

**NLWJC - Kagan**

**Counsel - Box 036 - Folder 001**

**Comment Period**

DRAFT

DRAFT

DRAFT

## TANF Implementation

**Issue:** Should HHS amend the answer to the question on State plan completeness to allow an administrative implementation period and credit before TANF State plan requirements become effective?

**BACKGROUND**

Section 402 of the Social Security Act, as amended, describes an "eligible State" as one who has submitted to the Secretary a plan that the Secretary has found includes the specified elements, i.e., that the plan is complete.

To provide States flexibility, the Department's guidance (questions and answers) has identified three basic State plan scenarios that are possible under the statute:

- a. A State which has fulfilled its 45-day consultation requirement may submit a complete plan to the Secretary and implement the plan immediately. The Secretary will review the plan, may request further explanation, and will assure that it includes the necessary elements. The State may implement immediately and does not have to wait for the Secretary's review. The State is subject to the TANF rules upon implementation.
- b. A State which has not fulfilled a 45-day consultation requirement may submit an otherwise complete plan, but it may not implement the plan until the 45-day period has expired. The Secretary will review the plan during that period, may request further explanation, and will assure that it includes the necessary elements. The State is subject to TANF rules on the date that it provides assurance that the 45-day comment requirement has been satisfied or such later date as elected by the State.
- c. A State which has fulfilled its 45-day consultation requirement may submit a complete plan and request the Secretary to assure that it includes the necessary elements. The State may delay implementation until the Secretary's review is conducted or until some other future point (but prior to July 1, 1997). In this case, the new TANF statutory rules would take effect after the plan submittal, on the delayed implementation date.

In the first scenario, the TANF implementation date and plan receipt date occur simultaneously and this date is used for purposes of computing the grant. In the third scenario, the

DRAFT

DRAFT

DRAFT

future date the State elects to implement TANF is deemed to be the date of State plan receipt for purposes of calculating the grant. Both of these situations are straightforward and few questions have been raised specifically about them.

Questions have been raised about the second scenario. First, our policy allows the 45-day comment period to run concurrently with the Secretary's review of the plan. States have asked when the 45-day comment period must begin? At our suggestion, some States initiated new consultation periods several days after submission of their State plan.

Second, under this scenario, the State plan receipt date is used for purposes of computing the grant, if the State implements or comes under TANF rules on the date the State completes its 45-day comment period. If the State elects a later implementation date, that date is deemed to be the State plan receipt date to calculate the State Family Assistance Grant (SFAG).

Some States have suggested that a reasonable period of time is needed between the end of the consultation period and actual implementation to consider comments, make needed changes and provide appropriate, advance notice to clients of new TANF requirements. Several States, who had assumed that such an administrative period would be provided without fiscal consequence, have expressed concern about the belated interpretation, especially since they provided new consultation periods based on the Department's advice.

Some States have also submitted plans suggesting an alternative phased-in interpretation to our policy statement that "[t]he State is subject to the TANF statutory rules upon implementation." These States want the funding calculation to the date of receipt of their State plans, even if they are unable to implement all provisions within a reasonable time frame. Basically, they agree that the State is subject to the TANF statutory rules, but maintain that there is flexibility in how and when these requirements are imposed on clients.

APWA and these States suggest that the absence of specific statutory language on implementation as well as two statutory provisions may be read as permitting TANF requirements to be phased in over time, as long as they are in place by July 1, 1997. First, they argue that section 402(a)(1) requires a "written document that outlines how the State intends to do the following...." Thus, they argue that the State plan is a statement of intention, not implementation.

DRAFT

DRAFT

DRAFT

Second, Section 402(a)(1)(A)(i) of the TANF legislation requires a State to conduct a TANF program in all its political subdivisions but "not necessarily in a uniform manner." One reading of this provision is that it permits the phase-in of TANF program requirements throughout a State.

The State plans of several States illustrate these issues:

#### State Plan Submissions

##### Delayed consultation period

Louisiana submitted their State plan on October 1, 1996 based on prior consultations. The ACLU, representing community organizations, suggested to the State that the prior consultation did not offer a 45-day comment period and requested one. Louisiana began a new consultation period on October 20, 1996, twenty days after submission of their plan. The 45-day comment period will end on December 5, 1996 and the State plans to implement certain new provisions, like their 2-year time limit, on January 1, 1997, not when the comment period ends.

##### Administrative or advance notice period

Massachusetts submitted their plan on 9/23/96, continuing their demonstration. While the State maintains that consultation occurred earlier, they started a new 45-day comment period on their proposed time-limited benefits (two out of five years for a nonexempt family) and new statutory limitation on benefits for noncitizens, and will accept comments on any part of their plan. This comment period ends on November 7, 1996. To allow time to consider any comments and notify clients in advance of their 2-year time limit and noncitizen limitation, Massachusetts proposes to implement these provisions effective December 1, 1996.

This proposed delay from November 7th to December 1st has substantial fiscal consequences for the State under our policy. Using the State plan submission date of September 23, 1996 to calculate funding results in the State receiving TANF funds for several days in FY 1996 and their entire TANF grant of \$459 million for FY 1997. Using the date of December 1, 1996 results in a net loss of over \$26 million for the State, based on estimated AFDC, EA and JOBS expenditures.

Kentucky will apply the time limit retroactive to October 1, 1996; however, the 45-day comment period will not be completed

DRAFT

DRAFT

DRAFT

until October 17, 1996. The state is receiving considerable criticism from advocates. If there will be no loss of funds, the State prefers to delay implementation of the time limit to December 1, 1996, after an advance client notice period.

Utah submitted its State plan on September 30, 1996. The State maintains that the consultation requirement was met through the waiver process and legislative enactment of Employment Assistance to Utah Families (EAUF) program. But, the State also started a new 45-day comment period that will run concurrently with the submittal of the State plan. Utah will not begin to apply their 36-month life-time limit until January, 1, 1997, with month by month extensions, not to exceed 60 months, if during the previous month the parent was employed for no less than 80 hours.

#### State Funded Implementation

California began a new consultation period on October 9, 1996, the date the State plan was received. The State expects the funding to be calculated using the date of receipt of the State plan. The State understands that under our stated policy, the TANF requirements must be implemented at the end of the consultation period. Since the State is primarily continuing AFDC, GAIN and current waiver provisions, most requirements have been or will be implemented by then. However, the State will be unable to comply with all provisions, because legislation is needed to implement several requirements.

For example, the 5-year time limit will not begin for a family until enactment of State legislation. To ensure that Federal funds are not spent beyond the limitation, the State will expend Federal TANF funds for the five year period beginning on the 46th day. After five years, California will spend only State funds for these families to make up for the time between the 46th day and when State legislation is enacted. (The use of State funds after 60 months is specifically allowed under the statute).

#### Unknown Implementation

New Jersey: The 45 day comment period began 10/15/96 which is also the date of State plan receipt. The funding calculation is requested from the date of receipt. Implementation will not occur until the State legislature enacts a law in support of the plan. It is not clear when the legislature will act or the effective date of the state law.

DRAFT

DRAFT

DRAFT

**New York:** The State maintains that the consultation period was met through the Governor's committee to reform welfare. New York is providing another comment period concurrent with the submission of the plan on October 17th. Implementation will occur at the end of the comment period, according to the State. But, the State's administrative procedures require changes in State law to implement key features of TANF, such as the time limit. When this will be accomplished by the legislature is not known.

(Both New Jersey and New York seem to be saying they can't implement certain rules until some unknown date. This is not generally regarded as phasing-in implementation.)

#### OPTIONS AND DISCUSSION

Within statutory constraints, the Department has long recognized the need to provide implementation flexibility and sought to provide States with reasonable timeframes to implement statutory and regulatory changes. For example, we have usually given States 90 or 120 days to implement regulatory provisions and, when possible, permitted new client requirements to be added as States redetermined eligibility. For years, our Quality Control rules have recognized that it is administratively impossible to immediately reflect changed circumstances in client grants. Our rules provide a reasonable, administrative timeframe during which Federal matching is provided while States make such changes.

Were it not financially advantageous for most States to implement TANF as soon as possible, many would have delayed implementation to plan, develop new policies, consult and train staff. And because of the lack of clarity surrounding any new, major legislation, many alternative interpretations about requirements abound. In light of the number of States in which these implementation issues arise and the potential fiscal consequences, our current policy should be re-examined.

Essentially, at least three options are available.

#### **Option 1: Retain the current policy.**

The current policy is clear and enables many States to promptly implement their current waivers, AFDC, and JOBS policies and receive the maximum available TANF resources, as permitted under the statute. It provides some flexibility while giving meaning to the transition rule of section 116 of the statute.

DRAFT

DRAFT

DRAFT

But, it provides little time for States who need, or want, to implement new statutory requirements. While the Department is encouraging States to provide a new, 45-day consultation period in light of the statute, the second scenario does not permit a State to modify or change their proposed policies based on comments, without the potential loss of Federal funds. And, if a State wanted to provide advance notice to their clients about new work requirements or time limited benefits, then such notices would have to be provided during the 45-day comment period. This appears to provide form, but little substance to consultation.

**Option 2: Provide a reasonable, administrative period, during this initial implementation year.**

To encourage States to provide a new 45-day consultation period for local governments and private sector organizations in light of the new legislation and to provide them with a reasonable administrative period to consider and implement these comments, the following changes could be made to the scenario.

- b. A State which has not fulfilled a 45-day consultation requirement may submit an otherwise complete plan, but it may not implement the plan until the 45-day period has expired. The 45-day consultation period must begin within 30 days of the date the Secretary receives the State plan. The Secretary will review the plan during that period, may request further explanation, and will assure that it includes the necessary elements. The State is subject to TANF rules no later than the first day of the second subsequent month following the month in which the 45-day comment requirement has been satisfied.

Or, the State may elect a later date on which they will implement the TANF program and become subject to TANF rules. If the State elects a date later than the first day of the second subsequent month, the State plan receipt date will not be used in calculating the SFAG amount for FY 1997. Instead the date elected by the State will be deemed to be the date of receipt of the State plan for this purpose.

This policy provides the type of flexibility which has often been granted to States by the Department. At the same time, it would not permit States to receive TANF funding while just continuing their AFDC and JOBS programs, without implementing and being subject to all the new provisions until July 1, 1997.

DRAFT

DRAFT

DRAFT

**Option 3: Allow States implementation discretion.**

A State's plan would outline the program of services and benefits -- generally a continuation of current policies under AFDC, JOBS and waivers, with the necessary TANF provisions. But, the plan would either explicitly specify future implementation dates (beyond the administrative period provided in option 2), unknown implementation dates, or not address implementation at all. (These situations would generally be caused because the State is unable to implement all requirements without new State legislation or administrative requirements.) These States expect the date of receipt of their State plans to be used for the funding calculation. Under this option, the State would not be subject to all of the TANF statutory rules upon the Secretary's determination that the "plan" was complete, but would be granted flexibility in how and when these requirements are imposed on clients.

While States have great flexibility in determining the content of the TANF program, the State must, by its own admission, be in a position to operate a TANF program when it receives TANF funding. The Act requires a State to run either an AFDC or a TANF program, with expenditures qualifying for payment under that particular appropriation. The Secretary cannot make a finding that a plan is complete if the State has not enacted the essential laws or published the administrative rules and procedures necessary to operate a TANF program. Although the Department would not ordinarily seek to determine whether a state has the legal authority under state law to implement TANF, if the state acknowledges that it lacks this authority, then the Secretary cannot make a finding that a plan is complete.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

23-Sep-1996 12:47pm

TO:           Jeremy D. Benami  
TO:           Bruce N. Reed  
TO:           Emily Bromberg  
TO:           Elena Kagan  
  
FROM:         Diana M. Fortuna  
              Domestic Policy Council

SUBJECT:     HHS wants to know if they can start telling people...

the decision on the 45 day comment period issue. They are having some folks in tomorrow that they would like to tell.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

24-Sep-1996 08:46am

TO:           Diana M. Fortuna

FROM:         Emily Bromberg  
              Intergovernmental Affairs

CC:           Jeremy D. Benami  
CC:           Bruce N. Reed  
CC:           Elena Kagan

SUBJECT:      RE: HHS wants to know if they can start telling people...

i say no--that until all is decided nothing is decided. if that's just too vindictive, and i'm just being cranky, you should ignore me!

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

24-Sep-1996 09:08am

TO:           Emily Bromberg

FROM:         Elena Kagan  
              Office of the Counsel

CC:           Diana M. Fortuna  
CC:           Jeremy D. Benami  
CC:           Bruce N. Reed

SUBJECT:      RE: HHS wants to know if they can start telling people...

Also, we don't yet have a definitive answer on the question of when the money will go out. Until they've satisfied us that they cannot legally send the money out now (as they are doing for child care), there's nothing to tell anyone.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

24-Sep-1996 09:26am

TO: Elena Kagan

FROM: Diana M. Fortuna  
Domestic Policy Council

CC: Emily Bromberg  
CC: Jeremy D. Benami  
CC: Bruce N. Reed

SUBJECT: RE: HHS wants to know if they can start telling people...

Good point on whether the money will flow at beginning or end of 45 days. I have put in a call to Monahan telling him not to announce it at this point.

EXECUTIVE OFFICE OF THE PRESIDENT

05-Sep-1996 12:31pm

TO: Elena Kagan  
FROM: Diana M. Fortuna  
Domestic Policy Council  
CC: Bruce N. Reed  
SUBJECT: 45 day comment period issue

FYI, on the 45 day comment period, the relevant section of the law is in Title I, Section 402 (a) (4).

In sum, it says that a state must submit a plan that includes the following:

"a certification ... which shall include assurances that local governments and private sector organizations--

(A) have been consulted....

(B) have had at least 45 days to submit comments on the plan and the design of such services."

I am trying to reach Anna Durand, who did HHS's legal work on this. I'll follow up with you.

EXECUTIVE OFFICE OF THE PRESIDENT

05-Sep-1996 11:45am

TO: Carol H. Rasco  
FROM: Bruce N. Reed  
Domestic Policy Council  
CC: Diana M. Fortuna  
Jeremy D. Benami  
Emily Bromberg  
SUBJECT: RE: 45 day comment period

402a YB  
legally required  
no one will have  
identical plan -  
no one will cause  
in w/ some thing -  
exactly line?  
where draw line?

I think the 45 day comment period is a dumb idea that will needlessly antagonize the states. We're not regulating them on process anymore, we're supposed to keep an eye on results. If there is any legal authority for this, I'm sure it's flimsy. And with Congress considering repealing the DC waiver, we shouldn't forget that HHS is infinitely capable of causing us unnecessary political headaches. ]

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

05-Sep-1996 03:37pm

TO: Diana M. Fortuna  
FROM: Bruce N. Reed  
Domestic Policy Council

SUBJECT: RE: 45 day comment period issue

That sounds different from a public comment period -- that's a cooperation requirement for local govt and the private sector.