CLASP

CENTER FOR LAW AND SOCIAL POLICY

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

Re: Charitable Choice Provisions Applicable to the Temporary Assistance for Needy Families Program, 67 Fed. Reg. 77362-66 (December 17, 2002)

Dear Ms. Kaplan:

Thank you for providing this opportunity to comment on proposed regulations to implement the "charitable choice" provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA). Proposals to incorporate charitable choice provisions in public programs present an array of significant policy issues, but the scope of these comments is much narrower. Because the proposed regulations are intended to implement the charitable choice provisions adopted by Congress in PRWORA, the comments here focus on whether aspects of the proposed regulations are consistent with Congressional requirements and direction. In particular, as explained below, we conclude that:

- Under Section 417 of the Social Security Act, 42 USC §617, HHS lacks authority to issue regulations to implement the charitable choice provisions of Sec. 104 of PRWORA. Accordingly, the entire rulemaking package should be withdrawn.
- If HHS determines that it has rulemaking authority in this area, the regulations should be revised to provide that their scope applies to TANF-funded programs and does not apply to "separate state programs," i.e., programs funded with state or local dollars counting toward TANF maintenance of effort requirements, but that receive no federal TANF dollars.

Again, we are not addressing the wisdom of particular regulations or the underlying Congressional enactment. However, as a matter of statutory construction, it seems clear that HHS does not have authority to adopt regulations to implement the charitable choice provisions, and that those provisions only apply to TANF-funded programs, rather than programs solely funded with state or local dollars.

Under 42 U.S.C. §617, HHS lacks authority to adopt regulations implementing the charitable choice provisions of Sec. 104 of PRWORA.

In enacting PRWORA, Congress sought to accomplish a number of social policy goals, but also sought to strictly limit the authority of the federal government to issue regulations interpreting or implementing the statutory provisions. Congress took this approach to give states maximum flexibility in implementing the provisions of the law. Specifically, in Sec. 103 of PRWORA, Congress enacted a new Section 417 of the Social Security Act, codified at 42 U.S.C. §617, which provides:

> SEC. 417. LIMITATION ON FEDERAL AUTHORITY.
>
> No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.

"This part" is a reference to Title IV, Part A of the Social Security Act, 42 U.S.C. §§601 to 619.

In Section 104 of PRWORA, Congress adopted the "charitable choice" provisions of the law. By their terms, the charitable choice provisions do not just apply to TANF. Rather, they apply to:

> (A) A State program funded under part A of title IV of the Social Security Act (as amended by section 103(a) of this Act [i.e., PRWORA]).
> (B) Any other program established or modified under title I or II of this Act [i.e., PRWORA], that—
> (C) (i) permits contracts with organizations; or
> (ii) permits certificates, vouchers, or other forms of disbursement to be provided to beneficiaries, as a means of providing assistance.

PRWORA Sec. 104(a)(2).

While the scope of the charitable choice provisions is clearly not limited to TANF, the charitable choice provisions were codified at 42 U.S.C. §604a, i.e., within Title IV-A of the Social Security Act. Since these provisions are a part of Title IV-A, any authority to regulate under these provisions is controlled by 42 U.S.C. §617, which bars the federal government from regulating or enforcing any provision of Part IV-A unless expressly provided in Part IV-A. Thus, a straightforward reading of the statutory language leads to the conclusion that HHS (and the federal government generally) lacks authority to regulate under the charitable choice provisions of 42 U.S.C. §604a.

The preamble to the proposed regulations, at 67 Fed. Reg. 77362, considers the applicability of Sec. 417, and then states:

> Section 417 applies only to Federal regulation or enforcement of provisions in Title IV-A of the [Social Security] Act. Because this proposed rule implements

> provisions in PRWORA, rather than the TANF provisions in Title IV-A, the limitations set forth in section 417 do not apply.

The assertion in the second sentence of the above quoted-language is erroneous. The issue is not whether the proposed rule implements provisions in PRWORA or provisions in TANF. The language of Section 417 clearly states that the bar on regulating and enforcing applies to the provisions of Title IV-A, and charitable choice is one of the provisions of Title IV-A. Accordingly, Section 417 bars HHS from regulating under this provision.

Our conclusion that HHS lacks statutory authority to issue TANF charitable choice regulations is precisely the same conclusion as was reached by the Centers for Faith-Based & Community Initiatives in the August 2001 White House Office for Faith-Based and Community Initiatives report entitled entitled *UNLEVEL PLAYING FIELD: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*. The report explains **"**In the case of TANF funds, Congress limited the authority of HHS to promulgate regulations and did not authorize Charitable Choice regulations." See discussion of Barrier 6, at http://www.whitehouse.gov/news/releases/2001/08/unlevelfield4.html.

Similarly, HHS recently provided the same conclusion in communicating with the General Accounting Office. The recent GAO publication, *CHARITABLE CHOICE: Federal Guidance on Statutory Provisions Could Improve Consistency of Implementation* GAO 02-887 (September 2002), notes, at p. 19: "HHS officials told us that the agency did not write regulatory language concerning charitable choice and TANF because PRWORA specifically limits HHS from regulating the conduct of states under TANF, except as expressly provided in the law. While PRWORA includes charitable choice provisions, the law does not indicate that HHS may prescribe how states must implement these provisions."

The lack of federal regulatory authority under the charitable choice provision does not leave individuals and affected organizations without remedy in case of alleged state violation of the charitable choice provisions. To the contrary, the statute expressly provides that "Any party which seeks to enforce its rights under this section may assert a civil action for injunctive relief exclusively in an appropriate State court against the entity or agency that allegedly commits such violation." 42 U.S.C. §604a(i). Thus, remedies are available, but the statute did not provide for regulatory authority, and 42 U.S.C. §617 precludes HHS from exercising such authority.

Charitable choice provisions apply to TANF-funded benefits and services, not benefits and services funded in "separate state programs."

If you reach the conclusion that HHS lacks the authority to issue charitable choice regulations, you need not consider specific issues posed by the regulations. However, if you do proceed to consider specific issues, a threshold one involves the circumstances under which charitable choice requirements apply to the use of state funds. The proposed regulations state that charitable choice provisions apply both to TANF-funded benefits

and services and also to benefits and services funded with state dollars counting toward TANF maintenance of effort requirements but in "separate state programs." We agree that charitable choice applies to federal and state funds in programs that receive federal TANF funds, but disagree with the assertion that charitable choice applies to benefits and services funded in separate state programs. Instead, the assertion that charitable choice applies to separate state programs is inconsistent with the clear language of the statute and with consistent prior HHS interpretations of similar language dating back to 1997.

While the following discussion necessarily focuses on the technical issues of statutory construction, the underlying issue is an important one: under the TANF structure, states are free to meet maintenance of effort requirements through use of state and local spending for benefits and services to low income families which are not subject to other TANF requirements. The overall maintenance of effort requirement involved $10.7 billion in state and local spending in FY 01. While much of that spending was within the TANF program, there is no requirement that states satisfy the MOE requirement in that manner, so over time, what is potentially at issue here involves the applicability of charitable choice provisions to billions of dollars of state and local spending.

Under the TANF statute, each state qualifies for a block grant of federal TANF funds, and as a condition of receiving those funds, must meet a "maintenance of effort" (MOE) obligation each year. The MOE obligation is a requirement to spend no less than a specified amount of non-federal funds on benefits and services that meet a purpose of TANF and are for members of eligible low-income families with children. Shortly after the TANF statute was enacted, questions began to arise about the circumstances under which TANF requirements applies to benefits funded with non-federal funds counting toward maintenance of effort. HHS addressed this question initially in TANF-ACF-PA-97-1 (January 31, 1997), and explained:

> The term "grant" refers to Federal funds provided to the State under the new section 403 of the Social Security Act. References to amounts "attributable to funds provided by the Federal government" have a similar meaning.
> The terms "under the program funded under this part" and "under the State program funded under this part" refer to the State's TANF program. Unlike "grant" references, they encompass programs funded both with Federal funds and with State expenditures made under the TANF plan and program.
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> What counts as a State expenditure for TANF maintenance-of-effort (MOE) purposes is governed by the language in the new section 409(a)(7) of the Social Security Act. The statutory language in this section allows expenditures "in all State programs" to count as TANF MOE when spent on "eligible families" and meeting other requirements.
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> When the statutory provisions are read with these terms in mind, it is possible to distinguish three different types of program configurations under the new title IV-A: TANF programs funded by expenditures of Federal grant funds or by co-mingling of State funds and Federal grant funds; TANF programs where Federal

> grant and State funds are segregated; and programs outside of TANF and funded by expenditures of State funds, but counting toward meeting the State's MOE requirements.
>
> The language used in a specific TANF provision (or in a related provision elsewhere in the statute) will determine its applicability to these three types of programs.

The Policy Announcement proceeded to apply these distinctions in analyzing whether particular language meant that a statutory provision applied only to Federal funds, applied to federal and state funds in the state's TANF program, or applied to state funds in separate state programs that receive no TANF funds. In this analysis, HHS consistently concluded that when the statute referred to the "state program funded under this part," the reference did not include separate state programs receiving no federal TANF funds. So, for example, HHS concluded that work participation requirements of 42 USC §607 are not applicable to those receiving assistance in separate state programs because the work participation rate calculation is based on "all families receiving assistance under the State program funded under this part…" 42 USC §607(a). Similarly, the sanction-related language of 42 USC §607(e) only applies to "an individual in a family receiving assistance under the State program funded under this part…" and not to a family in a separate state program. The mandate for disaggregated data reporting does not apply to families in separate state programs because it is worded as applying to "families receiving assistance under the State program funded under this part." 42 USC §611. The child support cooperation and assignment requirements are not applicable to those receiving assistance in separate state programs because they apply to families "under the State program funded under this part. 42 USC §608(a)(2). A review of the Policy Announcement and its interpretations makes clear that HHS had clearly advised states that requirements applicable to "the program under this part" do not apply to separate state programs.

HHS reiterated its statutory construction when promulgating proposed TANF regulations on November 20, 1997. The preamble to the proposed regulations explains:

> There are also specific statutory requirements that affect the use of State funds under a State's TANF program. The specific requirements that apply depend on whether the expenditures meet the definition of assistance under Sec. 270.30; the language used in each TANF provision or in a related provision elsewhere in the statute; and the manner in which a State structures its TANF program and accounts. (None of the TANF program requirements directly apply to eligible families served in separate State programs.)
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> Provisions in the statute that use the terms "under the program," "under the program funded under this part," and "under the State program funded under this part" apply to the State's TANF program, regardless of the funding source. That is, they apply to segregated Federal programs, commingled State/Federal programs, and segregated State programs. Thus, all families receiving TANF

> assistance (whether funded with State or Federal funds) must meet work participation and child support requirements….
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> 62 Fed. Reg. 62155 (November 20, 1997).

Final regulations, while not specifically repeating the prior legal analysis, begin by enunciating the same framework:

> Section 409(a)(7) of the Social Security Act permits States to assist eligible families by expending maintenance-of-effort funds (MOE) under "all State programs." Thus, we recognize expenditures under the State's TANF program and/or separate State program(s). However, eligible families assisted through a separate State program are not generally subject to TANF requirements, including work participation requirements, child support collection requirements, the time limit on receipt of assistance, and data collection and reporting requirements. In other words, by definition, States operating separate programs avoid TANF requirements; they have more flexibility to use the funds available in these programs to help eligible families.
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> 64 Fed. Reg. 17727 (April 12, 1999).

The relevant provisions of the charitable choice statutory language apply to "a State program funded under part A of title IV of the Security Act" and to "any other program established or modified" under Title I or II of PRWORA. 42 USC §604a(a)(2). The preamble to the proposed charitable choice regulations cites this statutory language, and then simply asserts that charitable choice requirements apply whenever a state or local government uses funds claimed to meet MOE requirements, irrespective of whether the funds are commingled with federal funds, segregated, or expended in separate state programs. The preamble offers no explanation for why this is the case, and we can identify no rationale. Under consistent statutory interpretations since 1997, HHS has repeatedly said that separate state programs are not programs funded under Title IV-A. And, under ordinary language, state funded programs that count toward a federal maintenance of effort requirement are neither established nor modified by federal law.

In short, the proposed extension of charitable choice requirements to separate state programs is not justified by the statutory language and is not consistent with longstanding HHS interpretations. Accordingly, if HHS determines that it has authority to issue TANF charitable choice regulations, the scope of those regulations should be limited to use of federal TANF funds and to state funds that are used as part of the state's TANF program.

Conclusion

Thank you for this opportunity to comment.

Sincerely,

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