

CLASP

CENTER FOR LAW AND SOCIAL POLICY

October 2, 2008

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

**Re: NPRM on Elimination of Enhanced Caseload Reduction Credit for Excess
Maintenance-of-Effort Expenditures -- Comments**

To Whom It May Concern:

These comments are submitted by the Center for Law and Social Policy (CLASP) in response to the Notice of Proposed Rulemaking published in the *Federal Register* on August 8, 2008 (73 FR 46230-32). Under the NPRM, the Department of Health and Human Services (HHS) proposes to delete 45 CFR § 261.43(b), which allows a state to receive an enhanced caseload reduction credit for maintenance-of-effort (MOE) expenditures above the minimum required. This provision has been in the Temporary Assistance for Needy Families (TANF) regulations since the final rule was issued in 1999.

In the NPRM, HHS offers two justifications for removing this provision: that there is no longer a need for additional spending on the purposes of TANF, and that the "excess MOE" provision is contrary to Congressional intent. There is no evidence to support either of these statements. Rather, in light of the current economic turndown, it is highly likely that need will increase.

Further, these proposed regulations are being issued in spite of White House guidance that limited issuance of new regulations after June 1, 2008. There have been no changes to the program that would require action now.

CLASP therefore urges HHS to make no changes to this regulatory provision.

Declining Cash Assistance Caseloads Do Not Equal Reduced Need for Funds

In the NPRM, HHS states:

“While the TANF block grant has remained constant, State TANF caseloads have plummeted. Consequently the amount of Federal TANF and minimum required State MOE funding available per case has grown considerably since that time and State TANF programs are operating successfully without spending large sums in excess of their required MOE levels.”

First, the cash assistance caseload is not the right basis for determining the need for funds, as Congress clearly intended that TANF and MOE funds be available to promote work and support family relationships among needy families who are not receiving cash assistance. States have done so, using TANF and MOE funds for child care, transportation, training, state EITCs, and family promotion activities. The number of poor children and families is now *higher* than it was in 1999, when the excess MOE rule was first adopted. Therefore, the claim that additional funds are not needed is groundless.

Second, because the TANF block grant and MOE requirements have not been adjusted for inflation, their real value has eroded over time. Even including the supplemental grants awarded to some states, the value of the TANF block grant is 22 percent less than it was in 1997.

Third, many states are currently experiencing budget deficits, and are having difficulty sustaining current levels of service even in the face of rising need. The excess MOE provision acts as a leverage point for state human service agencies to use to persuade state legislatures to maintain their investments in programs for needy families. While many of these programs will have long-term payoffs in terms of improved outcomes and reduced state costs, it is sometimes hard to win support for long-term investments in tight budgets. However, the benefit of reducing the risk of financial penalty is more tangible and immediate to legislators.

Congress Did Not Express Intent with Regard to the Excess MOE Provision

In the NPRM, HHS also claims that the excess MOE provision is contrary to the intent of Congress in passing the Deficit Reduction Act (DRA). In fact, while Congress altered other parts of the caseload reduction credit, the DRA is entirely silent regarding the excess MOE provision. Moreover, HHS appears to have recognized this, as it did not make any regulatory changes to the excess MOE provision in the interim final rules published in June 2006, and only codified previously issued guidance in the final rule published in February of this year.

HHS appears to be suggesting that because the DRA included several provisions that strengthened the work participation requirements, Congress' intent in the DRA was simply to force all states to achieve a 50 percent work participation rate, and that any provision that reduces the target rate must be contrary to Congressional intent. However, if that had been Congressional intent, the DRA would have eliminated the caseload reduction credit, rather than rebasing it. Since it did not do so, Congress clearly chose to reward states for continued caseload

decline. Similarly, Congress chose to maintain the incentive for states to spend more of their own money on needy families than the minimum required to avoid penalty.

HHS' claim of Congressional intent is further undermined by the letter sent to Secretary Leavitt on September 17 by the chairmen of the House and Senate committees and subcommittees with jurisdiction over the TANF program. They reject the statement that the credit is inconsistent with Congressional intent, and urge the Secretary to immediately withdraw the proposal.

No "Extraordinary Circumstances" Justify this Regulation

In a memorandum dated May 9, 2008, White House Chief of Staff Joshua Bolten directed agencies to avoid rushing regulations through in the waning months of the Administration. This memo stated that except in "extraordinary circumstances" proposed regulations should be published no later than June 1, 2008, and regulations should not be finalized after November 1, 2008. The excess MOE provision has been in effect for 9 years, Congress did not address it in legislation, and there is no pressing reason why it must be changed now.

TANF will need to be reauthorized again in less than two years. It is likely that Congress will wish to make additional changes at that time, including some of the provisions that received bipartisan support during the last reauthorization, but were not included in the final legislation for procedural reasons. If HHS has concerns about some of the expenditures that states are claiming for MOE, it will be appropriate to bring them up at that time, in public view, and in the context of accountability for the overall program. Changing this regulation at this time is an inappropriate use of regulatory authority.

Thank you for your consideration.

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