CLASP

The Child Care Protection Under TANF

by

Mark H. Greenberg

January 1998

CLASP gratefully acknowledges the financial support provided specifically for our child care work by the A.L. Mailman Family Foundation, Inc., the David and Lucile Packard Foundation, and the Foundation for Child Development. Additional financial support for the Beyond Devolution Project was provided by the Ford Foundation, Charles Stewart Mott Foundation, Public Welfare Foundation, the Moriah Fund and the Open Society Institute.

Thanks to Steve Savner and Nancy Ebb for their comments and suggestions; I am solely responsible for any errors of fact or interpretation

Introduction

In enacting the Temporary Assistance for Needy Families (TANF) Block Grant, Congress altered state responsibilities and protections for families when a family needs child care assistance in order to participate in a work or work-related activity. Under prior law, states had an affirmative responsibility to "guarantee" child care needed for a family member to accept or retain employment or to participate in approved education or training. Under TANF, there is instead a prohibition against a state imposing a grant reduction or termination against a family when the parent cannot participate in a required activity due to lack of needed child care.

There are a number of unresolved questions about the nature of the child care protection under TANF. However, some important guidance has emerged from proposed regulations issued by the federal Department of Health and Human Services. The guidance emerges from reading together two sets of proposed regulations: one set concerns the Child Care and Development Fund (62 Fed. Reg. 39610, July 23, 1997); more recently, a set of proposed TANF regulations were issued (62 Fed. Reg. 62124, November 20, 1998). While the comment period on the proposed CCDF regulations has closed, it is possible to submit comments on the proposed TANF regulations until

February 18, 1998.[(1)]

This document answers a set of questions concerning the child care protection, drawing on the TANF statute and the framework for interpretation provided by the proposed regulations. It begins by briefly reviewing prior law and the relevant language of the federal TANF statute, and then discusses a set of questions about who the protection applies to, its relation to work requirements and time limits, and the procedures that a state must have in place to avoid or minimize the risk of a penalty for failure to comply with the protection.

Background: Prior Law

The Family Support Act of 1988 had enacted a "child care guarantee" applicable to the Aid to Families with Dependent Children (AFDC) Program. The child care guarantee provided that states had a responsibility to "guarantee" child care needed for a family receiving assistance to accept or retain employment, or to participate in the JOBS Program or another approved education or training activities; states also had a responsibility to provide up to one year of transitional child care assistance for qualifying families who left AFDC due to employment. The child care guarantee extended to children under age 13, and in limited circumstances, to children ages 13 and over.

Under the AFDC statute, a state imposing work-related requirements on families could not sanction (reduce assistance to) a family if the noncomplying individual had good cause for the failure to comply, and the lack of needed child care was among the reasons that constituted good cause.

The Child Care Protection Under the TANF Statute

In enacting TANF, Congress repealed the AFDC Program and the child care guarantee. In eliminating the guarantee, Congress eliminated the affirmative duty of states under federal law to provide needed child care assistance to families receiving TANF assistance. States are, of course, free to maintain an affirmative duty under state law, but they are not obligated to do so. Instead, Congress created a limited protection against reducing or terminating TANF assistance when needed child care is unavailable. The relevant language of the provision first provides that states shall reduce or terminate assistance when an individual refuses to engage in work, subject to such good cause and other exceptions as the State may establish, and then provides for an exception:

(2) EXCEPTION.-Notwithstanding paragraph (1) [i.e., the general requirement to reduce or terminate assistance when an individual refuses to engage in work], a State may not reduce or terminate assistance under the State program funded under this part based on a refusal of an individual to work if the individual is a single custodial parent caring for a child who has not attained 6 years of age, and the individual proves that the individual has a demonstrated inability (as determined by the State) to obtain needed child care, for 1 or more of the following reasons:

(A) Unavailability of appropriate child care within a reasonable distance from the individual's home or work site.

(B) Unavailability or unsuitability of informal child care by a relative or under other arrangements.

(C) Unavailability of appropriate and affordable formal child care arrangements.

Under the TANF statute, the federal government lacks the authority to enforce requirements of the law except where that authority is expressly granted by statute. Congress provided for federal enforcement of the child care protection through the enactment of a provision stating that a state could be penalized in an amount up to 5% of its block grant for failure to comply with the child care protection.[(2)]

The Scope and Meaning of the Child Care Protection: Questions and Answers

The following discussion seeks to clarify the scope and meaning of the child care protection by addressing some key questions.

- Which families fall within the protections of the child care protection?

  By its terms, the child care protection applies to families in which a single custodial parent is caring for a child under age six. As a result, it does not provide protections for:

  - **families whose youngest child is age six or over;**
  - **two-parent families;**
  - **families in which a non-parent caretaker (e.g., a grandparent) is caring for a child under age six (or any other age).**

  A state is, of course, free to provide protections under state law for any or all of those categories of individuals and families who do not fall within the child care protection.

  - **How does the child care protection affect TANF work and participation requirements?**

  The child care protection is a protection against sanctions (i.e., the reduction or termination of assistance). The provision does not impose any duty on states to provide needed child care assistance, and does not make a family exempt from program requirements if needed child care is unavailable. It is only a restriction on the authority of states to reduce or

terminate assistance based on noncompliance with work requirements when needed child care is unavailable.

In situations where needed child care is unavailable, a state can elect to make families exempt from state-imposed requirements or develop more appropriate participation requirements. However, there are three TANF work-related requirements, and the lack of needed care does not automatically exempt individuals from these requirements; states do, however, have significant discretion in how these requirements are applied when needed child care is unavailable.

First, a state must meet federal TANF participation rates or risk a federal penalty. Technically, the participation rates are a requirement imposed on states, not individuals. Thus, a state is free to exempt anyone it wishes from these requirements, but the family will still be part of the denominator, i.e., the base from which the participation rate requirements are calculated. The only families receiving assistance that a state can remove from the denominator are single parent families with children under age one (for up to 12 months) and families being sanctioned for noncompliance (for not more than three months in a twelve month period). Thus, single parents with children under age one can be removed from the denominator due to lack of needed child care, but other individuals lacking needed care will still be part of the participation rate denominator. However, the state need not impose requirements (or inappropriate requirements) on such families in order to comply with the participation rate requirements, so long as the state has a sufficient strategy for meeting the applicable rates.

Second, states must require parents and caretakers receiving assistance to be "engaged in work" no later than twenty-four months after beginning to receive assistance. This is a separate provision from the participation rate requirements, and states are free to set their own definition of "engaged in work" not subject to the limited definitions of what is countable under TANF and not subject to the TANF hourly requirements. The TANF statute, as amended by the Balanced Budget Act of 1997, makes clear that this requirement is subject to the TANF child care protections, but that leaves unclear whether a state can "exempt" a family lacking needed child care, or whether the state is simply barred from reducing or terminating assistance to such a family based on noncompliance. If, however, it is not possible to exempt such a family, it would surely be possible to develop requirements that reasonably reflect the unavailability of child care. In addition, it remains unclear whether a state would face any penalty for violation of this provision, as no penalty is specified in the statute.

Third, there is a separate TANF requirement stating that a state must require individuals receiving assistance to be engaged in community service after two months of receiving

assistance, unless the state opts out. As with the twenty-four month requirement, this requirement is subject to the child care protection, and a state electing to apply the requirement is free to set its own definition of community service and its own hourly thresholds (if any); a state is also free to elect to opt out of this requirement.

- How does the child care protection affect TANF time limits?

By its terms, the child care protection does not affect the running of TANF time limits. However, if a state wishes to make families exempt from TANF time limits when needed child care is unavailable, the state can elect to do so by using "segregated" state funding to provide assistance within the state's TANF Program.

If a family is receiving federally-funded TANF assistance while needed child care is unavailable, the federal time-limit clock will continue to run. Even if, for example, the state elects to exempt single parents of children under age one from TANF work and participation requirements, the TANF time clock will still be running during their period of exemption so long as they are receiving federally-funded TANF assistance.

However, if a state does not want time limits to run when needed child care is unavailable, an alternative is readily available: the state can choose to fund the assistance to such families with "segregated" state funds, i.e., state funds in the TANF Program that are not commingled with the federal TANF funds. HHS has expressly recognized that in structuring its TANF Program, a state can choose whether to "commingle" federal and state funds or to segregate state from federal funds for at least some cases. If federal and state funds are commingled, then all families are receiving federally-funded assistance, and each month of assistance counts against the federal TANF time limit. On the other hand, in each month in which a family is assisted with segregated state funds, the federal time limit clock does not run. Thus, it is possible to prevent the federal time limit clock from running when needed child care is unavailable, but unless the state makes such an arrangement, the federal clock will run.[(3)]

- What responsibilities does a state's lead Child Care and Development Fund agency have concerning the child care protection?

In administering the Child Care and Development Fund in the state, every state has a CCDF lead agency, which may or may not be different from the TANF agency. In proposed CCDF regulations, HHS provides that CCDF lead agencies shall inform parents about the TANF child care protection, including the procedures and criteria or definitions used by the TANF agency to determine if a parent has a demonstrated inability to obtain care, and the

fact that the time limit clock will continue to run during the period when needed child care is unavailable. The proposed regulation also provides that a state's biennial CCDF plan must include the definitions or criteria used by the TANF agency to implement the child care protection. [Proposed] 45 C.F.R. §98.33, 62 Fed. Reg. 39610, 39646 (July 23, 1997).(4)

- How does a state determine if an individual has a demonstrated inability to obtain needed care?

Under the TANF statute, the state may not reduce or terminate assistance if the individual proves that the individual has a demonstrated inability (as determined by the State) to obtain needed child care, for 1 or more of the following reasons:

(A) Unavailability of appropriate child care within a reasonable distance from the individual's home or work site.

(B) Unavailability or unsuitability of informal child care by a relative or under other arrangements.

(C) Unavailability of appropriate and affordable formal child care arrangements.

None of the key terms are defined or clarified in the TANF statute. To date, HHS has not sought to define the terms. Rather, in proposed regulations, HHS would provide that the state must have criteria for determining when the individual has demonstrated that she cannot find child care and that the criteria must:

- address the procedures for determining if the parent has a demonstrated inability to obtain needed care;
- define the key relevant terms of the protection; and
- be submitted to HHS.(5)

- What is the consequence if a state fails to comply with the child care protection? What procedures must a state have in place to minimize the risk of penalty for failure to comply with the child care protection?

Proposed TANF rules provide important guidance for procedures states must have in place to minimize the risk of being penalized for failure to comply with the child care protection.(6)

The TANF statute provides that if HHS determines that the state has not complied with the child care protection, the state will be penalized up to 5% of its block grant, with the amount of the penalty based on the degree of noncompliance. Proposed rules (reflecting the

statutory requirements) also provide that the penalty will not be imposed if HHS determines that the state had reasonable cause for the violation or if the state corrects the violation through a corrective compliance process; moreover, HHS can choose to reduce the amount of the penalty even if the violation is not fully cured through the corrective compliance process.

The TANF statute allows for HHS to exercise discretion in deciding whether to impose the maximum 5% penalty or a lesser amount. HHS indicates in the proposed rules that it intends to impose the maximum penalty if:

- The State does not have a statewide process in place that enables families to demonstrate that they have been unable to obtain child care; or
- there is a pattern of substantiated complaints from parents or organizations verifying that a State has reduced or terminated assistance in violation of the child care protection.

HHS further indicates that it would impose a penalty less than the maximum if the state demonstrates that the violations were isolated or that they affected a minimal number of families.[(7)]

The preamble to the proposed regulations provides further guidance as to the circumstances under which HHS would conclude that there had been a violation of the child care protection, explaining that HHS would give consideration to:

- whether the State informs families about the exception to the penalty for refusing to work, including the fact that the exception does not extend the time limit on benefits;
- whether the State informs families about the process or procedures by which they can demonstrate an inability to obtain needed child care;
- whether the State has defined and informed parents of its definitions of "appropriate child care," "reasonable distance," "unsuitability of informal care," and "affordable child care arrangements";
- whether the State notifies the parent of its decision to accept or reject the parent's demonstration in a timely manner;
- whether the State has developed alternative strategies to minimize the amount of time parents are excepted from work requirements due to their inability to obtain needed child care.

62 Fed. Reg. 62164. HHS further explains:

For example, a State that uses the services of a child care resource and referral (CCR&R) office might accept a statement from that office noting the unavailability of appropriate or affordable child care. Or, if the refusal to work is due to difficulty in arranging transportation, the State could refer to bus and rail rates and schedules to determine if the appropriateness and/or reasonable distance criteria had been met.

We are not specifying the process or procedures that States should develop, or the documents, if any, States should require. However, we suggest that if States plan to require documents, they select ones that are readily available to families. We recommend that the process or procedures be simple and straight forward. In addition, we recommend frequent contact with parents since the penalty exception does not stay the time limits and there may be fluctuations in the availability of child care services.

62 Fed. Reg. 62164.

If there is a violation of the child care protection, other provisions of the proposed regulations suggest that HHS intends to read the "reasonable cause" exception narrowly. For the child care protection and another set of penalties, HHS indicates that "reasonable cause" would be limited to the following "general factors:"

- Natural disasters and other calamities (e.g., hurricanes, earthquakes, fire) whose disruptive impact was so significant as to cause the State's failure;
- formally issued Federal guidance that provided incorrect information resulting in the State's failure; or
- isolated, non-recurring problems of minimal impact that are not indicative of a systemic problem.(8)

[Proposed] 45 C.F.R. §272.5. Thus, in a number of instances, only "corrective compliance" would likely be available as a means to avoid the penalty. As to what would constitute "corrective compliance," the preamble explains:

The steps a State takes to correct or discontinue a violation may vary. . . . Where a State

has reduced or denied assistance improperly to a single custodial parent who could not find child care for a child under six, correcting the violation may require that the State reimburse a parent retroactively for the assistance that was improperly denied. The State's corrective compliance plan would also have to describe the steps to be taken to prevent such problems in the future.

62 Fed. Reg. 62149.

As a practical matter, many states are likely to not wish to be in a situation where they face the risk of penalties, and must assert reasonable cause or develop a corrective compliance plan. Under the proposed rules, the way to minimize the risk of a potential penalty is to review the preamble guidance (above) regarding the factors that HHS would consider in determining whether a violation has occurred, and ensure that statewide criteria and procedures are in place consistent with the terms of the statute and the HHS guidance.

Conclusion

At this point, there are still many unresolved questions about the scope and operation of the child care protection. The proposed HHS regulations are not binding, but they do provide important guidance, suggesting that, at minimum, a state wishing to avoid a penalty or minimize the size of any penalty needs to:

- have a statewide process in place to enable families to demonstrate that they have been unable to obtain child care; or
- inform families about the exception to the penalty for refusing to work, including the fact that the exception does not extend the time limit on benefits;
- inform families about the process or procedures by which they can demonstrate an inability to obtain needed child care;
- define and inform parents of its definitions of "appropriate child care," "reasonable distance," "unsuitability of informal care," and "affordable child care arrangements";
- notify parents of the state's decision to accept or reject the parent's demonstration in a timely manner;
- develop alternative strategies to minimize the amount of time parents are excepted from work requirements due to their inability to obtain needed child care.
- develop processes or procedures that are simple and straightforward, in which any documents required of the family are ones readily available to families.

Finally, it should be emphasized that the child care protection is a floor, not a ceiling on state conduct. Prior to TANF, all states were required to provide far more protections for families needing child care assistance in order to participate in work and training programs. Nothing in TANF prevents a state from establishing or maintaining more substantial protections than those required by federal law.

Appendix

Concerns Presented by the Proposed TANF Child Care Protection Regulations

While the proposed rules provide significant guidance in interpreting the chid care protection, there are still a set of unresolved concerns that could be addressed in final regulations. Among those concerns:

- Under the proposed CCDF regulations, the CCDF lead agency would have a responsibility for informing parents of the TANF child care protections. However, if the TANF agency doesn't refer a family to the CCDF lead agency, the family might never have occasion to have contact with the CCDF agency. Nothing in either set of proposed regulations imposes a duty on the TANF agency to refer the family to the CCDF lead agency for child care counseling prior to (or after) imposition of the TANF work requirements.

- The TANF statute provides that the child care protection applies when the individual has a demonstrated inability (as determined by the State) to obtain needed child care, for one of a set of statutory reasons. While it is up to the state to determine if the demonstrated inability is present, the statute does not say that it is up to the state to define all relevant terms, e.g., "unavailability," "appropriate child care," "reasonable distance," "unsuitability," "appropriate and affordable formal child care arrangements." Under the proposed CCDF regulations, a state would submit its definitions to HHS, but there is no indication that there will be any review of the definitions for their adequacy or reasonableness.

- The proposed regulations do not require states to submit a definition of a key term: "unavailability." For example, if appropriate child care exists within a reasonable distance from the individual's home, but the state provides no or minimal child care assistance and the individual cannot afford the care, is it "unavailable?"

To ensure that the child care protection operates effectively, CLASP has recommended that final TANF regulations:

- provide that a state found to have violated the child care protection will not qualify for a reasonable cause exception unless the state can demonstrate that it had procedures in place to inform families of the existence and nature of the child care protection;

- include definitions of all of the key statutory terms: specifically, "unavailability," "appropriate child care," "reasonable distance," "unavailability or unsuitability of informal child care by a relative or under other arrangements" and "appropriate and affordable formal child care arrangements." Alternatively, if HHS elects to allow states to develop their own definitions, final regulations should expressly provide that

a state found to have violated, and will not be found to have had reasonable cause for failure to comply with the child care protection if HHS determines that the definitions used by the state were unreasonable.

In addition:

- As drafted, a state is at risk of a maximum penalty if the state does not have a statewide process in place that enables families to demonstrate that they have been unable to obtain child care; this provision should be broadened to also apply if the state does not have a statewide process in place that ensures that families are informed of the extent and nature of the child care protection;

- As drafted, the proposed rule states that HHS "will" impose a reduced penalty if the state demonstrates that the violations were isolated or that they affected a minimal number of families. This provision should be modified to provide that HHS "may" impose a reduced penalty under such circumstances, but only if the state demonstrates that it had a statewide process in place that enables families to demonstrate that they have been unable to obtain care and that the statewide process informs families of the extent and nature of the child care protection.

Readers should keep in mind that comments on the TANF child care protection regulations (and other TANF regulations) may be submitted to HHS through February 18, 1998.

1. Comments may be mailed or hand-delivered to the Administration for Children and Families, Office of Family Assistance, 5th Floor East, 370 L'Enfant Promenade, SW, Washington, DC 20447, or may be transmitted electronically by accessing the ACF Welfare Reform Home Page at http://www.acf.dhhs.gov/news/welfare. For a discussion of the proposed TANF regulations pertaining to the child care protection, see, Appendix, Concerns Presented by the Proposed TANF Child Care Protection Regulations.

2. Section 409(a)(11) of the TANF statute provides:

FAILURE TO MAINTAIN ASSISTANCE TO ADULT SINGLE CUSTODIAL PARENT WHO CANNOT OBTAIN CHILD CARE FOR CHILD UNDER AGE 6.-

"(A) IN GENERAL.-If the Secretary determines that a State to which a grant is made under section 403 for a fiscal year has violated section 407(e)(2) during the fiscal year, the Secretary shall reduce the grant payable to the State under section 403(a)(1) for the immediately succeeding fiscal year by an amount equal to not more than 5 percent of the State family assistance grant.

"(B) PENALTY BASED ON SEVERITY OF FAILURE.-The Secretary shall impose reductions under subparagraph (A) with respect to a fiscal year based on the degree of noncompliance.

3. For a more detailed description of the possibilities and considerations in usage of segregated state funding, see Savner and Greenberg, The New Framework: Alternative State Funding Choices Under TANF (CLASP, March 1997). Note that in recent proposed federal regulations, HHS has proposed to restrict the relief from penalties available under certain circumstances to states that elect to use state maintenance of effort funding in order to operate separate state programs outside of TANF; however, the proposed regulations would not take a similarly restrictive approach to a state that uses segregated funding within TANF.

4. The proposed regulatory language says that CCDF lead agencies shall:

" (b) Inform parents about the requirement at section 407(e)(2) of the Social Security Act that the TANF agency make an exception to the individual penalties associated with the work requirement for any single custodial parent who has a demonstrated inability to obtain needed child care for a child under six years of age. The information provided shall include:

(1) The procedures the TANF agency uses to determine if the parent has a demonstrated inability to obtain needed child care;

(2) The criteria or definitions applied by the TANF agency to determine the whether the parent has a demonstrated inability to obtain needed child care, including:

(I) "Appropriate child care";

(ii) "Reasonable distance";

(iii) "Unsuitability of informal child care";

(iv) "Affordable child care arrangements";

(3) The clarification that the time during which an eligible parent receives the exception referred to in paragraph (b) will count toward the time limit on benefits required at section 408(a)(7) of the Social Security Act.

(c) Include in the biennial plan the definitions or criteria the TANF agency uses in implementing the exception to the work requirement specified in paragraph (b). "

5. The proposed regulatory language reads as follows:

§271.15 Can a family be penalized if a parent refuses to work because (s)he cannot find child care?

(a) If the individual is a single custodial parent caring for a child under age six, the State may not reduce or terminate assistance for the parent's refusal to engage in required work if (s)he demonstrates an inability to obtain needed child care for one or more of the following reasons:

(1) Appropriate child care within a reasonable distance from the home or work site is unavailable;

(2) Informal child care by a relative or under other arrangements is unavailable or unsuitable; or

(3) Appropriate and affordable formal child care arrangements are unavailable.

(b)(1) The State will determine when the individual has demonstrated that (s)he cannot find child care, in accordance with criteria established by the State.

(2) These criteria must:

(i) Address the procedures that the State uses to determine if the parent has a demonstrated inability to obtain needed child care;

(ii) Include definitions of the terms "appropriate child care," reasonable distance," "unsuitability of informal care," and "affordable child care arrangements"; and

(iii) Be submitted to us [i.e., HHS].

6. In publishing the proposed TANF rules, HHS expressly notes that while the regulations are in proposed form, they are not binding on states. Instead, HHS explains: "We will judge State behavior and actions that occur prior to (effective date of final rules) only against a reasonable interpretation of the statutory provision in title IV-A of the Act." [Proposed] 45 C.F.R. 270.40. In other words, even if a state takes an approach different from that of the proposed regulations, the state should not be penalized if the state can demonstrate that its approach reflected a reasonable interpretation of the statutory language. At the same time, a state should keep in mind that there may be disputes about what is a reasonable interpretation of the statutory language, and that a state operating its program in conformity with the proposed regulations will not need to risk losing such a dispute.

7. The proposed regulatory language reads as follows:

§274.20 What happens if a State sanctions a single parent of a child under six who cannot get needed child care?

(a) If we determine that a State has not complied with the requirements of §271.15 of this chapter, we will reduce the SFAG [State Family Assistance Grant] payable to the State by no more than five percent for the immediately succeeding fiscal year unless the State demonstrates to our satisfaction that it had reasonable cause or we approve a corrective action plan pursuant to §§ 272.5 and 272.6 of this chapter.

(b) We will impose the maximum penalty if:

(1) The State does not have a statewide process in place that enables families to demonstrate that they have been unable to obtain child care; or

(2) There is a pattern of substantiated complaints from parents or organizations verifying that a State has reduced or terminated assistance in violation of this requirement.

(c) We will impose a reduced penalty if the State demonstrates that the violations were isolated or that they affected a minimal number of families.

8. HHS also indicates that a reasonable cause exception would not be available if HHS detects that, in using the state's TANF maintenance of effort funds, there have been a significant pattern of diversion of families to a separate state program that achieves the effect of avoiding the work participation rates. [Proposed] §272.5(c). For a discussion of this issue, see CLASP comments on "Child Care and Development Fund NPRM, 62 Fed. Reg. 39610 (July 23, 1997)" September 22, 1997.
