

WR -



Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP  
cc: Cynthia A. Rice/OPD/EOP, Laura Emmett/WHO/EOP  
Subject: TANF reg fingerprinting issue

FYI, we have made remarkably little progress on this issue, and it may end up getting elevated. Just to remind you, this is the issue where HHS wants to count fingerprinting, drug testing, and whole grant sanctions as eligibility decreases, and give states that initiate use of these tools a smaller caseload reduction credit.

HHS has several arguments.

- First, the law says that eligibility decreases must be factored out of the credit, and they say fingerprinting was explicitly identified as a condition of eligibility in AFDC. Therefore, they argue that it's hard to say it's not an eligibility change for this purpose. We are working on this question.
- Second, they concede that some of the 10-20% caseload reduction that results from fingerprinting does reflect rooting out fraud, but they argue that much of it is simply an extra administrative hurdle that causes many people to fall by the wayside. Also, Emil Parker argues against us on this, making the argument that many poor people are generally frightened of fingerprinting and other police-like actions.
- Finally, they argue (as we do on other issues) that we are just talking about the caseload reduction credit here. States are still free to fingerprint, and they will benefit in other ways if they do -- with money saved, and with a smaller base of people to whom the work participation rates are applied.

We are assuming we should continue to carry the standard into battle on this one.

## **Diversion to Separate State Programs to Avoid Work Participation Rates and Child Support Requirements**

### Issue

States can currently divert cases into separate State programs in order to avoid work participation requirements and Federal child support collections. The proposal under discussion would require a State to prove it had not diverted participants, as a condition of gaining penalty relief. HHS has agreed to condition the reasonable cause penalty exception and degree of non-compliance penalty reductions on States not diverting cases to avoid work participation requirements.

### EOP Position:

Under the current proposed rule, states will have an incentive to move hard-to-employ individuals from TANF, which is subject to tough work participation rates, to separate state programs where such work rates don't apply, undermining our efforts to turn welfare into a work-based system. To discourage such diversion, States should not be permitted to enter into a corrective compliance plan or to receive a reduction in penalty after failing to correct a violation unless they prove they have not diverted cases for the purpose of avoiding the work participation rates. These restrictions must apply to all 14 penalties, not simply the work participation rate penalty, because a State that successfully diverts hard-to-employ cases will be able to meet the TANF work participation rates and will have no need for penalty relief in that area. In addition, HHS should withhold all forms of penalty relief from States that divert families in order to prevent the federal child support collections. The net Federal share of child support collections in FY1998 is estimated at \$1.047 billion, which States could avoid giving back to the Federal government by diverting cases with child support collections to separate State programs.

### HHS Position

As mentioned above, HHS supports the strict enforcement of the TANF penalty mechanisms that are directly related to work participation rates - denying reasonable cause for work penalty, collecting all the data HHS can, and monitoring for abuse to see if additional remedies need to be pursued, consistent with the mutually agreed upon January HHS guidance. In addition, HHS would hold States accountable through the use of the high performance bonus to reward States for getting recipients into work and use of the bully pulpit to publicize State actions if they abuse their flexibility. HHS will also consider future legislative or administrative remedies if abuse is widespread. HHS maintains that any further leveraging of the penalty relief provisions would be viewed by Congress and the Governors as overreaching and unduly prescriptive; is subject to legal and political challenge; and would severely damage their relationship with the States which is critical to the success of welfare reform.

## Treatment of State Waivers

### Issue

The TANF law allows States to continue to operate waiver provisions that are "inconsistent" with TANF. The issues at hand are 1) what is the scope of waiver policies that can be continued; and 2) whether we can and should deny bonuses and certain penalty relief to states that continue to operate waivers that differ from TANF work requirements and time limits.

### EOP Position:

The current proposed rule allows States to continue prior law policies that were not specifically covered under a waiver (e.g., unlimited vocational education and college attendance or more than 6 weeks a year of job search) which stretches the meaning of the statute and undermines the new law's strict work focus. Moreover, the regulation allows states to expand waivers beyond the geographic area in effect (i.e., implemented) on date of enactment.

While the statute requires us to preserve the right for states to continue waivers with less stringent work rules and time limits, we do not need to reward those that do so. Thus, we believe that States that do not comply with TANF rules regarding work requirements or time limits because they continue inconsistent waivers should not be eligible for the bonuses and rewards established under the new law, including the high performance bonus, the caseload reduction credit, a reasonable cause penalty exception, a corrective compliance plan, or a reduced penalty for any of the violations established in the law. States should not be able to continue program features that were not specifically covered under a waiver, such as unlimited vocational education, college attendance, or more than 6 weeks a year of job search. In addition, states should not be able to expand waivers beyond the geographic area in effect (i.e., implemented) on date of enactment.

### HHS Position

The current proposed rule provides a tight interpretation of the waiver inconsistency language that protects against widespread avoidance of the TANF provisions. Taken as a whole, the EOP recommended provisions appear to thwart Congressional intent in providing States with the opportunity to continue operating waivers. Such an approach is difficult to explain in light of the Administration's prior support of these waiver projects and claims of success. Denying a high performance bonus also would punish the very States whose waivers are most innovative and effective, undermine our efforts to shift the focus to outcomes, and severely damage a strong working relationship we have developed with the States. Further, denial of caseload reduction credits and the opportunity to enter into corrective compliance plans may not legally sustainable. Given the limited and indirect regulatory authority, we should exercise some restraint in penalizing States that elect an option available to them under the law.

| <b>Deny Relief from Penalties to States that Divert Hard-to-Employ Families from TANF to Avoid Work Participation Requirements</b> | <b>Work Penalty</b> | <b>Other Penalties (13)</b> |
|--|---------------------|-----------------------------|
| 1. Set penalty based on "degree of non-compliance" (option exists for two penalties: work and one other).                          | Agreed              | No Agreement                |
| 2. Reasonable cause penalty exception  | Agreed              | No Agreement                |
| 3. Corrective compliance plan (penalty postponed during plan)  | No Agreement        | No Agreement                |
| 4. Reduce penalty (impose "some or all") after state fails to correct violation.   | No Agreement        | No Agreement                |

| <b>Deny Relief from Penalties to States that Divert Families from TANF to Avoid Federal Collection of Child Support</b> | <b>Work Penalty</b> | <b>Other Penalties (13)</b> |
|---|---------------------|-----------------------------|
| 1. Set penalty based on "degree of non-compliance" (option exists for two penalties: work and one other).               | No Agreement        | No Agreement                |
| 2. Reasonable cause penalty exception   | No Agreement        | No Agreement                |
| 3. Corrective compliance plan (penalty postponed during plan)   | No Agreement        | No Agreement                |
| 4. Reduce penalty (impose "some or all") after state fails to correct violation.  | No Agreement        | No Agreement                |

Deny 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, then not applicable to that penalty.   |   |                            |                            |   |
| 1. Misuse of TANF funds   |   |                            |                            |   |
| 2. Failure to Submit Report   |   |                            |                            |   |
| 3. Failure to Meet Participation Rates  | Agreed                                  | Agreed                     |                            | *   |
| 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  |   |                            |                            |   |
| 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.   |   |                            |                            |   |

Deny Relief 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, then not applicable to that penalty.   |   |                            |                            |  |
| 1. Misuse of TANF funds   |   | x                          |                            | x  |
| 2. Failure to Submit Report   |   |                            |                            |  |
| 3. Failure to Meet Participation Rates  |   |                            |                            |  |
| 4. Failure to Participate in Income and Eligibility Verification System                                     |   |                            |                            |  |
| 5. Failure to Require Individuals to Cooperate with Child Support Rules                                     |   | x                          |                            | x  |
| 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  |   |                            |                            |  |
| 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.   |   |                            |                            |  |

## TANF PENALTY STRUCTURE

### 14 Penalties in Statute

(Penalties in shaded boxes are not eligible for reasonable cause or corrective compliance plan.)

|   |  |   |
|---|--|---|
| 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. The regulation allows the Secretary to not impose a penalty if the state made substantial progress, defined for the work penalty as having closed half the gap between actual and required rate.

Scope of Waivers

| Type of Policy  |        |
|---|--------|
| 1. Can continue specific waiver granted if new law is "inconsistent"  | Agreed |
| ② Can continue prior law policy for which waiver not specifically granted (e.g., unlimited vocational education, college, more than 6 weeks a year job search) <sup>1</sup> |        |
| 3. Can continue to operate waiver in geographic area no larger than originally authorized.  | Agreed |
| 4. Can continue to operate waiver in geographic area no larger than "in effect" or implemented on date of enactment.  |        |

Availability of TANF Bonuses and Rewards to States Continuing "Inconsistent" Waivers

| Type of Policy                             |  |
|--|--|
| ① Eligible for high performance bonus      |  |
| 2. Eligible for caseload reduction credit. |  |

III.

TN  
TK

Availability of Penalty Relief to States Continuing "Inconsistent" Waivers

| 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, then not applicable to that penalty.   |   |                            |                            |  |
| 1. Misuse of TANF funds   |   |                            |                            |  |
| 2. Failure to Submit Report   |   |                            |                            |  |
| 3. Failure to Meet Participation Rates  |   |                            |                            |  |
| 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  |   |                            |                            |  |
| 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.   |   |                            |                            |  |



Record Type: Record

To: Laura Emmett/WHO/EOP  
cc:  
Subject: for 5:30 meeting; I should have sent to you too

----- Forwarded by Diana Fortuna/OPD/EOP on 11/10/97 04:45 PM -----



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

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

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

- |                      |                    |
|----------------------|--------------------|
| Arizona (2002)       | Connecticut (2003) |
| Delaware (2002)      | Florida (2001)     |
| Hawaii (2004 - 2005) | Illinois (2000)    |
| Indiana (2002)       | Iowa (1998)        |
| Louisiana (2002)     | Nebraska (2002)    |

North Carolina (2001 - 2002)  
Oregon (2002)  
Tennessee (2007-2008)  
Virginia (2003)

Ohio (2001)  
South Carolina (2003-2004)  
Texas (2002)  
Wisconsin (2006)

Caseload Reduction Credit

Fingerprinting

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 calculable effects of <sup>new procedural requirements</sup> enforcement mechanisms that are used to enforce existing eligibility criteria (e.g., fingerprinting or other verification techniques), to the extent such requirements identify families that were 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 eligibility 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).

*including*  
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 they can show (through actual case studies, sampling, or other reliable techniques) that new 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.

## Issues

*To elevate* **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.

**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. *Done but see options on reducing penalty*

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

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

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.

**4. Child Only Cases** -

*See new option*  
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.

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. *See options*

6. **Caseload Reduction Factor**

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.~~ *agreed*

*well  
care*

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.~~

*Treat  
fingerprinting  
differently?*

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.

*\*  
To elevate*

7. **Waivers**

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.

*2*

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.

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. *agreed*

*Elevate  
to  
Paras 5*

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

## Domestic Violence and the Five Year Time Limit

### Tentatively Agreed-to Definition:

A "good cause domestic violence waiver" is defined in § 270.30 as one that is: "granted appropriately based on need as determined by an individualized assessment; temporary, for a period not to exceed six months [they can, however, be renewed]; and accompanied by an appropriate services plan designed to provide safety and lead to work."

### Our Proposal:

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.

### Their Proposal

Adds these new sections regarding domestic violence and time limits:

Insert #1: "States must grant good cause domestic violence waivers appropriately, which, in the context means there must be a need to exceed the time limit for a given family. We do not expect that many such cases will arise; however, we recognize that there are instances where an extension is necessary. For example, if a recipient suffers a recurrence of domestic violence toward the end of the five-year period, the State must waive the time limit in order to provide the services she now needs." *This*  
*may need to*

Insert #2: "A State must grant good cause domestic violence waivers appropriately, in accordance with the criteria specified at §270.30. If a State fails to meet the criteria specified for "good cause domestic violence waivers" specified at §270.30, the Secretary will not grant reasonable cause under this paragraph."

### A Possible Counter-Proposal

Option #1: Revise Insert #2 as follows:

"A State must grant good cause domestic violence waivers appropriately, in accordance with the criteria specified at §270.30. The need for the waiver, as defined in §270.30, must specifically apply to the need for a time limit extension; the Secretary will not automatically consider the granting of a good cause domestic violence waiver for work participation to be sufficient grounds for a time limit extension. If a State fails to meet the criteria specified for "good cause domestic violence waivers" specified at §270.30, the Secretary will not grant reasonable cause under this paragraph."

Option #2: Revise Insert #2 as follows:

"A State must grant good cause domestic violence waivers appropriately, in accordance with the criteria specified at §270.30. The need for the waiver, as defined in §270.30, must specifically apply to the need for a time limit extension; the Secretary will not automatically consider the granting of a good cause domestic violence waiver for work participation to be sufficient grounds for a time limit extension. Because the Secretary does not expect many such cases to arise, she will not grant reasonable cause under this paragraph for more than 20 percent of the good cause domestic violence waivers granted by the State for work participation, and she will not grant reasonable cause for waivers if a State fails to meet the criteria specified for "good cause domestic violence waivers" specified at §270.30, the Secretary will not grant reasonable cause under this paragraph."

### Child Only Cases

#### Add the following language:

States have flexibility to define the term "families receiving assistance that include an adult or a minor child head of household" as used in Section 407(b)(1)(B)(i) and the term used in Section 408(a)(7)(A) and (B) -- "a family that includes an adult who has received assistance" who is not "a minor child; and not the head of household or married to the head of household."

However, under no circumstances shall states exclude families from these categories for the purpose of avoiding the work participation rates or time limits.

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 (B) including an estimate of the number of families excluded because the parent or legal guardian is unable to care for the child, the parent is receiving assistance under SSI, the parent is not eligible for TANF because of the application of other parts of this law, and other causes.

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

## Work Penalties Structure

Assume a state with a block grant of \$100 million with a \$5 million or 5 percent top penalty for missing the work participation rate, 95% of caseload in single parent families and 5% in two parent families, an overall participation rate of 30 percent, and a two parent rate of 75 percent.

|  | OVERALL PARTICIPATION RATE   |  | TWO PARENT PARTICIPATION RATE  |   |
|--|--|--|--|---|
|  | HHS Revised Proposal   | Possible Counteroffer  | HHS Revised Proposal   | Possible Counteroffer   |
| <b>Step #1: Establish Penalty based on Degree of Non-Compliance</b>  |  |  |  |   |
| <b>Example A:</b><br>If state did not achieve 90% of the work participation rate (e.g. participation rate was lower than 27% for overall caseload and 67.5% for two parent): | The penalty is \$4.5 million.<br><br>[The smaller of \$4.5 million or \$4.75 million, i.e., the smaller of (\$5 million x .9) or (\$5 million x .95, the percent of caseload that is non-two parent families)] | The penalty is \$5 million. <sup>1</sup><br><br>[Full penalty imposed if state falls below 90% threshold].   | The penalty is \$.5 million<br><br>[The larger of \$.5 million or \$.25 million, i.e. the larger of (\$5 million x .1) or (\$5 million times .05, the percent of caseload that are two parent families)] | The penalty is \$.25 million<br><br>[Equal to \$5 million times .05, the percent of the caseload that are two parent families.] <sup>2</sup>  |
| <b>Example B:</b><br>If state achieved 95% of the work participation rate (e.g. 28.5% for overall and 71.25% for two parent):  | The penalty is \$2.25 million.<br><br>[The maximum penalty -- in this case \$4.5 million -- is reduced in half because state achieved half the difference between the required rate and the threshold.]        | The penalty is \$2.5 million.<br><br>[The maximum penalty -- in this case \$5 million -- is reduced in half because state achieved half the difference between the required rate and the threshold.] | The penalty is \$.25 million.<br><br>[The maximum penalty -- in this case \$.5 million -- is reduced in half because state achieved half the difference between the required rate and the threshold.]    | The penalty is \$.125 million.<br><br>[The maximum penalty -- in this case \$.25 million -- is reduced in half because state achieved half the difference between the required rate and the threshold.] |

<sup>1</sup> If state fails overall and two parent rate, the maximum total penalty shall be \$5 million.

<sup>2</sup> HHS argues that although this option is simpler and, one could argue, fairer to states with very small two parent caseloads, their minimum 10 percent penalty would be better because it would a) signal that we're serious about two parent work rates, and b) not discourage states from adopting pro-family welfare policies which increase the number of two parent families on the rolls.

|  | OVERALL PARTICIPATION RATE   |                       | TWO PARENT PARTICIPATION RATE |                       |
|--|--|-----------------------|-------------------------------|-----------------------|
|  | HHS Revised Proposal   | Possible Counteroffer | HHS Revised Proposal          | Possible Counteroffer |
| <b>Step #2: Consider Reasonable Cause</b>  |  |                       |                               |                       |
| The Secretary may waive the penalty if she determines the state had reasonable cause, defined in the regulation as:  | Failing because of:<br>1) Granting of good cause domestic violence waivers;<br>2) Natural disasters;<br>3) Formally issued federal guidance that was incorrect<br>4) "Isolated, non-recurring problems on minimal impact that are not indicative of a systemic problem"<br>5) Due to provision of assistance to refugees in a federally-approved alternative project.  | Same                  | Same                          | Same                  |
| <b>Step #3: Enter into Corrective Compliance Plan</b>  |  |                       |                               |                       |
| A state may accept the penalty or file within two months a corrective compliance plan. The state shall not be penalized while under the plan, which may last no longer than six months. Such plans must include: | 1) A complete analysis of why the state did not meet the requirements;<br>2) A detailed description of how the state will correct or discontinue, as appropriate, the violation in a timely manner;<br>3) The milestones, including interim process and outcome goals, the State will achieve to assure it comes into compliance within the specified time period;<br>4) A certification by the Governor that the state is committed to correcting or discontinuing the violation in accordance with the plan. | Same                  | Same                          | Same                  |

|  | OVERALL PARTICIPATION RATE  |  | TWO PARENT PARTICIPATION RATE   |  |
|--|---|--|---|--|
|  | HHS Revised Proposal  | Possible Counteroffer  | HHS Revised Proposal  | Possible Counteroffer  |
| <b>Step #4: After Corrective Compliance Plan, Secretary Can Reduce Penalty</b> |   |  |   |  |
| To receive a reduced penalty, the state must have:                             | 1) Had a natural disaster or regional recession, to which failure was attributable; | Same.  | Same.   | Same.  |
|  | 2) Made substantial progress towards correcting or discontinuing the violation      | <p>Option 2a): A state shall have its penalty reduced by the percentage by which it increased its participation rate (e.g., a state that increased its participation rate from 20 to 24 percent shall reduce its penalty by 20 percent (4/20));</p> <p>Option 2b) A state shall have its penalty reduced by the percentage that it reduced the gap between its participation rate before the plan and the required rate (e.g., a state that increased the overall rate from 20 to 24 percent shall reduce its penalty by 40 percent (4/10));</p> <p>Option 2c): A state that increased its participation rate by 25 percent or more shall have its penalty reduced at the discretion of the Secretary.</p> <p>Option 2d) A state that did not achieve 90 percent of the participation rate shall receive the full penalty. A state that achieved 90 percent of the participation rate shall have its penalty reduced at the discretion of the Secretary.</p> | 2) Made substantial progress towards correcting or discontinuing the violation. | <p>Option 2a): A state shall have its penalty reduced by the percentage by which it increased its participation rate (e.g., a state that increased its participation rate from 20 to 24 percent shall reduce its penalty by 20 percent (4/20));</p> <p>Option 2b) A state shall have its penalty reduced by the percentage that it reduced the gap between its participation rate before the plan and the required rate (e.g., a state that increased the overall rate from 20 to 24 percent shall reduce its penalty by 40 percent (4/10));</p> <p>Option 2c): A state that increased its participation rate by 25 percent or more shall have its penalty reduced at the discretion of the Secretary.</p> <p>Option 2d) A state that did not achieve 90 percent of the participation rate shall receive the full penalty. A state that achieved 90 percent of the participation rate shall have its penalty reduced at the discretion of the Secretary.</p> |

October 26, 1997

WR-Work reg

NOTE TO BRUCE AND ELENA

FROM: CYNTHIA

SUBJ: MONDAY'S TANF REGULATION MEETING

---

I've tried to make it fun...well, easy anyway.... to prepare for Monday's TANF regulation meeting. Attached are:

- 1) A list of the eight issues that will form the basis of the discussion. We sent this version of the list to HHS today; it is very close to the one you saw on Friday but the order of issues and the description of some issues has changed. In addition, Bruce said Friday he wanted to re-open the issue re: classification of fingerprinting and drug testing, so it's listed as issue 6 c).
- 2) A one pager on the penalty structure in the current draft regulation -- should be a helpful reference guide to this confusing topic.
- 3) For each issue, a description of our position, our justification, and, where appropriate, expected counter-arguments and possible compromises. Please look carefully at Issue 7 - waivers, which I believe pushes the envelope as far as it can go.

I believe that it is most important that we hold firm on the following:

- 1) Issue 1 relating to diversion to separate state programs;
- 2) Issue 3 b) relating to the Secretary's option to reduce penalties;
- 3) Issue 4 relating to child only cases;
- 4) Issue 7 a), b), c), and e) relating to waivers.

Bruce -- you indicated Friday that Issue 6 a) and b) (relating to the caseload reduction credit) weren't important to you and that you wanted to amend Issue 2 to ensure states that fail the two parent work rates won't be penalized so much (the latter I list as a "possible compromise" that you can raise in the meeting to show them good faith).

HHS, as you know, is very opposed to Issue 5 (domestic violence waivers and the time limit). They also seem to feel quite strongly about #3 b) and 1 b).

## Issues

**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.

**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** -

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

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.

**4. Child Only Cases** -

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.

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** -

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.

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.

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** -

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.

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.

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

## 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.

## ISSUE 1: PENALTY; DIVERSION TO SEPARATE STATE PROGRAM (3 subissues)

Issue 1 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.

Why it's important: In order to maintain the law's strong work requirements, states should not receive a break on any of the 14 penalties if it has diverted families to a separate state program to avoid the work participation rates.

### Justification for change:

- HHS agreed in January that states shall not receive any mitigation in penalty unless the state showed it has not used its own program to escape the force of the work participation rates (was in memo to the President).
- This proposed regulation has the opposite effect by allowing states that have diverted families to postpone penalties through the corrective compliance plan and to receive reduced penalties for states that fail to correct a violation.
- It is critical that states are prevented from receiving a break on penalties for any type of violation if they have diverted families to state only programs for the purpose of avoiding the work rates. That's because a state that successfully diverted families to state only programs to avoid the work rates will not be subject to a work participation rate penalty.
- What HHS has agreed to so far -- tying proof of non-diversion to granting of reasonable cause and reductions in the work penalty due to degree of non-compliance -- is not enough.

## ISSUE 1 CONTINUED: PENALTY: DIVERSION TO SEPARATE STATE PROGRAM

Issue 1 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.

Why it's important: If states move families with child support collections to separate state programs, the federal government will no longer receive its share of those collections, even though the federal government paid for 66 percent of the child support operating costs.

### Justification for change:

- Congress never envisioned that the new welfare law would reduce the federal collection of child support, and this regulatory provision is the best way to ensure that this does not happen.
- States want to take a "wait and see" attitude -- however, in the food stamp program, we've found that the federal government is never able to collect funds after the fact that should not have gone to states.

Issue 1 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.

Why it's important: If we do not collect information to determine if a state has diverted families to separate state programs to avoid the federal collection of child support or to avoid the work rates, we will not be able to enforce these provisions.

### Justification for change:

- We must have data in order to enforce these provisions.
- In particular, asking states to report how many families were moved from TANF to separate state programs within a six month period will give us direct evidence of whether diversion is occurring.
- HHS should also specify other data in the regulation that will ensure compliance.

### Possible Counter-Arguments:

- HHS says that asking state program participants about past TANF use would violate their privacy.
- We disagree -- the state MOE data report already contains questions asking about food stamp use.
- In addition, we've limited the question to TANF use in the last six months to avoid collecting unnecessary data.

## ISSUE 2: PENALTY: THRESHOLD LEVEL

Issue 2: 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.

Why it's important: To enforce the law's work requirements.

Justification for change:

- Only states that are very close to meeting the work participation rates -- within 10 percent -- should be eligible for a reduced penalty.

Possible counter-arguments:

- A threshold of 90 percent rather than 75 percent will impose the full penalty on nearly every state because they've failed to meet the two parent work participation rate.
- HHS has already come a long way by agreeing that states that fail to achieve a certain level of compliance with the work participation rates shall have the full penalty imposed -- all they're asking for is a 75 rather than 90 percent threshold. (States exceeding the threshold shall receive a reduction based on a sliding penalty scale defined in the regulation, which will impose a smaller penalty on those states that only fail the two parent rate).

Proposed compromise: Set threshold at 90 percent (or somewhere between 75 and 90 percent) but provide a break for states failing the threshold for two parent family work rate as follows: The penalty for failing to reach 75 or 90 percent of the two parent work rate shall be the penalty times the percent of TANF families in the state that are two parent families. States that fail to achieve the threshold for their overall work rate shall be levied the full penalty.

### ISSUE 3: PENALTY: CORRECTIVE COMPLIANCE PLAN (2 subissues)

#### Issue 3 a): Reduce the amount of time that States have to complete corrective actions from 12 to 6 months.

Why it's important: A 12 month corrective compliance plan means that a state would not be subject to penalties for violations in year one of the program until year three of the program.

#### Justification for change:

- Twelve months is a very long time for states to avoid a penalty for something as easily fixable as having exempting too many families from the five year time limit or for misusing funds.
- It has been very clear to states for a long time what work participation rates they will have to meet. Giving them an additional 12 months after the fact to come into compliance seems excessive.

#### Possible counter-arguments:

- Since states by statute are given two months to file their corrective compliance plans, they in reality have only 10 months to correct under HHS's proposal. A six month corrective compliance plan would therefore give states only four months under the plan to comply.

Possible compromise: Let them keep the corrective compliance plan at 12 months only if they agree to issue 3 b) limiting the Secretary's ability to reduce penalties for a state that has failed to correct the violation while the corrective compliance plan was in effect.

#### Issue 3 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.

Why it's important: This provision gives the Secretary tremendous flexibility in reducing penalties for states after they've failed to correct the violation through a corrective compliance plan. It is the "weakest link" in the penalty structure.

#### Justification for change:

- Rewarding states simply for expending more funds without producing results contradicts the outcome-oriented focus of this program.
- It makes no sense to allow the Secretary to reduce work penalties for "substantial compliance" since the penalty was originally set based on "degree of non-compliance."
- "Encountered circumstances that could not have been anticipated" is an enormous loophole.

Possible Counter-Argument: HHS will probably note that they have offered to amend the language so that it says "expended significantly more resources", made "substantial progress" and "encountered overriding circumstances that were beyond its control and could not have been anticipated."

#### ISSUE 4: CHILD ONLY CASES (2 subissues)

Issue 4 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.

Why it's important: Since child only cases are exempt from the work rates and time limits, it's important to ensure states don't reclassify families for the purpose of avoiding work and time limit requirements.

Justification for change:

- The Secretary has the authority through penalties to ensure that states are actually meeting the work participation and time limit rules for families served under TANF.
- If the Secretary allows states to reclassify families as child only in order to escape the work and time limits, then her authority to enforce the entire provisions is meaningless.

Issue 4 b): The regulation will identify which data elements will allow the Secretary to make this determination.

Why it's important: This is necessary to enforce the policy discussed above.

## ISSUE 5: DOMESTIC VIOLENCE

Issue 5: 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.

Why it's important: This policy could result in a majority of the caseload being exempt from the five year time limit (if 30 percent of the caseload were exempted because they were victims of domestic violence, above and beyond the 20 percent now allowed).

### Justification for change:

- Our goal should be to help this vulnerable group of welfare recipients achieve self-sufficiency -- that is why we have placed a priority on providing services to help prepare them for the workplace.
- We agree that it may be necessary to grant temporary waivers from the work rates for these women. But allowing states to exempt them from the five year time limit above and beyond the 20 percent cap will simply encourage states to "write off" this vulnerable population and not serve them.
- This policy sends the signal that domestic violence is a permanently debilitating condition.

### Possible counter-arguments:

- HHS will argue that it will be particularly difficult for us to win over certain advocates unless we include this policy.

## ISSUE 6: CASELOAD REDUCTION FACTOR (3 subissues)

**Issue 6 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.**

**Why it's important:** Unless this provision is removed, states will be able to significantly lower the work rate that applies to two parent families.

**Justification for change:** There is no reason to allow states to use the overall caseload reduction to reduce the two parent work rates.

**Possible counter-arguments:** If we make it so difficult for states to meet the two parent work rates, they will have an even greater incentive to bifurcate their caseloads, and move two parent cases to the state only program.

**Issue 6 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.**

**Why it's important:** The clause now included in the reg invites states to submit reasons why their caseload credit should be higher, and their work rates lower, because they spent their state-only dollars in innovative ways. To preserve the law's tough work rates and discourage bifurcation, we should include all TANF and state only cases when comparing the caseloads to FY 1995 levels.

**Justification for change:**

- We have already excluded non-cash and one-time assistance from the caseload reduction calculation.
- Allowing states to nominate other categories risks ending up with vastly bloated caseload reduction credits, and much reduced work rates.

**Issue 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.**

**Why it's important:** We support fingerprinting, drug testing, and sanctions and do not want to discourage states from using them.

**Justification for change:** These are legitimate reasons for caseloads to have declined, and we should reward states that catch fraud, not punish them.

**Possible counter-arguments:** HHS will argue, correctly, that the end result of this policy will be to make it much easier for states to meet the work participation rates.

## ISSUE 7: WAIVERS (5 subissues)

**Issue 7 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.**

Why it's important: This will discourage states from continuing waivers that weaken the work rates and time limits of the new law.

### Justification for change:

- States that operate under the old, less stringent rules should not be eligible for rewards for performance or a reduction in the work rates through a caseload reduction credit.
- HHS has already proposed in the reg to deny states a high performance bonus and a caseload reduction credit if they do not submit data on their state only programs -- thus, they clearly believe that the authority exists.

### Possible counter-arguments:

- HHS may argue that the statute says the Secretary shall encourage states to continue waivers and that this policy would run counter to that.
- We believe a more accurate reading of the statute is that the Secretary shall encourage states to continue to evaluate waivers that they do continue. (The statute actually says: "The Secretary shall encourage any state operating a waiver described in subsection (a) to continue the waiver and to evaluate, using random sampling and other characteristics of accepted scientific evaluations, the result or effect of the waiver." )
- The Secretary has already encouraged states to continue evaluated waivers by providing federal grants for these evaluations and has thus fulfilled the obligations in the statute.

**Issue 7 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.**

Why it's important: This will discourage states from continuing waivers that weaken the work rates and time limits of the new law.

### Justification for change:

- States that operate under the old, less stringent rules should not be eligible to receive reduced penalties if they fail to meet the work participation or other rules.
- HHS has already agreed to require states to prove that they did not divert families to separate state programs in order to receive a reasonable cause penalty exception or a reduced penalty based on degree of non-compliance. Thus, they clearly believe that the authority exists.

## ISSUE 7: WAIVERS CONTINUED

### Issue 7 c): Prior law definitions of work activities may not be continued under waivers.

Why it's important: Without this change, states could continue waivers allowing unlimited job search and vocational education as work.

Justification for change: Because prior law treated vocational education and job search differently, different arguments must be made for each:

#### Vocational education:

- HHS argues that states should not be able to continue prior law exemptions from the denominators of the participation rates (e.g. should not be able to exclude all disabled from the work participation calculation) because "we have never granted a waiver of a participation rate itself" and "we have never granted a waiver that added new exemptions from the work requirements."
- We think this same argument should apply to vocational education, which was unlimited in prior law and which states therefore never needed waivers to use as part of their programs.
- Our argument is strengthened by the fact that the final report language stated that "program features of the state program not specifically covered by the waiver must conform to this part."
- As a result, the new law's limitation of only counting vocational education for 12 months for any individual should still apply in all states.

#### Job Search

- Prior law did have a limit on job search (no more than 4 months of job search could count as work participation in a given year).
- States that received waivers specifically exempting them from that requirement can continue them.
- However, states whose waivers do not specifically cite the section of prior law limiting job search should not be allowed to continue the prior law's "4 months in 12 months" job search rule in lieu of the new law's "6 weeks in 12 months" rule.
- HHS argues that states should be able to continue parts of prior law that were integral parts of the demonstration embodied in the waiver "only if their inclusion were necessary to achieve the objective of the approved waiver."
- The objective of states that got welfare reform waivers that did not specifically waive the job search limitations was to put more people to work, not to allow more job search.
- Our argument is strengthened by the fact that the final report language stated that "program features of the state program not specifically covered by the waiver must conform to this part."

## ISSUE 7: WAIVERS CONTINUED

**Issue 7 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.**

Why it's important: This will help limit the influence of the waiver provision by ensuring that states cannot expand sub-state waivers -- or waivers that were implemented only substate in August 1996 -- statewide. For example, Virginia planned to take four years (from June 1995) to phase-in its time limit waiver policy -- which has many more exemptions than current law -- in different regions of the state.

Justification for change:

- The final report language states that "All geographic areas of the States... not specifically covered by the waiver must conform to this part."
- The statute itself refers throughout to waivers "in effect as of date of enactment" of the new law. We interpret "in effect" to mean the waiver as implemented on date of enactment.

Possible counter-arguments: The conference report also says "waivers may only apply to the geographic areas of the State and to the specific program features for which the waiver was granted." HHS could argue that the phrase "was granted" applies to "geographic areas" and thus it is the waiver "as granted" not "in effect" that matters.

**Issue 7 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.**

Why it's important: Requiring the governor himself to state in writing that he wants to continue the weaker waiver rules will discourage some states from continuing their waivers.

Justification for change: HHS has been willing to do require the same type of letter in order for a state to enter into a corrective action plan, so they should agree to this.

## **ISSUE 8: ADMINISTRATIVE COSTS**

### **Issue 8: Include case management and eligibility determination in the definition of administrative costs.**

Why it's important: OMB will argue that the 15 percent cap on administrative expenses was included in the statute to ensure that TANF funds are used to promote work and self-sufficiency, not increase state bureaucracies.

Justification for change: OMB will argue that eligibility determination and case management as traditionally defined are administrative costs.

Possible counter-arguments: HHS will argue that they've already agreed to include a long list of items in the definition of administrative costs, and that case management and eligibility determination should be excluded in TANF because they are excluded in JTPA and this definition will also be used for the Department of Labor's Welfare to Work grants operated by the JTPA system.

**I. STATUTE**

“Waivers in Effect on Date of Enactment of Welfare Reform”: “... if any waiver granted to a state...is in effect as of the date of enactment.... the amendments made by [PRWORA]...shall not apply with respect to the state before the expiration (determined without regard to any extension) of the waiver to the extent such amendments are inconsistent with the waiver.”

“Waivers Approved Subsequently” section says that such a waiver “shall not affect the applicability of section 407 to the state.” (Work requirements)

Legislative History: statutory language was narrowed from ‘if have a waiver, new law does not apply’ to ‘inconsistent’ standard. Final report language added clause re: “program features of state program not specifically covered by the waiver must conform to this part.”

**II. HHS PROPOSED REG****Legal Theory:**

A provision of TANF is inconsistent with a waiver only if the State must change its waiver policy in order to comply. The definition of a waiver can include applicable provisions of prior law if their inclusion was necessary to achieve the objective of the approved waiver. For example, a state whose waiver program counted community college attendance as work did not need a waiver of AFDC law in order to do this. The reg would permit such a practice to continue, because it would require a change in state policy to do otherwise, and it’s inconsistent with TANF’s definition of work. Legally, the reg defends the decision to consider prior law as part of the waiver on the grounds that doing otherwise would allow very few waiver practices to continue (largely just time limits), rendering that section of the law meaningless.

**Policy Effect:****Work Requirements:**

Section 407 doesn’t apply to waivers to the extent their features are inconsistent with current law. Examples given are looser definitions of work and requiring fewer hours of work per week to be counted as working. However, states may not claim inconsistencies that affect the denominator of the participation rates — i.e., limit the universe of people to whom the participation rates are applied. The reg defends this decision by noting that HHS never granted a waiver of a participation rate, nor a waiver that granted new exemptions from work requirements.

**Time Limits:**

States whose waivers have time limits may use their waiver’s more liberal exemption and extension policies.

- Extensions -- The draft reg says that both the federal and state clocks must start ticking simultaneously but that, once the federal clock expires, the state may grant extensions in accordance with the approved waiver until the waiver expires. The reg also says that a state need not comply with the law’s 20% limit on exemptions if its waiver’s extension policies cause it to exceed 20%.
- Exemptions -- The draft reg also says that months during which a recipient is exempt from time limits because of waiver policy do not count toward the federal five-year limit.

### III. OUR PROPOSAL

The Challenge: To define "inconsistent" in a way that narrows the effect of the provision without rendering the entire provision meaningless.

#### Work Requirements:

- Argue that definitions of work activity were not necessary to achieve objective of approved waiver (objective was to put more people to work)-- thus no grandfathering of more liberal job search and voc ed criteria.
- Alternative argument with the same result: Only permit specific items waived from compliance with prior law, rather than allowing states to import "provisions of prior law" into the definition of waiver. In this case, the definition of work in any waiver could not be inconsistent with the law, because in no case was the definition of work activities a "program feature...specifically covered by the waiver". Thus more liberal definitions of job search and vocational education could not be continued under the guise of waivers. [This theory may not, however, allow the policy listed in next bullet below; thus it may result in the provision having no effect on work rates, which HHS argues it must since the statute specifically exempts "waivers granted subsequently" from having any effect on work rates.] ?   
 why shd waiver allow them to preserve old law?
- Allow, as the draft reg now does, for waivers to be considered inconsistent if they specified the number of hours of work to be determined according to individual circumstances, but make explicit that these inconsistent waivers can only be continued in the same geographic areas as originally approved in the waiver and in effect at date of enactment [i.e., if a state had approval to expand a waiver statewide but had not done so yet, it could not]. YES

#### Time Limits:

- Allow, as the draft reg now does, for exemption and extension policies to be considered inconsistent, but make explicit that these waivers can only be continued in the same geographic areas as originally approved in the waiver and in effect at date of enactment [i.e., if a state had approval to expand a waiver statewide but had not done so yet, it could not]. good

#### Changes Applying to Both Work Requirements and Time Limits:

*Can we do these?*

- 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.
- 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 action plan, or receive reduced penalties.
- 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.
- The regulation shall place the burden of proof that waivers are inconsistent with the law on the state and must collect information necessary for the Secretary to make that determination.

#### IV. EFFECT ON STATES

##### Comparison of Proposals: Effect on Connecticut

|  | State View of Effect of New Law | HHS Proposed Reg   | Our Proposal   |
|--|---------------------------------|--|--|
| Under waiver, state could offer exemptions from and extensions to the time limits in conformance with its waiver | Continue                        | Continue   | Continue, but only to extent that state had implemented this when law was passed                                   |
| Definition of work that includes unlimited job search  | Continue                        | Continue   | No   |
| Individualized employability plans that allow state to tailor hours of work                                      | Continue                        | Continue   | Continue, but only to extent that state had implemented this when law was passed                                   |
| Exempting categories of people from work requirements and participation rates                                    | Continue                        | No   | No   |
| Old control group cases from demonstration can continue all AFDC policies  | Continue                        | Continue, as long as state maintains research group treatments for the purpose of completing an impact evaluation. | Continue, as long as state maintains research group treatments for the purpose of completing an impact evaluation. |

##### States with work policies that could override the law (as identified by states):

|                |                |
|----------------|----------------|
| Connecticut    | Delaware       |
| Hawaii         | Illinois       |
| -Massachusetts | Minnesota      |
| Missouri       | Nebraska       |
| New Hampshire  | South Carolina |
| South Dakota   | -Tennessee     |
| Texas          | Utah           |
| -Virginia      | Washington     |

##### Also possibly:

|              |                |
|--------------|----------------|
| Georgia      | Iowa           |
| Kansas       | Michigan       |
| Montana      | North Carolina |
| North Dakota | Oregon         |
| Vermont      | -Wisconsin     |

**States with time limit policies that could override the law:**

Connecticut

Florida

Illinois

Louisiana

North Carolina

Oregon

Tennessee

Wisconsin

Delaware

Hawaii

Iowa

Nebraska

Ohio

South Carolina

Virginia

**Update on TANF Regulation Negotiations**

| <b>Proposed Change</b>  | <b>Change Made</b> | <b>Partial Change Made</b> | <b>To Be Resolved</b> |
|---|--------------------|----------------------------|-----------------------|
| <b>DOMESTIC VIOLENCE</b>  |                    |                            |                       |
| 1) HHS <u>may</u> grant reasonable cause exemptions from penalties to states that fail to meet the work participation rates due to granting of good cause domestic violence waivers.                                |                    | X <sup>1</sup>             |                       |
| 2) States will be exempted from penalties only if they fail the work rate by no more than the number of individuals granted good cause waivers multiplied by the participation rate.                                | X                  |                            |                       |
| 3) HHS may grant reasonable cause exemptions from penalties for those good cause domestic violence waivers only for waivers that were granted <u>appropriately</u> .  | X                  |                            |                       |
| 4) HHS may grant reasonable cause exemptions from penalties only for good cause domestic violence waivers that are temporary ( <u>less than six months long</u> ).  | X                  |                            |                       |
| 5) HHS shall not grant reasonable cause exceptions to penalties to states for exempting more than 20 percent of the caseload from the five year time limit due to granting of good cause domestic violence waivers. |                    |                            | X                     |

---

<sup>1</sup> The reg is now changed to say the the Secretary “will determine whether a State has reasonable cause based on its demonstration that its failure to meet the work participation rates is attributable to its provision of good cause domestic violence waivers. If a state fails to meet these standards to the satisfaction of the Secretary, the Secretary will not grant the exemption.”  
Is this enough?

| Proposed Change   | Change Made | Partial Change Made | To Be Resolved |
|---|-------------|---------------------|----------------|
| <b>CASELOAD REDUCTION CREDIT</b>  |             |                     |                |
| 1) States that have expanded eligibility shall not get credit for caseload reductions that would have happened in the absence of the expansion.   | X           |                     |                |
| 2) States shall not have a choice of applying the two parent caseload reduction or the overall caseload reduction as a credit to the two parent work participation rate.                              |             |                     | X              |
| 3) HHS shall <u>not</u> have the option to allow states to exclude some or all families in any separate State program from the caseload reduction calculation "based on nature of benefits provided." |             |                     | X              |
| 4) Fingerprinting, drug testing, and whole grant sanctions shall not be defined as eligibility changes that must be factored out of the caseload credit.  |             | X <sup>2</sup>      |                |
| 5) Individuals receiving one-time, short-term assistance, or services with no monetary value shall not be eliminated from the caseload reduction credit calculation.                                  |             | X <sup>3</sup>      |                |

OK

~~XXXXXXXX~~

<sup>2</sup> The reg now refers more generally to excluding "procedural changes that have the effect of delaying or denying eligibility" but HHS policy would be to tell states that caseload changes from fingerprinting, etc., should count in that category. This HHS policy could help prevent states from gutting the work requirements: by not allowing a state to claim a caseload credit for caseload reductions due to fingerprinting (up to 15% in some states) the policy could prevent a state from lowering its work rate from, say, 50% to 35%.

NO -  
How do you tell whether fingerprinting was or wasn't the reason?

<sup>3</sup> The reg eliminates these cases from both comparison years, thus making more of an "apples to apples" comparison. For purposes of calculating the caseload credit, the TANF + MOE caseload not receiving short-term or non-monetary assistance in a given year is compared to the FY 1995 AFDC caseload without any short-time Emergency Assistance cases. The policy effect of this definition is that states that shift their services from monthly cash grants to either non-monetary services or one-time diversion grants will receive higher caseload credits.

OK

| Proposed Change  | Change Made    | Partial Change Made | To Be Resolved |
|--|----------------|---------------------|----------------|
| 6) States shall report eligibility changes on a form consistent across states and the regulation shall define a more specific set of criteria upon which the Secretary shall evaluate this information.  | X              |                     |                |
| <b>PENALTIES</b>   |                |                     |                |
| 1) In order for a state to be eligible to receive a reasonable cause penalty exception, to enter into a corrective compliance plan, or receive reduced penalties ("some or all") or penalties based on degree of non-compliance, a state must prove that it did not divert families to a separate state program for purposes of avoiding the work participation rates or preventing the federal collection of child support. | X <sup>4</sup> |                     | X <sup>5</sup> |
| 2) States may not retrospectively reclassify families in TANF as "state only" in order to game the work rates.   | X              |                     |                |

<sup>4</sup> HHS has made the following changes: in order to be eligible for a reasonable cause penalty exception or a reduced penalty based on degree of non-compliance, a state must prove that it did not divert families to a separate state program for the purpose of avoiding work participation rates.

<sup>5</sup> HHS has not agreed to make the following changes: 1) in order to enter into corrective compliance plan or receive a reduction in penalties ("some or all") for not correcting a failure through such a plan, a state must prove that it did not divert families to a separate state program for the purpose of avoiding work participation rates; 2) condition a state's eligibility for any of the penalty exceptions/reductions on the state proving that it did not divert families in order to prevent the federal collection of child support; and 3) to collect data that will help determine if states are diverting individuals to separate state programs (include in the MOE data report information on whether individuals served in the separate state program were on TANF within the last six months).

?

| Proposed Change  | Change Made                    | Partial Change Made | To Be Resolved |
|--|--------------------------------|---------------------|----------------|
| 3) States shall provide quarterly data regarding how many people have been sanctioned for not working. The data reports shall include the information necessary to determine if the state imposed a pro-rata reduction required by law, and whether the state required the individual to perform work within two years.  | X <sup>6</sup>                 |                     |                |
| 4) HHS shall enter into a corrective action plan with a state only if such a plan: a) contains monthly process and outcome goals that the state must meet in order to continue to operate under a corrective action plan; b) contains significant new actions the state plans to take to meet the law's requirements; c) contains a letter signed by the governor outlining the need for the corrective action plan; d) <u>shall be no longer than six months.</u> | X<br>(all but six month limit) |                     | X <sup>7</sup> |

<sup>6</sup> Need to confirm through change pages.

<sup>7</sup> HHS does not want to limit the compliance plan to six months. They've made the argument that the statute allows states up to two months to complete and file the plan, so in reality the compliance plan is in effect for 10 months. A six month time limit would give states only four months to comply.

*Maybe DK or Bas?*

| Proposed Change   | Change Made    | Partial Change Made | To Be Resolved  |
|---|----------------|---------------------|-----------------|
| 5) The regulations shall detail a sliding penalty scale that will be imposed based on degree of noncompliance with the work participation rates.  | X <sup>8</sup> |                     | X <sup>9</sup>  |
| 6) 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 a) expended more resources; b) made substantial progress; or c) encountered circumstances that could not have been anticipated.   |                |                     | X <sup>10</sup> |
| 7) OMB has sought to allow the Secretary to include certain child only cases in the work participation rate (denominator and, if applicable, numerator) if the Secretary determines that the state re-classified families as "child only" for purposes of avoiding the work rates (by statute, the work rates don't apply to child only cases). |                |                     | X               |

$25 \text{ of } 50 = 37.5\%$

<sup>8</sup> HHS has agreed to a sliding scale as follows: only states that met at least 75 percent of the work participation rate (e.g., 75% of 30% or 22.5%) would be eligible for a sliding penalty based on degree of non-compliance. All states falling below that standard will receive the full penalty. If a state failed both the overall and the two parent work rates, then its penalty would be reduced in direct proportion to the level of achievement above the 75 percent threshold (e.g., if a state were halfway between 22.5% and 30%, its penalty would be reduced in half). If a state failed only the two parent rate, its penalty would be first be multiplied by 10 percent and then reduced in direct proportion to the level of achievement above the 75 percent threshold.

*Is corrective action automatic?*

*what if 2 parent is 20% of state's caseload? 1%? (Alabama problem)*

<sup>9</sup> We proposed that the threshold be raised from 75 percent to 90 percent -- only states meeting a 90 percent of the work participation rate would be eligible for a sliding penalty based on degree of non-compliance. HHS has objected to this change. *Compromise at 80 or 85*

<sup>10</sup> HHS has proposed only minor word changes to this section, such as adding "expended significantly more resources", made "substantial progress", and "encountered overriding circumstances that were beyond its control and could not have been anticipated."

*SOME OR ALL?*

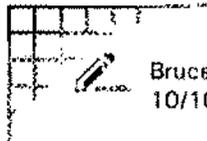
| Proposed Change  | Change Made | Partial Change Made | To Be Resolved                |
|--|-------------|---------------------|-------------------------------|
| ADMINISTRATIVE COSTS   |             |                     |                               |
| 1) OMB has sought to have a federal, rather than state, definition of administrative costs, which the statute limits to 15 percent of the total block grant. |             | X <sup>11</sup>     | X <sup>12</sup>               |
| WAIVERS  |             |                     | HHS is awaiting our proposal. |

---

<sup>11</sup> OMB has succeeded in getting HHS to agree to include several types of spending in a federal definition.

<sup>12</sup> OMB is still seeking to include spending on case management and eligibility determination in the federal definition of administrative costs.

WR - Work REG.



Bruce N. Reed  
10/10/97 11:05:04 AM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP, Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:

Subject: Re: Analysis of Welfare Regulations [EOP]

Diana, your summary is excellent, and you deserve a vacation for suffering through 400 pp of HHSese, not to mention the HHSers themselves.

It sounds like we're in for a good fight. I was concerned about the following:

1. Waivers. I think we need to bend over backwards to make sure the reg sends states a strong signal not to use their existing waivers to get around the time limits and work requirements. We should use the same strategies we have in mind to prevent bifurcation (withholding caseload reduction credits, not reducing penalties, etc.) to discourage states from doing this. We should do everything within reach of our legal authority, and where we lack the authority, we should propose a legislative fix. (And when Andrea starts, we should ask her to figure out what states are up to in this regard.)

2. Caseload reduction. It's absurd and laughable to give caseload reduction credit to states that expand eligibility, on the grounds that their caseloads would otherwise have gone down. Caseloads either go down or they don't. People are either working or they're not. If states want to expand eligibility, they can put those recipients to work.

3. Eligibility changes. I agree with you -- fingerprinting, drug testing, and sanctions are not fundamental eligibility changes -- they're enforcement mechanisms. We're in favor of these things.

4. Penalties. It's ridiculous to give states a break for making a good faith effort based on what they spend ("staff training").

5. Other issues.

-- I would like to see some kind of stronger push for states to have in place the 2 yr work requirement. That was the President's whole idea, after all.

-- What does the reg say about penalizing states for not sanctioning people who refuse to work? (Remember the Nickles amendment.)

-- I don't understand the domestic violence time limits options. I thought we weren't going to do that.

Thanks again. Great work! Let's talk next week.

## Waivers

**Summary:** The reg would permit states to continue features of their waivers that are "inconsistent" with provisions of the law in such areas as the definition of work, hours of work, and time limits, for as long as the waiver is in effect.

**Law and Prior Guidance:** The statute states that waivers granted before the law passed are grandfathered with the entire law to the extent that the law is "inconsistent with the waiver." In its original guidance, HHS asked states to identify areas where waivers are inconsistent with the law, but it has taken no action since then.

**Draft Reg:** The draft reg identifies Section 407 and the time limits as the parts of the law with provisions that may be inconsistent with a waiver. (Section 407 includes the work participation rates, the caseload reduction credit, hours of work required, definition of work activities, the requirement for sanctions for refusal to work, and nondisplacement provisions.) "Inconsistent" means that "complying with a TANF requirement would necessitate that a state change a policy reflected in an approved waiver."

**Section 407/Work Requirement:** The draft reg explicitly states that HHS will recognize inconsistencies in two areas: the definition of work and hours of work required per week to be considered "engaged in work." However, the draft reg states that HHS will not permit inconsistencies that affect the denominator of the participation rates -- i.e., limit the universe of people to whom the participation rates are applied. It is not clear why HHS is able to prohibit this waiver practice and not others.

**Time Limits:** States whose waivers have time limits may argue that their time limits are inconsistent with the law. No states have time limits greater than five years, but many states have time limits with exemption and extension policies more liberal than current law.

- Extensions -- The draft reg says that both the federal and state clocks must start ticking simultaneously but that, once the federal clock expires, the state may grant extensions in accordance with the approved waiver until the waiver expires. The reg also says that a state need not comply with the law's 20% limit on exemptions if its waiver's extension policies cause it to exceed 20%.
- Exemptions -- The draft reg also says that months during which a recipient is exempt from time limits because of waiver policy do not count toward the federal five-year limit.

NO-Fix

**Proposed Strategy:** We are still examining whether there is any basis in the law for not permitting these inconsistencies to continue. Failing that, we can press HHS on monitoring and enforcement of these provisions. There is nothing in the draft reg about how HHS will determine which items are inconsistent, monitor state actions, or impose penalties on this issue. We are asking HHS to provide us with a list of inconsistencies and its plans to review them.

## Work Requirements for Separate State Programs

**Summary:** The draft reg permits state-funded programs outside TANF to count toward the maintenance of effort requirement without being subject to the welfare law's requirements, including time limits and work participation rates.

**Law and Prior Guidance:** The law is unclear on this point. HHS and the states argued that bifurcation was permissible because the law uses the term "the state program funded under this part" to refer to TANF and its requirements, while the maintenance of effort section defines MOE as spending under "all state programs."

In a memo you wrote to the President in January, you recommended that we allow states to set up programs that are free of the law's requirements, but that we take additional steps outlined below.

1. Issue a regulation to ensure that we can monitor whether states are using state-only programs to avoid sharing child support collections with the federal government, and advise states that they should not do so.
2. Issue a regulation that a state will not qualify for a caseload reduction credit unless it demonstrates that the reduction did not result from transferring people from TANF into a separate state program.
3. Issue a regulation that a state cannot receive any mitigation in penalty for failure to meet work participation rates unless it shows that it has not used a state-only program to "escape the force of work participation rates."

(You also recommended that HHS look at a state's overall work effort in its regulation on the high performance bonus, and that we seek a legislative change stating that HHS will consider separate state programs in determining whether a state has met the participation rates.)

**Draft Reg:** The draft reg does not take the first action. It does a reasonably good job on the second action. On the third, it takes a softer approach. In describing how HHS will implement the statutory requirement that it reduce penalties based on the degree of a state's noncompliance, it states that, "We will look beyond the participation rates for the TANF caseload to the efforts a State is making to engage recipients of assistance in separate State programs in work activities."

**Proposed Strategy:** We propose to push for language that, unless a state proves it has not used a separate state program to get around the work participation rates, it is not eligible for a reasonable cause exception to a penalty, a reduction in penalty based on the degree of non-compliance, or a corrective compliance plan. HHS may express concerns about whether they have the legal authority to do this. In fact, HHS argues that it does not have legal authority even to require states to report data on separate state programs. HHS's solution is to say that states will not be eligible for a high performance bonus, a caseload reduction credit, or a reduction in penalty unless it reports on these programs. We are also exploring whether we could prohibit states from moving families to a separate state program retroactively, to limit gaming by states.

## Caseload Reduction Credit

**Summary:** The draft reg will make it easier for states to obtain the credit and it gives states a lot of latitude in estimating the credit. It requires states to submit data by November 30 of each year, and gives HHS the power to approve or disapprove plans by February 28. It also states that HHS will not consider a caseload reduction factor for approval unless the state reports data on separate state programs.

**Law and Prior Guidance:** The law permits states to reduce their minimum work participation rate if their current caseload is smaller than their FY95 caseload. The reduction is measured as the number of percentage points by which the current caseload is less than the FY95 caseload. This caseload credit from one fiscal year is applied to the participation rate for the following year -- i.e., a state whose caseload was 10 percent lower in FY 1997 than in FY 1995 would have a minimum participation rate in FY 1998 of 20 percent rather than 30. The credit must not count families dropped due to eligibility changes, although it "places the burden on the Secretary to prove that such families were diverted as a direct result of differences in such eligibility criteria."

### Draft Reg:

- The draft reg requires states to compare their TANF + MOE caseloads for a given year with their AFDC caseload from FY 1995. This seems designed to ensure that a state will not qualify for a caseload reduction credit simply by transferring people from TANF into a separate state program. However, for purposes of this calculation, the reg excludes from the caseload people "receiving services that have no direct monetary value...such as counseling...and employment services" and those "receiving one-time, short-term assistance" for 90 days or less. This may make it easier for some states to qualify for the credit:
- States that shift to providing only non-cash or short-time services will receive higher caseload reduction credits.
- At the same time, the draft reg invites a state that does not wish to include some or all families in a separate state program in the calculation to submit reasons for doing so. This may help prevent certain states from losing a caseload credit because they serve in MOE individuals who wouldn't have been eligible for AFDC.
- For two-parent families, the draft reg permits states to use either the overall reduction or the two-parent reduction, whichever will reduce the participation rate the most.
- Another way in which the draft reg makes it easier for states to claim the credit is that it allows states that have expanded eligibility to get credit for caseload reductions that would have occurred if they had not done so (e.g., increases in earned income that is disregarded). Presumably the logic here is not to discourage eligibility expansions, but the legal authority is unclear. Many states say that their difficulty in meeting the two-parent rate is due in part to eligibility expansions they granted.

/ NO

- The analysis and data that a state must submit are unnecessarily vague. So are the criteria under which HHS will review a state's proposed reduction factor -- "quality of data; adequacy of the documentation; and completeness of the list of changes in eligibility." It's unclear whether HHS will have the information needed to, as the statute requires "prove that such families were diverted as a direct result of differences in such eligibility criteria."
- The draft reg's list of what constitutes an eligibility change to be factored out has some questionable items. In addition to more straightforward items like changes in income and resource limitations, the imposition of time limits, grant reductions, and changes in requirements based on residency, age, or other demographic or categorical factors, it includes:
  - fingerprinting;
  - drug testing;
  - waiting lists for assistance; and
  - sanctions that terminate a family's grant

No

This broad list of "eligibility changes" will make it harder for states to reduce the participation rate. However, singling out these policies may be HHS's way of discouraging states from adopting them and we may not want to be in that position.

**Proposed Strategy:** We should ensure that the work rates are not undermined by an excessively generous caseload reduction credit. We should seek to ensure that states submit consistent and objective information to HHS and that they do not use the caseload reduction credit as a way to provide relief for the two parent work rates.

## Penalties

**Summary:** HHS should toughen its rules on imposing penalties significantly. The regulation is our best opportunity to ensure that the penalties have some teeth, since it will always be more difficult to impose penalties when faced with a specific state in a specific situation.

**Law and Prior Guidance:** The attached chart summarizes the penalties in the law. The law permits a state to be excused from most penalties if it had "reasonable cause." It also permits a state to enter into a corrective compliance plan to correct a deficiency for most penalties. For the work participation rates only, the statute allows states a third opportunity for a break: it requires HHS to reduce a penalty "based on the degree of non-compliance." States can appeal any adverse action to the HHS Departmental Appeals Board, which is subject to judicial review.

**Draft Reg:** The draft reg follows the statute pretty closely for most penalties. It states that its interpretations are not retroactive, and that HHS will enforce the law before the regulation is issued only against a reasonable interpretation of the law.

**Reasonable Cause:** The reg generally limits reasonable cause to unforeseen events like natural disasters. However, the draft reg describes two specific instances in which HHS will grant reasonable cause -- for certain types of refugees, and for domestic violence waivers.

**Refugees:** A state will be found to have reasonable cause if it demonstrates that it missed the work participation rates because it provided services to certain types of refugees.

**Domestic Violence Waivers:** Currently, states can exempt victims of domestic violence from the work rates and time limits, so long as they put 30 percent of their overall caseload to work and enforce the federal five year time limit for 80 percent of the caseload. Under this proposed reg, HHS will grant states reasonable cause exceptions to penalties if they fail to meet the work rates or exempt more than 20 percent of the caseload from the time limit if the failure is attributable to their granting of "good cause domestic violence waivers." To qualify as a "good cause domestic violence waivers," these waivers were temporary and included services to help individuals become self-sufficient.

As currently drafted, the reg would give states reasonable cause for missing the work rates and the time limit exceptions by as many people as they granted good cause domestic violence waiver to (see attached table). We would like to ensure that this calculation does not over-estimate how many of these individuals would have been working if they had not gotten a waiver.

As shown in the attached, we would propose to revise the reg so that the state could receive reasonable cause only for the number of good cause waivers multiplied by the work participation rate. Thus, if a state granted 10,000 good cause waivers, it could get reasonable cause for missing the work rates by only 3,000 (30% x 10,000). OMB has proposed a similar change for the time limit, although the situation is analogous.

**Corrective Compliance Plans:** The draft reg has vague and loose guidelines on when states may enter into corrective compliance plans.

- States may take up to 12 months to correct violations under corrective compliance plans.
- While the draft reg has a general definition of what a corrective compliance plan should include, it does not offer any insight into how HHS will determine if the plan is acceptable.
- Even if a corrective compliance plan fails, a state may not face the full penalty. The statute says that HHS shall impose “some or all” of a penalty if a state’s corrective compliance plan is unsuccessful. The reg’s interpretation is that a penalty may be reduced if a state:
  - “expended more resources toward eliminating the violation than it was committed to expend under the corrective compliance plan;”
  - “made considerable progress in meeting the actions and outcomes” in its plan; and
  - “encountered circumstances that could not have been anticipated at the time” the plan was developed.

**Reductions in Participation Rate Penalties Based on Degree of Non-Compliance:** The draft reg is not very strict in interpreting the statutory language requiring HHS to reduce the penalty for failure to meet the participation rate “based on the degree of non-compliance.” (Unfortunately, the statute itself is not very strict here.) To measure the degree of non-compliance and determine if a state is eligible for a reduction in penalty, the reg proposes that HHS should:

- “consider the objective evidence of the good-faith efforts the state has made to achieve the rates (e.g., its investment of resources, new program development, and staff training).”
- “look beyond the participation rates for the TANF caseload to the efforts a state is making to engage recipients of assistance in separate State programs in work activities.”

NO

Rather than emphasize outcomes, this invites states to submit reams of evidence on its process.

**Proposed Strategy:** The regulation should clearly spell out objective and outcome-oriented criteria for when penalties will be imposed.

## Other Issues/Features

Definition of administrative costs: OMB is very concerned that the draft reg does not define administrative costs subject to the statute's 15% cap.

Definition of assistance: This is defined to exclude short-term or one-time assistance, so that people who benefit from diversion programs are not subject to all the law's requirements. However, for MOE purposes, all types of assistance are permitted to count.

Individual work requirements: There is no enforcement of Section 402 work requirements (work after 2 years, community service after 2 months). Also, states may define work in any way they wish for the purposes of Section 402. The statute may support both of these interpretations. \*

Work Activities: As expected, Section 407 work activities are not defined. The six-week job search limit is defined as annual.

Non-Displacement: The draft reg does not take an alternative step that could strengthen the statute. The statute requires states to "establish and maintain a grievance procedure." The draft reg simply repeats this phrase rather than defining what an adequate procedure would be.

Data and reporting requirements: We are slogging through the question of whether the regulation requires enough data to measure success, but not so much that it becomes burdensome to states or can be publicly attacked. The requirements appear voluminous, but states are permitted to submit a data sample.

Form and length of the rule: The draft reg is about 100 pages long, with a 300-page preamble and a large appendix. HHS argues that they are unable to drop much in the way of existing regs at this time, since AFDC and EA are still being phased out for bookkeeping purposes. We are working with OIRA to ensure that the reg is as streamlined as possible.

Nickles

### Summary of TANF Penalties

| Penalty  | Amount                               | When | Sources of Data | Reas Cause/ Corrective Compl. Plan | Reduce for Degree of Non-Compl |
|--|--------------------------------------|------|-----------------|------------------------------------|--------------------------------|
| 1. Misuse of TANF funds  | Amount misused                       |      | Single audit    | Yes                                | No                             |
| 2. Intentional misuse  | 5%                                   |      | Single audit    | Yes                                | No                             |
| 3. Failure to submit an accurate, complete, and timely required report                         | 4%                                   |      |                 | Yes                                | No                             |
| 4. Failure to meet participation rates   | 5% initially; max. 21%               |      | Data report     | Yes                                | Yes                            |
| 5. Failure to participate in IEVS  | No more than 2%                      |      | Single audit    | Yes                                | No                             |
| 6. Failure to enforce penalties on recipients not cooperating with child support agency        | No more than 5%                      |      | Single audit    | Yes                                | No                             |
| 7. Failure to repay a federal loan   | Outstdg loan amt, interest           |      |                 | No                                 | No                             |
| 8. Failure to meet TANF MOE requirement  | Amount of shortfall                  |      | Fin'l report    | No                                 | No                             |
| 9. Failure to comply with time limit   | 5%                                   |      | Data report     | Yes                                | No                             |
| 10. Unremitted contingency funds   | Amount unremitted                    |      | Fin'l report    |                                    | No                             |
| 11. Failure to maintain assistance to single parent who can't get child care for child under 6 | No more than 5%                      |      | Single audit    | Yes                                | No                             |
| 12. Failure to spend to compensate for penalty   | Up to 2% + amount state didn't spend |      | Fin'l report    | No                                 | No                             |
| 13. Failure to meet MOE if you get WTW grant   | Amount of grant                      |      | Fin'l report    | No                                 | No                             |
| 14. Failure to sanction recips. refusing work  | 1-5%                                 |      |                 | Yes                                | No                             |

### Domestic Violence Waivers

| <b>WORK PARTICIPATION RATES</b><br>Examples assume a caseload of 100,000, a 30 percent work rate, and 10,000 welfare recipients receiving good cause domestic violence waivers, which must be temporary and must include services to ensure safety, promote independence, and prepare recipients for employment. |   |   |   |
|--|---|---|---|
|  | DISCRETION  | PARTICIPATION RATE CALCULATION  | END RESULT  |
| HHS  | Discretion: If HHS determines that the states do not meet the work participation rates because they've granted good cause domestic violence waivers, then HHS will not penalize them.   | 30% of 100,000 or 30,000 must work.   | HHS can allow states to lower the number of people working from 30,000 to 20,000 without penalty, if they find they have granted 10,000 good cause domestic waivers.          |
| OMB  | No Discretion: If HHS determines that the states do not meet the work participation rates because they've granted good cause domestic violence waivers, then HHS will not grant them a reasonable cause exception to the penalties. | If a state grants 10,000 domestic violence waivers, then 30% of 90,000 or 27,000 must work. | States have to put 27,000 people to work or be subject to penalties.  |
| IDEAL  | Discretion: If HHS determines that the states do not meet the work participation rates because they've granted good cause domestic violence waivers, then HHS will not penalize them.   | 30% of 100,000 or 30,000 must work.   | HHS can allow states to lower the number of people working from 30,000 to 27,000 without penalty, if they find they have granted 10,000 good cause domestic violence waivers. |

| <b>TIME LIMITS</b>   |  |  |  |
|--|--|--|--|
| Examples assume a caseload of 100,000, a maximum of 20 percent of caseload which can be exempt from the five year time limit, and 10,000 welfare recipients receiving good cause domestic violence waivers, which must be temporary and must include services to ensure safety, promote independence, and prepare recipients for employment. |  |  |  |
|  | <b>DISCRETION</b>  | <b>TIME LIMIT CALCULATION</b>  | <b>END RESULT</b>  |
| <b>HHS</b>   | Discretion: If HHS determines that the states have exempted more than 20 percent of individuals from the five year time limit because they've granted good cause domestic violence waivers, then HHS will not penalize them. | No more than 20% of 100,000 or 20,000 can be exempt from the time limit. | HHS can allow states to increase the number of people receiving federal assistance from 20,000 to 30,000, if they find they have granted 10,000 good cause domestic waivers.                               |
| <b>OMB</b>   | Discretion: If HHS determines that the states have exempted more than 20 percent of individuals from the five year time limit because they've granted good cause domestic violence waivers, then HHS will not penalize them. | No more than 20% of 100,000 or 20,000 can be exempt from the time limit. | HHS can allow states to increase the number of people receiving federal assistance from 20,000 to 24,000, if they find they have granted 10,000 good cause domestic waivers.<br>(5000*(.2*95,000))         |
| <b>?POSS IDEAL</b>   | Discretion: If HHS determines that the states have exempted more than 20 percent of individuals from the five year time limit because they've granted good cause domestic violence waivers, then HHS will not penalize them. | No more than 20% of 100,000 or 20,000 can be exempt from the time limit. | HHS can allow states to increase the number of people receiving federal assistance from 20,000 to 22,000, if they find they have granted 10,000 good cause domestic waivers.<br>? (10,000*.2)+(100,000*.2) |

WR-Work Reg.

10/15/97 -- 1:00

## Proposed Changes to Reg

### Waivers

- 1) A state that continues a waiver inconsistent with PRWORA's work participation rates or time limits shall not be eligible for a high performance bonus or a caseload reduction credit.
- 2) A state that continues a waiver inconsistent with PRWORA's work participation rates or time limits shall not be eligible to receive a reasonable cause penalty exception, to enter into a corrective action plan, or receive reduced penalties based on degree of non-compliance.
- 3) A state can continue a waiver inconsistent with PRWORA's work participation rates or time limits only if the waiver when granted explicitly named the policy that the state now wants to continue (i.e., state can continue waivers inconsistent with the new law, not policies operated under waivers inconsistent with the new law).
- 4) A state can continue a waiver inconsistent with PRWORA's work participation rates or time limits only in the geographic area for which the waiver was granted and implemented.
- 5) In order to continue a waiver inconsistent with PRWORA's work participation rates or time limits, the state must notify the Secretary in writing in a letter signed by the governor.
- 6) The burden of proof on proving waivers are inconsistent with the law shall rest with the state and the regulation will require that the information necessary for the Secretary to make that determination will be collected. States operating under waivers will report performance and be monitored like any other state. ?

### Caseload Reduction Credit

- 1) States that have expanded eligibility shall not get credit for caseload reductions that would have happened in the absence of the expansion.
- 2) States shall apply the two parent caseload reduction as a credit to the two parent work participation rate and the overall caseload reduction as a credit to the overall work participation rate. ?
- 3) Fingerprinting, drug testing, and sanctions shall not be defined as eligibility changes that must be factored out of the caseload reduction credit.
- 4) Individuals "receiving services that have no direct monetary value...such as counseling...and employment services" and those "receiving one-time, short-term assistance" for 90 days or less shall not be eliminated from the caseload reduction credit calculation. ?
- 5) States shall report eligibility changes to the Secretary on a form consistent across states and the regulation shall define a more specific set of criteria upon which the Secretary shall evaluate this information.

## Penalties

1) A state that does not prove that it did not divert families to a separate state program for purposes of avoiding the work participation rates or preventing the federal collection of child support shall not be eligible to receive a reasonable cause penalty exception, to enter into a corrective action plan, or receive reduced penalties based on degree of non-compliance. States must decide at the beginning of the quarter which families are in TANF and which families are in the separate state program (no retrospective reclassifying to game the work rates).

2) States shall provide quarterly data regarding how many people have been sanctioned for not working. The data reports shall include the information necessary to determine if the state imposed a pro-rata reduction required by law, and whether the state required the individual to perform community service within two months and/or to work within two years.

3) Good cause domestic violence waivers --

a) HHS may (rather than shall) grant reasonable cause exemptions from penalties to states that fail to meet the work participation rates so long as the states do not fail to meet the work rate by more than the number of individuals granted good cause waivers multiplied by the participation rate.

b) HHS may grant reasonable cause exemptions from penalties for those good cause domestic violence waivers (as now granted in the reg) that HHS determines were granted appropriately.

c) HHS may grant reasonable cause exemptions from penalties only for good cause domestic violence waivers that are temporary, i.e., less than six months long.

d) HHS shall not grant reasonable cause exceptions to penalties to states for exempting more than 20 percent of the caseload from the five year time limit.

4) Corrective action plans -- [seeking help from OMB on this one]

HHS shall enter into a corrective action plan with a state only if such a plan:

a) contains monthly process and outcome goals that the state must meet in order to continue to operate under a corrective action plan;

b) contains significant new actions the state plans to take to meet the law's requirements;

c) contains a letter signed by the governor outlining the need for the corrective action plan;

d) shall be no longer than six months.

5) Reductions Based on Degree of Noncompliance --

The regulations shall detail a sliding penalty scale that will be imposed based on degree of noncompliance.