, State Capitol, P.O. Box 7863, Madison, Wisconsin 53707 • (608) 266-1212 • FAX (608) 267-8983

I look forward to working with you to ensure states' flexibility is maintained in the proposed TANF regulations. Thank you for your consideration.

Sincerely,

TOMMY G. THOMPSON
Governor

TGT/aek

cc: Secretary Linda Stewart
Department of Workforce Development

WR - work participation rates

Andrea Kane [redacted]

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP, Diana Fortuna/OPD/EOP

Subject: TANF Participation Rates

ACF has proposed the following revised process, that they'd like to implement next week if we are OK with it:

1. Fax chart to each state with the data used to calculate the participation rate. This chart would not contain the participation rate itself, just the components that go into the equation. ACF believes it is necessary for states to have these data in writing so they can review and verify them. For states using a sample, there will be multiple data charts.

2. Regional Office calls each state with the participation rate ACF has calculated using the data in step 1. The state will be asked to verify the data and get back to ACF as soon as possible, but no later than 30 days (last week of August). ACF staff think some states will be able to immediately confirm that the data look fine, but others will need time to revisit it. ACF will explain that this is the first informal step to give states a chance to make sure ACF has calculated their rate correctly, to be followed by a more formal letter.

3. First week of September, ACF will send letter to each state with its participation rate, based on the verified data. If a state has not responded within 30 days to steo 2, ACF will send a rate based on the data they have. This letter will tell states how to claim a caseload reduction credit or adjustment for waivers and ask them to respond within 30 days.

This revised process adds an extra step and 30 days to the process, but it avoids sending out a formal letter with data that may be flawed for some states.

WR-work regulation

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP
Subject: Waiver info; expiration dates are in parentheses

I. The following states used definitions of work or hours of work in their waivers that did not require waivers of prior law, but would qualify as inconsistencies under HHS's proposed reg and therefore could continue:

Connecticut (2003)
Hawaii (2004-2005)
Minnesota (2001 - 2002)
Nebraska (2002)
North Dakota (2003)
South Dakota (1999)
Texas (2002)
Vermont (2001)
Delaware (2002)
Massachusetts (2005)
Missouri (2000)
New Hampshire (2001-2002)
South Carolina (2003 - 2004)
Tennessee (2007 - 2008)
Utah (2000)

HHS says the list above is probably incomplete, and it may also include:
Virginia, Indiana, Iowa, Illinios, and maybe Oregon and Michigan

II. The following states have time limits that could continue because they are inconsistent with current law:

Arizona (2002)
Delaware (2002)
Hawaii (2004 - 2005)
Indiana (2002)
Louisiana (2002)
North Carolina (2001 - 2002)
Oregon (2002)
Tennessee (2007-2008)
Virginia (2003)
Connecticut (2003)
Florida (2001)
Illinois (2000)
Iowa (1998)
Nebraska (2002)
Ohio (2001)
South Carolina (2003-2004)
Texas (2002)
Wisconsin (2006)

WP - work regulation

Caseload Reduction Credit

Section 271.42 Which reductions count in determining the caseload reduction factor?

(a) Each State's estimate must factor out any caseload decreases due to Federal requirements or State changes ~~since FY 1995 that affect an individual's eligibility for assistance. These include:~~

~~(1) Changes~~ in eligibility rules since FY 1995 that directly affect a family's eligibility for benefits (e.g., more stringent income and resource limitations or time limits)~~; and~~

~~(2) Procedural changes that have the effect of significantly delaying or denying eligibility (e.g., documentation requirements that create obstacles to the receipt of assistance).~~

A State need not factor out ~~calculable~~ the effects of enforcement mechanisms or procedural requirements that are used to enforce existing eligibility criteria (e.g., fingerprinting or other verification techniques) to the extent such mechanisms or requirements identify or deter families ~~that were~~ ineligible under existing eligibility rules.

Preamble language for Section 271.42

Thus, we propose to give States credit for caseload reductions except when those caseload reductions arise from two kinds of changes in eligibility: (1) changes in eligibility rules that directly affect a family's eligibility for benefits (e.g., more stringent income and resource limitations or time limits); or (2) changes in procedural conditions of eligiblity that also have a direct and significant effect on caseloads by delaying or denying eligibility ~~(e.g., documentation requirements that create extra obstacles or delay receipt of benefits).~~

Under this approach, we would not give States credit for caseload reductions due to new procedural requirements where such requirements served simply ~~as an obstacle that had the effect of keeping~~ to keep eligible families from seeking or receiving assistance. We would allow States to get caseload reduction credit where ~~they can show (through actual case studies, sampling, or other reliable techniques) that~~ new enforcement mechanisms or procedural requirements (such as fingerprinting or other verification techniques) have resulted in the identification of families that were ineligible under existing eligibility rules, or the deterrence of such families from applying for benefits. ~~In making this distinction, States could report the actual number of cases identified as fraudulently seeking benefits or they could~~

~~use a sample to determine what percentage of cases were deterred because they were ineligible (and not accurately reporting their circumstances). Unless a State provided documented evidence that cases were diverted from the rolls due to fraud or misreporting, we would exclude all cases diverted from the rolls by procedural requirements from the State's caseload reduction credit.~~'

Through this policy approach, we are seeking to achieve the balance identified by Congress: that a State should receive credit for moving families off welfare, including by detecting and preventing fraud, but should not be able to avoid its accountability for work as a result of any changes that restrict program eligibility.

Attachment #2 – State only programs

WR-work regulation

re caseload reduction

Agreed-to changes

(b) States must include cases receiving assistance in separate State programs as part of its caseload. However, we will consider excluding cases in the separate State program under the following circumstances, if adequately documented:

(1)
The cases overlap with or duplicate cases in the TANF caseload.

(2)
They are cases made ineligible for federal benefits by PRWORA that are receiving only state-~~purchased~~ assistance, nutrition assistance, or other benefits.

funded cash

(3)
They are cases that are receiving only state earned income tax credits, child care, transportation subsidies or benefits for working families that are not directed to meet their basic needs.

~~(1) The cases have already been included because they overlap or duplicate cases in the TANF caseload; or~~

~~(2) The State's estimate already factored them out because they are not receiving TANF assistance due to changes in eligibility (e.g., they were terminted from TANF because of the Federal time limit).~~

~~(3) It would not be appropriate to compare such cases against the 1995 AFDC caseload because the nature of benefits is not comparable. Examples include:~~

~~(i) State earned income tax credits, State-purchased nutrition assistance, child care, transportation subsidies, and other forms of assistance that is not directed to meet the basic needs of low-income families; and~~

~~(ii) Assistance provided to families that would not have been eligible under current or prior law (e.g., families with children over the TANF and AFDC age limits and immigrant families who would not meet AFDC or Federal TANF restrictions.)~~

Wk-work regulation

Cynthia A. Rice 11/07/97 01:58:58 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Laura Emmett/WHO/EOP, Diana Fortuna/OPD/EOP
Subject: Elena, please examine re: fingerprinting

HHS's rewrite after yesterday's meeting contained changes to preamble language only. Please examine below the changes to both the rule and the preamble which I have made to I think better reflect yesterday's conversation.

Section 271.42 Which reductions count in determining the caseload reduction factor?

(a) Each State's estimate must factor out any caseload decreases due to Federal requirements or State changes since FY 1995 that affect an individual's eligibility for assistance. These include:

(1) Changes in eligibility rules that directly affect a family's eligibility for benefits (e.g., more stringent income and resource limitations or time limits); and

(2) Procedural changes that have the effect of significantly delaying or denying eligibility ~~(e.g., documentation requirements that create obstacles to the receipt of assistance)~~.

A State need not factor out documented effects of enforcement mechanisms which are used to enforce existing eligibility criteria (e.g., fingerprinting or other verification techniques).

Preamble language for Section 271.42

Thus, we propose to give States credit for caseload reductions except when those caseload reductions arise from two kinds of changes in eligibility: (1) changes in eligibility rules that directly affect a family's eligibility for benefits (e.g., more stringent income and resource limitations or time limits); or (2) changes in procedural conditions of eligiblity that also have a direct and significant effect on caseloads by delaying or denying eligibility ~~(e.g., documentation requirements that create extra obstacles or delay receipt of benefits).~~

Under this approach, we would not give States credit for caseload reductions due to new procedural requirements where such requirements served simply as an obstacle that had the effect of keeping eligible families from seeking or receiving assistance. We would allow States to get caseload reduction credit where new procedural requirements (such as fingerprinting or other verification techniques) resulted in the identification of families that

were ineligible under existing eligibility rules. In making this distinction, States could report the actual number of cases identified as fraudulently seeking benefits ~~or~~ as well as cases identified through ~~they could use~~ a sample ~~to determine what percentage of cases~~ which were deterred because they were ineligible (and not accurately reporting their circumstances). Unless a State provided documented evidence that cases were diverted from the rolls due to fraud or misreporting, we would exclude all cases diverted from the rolls by procedural requirements from the State's caseload reduction credit.'

Through this policy approach, we are seeking to achieve the balance identified by Congress: that a State should receive credit for moving families off welfare, but should not be able to avoid its accountability for work as a result of any changes that restrict program eligibility.

WR - work regulation

PENALTY STRUCTURE
Types of Penalties

1. Misuse of TANF funds	6. Failure to Repay Federal Loan	11. Failure to Maintain Assistance to Parents who Can't Get Child Care for Child under Six and Doesn't Work
2. Failure to Submit Report	7. Failure to meet TANF MOE Requirement	12. Failure to Expend Additional State Funds to Replace Grant Reductions
3. Failure to Meet Participation Rates	8. Substantial Noncompliance with Child Support Requirements	13. Failure to meet TANF MOE if get DOL Welfare to Work Grant
4. Failure to Participate in Income and Eligibility Verification System	9. Failure to Comply with Time Limit	14. Failure to Sanction Individuals who Refuse to Work.
5. Failure to Require Individuals to Cooperate with Child Support Rules	10. Failure to Maintain 100% MOE if Received Contingency Funds	

Steps to Levying Penalty

Step #1: Establish Penalty

- Secretary levies penalty if she determines a violation has occurred.
- For 12 of the 14 penalties, the amount is listed in the statute.
- For two penalties -- for failure to meet the work participation rates and failure to maintain assistance to parents with children under age six who can't work because they can't find child care -- the statute says that the penalty shall be based on "degree of non-compliance." (In the proposed reg, we are establishing a sliding scale defining "degree of non-compliance" for purposes of the work penalty.)

Step #2: Consider Reasonable Cause

- If the Secretary determines that a state had reasonable cause, she will waive the penalty.
- The reg establishes that having failed the work and time limits due to granting good cause domestic violence waivers is a reasonable cause. Also allowed are natural disasters; incorrect formal federal guidance; and isolated, non-recurring problems of minimal impact.

Step #3: Enter into Corrective Compliance Plan

- The Secretary must allow state opportunity to enter into a corrective compliance plan and will not impose the penalty while such a plan is in effect. By statute, certain types of violations (all financial) are not eligible for a corrective compliance plan.

Step #4: Once Corrective Compliance Plan is Completed, Secretary Can Reduce Penalty

- The Secretary will not impose the penalty if the state corrects the violation.
- If a state does not correct the violation during its corrective compliance plan, then the Secretary shall assess "some or all" of the penalty. Currently the regulation allows the Secretary to not impose a penalty if the state a) expended more resources; b) made substantial progress; or c) encountered circumstances that could not have been anticipated.

WR-work regulation

11/5 UPDATE

Issues

No agreement

1. **Penalty; Diversion to Separate State Programs** - To discourage states from diverting families from TANF to state programs in order to avoid work penalties or avoid sharing child support collections with the federal government, add these provisions to the proposed regulation:

a) In order to enter into corrective compliance plan for any violation or to receive a reduction in penalties after failing to correct a violation, a state must prove that it did not divert families to a separate state program for the purpose of avoiding work participation rates.

b) In order for a state to be eligible to receive a reasonable cause penalty exception, to enter into a corrective compliance plan, or to receive reduced penalties or a penalty based on degree of non-compliance, a state must prove that it did not divert families to a separate state program for purposes of preventing the federal collection of child support.

c) Include in the MOE data report information on whether individuals served in the separate state program were on TANF within the last six months and other information to help the Secretary determine if diversion has occurred.

Agreed

2. **Penalty; Threshold Level** - ~~States~~ that achieve at least 90 percent (rather than 75 percent) of the required work participation ~~rate shall~~ be eligible for a reduced penalty based on degree of non-compliance.

3. **Penalty; Corrective Compliance Plan** -

Agreed

a) Reduce the ~~amount~~ of time that States have to complete corrective actions from 12 to 6 months.

Agreed w/ change

b) Eliminate the option for the Secretary to reduce the penalty on a state that has failed to correct a violation through a corrective compliance plan if a state expended more resources, made substantial progress, or encountered circumstances that could not have been anticipated.

Secretary can reduce penalty if substantial progress ~~penalty~~, defined as closing half the gap between rate achieved and goal.

4. **Child Only Cases** -

No agreement — to discuss 11/6 see attached

a) The Secretary will analyze data on a state's child-only cases to determine if the state has reclassified cases as child-only in order to avoid penalty for failure to meet the fiscal year work participation rate or for exceeding the 20% hardship exemption for the five year time limit. If the Secretary finds that the state has reclassified cases for this purpose, she will include the reclassified cases in the calculation of the state's work participation rate and hardship exemption.

b) The regulation will identify which data elements will allow the Secretary to make this determination.

11/5

See new proposal (attached)

5. **Domestic Violence** - The Secretary shall not grant reasonable cause exceptions to penalties to states that exempt more than 20 percent of their caseload from the five year time limit due to the granting of good cause domestic violence waivers.

6. **Caseload Reduction Factor** -

Agreed

a) Remove the provision that would provide states with a choice of applying the two parent caseload reduction or the overall caseload reduction as a credit to the two parent work participation rate.

Revised language from HHS

b) Remove the provision that would allow states to exclude "based on nature of benefits provided" some or all families in the separate State program when comparing a given year's caseload to that from FY 1995.

No agreement to discuss 11/6

c) Fingerprinting, drug testing, and whole grant sanctions shall not be considered eligibility changes that must be disregarded for purposes of calculating the caseload reduction factor. This will be accomplished by listing eligibility changes in the regulation without listing these items and making clear on the Caseload Reduction Report form that these policies are not eligibility changes.

7. **Waivers** -

No agreement

a) A state that continues a waiver inconsistent with PRWORA's time limits or work requirements shall not be eligible for a high performance bonus or a caseload reduction credit.

b) A state that continues a waiver inconsistent with PRWORA's time limits or work requirements shall not be eligible to receive a reasonable cause penalty exception, to enter into a corrective compliance plan, or to receive reduced penalties or a penalty based on degree of non-compliance.

c) Prior law definitions of work activities may not be continued under waivers.

?

d) Waivers that are inconsistent can only be continued in the same geographic areas as they were originally approved in the waiver and were in effect on date of enactment.

Agreed

e) In order to continue a waiver inconsistent with PRWORA's time limits or work requirements, the state must notify the Secretary in writing in a letter signed by the governor.

Revised language from HHS

8. **Administrative Costs** - Include case management and eligibility determination in the definition of administrative costs.

Child Only Cases -- Revised 11/5

States have flexibility to define the terms:

1) "families... that include an adult or a minor child head of household" as used in Section 407(b)(1)(B)(i) to regarding the calculation of the participation rates; and

2) "a family that includes an adult" used in Section 408(a)(7)(A) regarding the five year time limit.

However, states may not define these terms in a manner which excludes families for the purpose of avoiding penalties.

Where the Secretary finds that a state has excluded families for the purpose of avoiding a penalty for work participation or time limits, she shall include those families in the calculation in Section 407(b)(1)(B)(i) and Section 408(a)(7)(A).

States shall report annually to HHS on the number of families excluded from the calculation in Section 407(b)(1)(B)(i) and Section 408(a)(7)(A) and the circumstances underlying the exclusion.

Caseload Reduction Credit:
Fingerprinting, Drug Testing, and Whole Grant Sanctions as "Eligibility Changes"

Original proposal: Fingerprinting, drug testing, and whole grant sanctions shall not be considered eligibility changes that must be disregarded for purposes of calculating the caseload reduction factor.

Revised proposal: Changes such as fingerprinting that help enforce existing eligibility standards or document identity shall not be considered eligibility changes for the purposes of calculating the caseload reduction credit.

§274.3 How can a State avoid a penalty for failure to comply with the five-year limit?

(a) We will not impose the penalty if the State demonstrates to our satisfaction that it had reasonable cause for failing to meet the five-year limit or it completes a corrective compliance plan pursuant to §§ 272.5 and 272.6 of this chapter.

(b)(1) In addition, we will determine a State has reasonable cause if it demonstrates that it exceeded the 20 percent limitation on exceptions to the time limit because of good cause waivers provided to victims of domestic violence.

(2)(i) To demonstrate reasonable cause under paragraph (b)(1) of this section, a State must provide evidence that, when cases with active good cause waivers are excluded from the calculation, the percentage of cases receiving federally-funded assistance for more than 60 months did not exceed 20 percent of the total.

(ii) To qualify for exclusion, such cases must have good cause domestic violence waivers that:

(A) Reflect the State's assessment that the individual was temporarily unable to work because of domestic violence;

(B) Were in effect after the family had received federally-funded assistance for 60 or more months; and

(C) Were granted appropriately, in accordance with the criteria specified at §270.30 of this chapter.

(iii) If a State fails to meet the criteria specified for "good cause domestic violence waivers" at §270.30 or any of the other conditions in paragragh (b)(2)(ii) of this section, the Secretary will not grant reasonable cause under paragraph (b)(1) of this section.

#5

Section 270.30 ?

Good cause domestic violence waiver means a waiver of one or more program requirements granted by a State to a victim of domestic violence under the Family Violence Option that is: (1) based on an individualized assessment; (2) temporary; and (3) accompanied by an appropriate services plan designed to provide safety and lead to work.

Wk-work regulation

[redacted] 10:55:59 AM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc: Cynthia A. Rice/OPD/EOP, Laura Emmett/WHO/EOP
Subject: FYI OMB asked for a revision in our diversion proposal/#1

Attached is what we sent to HHS. It finally dawned on OMB that the penalties most strongly linked to child support (misuse of funds and the one related to child support) are not that likely to be imposed and therefore not that strong a disincentive for states. So they asked to piggyback onto our chosen penalties for work for the most part. We told them HHS may argue that there is no link between some of those penalties and child support.

Here are the penalty links we made by area:

Work	**Child Support**
1. Participation Rates	1. Participation Rates
	2. Failure to require individuals to coop. w/child support rules
2. Time Limits	3. Time Limits
3. Failure to maintain assistce to parents who can't get child care for child under 6	
4. Failure to sanction indivs who refuse to work	4. Failure to sanction indivs who refuse to work

tanf1112.wp

DIVERSION TO STATE-ONLY PROGRAMS

Note: See attached charts for illustratration of which of the 14 penalties these provisions would apply to and which they would not.

REG LANGUAGE:

271.51: Degree of Non-Compliance and 272.5 -- Reasonable Cause Exception

Here is the language HHS has already agreed to:

We will not forgive the state penalty under 272.1(a)(4) [work participation rate penalty] based on reasonable cause unless a state demonstrates as part of its reasonable cause application that it has not diverted cases to a separate state program for the purpose of avoiding the TANF work participation requirements.

Possible revision:

Work: We will not forgive the state penalty under 272.1(a)(4), 272.1(a)(9), 272.1(a)(11), or 272.1(a)(14) based on reasonable cause if we detect a significant pattern of diversion of families to a separate state program that achieves the effect of avoiding the work participation rates.

[Note: 4 penalties above are work participation, time limit, failure to maintain assistance to parent who can't get child care for child under 6, and failure to sanction individuals who refuse to work.]

Child Support: We will not forgive the state penalty under 272.1(a)(4), 272.1(a)(6), 272.1(a)(9), or 272.1(a)(14) based on reasonable cause if we detect a significant pattern of diversion of families to a separate state program that achieves the effect of preventing the federal collection of child support.

[Note: 4 penalties above are work participation, failure to require individuals to cooperate with child support rules, time limit, and failure to sanction individuals who refuse to work.]

272.6(I) -- "Some or all" of penalty after corrective compliance plan fails:

Work: We will not reduce the penalty under 272.1(a)(4), 272.1(a)(9), 272.1(a)(11), or 272.1(a)(14) if we detect a significant pattern of diversion of families to a separate state program that achieves the effect of avoiding the work participation rates.

Child Support: We will not reduce the state penalty under 272.1(a)(4), 272.1(a)(6), 272.1(a)(9), or 272.1(a)(14) if we detect a significant pattern of diversion of families to a separate state program that achieves the effect of preventing the federal collection of child support.

[Note: same penalties as under reasonable cause.]

PREAMBLE LANGUAGE:

In several places where we discuss penalties, we note that we will not forgive certain penalties due to reasonable cause, reduce certain penalties after a corrective compliance fails, or reduce the work participation rate penalty based on the degree of non-compliance if we detect a significant pattern of diversion of families to a separate state program that achieves the effect of avoiding the work participation rates. The same is true for certain other penalties if we detect a significant pattern of diversion of families to a separate state program that achieves the effect of preventing the federal collection of child support.

We plan to monitor states' actions to determine if they constitute a significant pattern of diversion. For example, if we came to the conclusion through an examination of statistical or other evidence that a state was assigning people to a separate state program in order to prevent federal collection of child support, or in order to evade the work requirements, we would conclude that this is a significant pattern of diversion, and would deny that state certain types of penalty relief.

A state would be permitted the opportunity to prove that this pattern was actually the result of state policies and objectives that were entirely unrelated to the goal of diversion, but we would make the final judgment as to what constitutes a significant pattern of diversion.

Work Rates: Proposal Would Deny the Following Relief from Penalties to States that Divert Hard-to-Employ Families from TANF to Avoid Work Participation Requirements

Penalty	Set Based on Degree of Non-Compliance	Reasonable Cause Exception	Corrective Compliance Plan	Can be Reduced After Plan Does Not Correct Violation
	If shaded, doesn ot now apply to that penalty.			
1. Misuse of TANF funds				
2. Failure to Submit Report				
3. Failure to Meet Participation Rates	Agreed	Agreed		Proposed
4. Failure to Participate in Income and Eligibility Verification System				
5. Failure to Require Individuals to Cooperate with Child Support Rules				
6. Failure to Repay Federal Loan				
7. Failure to meet TANF MOE Requirement				
8. Substantial Noncompliance with Child Support Requirements	Not addressed in this draft regulation.			
9. Failure to Comply with Time Limit		Proposed		Proposed
10. Failure to Maintain 100% MOE if Received Contingency Funds				
11. Failure to Maintain Assistance to Parents who Can't Get Child Care for Child under Six and Doesn't Work		Proposed		Proposed
12. Failure to Expend Additional State Funds to Replace Grant Reductions				
13. Failure to meet TANF MOE if get DOL Welfare to Work Grant				
14. Failure to Sanction Individuals who Refuse to Work.		Proposed		Proposed

Child Support: Proposal Would Deny the Following from Penalties to States that Divert Families from TANF to Avoid Federal Collection of Child Support

Penalty	Set Based on Degree of Non-Compliance	Reasonable Cause Exception	Corrective Compliance Plan	Can be Reduced After Plan Does Not Correct Violation
	If shaded, doesn ot now apply to that penalty.			
1. Misuse of TANF funds				
2. Failure to Submit Report				
3. Failure to Meet Participation Rates	Proposed	Proposed		Proposed
4. Failure to Participate in Income and Eligibility Verification System				
5. Failure to Require Individuals to Cooperate with Child Support Rules		Proposed		Proposed
6. Failure to Repay Federal Loan				
7. Failure to meet TANF MOE Requirement				
8. Substantial Noncompliance with Child Support Requirements	Not addressed in this draft regulation.			
9. Failure to Comply with Time Limit		Proposed		Proposed
10. Failure to Maintain 100% MOE if Received Contingency Funds				
11. Failure to Maintain Assistance to Parents who Can't Get Child Care for Child under Six and Doesn't Work				
12. Failure to Expend Additional State Funds to Replace Grant Reductions				
13. Failure to meet TANF MOE if get DOL Welfare to Work Grant				
14. Failure to Sanction Individuals who Refuse to Work.		Proposed		Proposed

WR - work regulation

Protections - That we can measure outcomes & correctly

10-12-97 TANF Reg Mtg

DS: Pres has good rep for wk

1) We should give Govs all flexib we can, as long as at end of day they must meet wk reqs.

Don't tie up - but at same time, hold them to outcomes

2) Attitude toward former waivers

Diff way of thinking abt relship w/ states.

BK: Share same philosophy -

But we need info to hold states accountable -

not opening up loopholes that some states may game.

Only do it in ways that are sensible -

things that we will carry out

Diversion eg to avoid wk reqs/child support.

waivers: DS: We tested waivers. Talked to Pres about this.

BK: Wait written part of law - cong intent cloudy.

Agree - don't want to vitiate all waivers.

But keep eye on ball. Does it make sense for state playing by diff rules to get high perf bonuses.

DS: Bonuses should be pegged on performance.

SK: Maybe you shouldn't get bonus, but should get caseload reduction.

DPC- #1 - Diff penalties/kinds of relief

Signif pattern of abuse

#7 - boring it in a bit - continued will have pieces where waiver non-optimum consequences

also issue re: non-waivers - pull in a bit (i.e. voced)

Wed: conf call w/ Olivia / 4:30 Wed