MEMORANDUM

TO: **People Interested in Family Law and TANF Intersection Issues**

FROM: **Paula Roberts**

DATE: **April 26, 1999**

RE: **Final TANF Regulations Regarding Child Support Assignment and Cooperation and Distribution of Support Collections.**

The Department of Health and Human Services has just issued final regulations governing the Temporary Assistance to Needy Families (TANF) program. These regulations and the explanation that accompanies them are found at 64 *Federal Register* 17720-17931 (April 12, 1999). The final regulations address many issues of importance to low income families. This memo addresses two sets of those issues: implementation of the child support cooperation requirement and the assignment/distribution of child support collected for families receiving TANF-funded assistance. In brief:

- it will now be easier for states to provide child support collections to the family, rather than retaining them to reimburse the government. The final regulations define "assistance" in a way that allows states which provide many forms of aid (especially aid provided to working poor families) to term this aid "non-assistance." By doing this, the federal assignment of child support rights is avoided. As a result, families --not the government-- are entitled to any child support collected on the family's behalf.

- states which have elected to implement the Family Violence Option (FVO) will be in a better position to integrate waivers of the child support cooperation requirement into their overall FVO plans.

- basic notice and due process issues around the good cause and other exceptions to the child support cooperation requirement are not addressed. This leaves a troubling vacuum of guidance on how state TANF agencies are to address these issues.

ASSIGNMENT AND DISTRIBUTION OF CHILD SUPPORT FOR FAMILIES RECEIVING TANF-FUNDED ASSISTANCE

As a condition of receipt of TANF-funded assistance, families are required to assign their support rights to the state. 42 USC Section 608(a)(3). The assignment gives the state the right to claim any support collected for the family "not exceeding the total amount of assistance *provided* the family"(emphasis added).

If a state actually collects support owed to a family receiving TANF-funded assistance, then the support must be distributed in accordance with 42 USC Section 657(a)(1). That section

provides that, the collected support is to be split between the state and federal governments based--in most instances-- on the state's Medicaid match rate.[1] The federal government retains its share and the state has the option of retaining its share or giving some or all of its share of the collected support to the family. However, Section 657 also says that "In no event shall the total of the amounts paid to the Federal Government and retained by the State exceed the total of the amounts that have been *paid to the family* as assistance by the state."(emphasis added)

Child support represents a potentially important source of cash to families making the transition from welfare to work. The support can supplement income from wages and help the family actually begin to move out of poverty. As part of their strategy to help families make this transition, states often provide TANF-funded subsidized child care and transportation services. Some also provide TANF-funded subsidies to employers to offset the cost of employing TANF recipients. However, there was concern that, when states provided such TANF-funded services/subsidies, families would have to give up their child support under the TANF assignment law.

To mitigate this problem, HHS provided guidance to the states which distinguished between aid which went directly to the family and aid which was provided through voucher or payment to an employer/ provider. In the latter case, while an assignment was still required under section 608(a)(3), since the aid went to a third party (and hence was not *paid* to the family), section 657(a)(1) required distribution of the support to the family according to this guidance. Action Transmittal 98-24 (August 12, 1998). While this was a potentially helpful distinction, it meant that whether or not a working TANF-recipient family got to keep some or all of the current child support collected on its behalf depended on how a state structured its assistance programs. Since these structural issues are both arbitrary and beyond the family's control, the result was potentially inequitable. For example, a mother in State A which provides subsidized child care through vouchers made payable to the provider gets to keep support paid for her child while a mother in State B which provides child care subsidies by direct payment to the mother does not.

The final regulations take a more equitable approach. These regulations define "assistance" in a way that makes it more likely that working families which receive TANF-funded support services will obtain child support paid on their behalf. Of particular note are the seven categories of aid which , under Section 260.31(b), are deemed **no**t to be assistance. A family receiving one of these types of aid is not receiving "assistance" so the child support assignment provision does not apply. Moreover, since they are not receiving "assistance," such families are either post-assistance (if they did receive what qualifies as "assistance" in the past) or never assistance families for child support distribution purposes. If they are post-assistance families, they will receive all current support , any post-assistance arrears owed and (by October 1, 2000) all pre-assistance arrears. 42 USC Section 657(a)(2).[2] If they never received assistance, then all support collected goes to the family. 42 USC Section 657(a)(3).

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[1] The statute refers to this figure as the "federal medical assistance percentage". 42 U.S.C. Section 657(c)(3). For Puerto Rico, Guam, American Samoa and the Virgin Islands the percentage is set at 75 percent. For all others , the definition is the same as the definition found at 42 U.S.C. Section 1396d(b) as in effect on September 30, 1995.

[2] The only exc eption is if the support is an arrearage collection made through federal tax intercept. In that case, all arrears owed the state must be paid before the family's arrears are paid. 42 USC Section 657(a)(2)(B)(iv).

Section 260.31 What does the term "assistance" mean?

(a)(1) The term "assistance" includes cash, payments, vouchers, and other forms of benefits designed to meet a family's ongoing basic needs (i.e., for food, clothing, shelter, utilities, household goods, personal care items, and general incidental expenses).

(2) It includes such benefits even when they are:

(i) Provided in the form of payments by a TANF agency, or other agency on its behalf, to individual recipients; and

(ii) Conditioned on participation in work experience or community service (or any other work activity under section 261.30 of this chapter)

(3) Except where excluded under subparagraph (b), of this section, it also includes supportive services such as transportation and child care provided to families who are not employed.

(b) It excludes:

(1) Nonrecurring short term benefits that:

(i) Are designed to deal with a specific crisis situation or episode of need:

(ii). Are not intended to meet recurrent or ongoing needs; and

(iii) Will not extend beyond 4 months.

(2) Work subsidies (i.e., payments to employers or third parties to help cover the costs of employee wages, benefits, supervision and training);

(3) Supportive services such as child care and transportation provided to families who are employed;

(4) Refundable earned income tax credits;

(5) Contributions to and distributions from Individual Development Accounts;

(6) Services such as counseling, case management, peer support child care information and referral, transitional services, job retention, job advancement and other employment-related services that do not provide basic income support; and

(7) Transportation benefits provided under a Job Access or Reverse Commute project pursuant to section 404(k) of the Act to an individual who is not otherwise receiving assistance.

Thus, in deciding whether a family receiving TANF-funded aid will or will not receive the current child support paid on its behalf, the first question is whether the aid qualifies as "assistance"for TANF purposes.

- If it does not, then the family is not receiving assistance (as defined by the distribution rules at 42 USC Section 657(c)(1)) and must be deemed either a post-assistance or a never-assistance family for purposes of the distribution statute. Under either scenario, current support and post-assistance arrears owed to the family are payable to the family. In some states now --and in all states by October 1, 2000-- the family is also entitled to pre-assistance arrears. Only when all of these arrears are paid is the government entitled to claim any arrears owed to it.

- If the aid qualifies as "assistance", then there is an assignment of support rights to the state which gives the state a *potential* claim on the collection. The important question is whether the assistance is "paid to the family". If it is not (e.g., it is paid by voucher to a

provider), then under Action Transmittal 98-24, the family would be eligible to receive current support collected on its behalf. However, since the family is still receiving "assistance", any arrears collected would probably be claimed by the government pursuant to the assignment and 42 USC Section 657(a)(1) to reimburse for any aid the family received which did qualify as "assistance".

- If aid is paid to the family and some of it qualifies as assistance and some does not, the family will have assigned its support rights to the state in an amount up to the amount which qualifies as assistance. The state will be able to claim this amount and distribute it under 42 USC Section 657(a)(1). If the amount exceeds the amount which qualifies as "assistance", then the support must be given to the family.

This has serious implications for the design of state TANF programs. States which wish to maximize the income of families in their TANF-funded programs can design those programs with the definition of assistance in mind so that families can benefit from the child support collected on their behalf. Consideration might also be given to offering aid in different forms (some of which qualify as assistance and some which do not) so that families with potential child support income could design a package which maximizes their income. By developing such approaches, states can be especially helpful in stabilizing the income of families moving from welfare to work. An investment in the stabilization of these families may go a long way to help them through the transition period and reduce the possibility that they will have to return to the TANF program.

CHILD SUPPORT COOPERATION REQUIREMENTS

Custodial parents who have applied for or are receiving TANF-funded assistance are required to cooperate with the state child support enforcement program established under Title IVD of the Social Security Act in establishing paternity and pursuing support. A custodial parent may be exempt from this cooperation obligation if she can establish "good cause" or "other exceptions" as defined by the state. 42 USC Section 654(29). If a custodial parent is not exempt and fails to cooperate with the child support (IVD) agency, then the family's assistance is reduced. The IVA agency must reduce the assistance by at least 25 percent and may reduce it even more, up to and including denial of all assistance to the family. 42 USC Section 608(a)(2). The new regulation provides as follows:

Section 264.30 What procedures exist to ensure cooperation with the child support enforcement requirements?

(a)(1) The State agency must refer all appropriate individuals in the family of a child, for whom paternity has not been established or for whom a child support order needs to be established, modified or enforced, to the child support enforcement agency (i.e., the IVD agency).

(2) Referred individuals must cooperate in establishing paternity and in establishing, modifying, or enforcing a support order with respect to the child.

(b) I f the IVD agency determines that an individual is not cooperating, and the individual does not qualify for a good cause or other exception established by the State agency responsible for

making good cause determinations in accordance with section 454(29) of the Act or for a good cause domestic violence waiver granted in accordance with section 260.52 of this chapter, then the IVD agency must notify the IVA agency promptly.

(c) The IVA agency must then take appropriate action by:

(1) Deducting from the assistance that would otherwise be provided to the family an amount equal to not less than 25 percent of the amount of such assistance; or

(2) Denying the family any assistance under the program.

In many respects, this regulation simply restates the statutes. However, there are some important nuances. There is also some useful explanatory material in the Response to Comments.

1. Who must be referred to IVD for child support services? Note that Section 264.30(a) requires that the IVA agency refer "appropriate" individuals to the IVD agency. This means that not all IVA applicants/recipients must be referred. In states which have decided to leave the good cause determination with the IVA agency, the IVA agency can work with the parent or other caretaker, and determine whether that person has good cause or qualifies for another exception to the cooperation requirement recognized by the state. If she/he does, then the case need not be referred to IVD.

2 Who is required to cooperate? Only referred individuals are required to cooperate with the IVD agency. Thus, an individual who is granted a good cause/other exception by the IVA agency will not have her/his case referred and will, therefore, not have a cooperation obligation.

Moreover, not even all referred cases will be subject to a cooperation obligation. The Response to Comments acknowledges that federal law requires cooperation only by *parents* of children applying for or receiving assistance for their *own* children. 64 *Fed. Reg* 17850 (2d col., middle). States are free to omit cooperation requirements for other caretakers.

If states do decide to impose cooperation requirements on non-parent caretakers, a different standard of cooperation than that imposed on parents should be developed. HHS notes: "...we would point out that other individuals would not ordinarily have the same level of information about the absent parent as a parent would. Thus, we would expect states to develop procedures which recognize this difference and apply a different standard in determining cooperation by nonparents." 64 *Fed. Reg*.17850 (2d col., bottom to 3d col., top).

3. How will individuals be notified of their obligation to cooperate? If families are to be sanctioned for non-cooperation, fundamental due process requires that they be 1) notified that they have a cooperation obligation; 2) told what that obligation is; 3) advised concerning the penalty for non-cooperation; 4) informed about good cause and any other exceptions which might apply and how to claim such an exemption; 5) given written notice when non-cooperation has been found; and 6) afforded the right to appeal an adverse determination. Unfortunately, none of these issues are addressed in the final regulations. In fact, HHS opines that "The statute does not give us the authority to require specific notice and procedural criteria from States." 64 *Fed. Reg*. 17850 (3d col., bottom). However, HHS notes that the cooperation requirement is not new . (States provided notice and hearing rights in the AFDC program pursuant to federal law

and regulations.) Thus, states currently have notices and procedures in place that "support fair and equitable treatment" of individuals subject to the cooperation requirement. HHS hints that it expects states will continue to use these *procedures*. *Id*.

It is also possible to argue that states must describe the notice and hearing rights they will provide to those seeking program waivers based on domestic violence considerations as part of their TANF state plans. Federal law requires that this plan describe how the state will provide "fair and equitable treatment, including an explanation of how the State will provide opportunities for recipients who have been adversely affected to be heard in a State administrative or appeal process." 42 USC Section 602(a)(1)(B)(iii). The Response to Comments suggests that this section applies and that HHS therefore "encourages States to send notices in these cases as a matter of fairness and equity and to treat those [domestic violence based] waiver denials as adverse actions."64 Fed. Reg. 17746 (3d col.,bottom) to 17747 (1st col., top).

4. How does the child support good cause exception to the cooperation requirement relate to the process for granting exceptions under the Family Violence Option? There are no federal definitions of "good cause" or "other exceptions" to the child support cooperation requirement. It is the individual states which define these terms subject only to the requirement that the definitions take into account " the best interests of the child". 42 USC Section 654(29)(A).Using this discretion, every state has recognized domestic violence as a potential reason for granting a "good cause" exception to the child support cooperation requirement.

Some states also grant domestic violence victims good cause exemptions from other TANF requirements, including time limits. 42 USC Section 608(a)(7)(C). In addition, some states have formally adopted the Family Violence Option (FVO) contained in the TANF statute. 42 USC Section 602(a)(7). These states follow a specific set of statutory (and now regulatory) provisions in granting waivers of time limits, residency requirements, and (if the state has adopted one) the family cap grant limitation to those who are or have been victims of domestic violence. 42 USC Section 602(a)(7). States using the FVO can avoid TANF fiscal penalties they might otherwise face for failure to meet TANF work participation rates and/or comply with the five year time limit on providing families TANF-funded assistance. 45 CFR Section 260, Subpart B.

The FVO also allows states to grant domestic violence victims good cause exceptions to the child support cooperation requirement. From the statutory language, it was not clear how this provision related to the IVA/IVD good cause exception discussed above. There was some concern that states which elected to implement the FVO would have to make two separate determinations about good cause: one to meet the requirements of Title IVD and one for FVO purposes. At 45 CFR Section 264.30(b), the final regulations make it clear that only one determination need be made. As explained by HHS, "The revised language explicitly recognizes that individuals may receive waivers of child support cooperation requirements under the FVO and that our rules would treat such waivers like good cause exceptions granted under the child support statute (at section 454(29) of the Act.)" 64 *Fed. Reg*. 17742 (2d col., bottom)

5. Do waivers of the child support cooperation requirement based on domestic violence considerations have to be periodically reviewed? Nothing in the regulation requires periodic

review of Title IVD good cause determinations or those issued pursuant to the FVO provision. However, if the exemption is granted as part of the FVO process, as a practical matter, it is likely to be reviewed every six months. This is because the FVO regulations require review of the good cause decision every six months if the state wants to use its FVO process to explain its failure to meet the work participation rate or comply with federal time limits on program participation. 45 CFR Section 260.55(b). Such periodic review should be helpful in insuring that a family's potential child support claim is not shelved and never looked at again.

PENALTIES FOR FAILURE TO SANCTION NON-COOPERATING FAMILIES

There are a number of situations in which HHS can impose fiscal penalties on states for failure to enforce the basic provisions of TANF. 42 USC Section 609. One of those situations is when the state IVA agency fails to impose sanctions on families containing individuals whom the state IVD agency[3] has found to be 1) subject to a cooperation requirement; 2) without sufficient grounds for claiming a good cause or other exception to the cooperation requirement; and 3) failing to cooperate with child support enforcement efforts. The maximum penalty for a state's failure to sanction such families is a 5 percent reduction in the state's TANF funds. 42 USC Section 609(a)(5). Part 262 of the new regulations describes the general scheme HHS will use for detecting such failures, and the process it will use in assessing penalties. In addition, 45 CFR Section 264.31 describes the specific penalty amounts applicable once the Part 262 process is over.

New 45 CFR Section 262.1(a)(6) makes it clear that the general penalty scheme applies in the case of a state's failure to sanction families for non-cooperation with child support efforts. Accountability for such failure will commence on the later of July 1, 1997 or six months after the state began operating its TANF program. 45 CFR Section 262.2(b). HHS will generally detect such errors through the use of the single state audit.[4] 45 CFR Section 262.3. If HHS determines that the state is failing to sanction families which are not cooperating with the IVD agency, then it will notify the state in writing. The state will then have 60 days to either 1) dispute the finding; 2) admit the error but claim reasonable cause[5]; or 3) admit the error and submit a corrective action plan. 45 CFR Section 262.5. If HHS accepts the state's corrective action plan and the state follows through and begins properly imposing sanctions, no penalty will be assessed. 45 CFR Section 262.6(i). Even limited compliance can bring partial penalty relief. 45 CFR Section 262.6(j). In short, states will be given ample opportunity to address any problems before a fiscal sanction will actually be imposed.

[3] Responsibility for making the decision about whether an individual has the right to claim a good cause or other exceptions to the cooperation requirement is given to the child support (IVD) agency. 42 USC Section 654(29). If that agency determines that an individual is not entitled to a good cause or other exception and has not cooperated in establishing paternity or pursuing support, the IVD agency is to notify the IVA agency. The IVA agency is then required to sanction the family.

[4] See, also 64 *Fed. Reg*. P. 17851 (1st col., top).

[5] If a reasonable cause claim is turned down, the state can also then submit a corrective action plan.45 CFR Section 262.6(c).

Moreover, even when a state does not manage to correct the problem, the penalty assessed will be small at first and will only reach the maximum allowable level after repeated failures. In this regard, the final regulations provide as follows:

Section 264.31. What happens if a State does not comply with the IVD sanction requirement?

(a)(1) If we find that, for a fiscal year, the State IVA agency did not enforce the penalties against recipients required under Section 264.30 (c) we will reduce the SFAG[6] payable for the next fiscal year by one percent of the adjusted SFAG.

(2) Upon a finding for a second fiscal year, we will reduce the SFAG by two percent of the adjusted SFAG for the following year.

(3) A third or subsequent filing will result in the maximum penalty of five percent.

(b) We will not impose a penalty if:

(1) The State demonstrates to our satisfaction that it had reasonable cause pursuant to Section 262.5 of this chapter; or

(2) The State achieves compliance under a corrective compliance plan pursuant to Section 262.6 of this chapter.

Taken as a whole, this scheme suggests that states which provide due process protections to families before imposing sanctions on them need not fear immediate, draconian fiscal consequences. A IVA agency receiving a sanction recommendation from IVD which does not seem to meet minimum due process requirements could and should provide the family with notice and an opportunity to be heard. (See discussion above.) Even if HHS later questions this decision, the state can avoid a penalty by invoking 45 CFR Section 262.5(a)(3) if the situation is an "isolated problem of minimal impact that is not indicative of a systemic problem."If there is a more systemic problem, then due process issues can be addressed in a corrective action plan. So long as the plan is implemented, there will be no federal fiscal penalty.

[6]SFAG is short for the "State family assistance grant" which is defined at 45 CFR Section 260.30 to be the state's basic TANF block grant.