



National Association of State TANF Administrators  
an affiliate of the American Public Human Services Association

July 14, 2008

Honorable Michael Leavitt  
Secretary  
U.S. Department of Health and Human Services  
Administration for Children and Families  
370 L'Enfant Promenade, S.W.  
Washington, DC 20201

Sidonie Squier  
Director  
Office of Family Assistance  
Aerospace Building, 5<sup>th</sup> Floor East  
370 L'Enfant Promenade, S.W.  
Washington, DC 20447

Dear Secretary Leavitt and Director Squier:

On behalf of the American Public Human Services Association and its affiliate, the National Association of State TANF Administrators, we wish to express our deep concern about a proposed regulatory amendment which appeared in the Unified Agenda and Regulatory Plan for the United States Department of Health and Human Services (HHS). The entry announced that HHS would be repealing 45 CFR 261.43(a)(2), the excess maintenance-of-effort (MOE) provision. The repeal of this provision is unnecessary, is certainly untimely, and will have deleterious effects on states and low-income families.

Section 261.43(a)(2) allows states to receive caseload reduction credit for making MOE expenditures in excess of the level required to avoid a penalty imposed pursuant to the Temporary Assistance for Needy Families (TANF) statute. The excess MOE provision was not in the original TANF Notice of Proposed Rule Making. Instead, HHS included the provision in the final regulations, effective October 1, 1999. Based on the preamble to those final regulations and discussions with officials involved in the drafts of those regulations, the excess MOE provision was crafted to respond to concerns by advocates and others that states would limit their spending to the minimum required to meet MOE. The regulation created an incentive for states to operate programs with their own funds beyond the minimum level.

Fortunately, for several years, because of unprecedented caseload reduction, most states did not avail themselves of the excess MOE provision. In the wake of the Deficit Reduction Act of 2005 (DRA), states have spent countless hours and resources coming to understand the methodology and guidance that HHS developed only in the last year for using the excess MOE provision. Now, when states are most in need of the excess MOE provision, HHS is proposing to remove it.

The DRA, by recalibrating the calculation of the caseload reduction credit, made very real for states the possibility of receiving TANF penalties for not meeting the work participation rates. In this context, the excess MOE provision has become essential. It allows states to meet the work participation rates. Equally important, the provisions are a vehicle for TANF agencies to leverage reluctant state legislatures to continue important investments for supports for families not receiving assistance.

The regulatory agenda justifies the proposed regulatory amendment by saying that this “provision is no longer necessary and not consistent with Congressional direction in the Deficit Reduction Act of 2005.” We strongly disagree with both clauses.

First, the very success of TANF has left states with large populations of low-income working families who, although no longer receiving public assistance, are still in need of support. State and local funds have provided, for example, necessary training, transportation, state EITC payments, and help with health insurance to help sustain and assist these families. It is these investments that comprise excess MOE. However, with the failing economy, states have diminishing resources. TANF agencies have to compete with other agencies for scarce state legislative funds. Excess MOE credit and its help in avoiding a TANF sanction give the TANF agency some leverage with state legislatures. In the absence of excess MOE credit, it will be increasingly difficult to convince legislatures to spend scarce resources on families no longer in receipt of public assistance. This is particularly true at a time when states may be at risk of receiving large fiscal sanctions in the TANF program. Any discretionary state spending is likely to be directed at sanction avoidance rather than toward the well-being of low-income working families.

Second, the excess MOE provision is not inconsistent with the DRA unless one interprets the DRA as a deliberate attempt to sanction states. The DRA provisions with respect to recalibrating the caseload reduction base were aimed at reinvigorating state efforts in work programs. No language in the DRA or policy, or other concerns, have changed from the enactment of the original TANF statute and implementing regulations that suggest that the excess MOE provision is no longer appropriate nor a tool to encourage states to assist those in need. The excess MOE provision is a companion to, not a competitor of, the DRA. By providing caseload reduction credit, the regulation incentivizes state spending in support of the TANF work effort and also incentivizes state spending on families who have left assistance. One obvious goal of such spending apart from increasing the well-being of low-income families is to prevent such families from falling back on assistance.

It is important to note that the excess MOE provisions were in place, albeit little used, during the legislative actions leading up to reauthorization of TANF and the DRA. We are not aware of any movement to repeal the excess MOE provision as part of the reauthorization of TANF and the passage of the DRA. They were part of the operating environment in which the DRA was enacted. In fact, Congress expanded the MOE provisions to greatly increase the ability to receive MOE credit for all expenditures for TANF purposes 3 or 4. Unfortunately, in the recently enacted regulations those provisions were substantially watered down to the detriment of the states.

The timing of this proposed amendment is particularly inopportune. The DRA has greatly increased the chance that states will suffer significant fiscal sanctions for not meeting the work participation rates due not only to the recalibrated caseload reduction credit but also to the newly restrictive work activities definitions. In addition, the states are burdened with heightened

verification requirements. At the same time, the failing economy is making it more difficult to place and maintain families in employment.

The failing economy has also disproportionately hit low-income working families hard, particularly the rising cost of food and fuel. As a result such families are in greater need for the support services that excess MOE funds support. At the same time, states have also been ravaged by the economic downturn. They are less able to make investments for persons not in need of public assistance. The excess MOE credit and its value in avoiding TANF sanctions provide TANF agencies with leverage in competing for scarce state funds.

Lastly, with respect to the timing of the proposed changes, the impact of those changes will almost certainly be that some states will fail to meet the work participation rates. While HHS has the authority to publish the Notice of Proposal Rulemaking, we ask that, out of respect for the states and the interest of protecting some of those most in need of assistance, it defer taking action.

Considering the many difficulties with this proposal, we find it particularly inappropriate that the Administration would consider issuing it in light of the White House's May 9 memorandum to federal agencies directing them to "avoid issuing regulations that are unnecessary" during the balance of this Administration. The memorandum added that any regulations issued this year should be proposed no later than June 1, and made final no later than November 1.

As always, we appreciate your consideration of our comments. We would be happy to meet with your representatives if you believe that would be beneficial. We request that you reconsider and not issue a Notice of Proposed Rulemaking amending excess MOE provisions.



Jerry W. Friedman  
Executive Director  
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Russell Sykes  
Chairperson  
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