

April 8, 2024

**EO 12866 Meeting
“Strengthening Temporary Assistance for Needy Families (TANF)
as a Safety Net and Work Program,”
RIN: 0970-AC97**

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Thank you for the opportunity¹ to provide comments on OIRA’s review of the Department of Health and Human Services’ (HHS) proposed rule, “Strengthening Temporary Assistance for Needy Families (TANF) as a Safety Net and Work Program,” RIN: 0970-AC97, Docket No. 2023-21169 (“Proposed Rule”).²

My name is Eric Kniffin. I am a fellow at the Ethics and Public Policy Center and a member of the HHS Accountability Project. I also served as an attorney in the DOJ Civil Rights Division under Presidents George W. Bush and Obama. I have also been involved in extensive civil rights litigation against HHS as counsel for the Becket Fund for Religious Liberty and in private practice, including successful lawsuits against HHS’s contraception mandate and HHS’s original Section 1557 transgender mandate.

As noted in our public comment,³ the Proposed Rule sets out seven proposals. Just as in our public comment, our comments here focus on only the second of these proposals, to “clarify when an expenditure is ‘reasonably calculated to accomplish a TANF purpose,’” which relates to subsection (c) of the Proposed Rule.

My comments here draw upon our public comment from last December and incorporate the observations and concerns outlined there by reference. For the reasons set out below, and as set out in our public comment on HHS’s TANF proposal, HHS has failed that there is any problem here that requires fixing. But even if it had, there is no reason to think that HHS’s proposal offers more clarity by layering a “reasonable person” test on top of a “reasonably

¹ As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars’ input on this rule. See Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, <https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/>.

² 88 Fed. Reg. 67697 (Oct. 2, 2023).

³ EPPC Scholar’s Comment on HHS Proposed Rule “Strengthening Temporary Assistance for Needy Families (TANF) as a Safety Net and Work Program,” RIN: 0970-AC97, Docket No. 2023-21169 (Dec. 1, 2023), <https://eppc.org/wp-content/uploads/2023/12/EPPC-Scholars-Comment-on-HHS-Proposed-TANF-Rule.pdf> (EPPC Public Comment).

calculated” test. Both tests are equally subjective and give HHS entirely too much discretion to weaponize the TANF program away from what Congress intended—a program to grant states extra flexibility in helping needy families—into another vehicle for advancing the administration’s policy agenda.

My concerns are heightened by HHS’s decision in the proposed rule to unjustly take aim at pregnancy resource centers. HHS’s discussion betrays HHS’s ignorance about the full range of services that pregnancy centers provide. Contrary to HHS’s mischaracterization, pregnancy centers’ services satisfy all four TANF purposes. In line with other politically-motivated attacks on pregnancy centers, HHS’s unwarranted targeting of pregnancy centers in the proposed rule functions to encourage states to stop providing pregnancy centers TANF funding and discourage states from providing TANF funding to pregnancy centers in the future. HHS’s proposal harms pregnancy centers and the women and families they serve. This unfair treatment underlines my concerns about the inherent subjectivity of the standards that HHS outlines in the proposed rule.

I urge HHS to abandon its proposed subsection (c) and drop its discussion targeting pro-life pregnancy centers.

1. HHS has failed to demonstrate that its rule would help fix an existing problem.

- HHS claims that this rule is necessary to fix an existing problem, as there are instances where states have abused the flexibility Congress gave them and misallocated TANF funds.
- As indicated in our public comment, we agree with HHS on this point.⁴
 - For example, as has been reported in the media, TANF funds have been misused to construct collegiate volleyball stadiums⁵ or to fund overreaching child protective services investigations that can punish the very parents those programs are intended to help.⁶
- But while we agree that that TANF abuse is a problem that needs to be addressed, the Administrative Procedure Act requires HHS to do more than just cite a problem to justify new rulemaking.
- An agency’s rule is “arbitrary and capricious” if its “explanation for its decision . . . runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁷ An agency must “articulate a satisfactory explanation for its action,” including a “rational connection between the facts found and the choice made.”⁸

⁴ EPPC Public Comment at 3.

⁵ Ashton Pittman & William Pittman, *In-Depth: How Brett Favre Got \$6 Million In Welfare Funds For A Volleyball Stadium*, Mississippi Free Press (Sept. 16, 2022), <https://www.mississippifreepress.org/27465/in-depth-how-brett-favre-secured-6-million-in-welfare-funds-for-a-volleyball-stadium>.

⁶ Eli Hager, *A Mother Needed Welfare. Instead, the State Used Welfare Funds to Take her Son*, Pro Publica (Dec. 23, 2021, 5 AM), <https://www.propublica.org/article/a-mother-needed-welfare-instead-the-state-used-welfare-funds-to-take-her-son>.

⁷ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

⁸ *Id.*

- Here, HHS already has enforcement power to impose penalties for misuse of TANF funds. In fact, its website currently touts “enforcement success stories involving TANF programs.”⁹ These “success stories” indicate that no lack of “clarity” precludes HHS from acting now—under existing regulations—to address obvious TANF abuses.
- In short, HHS fails to demonstrate a problem that proposed subsection (c) is actually calibrated to solve, making its proposal arbitrary and capricious.
- At the very least, HHS must explain why its current enforcement powers are inadequate to address abuses under the longstanding, current rule.

2. HHS has failed to explain why it believes that the “reasonable person” standard is an improvement over the “reasonably calculated” language that Congress used.

- HHS claims that the problem that needs addressing in this context is that the language that Congress used in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, the law that established the TANF program, is too vague.
- As HHS notes, in the TANF statute at 42 U.S.C. 604(a)(1), Congress provided that states may use TANF grants “in any manner reasonably calculated to accomplish the purpose of this part.”
- As noted above, we do not think HHS has done nearly enough to show that the current standards are problematic. But even if it did, the proposed rule does nothing to explain why HHS thinks its proposal would make this problem better.
- The proposed rule would “clarify” what “reasonably calculated” means by substituting in the “reasonable person” test. HHS says, “new subsection (c) [] sets forth the reasonable person standard for assessing whether an expenditure is ‘reasonably calculated to accomplish the purpose of this part’ 42 U.S.C. 604(a)(1).”
- HHS offers further “clarification” to explain what this standard means: “The proposed regulation defines it to mean expenditures that a reasonable person would consider to be within one or more of the enumerated four purposes of the TANF program.”
- With all due respect, that is not very helpful. HHS provides no reason why anyone should think that this is an improvement. As HHS and OIRA are aware, the Supreme Court has roundly criticized the reasonable person test, noting that it is inherently subjective and gives inadequate guidance to lower federal courts.
- All those same objections apply here. If HHS wishes to continue with this current proposal, it should explain why it believes that TANF grant recipients would do a better job interpreting the “reasonable person” standard than federal judges have done over the past fifty years.

⁹ HHS, *Enforcement Success Stories Involving TANF Programs: Summary of Selected OCR Compliance Reviews and Complaint Investigations*, <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/examples/need-family/index.html>.

3. HHS employees are not well positioned to determine what “a reasonable person” thinks about anything.

- What makes this proposal even worse is that the “reasonable person” here is going to be applied by HHS.
- As set out in proposed Section 263.11, the first hurdle is whether “an expenditure is satisfied that does not appear to HHS to be reasonably calculated to accomplish a purpose of TANF.”
- In that case, “the State must show that it used these funds for a purpose or purposes that a reasonable person would consider to be within the TANF purposes.” HHS will of course be deciding whether this standard is met as well.
- In other words, under the proposed rule, if a State is notified that HHS not “satisfied” that a TANF expenditure “does not appear” to be “reasonably calculated to accomplish a purpose of TANF,” HHS will notify the State that it must now prove to HHS’s satisfaction that a “reasonable person” would “consider” the exact same expenditure to be “within the TANF purposes.”
- With all due respect, that is not very helpful. It is hard to understand how HHS could contend that this new proposed standard gives any more “clarity” to states charged with managing TANF programs. It seems that this new standard puts states back in the same place it began.
- The problematic subjectivity of the reasonable person test is even more problematic when it comes to “crisis pregnancy centers or pregnancy resource centers,” which HHS targets with suspicion.¹⁰ There is no reason to think that HHS is well-positioned to know what a “reasonable person” thinks about the benefits that such centers offer and provide. Moreover, there is little reason for the American public to have confidence that would use its boundless discretion under the “reasonable person” test fairly as applied to such centers.
- I call on HHS to answer the following question in any final rule:
 - Why does HHS believe that that it is in a good position to assess whether a “reasonable person” would think that a pregnancy center would advance TANF purposes, given that HHS’s political leadership advocates for a radical pro-abortion agenda that does reflects Congress’ priorities or the American people’s convictions,¹¹ and given that HHS staff overwhelming support the Democratic Party.¹²

¹⁰ 88 Fed. Reg. at 67705.

¹¹ See Rachel N. Morrison, *The Biden Administration’s Post-Dobbs, Post-Roe Response*, FedSoc Blog, July 13, 2022, <https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-roe-response>; see also 88 Fed. Reg. 23506, 23420 and n.178 (HHS citing favorably a report from a “reproductive justice” group that laments that states are using reports from “designated mandatory reporters” and “police recovery of fetal remains” to enforce laws against second and third trimester “self-managed” chemical abortions).

¹² See Brian D. Feinstein and Abby K. Wood, *Divided Agencies*, 95 S. Cal. L. Rev. 731, 759 (2022) (data collected during the 2013-2014 election cycle shows that the average HHS career was 1.27 standard deviations to the left ideologically of the average campaign donor that cycle—more liberal than 90 percent of donors in that campaign cycle, and more liberal than Secretary Burrell, who was (only) 1.14 standard deviations to the left of the average

4. HHS appears to create a double standard for pregnancy resource centers.

- Finally, I note that it appears that HHS's proposed rule creates a higher standard for pregnancy resource centers than for other applications of TANF funds. This would be highly problematic and contrary to law. I call on HHS to clarify this matter in any final rule.

- The general standard set out in the proposed rule is as follows:

If an expenditure is identified that does not appear to HHS to be reasonably calculated to accomplish a purpose of TANF (as specified at § 260.20 of this chapter), the State must show [to HHS's satisfaction] that it used these funds for a purpose or purposes that a reasonable person would consider to be within one or more of the four purposes of the TANF program (as specified at § 260.20 of this chapter).¹³

- HHS says that its determination under subsection (c) is "fact-specific" and that it will consider several factors "as appropriate," including:

- (1) evidence that the expenditure actually accomplished a TANF purpose;
- (2) evidence that prior expenditures by the state or another entity for the same or a substantially similar program or activity actually accomplished a TANF purpose;
- (3) academic or other research indicating that the expenditure could reasonably be expected to accomplish a TANF purpose;
- (4) whether the actual or expected contribution of the expenditure to accomplishing a TANF purpose is reasonable in light of the extent of that expenditure; and
- (5) the quality of the reasoning (as outlined below) underlying the state's explanation that the expenditure accomplished or could be expected to accomplish a TANF purpose.¹⁴

- When speaking about pregnancy resource centers, it appears that HHS articulates a different standard:

States that provide funding for these types of programs, including through entities sometimes known as crisis pregnancy centers or pregnancy resource centers, must be able to show that the expenditure actually accomplishes the TANF purpose that prior expenditures by the state or another entity for the same or a substantially similar program or activity actually accomplished the

campaign donor.); see also Ralph R. Smith, *Tallying Political Donations from Federal Employees and Unions*, FedSmith, Dec. 27, 2016, <https://www.fedsmith.com/2016/12/21/tallying-political-donations-from-federal-employees-and-unions> (during 2016 election cycle, 94.8% of political donations from HHS employees went to support Democratic candidates).

¹³ *Id.* at 67720.

¹⁴ *Id.*

TANF purpose, or that there is academic or other research indicating that the expenditure could reasonably be expected to accomplish the TANF purpose. If pregnancy prevention programming is a part of an ongoing program, such as year round after-school programming, only those costs associated with delivery of pregnancy prevention should be cost allocated and non-TANF funds used to fund other activities.¹⁵

- As a general matter, as stated in our public comment, we believe that HHS is wrong to cast doubt on whether pregnancy resource centers fulfill TANF purposes.
- But here I am concerned about a separate matter: why does HHS set out a different standard for such centers? Why does HHS only list here three of the five factors detailed on page 67,720? And why are even these factors worded differently in the pregnancy resource center context than in the general context?
- I call on OIRA and HHS to revisit this issue and consider whether it would be better to simply state that states that provide TANF funding to pregnancy resource centers would be required to make the same showing as for any other TANF funding.

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld, and that HHS's rulemaking has sufficient legal and economic analysis that reflects HHS's obligations under the Constitution, the Administrative Procedure Act, executive orders, federal laws protecting religious liberty, and all other relevant legal authority.

¹⁵ *Id.* at 67705