CLASP

CENTER FOR LAW AND SOCIAL POLICY

Model Comments on TANF Interim Final Rule
Workforce Development System

August 10, 2006

On June 29, 2006 the Department of Health and Human Services (HHS) issued regulations regarding the Temporary Assistance for Needy Families (TANF) program.[1] These regulations were required as part of the Deficit Reduction Act of 2005 (DRA; PL 109-171), which substantially increased the effective targets for the proportion of TANF recipients who participate in federally countable work activities for a specified number of hours each week. Although these regulations were issued on an interim final basis, meaning that they are effective immediately, HHS is accepting comments on the regulations until August 28, 2006.

Of interest to the workforce development system, the regulations define the activities that are countable toward the work participation rate requirements and describe how states must monitor and verify hours of participation in these activities. In general, the regulations provide narrow definitions of the work activities — narrower than many states have utilized over the last ten years when the legal authority to establish definitions (subject to HHS oversight) rested with states. Moreover, in many cases the preamble language goes beyond the actual regulatory text in restricting state flexibility.

Since the implementation of TANF and the Workforce Investment Act of 1998 (WIA) states have increasingly mandated that workforce agencies oversee the provision of employment services for welfare recipients.[2] Below, we highlight the provisions in the regulations that may impact the ability of the WIA system to provide effective welfare-to-work activities for TANF recipients. In addition, we provide suggestions for workforce development policy makers and practitioners who may want to provide comments to HHS:

The regulations discourage innovative workforce development models that blend on-the-job experience with classroom training, education, and job readiness and therefore threaten the ability of the workforce system to meet employer needs.

[1] The regulations were published at 71 Federal Register 37454–37483, and are available online through GPO Access at: http://www.gpoaccess.gov/fr/index.html

[2] U.S. Department of Health and Human Services, *Serving TANF Low-Income Populations through WIA One-Stop Centers* (Washington DC: July, 2004).

As stated in the preamble to the regulations, HHS has attempted to define work activities so that they do not overlap (45 CFR §261.2). The efforts by HHS to ensure that the definitions of work activities are mutually exclusive may create barriers to implementation of effective welfare-to-work activities and may also affect collaboration between TANF and WIA.

Although we can appreciate HHS' desire for mutual exclusivity in the work activity definitions in order to clearly delineate each activity and ease comparability across states, it is unreasonable to expect that there will be no overlap between the types of training provided across work activities. The desire for mutual exclusivity should not outweigh the strong evidence that programs with the most successful outcomes combine services and approaches. Such a requirement will hinder the ability of program providers to offer integrated programs that adequately prepare participants for particular trades or occupations and that help them become self-sufficient. It also will prevent employers from filling jobs in demand occupations with TANF recipients who have been trained in programs designed to meet the changing needs of the labor market. In addition, requiring providers to track and report hours of participation in integrated programs under different work activities increases the reporting burden.

To ensure that industry has access to a pipeline of skilled workers, and program participants have access to better jobs, the workforce system has developed innovative models which blend various work activities, such as on-the-job training, classroom instruction, and job readiness activities. The U.S. Department of Labor (DOL) has supported the design and implementation of flexible, demand-driven workforce training models which blend education and work through initiatives such as the High Growth Job Training Initiative.[3]

The following provisions in the regulations discourage TANF agencies from placing recipients in integrated workforce programs:

Subsidized work, work experience, and community service may not include job search and job readiness activities, and subsidized work and work experience may not include education and training. (45 CFR §261.2)

The ultimate goal of subsidized employment and work experience programs is to move participants into unsubsidized jobs. Program providers should not be discouraged from combining subsidized employment or work experience with job readiness or skill building activities that will enable TANF recipients to secure unsubsidized jobs and leave welfare.

HHS asserts that the restrictive definition of subsidized employment was necessary in order to prevent states from subverting the time limit on job search and job readiness. However, the statutory time limit on job search and job readiness activities was designed to prevent clients from being left to languish indefinitely in unproductive job search, not to create barriers to helping recipients move into unsubsidized employment after participating in other services. As

[3] Department of Labor Fact Sheet, "The President's High Growth Job Training Initiative" available at: http://www.doleta.gov/BRG/JobTrainInitiative/.

part of the President's welfare reauthorization proposal, HHS itself promoted a program model that encouraged recipients to combine work and job search or job readiness activities.

The regulations will discourage implementation of transitional jobs programs and other model workforce programs that combine subsidized employment with job search and job readiness activities,, barrier removal activities and training, in spite of the proven effectiveness of these programs. Under the new regulations, core components of these programs will not be "countable".

Recommendations:

- HHS should develop more flexible definitions of work activities which recognize that many of the most successful welfare-to-work programs include a mix of overlapping work activities.

- HHS should expand the definitions of subsidized employment, work experience and community service to allow the counting of job development and barrier removal activities when they are an integral part of these programs. Such a provision could include a limitation on the number of hours a week that non-employment activities could be counted.

- Comparable to the provision under community service, HHS should allow short-term training or similar activities to be counted as part of subsidized employment and work experience as long as they are "of limited duration and are a necessary or regular part" of the activity.

The definition of OJT in the HHS regulations is "training in the public or private sector that is given to a paid employee while he or she is engaged in productive work that provides knowledge and skills essential to full and adequate performance of the job." (45 CFR §261.2(f))

HHS is interested in receiving comments about "whether they should broaden the [OJT] definition beyond paid employment to include other aspects of training" (45 CFR §261.2(f)). The workforce development system has considerable experience providing OJT programs and has developed blended training models which include a mix of training at the worksite, work experience, and classroom instruction. In these flexible models, education and training decisions are driven by employer needs.

Recommendation:

HHS should include classroom-based vocational instruction in the definition of OJT, as long as it is provided at the direction of an employer in order to prepare a participant for a specific job. This will ensure that existing workforce development models which blend on-the-job learning with vocational instruction will continue to count as OJT, and that program providers have the necessary flexibility to design training programs based on employer needs.

Programs should accommodate the needs of individuals with disabilities.

The regulations do not make any accommodations to states that are trying to comply with both the requirements of the Americans with Disabilities Act (ADA) and the work participation requirements.

ADA requires that reasonable accommodations be made to enable individuals with disabilities to participate in public programs. To comply with ADA, welfare-to-work program providers may have to modify the number of hours worked or the specific activities assigned to participants with disabilities.

Recommendation:

> HHS should allow states to deem less than full hours of participation to count for the full required number of hours when needed to make accommodations required under the ADA. This would be parallel with the deeming that is allowed in order to respond to the requirements of the Fair Labor Standards Act (FLSA).

The regulations limit the ability of states to design job search and job readiness programs that adequately prepare participants for employment.

By statute, job search and job readiness activities are limited to 6 weeks (or 12 weeks in states that meet the definition of a "needy state" as defined for purposes of the contingency fund) of which no more than 4 weeks can be consecutive. The regulations interpret this provision so that a single hour of participation constitutes a full week for purposes of the limitation. (45 CFR §261.2(g))

Job search and job readiness is now the work activity under which the broadest set of activities can fit, including barrier reduction activities such as substance abuse treatment, mental health counseling, or physical therapy. The new regulations make it more difficult to accommodate individuals with severe barriers to work, since barrier reduction activities are now extremely time-limited and do not count towards the work participation rates when combined with other work activities.

The workforce development system, which operates as a provider of job readiness activities, maintains close connections with employers. These connections depend on the ability of the workforce system to refer job ready participants to employers. It is in the best interest of the workforce system to have the necessary flexibility to design job search and job readiness

programs and other work activities that will adequately prepare program participants to succeed in the workplace, and to ensure participants have had the opportunity to address barriers to employment which may affect their ability to perform on the job.

The TANF regulations, which severely limit job search activities for TANF recipients and encourage rapid placement in any available job, may create new barriers for co-enrollments with WIA programs that are now subject to the "Average Earnings" performance measure that was introduced as part of the Common Measures.[4] This new performance measure will encourage WIA service providers to design job search programs that specifically target higher wage jobs, emphasize job quality over rapid placement, and may take longer than traditional programs.

Recommendation:

> HHS should regulate that de minimis inclusion of job search and job readiness activities (e.g. less than 8 hours per week) should not be considered as using up a week of the time limit.

The regulations discourage education and training and limit state and local flexibility to develop training programs for TANF recipients based on employer needs.

The restrictive definitions of training and education as outlined in the HHS regulations may undermine the ability of the workforce system to meet industry workforce needs and create unnecessary barriers to further integration between TANF and WIA. HHS has chosen to discourage education and training services to TANF recipients, even though close to half lack even a high school diploma, and thus lack the qualifications that are increasingly necessary to gain employment in good jobs that provide family-supporting wages and benefits.[5]

By contrast, the Department of Labor (DOL) has consistently stressed the importance of providing necessary training and education for WIA participants so that they can access high-wage, high-growth jobs. As noted earlier, WIA programs are now subject to a new Average Earnings performance measure, which calculates the average earnings of participants after program exit. This measure will encourage workforce development providers to increase access to postsecondary education and training so participants can secure higher paying jobs after program exit.

---

[4] The new WIA Common Measures, which took effect on July 1, 2006, replaced the old "Earnings Gains" measure, which was based on a comparison between pre- and post-program income, with the new "Average Earnings" measure. This new measure no longer takes into account pre-program earnings for participants, and instead measures the average post-program income for all participants (with limited exceptions). For more information see: http://wdr.doleta.gov/directives/attach/TEGL17-05.pdf.

[5] U.S. Department of Health and Human Services. Fiscal Year 2002 Characteristics and Financial Circumstances of TANF Recipients.

The following provisions in the HHS regulations discourage the expansion of education and training for TANF participants, and as a result, may create new barriers to WIA and TANF co-enrollments and further program integration:

The regulations' preamble stipulates that "basic skills education may be counted as vocational educational training as long as it is of limited duration and is a necessary or regular part of the vocational educational training."

We appreciate that HHS recognizes the importance of basic skills education as a key component of training necessary for lower-skilled individuals to succeed in the labor market. Unfortunately, those TANF recipients with the lowest skills often get stuck in low-wage jobs with little opportunity for advancement. By making explicit the eligibility of basic skills education and ESL under various education and training provisions, we believe HHS is encouraging states to make available training that will help ensure that all families, including those with the lowest skills, have access to better jobs.

We are concerned, however, that HHS has stated that basic skills education is acceptable only if it is of limited duration. Some of the most successful vocational educational training programs designed for lower-skilled adults, including those which last up to a year or longer, seamlessly integrate basic skills with vocational educational training, thus making the combined program longer than if each component were provided separately. HHS and the states may arbitrarily define "limited duration" rather than acknowledging the diversity of programs which successfully provide basic education as a component of vocational educational training and, in turn, lead to increased wages upon completion.

Recommendation:

> Basic skills education should be countable as part of vocational educational training if it is a necessary or regular part of the vocational training program or if is if it is necessary for a TANF recipient to access vocational education training which will lead to employment with higher wages. If the "limited duration" language is kept, HHS should clarify that it does not apply to programs that integrate basic skills into a vocational educational training program.

The regulations do not explicitly include English as a Second Language as a necessary part of vocational educational training. (45 CFR §261.2)

Although HHS' failure to mention ESL in the context of vocational educational training may simply be an oversight, states may be unwilling to count it without clear guidance from HHS that it is permissible. Just like basic skills training, ESL can be a necessary requirement to participate in vocational educational training or the labor market.

Recommendation:

> HHS should explicitly include ESL necessary for vocational educational training in its definition of vocational educational training, as well as basic skills education.

The regulations preclude postsecondary education that leads to a baccalaureate or advanced degree from counting as vocational educational training.

It is extremely short-sighted to deny recipients the opportunity to work toward a baccalaureate degree because individuals with baccalaureate degrees have higher earnings than those with high school diplomas and associate degrees, and are much more likely to be economically self-sufficient in the long run. Sixty-three percent of the 18.9 million new jobs that will be created between 2004 and 2014 are projected to be filled by those with at least a bachelor's degree. Workers with a bachelor's degree earn an average of $51,206 a year, while those with a high school diploma earn $27,915, and those without a high school diploma average $18,734.[6] Several states have recognized this fact, and have allowed qualified TANF recipients to meet their participation requirements by attending college. As there is already a statutory limit on the length of time during which a recipient may participate in full-time education, there is no risk that states will abuse this flexibility.

HHS' policy is particularly counter-productive when a student is nearing completion of a degree. In some cases, recipients have started programs under the previous TANF rules. In other cases, a student nearing completion of a degree may experience such financial hardship that she needs to apply for TANF. In either situation, the recipient should be allowed to complete the degree if it is possible within the statutory limit on vocational educational training.

Recommendation:

> HHS should allow states to count under vocational educational training TANF participants working toward a baccalaureate degree. At a minimum, such coursework should be allowed so long as the recipient is within 12 months of completing the degree.

The preamble of the regulations bar states from counting "unsupervised homework time as part of the hours of participation" in vocational educational training programs and instead require states to count "monitored study sessions" for which "it can document hours of participation." (45 CFR §261.2)

We commend HHS for recognizing the necessity of study time for the successful completion of vocational educational training and other education and training related to employment. In order to successfully complete any educational program, study time is necessary. Previously, some states did not count any of the hours students invested in their academic success through study or provide child care to support study time, although it is commonly accepted at the postsecondary level that courses require two or more hours of preparation time for each hour of class time. Therefore, the provision that monitored study hours can be counted toward participation encourages states to reward students for their studying efforts.

[6] DOL/ETA Fact Sheet "Why America Needs an Educated and Prepared Workforce" available at: http://www.doleta.gov/budget/1%20Why%20America%20needs%2007.pdf

However, the requirement that study time be monitored is an area of significant concern in the current regulations and a change from prior HHS policy. The notion that adults need to be "monitored" in order to qualify for countable study hours is inconsistent with prevailing practices at postsecondary institutions. If a TANF recipient is progressing in school, it is evident she is spending time studying. In addition, it is also burdensome to the student and to the program provider. States need the flexibility to allow study time for those facing transportation barriers and living in rural areas, where arranging monitored study time may be particularly challenging.

Recommendation:

> HHS should offer states the option to replace the "monitored" study time requirement with an allowance of two hours of unmonitored study time for one hour of class time if a TANF recipient is making satisfactory progress, as defined by the State or the education institution, or to allow states to count actual study time if it is monitored.

The limitation on unsupervised study time also applies to education directly related to employment in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate.

Both of these provisions also include the requirement that students make good and satisfactory progress in order to continue in the activity. In order to satisfactorily progress in a course of study, regardless of whether it is at the secondary level or in preparation for the GED, it is necessary for that student to study. Complying with the monitored study time requirement will be burdensome for education and training providers, including high schools. The requirement will also be burdensome for program participants and could interfere with the individual's ability to make good and satisfactory progress.

Recommendation:

> HHS should offer states the option to replace the "monitored" study time requirement with an allowance of one hour of unmonitored study time for one hour of class time if a TANF recipient is making satisfactory progress, as defined by the State or the education institution, or to allow states to count actual study time if it is monitored.

The regulations include burdensome reporting requirements for welfare-to-work programs.

The Interim Final Rule contains a number of requirements regarding the reporting of hours of participation. Specifically, the regulations require:

- **Only actual hours of participation may be reported, not scheduled hours. (45 CFR 261.60) A limited exception is provided for excused absences and holidays.**
- **All hours of participation must be verified through documentation (45 CFR 261.61). A state may not report data on the basis of "exception reporting" where clients are assumed to be participating for all scheduled hours unless a report to the contrary is received. Time sheets and school attendance records are mentioned in the preamble as possible forms of documentation.**
- **Hours of participation in education and training programs must be documented no less frequently than every two weeks. (45 CFR 261.62) This is distinct from the requirement that participation must be supervised at least daily. (45 CFR 261.2)**
- **State procedures must be described in the state Work Verification Plan, which is subject to HHS approval. (45 CFR §261.61(a))**

These requirements may place a heavy burden on workforce development systems that operate welfare-to-work programs, since they will be responsible for documenting hourly participation. In states that do not currently collect the level of documentation that appears to be required under the regulations, welfare-to-work program providers will have to begin collecting and submitting needed information to the TANF agency. Resources that could otherwise be spent helping recipients succeed in the labor market will be diverted to monitoring hourly participation and ensuring paperwork requirements are met.

The regulations may also create additional burdens for states that place TANF recipients in mainstream WIA or community college programs that serve both TANF and non-TANF recipients and may offer additional opportunities to advance in the labor market. Programs that do not serve TANF recipients exclusively may not have the infrastructure to monitor participation in these ways. If TANF recipients continue to participate in mainstream programs, care must be taken to ensure that plans to monitor participation do not stigmatize these recipients, and create an additional barrier to continued program participation.

Recommendations:

- HHS should allow states flexibility to develop plans to monitor participation, including allowing states to project future hours based on documented actual hours and allowing progress in assigned programs as evidence of participation.
- As long as clients are making satisfactory progress in an education and training program, use the providers' definitions of holidays and excused absence procedures.
- Clarify that distance learning programs are countable and that electronic records of student participation are adequate evidence of supervision.

The regulations permit hours of employment (including unsubsidized employment, subsidized employment, and on-the-job training) to be projected for up to 6 months based on one month's worth of verified hours of participation. (45 CFR §261.61(c)) In addition, recipients in unsubsidized employment are assumed to be working for the full number of hours for which they are paid, even if some of these hours reflect paid leave. (45 CFR §261.61(b))

These provisions significantly reduce the burden on employers and the stigmatization of recipients, and HHS should be commended for them.

Recommendation:

Recipients in subsidized employment and on-the-job training should be assumed to be working for the full number of hours for which they are paid, even if some of these hours reflect paid leave. This will make the policies regarding the 3 types of paid employment parallel and similarly reduce the burden on employers.

In addition, the regulations note that for job search/readiness participants, documentation of participation must be done "daily." (45 CFR §261.2(g))

The workforce system often provides job search programs for TANF recipients through the one-stop centers. In some areas TANF recipients are currently considered to be participating in "job search and job readiness" activities if they make a certain number of job contacts every week, and show documentation of those job contacts at the end of the week. Such unsupervised job search is no longer countable under the interim final regulations. Moreover, while the regulations state that all activities must be supervised daily, only job search and job readiness assistance must also be documented daily.

The requirement that job search and job readiness be documented daily creates a huge paperwork burden, and does not provide any meaningful information to welfare caseworkers

Recommendation:

HHS should allow job search and job readiness to be documented bi-weekly, consistent with all other activities.

Comments are due on or before **August 28, 2006** and may be submitted to:

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

or submitted electronically at http://www.regulations.acf.hhs.gov.

The most effective comments are individualized and describe how your particular program would be affected by the regulations.

If you have any questions regarding these model comments, contact Allegra Baider abaider@clasp.org or Elizabeth Lower-Basch elowerbasch@clasp.org.