DF

Clear Hold

TIES ISSUES: MERIT SYSTEM REQUIREMENTS AND DELEGATION OF AUTHORITY

In the course of Texas' TIES discussions with DHHS and USDA, federal agency staff have raised two issues:

- Are the merit system requirements of the Food Stamp Act and the Social Security Act applicable to a privatized eligibility work force?
- Do the merit system provisions prohibit the state from delegating eligibility determination functions to a contractor?

Texas has taken the position in those discussions that:

(1) under the TIES proposal, the relevant Texas state agencies retain all responsibilities for administration that are associated with their designations as single state agencies;

(2) the state is obligated to ensure that state-administered portions of TIES programs will use a merit system of personnel administration. That merit system, however, is not applicable to any private work force with which the state contracts to administer other parts of the eligibility determination process;

(3) nothing in federal statute or regulation prohibits the state from delegating certain eligibility determination functions to a contractor, including some certification-related functions under the Food Stamp program.

Texas does not argue that, in order to comply with federal requirements, only the individual "pushing the button" to certify eligibility must be a public, merit system-protected employee. But the federal government has no basis for arguing the other extreme, namely that <u>all</u> eligibility functions beyond data intake must be performed by public employees.

Texas has asked the federal agencies repeatedly to identify where they draw the line between public and private employees in the eligibility certification process. Federal agency staff to date has refused to take a position on that issue.

The issue of whether private employees can certify client eligibility is a red herring for the following reasons:

(A) The eligibility determination process and automation system are <u>rules-based</u> which minimizes the possibility of public <u>or</u> private employees exercising unbridled discretion.

(B) The state at all times will retain responsibility for the promulgation of program rules and policy. In other words, the objective criteria used by staff and systems in determining client eligibility in all instances will be defined by public employees.

(C) The state will retain final approval and disapproval authority over all eligibility determinations and the state, not a private contractor, will be responsible for assuring the due process rights of all applicants whose eligibility is denied.

(D) The state will retain control over all eligibility determination functions by holding the contractor to strict performance standards through stringent oversight of contractor operations.

(E) While holding the contractor strictly responsible for results, the state will remain the party that is accountable to the federal government for compliance with all federal requirements.

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February 24, 1997

Cc: Elena
Cynthia
Diane

The Honorable Franklin Raines
Director
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20500

File: WR-privatization

Dear Frank:

I am writing on behalf of my constituents in the 17th District and the State of Texas to request your prompt attention to Texas' request for approval of the Request for Offers for the Texas Integrated Enrollment System (TIES). This request has been pending for several months and has reached a critical point for a decision.

When the welfare reform debate began in earnest in 1995, I set up welfare task forces in my district and asked them to put together their recommendations on how to structure the welfare delivery system. The number one recommendation of the task force was that the application process be streamlined and simplified across various means-tested programs. The task force concluded that streamlining the application process would provide better service to needy individuals and would use scarce resources more efficiently. I was therefore pleased that the Texas legislature directed the Texas Human Services Commission to develop an integrated enrollment system as part of the state's welfare reform plan. I have been even more pleased that the Commission has taken this direction very seriously and developed an integrated enrollment proposal very consistent with the goals outlined by the welfare task force I established.

I am enclosing a copy of a letter that Dr. Mike McKinney, Commissioner of the Texas Human Services Commission, sent to Secretary Donna Shalala on February 19 informing the Department of Health and Human Services of his intention to proceed with the release of the TIES Request for Offers. The Commission is proceeding under the authority of HHS regulations that deem requests to be approved if the Department does not provide the state with approval, disapproval or a written request for more information within 60 days.

While I share Dr. McKinney's disappointment that the Commission has found it necessary to proceed without formal approval from HHS or USDA, I believe that the Commission has been extremely patient throughout the approval process and has ample legal and substantive justification to proceed with the program at this point. The Texas Human Services Commission has been developing the TIES at the direction of the Texas legislature since June of 1995. The initial RFO was presented to HHS and USDA in June of 1996. Since that time, state officials have worked extensively with the administration to refine and improve the proposal and have responded to several requests for information. Further delay risks jeopardizing the success of the Texas welfare reform initiative, which anticipated implementation of the TIES. The timing is especially critical because the Texas legislature will only be in session for a few months. Dr. McKinney and his staff need to begin to work with the legislature very soon if any changes need to be made to the TIES that need legislative approval, or if the welfare reform legislation needs to be modified to adjust to the absence of the TIES.

I have worked with Dr. McKinney in seeking federal approval of the TIES and several other issues, most notably approval of a waiver for the Texas welfare reform plan in 1995. In all of these instances, I have found Dr. McKinney to be extremely reasonable and willing to make accommodations to address administration concerns. Dr. McKinney remains willing to work with the administration to resolve any problems preventing federal approval of the TIES. I am willing to work with you, Dr. McKinney, Governor Bush and other state and administration officials to foster a constructive dialogue that can lead to prompt resolution of this matter. If the administration determines that legislation is necessary to allow approval of the TIES, I will work in my capacity as Ranking Member of the House Committee on Agriculture to pursue such legislation, and believe that there would be bipartisan support for such an effort. I hope that the cooperation between the State of Texas, my office and the administration that led to the approval of the Texas welfare waiver under terms that were acceptable to all parties can serve as a model for dealing with this issue.

Thank you in advance for your attention to this matter. I look forward to working with both the State of Texas and the Administration to see that we continue to make progress toward final implementation of the Texas Integrated Enrollment System. Please feel free to contact me if I can be of assistance. With kind regards, I remain

Sincerely yours,

Charlie

Charles W. Stenholm
Member of Congress

CWS:esl
Enclosure
cc: Governor George Bush
Lieutenant Governor Bob Bullock
Dr. Mike McKinney
Bruce Reed
Ken Apfel

JC

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MICHAEL D. McKINNEY, M. D.
COMMISSIONER

February 19, 1997

Donna E. Shalala, Ph.D.
Secretary
United States Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D. C. 20201

Re: Texas Integrated Enrollment Services Project

Dear Secretary Shalala:

The purpose of this letter is to respond to correspondence dated January 31, 1997, from Mr. Mark Ragan, Director of the Office of State Systems, Administration for Children and Families, to my office regarding the review of the State of Texas' request for approval of the Request for Offers for the Texas Integrated Enrollment Services [TIES] project. [Copy attached.] Mr. Ragan advises that the ACF and HCFA continue to review the RFO and that a final decision cannot be given at this time. He states that discussions were being conducted at the highest levels within DHHS.

It is therefore appropriate to direct my concerns about the approval process to your office and to inform you of my office's plans, based on our understanding of applicable federal regulations, to release the TIES Request for Offers [RFO].

As you may know, the State of Texas, through this agency and the State Council on Competitive Government, has embarked on a challenging initiative to integrate the eligibility determination and client enrollment functions of several public assistance programs, including Medicaid and cash assistance under the Temporary Assistance to Needy Families program. The State's overarching goal is to improve service to recipients of public assistance by maximizing efficiencies and taking advantage of technical and business innovations available through the marketplace. The State also has selected this project as a means to encourage public-private competition and, in the process, stimulate the formation of public-private partnerships.

The Texas Legislature directed this agency and the Council to determine the potential benefits of contracting out these functions and, if this option was deemed feasible, authorized this agency to contract out those functions. Following an extensive study of the programs to be included in the project and an assessment by the Council, the Council determined that there was a compelling business case to support the contracting out of eligibility determination and enrollment functions. The Council directed this agency to prepare and conduct a competitive procurement to implement the Council's findings.

We first presented the RFO for an integrated enrollment service for required prior approval to your agency and the Department of Agriculture in June of 1996. Following an extensive review and

Secretary Donna E. Shalala
February 19, 1997
Page 2

comment by the federal agencies, we met with agency representatives in Austin on July 23, 24, and 25. Based on the input and direction we received from federal staff and others, we resubmitted the RFO and Planning APD for the project for prior federal approval on October 17, 1996. We received acknowledgment in a letter from Mr. Joseph F. Costa, Director of the State Systems Policy Staff for ACF, dated October 24, 1997.

We met once again with federal staff at the offices of the Food and Consumer Service in Alexandria on November 15, 1996, where we received additional comments and direction. We received requests for clarification from DHHS and USDA on November 19th. We submitted information in response to these requests on November 27 and December 13, 1996. Mr. Ragan's letter is the most recent correspondence we have received from the Department on this matter.

Although your agency has indicated more time is needed to make a final decision on our request for approval, we believe a DHHS regulation adopted last year authorizes the State of Texas to proceed with the implementation of the TIES on a provisional basis without the Department's prior approval. The regulation, codified at 45 C.F.R. section 95.611(d), promises prompt agency action on states' requests for prior approval of Planning APDs, Implementation APDs, RFPs, contracts, and certain contract amendments. Under the new regulation, a state's request is automatically deemed to have provisionally met the prior approval conditions of the regulations if DHHS has not, within 60 days following the date of the its letter acknowledging receipt of the state's request, provided the state written approval, disapproval, or a request for information.

Based on our understanding of the purpose and intent of the regulation, we believe that, due to the delay in federal action, the State has provisionally met the prior approval conditions of DHHS and USDA regulations.

In the notice of proposed rule making that appeared in the Federal Register, the Department explained that the "prompt action" regulation was proposed in the interest of increasing efficiency and reducing federally-imposed burdens on the states. The Department's avowed intention was to help states contain costs by minimizing the delay in granting required approvals. The Department acknowledged that states which are confident their proposed ADP projects satisfy federal requirements should not be penalized by excessive delay in the Department's approval. *See* 60 Fed. Reg. 37859 (July 24, 1995). On final adoption of the regulation, the Department responded to a comment that the regulation may be employed to delay the approval of state requests by offering explicit assurance that "this will not happen." 61 Fed. Reg. 39894, 39896 (July 31, 1996).

Unfortunately, it appears that this is precisely what has occurred with the State's request for approval of the TIES RFO. Our concern is that the current and – if we interpret your agency's actions correctly – potentially interminable delay in the approval of the TIES RFO violates the spirit, if not the letter, of the prompt action regulation. Certain that this is not the Department's intention, we believe it is reasonable to interpret the regulation to authorize the State of Texas to proceed with the TIES project under the provisional approval criteria of the regulation.

The regulation is silent as to the Department's duty and a state's reasonable expectations in cases where federal approval takes longer than 60 days. It seems clear, though, that the policy basis for the regulation was to bring closure to a process that unfairly delays and adds costs to proposed state action. The Department's actions imply, however, that it interprets the regulation to permit an extension of the period of review for an additional 60 days upon delivery of written notice to the state. This application is plainly at odds with the Department's justification for the rule.

If the regulation is to apply in this instance, we think the more reasonable application would be to permit the Department to receive an additional 60 days to review a state request for approval when it either (1) requests additional information from the state or (2) receives information from the state in response to such a request. Under this interpretation, the Department would be required, within the 60 days following the request or receipt of information, to provide the state a written approval, disapproval, or request for additional information. Mr. Ragan's letter of January 31, then, would not extend the Department's review period because it did not provide approval, disapproval, or request additional information from the State.

Accordingly, under this reading of the prompt review regulation, the State of Texas was deemed to have provisionally met the prior approval conditions of regulations, at the earliest, on January 18, 1997 (60 calendar days following November 19, 1996, the date of the Department's request for more information) or February 11, 1997, at the latest (60 days following the State's December 13, 1996, submission in response to the November 19 request).

Based on this understanding of the regulation, my staff is proceeding with final preparation of the TIES RFO for formal release to the marketplace. If we are incorrect in our reading of the regulations, we believe it is the Department's responsibility to so advise and provide the State of Texas information necessary to fulfill the prior approval requirement. If we receive no direction from the Department by February 28, 1997, we will assume you concur in our reading of the regulations and we will formally issue the TIES RFO.

We have conducted the dialog with our federal partners in the utmost good faith and in the spirit of partnership. We think this commitment is critical to the ultimate success of the TIES project. Almost without exception, our federal counterparts have been extremely helpful in providing my staff useful advice and direction. Their input has been indispensable to ensuring the success of the project. Yet, despite these efforts and repeated assurances of a prompt federal decision, we appear no closer to approval than we were nearly nine months ago when we first approached our federal partners. To my knowledge, we have responded (or have attempted to respond) to every request for information and clarification from federal oversight agencies. We are unaware of any reason why the RFO cannot be issued at this time. Mr. Ragan's letter discloses no lingering or insurmountable issues regarding the project. Thus, we are left to speculate whether the delay in approval is for reasons other than the adequacy of the RFO and compliance with federal requirements.

I agree with Mr. Ragan that a project as large and ambitious as TIES deserves careful consideration, and we are committed, as your staff are, to ensuring that the needs of our clients and taxpayers' interests are protected. However, each month of delay in the release of the RFO costs the taxpayers of Texas. To date, the State of Texas has invested approximately \$1.8 million in the planning and development of the TIES project. Additional expenditures will no doubt be necessary to accommodate further federal delay.

More important, we conservatively estimate that each month of delay in the statewide implementation of integrated enrollment in Texas costs the taxpayers of this state at least \$10,000,000. The Texas Legislature, in authorizing this project in 1995, instructed my office to direct the savings generated by integrated enrollment to fund additional health and human services programs. I estimate that the annual savings in administrative costs alone generated by TIES could provide health care coverage an additional 150,000 needy Texas children. Thus, the inability of the federal authorities to fulfill their

Secretary Donna E. Shalala
February 19, 1997
Page 4

responsibilities frustrates the intent of the Texas Legislature and is borne directly by our agencies' clients and the citizens of Texas.

I regret that this action has become necessary, but it is my duty to ensure the intent of the Texas Legislature is implemented and the interests of the people of Texas are advanced. We firmly believe that the TIES project is the right thing for recipients of public assistance and the State of Texas, and it is long overdue. I understand our efforts have been criticized by people whose interests may be to preserve the status quo. Unlike your staff, these persons either have not taken the time to consult with us, have not given us the courtesy of an open and honest discussion of the issues, or have chosen to ignore the clear commitments we have made to improve service to our clients and give value to the taxpayers.

We view the TIES project as an opportunity to realize President Clinton's vision of a nation where the important and critical decisions of government are made closest to the people whose lives they affect. We also share his belief that restoring to the states this responsibility and authority is critical to reforming the welfare system and meeting the challenges of the next century. And we agree with your recent remarks that "when we target our resources responsibly and innovatively, when we team up with our private and public partners, and when we act as tough, savvy managers, the federal government can help lead the way in creating a stronger and healthier nation – a nation capable of meeting challenges both old and new." With your help, the State of Texas can follow a similar path.

Consequently, I respectfully ask for your assistance in resolving the apparent impasse over the approval of the Texas Integrated Enrollment Services Request for Offers. As always, we are prepared to supply any information you or your staff may need to reach a prompt and correct decision.

Sincerely,

Michael D. McKinney

Michael D. McKinney, M.D.
Commissioner

Attachment

c: Governor George W. Bush
Lieutenant Governor Bob Bullock
Speaker Pete Laney
Comptroller John Sharp

NOTE TO ELENA, DIANA

FROM: CYNTHIA

FYI-- ATTACHED IS PRIOR LAW LANGUAGE REGARDING WORK SUPPLEMENTATION AND WORK FARE. ELENA -- THERE ARE EXCEPTIONS TO LABOR LAWS FOR BOTH KINDS OF WORK, BUT SEEMINGLY DIFFERENT EXCEPTIONS.

104TH CONGRESS
1st Session

COMMITTEE PRINT

WMCP:
104–7

COMPILATION

OF THE

SOCIAL SECURITY LAWS

INCLUDING THE SOCIAL SECURITY ACT,

AS AMENDED, AND RELATED ENACTMENTS

THROUGH JANUARY 1, 1995

VOLUME I

PRINTED FOR THE USE OF THE

COMMITTEE ON WAYS AND MEANS BY ITS STAFF

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(III) job readiness activities to help prepare participants for work; and

(IV) job development and job placement; and

(ii) must also include at least 2 of the following:

(I) group and individual job search as described in subsection (g);

(II) on-the-job training;

(III) work supplementation programs as described in subsection (e); and

(IV) community work experience programs as described in subsection (f) or any other work experience program approved by the Secretary.

(B) The State may also offer to participants under the program (i) postsecondary education in appropriate cases, and (ii) such other education, training, and employment activities as may be determined by the State and allowed by regulations of the Secretary.

(2) If the State requires an individual who has attained the age of 20 years and has not earned a high school diploma (or equivalent) to participate in the program, the State agency shall include educational activities consistent with his or her employment goals as a component of the individual's participation in the program, unless the individual demonstrates a basic literacy level, or the employability plan for the individual identifies a long-term employment goal that does not require a high school diploma (or equivalent). Any other services or activities to which such a participant is assigned may not be permitted to interfere with his or her participation in an appropriate educational activity under this subparagraph.

(3) Notwithstanding any other provision of this section, the Secretary shall permit up to 5 States to provide services under the program, on a voluntary or mandatory basis, to non-custodial parents who are unemployed and unable to meet their child support obligations. Any State providing services to non-custodial parents pursuant to this paragraph shall evaluate the provision of such services, giving particular attention to the extent to which the provision of such services to those parents is contributing to the achievement of the purpose of this part, and shall report the results of such evaluation to the Secretary.

(e) WORK SUPPLEMENTATION PROGRAM.—(1) Any State may institute a work supplementation program under which such State, to the extent it considers appropriate, may reserve the sums that would otherwise be payable to participants in the program as aid to families with dependent children and use such sums instead for the purpose of providing and subsidizing jobs for such participants (as described in paragraph (3)(C)(i) and (ii)), as an alternative to the aid to families with dependent children that would otherwise be so payable to them.

(2)(A) Notwithstanding section 406 or any other provision of law, Federal funds may be paid to a State under part A, subject to this subsection, with respect to expenditures incurred in operating a work supplementation program under this subsection.

(B) Nothing in this part, or in any State plan approved under part A, shall be construed to prevent a State from operating (on such terms and conditions and in such cases as the State may find to be necessary or appropriate) a work supplementation program in accordance with this subsection and section 484.

(C) Notwithstanding section 402(a)(23) or any other provision of law, a State may adjust the levels of the standards of need under the State plan as the State determines to be necessary and appropriate for carrying out a work supplementation program under this subsection.

(D) Notwithstanding section 402(a)(1) or any other provision of law, a State operating a work supplementation program under this subsection may provide that the need standards in effect in those areas of the State in which such program is in operation may be different from the need standards in effect in the areas in which such program is not in operation, and such State may provide that the need standards for categories of recipients may vary among such categories to the extent the State determines to be appropriate on the basis of ability to participate in the work supplementation program.

(E) Notwithstanding any other provision of law, a State may make such further adjustments in the amounts of the aid to families with dependent children paid under the plan to different categories of recipients (as determined under subparagraph (D)) in order to offset increases in benefits from needs-related programs (other than the State plan approved under part A) as the State determines to be necessary and appropriate to further the purposes of the work supplementation program.

(F) In determining the amounts to be reserved and used for providing and subsidizing jobs under this subsection as described in paragraph (1), the State may use a sampling methodology.

(G) Notwithstanding section 402(a)(8) or any other provision of law, a State operating a work supplementation program under this subsection (i) may reduce or eliminate the amount of earned income to be disregarded under the State plan as the State determines to be necessary and appropriate to further the purposes of the work supplementation program, and (ii) during one or more of the first 9 months of an individual's employment pursuant to a program under this section, may apply to the wages of the individual the provisions of subparagraph (A)(iv) of section 402(a)(8) without regard to the provisions of subparagraph (B)(ii)(II) of such section.

(3)(A) A work supplementation program operated by a State under this subsection may provide that any individual who is an eligible individual (as determined under subparagraph (B)) shall take a supplemented job (as defined in subparagraph (C)) to the extent that supplemented jobs are available under the program. Payments by the State to individuals or to employers under the work supplementation program shall be treated as expenditures incurred by the State for aid to families with dependent children except as limited by paragraph (4).

(B) For purposes of this subsection, an eligible individual is an individual who is in a category which the State determines should be eligible to participate in the work supplementation program, and who would, at the time of placement in the job involved, be eligible for aid to families with dependent children under an approved State plan if such State did not have a work supplementation program in effect.

(C) For purposes of this section, a supplemented job is—

(i) a job provided to an eligible individual by the State or local agency administering the State plan under part A; or

(ii) a job provided to an eligible individual by any other employer for which all or part of the wages are paid by such State or local agency.

A State may provide or subsidize under the program any job which such State determines to be appropriate.

(D) At the option of the State, individuals who hold supplemented jobs under a State's work supplementation program shall be exempt from the retrospective budgeting requirements imposed pursuant to section 402(a)(13)(A)(ii) (and the amount of the aid which is payable to the family of any such individual for any month, or which would be so payable but for the individual's participation in the work supplementation program, shall be determined on the basis of the income and other relevant circumstances in that month).

(4) The amount of the Federal payment to a State under section 403 for expenditures incurred in making payments to individuals and employers under a work supplementation program under this subsection shall not exceed an amount equal to the amount which would otherwise be payable under such section if the family of each individual employed in the program established in such State under this subsection had received the maximum amount of aid to families with dependent children payable under the State plan to such a family with no income (without regard to adjustments under paragraph (2)) for the lesser of (A) 9 months, or (B) the number of months in which such individual was employed in such program.

(5)(A) Nothing in this subsection shall be construed as requiring the State or local agency administering the State plan to provide employee status to an eligible individual to whom it provides a job under the work supplementation program (or with respect to whom it provides all or part of the wages paid to the individual by another entity under such program), or as requiring any State or local agency to provide that an eligible individual filling a job position provided by another entity under such program be provided employee status by such entity during the first 13 weeks such individual fills that position.

(B) Wages paid under a work supplementation program shall be considered to be earned income for purposes of any provision of law.

(6) Any State that chooses to operate a work supplementation program under this subsection shall provide that any individual who participates in such program, and any child or relative of such individual (or other individual living in the same household as such individual) who would be eligible for aid to families with dependent children under the State plan approved under part A if such State did not have a work supplementation program, shall be considered individuals receiving aid to families with dependent children under the State plan approved under part A for purposes of eligibility for medical assistance under the State plan approved under title XIX.

(7) No individual receiving aid to families with dependent children under a State plan shall be excused by reason of the fact that such State has a work supplementation program from any requirement of this part relating to work requirements, except during periods in which such individual is employed under such work supplementation program.

(f) COMMUNITY WORK EXPERIENCE PROGRAM.—(1)(A) Any State may establish a community work experience program in accordance with this subsection. The purpose of the community work experience program is to provide experience and training for individuals not otherwise able to obtain employment, in order to assist them to move into regular employment. Community work experience programs shall be designed to improve the employability of participants through actual work experience and training and to enable individuals employed under community work experience programs to move promptly into regular public or private employment. The facilities of the State public employment offices may be utilized to find employment opportunities for recipients under this program. Community work experience programs shall be limited to projects which serve a useful public purpose in fields such as health, social service, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, public facilities, public safety, and day care. To the extent possible, the prior training, experience, and skills of a recipient shall be used in making appropriate work experience assignments.

(B)(i) A State that elects to establish a community work experience program under this subsection shall operate such program so that each participant (as determined by the State) either works or undergoes training (or both) with the maximum number of hours that any such individual may be required to work in any month being a number equal to the amount of the aid to families with dependent children payable with respect to the family of which such individual is a member under the State plan approved under this part, divided by the greater of the Federal minimum wage or the applicable State minimum wage (and the portion of a recipient's aid for which the State is reimbursed by a child support collection shall not be taken into account in determining the number of hours that such individual may be required to work).

(ii) After an individual has been assigned to a position in a community work experience program under this subsection for 9 months, such individual may not be required to continue in that assignment unless the maximum number of hours of participation is no greater than (I) the amount of the aid to families with dependent children payable with respect to the family of which such individual is a member under the State plan approved under this part (excluding any portion of such aid for which the State is reimbursed by a child support payment), divided by (II) the higher of (a) the Federal minimum wage or the applicable State minimum wage, whichever is greater, or (b) the rate of pay for individuals employed in the same or similar occupations by the same employer at the same site.

(C) Nothing contained in this subsection shall be construed as authorizing the payment of aid to families with dependent children as compensation for work performed, nor shall a participant be entitled to a salary or to any other work or training expense provided under any other provision of law by reason of his participation in a program under this subsection.

(D) Nothing in this part or in any State plan approved under this part shall be construed to prevent a State from operating (on such terms and conditions and in such cases as the State may find to be necessary or appropriate) a community work experience program in accordance with this subsection and subsection (d).

(E) Participants in community work experience programs under this subsection may perform work in the public interest (which otherwise meets the requirements of this subsection) for a Federal office or agency with its consent, and, notwithstanding section 1342 of title 31, United States Code[182], or any other provision of law, such agency may accept such services, but such participants shall not be considered to be Federal employees for any purpose.

(2) After each 6 months of an individual's participation in a community work experience program under this subsection, and at the conclusion of each assignment of the individual under such program, the State agency must provide a reassessment and revision, as appropriate, of the individual's employability plan.

(3) The State agency shall provide coordination among a community work experience program operated pursuant to this subsection, any program of job search under subsection (g), and the other employment-related activities under the program established by this section so as to insure that job placement will have priority over participation in the community work experience program, and that individuals eligible to participate in more than one such program are not denied aid to families with dependent children on the grounds of failure to participate in one such program if they are actively and satisfactorily participating in another. The State agency may provide that part-time participation in more than one such program may be required where appropriate.

(4) In the case of any State that makes expenditures in the form described in paragraph (1) under its State plan approved under section 482(a)(1), expenditures for the operation and administration of the program under this section may not include, for purposes of section 403, the cost of making or acquiring materials or equipment in connection with the work performed under a program referred to in paragraph (1) or the cost of supervision of work under such program, and may include only such other costs attributable to such programs as are permitted by the Secretary.

(g) JOB SEARCH PROGRAM.—(1) The State agency may establish and carry out a program of job search for individuals participating in the program under this part.

(2) Notwithstanding section 402(a)(19)(B)(i), the State agency may require job search by an individual applying for or receiving aid to families with dependent children (other than an individual described in section 402(a)(19)(C) who is not an individual with respect to whom section 402(a)(19)(D) applies)—

(A) subject to the next to last sentence of this paragraph, beginning at the time such individual applies for aid to families with dependent children and continuing for a period (prescribed by the State) of not more than 8 weeks (but this requirement may not be used as a reason for any delay in making a determination of an individual's eligibility for such aid or in issuing a payment to or on behalf of any individual who is otherwise eligible for such aid); and

(B) at such time or times after the close of the period prescribed under subparagraph (A) as the State agency may determine but not to exceed a total of 8 weeks in any period of 12 consecutive months.

[182] See Vol. II, Title 31.

Sharp - 2nd thoughts ??

Cynthia A. Rice 03/11/97 07:08:04 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: Re: FLSA in 94 and 96 Administration WR Bills

Jeff Farkas found basically that our '94 bill kept worker protections for workfare protections while our '96 bill did not (see below). This will make our roll-out even more tricky.

-------------------- Forwarded by Cynthia A. Rice/OPD/EOP on 03/11/97 07:01 PM ---------------------------

Doc. Verification - immediate discretion
More wkld on redetermin
14,000

Jeffrey A. Farkas
03/11/97 09:34:15 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Keith J. Fontenot/OMB/EOP, Stacy L. Dean/OMB/EOP

Subject: FLSA in 94 and 96 Administration WR Bills

Here is some information on the FLSA-related provisions of the Administration's 1994 and 1996 welfare bills (in the sections related to cash assistance work programs). Please let me know if you have any questions.

The WORK program in the 1994 bill incorporated a comprehensive set of workfare protections, including minimum wage (FLSA), workers compensation, working conditions, and FICA taxation. The bill did not provide unemployment compensation coverage (at the Federal or State level), and did not allow the EITC for earnings from WORK positions.

The 1996 bill is much less specific than the 1994 bill. It would extend FLSA coverage for work supplementation programs (the language is nearly identical to the work supp provisions in the JOBS statute, where FLSA applied), but not for workfare positions. Under workfare, participants in community service jobs were required to work a designated number of hours (reaching 30 per week in the outyears) and to be paid at a rate which is "100 percent of the maximum amount of assistance that may be provided under the State plan...to a family of the same size and composition with no income." In many instances this level would be sub-minimum wage. In addition, the bill provided that "wages paid under a workfare program shall not be considered to be earned income for puposes of any provision of law." This would seem to preclude application of FLSA.

How is the Texas contract structured?

Payment for costs?

for person processed?

Not sure, but there is an incentive bonus if they come in lower than projected. So it is a likely cost per case

We could insist on some contract feature to counter that, right?

Does Texas have an integrated system now?

(same system/office for Medicaid, Food Stamps/welfare)?

yes/ plus same system — also does other program referals. TIES is even more elaborate.

Stenholm's guy said they expect to save a bundle even without privatization from automation — Is that integrating system? or just automation?

Texas will save, feds won't. So a combo of both

This is key to the union's argument on the state by state issue.

cc: Cynthia
Bruce
Diana

Stacy L. Dean 03/05/97 05:19:01 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Diana Fortuna/OPD/EOP

cc:

Subject: privatization paper

Attached is the lastest draft of the agency privatization paper. There is another option and one or two more policy issues. It is a long read, but almost everything is there. If I were to do it again, I'd differentiate more between Wisconsin and Texas. Wisconsin has a more performance based approach which expands or contracts their privatization efforts based on how the public counties do compared with the privatized counties.

This version is being distributed to all the agencies tonight.

texcomb2.wp

PRIVATIZATION OF FEDERAL PUBLIC ASSISTANCE PROGRAMS

New Draft

I. OVERVIEW & ISSUES

This paper has been prepared jointly by staff from the Departments of Agriculture (Food and Consumer Service), Health and Human Services (Health Care Financing Administration and Administration for Children and Families), Labor (Employment and Training Administration), and the Office of Personnel Management (OPM). The Federal agencies have been meeting recently to discuss the general background and issues surrounding privatization initiatives that are under review within the Departments and to explore options for making final decisions and responding to States. Decisions made here will set the precedents for proposals around the country.

Policy Issues: To what extent should the States be permitted to transfer the responsibility for eligibility determination for Federal public assistance programs to the private sector through competitively bid contracts?

Legal Issues: May the Merit System of Personnel Administration requirements, applicable in different ways in each statute, be waived to allow States to enter into contract agreements?

II. BACKGROUND

There is increasing interest among the State welfare agencies in transferring the administration of public assistance programs to the private sector through competitively bid contracts. This interest stems in part from the efforts of the Federal and State governments to test new methods to reduce costs, to improve program services and to increase self-sufficiency among program recipients.

Contracting or privatizing certain functions of the public assistance programs is not new, e.g. backroom data processing. What is new is the possibility of contracting with private entities to perform functions that have historically been the responsibility of the public sector, such as conducting the determination of eligibility and certification for public assistance programs like the Federal Food Stamp Program and Medicaid. While the new welfare law explicitly permits States to privatize TANF administration and service provision, no other major Federal public assistance program has such broad latitude[1]. Other programs became part of this issue because typically eligibility for AFDC (now TANF), Food Stamps and Medicaid and a host of other programs has been determined by a common process and worker.

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[1] Note that eligibility for $6 billion in Pell Grants and $25 billion in student loans is routinely determined largely by non-Federal, non-public entities.

III. THERE ARE CURRENT PROPOSALS BEFORE THE ADMINISTRATION REQUIRING DECISIONS ABOUT THE EXTENT TO WHICH PRIVATIZATION SHOULD BE PERMITTED

A. Texas Integrated Enrollment Services (TIES)

TIES is a statewide privatization initiative of the Texas Health and Human Services Commission (HHSC) and the Texas Council on Competitive Government (CCG) in support of a State law enacted in 1995. Under TIES, the certification and eligibility determinations for most public assistance programs, including the Food Stamp, Special Supplemental Nutrition Program for Women, Infants and Children (WIC), TANF and Medicaid programs, would be contracted to the private and/or public sectors through competitive bids.

USDA has determined the TIES proposal would require a waiver of the merit system requirements under the Food Stamp Act. HCFA is still reviewing the extent to which merit system requirements must be waived. The Federal agencies and the State of Texas have been negotiating the conditions for releasing a Request for Offers (RFO) for TIES since May 1996. With the exception of a final decision about the merit system provisions contained in the RFO, and the role of the single State agency, all other issues have been resolved with regard to the draft RFO.

Texas was expecting final approval of the RFO in January to be able to release the RFO by the end of the month. Two consortia have been developed with the intention of bidding on the RFO. One consortium is composed of the Texas Workforce Commission, International Business Machines Corporation and Lockheed Martin Corporation. The other consortium consists of the Texas Department of Human Services, Electronic Data Systems Corporation and the Unisys Corporation. Arthur Anderson has also indicated an interest in the proposal but has not aligned itself with a State agency.

Wisconsin Works (W-2)

Under the W-2 proposal, the State is contracting on a competitive basis with public or private agencies for certification actions such as gathering client eligibility information, conducting eligibility interviews and data input. The State, presuming the Department of Agriculture's approval of its waiver request of the merit system requirements for the Food Stamp Program, released its Request for Proposals (RFP). While the State can issue the RFP without USDA's approval, they will need to hear back from USDA in order to award the contract. State officials have advised that the contract process has been completed for one County (with over 60 percent of the State caseload) without the inclusion of the Food Stamp Program. Contracts have been awarded to six private, non-profit agencies.

C. Employment Services – One-Stop Grant

Legislation enacted in the State of Texas, effective September 1, 1996, provides for the delivery of labor exchange services that are authorized under the Wagner-Peyser Act and currently delivered by State employment security agencies by local workforce development boards and private, non-governmental providers. Thus far, Texas has not considered contracting out the delivery of unemployment insurance services. The Department of Labor has urged Texas to delay implementation until the Department's review is completed.

In addition, the State of Massachusetts, with the Department of Labor's approval of a 1994? grant to implement a competitive One-Stop Career Center system throughout the State, has awarded contracts to private-for-profit entitles to deliver labor exchange services in several local areas under that grant. Other States such as Montana, Utah, Pennsylvania, and Iowa are on the threshold of requesting similar approval.

IV. ORGANIZED LABOR RESPONSE

The Departments of Agriculture and Health and Human Services have received numerous letters from employee unions about the TIES proposal, including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Federation of State, County, and Municipal Employees (AFSCME) and the Service Employees International Union. The unions assert that a waiver of the merit system would result in a decline of client services, including access to program benefits and client confidentiality. The Department of Agriculture received over 1,000 letters from employees in Wisconsin objecting to the W-2 project.

In the case of the Texas workforce development legislation, the Department of Labor has received a letter from the AFL-CIO questioning the legality of privatizing employment services.

In the Massachusetts One Stamp project, the State AFL-CIO concurred in the proposal but current implementation problems are raising new concerns.

V. THE TEXAS SITUATION

A. Food Stamp Program–Certification and Other Program Requirements

The Food Stamp Act requires certification, i.e., the application and the components of the eligibility determination process, to be completed by merit system employees. Certification, however, is not defined in statute. As supported by legislative history to the Act, current regulations specify that the required interview be conducted by merit system employees. Given the complexity and discretion that may be required in the food stamp certification process, the food stamp interview is crucial to accurate determinations of eligibility and benefit level. It is through the food stamp interview that the worker solicits most household information, determines the necessity for additional verification or resolution of questionable information, and ascertains the need for appropriate policy decisions. It is also the applicant household's opportunity to have face-to-face contact with a public employee. Volunteers and other non-merit employees may assist an applicant household in other actions related to certification but may not conduct the food stamp interview or certify a household.

During recent debate on welfare reform legislation, Congressional conferees reinserted the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

B. Medicaid--Certification and Other Program Requirements

Similar to Food Stamps, the entire application process, from taking an application to making the final eligibility determination, is performed almost entirely by employees of the State agency responsible for administering the Medicaid program. Under Medicaid law, States are required to establish or designate a single State agency to administer their Medicaid program and determine Medicaid eligibility. Moreover, the Medicaid statute requires that the State agency responsible for Medicaid not delegate authority to "exercise administrative discretion in the administration or supervision of the plan" to non-government entities. The regulations implementing that part of the statute also require that other agencies which perform services for the State agency "must not have the authority to ... substitute their judgement for that of the Medicaid agency with respect to the application of policies, rules, and regulations issued by the Medicaid agency."

Unlike Food Stamps, the Social Security Act also provides for "outstationing", which allows the State to use private sector employees to perform some of the eligibility process at locations other than State TANF offices for certain groups of applicants. Outstationing was incorporated into the law to increase program access when the law was amended to substantially broaden the categories of eligible individuals.

States have the option of staffing outstation locations with State employees or non-State employees (e.g., contractors or volunteers), or a combination of both. Because outstationing can involve the use of non-State employees to perform certain eligibility-related functions, Medicaid regulations--but not the law--specify which functions can be

E. Intergovernmental Personnel Act

For decades, a Merit System of Personnel Administration was routinely established for many Federal-State grant-in-aid programs as now codified within the Intergovernmental Personnel Act (IPA) because it was presumed by Congress that services would be provided directly by State or local employees who were acting in lieu of Federal employees. The IPA is not a genuine statute; its provisions only come into play when another law or regulation invokes it.

While the IPA is silent on whether States or local governments may contract for services, the law does provide for maximum flexibility within the requirements for merit principles in the administration of grant-in-aid programs by grantees. However, as the roles of government and the relationships between the State and the Federal government continue to evolve, a determination must be made as to whether new ways of doing business can be carried out under existing laws, or whether change in those laws is required. While government contracting with the private sector for commercial products and services is not new, the Texas proposal raises the possibility of contracting with private entities to perform functions that have historically been the responsibility of the public sector. The proposal, as currently drafted, would require a waiver by OPM of current statutory and regulatory provisions related to the Merit System of Personnel Administration provision of the IPA.

Aspects of the current proposals under review by Federal agencies appear to conflict with the general requirements of the IPA, but as noted above, the key issue is defining precisely what aspects of program processes are in fact covered by the IPA. Although OPM has not consulted with their General Counsel for a legal opinion, OPM is confident that it does not have authority to waive any provisions of the statute. In fact, OPM counsels have consistently held that OPM does not have authority to waive its own regulations, unless such waiver is specifically provided for in the applicable statute. The Administration could elect to seek legislative change if the determination of what processes are covered presents the need.

This leads us back, then, to examining the Texas proposal and shredding out what is "inherently governmental" for these programs at issue and must therefore be performed by merit system employees, and what is commercial and can therefore be contracted out. The OPM General Counsel has relied on OMB Circular A-76 to define what is and is not an inherently governmental function for programs whose statute relies upon IPA coverage. Included in the definition of governmental functions are "those activities which require either the exercise of discretion in applying Governmental authority or the use of value judgment in making decisions for the Government. ...Governmental functions normally fall into two categories: (1) The Act of governing;....(2) Monetary transactions and entitlements...." It would appear that some contracting is appropriate but wholesale contracting of Food Stamp and Medicaid eligibility may raise questions of consistency with the intention of Congress to ensure that administration of these programs be conducted by employees covered by a merit system of personnel administration.

G. Options for Texas TIES

1. Allow the State to fully privatize its eligibility process, requiring only that the State itself certify the determination. Under Medicaid, implementing this option would essentially involve an administrative decision, and possibly publishing a Federal Register Notice announcing the decision. For the Food Stamp program , this option would involve approving a waiver of the Merit System of Personnel Administration. It would also require use of the Food Stamp Program's statutory demonstration authority, with the necessary approval of waivers of the Merit System of Personnel Administration by OPM. The Agriculture Department's waiver authority for demonstrations is intended to test innovations and is not intended to approve long-term operational alternatives such as those proposed by Texas. The majority of the 15,000 employees would be at risk of losing at least their State merit systems protections and possibly their jobs.

Approval of this option would result in additional objections from employee unions and advocacy groups that believe State employees will treat welfare recipients more fairly than contractors. It would be supported by States, the National Governors Association and private corporations which have formed alliances with public agencies to respond to the RFO.

2. Require the State to perform all eligibility functions, including intake, processing, and making and certifying the actual determination. This option would effectively deny the State's request to privatize its eligibility process. Even though this is the most restrictive option, it may be the most legally supportable option for the Medicaid program, based on a restrictive reading of statutory and regulatory requirements involving proper and efficient administration of the program. An argument can be made that outstationing establishes a precedent for permitting at least some privatization. However, a legal counter argument could be made that the Medicaid statute restricts non-government eligibility activities to specific eligibility groups and situations and, thus, is not applicable to the TIES proposal.

For the Food Stamp Program, this option would mean denial of a waiver of the Merit System of Personnel Administration. This option also would require the State to continue to be responsible for the Food Stamp interview and determinations of eligibility and benefit level. It is also important to note that during the recent debate on welfare reform legislation, Congressional Conferees reinstated the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

The Federal agencies would receive serious objections from the State and private corporations. Also, a denial may be viewed as inconsistent with the Administration's support for allowing the private sector to be more involved in the administration of public assistance programs.

3. Approve an information system project as a stand alone effort. This option would allow the State to replace its outdated information systems with a new integrated system. Once completed, the TANF program could be administered through a private contractor using the new integrated information system, while eligibility for the Food Stamp and Medicaid programs could be handled by State employees. This approach would demonstrate the merits of privatization in these types of programs and not require a waiver of the other program rules.

This approach would require the State to fund the system development effort as it is being developed. Under the approach outlined in the RFO, the winning vendor would pay for the system development costs and then recoup its costs through administrative fees charged to the State once the system was operational. This option may satisfy the vendor community by reducing the risks associated with the up-front costs of developing the large system and still allow a significant privatization effort associated with TANF and other State programs. If information sharing rules can be resolved, the State may be able to satisfy its cost saving goals.

4. Allow the State to privatize its eligibility process to the same degree that privatization is permitted under the Medicaid outstationing process. This option would allow the State to privatize the application, interview, and information gathering/verification process, but require the State to do and certify the actual eligibility determination. For the Food Stamp Program, this option would require a redefinition of "certification". The Food Stamp statute requires certification to be completed by merit system employees, while the Medicaid statute allows non-State out stationed personnel to perform some elements of the application process. States want to reinterpret the laws so that compliance could be achieved through the automated processing of data by computers which are programmed under State agency direction to make eligibility and benefit decisions.

A middle ground could preserve more government involvement in a complex eligibility determination process that requires judgment. The Federal agencies could revise regulations (Food Stamp Program) or publish an appropriate Notice in the Federal Register (Medicaid) to require government review of applications and interview results before eligibility for benefits is determined (a process comparable to the Medicaid outstations, or supervisory reviews currently used by many State agencies in the Food Stamp Program). However, this option may not allow the States to make privatization initiatives financially worthwhile. The agencies do not have an estimate of how many

State jobs would be at stake under this option.

<u>5. Approve small-scale demonstration projects</u>. The Departments support privatization initiatives that may result in improved services and/or administrative costs savings. However, both Departments have concerns about statewide initiatives that have not been proven to be effective and may seriously affect program access to low-income households. For instance, TIES is a Statewide initiative in a State that issues annually approximately 10 percent of food stamp benefits issued nationwide. The Department of Agriculture further believes it would be imprudent to eliminate the interview from merit employees on a statewide basis without further testing.

A demonstration limited to a small number of counties, for say 3 years, may be supportable by the advocacy groups. Private corporations may object or lose interest in small-scale demonstration projects or they could see it as the way to prove the benefits to all programs for contracting out on a larger scale. It is unclear how the unions and other States would react to such a compromise. It is estimated that an evaluation of a Food Stamp and Medicaid demonstration would cost at least $1 million.

VI RELATIONSHIP TO THE TEXAS EMPLOYMENT SERVICE AND OTHER ES PROPOSALS

The issue of whether an entity other than the SESA may deliver basic labor exchange and unemployment insurance services has been raised in the context of Employment and Training (ETA) sponsored initiatives to build new State workforce development systems utilizing One-Stop Career Centers. This system building at the local level involves the delivery of labor exchange services under the Wagner-Peyser Act and may involve the unemployment insurance program for payment of benefits under the Social Security Act (SSA). Basic labor exchange and unemployment insurance services are funded through a dedicated employer tax, the Federal Unemployment Tax Act (FUTA).

As noted, this Administration has already permitted Massachusetts to privatize its employment services, office by office, through competitive bidding.

Unemployment Insurance - Contracting out of benefit eligibility determination and tax functions raise different conceptual issues. Arguably these functions involve much more use of value judgments in Government decision making than ES. However, it may be permissible to contract out those data gathering functions that can be broken out in an effective, cost-efficient manner, without deterioration of services to claimants and employers.

The Texas proposal is largely limited to Food Stamps and Medicaid, however, policy makers should be aware that a decision for these programs may well set precedent for other public assistance programs such as Foster Care and Child Care.

The merit system requirements remain in effect for the Title IV-E of the SSA (Foster Care). Historically, ACF has offered the State agencies administering the foster care program the option of contracting to private, non-profits for such administrative activities such as licensing, recruitment, supervision and training. ACF is currently in the process of reviewing the foster care statutory language to determine what effect, if any, the merit system standards may have on a State's ability to contract out certain administrative activities in the private sector.

VII Related Issues

Job Protection -- Successorship

As stated above, one of the most significant concerns of organized labor is the risk State employees face under privatization. Thousands of State eligibility workers could lose their jobs if private employees are hired to replace them. Typically, the Federal Government has taken an interest in economy and efficiency, and recognizes benefits from the fact that a carryover workforce will minimize disruption to the delivery of services during any period of transition and provide the advantages of an experienced and trained workforce.

The Clinton Administration has a clear position with regard to employees working under Federal service contracts. In October 1994, the President signed E.O. 12933 "Non-Displacement of Qualified Workers Under Certain Contracts". The E.O. protects workers under Federal contracts from being displaced when a successor contract is awarded, by assuring them the right of first refusal to employment under the new contract in positions for which they are qualified.

It is unclear whether such protections could be required of a State seeking to privatize Food Stamp and Medicaid eligibility workers. However, wherever possible -- especially under a waiver – the programs could establish a requirement similar to the EO. These non-displacement protections would require successor contracts to offer those employees (other than managerial and supervisorial employees) whose employment would be terminated as a result of the new contract, a right of first refusal to employment under the contract in positions for which they are qualified. No employment openings could be filled under the contract until such right of first refusal has been provided. This option has not yet been explored with the program agencies.

Entitlement Guarantee

One of the Administration's key principles during the Congressional budget battles of 1995 and 1996 was that Medicaid beneficiaries should retain a legally enforceable right to Medicaid. HCFA believes this principle could be compromised by allowing private contractors to make eligibility determinations. HCFA staff suggest making decisions about the eligibility of needy people for health care is one of the most fundamental functions of government. Giving so basic a function to the private sector raises questions about what role government legitimately serves in assuring the protection of the most vulnerable among us.

Confidentiality

As a result of negotiations between the State of Texas and Department of Agriculture, the RFO was revised to include language ensuring that the contractor would adhere to the confidentiality provisions under the Food Stamp Act and that applicants and recipients would have the right to fully understand how information would be used in determining eligibility. The RFO currently includes language specifying that the use or disclosure of information about applicants or clients during the screening and referral and the eligibility determination and enrollment processes shall be restricted to purposes directly connected with the administration of assistance programs. Information supplied for the purpose of determining eligibility may not be made available to other programs in TIES without the consent of the client. Bidders must demonstrate how clients will be advised of their right to confidentiality and how their concurrence would be obtained.

While these revisions ensure compliance with the Food Stamp and Social Security Acts, the Departments continue to have concerns that wide-scale privatization and potential loss of merit system protections may undermine the client confidentiality. Merit Personnel systems have historically established incentives for maintaining the integrity of public assistance programs. It is uncertain how privatization would influence the relationship between case workers and clients.

Conflict of Interests in Policy

It should not be assumed that a public employee would be more interested in operating public assistance programs better than a private employee on the basis of his or her status as a merit employee. However, private employees hired to carry out the TIES system may be affected negatively if the contractor does not realize a profit. The profit incentive raises numerous questions regarding the effect such wide-scale privatization would have on employees who are responsible for the determination of eligibility as well as the effect on overall client services. For instance, the TIES RFO proposes to use client surveys to measure the contractor's performance. Will the interest in maintaining client satisfaction increase a caseworker's incentive to approve benefits, even if questionable information about the applicant's eligibility exists? Would profit incentives alter the current incentives out stationed non-merit employees have for their role in the Medicaid certification process?

Also, a conflict of interest may be created by the increased flexibility provided to the States through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. While the State of Texas retains the authority to establish program policy decisions, the State may come under heavy influence by the contractor to approve policies that assist the contractor in containing costs, possibly at the expense of client services.

State/Contractor Program Responsibilities

Under the proposed TIES RFO, the State maintains responsibility for developing program policy, conducting Quality Control (QC) reviews and fair hearings. The TIES contractor is responsible for implementing program policy. The TIES system, therefore, adds an additional level to the current bureaucratic structure. The FCS and the State of Texas have negotiated revisions to the RFO to clarify Federal/State and State/Contractor relationships. However, the Departments continue to have serious concerns about the increased complexity of the certification process under a Statewide privatization initiative and whether any resulting barriers to participation would be created as a result of these split relationships. These relationships may become even further complicated if the responsibility for the certification process becomes split between State and contract employees.

Risk of Loss

The draft TIES RFO specifies the financial incentives for good performance and fiscal penalties for poor performance. One financial penalty to the contractor is the liability of QC sanctions. The Department and State of Texas have negotiated additional language that clarifies that the Federal Government will continue to hold the State liable for the QC sanctions and that the Federal and State governments would be responsible for negotiating the resolution of any Federal QC liability.

The Departments have concerns that the contractor may have more interest in cost savings and less interest in resulting QC liabilities. Should a contractor experience a financial loss due to a QC liability, the potential for litigation between the State and contractor would appear to be great. The Departments also share concerns about the potential of increased litigation between the State and contractor if the certification process becomes a joint responsibility between State and private contract employees.

The Departments have concerns about how these potential conflicts would affect the ongoing operations of the Food Stamp and Medicaid Programs throughout the State.

Payment Arrangements

The contract as described in the Request for Offer (RFO) draft provides for a cost incentive formula for payment to the supplier. The proposal being contemplated is a Fixed Price Incentive Fee/Performance Fee contract based on a 60/40 share ratio cost incentive formula for the State and the Supplier. Payment to the selected supplier will be monthly at 80% of the negotiated billing amount. The State will review the supplier's cost and performance for every three-month period throughout the term of the contract. In the event the supplier's incurred costs in any given three-month period are less than the total costs contained within the negotiated billing amounts for the same period, the supplier will earn and be paid an additional fee in an amount equal to 40% of the cost underrun of the three-month period.

Conversely, if the supplier-incurred costs are over the total costs contained within the negotiated billing amounts for the three-month period, the supplier's fee for that period will be reduced by an amount to equal 60% of the cost overrun for that period. In either case, every three months, the supplier will be paid all costs not paid against the three monthly billings plus fees adjusted up or down to reflect its increase or decrease resulting from the application of the 60/40 share ratio formula, subject to an absolute price ceiling of 110% of the total contract price for the three -month period. In no event shall the supplier be paid , for any given three-month period, a total amount greater than the ceiling price established for that period.

In addition to the above cost incentive, the State will negotiate a portion of the total fees available for performance incentives. This will be done on a quarterly basis and the award determination is unilateral and not subject to dispute by the Supplier.

Because Medicaid and Food Stamps pay for the actual cost to the State programs of acquiring this system, the above payment arrangement would be eligible for Federal Financial Participation (FFP).

Potential Financial Conflicts of Interest

Under CFR 45 Part 74 in Subpart E, section 74.81 (Prohibition against profit) no HHS funds may be paid as profit to any recipient even if the recipient is a commercial organization, and HHS feels that this could be cited as a basis for limiting the payments in the above described situation to the costs of the State governmental agency.

The RFO may permit a situation that could give rise to a potential conflict of interest. The terms of the RFO are such that it permits a potential supplier to be a State governmental agency. In this situation (where the supplier is a State governmental agency) the State shall propose an interagency contract with the supplier in accordance with the Interagency Cooperation Act, Chapter 771, Texas Government Code. In otherwords, the State would not pay the contractor for services to be performed by the subcontracting State agency. Rather, the State will pay the supplier/sub-State agency directly.

This scenario could result in payments to the supplier/sub-State agency in an amount that would be in excess of what had been paid when the State was performing the same functions. Consequently, the payments made could be in excess of the cost of providing the services. This may create an opportunity for intergovernmental transfers (IGTs) which could return a portion of the State's payment to the sub-State agency back to the State to be re-used for the State's share of the match for additional Medicaid expenditures.

According to CFR 45 Part 74 in Subpart E, section 74.81(Prohibition against profit) no HHS funds may be paid as profit to any recipient even if the recipient is a commercial organization. Profit is any amount in excess of allowable direct and indirect costs. This could be cited as a basis for limiting the payments in the above described situation to the costs of the State governmental agency.

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Wage

OT

WC

OSHA

Taxes

mw? EITC

Kind of where we're at

- probs

· how to avoid

(FS?)

Unionization/CB

cc CMB, Anne Lewis

Stenholm

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FAX TRANSMISSION COVER SHEET

TO: Diane Fortuna

DATE: Feb 21, 1997

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Comments: ____________

JC

TEXAS HEALTH AND HUMAN SERVICES COMMISSION

MICHAEL D. McKINNEY, M. D.
COMMISSIONER

February 19, 1997

Donna E. Shalala, Ph.D.
Secretary
United States Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D. C. 20201

Re: Texas Integrated Enrollment Services Project

Dear Secretary Shalala:

The purpose of this letter is to respond to correspondence dated January 31, 1997, from Mr. Mark Ragan, Director of the Office of State Systems, Administration for Children and Families, to my office regarding the review of the State of Texas' request for approval of the Request for Offers for the Texas Integrated Enrollment Services [TIES] project. [Copy attached.] Mr. Ragan advises that the ACF and HCFA continue to review the RFO and that a final decision cannot be given at this time. He states that discussions were being conducted at the highest levels within DHHS.

It is therefore appropriate to direct my concerns about the approval process to your office and to inform you of my office's plans, based on our understanding of applicable federal regulations, to release the TIES Request for Offers [RFO].

As you may know, the State of Texas, through this agency and the State Council on Competitive Government, has embarked on a challenging initiative to integrate the eligibility determination and client enrollment functions of several public assistance programs, including Medicaid and cash assistance under the Temporary Assistance to Needy Families program. The State's overarching goal is to improve service to recipients of public assistance by maximizing efficiencies and taking advantage of technical and business innovations available through the marketplace. The State also has selected this project as a means to encourage public-private competition and, in the process, stimulate the formation of public-private partnerships.

The Texas Legislature directed this agency and the Council to determine the potential benefits of contracting out these functions and, if this option was deemed feasible, authorized this agency to contract out those functions. Following an extensive study of the programs to be included in the project and an assessment by the Council, the Council determined that there was a compelling business case to support the contracting out of eligibility determination and enrollment functions. The Council directed this agency to prepare and conduct a competitive procurement to implement the Council's findings.

We first presented the RFO for an integrated enrollment service for required prior approval to your agency and the Department of Agriculture in June of 1996. Following an extensive review and comment by the federal agencies, we met with agency representatives in Austin on July 23, 24, and 25. Based on the input and direction we received from federal staff and others, we resubmitted the RFO and Planning APD for the project for prior federal approval on October 17, 1996. We received acknowledgment in a letter from Mr. Joseph F. Costa, Director of the State Systems Policy Staff for ACF, dated October 24, 1997.

We met once again with federal staff at the offices of the Food and Consumer Service in Alexandria on November 15, 1996, where we received additional comments and direction. We received requests for clarification from DHHS and USDA on November 19th. We submitted information in response to these requests on November 27 and December 13, 1996. Mr. Ragan's letter is the most recent correspondence we have received from the Department on this matter.

Although your agency has indicated more time is needed to make a final decision on our request for approval, we believe a DHHS regulation adopted last year authorizes the State of Texas to proceed with the implementation of the TIES on a provisional basis without the Department's prior approval. The regulation, codified at 45 C.F.R. section 95.611(d), promises prompt agency action on states' requests for prior approval of Planning APDs, Implementation APDs, RFPs, contracts, and certain contract amendments. Under the new regulation, a state's request is automatically deemed to have provisionally met the prior approval conditions of the regulations if DHHS has not, within 60 days following the date of the its letter acknowledging receipt of the state's request, provided the state written approval, disapproval, or a request for information.

Based on our understanding of the purpose and intent of the regulation, we believe that, due to the delay in federal action, the State has provisionally met the prior approval conditions of DHHS and USDA regulations.

In the notice of proposed rule making that appeared in the Federal Register, the Department explained that the "prompt action" regulation was proposed in the interest of increasing efficiency and reducing federally-imposed burdens on the states. The Department's avowed intention was to help states contain costs by minimizing the delay in granting required approvals. The Department acknowledged that states which are confident their proposed ADP projects satisfy federal requirements should not be penalized by excessive delay in the Department's approval. *See* 60 Fed. Reg. 37859 (July 24, 1995). On final adoption of the regulation, the Department responded to a comment that the regulation may be employed to delay the approval of state requests by offering explicit assurance that "this will not happen." 61 Fed. Reg. 39894, 39896 (July 31, 1996).

Unfortunately, it appears that this is precisely what has occurred with the State's request for approval of the TIES RFO. Our concern is that the current and – if we interpret your agency's actions correctly – potentially interminable delay in the approval of the TIES RFO violates the spirit, if not the letter, of the prompt action regulation. Certain that this is not the Department's intention, we believe it is reasonable to interpret the regulation to authorize the State of Texas to proceed with the TIES project under the provisional approval criteria of the regulation.

The regulation is silent as to the Department's duty and a state's reasonable expectations in cases where federal approval takes longer than 60 days. It seems clear, though, that the policy basis for the regulation was to bring closure to a process that unfairly delays and adds costs to proposed state action. The Department's actions imply, however, that it interprets the regulation to permit an extension of the period of review for an additional 60 days upon delivery of written notice to the state. This application is plainly at odds with the Department's justification for the rule.

Secretary Donna E. Shalala
February 19, 1997
Page 3

If the regulation is to apply in this instance, we think the more reasonable application would be to permit the Department to receive an additional 60 days to review a state request for approval when it either (1) requests additional information from the state or (2) receives information from the state in response to such a request. Under this interpretation, the Department would be required, within the 60 days following the request or receipt of information, to provide the state a written approval, disapproval, or request for additional information. Mr. Ragan's letter of January 31, then, would not extend the Department's review period because it did not provide approval, disapproval, or request additional information from the State.

Accordingly, under this reading of the prompt review regulation, the State of Texas was deemed to have provisionally met the prior approval conditions of regulations, at the earliest, on January 18, 1997 (60 calendar days following November 19, 1996, the date of the Department's request for more information) or February 11, 1997, at the latest (60 days following the State's December 13, 1996, submission in response to the November 19 request).

Based on this understanding of the regulation, my staff is proceeding with final preparation of the TIES RFO for formal release to the marketplace. If we are incorrect in our reading of the regulations, we believe it is the Department's responsibility to so advise and provide the State of Texas information necessary to fulfill the prior approval requirement. If we receive no direction from the Department by February 28, 1997, we will assume you concur in our reading of the regulations and we will formally issue the TIES RFO.

We have conducted the dialog with our federal partners in the utmost good faith and in the spirit of partnership. We think this commitment is critical to the ultimate success of the TIES project. Almost without exception, our federal counterparts have been extremely helpful in providing my staff useful advice and direction. Their input has been indispensable to ensuring the success of the project. Yet, despite these efforts and repeated assurances of a prompt federal decision, we appear no closer to approval than we were nearly nine months ago when we first approached our federal partners. To my knowledge, we have responded (or have attempted to respond) to every request for information and clarification from federal oversight agencies. We are unaware of any reason why the RFO cannot be issued at this time. Mr. Ragan's letter discloses no lingering or insurmountable issues regarding the project. Thus, we are left to speculate whether the delay in approval is for reasons other than the adequacy of the RFO and compliance with federal requirements.

I agree with Mr. Ragan that a project as large and ambitious as TIES deserves careful consideration, and we are committed, as your staff are, to ensuring that the needs of our clients and taxpayers' interests are protected. However, each month of delay in the release of the RFO costs the taxpayers of Texas. To date, the State of Texas has invested approximately $1.8 million in the planning and development of the TIES project. Additional expenditures will no doubt be necessary to accommodate further federal delay.

More important, we conservatively estimate that each month of delay in the statewide implementation of integrated enrollment in Texas costs the taxpayers of this state at least $10,000,000. The Texas Legislature, in authorizing this project in 1995, instructed my office to direct the savings generated by integrated enrollment to fund additional health and human services programs. I estimate that the annual savings in administrative costs alone generated by TIES could provide health care coverage an additional 150,000 needy Texas children. Thus, the inability of the federal authorities to fulfill their responsibilities frustrates the intent of the Texas Legislature and is borne directly by our agencies' clients and the citizens of Texas.

I regret that this action has become necessary, but it is my duty to ensure the intent of the Texas Legislature is implemented and the interests of the people of Texas are advanced. We firmly believe that the TIES project is the right thing for recipients of public assistance and the State of Texas, and it is long overdue. I understand our efforts have been criticized by people whose interests may be to preserve the status quo. Unlike your staff, these persons either have not taken the time to consult with us, have not given us the courtesy of an open and honest discussion of the issues, or have chosen to ignore the clear commitments we have made to improve service to our clients and give value to the taxpayers.

We view the TIES project as an opportunity to realize President Clinton's vision of a nation where the important and critical decisions of government are made closest to the people whose lives they affect. We also share his belief that restoring to the states this responsibility and authority is critical to reforming the welfare system and meeting the challenges of the next century. And we agree with your recent remarks that "when we target our resources responsibly and innovatively, when we team up with our private and public partners, and when we act as tough, savvy managers, the federal government can help lead the way in creating a stronger and healthier nation – a nation capable of meeting challenges both old and new." With your help, the State of Texas can follow a similar path.

Consequently, I respectfully ask for your assistance in resolving the apparent impasse over the approval of the Texas Integrated Enrollment Services Request for Offers. As always, we are prepared to supply any information you or your staff may need to reach a prompt and correct decision.

Sincerely,

Michael D. McKinney, M.D.
Commissioner

Attachment

c: Governor George W. Bush
Lieutenant Governor Bob Bullock
Speaker Pete Laney
Comptroller John Sharp

FACSIMILE TRANSMISSION

Office of the Assistant Secretary

The Administration for Children and Families

DATE:

TO: John Monahan / Diana Fortuna

Telephone: 690 5672 456 7028

Fax:

Number of Pages (excluding cover): 11

FROM: Margaret Pugh

Telephone: (202)401-6944

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MESSAGE:

Background - everything you ever wanted to know about CWEP and AWEP

Department of Health and Human Services
Administration for Children and Families
370 L'Enfant Promenade, S.W., Washington, D.C. 20447
Phone: (202) 401-9200

JOBS Characteristics Book
FY 1995-1996

TABLE 4
OPTIONAL COMPONENTS

State	Job Search	OJT	Work Supp.	CWEP	Post-secondary	Alternative Work Ex.	Alternative Emp., Ed. or Training	Limited or Restricted Self-Initiated Education or Training	State Designed UP Work Program
Alabama	X	X			X	X	X	X	X
Alaska	X	X			X	X	X	X	X
Arizona	X	X		X	X	X	X	X	X
Arkansas	X	X			X	X		X	X
California	X	X	X	X	X	X		X	X
Colorado	X	X	X	X	X			X	X
Connecticut	X	X			X	X		X	X
Delaware	X	X		X	X			X	X
District of Columbia	X	X			X	X	X	X	X
Florida	X	X	X	X	X	X		X	
Georgia	X	X		X	X	X		X	
Hawaii	X	X		X	X		X		X
Idaho	X	X			X	X	X	X	X
Illinois	X	X	X	X	X	X	X		X
Indiana	X	X	X	X	X	X	X	X	X
Iowa	X				X	X	X	X	X
Kansas	X	X		X	X				X
Kentucky	X	X		X	X	X	X	X	X
Louisiana	X	X		X	X		X	X	X
Maine	X	X		X	X	X	X	X	X
Maryland	X	X	X		X	X	X	X	X
Massachusetts	X	X	X		X	X		X	X
Michigan	X	X	X	X			X	X	X
Minnesota	X	X	X	X	X	X	X		X
Mississippi	X				X	X		X	X
Missouri	X	X		X	X	X		X	X
Montana	X	X			X	X		X	X
Nebraska	X	X		X	X	X		X	
Nevada	X	X		X				X	X
New Hampshire	X	X			X	X		X	X
New Jersey	X	X	X	X	X		X	X	X
New Mexico	X	X		X	X	X	X		X
New York	X	X	X	X	X		X	X	X
North Carolina	X	X		X	X				X

FY 1995-1996

TABLE 4
OPTIONAL COMPONENTS

State	Job Search	OJT	Work Supp.	CWEP	Post-secondary	Alternative Work Ex.	Alternative Emp., Ed. or Training	Limited or Restricted Self-Initiated Education or Training	State Designed UP Work Program
North Dakota	X	X	X	X	X	X		X	X
Ohio	X	X	X	X	X	X	X	X	X
Oklahoma	X	X	X		X	X	X	X	X
Oregon	X	X	X			X	X	X	X
Pennsylvania	X	X		X	X	X	X	X	X
Rhode Island	X	X	X	X	X	X		X	X
South Carolina	X	X			X	X	X	X	X
South Dakota	X	X			X	X		X	X
Tennessee	X	X			X	X	X	X	X
Texas	X	X			X	X		X	X
Utah	X	X			X	X		X	X
Vermont	X	X	X	X	X			X	X
Virginia	X	X	X		X	X	X		X
Washington	X	X	X	X	X	X		X	X
West Virginia	X	X		X	X	X		X	X
Wisconsin	X	X	X	X	X	X		X	X
Wyoming	X	X			X	X			X
Guam	X	X		X	X				X
Puerto Rico	X	X			X	X	X	X	
Virgin Islands	X	X		X	X			X	
TOTALS	54	52	20	32	51	41	26	45	48

HHS-ACF circular, January 1994

BACKGROUND

Under the Job Opportunities and Basic Skills Training Program (JOBS), the Community Work Experience Program (CWEP) is an optional component. The State IV-A agency must offer at least two of the following four activities: (1) group and individual job search, (2) on-the-job-training, (3) work supplementation, and (4) community work experience (CWEP), or other alternative work experience (AWEP).

CWEP is generally limited to projects which serve a useful public purpose in fields such as health, social services, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, public facilities, public safety and child care. CWEP provides unpaid work experience and training to assist JOBS participants, who have little or no work experience, move into regular public or private employment.

The sponsoring agency must be a public or a private nonprofit agency. The maximum number of hours that a participant may work is determined by dividing the family's AFDC grant by the Federal or State minimum wage, whichever is higher.

States may offer an alternative work experience program (AWEP) which must be described in its JOBS plan and approved by the Secretary. The description should include sponsors, the type of activities, the hours or length of participation required, target groups, and how the program is different from CWEP.
Most States offer AWEP to provide more flexibility in the number of hours that a participant may work. Under AWEP, the AFDC grant does not necessarily determine the number of hours a participant may work. In an approved AWEP, work assignments may be full- or part-time. Participants may generally work any number of hours per week that the sponsor requires.

Manpower Demonstration Research Corporation (MDRC) has conducted research on CWEP in a number of States and results have shown that CWEP is well received by supervisors, communities and participants. Although there is little evidence that CWEP assignments have led to positive employment and earnings effects, or reductions in welfare payments, the MDRC studies have shown that the work assignments were meaningful, and most participants thought that the work requirement was fair. In addition, analysis conducted by MDRC indicates that the value of work performed from unpaid work experience is generally a worthwhile investment for taxpayers.

In its 1993 report on "Unpaid Work Experience for Welfare Recipients," MDRC suggests that to run work experience on a large scale, the essential ingredients are: sufficient funding; strong staff commitment to the program; adequate worksite capacity; clearly articulated procedures for assigning clients to worksites, monitoring client participation, exempting clients who cannot work, and sanctioning clients who do not comply; and support for the program (or at least lack of opposition) from labor unions, welfare advocacy groups, and others in the community.

CURRENT STATUS

At present, there are 32 States and 2 territories that operate CWEP. In addition, there are 26 States that have approved AWEP Programs. The national monthly percentage of JOBS participants enrolled in CWEP/AWEP is roughly 3.6 percent (FY 1992 report).

The following 8 States are reporting the most participants enrolled in work experience. Of the 8 States surveyed, Arkansas, Oklahoma, and South Dakota have an approved AWEP.

STATE (AWEP States in italic)	CWEP / AWEP PARTICIPATION
ARKANSAS	27.9%
COLORADO	12.8%
NEVADA	19.1%
OHIO	15.6%
OKLAHOMA	8.6%
SOUTH DAKOTA	8.7%
VERMONT	7.6%
WEST VIRGINIA	8.5%

TABLE 1 AVERAGE MONTHLY PERCENTAGE OF PARTICIPANTS BY STATE AND COMPONENT
FISCAL YEAR 1995

	Component						
State	Job Search	OJT	Work Supplmntn	CWEP	Other Unpaid	Other Paid	Total Participants
Alaska							
Alabama	8.6%	0.1%	0.0%	0.0%	3.4%	0.9%	5183
Arkansas	8.0%	0.3%	0.0%	0.1%	5.8%	0.0%	6591
Arizona	9.2%	0.1%	0.0%	7.4%	0.1%	0.2%	5222
California	4.3%	0.2%	0.1%	4.8%	0.9%	0.5%	80070
Colorado	8.5%	0.2%	2.7%	7.2%	0.2%	0.0%	5880
Connecticut	7.4%	2.0%	0.0%	3.2%	0.0%	0.0%	6987
District of Columbia							
Delaware	12.1%	0.2%	0.0%	5.1%	0.0%	4.6%	944
Florida	0.2%	0.7%	0.0%	0.0%	0.0%	0.0%	27830
Georgia	0.9%	4.5%	0.0%	0.0%	5.9%	0.0%	17306
Guam							
Hawaii	14.4%	0.0%	0.0%	14.4%	0.0%	1.6%	1449
Iowa	5.4%	0.0%	0.0%	0.0%	3.4%	0.0%	12782
Idaho	7.0%	0.1%	0.0%	14.2%	0.0%	0.2%	1014
Illinois	8.5%	0.0%	0.0%	1.0%	4.8%	21.0%	31096
Indiana	8.9%	0.0%	0.0%	0.0%	0.0%	0.0%	9245
Kansas	9.5%	0.1%	0.0%	10.5%	0.3%	5.5%	4928
Kentucky	1.5%	0.0%	0.0%	1.5%	22.4%	0.0%	9478
Louisiana	4.0%	0.1%	0.0%	4.3%	0.0%	0.0%	8650
Massachusetts	7.7%	0.0%	0.2%	0.0%	3.0%	0.0%	18524
Maryland	6.5%	0.3%	0.7%	0.0%	11.0%	2.1%	7432
Maine	15.6%	1.0%	0.0%	0.3%	12.4%	0.1%	3477
Michigan	10.6%	0.4%	0.0%	1.2%	0.1%	0.1%	41986
Minnesota	8.1%	0.4%	0.4%	8.4%	0.0%	0.0%	6227
Missouri	3.1%	0.2%	0.9%	16.0%	3.7%	0.0%	7194
Mississippi	2.9%	0.1%	0.0%	0.0%	11.8%	0.0%	5887
Montana	9.6%	0.3%	0.0%	0.0%	12.3%	0.0%	1848
North Carolina	2.1%	0.3%	0.0%	2.1%	0.0%	0.0%	12789
North Dakota	2.9%	0.2%	0.1%	1.7%	0.9%	0.0%	1398
Nebraska	21.5%	0.2%	0.0%	0.9%	0.0%	8.2%	5778
New Hampshire	7.9%	0.1%	0.0%	1.1%	0.0%	5.4%	1991
New Jersey	4.4%	0.0%	0.0%	0.0%	0.0%	0.0%	15401
New Mexico	10.0%	0.0%	0.0%	0.2%	10.0%	0.0%	8251
Nevada	13.1%	0.3%	0.0%	7.8%	0.0%	0.0%	742
New York	3.7%	0.0%	1.2%	6.4%	0.0%	0.0%	52332
Ohio	3.1%	0.0%	0.1%	14.9%	2.1%	0.0%	45288
Oklahoma	10.7%	0.0%	0.0%	0.0%	7.9%	2.6%	6577
Oregon	21.7%	0.0%	0.7%	0.0%	3.2%	1.1%	2725
Pennsylvania	3.3%	0.1%	0.0%	5.8%	0.6%	0.0%	35119
Puerto Rico	7.1%	0.0%	0.1%	0.0%	0.3%	2.2%	6326
Rhode Island	7.3%	0.0%	4.8%	4.8%	3.5%	15.2%	4051
South Carolina	16.6%	0.1%	0.0%	0.0%	7.9%	0.5%	7013
South Dakota	12.0%	1.9%	0.0%	0.0%	5.9%	0.0%	1453
Tennessee	0.5%	0.1%	0.0%	0.0%	3.8%	0.0%	11163
Texas	7.4%	0.8%	0.0%	0.0%	0.0%	0.0%	23148
Utah	11.9%	0.0%	0.0%	0.0%	1.5%	2.7%	6377
Virginia	13.0%	0.3%	0.5%	0.0%	8.1%	1.6%	6994
Virgin Islands							
Vermont	21.3%	0.1%	0.1%	9.1%	0.0%	0.0%	2175
Washington	1.6%	0.2%	0.0%	0.0%	0.0%	0.0%	22229
Wisconsin	22.6%	0.3%	1.6%	5.2%	8.2%	0.5%	14731
West Virginia	0.2%	0.1%	0.0%	15.1%	0.0%	0.0%	9377
Wyoming	0.0%	46.3%	0.0%	0.0%	0.0%	0.0%	986
U.S. Total	6.1%	0.4%	0.3%	3.8%	2.4%	1.5%	632,054

TABLE 2 AVERAGE MONTHLY PERCENTAGE OF PARTICIPANTS BY STATE AND WEEKLY SCHEDULED HOURS
FISCAL YEAR 1995

	Weekly Scheduled Hours								
State	1-5 Hours	6-10 Hours	11-15 Hours	16-20 Hours	21-25 Hours	26-30 Hours	31-35 Hours	Over 35 Hours	Total Participants
Alaska	/1								
Alabama	15.9%	8.1%	11.2%	29.8%	5.5%	10.8%	12.9%	6.6%	6147
Arkansas	56.0%	4.0%	2.9%	28.0%	1.1%	2.9%	2.5%	4.7%	6393
Arizona	19.4%	5.2%	5.4%	32.6%	9.6%	12.5%	4.8%	10.4%	5218
California	6.3%	11.7%	10.5%	37.8%	8.3%	6.8%	6.8%	12.0%	77502
Colorado	18.9%	11.1%	15.8%	25.8%	6.0%	7.3%	3.5%	11.3%	5680
Connecticut	0.0%	2.6%	0.0%	97.4%	0.0%	0.0%	0.0%	0.0%	6065
District of Columbia	/1								
Delaware	28.6%	4.9%	6.8%	17.2%	5.4%	28.0%	5.8%	5.2%	938
Florida	28.7%	4.3%	7.5%	14.2%	16.7%	14.8%	5.0%	8.8%	27582
Georgia	6.6%	3.4%	4.8%	48.6%	9.5%	10.0%	5.5%	11.6%	17294
Guam	/1								
Hawaii	2.9%	6.2%	6.6%	15.5%	45.1%	9.3%	11.6%	2.8%	1444
Iowa	38.7%	3.9%	5.7%	18.4%	7.0%	8.5%	3.9%	15.9%	12746
Idaho	16.8%	11.7%	14.3%	30.2%	7.2%	8.4%	4.6%	6.7%	1013
Illinois	13.6%	1.2%	1.5%	53.8%	13.8%	5.9%	3.9%	6.3%	31068
Indiana	7.1%	8.4%	6.2%	59.5%	6.8%	4.0%	2.6%	5.5%	6779
Kansas	7.5%	10.3%	19.1%	28.4%	5.4%	8.8%	4.4%	16.1%	4892
Kentucky	2.5%	5.4%	18.0%	62.7%	3.8%	5.0%	1.4%	1.3%	9475
Louisiana	14.7%	12.1%	10.9%	24.6%	13.7%	12.2%	6.3%	5.6%	8639
Massachusetts	0.5%	15.8%	22.3%	37.2%	5.6%	5.8%	3.1%	9.6%	17849
Maryland	0.7%	6.3%	6.7%	36.9%	17.8%	12.1%	8.0%	11.5%	6647
Maine	13.4%	10.2%	6.3%	53.3%	5.8%	5.0%	2.0%	3.9%	3472
Michigan	8.9%	2.3%	3.4%	61.7%	6.4%	6.9%	1.9%	8.4%	33899
Minnesota	10.2%	16.7%	15.6%	28.9%	9.2%	8.0%	4.8%	6.6%	6202
Missouri	13.0%	2.6%	7.6%	44.8%	11.5%	7.9%	7.1%	5.6%	7184
Mississippi	18.6%	1.5%	1.5%	55.4%	6.0%	6.3%	6.2%	4.5%	5860
Montana	1.2%	4.5%	5.9%	40.7%	8.7%	12.0%	6.4%	20.6%	1638
North Carolina	20.3%	8.6%	14.1%	17.6%	15.1%	8.7%	6.5%	9.0%	12713
North Dakota	3.0%	9.2%	40.5%	28.2%	4.1%	4.7%	2.5%	7.8%	944
Nebraska	19.4%	12.2%	14.3%	25.1%	5.2%	9.8%	1.1%	12.9%	5731
New Hampshire	6.1%	13.8%	7.1%	48.5%	4.2%	10.6%	2.0%	7.7%	1969
New Jersey	0.9%	2.0%	6.3%	36.9%	13.8%	25.1%	8.2%	6.8%	12207
New Mexico	22.6%	16.6%	20.2%	24.4%	4.0%	4.7%	1.9%	5.6%	8234
Nevada	28.0%	4.7%	8.1%	35.9%	5.1%	6.5%	2.3%	9.5%	744
New York	3.9%	2.8%	15.1%	42.6%	11.2%	12.7%	6.8%	4.8%	50674
Ohio	29.6%	5.2%	13.2%	31.2%	6.2%	6.9%	3.5%	4.2%	44549
Oklahoma	2.7%	13.7%	22.8%	29.9%	6.0%	11.4%	4.0%	9.4%	5488
Oregon	8.3%	7.3%	5.6%	32.9%	9.4%	10.4%	5.0%	21.0%	2614
Pennsylvania	7.3%	8.4%	13.0%	29.3%	13.5%	15.1%	7.2%	6.1%	35119
Puerto Rico	1.9%	7.7%	17.7%	34.9%	13.4%	10.4%	4.2%	9.7%	5584
Rhode Island	2.8%	1.2%	2.1%	43.5%	15.7%	9.5%	8.2%	17.0%	3897
South Carolina	11.8%	18.4%	8.7%	35.1%	2.7%	10.4%	3.6%	9.3%	7004
South Dakota	6.9%	21.1%	24.9%	20.2%	4.1%	15.8%	1.9%	5.0%	1451
Tennessee	33.7%	4.1%	4.0%	47.4%	1.7%	3.7%	2.5%	3.0%	11010
Texas	32.9%	7.5%	7.7%	19.4%	12.1%	7.3%	4.6%	8.6%	23118
Utah	19.9%	9.2%	13.2%	18.7%	9.9%	9.1%	5.3%	14.7%	6372
Virginia	11.4%	9.3%	20.4%	37.0%	5.7%	5.2%	4.3%	6.8%	6610
Virgin Islands	/1								
Vermont	33.5%	22.4%	11.6%	18.5%	3.9%	2.7%	1.5%	5.9%	2170
Washington	21.4%	9.7%	28.2%	23.2%	3.8%	6.3%	2.5%	5.0%	22151
Wisconsin	6.2%	6.7%	8.4%	45.4%	4.8%	7.8%	6.6%	14.2%	14712
West Virginia	0.2%	0.4%	0.5%	0.7%	0.4%	0.3%	0.1%	97.4%	8376
Wyoming	6.9%	13.0%	19.2%	20.7%	6.2%	9.0%	12.0%	13.1%	610
U.S. Total	13.8%	7.1%	10.8%	36.3%	8.9%	8.8%	4.9%	9.5%	606,655

/1 Data not reported

EXAMPLES OF WORK AND TRAINING PROGRAMS UNDER WAIVERS

Between January 1993 and August 1996, the Clinton Administration granted 79 AFDC waivers (under Section 1115 of the Social Security Act) to 43 states. Many states used this authority to create time limits and work requirements, and to translate cash grant and in-kind benefits into wages earned by the recipient.

The most common kind of work program created through waivers involved diverting AFDC and Food Stamp benefits to employers to subsidize private sector jobs. Employment generated through this mechanism is subject to FLSA, and workers are subject to FICA and other taxes, and are eligible for the EITC. A paper which describes these demonstrations in detail is attached.

Most state work programs were implemented under existing Community Work Experience Program (CWEP) or Alternative Work Experience Program (AWEP) authority. Attached are two memoranda which describe state CWEP and AWEP programs. AWEP already provided states the flexibility to require up to 40 hours of work, without regard to a minimum wage requirement. As a result, most state waivers did not involve creating new work programs in this area, but instead focused on provisions, such as narrowing exemptions, increasing sanctions, etc.

There are a few examples of community service programs established under Section 1115 waivers. Two significant examples are Michigan and Wisconsin. Michigan's "To Strengthen Michigan Families" demonstration project, recipients could be required to attend PTA meetings, work at schools where their children attended (e.g., playground duty), reading to their children. Wisconsin's W-2 program, now being implemented under TANF, is a variation of the AWEP program. There are three kinds of requirements, depending upon one's employability. These are:

1) Trial Jobs. W-2 pays a maximum of $300 a month to the employer; the employment is subject to FLSA requirements.

2) Community Service Jobs. A family would receive a payment of $555 per month, but would be required to perform 30 hours of work per week and up to 10 hours in educational and training activities. This would have met the FLSA standard before the most recent increase in the minimum wage (though this wasn't a factor in the state's selection of the payment amount), but under Wisconsin's current TANF state plan the payment and hourly requirement will remain the same, even though the increase in the minimum wage effectively pushes the family below the FLSA threshold.

3) W-2 Transition. This component is for the least employable recipients. They would receive a payment of $518 per months, for 28 hours of work activities per week, with up to 12 more hours of participation in education and training activities. With the increase in the minimum wage, this also effectively pushes the family below the FLSA threshold.

The state has no plans to reduce the hourly work requirements above in response to the increase in the minimum wage.

[n.b. - as of 2/24/97, WI has indicated its intention to raise benefits $120/mo, ~~[illegible]~~ giving W2 participants $5.25/hr. in wages]

II. OPTIONAL JOBS PROGRAM COMPONENTS & BASIC LITERACY LEVEL

A. JOB SEARCH -- A job search program may serve applicants and/or recipients in either individual or group job seeking activities. Individual job search includes the provision of counseling, job-seeking skills training, information dissemination and support on a one-to-one basis. Group job search includes the provision of counseling and training in a group setting where applicants and/or recipients are taught job seeking skills, and may include a phone bank from which participants contact potential employers. However, the statute limited the length of time (in any period of 12 consecutive months) that individuals in each group could be assigned to participate in job search activities. For individuals that are determined to be job ready, job search alone is an appropriate activity. For individuals that are determined to be skills deficient, job search may be combined with other education and training activities. This entry indicates whether the State provides applicant and/or recipient job search and identifies other components where the State assigns job search activities in conjunction with those components.

B. ON-THE-JOB TRAINING (OJT) -- A State may enter into a contract with an employer to provide on-the-job training. The basic principles governing OJTs are: 1) the participant is hired by the employer; 2) while engaged in productive work, the participant is provided training which gives him/her the knowledge or skills essential to the full and adequate performance of the job; 3) the participant is compensated at a rate (including benefits) comparable to that of other employees performing the same or similar jobs; and 4) the employer is reimbursed by the State or its agent for the extraordinary training and the additional supervision that are required. The State may vary the length of the OJT, but employers are expected to retain the participant at the end of the OJT. Because participants may lose eligibility for AFDC during an OJT, the State may provide child care as regular child care or as transitional child care. These entries indicate if the State operates an OJT program and the method(s) the State uses to provide child care to participants.

C. WORK SUPPLEMENTATION PROGRAM (WSP) -- This component allows the State to "divert" all or part of the AFDC grant to an employer to cover all or part of the costs of the wages paid to an AFDC recipient who is participating in the program. The State may choose from several options in designing WSP. Among those, the State may choose to make the program voluntary or mandatory, "freeze" a participant's AFDC grant, exempt individuals who are participating in WSP from retrospective budgeting requirements and monthly reporting, make changes to the standard of need, and make changes in the earned income disregard. The State is allowed to provide child care to WSP participants according to the same policy that we apply to OJT participants. This entry identifies the specific options the State has chosen to exercise.

D. COMMUNITY WORK EXPERIENCE PROGRAM (CWEP) -- The purpose of CWEP is to improve the employability of individuals not otherwise able to obtain employment by providing work experience and training to assist them to move promptly into regular public or private employment. CWEP is limited to projects which serve a useful public purpose in fields such as health, social service, environmental protection, education, urban and rural development and redevelopment, welfare, recreation, public facilities, public safety, and child care. Placements may only be made with public and private non-profit employers. The maximum number of hours in any month that a participant may be required to work is based upon the size of the family's assistance grant. This entry identifies whether a State operates a CWEP program.

exempt from FLSA provisions except min. wage.

E. POSTSECONDARY EDUCATION -- Each State has the option of providing postsecondary education. Postsecondary education must be necessary to meet the individual's employability goals that are directly related to obtaining useful employment in a recognized occupation. At State option, limits or restrictions may be placed on the postsecondary education available e.g., the type of education, length of program, or the length of coverage under JOBS. This entry identifies whether the State refers individuals to postsecondary education. It also identifies the limits or restrictions the State places on that education, if any.

F. OTHER WORK, EDUCATION AND TRAINING -- Subject to approval, a State's JOBS program may include an alternative work experience component and/or education, training, and employment activities other than those listed above. These entries indicate whether the State offers alternative work experience and/or alternative education, training and employment activities.

G. SELF-INITIATED EDUCATION OR TRAINING -- The State may allow an individual who is attending a postsecondary institution or another entity offering a course of vocational or technical training, at the time he/she would otherwise be required to participate in JOBS, to continue to attend. The State may restrict self-initiated education or training in its JOBS Plan. These restrictions may be the same or different restrictions as those the State uses for postsecondary education in E above). This entry identifies whether the State elects to limit or restrict self-initiated education or training. It also identifies the limits or restrictions the State places on that education or training, if any.

H. STATE-DESIGNED UP WORK PROGRAM -- At least one parent in a family who is receiving AFDC based on the unemployment of the principal earner (AFDC-UP benefits) is required to participate in certain work activities for at least 16 hours per week. The activities that count toward the AFDC-UP work requirement are WSP, CWEP, other work experience, OJT and State-designed work programs approved by the Secretary. The first 4 component activities are separately identified in the State JOBS Plan. The State-designed UP work program is a component activity that is distinct from the other 4 specified activities and unlike the other 4 activities, participation in the State-designed UP work program component is limited to parents receiving AFDC-UP benefits. This item identifies whether a State has an approved State-designed UP work program.

I. BASIC LITERACY LEVEL -- The basic literacy level is a literacy level that allows an individual to function at a level equivalent to at least grade 8.9. The State may define its basic literacy level as higher than grade 8.9. The State's choice is indicated in this entry.

Below is a further explanation of Alternative Work Experience (AWEP) which is not covered in the attached material in any detail. Unlike JOBS activities, the TANF work activities are not defined in the law, nor does DHHS plan to define these activities through regulations.

Alternative Work Experience -- States may offer an alternative work experience program which must be described in its JOBS plan and approved by the Secretary. Most states offer AWEP to provide more flexibility in the number of hours that a particpant may work. Under AWEP the AFDC grant does not necessarily determine the number of hours a participant may work. Most states using AWEP under JOBS required about 15-20 hours per week participation; some required between 30-40 hours per week and a few determined hours by participant and/or sponsor's need. The length of these programs was between 3 and 6 months; for some this was a maximum duration; for others the time could be extended upon reassessment.

Historically, the types of work experience activities (for CWEP and AWEP) included "hands on" assignments such as maintenance/general repairs, bus drivers, clerical work, food service, child care, nursing aides, etc. Sponsors included schools, hospitals, nursing homes, state and local departments of human services, education, etc.

States generally preferred using alternative work rather than CWEP because they did not have to do the grant calculation i.e., dividing the grant by the minimum wage to determine the number of hours that they could require an individual to participate in unpaid work experience. This was important for 3 reasons:

(a) The State did not have to look at the grant each month to see if a new calculation of hours had to be done. Under CWEP, if there was a change, the State would have to notify the employer and participant that there was a change in the hours;
(b) Many employers prefer taking participants for set hours (e.g., 20 hours a week; Monday, Wednesday and Friday) so that they can provide training, supervision, and real work experience; and

(c) The participants appeared to be "real employees" - not distinguishable as welfare recipients because they worked 17 hours this month and 21 next month, etc.

All cwep had to meet min wage, has continued through waivers
awep: were instances of submin; and some waivers that werenot specific - mushiness

that's about it;

KWay: talked to her; gave Elena her #; Kathi sez sell it

5 slots to summit; plus maybe 5 more;

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget
Associate Director for Human Resources
260 Old Executive Office Building
Washington, DC 20503
Fax #: 395-5730 Phone #: 395-4844

FACSIMILE COVER SHEET

DATE: 2-19

TO: Elena Kagan AND Diana Fortuna

* Mass ES bad?

MA - last yr leg proposal to allow privatiz/no merit systems (not single st ag)

Fax Number:

Number of pages (including cover sheet): 14

FROM: Ken Apfel

REMARKS:

Re: - Privatization / for tomorrow's meeting.
- Let's talk.

February 7, 1997

Income Maintenance Branch

Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Please route to:

Ken Apfel

Decision needed	___
Please comment	___
For your information	___
Per your request	___
See remarks below	X

With informational copies for:

Phone: 202/395-4686
Fax: 202/395-0851
Room: #8222

Subject: Background paper on Texas Privatization

From: Stacy Dean SD

Attached is a draft interagency issue paper on the Texas TIES privatization proposal. You and others may ~~find it~~ helpful for Monday's meeting with Bruce on the subject. I would caution you though that the agencies have not provided final comments on the paper -- Medicaid in particular will probably want to change quite a bit since the perspective of the paper is largely Food Stamps.

Also, agency principals have not yet seen the paper. Our goal was to share it with them by Wednesday of next week.

February 7, 1997

Income Maintenance Branch

Office of Management and Budget
Executive Office of the President
Washington, DC 20503

Please route to:

Barbara Farmer, ETA/DOL
Margaret Pugh, ACF/HHS
Terry Watt, ACF/HHS
Marty Svolos, HCFA/HHS
David Cade, HCFA/HHS
Dana Sitnik, US/OPM
Ron Hill, GC/USDA
Carolyn Foley, FCS/USDA

Decision needed ___
Please comment ___
For your information ___
Per your request ___
See remarks below X

With informational copies for:
Barry White, Carole Kitti, Meg Murray, Jeff Farkas, Bob Ridcout

Phone: 202/395-4686
Fax: 202/395-0851
Room: #8222

Subject: Background paper on Texas Privatization

From: Stacy Dean

Attached is a draft interagency issue paper on the Texas TIES privatization proposal. This paper was pulled together by USDA and OMB using the information provided to us by USDA, ACF, HCFA, OPM and DoL. This paper is intended to provide background information and not to serve as a decision paper. Please review the paper and let me know if you have any comments. At the moment, the paper has quite a bit of information on each program and many of the issues relating to privatization. It probably needs a bit more of a global view and more of an effort to draw out commonalities and distinctions among the programs. During the process of compiling each agency's paper into one piece we've taken some liberties. If we've inadvertently obscured or deleted important information from your section, please let us know.

By Tuesday morning, we'd like your comments on the paper. By then we should be able to pull together a final piece which we can all share with our principles on Wednesday.

Thank you very much for your timely and valuable input.

Barbara Farmer, ETA/DOL	ph: 202-219-5585	fx:	202-219-6510
Margaret Pugh, ACF/HHS	ph: 202-401-6944	fx:	202-401-4678
Terry Watt, ACF/HHS	ph: 202-690-6437	fx:	202-401-6400
Marty Svolos, HCFA/HHS	ph: 410-786-4582	fx:	410-786-3252
David Cade, HCFA/HHS	ph: 410-786-3870	fx:	410-786-0025
Dana Sitnik, US/OPM	ph: 202-606-2840	fx:	202-606-2663
Ron Hill, GC/USDA	ph: 202-720-6181	fx:	202-720-6910
Carolyn Foley, FCS/USDA	ph: 703-305-2473	fx:	703-305-2098
Stacy Dean, OMB	ph: 202-395-7762	fx:	202-395-0851

PRIVATIZATION OF FEDERAL PUBLIC ASSISTANCE PROGRAMS

OVERVIEW

This paper has been prepared jointly by staff from the Departments of Agriculture (Food and Consumer Service), Health and Human Services (Health Care Financing Administration and Administration for Children and Families), Labor (Employment and Training Administration), and the Office of Personnel Management (OPM). The Federal agencies have been meeting recently to discuss the general background and issues surrounding privatization initiatives that are under review within the Departments and to explore options for making final decisions and responding to States.

ISSUES REQUIRING DECISION

To what extent should the States be permitted to transfer the responsibility for eligibility determination for Federal public assistance programs to the private sector through competitively bid contracts? And, may the Merit System of Personnel Administration requirements be waived to allow States to enter into contract agreements?

BACKGROUND

There is increasing interest among the State welfare agencies in transferring the administration of public assistance programs to the private sector through competitively bid contracts. This interest stems in part from the efforts of the Federal and State governments to test new methods to improve program services and to increase self-sufficiency among program recipients.

Contracting or privatizing certain functions of the public assistance programs is not new. For instance, all States that have implemented an Electronic Benefit Transfer (EBT) system for the issuance of benefits have a contract agreement with a private entity.

What is new is the possibility of contracting with private entities to perform functions that have historically been the responsibility of the public sector, such conducting the determination of eligibility and certification for public assistance programs such as the Federal Food Stamp Program and Medicaid. While the new welfare law explicitly permits States to privatize TANF administration and service provision, no other major Federal public assistance program has such broad latitude[1]. Privatization would require a waiver of current statutory and regulatory provisions related to the Merit System of

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[1] Note that eligibility for $6 billion in Pell Grants and $25 billion in student loans are routinely determined by largely non-Federal, non-public entities.

DRAFT 1

Personnel Administration as required under section 11(e)(6) of the Food Stamp Act of 1977, as amended, and as required under section 1902(a)(4) of the Social Security Act (Medicaid Program).

In addition to its TIES proposal for welfare programs, Texas also plans to privatize labor exchange services authorized by the Wagner-Peyser Act. Therefore, the Department of Labor (DOL) is in the process of a broad policy and legal review of the extent to which entities other than the State employment security agencies may deliver basic labor exchange and unemployment insurance services.

CURRENT PROPOSALS REQUIRING DECISIONS ABOUT THE MERIT SYSTEM OF PERSONNEL ADMINISTRATION

Texas Integrated Enrollment Services (TIES)

TIES is a statewide privatization initiative of the Texas Health and Human Services Commission (HHSC) and the Texas Council on Competitive Government (CCG) in support of a State law enacted in 1995. Under TIES, the certification and eligibility determinations for most public assistance programs, including the Food Stamp, Special Supplemental Nutrition Program for Women, Infants and Children (WIC), TANF and Medicaid programs, would be contracted to the private and/or public sectors through competitive bids. The TIES proposal does not address contracting out the delivery of unemployment insurance or employment services funded by the Department of Labor.

The TIES proposal would require a waiver of the merit system requirements under the Food Stamp Act. HCFA is reviewing the extent to which merit system requirements may be waived. The Federal agencies and the State of Texas have been negotiating the conditions for releasing a Request for Offers (RFO) for TIES since May 1996. With the exception of a final decision about the merit system provisions contained in the RFO, all other issues have been resolved.

Texas was expecting final approval of the RFO in January to be able to release the RFO by the end of the month. Two consortia have been developed with the intention of bidding on the RFO. One consortium is composed of the Texas Workforce Commission, International Business Machines Corporation and Lockheed Martin Corporation. The other consortium consists of the Texas Department of Human Services, Electronic Data Systems Corporation and the Unisys Corporation. Arthur Anderson has also indicated an interest in the proposal but has not aligned itself with a State agency.

Wisconsin Works (W-2)

Under the W-2 proposal, the State is contracting on a competitive basis with public or private agencies for certification actions such as gathering client eligibility information, conducting eligibility interviews and data input. The State, presuming the Department of Agriculture's approval of its waiver request of the merit system requirements for the Food Stamp Program, released its Request for Proposals (RFP). We have been advised by State officials that the contract process has been completed for one County (with over 60 percent of the State caseload) without the inclusion of the Food Stamp Program. Contracts have been awarded to six private, non-profit agencies.

[Insert information on Wisconsin and Medicaid.]

Employment Services -- One-Stop Grant

Legislation enacted in the State of Texas, effective September 1, 1998, provides for the delivery of labor exchange services that are authorized under the Wagner-Peyser Act and currently delivered by State employment security agencies by local workforce development boards and private, non-governmental providers. Thus far, Texas has not considered contracting out the delivery of unemployment insurance services. The Department of Labor has urged Texas to delay implementation until the Department's review is completed.

In addition, the State of Massachusetts, with the Department of Labor's approval of a grant to implement a One-Stop Career Center system throughout the State, has awarded contracts to private-for-profit entities to deliver labor exchange services in several local areas under that grant. Other States such as Montana, Utah, Pennsylvania, and Iowa are on the threshold of requesting similar approval.

ORGANIZED LABOR RESPONSE

The Departments of Agriculture and Health and Human Services have received numerous letters from employee unions about the TIES proposal, including the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the American Federation of State, County, and Municipal Employees (AFSCME) and the Service Employees International Union. The unions assert that a waiver of the merit system would result in a decline of client services, including access to program benefits and client confidentiality. The Department of Agriculture received over 1,000 letters from employees in Wisconsin objecting to the W-2 project.

In the case of the Texas workforce development legislation, the Department of Labor has received a letter from the AFL-CIO questioning the legality of privatizing employment services.

CURRENT PROGRAMS - Certification and Other Program Requirements

Food Stamp Program

The Food Stamp Act requires certification, i.e., the application and eligibility determination process, to be completed by merit system employees. Certification, however, is not defined in statute. As supported by legislative history to the Act, current regulations specify that the required interview be conducted by merit system employees. Given the complexity and discretion that may be required in the food stamp certification process, the food stamp interview is crucial to accurate determinations of eligibility and benefit level. It is through the food stamp interview that the worker solicits most household information, determines the necessity for additional verification or resolution of questionable information, and ascertains the need for appropriate policy decisions. It is also the applicant household's opportunity to have face-to-face contact with a public employee. Volunteers and other non-merit employees may assist an applicant household in other actions related to certification but may not conduct the food stamp interview or certify a household. During recent debate on welfare reform legislation, Congressional conferees reinserted the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

Medicaid

Similar to Food Stamps, the entire application process, from taking an application to making the final eligibility determination, is performed almost entirely by employees of the State agency responsible for administering the Medicaid program. The Medicaid statute and regulations contain very little about the eligibility determination process, and virtually nothing about what entities may or may not perform specific functions within that process, except that the determination of eligibility must be made by the agency or agencies specified in the State plan.

Unlike Food Stamps, the Social Security Act provides for "out stationing" which allows the State to use private sector employees to perform some eligibility process at locations other than State TANF offices for certain groups of applicants. Outstationing was incorporated into the law as to increase program access when the law was amended to substantially broaden the categories of eligible individuals.

States have the option of staffing outstation locations with State employees or non-State employees (e.g., contractors or volunteers), or a combination of both. Because out stationing can involve the use of non-State employees to perform certain eligibility-related functions, regulations specify which functions can be performed by non-State employees and which must be performed by State workers.

DRAFT

Non-State employees staffing outstation locations can perform "initial processing" which includes: (1) taking applications; (2) assisting applicants in completing the application; (3) providing information and referrals; (4) obtaining required documentation; (5) assuring that information contained in the application is complete; and (6) conducting any necessary interviews.

Non-State employees are specifically precluded from: (1) evaluating the information contained in the application and supporting documentation; and (2) making a determination of eligibility or ineligibility. Actual evaluations and determinations can be made at the outstation location or at a State Medicaid agency office, but they must be made by a State employee authorized to make eligibility determination for the State Medicaid agency.

Temporary Assistance for Needy Families and Foster Care Programs

Section 104 of the Block Grant for Temporary Assistance for Needy Families (TANF) specifically allows States to "administer and provide services" under title I and II of the welfare reform legislation through contracts with charitable, religious or private organizations. Therefore, there are no prohibitions to privatization initiatives, such as TIES, related to merit personnel provisions for the TANF.

However, the merit system requirements remain in effect for the Title IV-E of the SSA (Foster Care). Even though no State has proposed to privatize any aspect of its Foster Care Program, the Administration of Children and Families is examining the implications of the merit system requirements for Title IV-E.

WAIVER AUTHORITY TO CONDUCT DEMONSTRATION PROJECTS

The Food Stamp and Social Security Acts provide the Departments with the authority to waive most statutory requirements to allow the States to conduct demonstration projects. However, because authority for the Merit System of Personnel Management was transferred from the Departments to OPM under the Intergovernmental Personnel Act of 1970, USDAwould need to obtain concurrence from OPM prior to approving any demonstration project that would waive the Merit System of Personnel Management. However, HHS believes they would not need OPM's concurrance for such a waiver.

Why not

INTERGOVERNMENTAL PERSONNEL ACT

When the Intergovernmental Personnel Act (IPA) was written, it was presumed that services would be provided directly by State or local employees who were acting in lieu of Federal employees; this was this was the reason for establishing for a Merit System of Personnel Administration. While the IPA is silent on whether States or local

DRAFT 5

What does IPA say

governments may contract for services, the law does provide for maximum flexibility within the requirements for merit principles in the administration of grant-in-aid programs by grantees. However, as the roles of government and the relationships between the State and the Federal government continue to evolve, a determination must be made as to whether new ways of doing business can be carried out under existing laws, or whether change in those laws is required. While government contracting with the private sector for commercial products and services is not new, the Texas proposal raises the possibility of contracting with private entities to perform functions that have historically been the responsibility of the private sector. This proposal would require a waiver by OPM of current statutory and regulatory provisions related to the Merit System of Personnel Administration provision of the IPA.

Ind govtal

The current proposals under review by Federal agencies appear to conflict with the requirements of the IPA. Although OPM has not consulted with their General Counsel for a legal opinion, OPM is confident that it does not have authority to waive any provisions of the statute. In fact, OPM counsels have consistently held that OPM does not have authority to waive its own regulations, unless such waiver is specifically provided for. The Administration could elect to seek legislative change. ?

This leads us back, then, to examining the Texas proposal and shredding out what is inherently governmental and must therefore be performed by merit system employees, and what is commercial and can therefore be contracted out. The OPM General Counsel has relied on OMB Circular A-76 to define what is and is not an inherently governmental function. Included in the definition of governmental functions are "those activities which require either the exercise of discretion in applying Governmental authority or the use of value judgment in making decisions for the Government. ...Governmental functions normally fall into two categories: (1) The Act of governing;....(2) Monetary transactions and entitlements...." It would appear that some contracting is appropriate but wholesale contracting may violate the intention of Congress to ensure that administration of grant-in-aid programs be conducted by employees covered by a merit system of personnel administration.

why?

not a reg?

OPTIONS FOR TEXAS TIES

Approve Waiver of Merit System of Personnel Administration. This option would allow the State to almost fully privatize its eligibility process, requiring only that the State certify the final determination. This approval would require use of the Food Stamp Program and Medicaid programs' statutory demonstration authority, with the necessary approval of waivers of the Merit System of Personnel Administration by OPM. The Departments' waiver authority for demonstrations is intended to test innovations and is not intended to approve long-term operational alternatives such as those proposed by Texas.

poss?

DRAFT 6

Approval of the waiver may result in additional objections from employee unions and advocacy groups but would be supported by States, the National Governors Association and private corporations which have formed alliances with public agencies to respond to the RFO.

Deny Waiver of Merit System of Personnel Administration. This option would require the State to perform all Medicaid eligibility functions, including intake, interview, processing, and final determination and certification. Even though this is the most restrictive option, it may be the most legally supportable option for the Medicaid program based on statutory and regulatory requirements involving proper and efficient administration of the program. A legal argument could be made that the Medicaid statute restricts third-party eligibility activities to specific eligibility groups and situations and, thus, is not applicable to the TIES proposal.

This option also would require the State to continue to be responsible for the Food Stamp interview and determinations of eligibility and benefit level. It is also important to note that during the recent debate on welfare reform legislation, Congressional Conferees reinstated the merit system provisions in the Food Stamp Act that a previous Senate bill had deleted.

A denial of a waiver for the TIES proposal may seriously disrupt the progress the Federal and State agencies have made on the proposals. The Federal agencies would receive serious objections from the State and private corporations. Also, a denial may be viewed as inconsistent with the Administration's support for allowing the private sector to be more involved in the administration of public assistance programs.

Redefine Certification. The Food Stamp statute requires certification to be completed by merit system employees, while the Medicaid statute allows non-merit personnel outstantioned personnel to perform some elements of the application process. States want to reinterpret the laws so that compliance could be achieved through the automated processing of data by computers which are programmed under State agency direction to make eligibility and benefit decisions.

A middle ground could preserve more merit system involvement in a complex eligibility determination process that requires judgment. The Federal agencies could to revise regulations (Food Stamp Program) or publish an appropriate Notice in the Federal Register (Medicaid) to require merit system review of applications and interview results before benefits were determined (a process comparable to the Medicaid outstations or supervisory reviews currently used by many State agencies in the Food Stamp Program). However, this option may not allow the States to make privatization initiatives financially worthwhile.

DRAFT 7

Approve small-scale demonstration projects. The Departments support privatization initiatives that may result in improved services and/or administrative costs savings. However, both Departments have concerns about statewide initiatives that have not been proven to be effective and may seriously affect program access to low-income households. For instance, TIES is a Statewide initiative in a State that issues annually approximately 10 percent of food stamp benefits issued nationwide. The Department of Agriculture further believes it would be imprudent to eliminate the interview from merit employees on a statewide basis without further testing.

A demonstration limited to a small number of counties may be supportable by the advocacy groups. Private corporations may object or lose interest in small-scale demonstration projects. It is unclear how the unions and other States would react to such a compromise. It is estimated that an evaluation of a Food Stamp Program demonstration would cost about $1 million.

BROAD POLICY CONCERNS

Relationship to the Texas Employment Services Proposal

The issue of whether an entity other than the SESA may deliver basic labor exchange and unemployment insurance services has been raised in the context of Employment and Training (ETA) sponsored initiatives to build new State workforce development systems utilizing One-Stop Career Centers. This system building at the local level involves the delivery of labor exchange services under the Wagner-Peyser Act and may involve the unemployment insurance program for payment of benefits under the Social Security Act (SSA). Basic labor exchange and unemployment insurance services are funded through a dedicated employer tax, the Federal Unemployment Tax Act (FUTA).

Unemployment Insurance - Contracting out of benefit eligibility determination and tax functions are unlikely to be permitted because these functions involve the use of value judgments in Government decision making. However, it may be permissible to contract out those data gathering functions that can be broken out in an effective, cost-efficient manner, without deterioration of services to claimants and employers.

Employment Services - Contracting out beyond support functions may be permitted for the delivery of many basic labor exchange services.

Confidentiality

As a result of negotiations between the State of Texas and Department of Agriculture, the RFO was revised to include language ensuring that the contractor would adhere to the confidentiality provisions under the Food Stamp Act and that applicants and recipients would have the right to fully understand how information would be used in determining eligibility. The RFO currently includes language specifying that the use or disclosure of information about applicants or clients during the screening and referral and the eligibility determination and enrollment processes shall be restricted to purposes directly connected with the administration of assistance programs. Information supplied for the purpose of determining eligibility may not be made available to other programs in TIES without the consent of the client. Bidders must demonstrate how clients will be advised of their right to confidentiality and how their concurrence would be obtained.

While these revisions ensure compliance with the Food Stamp and Social Security Acts, the Departments continue to have concerns that wide-scale privatization and potential loss of merit system protections may undermine the client confidentiality. Merit Personnel systems have historically established incentives for maintaining the integrity of public assistance programs. It is uncertain how privatization would influence the relationship between case workers and clients.

Conflict of Interests

It should not be assumed that a public employee would be more interested in operating public assistance programs better than a private employee on the basis of his or her status as a merit employee. However, private employees hired to carry out the TIES system may be affected negatively if the contractor does not realize a profit. The profit incentive raises numerous questions regarding the effect such wide-scale privatization would have on employees who are responsible for the determination of eligibility as well as the effect on overall client services. For instance, the TIES RFO proposes to use client surveys to measure the contractor's performance. Will the interest in maintaining client satisfaction increase a caseworker's incentive to approve benefits, even if questionable information about the applicant's eligibility exists? Would profit incentives alter the current incentives out stationed non-merit employees have for their role in the Medicaid certification process?

Also, a conflict of interest may be created by the increased flexibility provided to the States through the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. While the State of Texas retains the authority to establish program policy decisions, the State may come under heavy influence by the contractor to approve policies that assist the contractor in containing costs, possibly at the expense of client services.

State/Contractor Program Responsibilities

Under the proposed TIES RFO, the State maintains responsibility for developing program policy, conducting Quality Control (QC) reviews and fair hearings. The TIES contractor is responsible for implementing program policy. The TIES system, therefore, adds an additional level to the current bureaucratic structure. The FCS and the State of Texas have negotiated revisions to the RFO to clarify Federal/State and State/Contractor relationships. However, the Departments continue to have serious concerns about the increased complexity of the certification process under a Statewide privatization initiative and whether any resulting barriers to participation would be created as a result of these split relationships. These relationships may become even further complicated if the responsibility for the certification process becomes split between State and contract employees.

<u>Risk of Loss</u>

The draft TIES RFO specifies the financial incentives for good performance and fiscal penalties for poor performance. One financial penalty to the contractor is the liability of QC sanctions. The Department and State of Texas have negotiated regarding additional language that clarifies that the Federal Government will continue to hold the State liable for the QC sanctions and that the Federal and State governments would be responsible for negotiating the resolution of any Federal QC liability.

The Departments have concerns that the contractor may have more interest in cost savings and less interest in resulting QC liabilities. Should a contractor experience a financial loss due to a QC liability, the potential for litigation between the State and contractor would appear to be great. The Departments also share concerns about the potential of increased litigation between the State and contractor if the certification process becomes a joint responsibility between State and private contract employees. The Departments have concerns about how these potential conflicts would affect the ongoing operations of the Food Stamp and Medicaid Programs throughout the State.

<u>Inherently Governmental Decisions</u>

The certification process for determining eligibility for Federal benefits is a discretionary action . Thus, it is important to review any transfer of the certification process to the private sector under OMB guidance. OMB Circular A-76 provides guidance to Federal agencies in determining activities that may be contracted to the private sector. Activities that are "inherently governmental functions" may not be contracted to the private sector. The OMB Circular specifies that an inherently governmental function is, "so intimately related to the public interest as to mandate performance by Government employees. These functions include those activities that require either the exercise of discretion in applying Government authority or the making of the value judgment in making decision for the Government".

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While OMB Circular A-76 may not be binding on State agencies, the concept of functions that are inherently governmental is basic to the review of the TIES. The State of Texas indicates that it is prohibited by State law from entering into private contracts for discretionary activities.

Q&A on Minimum Wage -- For Background

Q: Won't it be a great burden for the states if you require them to pay welfare recipients the minimum wage?

A. There has already been an enormous amount of welfare reform innovation taking place in the states, whether through demonstration waivers or workfare programs, and many states have already addressed this issue as part of those programs. In most instances where it has come up, states have made the decision to pay the minimum wage. We have no reason to believe they would change course on this issue.

It is difficult to generalize about how states would be affected, because we don't know how individual states will choose to spend their new TANF block grant money, or how much the already shrinking caseload in individual states will reduce the number of people they must put to work.

However, paying the minimum wage should not be a problem in most states. This is particularly true in the next year or two, as the requirements of the law are still being phased in.

FACSIMILE TRANSMITTAL COVER SHEET

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FROM: Elena Kagan
Diana Fortuna

SUBJECT: As we discussed.

PAGES: 2 (including cover)

In the case of incomplete transmission please contact Jennifer Bazzell at 456-5603. Thank you.

Background Q&A on Minimum Wage

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few years?

To: Elena K

Fr: Diana

As we discussed

This is great. Get it to Melissa Skolfield HHS 690-5073 690-7850 (Fax #

Someone from USDA (Yvette?)

Seth Harris and Susan King from DOL

And whoever else you think appropriate.

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