The Games They Will Play – the Welfare "Reform" Edition: A Tale about Congress, Loopholes, and the Need for Competent Legislation

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Congress has a problem – on key "reform" issues like welfare, health,[2] and tax policy, it seems incapable of drafting legislation without including a myriad of loopholes that undermine the very goals it is trying to achieve. In "The Games They Will Play: An Update on the Conference Committee Tax Bill," a group of tax attorneys describe a variety of unintended tax avoidance strategies that are likely to be utilized "to advantage the well-advised (and their advisors) in ways that are both deliberate and inadvertent."[3] As a result, the recently enacted tax legislation is "likely to cost more than the current estimates of over $1 trillion."[4]

The problem of loopholes is not limited to tax "reform." Most conservatives believe the 1996 "welfare reform," particularly the creation of the Temporary Assistance for Needy Families (TANF) block grant is an unprecedented success and is a model for reforming other safety net programs. Any objective analysis, however, would have to conclude that TANF is a massive policy failure. Among its failings is the fact that the law itself created an array of loopholes that have allowed states to manipulate its work requirements, time limit, funding structure, and various other provisions. The law was not implemented as its drafters intended. Ron Haskins, the architect of the 1996 law, now cautions, "Congress and the administration would be well advised to carefully consider ways TANF could be reformed to minimize the game playing that many states now use to avoid spending TANF dollars on core TANF purposes and to avoid the federal work requirement."[5]

The focus of this paper is not an assessment of TANF itself, but to highlight some of the most obvious loopholes *Congress created* in drafting the law and to offer simple solutions. Even if the loopholes were closed, however, TANF would remain a fundamentally flawed "program."[6] The nation needs competent legislation – whether it is tax policy, welfare reform, or another national priority. This means basing legislation on empirical evidence, rather than talking points, and paying attention to policy details.

TANF Work Requirements: An Epic Fail

Speaking to the Heritage Foundation in September 2012, Speaker Ryan said:

> [The 1996 welfare reform law] is the crown jewel and the centerpiece of some of the most successful social policy legislation we've passed. It lowered child poverty rates, it moved people from welfare to work – because of these work requirements.[7]

TANF's work requirements have never worked. The block grant structure created a situation in which many states don't have the resources to run meaningful welfare-to-work programs, as the amount is not adjusted for inflation or demographic changes. And, the excessive state flexibility means that states can game the requirements to meet the federal work rate targets and then divert the funds for purposes unrelated to core welfare reform activities. TANF's work requirements

are unreasonable, dysfunctional, and are not about work. Real welfare reform requires adequate funding, realistic work requirements, and rigorous evaluation so that we can learn what works and what doesn't and build on an evidence base. (For a more complete discussion of how these work requirements have failed, see *TANF is Broken! It's Time to Reform "Welfare Reform."*[8])

The following bullets provide a summary of the work requirement loopholes *created by Congress* that are a direct result of the 1996 legislation. Congress closed some of these loopholes in the Deficit Reduction Act of 2005, but the main effect was to open the door to new loopholes because it failed to deal with TANF's structural problems stemming from the block grant structure and excessive state flexibility.

- **The caseload reduction credit.** The 1996 law changed the overall work participation rate for a state by requiring that at least 50 percent of TANF families with an adult engage in specified work activities. The caseload reduction credit reduced the work participation targets to the extent sates lowered caseloads below fiscal year (FY) 1995 levels (changed to FY 2005 starting in FY 2007). For most years since TANF's inception, 15 to 30 states faced a 0 percent work target (meaning that in order to avoid a penalty, they had to engage 0 percent of their caseload a certain number of hours per week in the statutorily prescribed work activities). States already have an incentive to reduce the caseload because the number of cases they would have to place in work activities would decline; giving them further credit by reducing the target rate all the way to 0 percent was a massive conceptual error that totally gutted the work requirements in most states. Solution: Select a target rate that is reasonable, predictable, and constant.

- **Counting "unsubsidized employment" as an activity.** Under TANF's predecessor program, AFDC/JOBS, a full-time worker was exempt from participation requirements; TANF made it a countable activity. This made it considerably easier for states to meet their work rates. The states that gained most from this decision are those with the highest breakeven levels (which are a function of the generosity of benefits and earnings disregards). This was basically a windfall for states in being able to count individuals as "participants" and combined with the caseload reduction credit meant that most states had to do little or nothing in terms of placing individuals in actual work or training activities. Indeed, participation in actual work activities has plummeted since TANF was created, falling even faster than the caseload – yet the number of poor families with children was about the same in 2015 as it was in 1996. Solution: Full-time, unsubsidized employment is the goal (an outcome); it should be an exemption, not an activity.

- **Limiting work requirements to TANF *adult recipients*.** TANF work requirements were initially applied to a family with an adult receiving assistance. In some states, sanction policies and time limits removed an adult's needs from the benefit calculation (the old AFDC policy). Since no adult was receiving assistance, the family was no longer included in the work participation rate calculation, even though the adult may have been able-bodied and the children continued to receive assistance. After the Deficit Reduction Act of 2005, the work requirements included families with a "work-eligible individual" (including non-recipient parents considered capable of work). Solution:

None needed *now*; this loophole illustrates the need for care in drafting legislation in the first place.

- **Separate state programs.** Until FY 2007, families assisted through separate state programs funded with state maintenance-of-effort (MOE) dollars were not subject to TANF's work requirements. Congress was either careless in writing the law or it intentionally created a massive loophole. By 2005, over half the states had such programs and their primary purpose was to remove those families from the work rate calculation that would not help them meet the work rate targets, most notably two-parent families, because the 90 percent two-parent work participation rate target was considered unachievable (even with the caseload reduction credit). States also moved other families that were not likely to meet the work requirements to these separate state programs, including those applying for Supplemental Security Income (SSI), with employment barriers, or caring for a disabled family member. Although Congress included families in separate state programs in the work rate starting in FY 2007, this was too little, too late. It simply led to a new loophole – solely state funded programs (see below). Solution: None needed *now*; this loophole illustrates the need for care in drafting legislation in the first place.

- **The failure to actually *define* work activities.** When Congress wrote the TANF statute, it "defined" work activities simply by listing 12 activities. Some states defined work activities to include bed rest and personal care activities as part of recovery from a medical problem, physical rehabilitation including massage and exercise, personal journaling and motivational reading, participation in a smoking cessation program, and other activities typically not considered "work activities." Congress addressed this loophole in the Deficit Reduction Act of 2005 by requiring the U.S. Department of Health and Human Services (HHS) to actually define work activities, instead of just listing them. Solution: None needed *now*; this loophole illustrates the need for care in drafting legislation in the first place.

- **Waiver inconsistencies.** States with section 1115 welfare reform waivers when the 1996 welfare reform law was enacted were allowed to continue the waiver policy to the extent it was inconsistent with TANF through the end of the approved project period. While states still had to meet the new work participation rate targets, they could continue to operate under pre-TANF policies that often gave them a distinct advantage in the meeting these rates. Twenty states continued such waivers, which included provisions related to exemptions, countable work activities, and hours of participation. Aside from weakening TANF's work requirements, it is unclear why Congress thought it was fair to give some states preferential treatment in meeting their work targets (and potentially avoiding a financial penalty) for as long as 5 to 10 years after enactment of TANF. Solution: As a matter of fairness, particularly when penalties are involved, all states should face the same rules. While transition periods for change are worth considering, they should be reasonable and relatively short.

- **Excess MOE.** The Deficit Reduction Act of 2005 recalibrated the base year for caseload reduction credit from FY 1995 to FY 2005. In many states, caseload declines had stalled

by the mid-2000s, but a regulatory provision allows states to reduce their comparison year caseload by spending in excess of their basic MOE requirement and including only the pro rata share of caseloads receiving assistance that is required to meet the basic MOE requirement. (Note: While this is a regulatory provision, it is only possible because Congress replaced the federal-state match with a block grant and a separate MOE requirement. The concept of "excess MOE" would not exist in a federal-state matching program.) This led many states to simply find more third-party spending to count as MOE, including third-party nongovernmental expenditures, just so that they could artificially inflate the caseload reduction credit. And, reported MOE did rise sharply – from $12 billion in FY 2006 to $13.7 billion in FY 2008 to over $15 billion in FY 2009 and most subsequent years. <u>Solution</u>: Get rid of the block grant structure with its separate MOE requirement; revert to a federal-state match.

- **Solely state funded programs.** Congress eliminated the separate state program loophole in the Deficit Reduction Act of 2005 by requiring states to include such families in the work participation rate calculation. However, the TANF law has made it very easy for states to meet their basic MOE requirement without spending more money and most states report an "excess" amount of MOE. Indeed, states were only required to spend 75 or 80 percent of their previous spending (depending on whether they met their work rates), resulting in an immediate state savings. Inflation has further reduced the state requirement so that it is 50 percent of what it was before TANF. Add to this the fact that under TANF states can count virtually any state expenditure that meets a TANF purpose and even the value of third-party non-governmental "donations," it is easy for most states to generate a significant amount of "excess MOE." As noted above, this can be used to maximize the caseload reduction credit, but a state can also just fund part of its assistance caseload outside the TANF/MOE structure in solely state funded programs (and still meet its basic MOE requirement) so those families are not subject to TANF's work requirements. <u>Solution</u>: Get rid of the block grant structure with its separate MOE requirement; revert to a federal-state match.

- **Diversion programs.** Many states provide TANF applicants non-recurrent short-term benefits (i.e., diversion payments) as a way to help them overcome a short-term crisis without actually going on the assistance rolls. Because short-term (less than four months) benefits are not considered "assistance," many TANF requirements do not apply, most notably the federal 60-month time limit and work requirements. Shortly after passage of the Deficit Reduction Act of 2005, a number of states began operating diversion programs for all or most TANF applicants, because many of those applying for aid could not immediately be transitioned into work activities and would thus lower a state's work participation rate. HHS issued guidance warning states about this practice, cautioning: "States should not divert cases from their Federal TANF or MOE-funded assistance program solely to avoid the work participation requirements. This not only reduces State accountability for ensuring that needy families take appropriate steps toward achieving self-sufficiency, but also has the effect of inflating a State's work participation results."[9] While this guidance may have limited the most egregious examples of states taking advantage of this loophole, the decision about whether one form of diversion is gaming or not is ultimately a judgment call, so this loophole remains a potential option, at least to

some degree. Solution: Limit state flexibility to redefine "assistance" as "non-assistance."

- **"Unsubsidized employment" as a "gimmick."** One of the gimmicks some states use to meet TANF's work rates is to pay a token benefit (e.g., $10 a month) to full-time working families with children just to count them in the work rate calculation. These families typically come from the SNAP (i.e., food stamp) caseload and otherwise have no connection to cash assistance. In FY 2016, these "token-payment" cases accounted for nearly 20 percent of the TANF/SSP caseload; they have nothing to do with "welfare reform," yet they are the largest category of countable participants in the work participation rate. This gimmick is possible because Congress made unsubsidized employment an activity; it would not have been an option if it had remained an exemption as under JOBS. Solution: Full-time, unsubsidized employment is the goal (an outcome); it should be an exemption, not an activity.

All 10 loopholes described above (and there are others) are (or were) the result of the way *Congress* wrote the TANF law – some are due to the block grant structure and the ability to separate the use of federal and state funds; others stem from flaws in the way the work requirements were written. Congress can't close these loopholes given the current block grant structure of the program. It can try, but as the Deficit Reduction Act 2005 showed, closing one loophole just leads to a new one. Indeed, in the summer of 2015, the House Ways and Means Committee produced a "discussion draft" TANF reauthorization bill with the claim, "The discussion draft ends the credits and loopholes, so states will have to engage at least 50 percent of adults on welfare in work and activities, as the 1996 law intended." This statement is untrue. The draft bill failed to address TANF's real problems and would have left gaping loopholes that states could continue to exploit to meet work requirements, most notably the solely state funded program and creative earnings disregards (an alternative to token payments).

TANF's 60-Month Federal Time Limit: Bureaucratic and Ineffective.

Federal TANF funds may not be used for a family with an adult who has received federally-funded assistance for 60 months. There are arguments for and against time limits, but the federal 60-month time limit has loopholes that allow states to largely ignore it, except for the bureaucratic hoops that it imposes.

- **Manipulating funding streams.** The time limit only applies to families with an adult receiving federally-funded assistance. Federal and state MOE funds are largely fungible, so if a state wants to exempt families from the federal 60-month time limit or extend their assistance, it can simply fund the families using MOE with segregated state funds or separate state programs. As noted above, switching from a federal-state matching program to a block grant with a separate MOE requirement allows states to do this. Solution: Apply the same set of rules to all funding streams; given the absence of credible research regarding the impact of time limits, eliminate the current federal 60-month time limit and require states with time limits to evaluate them rigorously.

- **The hardship exemption.** TANF specifically allows states to extend assistance for up to 20 percent of the caseload by reason of "hardship," with hardship defined by the states. The 20 percent calculation applies to the entire caseload, including child-only cases that are not even subject to time limit. (About half the national TANF caseload has no adult receiving assistance, so the exemption is really about 40 percent for the share of the caseload that is subject to the federal time limit – with considerable variation across states.) Solution: Given the absence of credible research regarding the impact of time limits, eliminate the current federal 60-month time limit and require states with time limits to evaluate them rigorously, including the exemption/extension policies.

- **Manipulating the assistance unit.** A state could avoid the federal time limit by removing the adult from the "assistance unit," for purposes of the benefit payment, and provide assistance to just the children (and even increase the payments to the children to offset the reduction from removing the adult). Solution: Given the absence of credible research regarding the impact of time limits, eliminate the current federal 60-month time limit and require states with time limits to evaluate them rigorously.

For states that do not want a time limit, these loopholes just waste resources by forcing them to engage in gimmicks. In addition to the federal time limit, many states have their own time limits that differ in the duration and/or exemption/extension criteria. These states now must monitor and enforce two different time limits. If a time limit is considered important for signaling that welfare should be temporary, a better approach would be to require states to have a time limit, but allow each state to develop its own policies, with a requirement for a rigorous evaluation.

Gaming the Funding Structure

In a December 3, 2015, speech, Speaker Ryan explained that a goal of tax reform was "to simplify, simplify, simplify."[10] If anything, many tax experts believe the most recent effort to reform the tax code went in the opposite direction. The same thing happened in 1996 – *Congress* took a simple, straightforward funding mechanism and replaced it with a myriad of flawed funding formulas and requirements that complicated the program and allowed states to further game some aspect of the program. (See *TANF is Broken! It's Time to Reform "Welfare Reform*," in a section titled, "Funding and Flexibility: How Congress Shot Itself in the Foot.")

- **The TANF block grant structure with a separate MOE requirement has allowed states to avoid federal requirements by being selective about which funding stream(s) to use.** As described above, states have used the block grant/MOE funding structure to game federal work requirements and the 60-month time limit. States can avoid a number of other "requirements" by being selective about which funding stream to use, e.g., the ban on assistance for teen parents who do not live in an adult-supervised setting and the ban on using federal funds for medical services. Solution: Revert to a federal-state match with one set of rules.

- **Federal TANF dollars can be used to supplant state expenditures, with no benefit for federal taxpayers or the poor.** Since TANF's inception, states have used tens of billions of federal TANF dollars to simply replace existing state spending. Jon Peacock

of the Wisconsin Budget Project explains how this worked in his state – "a significant portion of the federal funding for ... assistance is being siphoned off for use elsewhere in the budget, to the detriment of the Wisconsin Works (W-2) program and child care subsidies for low-income working families."[11] If the supplanted funds were used to fund other programs for poor families, the practice would be less harmful, but that doesn't seem to be what happened in Wisconsin, as Peacock explains, "That shell game uses TANF funds to free up state funds [general purpose revenue] (GPR) to use for other purposes, such as the proposed income tax cuts."[12] Solution: Limit TANF funding to core welfare reform activities – basic assistance, welfare-to-work programs, and child care.

- **The ban on supplantation with MOE dollars is ineffective.** Congress did attempt to ban supplantation with state MOE dollars. State and local governmental expenditures on programs that existed in FY 1995 and were not part of the state's AFDC and related programs can only be claimed as MOE to the extent that they are higher than the spending in FY 1995. In other words, only new spending on qualifying activities can count. Of course, since that level is not adjusted for inflation, over time states can count more preexisting spending that rises simply because of inflation. In effect, this permits supplantation with MOE funds as well. And, some states have also tried to reclassify "pre-existing" programs as "new" programs by asserting the modest changes in programmatic structure constitute a "new" program. Solution: Limit TANF funding to core welfare reform activities – basic assistance, welfare-to-work programs, and child care.

Other Loopholes

- **TANF's ban on EBT use at strip clubs, liquor stores, and casinos is ineffective and costly.** In 2012, Congress passed legislation requiring states to maintain policies and practices to prevent TANF assistance funds from being used in an EBT transaction in liquor stores, casinos, and strip clubs. This includes both purchases and cash withdrawals at ATMs in such establishments. While it is reasonable to expect that TANF funds be spent on basic needs items, this legislation is misguided. First, it was enacted based on anecdotal evidence without any real understanding of the size and scope of the problem. Second, and more important, regardless of the size of the problem, this solution is totally ineffective and wastes tens of millions of dollars in monitoring and enforcement efforts (by states and the affected establishments). Why? Obviously, if someone wants to spend their TANF dollars at these establishments, the only thing this provision does is encourage them to go to an ATM at a bank or grocery store to withdraw the cash and then use it on the prohibited purposes. How has this accomplished anything? Solution: Focus on TANF's very real problems – its failure as a safety net and a welfare-to-work program – not political grandstanding.

- **TANF's limits on transfers of funds are ineffective and unnecessary.** Up to 30 percent of federal block grant funds can be transferred to the Child Care and Development Block Grant (CCDBG) and the Social Services Block Grant (SSBG), with a separate limit of 10 percent for the SSBG. These limits serve no practical purpose, as a

state could spend its federal TANF money directly in exactly the same way as funds are spent in these block grants. Solution: Keep it simple; don't impose requirements that have no practical significance.

- **TANF's 24-month work requirement is no requirement at all.** The law states that all parents and caretakers receiving assistance after 24 months must engage in work activities. There is no penalty; there is no requirement. Solution: Keep it simple; don't add provisions that have no practical significance.

Conclusion

Writing about the politics of the 1996 legislation, Robert Rector, dubbed the "godfather of welfare reform" by conservatives, once stated: "It isn't enough to get the technical details of a policy right. Words and symbols matter, too."[13] Unfortunately, when it comes to the TANF legislation, *Congress* got virtually every technical detail wrong. While the law sent a symbolic message about the importance of work requirements and time limits, in practice, neither of these elements have been implemented to the extent Congress intended. The loopholes described in this paper are just a small part of TANF's overall dysfunction. In fact, to some extent, they may actually help states run a better program because they provide a safety valve to escape misguided requirements. As the welfare and tax "reform" examples demonstrate, Congress needs to pay much more attention to evidence and policy details (vs. conservative talking points and donor demands).

[1] The views in this document reflect my own as a citizen and do not reflect the views of any organization I am now or have ever been affiliated with. By way of background, I am a conservative and have worked on welfare issues for the Heritage Foundation, the American Enterprise Institute, and the White House under both President Reagan and President George H.W. Bush. This paper assumes the reader has a basic understanding of the TANF program, but for those readers who want more context and background, see Peter Germanis, *TANF is Broken! It's Time to Reform "Welfare Reform" (And Fix the Problems, Not Treat their Symptoms)*, July 25, 2015 draft, available at: http://mlwiseman.com/wp-content/uploads/2013/09/TANF-is-Broken.072515.pdf.

[2] For an example of how states could divert block grant funding under the Graham-Cassidy health care proposal to unrelated purposes, see Matthew Fiedler and Loren Adler, "How will the Graham-Cassidy proposal affect the number of people with health insurance coverage?," September 22, 2017, available at: https://www.brookings.edu/research/how-will-the-graham-cassidy-proposal-affect-the-number-of-people-with-health-insurance-coverage/.

[3] Reuven Avi-Yonah, Lily Batchelder, J. Clifton Fleming, David Gamage, Ari Glogower, Daniel Hemel, David Kamin, Mitchell Kane, Rebecca Kysar, David Miller, Darien Shanske, Daniel Shaviro, and Manoj Viswanathan, "The Games They Will Play: An Update on the Conference Committee Tax Bill," December 22, 2017, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3089423.

[4] *Ibid*.

[5] Ron Haskins, "TANF at Age 20: Work Still Works," *Journal of Policy Analysis and Management*, Winter 2015, available at: http://mlwiseman.com/wp-content/uploads/2015/11/Haskins2015Age.pdf.

[6] TANF is not really a program, but a funding stream – a form of revenue sharing.

[7] Cited in Rob Bluey, "Paul Ryan: HHS Welfare Work Waiver Will Undermine 1996 Reforms," *The Daily Signal*, September 13, 2012, available at: http://dailysignal.com/2012/09/13/paul-ryan-hhs-welfare-work-waiver-will-undermine-1996-reforms/.

[8] Peter Germanis, *TANF is Broken! It's Time to Reform "Welfare Reform" (And Fix the Problems, Not Treat their Symptoms)*, July 25, 2015 draft, available at: http://mlwiseman.com/wp-content/uploads/2013/09/TANF-is-Broken.072515.pdf.

[9] U.S. Department of Health and Human Services, Administration for Children and Families, Office of Family Assistance, TANF-ACF-PI-2008-05 (Diversion Programs) (AMENDED), May 22, 2008, at: http://www.acf.hhs.gov/programs/ofa/resource/policy/pi-ofa/2008/200805/pi200805.

[10] Speaker Paul Ryan, "#ConfidentAmerica: Full Text of Speaker Ryan's Remarks at the Library of Congress," December 3, 2015, available at: http://www.speaker.gov/press-release/full-text-speaker-ryans-remarks-library-congress.

[11] Jon Peacock, Wisconsin Budget Project, "Funding for Low-Income Families Siphoned off for Other Uses," April 29, 2013, available at: http://www.wisconsinbudgetproject.org/.

[12] *Ibid*.

[13] Robert Rector, "Bill Clinton was Right," *The Washington Post*, August 23, 2006.