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Child Support Collections in Separate State Assistance Programs

Ensuring Families Receive the Child Support They Are Entitled To

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In reaction to recent changes in federal law, states are considering – and in at least one case have already created¹ – separate state assistance programs (SSPs) that are separate from the federal Temporary Assistance to Needy Families (TANF) program.

Federal law now makes it harder for states to meet TANF work participation rate requirements (the percentage of TANF recipient families that must be working). States that fail to meet these requirements are subject to federal penalties. By creating SSPs, states are able to remove some families who do not meet the work participation requirements from the total number of families included in the work participation rate calculations.² By taking these families out of the equation, states may stand a better chance of meeting the federal work participation requirements.

However, the manner in which states treat child support in these programs is critical. If not monitored closely, states could adopt child support policies that would lead to the state retaining child support collections that belong to the family. This article alerts advocates to two

key child support issues that may arise in SSPs. First, some states may attempt to distribute child support collections to families in the same manner as in TANF-funded programs, and in doing so keep the child support as reimbursement for the assistance provided to the family. Not only would this hurt the family, but it also violates federal law. Second, states may treat child support collections as income to families receiving SSP benefits. This would result in reduced benefits to families while at the same time increasing administrative costs to states.

Recent Changes in Federal Law May Encourage States to Create SSPs

The changes to the federal TANF program drastically increase the number of TANF recipients that must be participating in work activities in order for states to avoid penalties. These penalties are significant – and states are feeling hard pressed to figure out ways to meet the requirements. For some states, the creation of an SSP may be an attractive way to help meet the new federal demands, as explained below.

In 1996, President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) that created the TANF block grant and replaced the former federal Aid to Families with Dependent Children (AFDC) program.³ The federal law gives states fixed block grants to operate programs that provide assistance to needy families. Federal law imposes minimum work participation rates on states for families in TANF-funded programs. The rates did not include families receiving benefits in separate state programs counting toward TANF maintenance of effort (MOE) requirements.⁴

The statutory work participation rate requirements began in fiscal year 1997 – requiring that 25 percent of all families receiving TANF assistance and 75 percent of all two-parent TANF families meet the work participation requirements. These percentages increased to 50 percent and 90 percent, respectively, by fiscal year 2002.⁵ States that fail to meet the work requirements are subject to a federal penalty of up to 5 percent of the state's TANF block grant. This can increase up to 2 percent each

1 The California Legislature has created the Temporary Assistance Program (TAP). Assem. Bill No. 1808, 2005-2006 Reg. Sess. § 29.2 (Cal. 2006), adding Cal. Welf. & Inst. Code § 11320.32.

2 Only recipients of TANF funds are included in the work participation rates. Families receiving benefits from an SSP, funded only with state funds, are not included in the state's work participation rate.

3 Pub. L. No. 104-193, 110 Stat. 2105 (2006).

4 To receive a full TANF block grant, a state must satisfy maintenance of effort requirements by expending at least 80 percent of the State's historic assistance spending level (or 75 percent, if the state meets federal TANF participation rate requirements) for certain qualified expenditures for eligible families.

year, with a maximum of 21 percent.⁶ However, states receive a credit toward their work participation rate if they reduce their TANF caseload (the total number of families served by TANF).⁷ For each percentage point drop in the caseload (not attributed to state eligibility criteria changes), the required work participation rate is lowered by one percentage point.⁸

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 (DRA).⁹ The Act reauthorized the TANF block grant at the same level of funding through fiscal year 2010 and made some significant changes to the work participation provisions. Under the DRA, Congress retained the work participation requirements as they existed for fiscal year 2002. However, it made two significant changes. First, Congress recalibrated the caseload reduction credit so that states only receive credit for additional caseload reductions after fiscal year 2005, effective October 1, 2006.¹⁰ Second, the work participation rates are now based on all families that receive assistance in either a TANF-funded program or a separate state program counting toward TANF MOE requirements.¹¹ This change significantly increases the number of families that must be included in the denominator for determining work participation rates.

Pursuant to Congressional directive, the Secretary of the Department of Health and Human Services (HHS) promulgated an interim final rule on June 29, 2006 that redefined work activities; included sanctioned cases, even when the adult is excluded from the assistance unit, and safety net cases in the work participation

rate calculation; and, established new work participation verification procedures.¹² These changes also increase the number of families included in the work participation rate denominator, further pressuring states to come up with ways to meet the work participation requirements and avoid penalties.

In response to these recent federal changes, some states are considering or, as in the case of California, have created SSPs in order to avoid federal penalties.¹³ These programs aim to provide cash assistance and other benefits to eligible families. Because they are not funded with federal money, they are not subject to federal restrictions or requirements otherwise imposed by federal law. By removing some families from the TANF rolls, states can reduce the overall number of families subject to the work participation rates. If these families are ones in which (due to various circumstances) the parents are not now or will not likely be working in the future, their removal from the federal work participation rates will result in a higher percentage of working families for purposes of TANF. California's SSP, the Temporary Assistance Program (TAP), does just this.

Federal Law is Clear: States May Not Retain Any Child Support Collected for Families Receiving SSP Assistance

In creating SSPs, states may want to adopt child support collection and distribution schemes that mirror the distribution scheme for TANF recipients, and in doing so, keep some or all of the child support as "reimbursement" for benefits paid to the families. This is prohibited by

federal law.

In order to be eligible for TANF funds, each state must operate a child support enforcement program that meets federal requirements.¹⁴ States must provide child support enforcement services to *all* families, whether they receive TANF assistance or not.¹⁵

In determining who is entitled to receive the child support collected by the state, there are two related sets of rules: the assignment rules and the distribution rules. The assignment rules specify who has legal claim to the child support payments made by the noncustodial parent. Those families receiving TANF assistance must assign to the state any rights (with certain exceptions) to child support.¹⁶ The distribution rules determine the order in which child support is paid.¹⁷ That is, whether the government may retain some or all of the child support as reimbursement for assistance paid, before the remainder, if any, is paid to the family. The rules for distributing child support are based on whether the family on whose behalf the support is paid is receiving assistance, formerly received assistance, or, never received assistance.¹⁸

For families currently receiving TANF assistance, the state may retain any current child support payments and any pre-assistance arrearages (those arrearages that accrued before the family received assistance) that it collects that do not exceed the amount of the total assistance paid to the family.¹⁹ The distribution rules for families that have never received any assistance are much simpler: the state must distribute all collections, current and arrearages, to the family.²⁰

The federal statute governing child support distribution states that,

5 42 U.S.C. § 607(a)(1) and (2) (1996).

6 42 U.S.C. § 609(a)(3)(B) (1996).

7 42 U.S.C. § 607(b)(3) (1996).

8 *Id.*

9 Pub. L. No. 109-171, 120 Stat. 4 (2006).

10 42 U.S.C. § 607(b)(3)(A)(iii) (2006).

11 *Id.*

12 71 Fed. Reg. 37454, 37475-37483 (June 29, 2006) (to be codified at 45 CFR Parts 261, 262, 263 and 265).

13 The term "separate state programs" as used herein refers to state assistance programs that are entirely funded with state or local funds. Programs funded with state TANF MOE funds are known as SSP-MOE programs. These SSP-MOE programs no longer benefit the states in the same way they did pre-DRA because participants in SSP-MOE funded programs are now included in determining a state's work participation rates. 71 Fed. Reg. 37454, 37476 (June 29, 2006) (to be codified at 45 CFR, Part 261, § 261.22(b)) (2006). Separate state programs that are not funded with MOE funds are sometimes called "solely state funded programs" ("SSF").

14 42 U.S.C. § 602 (2006).

15 42 U.S.C. §§ 654(4)(A)(i)-(ii) (2006).

16 42 U.S.C. § 608(a)(3) (2006).

17 42 U.S.C. § 608(a)(3) (2006); 42 U.S.C. § 657 (2006).

18 42 U.S.C. § 657(a) (2006).

19 42 U.S.C. § 657(a)(1) (2006). The distribution rules for families that leave assistance, known as "former assistance," is far more complicated. When a family leaves TANF assistance states must keep track of six categories of child support arrearages that are determined by the family's assistance status when the arrearage accrued, the amount of the non-reimbursed public assistance balance, the date of the assignment of support rights as well as the date the TANF case closed, and whether the family received assistance before or after October 1, 1997.

In former assistance cases, if a collection is from an IRS tax refund intercept, it will be paid to the state rather than the family, up to the cumulative amount of the assistance not reimbursed. Any other support payment is first distributed to the family and any balance is allocated to any arrearages and distributed depending on the category of the arrearage. In former assistance cases, if a collection is from an IRS tax refund intercept, it will be paid to the state rather than the family, up to the cumulative amount of the assistance not reimbursed. Any other support payment is first distributed to the family and any balance is allocated to any arrearages and distributed depending on the category of the arrearage. 42 U.S.C. § 657(a)(2) (2006).

20 42 U.S.C. § 657(a)(3) (2006).

unless a family is receiving “assistance from the state” as is defined by federal law, then *all* child support collections must be distributed to “the resident parent, legal guardian, or caretaker relative having custody of or responsibility for the child or children.”²¹ It cannot be retained by the state. Thus, the threshold inquiry in determining whether recipients of SSP assistance are entitled to receive all child support that the state collects is whether the family is receiving “assistance from the state” as defined by federal law. Federal law defines families as receiving “assistance from the state” for purposes of child support distribution, as *only* those families receiving assistance provided through a state program that is funded under: (a) Title IV-A (the TANF program); (b) the former Title IV-A AFDC program where the state holds a pre-1996 assignment; and (c) Title IV-E (the foster care program).²² Any other families receiving benefits provided by a state (and/or local government), are not receiving “assistance from the state.”

Because the federal distribution rules make clear that states cannot retain child support as reimbursement from families that do not receive “assistance from the state,” states must pay families receiving SSP assistance any and all child support collected on their behalf.²³

HHS Interprets Federal Law to Require States to Pay All Collected Child Support to SSP Families

The plain language of 42 U.S.C. Section 657(c)(1) – that states cannot retain any part of child support collected on behalf of SSP recipients – is also supported by HHS commentary accompanying the TANF program rules issued by HHS in 1999. This commentary makes clear that families in SSPs are not subject to TANF child support requirements. In a section

entitled “Separate State Programs,” the commentary states:

Section 409(a)(7) of the Social Security Act permits States to assist eligible families by expending maintenance-of-effort funds (MOE) under ‘all State programs.’ Thus, we recognize expenditures under the State’s TANF program and/or separate State program(s).

However, eligible families assisted through a separate State program are not generally subject to TANF requirements, including work participation requirements, child support collection requirements, the time limit on receipt of assistance, and data collection and reporting requirements. In other words, by definition, States operating separate programs avoid TANF requirements; they have more flexibility to use the funds available in these programs to help eligible families.²⁴

Later, the commentary reiterates that TANF program requirements do not apply to families in SSPs:

States may also expend State funds in a State program separate from TANF to provide the benefits and services listed under section 409(a)(7)(B)(i)(I) of the Act, e.g., cash assistance, child care assistance, and education activities. **None of the TANF program requirements directly apply to eligible families served in separate State programs.**²⁵

A guide issued by the federal Office of Family Assistance (OFA), *Helping Families Achieve Self-Sufficiency: A Guide for Funding Services for Children and Families Through the TANF Program*, offers further support for the argument that the federal statute does not permit states to retain child support collected on

behalf of SSP recipients. The guide includes a detailed matrix identifying different TANF program requirements under different funding configurations. According to the chart, TANF distribution rules apply to “assistance” provided under federally funded TANF programs and TANF programs funded with segregated state funds, but do not apply to SSPs.²⁶

Thus, this consistent long-standing interpretation by HHS that states may not retain any collected child support in state programs that are not funded with federal money, unmistakably supports the plain language of 42 U.S.C. Section 657(c)(1) (2006).

Judicial Decisions Preclude States From Veering From the Federal Child Support Distribution Scheme

As noted above, families receiving benefits provided through an SSP are not recipients of “assistance from the state” for child support purposes and, therefore, states must distribute any collected support to them. The U.S. Supreme Court has long held that state provisions that are “inconsistent with an act of Congress, are void, as far as that inconsistency extends.”²⁷ In circumstances such as this one where the federal government has specified requirements and prohibitions as conditions for the state’s receipt of federal funds, the Supreme Court has held that:

There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid.²⁸

Thus, in keeping with

21 42 U.S.C. § 654 (11) (2006); 42 U.S.C. § 657(a) (2006).

22 The federal statute defines “assistance from the state” as: “(A) assistance under the State program funded under part A of this subchapter or under the State plan approved under part A of this subchapter (as in effect on August 21, 1996); and (B) foster care maintenance payments under the State plan approved under Part E of this subchapter.” 42 U.S.C. § 657(c)(1).

23 42 U.S.C. § 654 (11) (2006); 42 U.S.C. § 657(a) (2006).

24 64 Fed. Reg. (April 12, 1999) at p. 17727 (emphasis added).

25 *Id.* at 17816 (emphasis added).

26 The chart from the guide can be accessed at www.acf.hhs.gov/programs/ofa/funds2.htm.

27 *Gibbons v. Ogden*, 22 U.S. 1, 31 (1824).

28 *King v. Smith*, 392 U.S. 309, 334 (1968).

these principles, a state child support distribution scheme that is inconsistent with federal law — i.e. one that allows states to retain child support collected on behalf of SSP recipients — would be invalid. Indeed, courts have already invalidated states' schemes that have conflicted with the federal welfare cost reimbursement scheme. In *Jackson v. Rapps*,²⁹ the court invalidated a Missouri child support guidelines statute because it conflicted with the federal child support guidelines regulations. The court found that “the supremacy clause prevents the implementation of a reimbursement policy other than one in accordance with existing federal regulations.”³⁰ See, *The State of Ohio v. Barron*³¹ (applying the *Jackson* court analysis to uphold a California child support distribution statute correcting prior legislation similar to that found to be constitutionally infirm in *Jackson*.)

Given that Congress clearly intended that states not be permitted to retain any child support collected in an SSP, advocates should challenge any state that attempts to do so. In making such challenges, advocates should point to the plain language of the federal statute, long-standing HHS interpretation of the distribution rules, and federal case law.

Counting Child Support as Income in an SSP Will Create Significant Administrative Complexities and Disadvantage Recipients

Even though a state must distribute child support directly to a family in an SSP it is still free to count the child

support as income for determining SSP eligibility and grant amount. Advocates should note that state schemes that count child support as income may (1) require complex income reporting methods that increase state costs and, (2) if not designed carefully, disadvantage recipient families. If child support has been assigned under state law and is counted as income for purposes of SSP eligibility and benefit amount, then the state must devise a method for the family to report the income and for the state to deduct the income from the SSP grant. For many assistance recipients, child support is sporadic and comes in variable amounts depending on the ability and the willingness of the non-custodial parent to make the child support payments. This makes it difficult, and in many cases impossible, to predict in advance how much child support a family will receive. If states use schemes that are identical or similar to income reporting schemes in their TANF program, the unreliability of child support payments may disadvantage many families. For example, in California's CalWORKS program, recipients are required to submit an income/eligibility report once per quarter.³² Eligibility and benefits for a three-month period are based on information provided in the quarterly report and are determined using prospective budgeting and income averaging rules. With limited exceptions, benefits are “frozen” for the three month period. Any income the recipient “reasonably anticipates” he or she will receive in a quarter is used to calculate benefits in

that quarter. In CalWORKS, child support collections are retained by the state and families receive full grants regardless of the amount collected.³³ However, if a state were to use the same reporting/budgeting scheme in an SSP, the results could disadvantage many families. If a family reported reasonably anticipated child support payments which then did not materialize, the family would be left with a reduced grant amount *in addition* to no child support.³⁴

To avoid outcomes that disadvantage families through the use of existing TANF income reporting rules, states are likely to develop different income reporting schemes for families in SSPs. Multiple income and eligibility requirements for TANF programs and SSPs, however, inject significant administrative program complexities and costs for states.

States Should Disregard Child Support as Income in SSPs

As a practical alternative to a separate income and eligibility reporting process in an SSP, states should simply disregard child support payments made to SSP recipients when determining family income and resources. There are important advantages for both children and the state if child support paid directly to the family is “disregarded” in an SSP:³⁵

- **Windfall savings for the state that can be shared with children**
Under the TANF program, states must pay 50 percent of all child support collected to the federal

29 947 F.2d 332 (8th Cir. 1991), cert. denied, 503 U.S. 960 (1992).

30 *Id.* at 337.

31 52 Cal.App. 4th 62, 74 (1997)

32 See Department of Social Services All County Letter No. 03-18 (April 29, 2003), <http://www.dss.cahwnet.gov/getinfo/acl03/pdf/03-18.pdf>.

33 If the family receives a current child support payment it is entitled to a \$50 “pass through” which is “disregarded” as both CalWORKS income and a resource. Cal. Welf. & Inst. Code § 11475.3 (West 2006).

34 In California the separate state-funded TAP program was created for those families who have been excluded from work requirements because they meet one or more program exemptions. Cal. Welf. & Inst. Code § 11320.32(a). Statutorily, TAP eligibility must be identical to the CalWORKS program in every respect. Cal. Welf. & Inst. Code § 11320.32(e). The unreliability of the receipt of child support payments combined with a quarterly income reporting process has the potential for disadvantaging families because in some months they would not receive a portion of the TAP grant in an amount of anticipated child support or the child support payment themselves. The unreliability of child support collections recognized in CalWORKS would not be recognized in TAP. This would violate the state legislative directive that TAP

be implemented without any adverse impacts on recipients. Maintaining consistency in SSPs is important because if a state creates an SSP that alters the eligibility requirements it risks losing a claim that it is entitled to a caseload reduction credit. This is because states are not entitled to the credit if the caseload reduction is a result of a change in eligibility criteria from those in effect in FFY 2005. 71 Fed. Reg. 37478 (June 29, 2006) (to be codified at 45 CFR, Part 261, §§ 261.40-.44).

35 The Deficit Reduction Act (DRA) provides significant new flexibility to states to pass through more child support dollars to children who receive or formerly received TANF assistance. See, *More Child Support Dollars to Kids: Using New State Flexibility in Child Support Pass-Through and Distribution Rules to Benefit Government and Families*, Center for Law and Social Policy and Policy Studies, Inc. (July 2006). Congress, by

including the distribution reform provisions in the DRA, recognized that there was important program value in paying more child support directly to families. Prior to PRWORA states were required to “pass through” and “disregard” as countable income for AFDC grant amount purposes the first \$50 of current child support collections to the family. 42 U.S.C. § 657 (a)(1) (1996). This provision was repealed as part of PRWORA but states retained the authority to “pass through” and “disregard” the \$50, or any amount, to families. The “pass through” however must be paid out of the state share of collections and not out of the federal share. Under the DRA, effective October 1, 2008, if a state passes through a child support payment and disregards it as countable income the federal government will waive its share of collections, up to \$100 per month for one child and \$200 per month for two or more children. 42 U.S.C. § 657(a)(7) (2006).

government. In an SSP, because all benefits are paid with state funds, the state does not have to pay the federal government anything. Thus, by retaining what was formerly the federal share the state has generated a windfall for itself by creating an SSP. For example, in the California TANF program (CalWORKS), the state gives the family a \$50 disregard, which means the family keeps \$50 of the child support collected.³⁶ So, if a state collects \$100 on behalf of a family, the money would be allocated as follows: (A) Under CalWORKS, the state would give \$50 (50% of the \$100) to the federal government and \$50 (as a child support disregard) to the family. The state would retain \$0. (B) Under TAP (the California SSP), if California did not count the child support as income the federal government would get \$0, California would get \$0 and the recipient would get \$100. California would not lose any money (it would get \$0 under both schemes) and the family would benefit – getting \$100, rather than \$50.

- **Simplified administration of separate state assistance and child support programs**

By simply not counting child support as income, the state would avoid creating a separate complex administrative scheme

for reporting income. Once created, administering a fair reporting process would be costly for the state and, if not designed well, harmful to the family, as discussed previously.³⁷

Research Demonstrates that Child Support Disregards Benefit Both States and Families

In addition to making the above arguments when urging states to disregard child support as income in SSPs, advocates can also point to research that such schemes (1) increase child support payments by non-custodial parents, (2) increase paternity establishments (which pave the way for child support), and, (3) produce cost savings to the state. In the W-2 Child Support Demonstration Project in Wisconsin, created in 1997, all child support collected by the state is passed through to families receiving TANF cash assistance and disregarded as income. Studies evaluating the demonstration project found:

- Fathers were more likely to pay child support; and, when they paid child support, made higher payments.³⁸
- Mothers were more likely to receive child support and received more child support payments.³⁹
- Rates of paternity establishment increased.⁴⁰
- Costs for increased collections and distribution were relatively small overall with a cost savings to the state.⁴¹

Advocates should point to this research in urging states not to count child support as income in determining SSP eligibility and benefit amount.

Conclusion

Child and Family advocates should be vigilant in ensuring that states contemplating the creation of SSPs treat child support collections in the manner required by federal law by distributing it directly to the family. Additionally, if a state creates an SSP despite the federal distribution requirement, advocates should encourage their state to disregard as income any child support collected on behalf of families in SSPs rather than attempting to create complex income reporting schemes that will only serve to disadvantage families and increase state costs.

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36 In adopting final TANF regulations in 1999 the federal Department of Health and Human Services cautioned states about creating SSP-MOE in order to divert the federal share of child support collections and that any significant pattern of diversion would be used to deny the state specified types of penalty relief and work participation credits. However, states would be given an opportunity to prove the diversion was a result of state policies and objectives unrelated to the goal of diversion. 64 Fed. Reg. 17719, 17728 (April 12, 1999). Increasing the financial security for TAP families and simplifying and reducing administrative costs to the State demonstrate an important State policy unrelated to diverting the federal share of child support payments only for state gain.

37 Indeed, the California legislature has suspended the statutory April 1, 2007 TAP implementation deadline until October 1, 2007 in part because of these complex administrative issues. As we conclude, TAP could be implemented with little administrative effort or costs and in compliance with federal law by disregarding all child support as income and resources collected on behalf of the families in the program. See Curtis L. Child, *Policy Brief: More Child Support for Children in the TAP Program*, National Center for Youth Law (August 2006), http://www.youthlaw.org/policy/advocacy/policy_brief_more_child_support_for_children_in_the_tap_program/.

38 Daniel Meyer and Maria Cancian, *W-2 Child Support Evaluation, Phase 1: Final Report, Vol. 1, Effects of the Experiment* (Madison, WI: Institute for Research on Poverty, University of Wisconsin-Madison 2001).

39 *Id.*

40 *Id.*

41 Daniel Meyer and Maria Cancian, *W-2 Child Support Evaluation, Phase 2: Final Report* (Madison, WI: Institute for Research on Poverty, University of Wisconsin-Madison 2003); Emma Caspar and Steven Cook, *Child Support Demonstration Evaluation Cost-Benefit Analysis, September 1997-December 2004* (Madison, WI: Institute for Research on Poverty, University of Wisconsin-Madison 2006).