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CENTER FOR LAW AND SOCIAL POLICY

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

Re: Interim Final Rule Implementing Reauthorization of the Temporary Assistance for Needy Families Program -- Comments

To Whom It May Concern:

On June 29, the U.S. Department of Health and Human Services (HHS) issued regulations regarding the Temporary Assistance for Needy Families (TANF) program (71 Federal Register 37454–37483). These regulations define the activities that are countable toward the work participation rate requirements, describe how the states must monitor and verify the hours that TANF recipients participate, and explain when non-recipient parents living with a recipient child should be included in the work participation rate calculation. These regulations were required as part of the Deficit Reduction Act of 2005 (DRA; PL 109-171), which also 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.

The DRA specifically authorized HHS to issue the implementing regulations on an interim final basis, and HHS did so. The DRA also stated:

“If the Secretary provides for an interim final regulation, the Secretary shall provide for a period of public comment on the regulation after the date of publication. The Secretary may change or revise the regulation after the public comment period.”

Following are the Center for Law and Social Policy’s comments on the Interim Final Rule. We appreciate the opportunity to comment and hope that these recommendations will be taken into consideration in revising the regulations. We believe that these regulations fail to take into account the substantial body of evidence that has been developed over the past two decades regarding effective job preparation programs for welfare recipients. They inappropriately and unnecessarily restrict state flexibility and focus states’ efforts on monitoring participation in the limited set of countable activities rather than promoting critical outcomes such as work and poverty reduction.

While the list of countable activities is statutory, nothing in the law requires HHS to adopt these restrictive definitions. Many states have used more expansive definitions over the past 10 years, and HHS has never suggested that they were in violation of the statute. Effective programs require the flexibility to design work activities that are responsive to local labor market conditions and 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 best providers of employment preparation activities maintain close connections with employers, which allow them to link clients directly to jobs as well as to prepare them with the skills that employers expect. These connections depend on the ability of the employment programs to refer job ready participants to employers. The regulations represent a significant step backwards, away from best practices.

In particular, the regulations discourage states from providing accommodations to individuals with disabilities in order to enable them to participate in productive work-related activities. The regulations thus encourage states that are concerned about meeting the required participation rate to either require individuals with disabilities to participate in countable activities without accommodation or to exempt them from participation requirements entirely. Either alternative is unacceptable and inconsistent with civil rights law, including the Americans with Disabilities Act of 1990 (ADA) and Section 504 of the Rehabilitation Act of 1973 (Section 504). As the preamble to the regulations notes:

“Disabled individuals on TANF caseloads are capable of participating in productive work activities and deserve an opportunity to become self-sufficient through work.... States are encouraged to explore the capabilities of all TANF recipients to learn what they can do rather than focusing on their limitations.”

The regulations also limit access to education and training which would enable recipients to access higher paying jobs. The regulations limit access both by imposing direct restrictions on the types of education and training that may be included under the countable work activities, and by imposing unreasonable monitoring requirements on providers of education and training services. These limitations are contrary to Administration statements and the actions of other Departments that emphasize the importance of education and skill development for individual advancement and the competitiveness of the U.S. economy. As Assistant Secretary of Labor for Employment and Training, Emily Stover DeRocco said earlier this year:

“Today, high school serves only as the prerequisite to further education.... Whether it is an 18-year-old student entering a four-year university or a 50 year-old worker displaced from the manufacturing sector entering a community college to learn new skills, our citizens need access to the education and skills development that our role in the global economy demands.”¹

There are also some aspects of these regulations that we would like to commend. In particular, we strongly support the choices that HHS has made to minimize the reporting burden on

¹ Emily Stover DeRocco speech to WIRED Town Hall, February 22, 2006.
http://www.doleta.gov/whatsnew/Derocco_speeches/WIRED-%20Town%20Hall%20Speech.pdf

recipients who are working and their employers. We also appreciate that through these regulations HHS affirms the importance of basic skills and English as a Second Language education in promoting and ensuring TANF participants' employability.

Our comments are organized according to the structure of the regulations themselves. Issues that affect several of the work activities are discussed following the discussion of individual work activity definitions. In order to make our recommendations clear, we have provided specific suggestions of preamble and regulatory language. Changes to the existing text are shown with deletions in ~~strike through~~ and additions underlined.

45 CFR §261.2 Definitions

HHS' attempt to make definitions of work activities non-overlapping is inappropriate and not required by the statute. The definitions should be more flexible to allow for innovative approaches that integrate and combine activities as needed to help participants move into sustainable employment quickly rather than having to move more slowly through a rigid sequence of exclusive activities.

The ultimate goal of all the work activities listed at 42 U.S.C. §607(d) is to move participants into unsubsidized jobs. Rigorous research indicates that the most effective welfare-to-work programs provide a range of employment and education and training services, often tailored to the particular strengths and needs of the individual. Further, the most innovative approaches in recent years have woven activities together in ways that increase employability and accelerate program completion, combining activities such as job search, work experience, mental health treatment, English language instruction, subsidized employment, occupational training, community service, and basic skills remediation.

However, the interim final regulations attempt to define work activities into mutually exclusive categories (71 FR 37457). This effort will discourage states from combining and integrating services in ways that further TANF goals of increasing employment and earnings because core components of these programs will not be "countable" under the new regulations. For example, under the regulations, subsidized work, work experience, and community service may not include job search and job readiness activities. Similarly, subsidized work and work experience may not include education and training.

While the interim final regulations do not explicitly preclude welfare agencies from offering such integrated programs, they strongly discourage them from doing so. HHS' regulatory approach seeks to draw bright lines between activities in ways that are neither practical nor desirable and which will slow down preparation of individuals for family-supporting jobs. Employers are unlikely to hire TANF recipients if their barriers to employment have not been addressed and their training does not adequately prepare them to meet job requirements and the changing needs of the labor market. In addition, requiring providers to track and report hours of participation in such integrated programs under different work activities substantially increases the reporting burden and may make it harder to serve TANF recipients in programs that serve a mixed TANF and non-TANF population.

HHS acknowledges in various parts of the regulations that the listed work activities are often overlapping – that other activities may be “embedded” into community service, that on-the-job training includes aspects of both subsidized employment and vocational education, and that many of the same activities are countable as both job skills training and education directly related to employment. We believe that there is no statutory basis for HHS’ desire to issue definitions of work activities that are “mutually exclusive from one another.” The desire for simplicity and ease of comparison should not outweigh the need to craft programs that can produce the most successful outcomes in the shortest feasible time—and this will often mean combining services.

HHS should define each activity in a way that makes sense and recognizes leading edge practices in the field, without regard to whether the resultant definition overlaps with the definition of another statutory activity. Specific suggestions are provided under each of the listed work activities. In addition, if HHS does not introduce flexibility into the regulatory definitions of the various activities, when an individual participates in an integrated program that includes more than one work activity, HHS should not force the states to track participation in each component separately. Rather, HHS should allow states to report all of the time spent in the program under the primary activity.

Specific Recommendation:

Amend 45 CFR §261.60 to include the underlined text:

- (a) A State must report the actual hours that an individual participates in an activity, subject to the qualifications in paragraphs (b) and (c) and §261.61(c). It is not sufficient to report the hours an individual is scheduled to participate in an activity.
- (b) If a recipient participates in more than one work activity as part of a single program, then all hours that the recipient participates in the program may count under a single activity if (1) that single activity constitutes the majority of the hours of participation and (2) the state has an approved Work Verification Plan that provides a methodology for determining when a program qualifies for this treatment.”

[Re-label the existing subsections (b) and (c) as (c) and (d), respectively.]

Comments on individual definitions

45 CFR §261.2(b) Unsubsidized employment

In general, the definition of unsubsidized employment seems appropriate. We have some concerns about the provisions regarding the counting of self-employment, which are discussed at 45 CFR §261.60. (See page 38.)

45 CFR §261.2(c) and (d) Subsidized private sector employment and subsidized public sector employment.

The preamble language should not indicate an expectation that the participant will continue in unsubsidized employment with the same employer. At 71 FR 37458, HHS states, “At the end of the subsidy period, the employer is expected to retain the participant as a regular employee without receiving a subsidy.” Even though the preamble language does not have the same force of law as the regulation itself, some states may believe that this language prohibits counting individuals who are participating in existing Transitional Jobs programs that place participants in short-term subsidized placements that do not end in a permanent position with the same employer. For example, many transitional jobs placements are made in government agencies or nonprofit organizations since these organizations will often provide enhanced supervision and developmental opportunities for participants in exchange for employees that they might not otherwise be able to afford.² These programs generally do not expect the agencies or nonprofit organizations to continue to employ the participants after the subsidy period ends, but rather assist them to obtain an unsubsidized position with another employer.

While we are supportive of HHS’ intention to prevent states from placing participants in positions that only serve to subsidize employers’ labor costs and do not link participants to unsubsidized employment, the preamble language is unnecessarily restrictive. It does not recognize the existence of the Transitional Jobs models discussed above which link participants to temporary subsidized jobs in which they can gain transferable skills and work experience, which will allow them to move into permanent unsubsidized employment with another employer. Transitional Jobs programs typically collaborate with local representatives from organized labor to ensure that unsubsidized workers are not displaced as a result of the program.

In the statute, Congress listed public and private sector subsidized employment as separate work activities; therefore, it is reasonable to have different expectations depending on the sector of the employer. While it may generally be appropriate to limit subsidized employment in the private sector to programs where there is an expectation of continued employment with that employer, subsidized employment in the public sector (including not-for-profit organizations) should not be so limited. However, the state should describe in the Work Verification Plan how the program will link participants to unsubsidized jobs and how it will avoid displacement of current workers.

Specific Recommendation:

Modify the preamble at 71 FR 37458 to read as follows:

During the ~~trial~~ period in which the costs of employment are being subsidized, the employer should provide necessary training, guidance, and direction to an employee. In the case of subsidized private sector employment, aAt the end of the subsidy period, the employer is ordinarily expected to retain the participant as a regular employee without receiving a subsidy. States should not allow private sector employers to recycle TANF recipients in subsidized employment slots, thereby reducing their competitive labor costs. The state shall describe in its Work Verification Plan how a subsidized employment program will help program participants find unsubsidized employment.

² Kirby, Gretchen, et al. 2002. *Transitional Jobs: Stepping Stones to Unsubsidized Employment*. Washington DC: Mathematica Policy Research, Inc. Available online at: <http://www.mathematica-mpr.com/publications/PDFs/transitionalreport.pdf>.

whether there is an expectation of continued employment with the same employer, and how the program will avoid displacement of current workers.

45 CFR §261.2(e) Work Experience

HHS should allow job search, job readiness, and vocational education to be included as integral parts of a work experience program. In the preamble to the regulations, HHS notes that some existing states include job search, job readiness, and vocational educational training as part of a work experience program, and states “We will not permit these practices under this interim final rule.” HHS asserts that these states were attempting “to avoid various limitations,” such as the time limit on job search and job readiness. However, given the large caseload reduction credits they received, states had no need to circumvent these limits. Rather, it seems likely that states adopted these models because they believed them to be effective.

The ultimate goal of work experience programs is to move participants into unsubsidized jobs. Welfare agencies should not be discouraged from combining work experience with activities that will enable TANF recipients to transition into unsubsidized jobs and leave welfare. There is no evidence that stand-alone work experience programs improve employment or earnings. Work experience programs typically have been designed to enforce a reciprocal obligation on recipients, not to help participants become more employable or help them find jobs.

The regulations will discourage implementation of model workforce programs that combine work with job search and job readiness, barrier removal activities, and training because core components of these programs will not be “countable” under the new regulations. TANF agencies may be reluctant to place recipients in such programs, in spite of their proven effectiveness.

It is particularly strange that the preamble discussion of work experience does not contain any recognition that training may be needed in order to perform the duties assigned as part of work experience. In the discussion of community service, HHS gives the example of an individual assigned to clerical support who needs to attend a computer training class. A similar provision should apply to work experience. The ability to count associated training is particularly critical if states are to assign clients to work experience programs that provide participants with real skills, not just to busy-work menial tasks. Job search is also an essential component of a work experience program that seeks to transition participants into unsubsidized employment.

Specific Recommendation:

Delete the preamble paragraph that begins “Some existing State work experience programs...” in the middle column of 71 FR 37458 and replace with:

We recognize that there are instances in which other activities are embedded within the work experience activity. For example, an individual providing clerical support might attend computer training classes as part of the work experience program if the assigned activity requires it. Short-term training or similar activities may be counted as work experience as long as such activities are of limited duration and are a necessary or regular

part of work experience. Similarly, meeting with a job developer in order to discuss job openings and the skills needed in order to obtain unsubsidized employment would be countable.

45 CFR §261.2(f) On-the-Job Training

HHS should include classroom-based skill upgrading, such as occupational training, basic skills remediation, and English language instruction, and preemployment skill upgrading in the definition of on-the-job training (OJT), as long as it is provided at the direction of an employer in order to prepare a participant for a specific job. 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.”

HHS notes that OJT combines some elements of subsidized employment and vocational education and other forms of training. The preamble to the regulations states: “We are interested in receiving comments about whether we should broaden the [OJT] definition beyond paid employment to include other aspects of training.” (71 FR 37459) It is widespread practice for companies to provide both on-site training and off-site training to employees. Small employers, in particular, often rely more on external providers to provide training. The workforce development system has considerable experience providing OJT programs and has developed blended training models that 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. HHS should adopt a similar policy.

Further, while research indicates that OJT can be a very effective strategy, employers have typically been willing to provide OJT only to the higher skilled participants in public employment programs. To encourage broader use of OJT, HHS should include in the OJT definition preemployment skill upgrading at the direction of an employer if required for entry into an OJT position.

In sum, HHS should include classroom-based skill upgrading in the definition of OJT, as long as it is provided at the direction of an employer in order to prepare a participant for an OJT position or an unsubsidized job. This will ensure that existing workforce development models which blend on-the-job learning with skill upgrading will continue to count as OJT, that the benefits of OJT can be extended to a broader group of participants, and that program providers have the necessary flexibility to design OJT programs based on employer needs.

Specific Recommendation:

Amend 45 CFR §261.2(f) to read:

On-the-job training means worksite or classroom-based education or training in the public or private sector that is given to a paid employee or prospective employee while he or she is engaged in productive work at the direction of an employer that provides knowledge and skills essential to full and adequate performance of the job.

Job search and job readiness assistance

In the definition of job search and job readiness assistance, HHS should not limit mental health treatment, substance abuse treatment, or rehabilitation activities to those who are “otherwise employable.” The preamble to this section of the regulations articulates the rationale for including mental health treatment, substance abuse treatment, and rehabilitation services as follows:

Some individuals in the TANF caseload are capable of getting and keeping a job but for a substance abuse, mental health, or other condition that treatment or rehabilitation activities would resolve. We have included these services as part of our definition to help such individuals make the transition from welfare to work.

The language limiting these services to an individual who is “otherwise employable” is potentially a violation of the ADA and Section 504. This language could be read to limit the counting of participation in treatment or rehabilitation activities to those individuals that the state believes will be ready to be employed in unsubsidized jobs at the end of the treatment period. However, many individuals with substance abuse, mental health, or other conditions requiring treatment or rehabilitation will need more than just those services to become “employable.” They may need subsidized employment, on-the-job training, vocational educational training, or other services before they are “employable.” By denying services to individuals with multiple barriers to employment, this provision is inconsistent with at least the spirit, if not the letter, of the ADA and Section 504 (discussed in detail on page 28.) Thus, the language should be removed from the regulations.

This provision also adds an unnecessary additional layer of review to the process of assigning clients to these activities -- above and beyond the requirement that the need for these services be certified by a qualified medical or mental health professional. In effect, it appears that the regulations require states to determine that recipients would be employable “but for” the need for job readiness activities before they may be assigned for such activities. That is, the regulations could be read to require states to make an upfront determination that recipients will be employable once they receive the treatment or rehabilitation services. This will increase the administrative burden on states and delay treatment for those who need it.

Furthermore, the definition of community service programs states that such programs are “designed to improve the employability of recipients *not otherwise able to obtain employment*” (italics added). This could be read to require states to determine that recipients are not

employable before assigning them to community service. When read together, these provisions appear to prohibit a state from assigning someone to certain job readiness activities followed by community service. States should be able to mix and sequence services to respond to individual needs, without arbitrary restrictions such as this.

Specific Recommendation:

Amend the preamble at 71 FR 37459 by striking “for those otherwise employable” as follows:

The second is substance abuse treatment, mental health treatment, or rehabilitation activities ~~for those who are otherwise employable~~.

Amend 45 CFR §261.2(g) by striking “for those otherwise employable” as follows:

Job search and job readiness assistance means the act of seeking or obtaining employment, preparation to seek or obtain employment, including life skills training, and substance abuse treatment, mental health treatment, or rehabilitation activities ~~for those who are otherwise employable~~.

HHS should apply the statutory limits on job search and job readiness in ways that are consistent with Congressional intent to limit the extent to which these may be used as stand-alone activities, but allow states greater flexibility to combine smaller doses of these activities with other countable activities. 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.

However, the statutory time limit on these 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 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. It is utterly counterproductive to regulate that an individual who responds to a few help wanted ads or attends a job interview should later be denied access to a more intensive job search or job readiness activity.

HHS has the authority to define a week of job search and job readiness assistance so as to exclude weeks in which less than half of the hours of countable participation are from job search and job readiness assistance. The DRA grants HHS broad authority to determine when hours of participation can count toward the work participation rates. This includes authority to determine when an hour of participation in job search and job readiness activities counts toward the participation rate and when it does not because one or more of the durational limits on participation in this activity has been reached.

Specific Recommendation:

Revise preamble language at 71 FR 37459 – 37460 as follows:

We believe that the most commonly understood and simplest way to answer this question is to use the ordinary definition of a week: seven consecutive days. ~~Whether the State starts counting an individual's participation on a Monday, a Wednesday or any other day, a week ends seven days later, regardless of how many hours the individual participated in the course of those seven days. If an individual participates for more than four consecutive weeks or a total of six weeks in a fiscal year, the State may not count those hours toward the participation rate.~~ However, we believe that it is appropriate to only consider an individual as "using up" a week of job search and job readiness assistance when at least half of the hours the individual participates in countable work activities are attributable to participation in job search and job readiness activities.

If HHS believes this is too generous, another approach would be to say that participation in job search and job readiness activities counts against the four week consecutive limit if the activity counts toward the first 20 hours of participation, but that participation in these activities can count toward the work rate and will not count against the durational limits if they are combined with at least 20 hours of core activities.

HHS should clarify that a state that is "needy" in one month qualifies for the extended counting of job search and job readiness assistance for the entire year. As noted above, in a state that qualifies as "needy" under the Contingency Fund provisions, the 6 week limit on job search and job readiness assistance is extended to 12 weeks. However, HHS has not issued regulations explaining how the "needy state" provision, which is defined on a monthly basis at 45 CFR §260.30, is applied to the limit on job search and job readiness assistance, which applies on a fiscal year basis.

The simplest way to interpret this provision is that a state may count job search and job readiness assistance for up to 12 weeks during any fiscal year in which it qualifies as a needy state for at least one month. This policy would allow states to make informed decisions about how long to permit participants to engage in job search and job readiness activities, and would minimize confusion among caseworkers and participants. It would be extremely difficult to implement any policy that involved adjusting the limit up and down during the course of a year.

HHS should regulate or issue a policy announcement clarifying that a state may count job search and job readiness assistance toward the participation rate for up to 12 weeks for the entirety of any fiscal year in which it qualifies as a needy state for at least one month.

Specific Recommendation:

Amend 45 CFR §261.34(b) to read:

If the State's total unemployment rate is at least 50 percent greater than the United States' total unemployment rate or if the State meets the definition of a needy State, specified at §260.30 of this chapter, for at least one month during the fiscal year, then an individual's

participation in job search and job readiness assistance counts for a maximum of 12 weeks in that fiscal year.

If HHS believes that such a change is outside the scope of the rulemaking required by the DRA, then a similar provision could be included in a policy announcement.

45 CFR §261.2(i) Vocational Educational Training

HHS should eliminate the preamble language that states that basic skills education may only be counted as vocational educational training if it is “of limited duration.”

We appreciate that HHS recognizes the importance of basic skills education and English language instruction as key components of the training necessary for lower-skilled or foreign-born individuals to succeed in the labor market. Unfortunately, those TANF recipients with the lowest skills and/or limited English proficiency (LEP) often get stuck in low-wage jobs with little opportunity for advancement or are shut out of the labor market altogether. By making explicit that basic skills education and ESL can count toward work requirements under various work activities, we believe HHS is encouraging states to make available services that will help ensure that all recipients, including those with the lowest skills or limited English, have access to work and can move up to better jobs.

We are concerned, however, that the proposed rules would allow basic skills education under vocational educational training only if it is of limited duration. Some of the most successful vocational educational training programs designed for lower-skilled or LEP adults, including those which last up to a year or longer, seamlessly integrate basic skills with vocational educational training. This means that the basic education or English language component continues throughout the length of the training program, rather than being provided as a separate service prior to training. Programs such as Washington State’s Integrated Basic Education and Skills Training program (I-BEST) and the Center for Employment Training in San Jose, CA illustrate that such integrated approaches can substantially improve persistence and completion in job training for lower skilled or LEP adults. Such programs can also enable participants to move through education and training much more quickly than when those services must be taken in a rigid sequence.

Further, even when basic education/English language and job training services are provided sequentially, an arbitrary limit on the amount of time that can be spent in basic education and English language services fails to recognize the diversity of programs which successfully open the doors to occupational training for lower skilled or LEP adults by qualifying them to meet entry requirements. For example, job training programs typically require that participants demonstrate certain minimum levels of reading, math and English language proficiency for entry into the programs. Intensive “bridge” programs which contextualize basic education and English language services for the workplace are often designed specifically to help students meet these prerequisites. These programs may be operated by the vocational educational institution or by another organization, such as an adult basic education or English language provider. The length of these pre-training preparation programs will and must vary depending on the characteristics of

the participants and on the entry requirements of the training program they are seeking to enter. One size cannot possibly fit all.

Finally, the limited duration language is not necessary because the total sum of activities under the vocational educational training category is already time limited to 12 months. This time limit, in combination with the requirement that any basic education or ESL be a necessary or regular part of the vocational educational training activity, provides ample safeguards against indefinite participation in basic education.

HHS should explicitly include ESL necessary for vocational educational training in its definition of vocational educational training.

We assume that the failure to mention ESL in the context of vocational educational training is simply an oversight; however, states may be unwilling to count it without clear guidance from HHS that it is permissible. As with basic skills education, ESL can be a necessary requirement to participate in vocational educational training and the labor market. It is especially important to include ESL services given the exponential growth in immigration over the last decade and the key role that immigrants are playing in many areas in filling business workforce needs. As with basic education, there should not be any requirement that ESL be of limited duration, for the reasons described above.

Specific Recommendation:

Amend preamble language in the first column of 71 FR 37461 as follows:

We recognize that there may be instances in which basic skills education and English language instruction are ~~is embedded within~~ integral to vocational educational training. Such basic skills education and English language instruction 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. Vocational educational programs may incorporate these components in different ways, with some programs providing a combination of vocational, basic skills, and/or English language instruction each week and others sequencing these activities. The manner in which these activities are provided also may depend on the skill levels of individuals beginning the program. Basic skills education and English language instruction of this nature may enhance preparation for the labor market by giving participants an opportunity to apply their learning in the context of their future jobs.

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.

HHS should include in the definition of vocational educational training, those adult basic education and ESL programs which increase employment-related basic and English language skills and provide a credential with value in the labor market, even if they do not prepare individuals for a specific job or job training program.

These programs teach core basic skills and English language competencies needed for the workplace and are therefore critical to employability for those with low skills or limited English, many of whom will have basic or English skills too low to enter job-specific training programs. Others may already have the job skills, but lack the language skills, such as highly educated immigrants from Eastern Europe. Examples of such basic skills programs are those leading to attainment of ACT's Work Keys Bronze, Silver, or Gold credentials and to the U.S. Chamber of Commerce's Work Readiness Credential. These credentials are important tools for opening doors to employment that does not require an occupational credential but instead provides on the job training to new hires. For example, among the 30 occupations with the most total job openings between now and 2014, 22 of them require on the job training rather than a postsecondary credential.³ Employers are only willing to invest in this training for new hires if they have some way of knowing that the employee has the skills to benefit from it. These workplace readiness credentials provide that assurance.

Specific Recommendation:

Amend preamble language in the third column of 71 FR 37460 as follows:

Vocational educational training programs should be limited to activities that give individuals the knowledge and skills to perform a specific occupation or increase workplace-related basic or English language skills and lead to a credential with value in the labor market.

Amend preamble language in the first column of 71 FR 37461 as follows:

Our definition of vocational educational training narrows the scope of what counts for this activity to programs that prepare participants for a specific trade, occupation, or "vocation" or increase workplace-related basic or English language skills and lead to a credential with value in the labor market.

HHS should eliminate the regulatory language that precludes postsecondary education that leads to a baccalaureate 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 \$18,734.⁴ Several states have recognized this fact, and have allowed qualified TANF recipients to meet

³ Hecker, Daniel E., "Occupational Employment Projections to 2014," *Monthly Labor Review*, November 2005. Bureau of Labor Statistics, Washington, D.C.

⁴ 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>

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, participants 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 because the resultant earnings will increase the likelihood of the individual permanently leaving public assistance.

In the preamble, HHS states that "the TANF program was not intended to be a college scholarship program for postsecondary education." That statement is inaccurate. TANF granted states wide flexibility in use of TANF funds for activities that support the four purposes of TANF, and higher education is a highly effective means of ending the dependence of needy parents on government benefits. Several states have used TANF funds to provide educational assistance to students enrolled in college, and HHS has never claimed that this is an inappropriate use of funds.

Specific Recommendation:

Amend 45 CFR §261.2(i) as follows:

Vocational educational training (not to exceed 12 months with respect to any individual) means organized educational programs that are directly related to the preparation of individuals for employment in current or emerging occupations requiring training other than a ~~baccalaureate or an~~ advanced (post-baccalaureate) degree.

In addition, delete the corresponding paragraph in the preamble in the third column of 71 FR 37460.

If HHS does not lift the overall ban on counting education that leads to a baccalaureate degree, at a minimum, such coursework should be allowed so long as the recipient is within 12 months of completing the degree.

HHS should not further narrow the definition of vocational educational training in a misguided attempt to distinguish it from on-the-job training or job skills training.

The regulations narrow the definition of vocational educational training “to programs that prepare participants for a specific trade, occupation, or vocation...” HHS notes in the preamble, “Even so, this definition could overlap with other TANF work activities that provide training, including on-the-job training and job skills training. Since we want to define work activities that are mutually exclusive, we are interested in comments on how States currently implement this component and whether the definition should be broadened.”

Employers, in combination with the state and educational institutions, know best what types of vocational educational training is necessary “to give individuals the knowledge and skills to perform a specific occupation.” As the preamble itself states, it is easy to imagine the same training being provided under vocational educational training as that provided by an employer through on-the-job training or job skills training directly related to employment, particularly for lower-skilled TANF participants.

Specific Recommendations:

HHS should not further narrow the definition of vocational educational training in a misguided attempt to distinguish it from on-the-job training or job skills training.

Also, as previously discussed on page 3, HHS should allow a mix of activities to be counted under the primary component of a program (the one in which a majority of hours are spent).

45 CFR §261.2(k) Job skills training directly related to employment

The definition proposed here by HHS appropriately encompasses a fairly broad range of education and training activities, including training in preparation for job entry and job advancement and upgrade training for those already employed to “adapt to the changing demands of the workplace.” We especially appreciate that HHS has included literacy programs and ESL in this definition, if these activities are focused on skills needed for employment or combined with job training.

45 CFR §261.2(l) Education directly related to employment

The definition proposed here by HHS is flexible enough to allow for a broad range of relevant educational activities that increase skills needed for employment. One issue not addressed by the regulations, however, is the situation of immigrants and refugees who hold a high school diploma from overseas but do not have an American high school diploma or GED and so may lack the skills and credentials employers require from native high school graduates. We urge HHS to clarify that such individuals may receive education services, including English language instruction, under this category.

Specific Recommendations:

Add to preamble in middle column of 71 FR 37461:

By statute, this activity is limited to recipients who have not received a high school diploma or a certificate of high school equivalency. We recognize that some recipients may have received a high school diploma from another country that does not reflect the same level of skills as an American high school diploma. States have the flexibility to determine that an individual who has such a diploma should not be considered as having a high school diploma or certificate of high school equivalency. A state that uses this option should include in its Work Verification Plan a description of how it will make such a determination.

Crosscutting Issues

HHS should clarify that the requirement that job search and job readiness activities, community service, vocational educational training, and other education and training activities be supervised daily means that someone with responsibility for oversight of the individual's participation had contact with the recipient, but that the supervision does not have to be done by the TANF agency itself or an employment services contractor. Furthermore, HHS should clarify that supervision does not necessarily require in-person contact and that supervision is only required on days when an individual is scheduled to participate.

The definitions of each of these work activities includes a statement that this activity must be supervised no less frequently than daily. In describing this requirement, HHS officials have indicated that the goal is to ensure that recipients are indeed participating in required activities and that they are receiving guidance and assistance as needed. These are worthy goals, but the rules should be clarified to make clear that this supervision does not have to be done by the TANF agency or an entity with a direct contract with the TANF agency, but instead can be done by individuals associated with the work activities themselves, for example, a community-based service provider.

The discussion around daily supervision for work experience and on-the-job training makes clear that the supervision can be provided by a range of individuals, including employers or work site sponsors. The discussion for the other activities is not as clear. For example, an individual in a vocational educational training program should not be required to attend her program *and* make a separate contact with a caseworker to report that she did, indeed, attend class that day. The supervision, in this case, could be done by the instructor of the vocational educational training program. Similarly, staff at a not-for-profit organization could provide supervision of a community service participant.

HHS should also clarify that supervision does not necessarily require in-person contact; in some cases, a telephone or electronic contact could be appropriate. This issue is particularly significant for clients engaged in job search in rural areas, where clients might have to travel long distances in order to report to a case manager. This time could better be spent actually

searching for jobs. Similarly, HHS should clarify that distance learning programs are countable, to the extent that the programs would otherwise meet the work activity definitions, and that electronic records of student participation in virtual classrooms or chatrooms associated with the education and training programs are adequate evidence of supervision.

HHS should further clarify that supervision is only required on days when an individual is scheduled to participate. Many individuals will only be scheduled to participate 3 or 4 days a week, and it would be nonsensical to require supervision on the other days.

Finally, daily supervision is likely to be difficult for states to manage with respect to individuals providing child care to community service participants if the child care is bring provided in private homes. For this category, HHS should not require daily supervision, but should allow states to develop mechanisms for tracking participation.

Specific Recommendations:

Edit 45 CFR §261.2(e) as follows:

This activity must be supervised by an employer, work site sponsor, or other responsible party on an ongoing basis no less frequently than ~~daily~~ once each day in which the individual is scheduled to participate.

Edit 45 CFR §261.2(f) as follows:

On-the-job training must be supervised by an employer, work site sponsor, or other responsible party on an ongoing basis no less frequently than ~~daily~~ once each day in which the individual is scheduled to participate.

Edit 45 CFR §261.2(g) as follows:

Job search and job readiness assistance activities must be supervised by an individual employed by a public or private job search and job readiness program or otherwise associated with individual program components on an ongoing basis no less frequently than ~~daily~~ once each day in which the individual is scheduled to participate.

Edit preamble in the first column of 71 FR 37459 as follows:

Job search and job readiness assistance participants should be supervised on an ongoing basis no less frequently than ~~daily~~ once each day in which the individual is scheduled to participate. Job search and job readiness assistance may be supervised by an individual employed by a public or private job search and job readiness program or otherwise associated with individual program components. For example, if an individual participates in a substance abuse treatment program as part of his/her job readiness activities, an individual (or individuals) from the substance abuse treatment program can be responsible for supervising the activities. Supervision requires two-way communication regarding participation and progress in the activity, but does not necessarily require in-person contact.

Edit 45 CFR §261.2(h) as follows:

Community service programs must be designed to improve the employability of recipients not otherwise able to obtain employment and must be supervised on an ongoing basis no less frequently than daily once each day in which the individual is scheduled to participate.

Edit preamble in the first column of 71 FR 37460 as follows:

Community service programs must be designed to improve the employability of recipients not otherwise able to obtain employment and must be supervised on an ongoing basis no less frequently than daily once each day in which the individual is scheduled to participate. The supervision may be performed by individuals associated with the entity where the recipient is performing the community service. For example, if a recipient performs community service at a local food pantry, a staff member of the organization can be responsible for the supervision.

Edit 45 CFR §261.2(i) as follows:

Vocational educational training must be supervised on an ongoing basis no less frequently than daily once each day in which the individual is scheduled to participate, except with respect to homework and study time discussed separately below.

Edit preamble in the third column of 71 FR 37460 as follows:

Vocational educational training participants should be supervised no less frequently than daily once each day in which the individual is scheduled to participate, except with respect to homework and study time discussed separately below. The supervision may be performed by individuals associated with the vocational educational training program, such as instructors or program administrators. Supervision requires two-way communication regarding participation and progress in the activity, but does not necessarily require in-person contact. For individuals participating in distance learning programs, electronic records of student participation in virtual classrooms or chatrooms associated with the education and training programs are adequate evidence of supervision.

Edit 45 CFR §261.2(j) as follows:

Job skills training directly related to employment must be supervised on an ongoing basis no less frequently than daily once each day in which the individual is scheduled to participate, except with respect to homework and study time discussed separately below.

Edit preamble in the middle column of 71 FR 37461 as follows:

Job skills training directly related to employment should be supervised on an ongoing basis no less frequently than daily once each day in which the individual is scheduled to

participate, except with respect to homework and study time discussed separately below. The supervision may be performed by individuals associated with the training programs, such as instructors or program administrators. Supervision requires two-way communication regarding participation and progress in the activity, but does not necessarily require in-person contact. For individuals participating in distance learning programs, electronic records of student participation in virtual classrooms or chatrooms associated with the education and training programs are adequate evidence of supervision.

Edit 45 CFR §261.2(k) as follows:

Education directly related to employment must be supervised on an ongoing basis no less frequently than ~~daily once~~ each day in which the individual is scheduled to participate, except with respect to homework and study time discussed separately below.

Edit preamble in the middle column of 71 FR 37461 as follows:

Participants in education directly related to employment must be supervised on an ongoing basis no less frequently than ~~daily once~~ each day in which the individual is scheduled to participate, except with respect to homework and study time discussed separately below. The supervision may be performed by individuals associated with the educational program, such as teachers or school administrators. Supervision requires two-way communication regarding participation and progress in the activity, but does not necessarily require in-person contact. For individuals participating in distance learning programs, electronic records of student participation in virtual classrooms or chatrooms associated with the education and training programs are adequate evidence of supervision.

Edit 45 CFR §261.2(l) as follows:

(This relates to satisfactory attendance at secondary school...)

This activity must be supervised on an ongoing basis no less frequently than ~~daily once~~ each day in which the individual is scheduled to participate, except with respect to homework and study time discussed separately below.

Edit preamble in the third column of 71 FR 37461 as follows:

Participants in this activity should be supervised on an ongoing basis no less frequently than ~~daily once~~ each day in which the individual is scheduled to participate. The supervision may be performed by individuals associated with the educational program, such as teachers and school administrators. Supervision requires two-way communication regarding participation and progress in the activity, but does not necessarily require in-person contact. For individuals participating in distance learning programs, electronic records of student participation in virtual classrooms or chatrooms associated with the education and training programs are adequate evidence of supervision.

Edit 45 CFR §261.2(m) as follows:

~~This activity must be supervised on an ongoing basis no less frequently than daily. States must explain in their Work Verification Plan how they will track hours of participation in this activity.~~

Edit preamble in the third column of 71 FR 37461 as follows:

Because daily supervision may be infeasible if the child care is being provided in private homes, states do not have to supervise this activity daily, but must develop a mechanism for tracking hours of participation. Participants in this activity should be supervised on an ongoing basis no less frequently than daily.

The definition of “good and satisfactory progress” should be left up to educational institutions or programs. HHS should direct that these definitions should include appropriate accommodations for individuals with disabilities. HHS should clarify that under no circumstances will a state retroactively be denied credit toward the participation rate calculation on the basis that a client who participated for the required hours failed to make adequate progress. The preamble states that to count as participating in education directly related to employment or satisfactory attendance at secondary school, participants need to be making “good or satisfactory progress.” HHS invites comments regarding what constitutes good or satisfactory progress.

We believe that this standard should be left up to “the educational institutions or program in which the recipient is enrolled,” and not to the state, as such institutions are in the best position to know what the standard should be. Further, education institutions usually have such standards in place and it would be confusing and burdensome to have the states impose a second and possibly contradictory set of standards on top of these existing ones. We are unsure of what HHS’ intent is here as in one place (the preamble section for education related to employment) the good and satisfactory progress standard is left up to the education institutions and programs and in another place (the preamble section for secondary school and GED completion) the standard can be set either by the state or the educational institution. We urge HHS to leave the standard setting to educational institutions and programs in both instances.

HHS should direct states to ensure that the criteria for monitoring “satisfactory progress” not discourage institutions or programs from serving people with barriers. Such individuals may require a longer time than others to reach benchmarks or complete programs.

A second concern is whether such standards will include any flexibility for extraordinary circumstances as do the ones used in federal student aid programs. The standards for satisfactory progress used in federal student aid programs allow for financial aid administrators to, on a case-by-case basis, certify students as making satisfactory progress even if the time or GPA standards are not met, if the failure was due to exceptional circumstances, such as death of a relative, injury or illness of the student, or other special circumstances. (See 34 CFR §668.34) For example, a student in a one-year occupational certificate program may find that he or she cannot complete

within the normal timeframe because required courses happened to not be offered by the institution in a given quarter, or because he or she was required to take extra noncredit courses (such as ESL) in addition to the for-credit courses that are part of the program. We urge HHS to allow for similar case-by-case exceptions to satisfactory progress if the reasons are provided in writing by the educational institution or program to the TANF agency.

Finally, HHS should reassure states that they will not be retroactively denied credit toward the participation rate calculation on the basis that a client who participated for the required hours failed to make adequate progress. Even the most qualified and diligent student sometimes finds a course unexpectedly difficult, or encounters personal difficulties that result in a poor grade for a term. If states are afraid that HHS will *retroactively* deny participation credit if a student fails a course or otherwise fails to make adequate progress, they will be highly unlikely to allow recipients to participate in educational activities.

Specific Recommendation:

Revise preamble language in the middle column of 71 FR 37461 as follows:

Participants should have been determined to be making “good or satisfactory progress” in order for their hours to count. This includes a standard of progress developed by the educational institution or program in which the recipient is enrolled. Good or satisfactory progress should be judged by both a qualitative measure of progress, such as grade point average, as well as a quantitative measure, such as a time frame within which a participant is expected to complete such education. The standard should include safeguards for exceptional circumstances based on those in federal higher education programs as defined in 34 CFR §668.34. An educational institution’s or program’s definition of good or satisfactory progress should allow for accommodations for individuals with disabilities, as required by ADA and Section 504. A determination of “good or satisfactory progress” should be made at the start of each course, term, or enrollment period. A state will not retroactively be denied credit for recipients’ hours of participation as the result of their failure to make progress during the duration of such course, term, or enrollment period.

Revise preamble language in the third column of 71 FR 37461 as follows.

In addition to regular school attendance at a secondary school or in a course of study leading to a certificate of general equivalence, participants should have been determined to be making “good or satisfactory progress” for the activity to count. This includes a standard of progress developed ~~either by the State or~~ by the educational institution or program in which the recipient is enrolled. The standard should include safeguards for exceptional circumstances based on those in federal higher education programs as defined in 34 CFR §668.34. An educational institution’s or program’s definition of good or satisfactory progress should allow for accommodations for individuals with disabilities, as required by ADA and Section 504. A determination of “good or satisfactory progress” should be made at the start of each course, term, or enrollment period. A state will not retroactively be denied credit for recipients’ hours of

participation as the result of their failure to make progress during the duration of such course, term, or enrollment period.

HHS should eliminate the requirement that all homework time be supervised, and give states the option to deem as participation a limited number of unmonitored study hours on the basis of classroom hours. The preamble of the regulations bars states from counting “unsupervised homework time as part of the hours of participation” in education programs and instead requires states to count “monitored study sessions” for which “it can document hours of participation.”

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. Over the past ten years of TANF implementation, many states recognized this by counting hours of study time toward meeting work participation requirements.

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 educational practices. If a TANF recipient is progressing in school, it is evident she is spending time studying. Requiring students to study in monitored environments is also burdensome to the student and to the program provider, especially given that TANF participants have children and often must study at night after their children have gone to bed. Arranging monitored study time may be particularly challenging in rural areas, where clients might have to travel long distances to participate in a supervised study activity. In practice, states are unlikely to set up the complicated and expensive arrangements necessary to comply with this and may instead simply not count study time at all. This would be disastrous for the ability of participants to make good and satisfactory progress in educational activities, complete credentials, and move into employment.

HHS should allow states to count at least one hour of unsupervised homework and study time for one hour of class time for participants (unless they are in clock hour training programs) if they are making satisfactory progress. And because this 1:1 ratio of study time to class hours is only half of the standard used by postsecondary institutions (which is two hours of study time for each hour of class time⁵), states should be allowed to count other study hours if monitored in some way. (See below for recommendations on technology-based means of monitoring.) For students in clock hour training programs, HHS should allow states to propose a methodology for deeming a reasonable amount of unsupervised study hours. In either case, HHS should allow states to count any study time that is monitored, regardless of whether the participant is making satisfactory progress.

⁵ This standard is sometimes referred to as a “Carnegie Unit.” See, for example references at: <http://www.academicprograms.calpoly.edu/academicpolicies/Policies-Courses/carnegie-unit.htm>, http://registrar.ucdavis.edu/ucdwebcatalog99_00/WebCatFrt/gc_ai_credit.htm, and <http://www.skidmore.edu/academics/curric/flex4.htm>. Note also that for purposes of the Pell Grant program, a student may be considered as enrolled “full-time” on the basis of 12 credit hours of classes, given the necessity of study time as well as classroom time.

Specific Recommendation:

Revise the preamble in the first column of 71 FR 37461:

States may not count unsupervised homework and study time as part of the hours of participation. States may count one hour of unmonitored homework and study time as participation for each hour of classroom time (except for participants in clock hour training programs) so long as the participant is making satisfactory progress. We do, however, permit hours to count where a State structures a vocational educational training program to include monitored study sessions and it can document the hours of participation. States may also count other hours of homework and study time as participation if those hours are monitored, regardless of whether the participant is making satisfactory progress. For participants in clock hour training programs who are making satisfactory progress, States may propose in their Work Verification Plan a methodology for determining a reasonable amount of unmonitored homework or study time to deem as participation.

Comparable changes should be made each time the preamble discusses the counting of homework time.

If this recommendation is not followed, HHS should clarify that the requirement that time spent doing homework be monitored does not necessarily require in-person supervision. States may describe alternative mechanisms for monitoring participation as part of their Work Verification Plans.

Fair Labor Standards Act

The regulations remind states that TANF recipients who are required to work in return for their benefits (most frequently in work experience, but also in community service programs) are covered by the minimum wage provision of the Fair Labor Standards Act (FLSA). They may not be required to work for more hours than their benefit level divided by the applicable minimum wage. The rules allow a state to deem the number of hours of participation that are permissible under FLSA as meeting the core hourly participation requirement. States can only take advantage of this option, however, if it considers food stamps as well as TANF when determining the family's benefits and if the state adopts a food stamp workfare program and a Simplified Food Stamp Program.

HHS should remind states that when calculating the hours that a recipient may participate in these activities, the TANF-funded assistance used in the calculation must be net of child support retained by the state or federal government. States may not “double dip”--that is, they may not retain child support to repay assistance at the same time that they require recipients to “work off” the assistance. Furthermore, for purposes of calculating hours, states may not include as part of the benefit child support collected and passed through to the family. Since receipt of this child support is not conditional on participation, states can not require the recipient to “work it off.” For purpose of the FLSA calculation, the benefit the family is receiving from

the TANF program is equal to its assistance benefit minus any child support that was retained to offset the cost of that assistance.

HHS should also revise the preamble language to clarify that states do not need to make parents of young children *mandatory* Food Stamp Employment and Training (FSET) participants in order to include food stamp benefits in the calculation of allowable hours and qualify for the deeming provision. The preamble language could be interpreted to suggest that the Simplified Food Stamp Program must conform Food Stamp Employment and Training Program exemptions for food stamp recipients with TANF exemption policies in order to meet these conditions. (Ordinarily, parents of children under age 6 are not mandatory FSET participants.) This is not the case. The Department of Agriculture has indicated that a state could secure approval for a Simplified Food Stamp Program that treats TANF participants with young children as *voluntary* FSET participants. This would allow the states to add the food stamp benefit to the TANF benefit for the purpose of determining the maximum number of hours, without requiring them to impose food stamp sanctions on parents with young children who fail to participate.

Specific Recommendation:

Amend the preamble at 71 FR 37464 as follows:

According to the Department of Labor's guidance entitled "How Workplace Laws Apply to Welfare Recipients" (May 1997), a state may count the cash value of food stamps toward participation requirements if the State adopts a food stamp workfare program. In addition, a State must adopt a Food Stamp Simplified Program that allows the State to ~~could adopt a Simplified Food Stamp Program, which would allow it to match its food stamp exemptions to those of its TANF program. For example, the Food Stamp Program exempts single parents with a child under age 6 from participation. Adopting a Simplified Food Stamp Program would allow a State to~~ count food stamp benefits toward the hours of required participation for TANF recipients required to participate in TANF work activities this otherwise exempt group. States are reminded that when determining the hours of participation that are allowable under the FLSA, the level of assistance provided by the TANF program must be net of any child support that was collected on the family's behalf and retained to offset the cost of providing assistance to the family. States may not "double dip" -- that is, they may not retain child support to repay assistance at the same time that they require recipients to "work off" the assistance.

45 CFR §261.2(n) Work eligible individual

HHS has introduced a new term “work-eligible” to describe categories of individuals who are included in the work participation rate calculation.

HHS’ definition of “work-eligible” individual excludes one category of non-recipient parents who are statutorily ineligible for TANF (an alien who is ineligible to receive assistance due to his or her immigration status), but should include others as well.

We agree that it is inappropriate to include individuals who are ineligible for both services and assistance in the work participation rate. However, there are other categories of ineligible individuals that HHS has failed to exclude, and therefore has included by omission: fleeing felons, individuals convicted of drug-related felonies (unless the state has opted out) and persons ineligible for past fraud who may be living with a child receiving assistance. These groups should also be excluded.

Specific Recommendation:

Amend 45 CFR §261.2(n)(1) by adding the following exclusions from the definition of “work-eligible individual:”

(iv) an individual who is ineligible for assistance under the requirements of §408(a)(8) or §408(a)(9) of the Social Security Act or §115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996.

HHS should modify the definition of “work-eligible individual” to give states the option to include or exclude individuals receiving Social Security Disability Insurance (SSDI) benefits or state funded disability benefits from work participation rate calculations.

The regulations as written permit states to include or exclude from the definition of “work-eligible individual” non-recipient parents living with a child who is receiving assistance when the parent is a recipient of SSI. The preamble explains that:

SSI recipients are not eligible for TANF and we recognize that many are unable to work. Therefore, it would be inappropriate to require inclusion of these families. However, the Social Security Administration is working to remove disincentives to work from the SSI program and we would like to encourage states to support these efforts through their TANF programs. Therefore, we will allow States to receive credit toward the TANF participation rates for any parents that are able to participate in these efforts by including their families in both the numerator and the denominator of the calculation of the participation rate on a case-by-case basis.

The same analysis applies to non-recipient parents receiving SSDI or state funded disability benefits who live with a child receiving TANF assistance.

Specific Recommendation:

Amend 45 CFR §261.2(n)(1) by modifying subsection (iii) and adding subsection (iv) as follows:

- (i) A minor parent and not the head-of-household or spouse of the head-of-household;
- (ii) An alien who is ineligible to receive assistance due to his or her immigration status;
- ~~or~~
- (iii) At State option on a case-by-case basis, a recipient of Supplemental Security Income (SSI) benefits or Social Security Disability Insurance (SSDI) benefits; or
- (iv) At State option on a case-by-case basis, a recipient of state funded disability benefits.

HHS should modify the definition of “work-eligible individual” to exclude two additional groups of TANF recipients – (1) parents who are awaiting a disability determination; and (2) parents who would be eligible for SSI but for the durational requirement.

The current regulations exclude certain individuals receiving assistance from the definition of “work-eligible individuals.” HHS recognizes that it would be inappropriate to include individuals who cannot work in the work participation rate calculations. For example, HHS recognizes that caring for a child or other family member with a disability may preclude a parent from working. There are two other groups of parents who are in similar circumstances and HHS should exclude these parents from the definition of “work-eligible individuals.”

The first group consists of those who have applied for SSI or SSDI but who are waiting for final decision on their claims. The second group consists of parents who would meet the eligibility standards for SSI or SSDI except that their disability is not expected to last 12 months or result in death. In both cases, if the state makes its determination that the individual meets the disability standards, it should be permitted to exclude such individuals from the definition of “work-eligible individual.” It makes no sense to include in the calculation of work participation rates those who simply cannot work.

Specific Recommendation:

Amend 45 CFR §261.2(n)(2) by adding the following exclusions from the definition of “work-eligible individual:”

(iii) A parent who has an application pending for SSI or SSDI with the Social Security Administration and for whom the State has made its own determination that the individual meets the disability standard to qualify for the SSI or SSDI programs. The State must reassess the circumstances of these individuals every six months to determine if they still have an application for SSI or SSDI pending and if they still meet the disability standard; and

(iv) A parent whom the State determines would meet the disability standard to qualify for SSI or SSDI but for the eligibility requirement that the disability has lasted or is expected to last for 12 consecutive months or result in death. The State must reassess the

circumstances of these individuals every six months to determine if they still meet the disability standard but for the durational requirement.

If HHS declines to adopt this recommendation, states should be permitted to retroactively define parents whose SSI or SSDI applications are approved as not “work-eligible individuals,” at least until the participation rate calculations for the fiscal year are finalized.

HHS should clarify that “attending school” relates to the child’s physical presence at school on full-time basis.

We commend HHS for recognizing that parents caring for a child or other family member with a disability are often not able to participate in TANF work activities in the same way and to the same extent as other adults receiving TANF. Parents who are caring for children with a disability will be able to participate in work activities to varying degrees. Parents of children who are attending school on a full-time basis should generally be able to participate in work activities. However, as noted in our recommendation regarding hourly requirements (see page 34) some parents will need modified hours as a reasonable accommodation because of the special needs of their children.

Parents whose children are not in school full-time cannot realistically participate in work activities and we are pleased that HHS has excluded these parents from the definition of “work-eligible individual.” It is important for HHS to clarify that “attending school full-time” relates to the child’s actual presence in the school. A child may be enrolled full-time, but not actually be in school for a variety of reasons, such as holidays, vacations, teacher work days, and the like. We suggest that HHS add to the language in the preamble to make clear that a state may recognize that when the child is not actually at school, his or her parent is not available to participate in work activities.

Specific Recommendation:

Revise preamble language at 71 FR 37462 as follows:

We also chose to exclude from the definition of a work-eligible individual a parent providing care for a disabled family member living in the home who does not attend school on a full-time basis. We will consider that an individual is not attending school full-time during any month in which the school is closed for five weekdays or more including periods of school vacation, including summer vacation The State must provide medical documentation to support the need for the parent to remain in the home to care for the disabled family member. We recognize that parents responsible for disabled family members often encounter problems finding affordable and appropriate care and may not be able to participate in TANF work activities to the same extent as other adults. We therefore exclude them from the participation rate calculation.

HHS should amend the definition of “work-eligible individual” to also exclude a parent caring for a child or other family member with a disability who is not residing in the household.

The same policy reasons HHS articulated for excluding from the definition of “work-eligible individual” those individuals responsible for the care of a child or family member with a disability apply whether the person with the disability resides in the same home or not. As HHS notes, such caregivers often find it difficult to obtain affordable and appropriate care and thus are not able to participate in work activities in the same way other adult TANF recipients are. For example, an individual receiving TANF may be caring for a parent or an adult sibling with disability who resides with another family member and that family member is able to provide care at night but has work or other responsibilities during the day. The regulations already include a safeguard by requiring medical documentation of the need for care. Thus, HHS should expand the exclusion to caregivers even when the person with a disability resides in different home.

Specific Recommendation:

Amend 45 CFR §261.2(n)(2)(i) by striking the language “living in the home” as follows:

(2) The term also excludes:

(i) A parent providing care for a disabled family member ~~living in the home~~ who does not attend school on a full-time basis, provided that the need for such care is supported by medical documentation; and

HHS should amend the regulations to allow states to comply with the Americans with Disabilities Act and Section 504 of the Rehabilitation Act.

In the preamble to the regulations, HHS called upon states:

. . . . to make every effort to engage individuals with disabilities in work activities. Disabled individuals on the TANF caseloads are capable of participating in productive work activities and deserve an opportunity to become self-sufficient through work. . . . States are encouraged to explore the capabilities of all TANF recipients to learn what they can do rather than focusing on their limitations. States may explore new ways to implement activities like specialized work experience sites that help families attain the necessary work skills to improve their ability to obtain employment.

In keeping with this philosophy, HHS exhorts states to comply with civil rights laws, including the ADA and Section 504 as they try to comport with the new TANF regulations. The Office of Civil Rights (OCR) within HHS previously issued clear guidance on how states are to comply with the ADA and Section 504 and TANF and, in the preamble to these regulations, HHS reminds states of this guidance and their need to follow it. Unfortunately, HHS seems to have lost the spirit of the ADA and Section 504 when it came to drafting the regulations themselves.

Two key principles of the ADA and Section 504 require that all program participants be provided (1) individualized treatment; and (2) an effective and meaningful opportunity to participate. To fulfill these principles, states must treat individuals on a case-by-case basis and provide reasonable accommodations, auxiliary aids and services to program participants. States will find it difficult, if not impossible, to meet the requirements of TANF, as interpreted in these regulations, and also provide individualized accommodation.

As currently drafted, states will receive no credit for engaging an individual in productive activities that fall outside the narrow definitions included in the regulations, even if those activities help move the individual towards unsubsidized employment and were required as a reasonable accommodation under the ADA or Section 504. Similarly, if an individual engages in activities that meet the definitions in the regulations, but is unable, because a disability, to engage for the number of hours required, the state gets no credit for engaging that individual.

HHS' response to the numerous concerns that have been raised about the restrictive nature of the definitions and how work participation rates are to be calculated has consistently been: "That's why the rate is only 50 percent." Even if a state could achieve the required participation rates without counting individuals with disabilities as participating (a highly debatable point), HHS' response and the approach of the regulations simply sends the wrong message. This approach suggests that if an individual with a disability cannot participate in the same manner as non-disabled participants, his or her efforts and the efforts of the state deserve no credit. It encourages states to either require individuals with disabilities to participate in countable activities, without making accommodations, or to exempt them from participation requirements entirely, if they will not contribute toward the state's participation rate. Either alternative is unacceptable.

This approach runs counter to ADA and Section 504. It runs counter to Congress' goal of moving more individuals from TANF into work. It runs counter to the President's July 25th proclamation, commemorating the anniversary of the ADA, that "My Administration will continue its efforts to remove barriers confronting Americans with disabilities and their families so that every individual can realize their full potential." Instead these regulations throw a major road block onto the path of many individuals with disabilities.

Fortunately, HHS has the authority to make changes to the regulations that will give all TANF recipients with disabilities a chance to succeed. These changes would make reasonable accommodations on work activity definitions and, when necessary, hourly requirements, for individuals with disabilities. These types of accommodations are not mutually exclusive; some individuals with disabilities could best be accommodated by modifying the activities required, while others might be able to participate in the standard activities, but for fewer hours than otherwise required. Other recommendations we have made throughout our comments would better accommodate parents of children with a disability. Finally, the recommendation to modify the definition of "work-eligible" individuals to exclude from the participation rate calculation those individuals who are so disabled that they cannot participate in any work activities (see page 26) would recognize circumstances when the work requirements are not appropriate.

HHS should expand the definitions of work activities when a person with a disability needs accommodation under the ADA or Section 504.

There are several ways to expand the definitions of work activities to accommodate the needs of TANF recipients with disabilities. Under any of the approaches, states would need to conduct an assessment of the individual and develop a tailored employment plan that spells out the accommodations needed by that individual.

The first option for ensuring that states can and do comply with the ADA, Section 504, and TANF is to allow a broadened definition for any of the 12 work activities set forth in the statute when specific requirements for accommodation under the ADA or Section 504 are met. HHS should also add to the preamble language that provides examples of ways the 12 work activities could be amended.

Specific Recommendation:

Add a new section 45 CFR §261.3 as follows:

A state may count an individual's participation in any of the 12 work activities set forth in the federal law, even if the activity is modified from the definitions set forth in section 261.2, when such modification is needed to provide access to program benefits and services for an individual with a disability and the following circumstances are met:

- (1) the individual has a disability as defined under the Americans with Disabilities Act;
- (2) the state has determined that under the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act, a reasonable accommodation is needed with respect to participation in activities to provide access to program benefits and services;
- (3) the state and the individual have developed, and continue to modify, as needed, an individualized employment plan for the individual; and
- (4) the individual is meeting the terms of the individualized employment plan.

Add to the preamble the following examples of expanded definitions that could be used under new section 45 CFR §261.3:

There are a variety of ways States could expand the definitions of work activities in order to provide reasonable accommodations to individuals with disabilities, but we are including three examples to help States as they work to meet the needs of individuals with disabilities. These examples are not meant to be exclusive, but merely illustrative of ways States can comply with the provisions of TANF, the ADA, and Section 504.

First, a State could expand the definition of "work experience." As noted in the preamble, work experience includes activities that provide the individual with an opportunity to acquire the general skills, training, knowledge, and work habits necessary to obtain employment. The purpose of work experience is to improve the employability of those who cannot find unsubsidized employment. There are a range of services, supports, and activities that individuals with disabilities may need to become more employable. They

may, for example, need to obtain substance abuse or mental health treatment, physical therapy, occupational therapy, or other rehabilitative services before they will be able to acquire the general skills, training, knowledge, and work habits needed for employment. While rehabilitative activities can be counted under the regulations as “job readiness” activities for up to four consecutive weeks and up to six weeks (or 12 weeks in “needy” states) total, that may not be enough of an accommodation for some individuals with disabilities. Thus, States may broaden the definition of “work experience” for individuals with disabilities to count these activities for a longer period of time.

Second, a State could expand the definition of “community service” for individuals with disabilities. For individuals with disabilities who need more rehabilitative services than can be counted under “job readiness,” States could define community service to include these activities, recognizing that while such services clearly benefit the individual, the entire community also benefits when individuals are able to participate more fully in community life – to become more independent and self-sufficient and enhance the well-being of their children.

Third, a State could broaden the definition of “job skills directly related to employment” to accommodate the needs of individuals with disabilities. The regulations define this work activity as training and education required by an employer that provides an individual with the ability to obtain, advance, or adapt to the changing needs of the workplace. Typically, this work activity would not encompass rehabilitative services. However, for individuals with disabilities to have meaningful access to such job skills training, they may need to engage in rehabilitative services for more than the period such activities count under “job readiness.” In such cases, States may expand the definition of “jobs skills training directly related to employment” to include such services. If States choose to provide reasonable accommodations by expanding this definition, they may also need to provide reasonable accommodations on the hours that a person may participate in these services. Generally, participation in “job skills directly related to employment” count only after an individual has participated in activities listed in Section 407(d)(1), (2), (3), (4), (5), (6), (7), (8), or (12) of the Act, often referred to as “core work activities,” for at least 20 hours. However, for individuals with disabilities, an accommodation with regard to hours may be needed. States may deem the number of hours that an individual with a disability participates as meeting the full hourly participation requirement if the State has determined that the individual has a disability and needs an accommodation of the hourly requirements and if the individual has met his/her individualized hourly requirements. As noted at 45 CFR §261.31 and 261.32, the accommodation of the hourly requirements can be with respect to the total number of hours of participation or the mix between hours of participation in core and non-core activities.

If HHS does not want to have States make reasonable accommodations by broadening any of the 12 work activity definitions, HHS should expand one or more of the individual definitions so that that category permits states to count rehabilitative services, beyond the limits set forth in “job readiness,” when needed to make a reasonable accommodation under the ADA or Section 504. There a number of ways to expand the definitions. For example, HHS could expand the definition of “work experience,” “community service” or “job skills directly related to

employment” when an individual with a disability needs an accommodation under the ADA or Section 504.

Specific Recommendation:

Amend 45 CFR §261.2(e) by adding, after the last sentence:

Work experience can also mean activities in which an individual with a disability, as defined under the Americans with Disabilities Act, participates pursuant to an individualized employment plan in which the State has determined that, under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, a reasonable accommodation of work-related activities should be granted in order to provide the individual with access to the program benefits and services.

Or

Amend 45 CFR §261.2(h) by adding, after the last sentence:

Community service programs can also mean activities in which an individual with a disability, as defined under the Americans with Disabilities Act, participates pursuant to an individualized employment plan in which the state has determined that, under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, a reasonable modification of work-related activities should be granted in order to provide the individual with access to the program benefits and services.

Or

Amend 45 CFR §261.2(j) by adding, after the last sentence the following:

Job skills training directly related to employment can also mean activities in which an individual with a disability, as defined under the Americans with Disabilities Act, participates pursuant to an individualized employment plan in which the state has determined that, under the Americans with Disabilities Act or Section 504 of the Rehabilitation Act, a reasonable modification of work-related activities should be granted in order to provide the individual with access to the program benefits and services. When such an accommodation is needed, States may deem the number of hours that an individual with a disability participates as meeting the full hourly participation requirement if the State has determined that the individual has a disability and needs an accommodation of the hourly requirements and if the individual has met his/her individualized hourly requirements. The accommodation of the hourly requirements can be with respect to the total number of hours of participation or the number of core hours of participation required for activities listed in 42 U.S.C. §607(d)(1), (2), (3), (4), (5), (6), (7), (8), or (12) of the Act.

Whichever option HHS takes to expand the definitions of work activities when a person with a disability needs accommodation under the ADA or Section 504, HHS should amend the preamble to be consistent with the regulatory changes.

Specific Recommendation:

Amend the preamble at 71 FR 37458, in the second column, by striking the language as follows:

~~Some existing State work experience programs include activities that fall outside this definition. For example, several States count job search, job readiness activities, and vocational educational training as part of a work experience program. In some instances, it appears that States integrated these activities into work experience to avoid various limitations, such as the six-week limitation on counting job search and job readiness assistance. We will not permit these practices under this interim final rule.~~

Amend the preamble at 71 FR 37460, in the first column, by striking the language as follows:

~~The definition limits the activity to what many commonly think of as “community service.” It excludes, for example, activities such as participation in substance abuse treatment program, mental health and family violence counseling, life skills classes, parenting classes, job readiness instruction, and caring for a disabled household member, which while important and beneficial, are not primarily directed at benefiting the greater community.~~

Amend the preamble at 71 FR 37460, in the second column, to strike the language as follows:

~~Activities that are not an integral part of community service cannot count. For example, substance abuse treatment may be a prerequisite for participation in work activities, but it does not count under community service because it is not an integral part of the community service activity.~~

Amend the preamble at 71 FR 37461, in the second column, by striking the language as follows:

~~Some States include barrier removal activities as job skills training, such as substance abuse counseling and treatment, mental health services, and other rehabilitative activities. While we encourage states to work with individuals in these areas, the definition of job skills training focuses on educational or technical training that is specifically designed to help individuals move into employment.~~

Amend the preamble discussion of “work experience” at 71 FR 37459, in the third column, by striking text as indicated and including the underlined text:

For example, a State may place an individual who is otherwise able to work but for the need to reinforce substance abuse treatment in to a special program in which a single provider coordinates work and treatment in a halfway house environment. As part of the that treatment program, the individual fulfills assigned, supervised, documented work responsibilities for the benefit of all residents, such as preparing meals, housecleaning, or scheduling group activities. In that case, the State may report the hours the individual was in the work portion of the program, i.e. performing work that meets the requirements of these rules. The time the individual spent in the treatment component does not count

in the work category. The time the individual spent in the treatment portion of the program could also be counted as a work activity if the majority of the individual's time was spent in the work portion of the program. The time spent in the treatment portion of the program could also be counted if the individual participating had a disability that required accommodation under the ADA or Section 504.

HHS should allow for accommodation of hourly requirements by deeming the number of hours a TANF recipient with a disability or an individual caring for a family member with a disability participates to be the number of hours required under the work participation rate.

Some individuals may be able to engage in the activities as defined in the regulations but may not be able to participate in these hours for the requisite 20, 30, or 35 hours per week because of their disability. Similarly, a person caring for a child or family member with a disability may not be able to participate for the standard number of hours because they need to provide care for the family member. (HHS excludes some individuals caring for family members from the work participation calculations – recognizing that caring for a family member with a disability can be a full-time endeavor. However, some individuals caring for a family member with a disability will not be exempt under the regulations but will also not be able to participate for the standard number of hours on occasion.) In either case, HHS should deem the hours the individual participates to meet the applicable hourly requirement.

While the statute prescribes the number of hours for which individuals are required to participate, Congress specifically delegated to the Secretary in the DRA the authority to establish procedures for counting hours. HHS has already recognized that it has authority to count toward the participation requirements hours an individual does not actually engage in the activity. For example, in the regulations, HHS allows states to count hours the person was not participating due to excused absences and holidays. Similarly, HHS deems less than 20 hours of participation in “core work activities” to meet the 20 hour requirement when the individual cannot be required to participate in the activity for 20 hours due to the requirements of the Fair Labor Standards Act. By analogy, HHS should deem the number of hours an individual with a disability participates to meet the requisite hours, if the ADA or Section 504 require less hours as a reasonable accommodation.

Specific Recommendation:

Amend 45 CFR §261.31 to add a new subsection (e) and amend 45 CFR §261.32 to add a new subsection (f) as follows:

We will consider a work-eligible individual who participates in work activities for the number of hours required under an individualized employment plan to have participated for the number of hours the individual would have been required to participate to count toward the state's participation rate if:

- (1) the individual has a disability or cares for an individual with a disability as defined under the Americans with Disabilities Act;
- (2) the state has determined that under the Americans with Disabilities Act and/or Section 504 of the Rehabilitation Act, a reasonable accommodation is needed with respect to the total number of hours of required participation and/or the number of hours of participation required for activities listed in 42 U.S.C. §607(d)(1), (2), (3), (4), (5), (6), (7), (8), or (12) of the Act to afford the individual with access to the program benefits and services;
- (3) the state and the individual have developed, and continue to modify, as needed, an individualized employment plan for the individual; and
- (4) the individual is meeting the terms of the individualized employment plan.

45 CFR §261.40 Is there a way for the State to reduce the work participation rates?

HHS should clarify that the original base year of FY 1995 applies for the entirety of FY 2006. By statute, the new base year for the caseload reduction credit provisions does not take effect until October 1, 2006. HHS therefore did not have the authority to make this provision effective on publication of the Interim Final Rule (e.g. June 29, 2006).

Specific Recommendation:

As the final rule will not be issued until after October 1, 2006, HHS should issue a program announcement to States clarifying that the original base year of FY 1995 applies for the entirety of FY 2006.

45 CFR §261.42 Which reductions count in determining the caseload reduction credit?

HHS should restore deleted language that provided detail concerning state eligibility changes that must be considered to offset caseload reduction for purposes of claiming caseload reduction credit.

The DRA re-based the measurement of the caseload reduction credit to reflect caseload reduction, net of state eligibility changes, since FY 2005, replacing the prior base of FY 1995 which had been set by PRWORA. In revising the regulations to reflect the DRA change, HHS also deleted important language that detailed the types of state policies represented eligibility changes from 45 CFR §261.42(a)(1). At the same time, the revised rule did not delete additional language detailing the types of state procedural requirements that do not constitute eligibility changes; the language that remained is now in 45 CFR §261.42(a)(4).

The deleted language remains relevant and vital as states consider additional eligibility changes as they redesign their programs in light of the TANF requirements under the DRA. It should be restored. For example, a state may modify its sanction policy or adopt other conditions of eligibility to foster caseload reduction. Under the statute, these must be offset from caseload reductions before states can receive credit for caseload reduction.

Specific Recommendation:

Restore language to 45 CFR §261.42 that has been deleted:

(a)(1) A State's caseload reduction credit must not include caseload decreases due to Federal requirements or State changes in eligibility rules since FY 2005 that directly affect a family's eligibility for assistance. These include more stringent income and resource limitations, time limits, full family sanctions, and other new requirements that deny families assistance when an individual does not comply with work requirements, cooperate with child support, or fulfill other behavioral requirements.

45 CFR §261.60 What methods may a State use to report a work-eligible individual's hours of participation?

We support the provision under which HHS allows the counting of all hours for which a recipient is paid, including paid holidays and sick leave.

This is an important policy that allows for the use of paystubs as a primary means of verifying hours of employment. It therefore reduces the reporting burden on individuals and employers, avoids stigmatizing welfare recipients, and recognizes that holidays and sick leave are in many cases a standard part of the work environment. We strongly support this provision.

Revise the excused absence policy to recognize states' efforts when recipients must miss more than two days of participation due to specific reasons that are clearly appropriate.

For unpaid work activities, HHS allows for the counting of hours missed for holidays, plus a maximum of an additional 10 days of excused absences per year, no more than two of which may occur in a month. This policy is an important step in the right direction, and recognizes that there are many legitimate reasons why an individual might need to miss hours of scheduled activities.

However, the limit of 10 days a year, and two days a month, is arbitrary and unreasonable, particularly given the many competing obligations of families receiving welfare. A client might

well need to attend a doctor's visit, care for a sick child, attend court hearings required by the child welfare system, appear for an eligibility review for housing assistance, and go on a job interview, all within a single month. The ultimate goal of unpaid work activities should be to help participants enter unsubsidized family sustaining jobs that will allow them to move off of welfare. Limiting the amount of time that participants can go to job interviews is at odds with the overall goals of these activities.

While HHS is careful to say that this limit does not preclude states from allowing additional absences, in practice, it places strong pressure on states to limit excused absences. A state that fails to achieve the target participation rates because of its excused absences policy will be labeled as "failing" and required to identify the ways it will change its policies and practices, while a state that sanctions clients who miss work activities for legitimate reasons will be applauded for its success at reducing the rolls.

HHS should allow for the limit on excused absences to be extended in the following circumstances:

- Job interviews. This recognizes that the primary focus of welfare agencies should not be participation in work activities, but moving clients into unsubsidized employment.
- Attendance at meetings or hearings that are required by other governmental agencies (child welfare, child support, schools, courts, other assistance programs). This recognizes that the welfare agency is not the only entity that imposes requirements on recipients, and in fact, missing some appointments (such as with the child support agency) may result in a TANF sanction.
- Participant illness.
- Individuals caring for sick children, especially individual caring for children who have a disability but who are considered "work-eligible" because the children are enrolled in school full-time. This recognizes that children often miss school more often than two days in a single month.

In order for a state to receive credit for excused absences, the participant would need to participate in countable activities for at least one-half of the required hours, without regard to any excused absences.

Measure excused absences on an hourly, rather than daily, basis. A "day" of excused absences should be defined as 8 hours, which may be spread out over one or more calendar days. Otherwise, this policy will eliminate any incentive for clients to participate in work activities before and after their required appointments, and undermine good work habits.

A day should be fixed at 8 hours, regardless of the number of hours a participant is required to participate. Otherwise, a single day's absence could consume more than one day's worth of excused absences.

In addition, as long as clients are making satisfactory progress in an education and training program, states should be able to use the providers' definitions of holidays and excused absence procedures.

Finally, we recommend that this policy be extended to individuals who are in paid employment but who do not receive paid leave. Many welfare recipients are employed in low-wage hourly jobs, and are not paid when they miss work for illness or holidays. It is only fair to grant them the same flexibility as participants in unpaid activities.

Specific Recommendation:

Revise 45 CFR §261.60(b) as follows:

For participation in unpaid work activities or paid work activities that do not provide paid leave, it may also include excused absences for hours missed due to holidays and hours missed due to the following reasons: the recipient is sick, the recipient must care for a sick family member, the recipient has a required appointment related to child protective services, child support enforcement, court order, or other state human service agency, or with school officials with respect to the recipient's child. In addition, a maximum of an additional 80 hours 40 days of excused absences in any 12-month period, no more than two 16 of which may occur in a month may count toward the participation rate. In order to count an excused absence as actual hours of participation, the individual must have been scheduled to participate in an allowable work activity for the period of the absence that the State reports as participation and the number of hours of actual participation — including holidays but excluding all excused absences — must equal not less than one-half of the number of hours the individual must participate to count toward the state's work participation rate. For clients making satisfactory progress in an approved education or training program, a State may use the holidays and excused absence policies of the education and training provider. A State must describe its excused absence policies and definitions as part of its Work Verification Plan, specified at §261.62.

HHS should grant states flexibility in determining how to count hours of participation in self-employment. At 45 CFR §261.60(c), HHS says that a state may not count more hours toward the participation rate for a self-employed individual than the number derived by dividing the individual's self-employment income by the Federal minimum wage.

There are several circumstances under which this limit is inappropriate:

- An individual just starting a business may work long hours, but not have much income at the initial stages. If the state believes that this business has a reasonable likelihood of enabling the participant to leave welfare in the long run, the state should be able to count these hours as participation.
- Self-employed individuals providing child care sometimes earn less than the minimum wage. It is inappropriate that a recipient should be excluded from the participation rate during a period when they are working full-time but making low earnings.
- Income in some industries is seasonal, even if work effort is not. For example, a farmer may work long hours during the spring and summer, but not receive income until the harvest in the fall.

Specific Recommendation:

Replace the paragraph in the preamble in the first column of 71 FR 37467 with the following:

A State must describe the means it will use to determine the hours of participation for an individual who is self-employed as part of its Work Verification Plan. One common method is to divide the individual's self-employment income by the Federal minimum wage. However, states should consider proposing alternative methods for circumstances where that calculation produces an underestimate of the true numbers of hours of participation, for example during the start-up phase of a business, or if a home child care provider is earning less than the minimum wage.

Revise 45 CFR §261.60(c) to read:

A State must describe the means it will use to determine the hours of participation for an individual who is self-employed as part of its Work Verification Plan.

45 CFR §261.61 How must a State document a work-eligible individual's hours of participation?

HHS should treat all forms of employment, including on-the-job training, and subsidized employment comparably to unsubsidized employment.

At 45 CFR §261.61(c), HHS states that for unsubsidized employment, subsidized employment, and OJT, states may report "projected actual hours of employment" for up to 6 months based on one month's worth of verified and documented hours of participation. These provisions significantly reduce the burden on employers and recipients and the stigmatization of recipients, and HHS should be commended for them. They also allow for the alignment of TANF requirements with the semi-annual certification allowed under the Food Stamp program.

At 45 CFR §261.61(b), HHS states that "for an employed individual" participation may be documented through means such as pay stubs, employer reports, or time and attendance records. The regulations then state, "A State may presume that an employed individual participated in unsubsidized employment for the total number of hours for which that individual was paid." The use of the word "unsubsidized" in this paragraph may lead states to believe that they may not assume that employed individuals participated in *subsidized* employment or OJT for the hours for which the individual was paid.

Treating subsidized employment and OJT differently from unsubsidized employment is inconsistent with HHS' treatment of them as comparable in the next paragraph. Moreover, requiring employers to document hours of participation in subsidized employment or OJT in a manner other than their standard pay stub or time and attendance record would impose a significant burden upon them, and would make them less willing to provide TANF recipients with these important learning opportunities.

Specific Recommendation:

Amend 45 CFR §261.61(b) to read:

“For an employed individual, the documentation may consist of, but is not limited to pay stubs, employer reports, or time and attendance records substantiating hours of participation. A State may presume that an employed individual participated in unsubsidized employment, subsidized employment, or OJT for the total number of hours for which that individual was paid.”

45 CFR §261.62 What must a State do to verify the accuracy of its work participation information?

Eliminate requirement that hours of participation must be “documented” daily, in the case of job search and job readiness activities, and not less than every two weeks in other unpaid work activities. In the preamble to 45 CFR §261.62 HHS states that participation in job search and readiness assistance must be “documented daily due to the short-term nature of this activity.” For all other unpaid work activities, participation must be documented no less than every two weeks. (71 FR 37468)

Under the rules, all activities must be supervised daily, and states must have auditable documentation for *all* hours of participation, except for individuals in paid employment. The rules indicate that states must have in their case files verification of any hour of participation that the state counted toward the work participation rate calculation. This preamble language appears to impose an additional requirement that the documentation be transmitted to the TANF agency or its designee no less often than biweekly (or daily, in the case of job search and job readiness).

This second requirement is redundant and micromanages states’ data collection and program management decisions. States cannot claim hours of participation toward the work participation rate if those hours have not been verified. Given that, states should have the authority to determine how they are going to collect information about participation from program providers, including how often they want to receive that information.

In most cases, receiving information *daily* about whether a recipient participated in an activity creates a volume of paperwork that is not helpful in identifying families that may be having difficulty participating in the program. Both caseworkers and program providers will be forced to spend significant resources simply generating and tracking reports rather than working to help clients get jobs. This requirement imposes an especially severe burden on providers that offer employment programs that are not exclusively for TANF recipients.

Specific Recommendation:

Revise the preamble at 71 FR 37468 as follows:

~~Under §261.62(b)(1)(iii), for each of the work activities, a State must describe in its Work Verification Plan the documentation it uses to monitor participation and ensure that it reports actual hours of participation. While all activities must be supervised no less than daily to count in the work participation rate, we are establishing a range of documentation guidelines that vary by type of activity. Job search and job readiness assistance should be documented daily due to the short-term nature of this activity. Other unpaid work activities, including work experience, community service programs, vocational educational training, and providing child care to participants in community service programs, require documentation of hours of participation no less than every two weeks.~~

At a minimum, the daily reporting requirement for job search and job readiness assistance should be conformed with the requirement for all other unpaid activities.

HHS should correct regulatory language requiring states to describe how hours of self-employment will be determined under each countable work activity. This appears to have been a drafting error, as there is no reason why this information should be provided more than once.

Specific Recommendation:

Amend 45 CFR §261.62(b) as follows:

A State's Work Verification Plan must include the following:

(1) For each countable activity:

(i) A description demonstrating how the activity meets the relevant definition at §261.2;

~~(ii) A description of how the State determines the number of countable hours of participation for self-employed individuals; and~~

~~(iii)~~ (ii) a description of the documentation it uses to monitor participation and ensure that the actual hours of participation are reported:

(2) For unsubsidized employment, a description of how the State determines the number of countable hours of participation for self-employed individuals;

(3)....