S T A T E O F T E N N E S S E E
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Opinion No. 07-09

Families First Act Status

QUESTIONS

1. Due to modifications to the Temporary Assistance for Needy Families ("TANF") Block Grant program and expiration of Tennessee's Families First waiver, and the potential loss of federal funding or the possible non-compliance with federal regulations that may occur if certain statutes controlling the Families First program remain in effect, does Tenn. Code Ann. § 71-3-158(d)(2)(D) permit the Department of Human Services ("DHS") to promulgate public necessity rules that abrogate existing Families First statutes pursuant to the criteria for use of those rules?

2. Upon expiration of Tennessee's Families First waiver, what provisions of the Families First law will meet the criterion of being inconsistent with federal requirements and superseded pursuant to Tenn. Code Ann. § 71-3-158(d)(2)(B)(iii)(i)?

3. Under the provisions of Tenn. Code Ann. § 71-3-158(d)(2)(D) permitting the promulgation of public necessity rules, can Families First statutes be abrogated which, though not directly inconsistent with TANF law or regulations, or which are not specifically prohibited by TANF laws or regulations, would result in the loss or potential loss of federal funding unless the Department discontinues those exemptions or activities that are not recognized for purposes of meeting certain performance standards under TANF law or regulations?

4. If DHS can promulgate public necessity rules to comply with federal law or regulations resulting from the termination of the Families First waiver, to maintain federal funding, or to comply with any federal regulation that has not been waived to abrogate existing statutes, can DHS also use public necessity rules to abrogate other existing Families First statutes for the purpose of revising and/or updating all existing Families First program regulations (Tenn. Comp. Rules and Regulations, 1240-1, Chapters 1-56) as part of a general program re-design if necessary to maintain federal funding, or is the authority to use public necessity rules limited to revision of only those rules that would be immediately necessary to address continued compliance with federal law and/or that would be necessary to maintain federal funding?

OPINIONS

1. A state agency cannot adopt rules to circumvent a statute. Therefore, DHS cannot promulgate public necessity rules to "abrogate existing Families First statutes." However, in this instance, the Families First statute itself provides that its provisions will be superseded insofar as inconsistent with federal law or when federal funding is no longer available. Federal pre-emption principles would also operate to pre-empt Families First statutes to the extent that they conflict with federal law. DHS then has the statutory authority to promulgate public necessity rules to the extent necessary to comply with changes in federal law pertaining to the TANF block grant program.

2. No provision of Tenn. Code Ann. §§ 71-3-151 through 71-3-165, title 71, chapter 3, parts 9 and 10, or title 71, chapter 5, part 12 is inconsistent, on its face, with TANF work participation, time-limit, or sanction requirements such that compliance with those requirements would be precluded.

3. While Tenn. Code Ann. § 71-3-158(d)(2)(D) provides that DHS has the statutory authority to promulgate public necessity rules necessary to maintain federal funding, exemptions or activities in the Families First statute which are not required by or inconsistent with TANF law or regulation, but which have been added based on policy decisions, do not affect federal funding and will not be superseded pursuant to Tenn. Code Ann. § 71-3-158(d)(2)(D).

4. DHS cannot promulgate public necessity rules to "abrogate existing Families First statutes" and although DHS has the statutory authority to promulgate public necessity rules necessary to maintain federal funding, DHS may not promulgate public necessity rules to revise and/or update existing Families First program regulations as part of a general program re-design necessary to maintain federal funding. Funding under the TANF block grant program is not tied to any particular provision in Tennessee statute, but is granted to the overall state program based on historical expenditures and the plan submitted by the state, and funding is only lost by way of retrospective audits and assessment of penalties for certain specified noncompliance.

ANALYSIS

1. Since July 26, 1996, the Tennessee Department of Human Services has administered Tennessee's Families First program (Tenn. Code Ann. § 71-3-151 *et seq*.) subject to a waiver obtained pursuant to 42 U.S.C. §1315. On June 30, 2007, this waiver will expire and Tennessee will be subject to the full array of federal welfare requirements of the Temporary Assistance for Needy Families ("TANF") Block Grant program. The TANF program, as reauthorized on February 8, 2006, by the Deficit Reduction Act of 2005, was also modified to add more stringent requirements related to work requirements and work participation rates. Recognizing that the statutory provisions applicable to the Families First program includes exemptions contained in the waiver which could be inconsistent with the federal requirements applicable to the TANF program, you have asked whether Tenn. Code Ann. § 71-3-158(d)(2)(D) would permit DHS to promulgate public necessity rules to "abrogate existing Families First statutes."

A state agency cannot adopt rules to circumvent or abrogate a statute. *Tasco Developing and Building Corporation v. Long*, 212 Tenn. 96, 102, 368 S.W.2d 65, 67 (1963); *Tennessee Department of Mental Health and Mental Retardation v. Allison*, 833 S.W.2d 82, 85 (Tenn. Ct. App. 1992). Therefore, DHS cannot promulgate public necessity rules to "abrogate existing Families First statutes." However, in this instance, the Families First statute itself provides that its provisions will be superseded insofar as inconsistent with federal law or when federal funding is no longer available. Federal pre-emption principles would also operate to pre-empt Families First statutes to the extent that they conflict with federal law. DHS then has the statutory authority to promulgate public necessity rules to the extent necessary to comply with changes in federal law pertaining to the TANF block grant program.

To the extent that the United States Congress has modified the TANF block grant program and to the extent that the waiver can be considered to have been terminated by the United States Congress and/or the United States Department of Health and Human Services, the Tennessee legislature has expressly provided that Tenn. Code Ann. §§ 71-3-151 through 71-3-165 and title 71, chapter 3, parts 9 and 10, and chapter 5, part 12, be superseded insofar as inconsistent with federal law or when federal funding is no longer available. Tenn. Code Ann. § 71-3-158(d)(2) (B) provides that:

> If at anytime: (i) The congress of the United States terminates or modifies the Title IV-A block grant program for federally funded economic or welfare assistance to families and children to the states under the temporary assistance to needy families program (TANF) as provided in Public Law 104-193 (1996), as amended; [or] (ii) The congress of the United States, or the United States department of health and human services or its successor terminates, or modifies, Tennessee's Section 1115 waiver obtained pursuant to subdivision (d)(1) on July 26, 1996, that resulted in the creation of the families first program; . . . then, in that circumstance, the department shall continue to administer, pursuant to the requirements of federal statutes and regulations existing at that time or subsequently enacted, the programs of economic or welfare assistance to families and children under Titles IV-A and IV-D of the Social Security Act as they may continue to exist on or after the date of such termination or modification or until the granting of a new waiver, and *the provisions of §§ 71-3-151--71-3-165, chapter 3, parts 9 and 10 and chapter 5, part 12 of this title shall be superseded to the extent: (i) Those provisions are inconsistent with any federal requirements for which no waiver exists; or (ii) No further federal funding is available, unless the general assembly specifically authorizes and funds the continuation of such provisions that do not otherwise conflict with federal law, regulation or waiver requirements*. (Emphasis added.)

Also pertinent to this issue are federal pre-emption principles, pursuant to which any state statutes applicable to the Families First program waiver would, upon the expiration of the waiver, be pre-empted to the extent that they conflict with the federal requirements of the TANF program. Under the Supremacy Clause of the United States Constitution, state law is pre-empted to the extent that it actually conflicts with federal law. *English v. General Electric Company*, 496 U.S. 72, 79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990); *Geier v. American Honda Motor Company*, 529 U.S. 861, 873-874, 120 S.Ct. 1913, 1921-1922, 1476 L.Ed.2d 914 (2000). Under this standard, pre-emption will be found when it is impossible for a private party to comply with both state and federal law, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143, 83 S.Ct. 1210, 1217-1218, 10 L.Ed.2d 248 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941). In *Comacho v. Texas Workforce Commission*, the Fifth Circuit Court of Appeals invalidated a Texas work requirement which allowed termination of benefits to TANF recipients who engaged in substance abuse and/or failed to ensure that their children received immunizations and wellness check-ups and maintained school attendance. 408 F.3d 229, 236-237 (5th Cir. 2005). The court declined to adopt the state's argument that TANF allowed the state to define "work activities" and that these work requirements fell within job search and job readiness assistance, one of the twelve enumerated work activities set out in 42 U.S.C. § 607(d). *Id*. at 234-235. The court concluded that Texas could not add work requirements and had flexibility to define work activities only within the confines of 42 U.S.C. § 607(d)(1)-(12). *Id*. at 236. The court found that the Texas work requirements were unrelated to job search and job readiness assistance and were, therefore, inconsistent with 42 U.S.C. § 607(d)(1)-(12) and pre-empted. *Id*. at 237. It should be noted that the definition of "inconsistent" adopted by the Fifth Circuit in *Comacho* is not the same definition found within TANF regulations (see response to question 2 below). However, it is possible that a court could adopt this reasoning and conclude that the following provisions of the Tennessee Families First statute are pre-empted: Tenn. Code Ann. § 71-3-154(g)(9), which, by limiting attendance at a secondary school as a work activity to persons under 19 years of age, is more restrictive than 42 U.S.C.§ 607(d)(10); Tenn. Code Ann. § 71-3-154(g)(10), which adds postsecondary education and training leading to a degree or certificate to the twelve enumerated work activities recognized by TANF; and Tenn. Code Ann. § 71-3-154(h)(3)(E), which excuses parents or caretaker relatives who function at or below grade level 8.9 from compliance with the work requirements.

With regard to DHS' authority to promulgate public necessity rules to comply with TANF requirements either newly adopted or previously exempted by the waiver, Tenn. Code Ann. § 71-3-158 authorizes the Commissioner of the Tennessee Department of Human Services ("DHS") "to immediately implement changes necessary as a result of federal legislation designed to reform welfare programs that are, or may be in the future, administered by [DHS] or other appropriate state agencies" by public necessity rules promulgated pursuant to Tenn. Code Ann. § 4-5-209[1], followed

[1]To promulgate public necessity rules, the agency must find and file a "written statement of reasons with the rule specifying that: (1) The rule only delays the effective date of another rule that is not yet effective; (2) It is required by the constitution, or court order; (3) It is required by an agency of the federal government and adoption of the rule through ordinary rulemaking procedures described in this chapter might jeopardize the loss of a federal program or

by permanent rules. Tenn. Code Ann. § 71-3-158(a) and (c). These "necessary changes" would include " any modifications to the state's welfare programs . . . that are required by federal law or that are necessary to ensure or enhance federal funding of the state's welfare programs or that are necessary for the implementation of such changes." Tenn. Code Ann. § 71-3-158(b). Tenn. Code Ann. § 71-3-158(d)(2)(D) further provides that DHS has the statutory authority to promulgate public necessity rules " [n]otwithstanding any law to the contrary, . . . that are necessary to . . . maintain compliance with . . . termination or modification [of the waiver or the TANF block grant program]; . . . maintain federal funding; . . . [or] comply with any federal regulation that has not been waived."

2. You also asked what provisions of the Families First law will meet the criterion of being inconsistent with federal requirements and superseded pursuant to Tenn. Code Ann. § 71-3-158(d)(2)(B)(iii)(i) upon the expiration of Tennessee's waiver. Tenn. Code Ann. § 71-3-158(d)(2)(B) provides that:

> If at anytime: (i) The congress of the United States terminates or modifies the Title IV-A block grant program for federally funded economic or welfare assistance to families and children to the states under the temporary assistance to needy families program (TANF) as provided in Public Law 104-193 (1996), as amended; [or] (ii) The congress of the United States, or the United States department of health and human services or its successor terminates, or modifies, Tennessee's Section 1115 waiver obtained pursuant to subdivision (d)(1) on July 26, 1996, that resulted in the creation of the families first program; . . . then, in that circumstance, the department shall continue to administer, pursuant to the requirements of federal statutes and regulations existing at that time or subsequently enacted, the programs of economic or welfare assistance to families and children under Titles IV-A and IV-D of the Social Security Act as they may continue to exist on or after the date of such termination or modification or until the granting of a new waiver, and *the provisions of §§ 71-3-151--71-3-165, chapter 3, parts 9 and 10 and chapter 5, part 12 of this title shall be superseded to the extent: (i) Those provisions are inconsistent with any federal requirements for which no waiver exists;* or (ii) No further federal funding is available, unless the general assembly specifically authorizes and funds the continuation of such provisions that do not otherwise conflict with federal law, regulation or waiver requirements. (Emphasis added.)

Families First statutes and rules do not define the term "inconsistent." However, TANF regulations provide that "[i]nconsistent is a term relevant to continuation of a waiver" and "means that

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funds; or (4) The agency is required by an enactment of the general assembly to implement rules within a prescribed period of time that precludes utilization of rulemaking procedures described elsewhere in this chapter for the promulgation of permanent rules." Tenn. Code Ann. § 4-5-209(a).

complying with the TANF work participation or sanction requirements at section 407 of the Act [42 U.S.C. § 607] or the time-limit requirement at section 408(a)(7) of the Act [42 U.S.C. § 608(a)(7)] would necessitate that a State change a policy reflected in an approved waiver." 45 C.F.R. §§ 260.30 and 260.71; *see also* 45 C.F.R. § 260.70. TANF regulations further provide that "[a]n inconsistency may not apply beyond . . . the expiration of [the] waiver authority . . .." 45 C.F.R. § 260.72.

Establishing that any particular Families First statutory provision is "inconsistent" with TANF work participation requirements such that it would be necessary for the state to change the provision in order to comply with those regulations would be difficult. TANF regulations with respect to work participation rates are detailed and complex, but simply put, require states to maintain an overall 50 percent work participation rate. 42 U.S.C. § 607 (a); 45 C.F.R. §§ 261.20 - 261.24. This work participation rate is a numerical expression of the percentage of TANF recipients who are engaged in a work activity. TANF defines "work activities" as the following twelve activities:

(1) unsubsidized employment;
(2) subsidized private sector employment;
(3) subsidized public sector employment;
(4) work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;
(5) on-the-job training;
(6) job search and job readiness assistance;
(7) community service programs;
(8) vocational educational training (not to exceed 12 months with respect to any individual);
(9) job skills training directly related to employment;
(10) education directly related to employment, in the case of a recipient who has not received a high school diploma or a certificate of high school equivalency;
(11) satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence, in the case of a recipient who has not completed secondary school or received such a certificate; and
(12) the provision of child care services to an individual who is participating in a community service program.

42 U.S.C. § 607(d); 45 C.F.R. §§ 261.2 and 261.30. We found no single Families First provision which, on its face, standing alone, appeared capable of precluding compliance with the 50 percent work participation requirement, as any noncompliance could be absorbed in the remaining 50 percent. Specifically considered in this analysis were Tenn. Code Ann. § 71-3-154(g)(10), which adds postsecondary education or training as a work activity, and Tenn. Code Ann. § 71-3-154(h)(3)(E), which excuses compliance with work requirements for a parent or caretaker relative

who functions at or below grade level 8.9. Neither of these provisions are recognized under the TANF regulations and both could make it difficult for DHS to comply with the TANF work participation requirement. However, we could not conclude that these provisions would preclude compliance with the 50 percent work participation requirement absent data which would establish that the number of recipients affected by these provisions would preclude such compliance. Relevant to this conclusion is the fact that assistance under Families First/TANF is not an entitlement (42 U.S.C. § 601(b)) and DHS has some discretion in determining assignment of work activities.

TANF recipients who refuse to engage in the twelve enumerated work activities are subject to having their assistance reduced or terminated, unless they fit within certain limited exceptions. 42 U.S.C. § 607(e); 45 C.F.R. §§ 261.14 and 261.15. States are also subject to monetary penalties if they fail to meet the work participation rate and/or fail to reduce assistance to recipients who refuse, without good cause, to work. 42 U.S.C. § 609(a)(3) and (a)(14); 45 C.F.R. §§ 261.14, 261.15, 261.20 - 261.24, 261.50 - 261.55, 262.1 - 262.3. We found no Families First provision which appeared inconsistent with these sanction requirements.

With regard to time-limit requirements, TANF limits assistance to any recipient to a total of sixty months, whether consecutive or not, subject to several limited exceptions. 42 U.S.C. § 608(a)(7); 45 C.F.R. § 264.1(a). A state may exempt up to 20 percent of recipients from the application of the five year time limit based on hardship or when the family includes an individual who has been battered or subjected to extreme cruelty. 42 U.S.C. § 608(a)(7)(C); 45 C.F.R. § 264.1(c). States are subject to monetary penalties if they fail to comply with the five year limit on assistance. 42 U.S.C. § 609(a)(9); 45 C.F.R. § 264.2. Tennessee's Families First statute and waiver include the sixty month time limit, as well as a provision which limits any single continuous period of eligibility to eighteen months, with some limited exceptions. Tenn. Code Ann. § 71-3-154(d)(1)(A). This eighteen month eligibility period was apparently carried over into the Families First statute and waiver from the AFDC program which preceded the TANF block grant program, but not included in the TANF block grant program. However, the eighteen month eligibility period does not appear to interfere with DHS' ability to comply with the five year time-limit requirement as the five year period is not required to be one continuous period.

Tenn. Code Ann. § 71-3-154(d)(4) also includes an exemption from the sixty-month time limit and the eighteen-month time limit for a person who functions at or below grade level 8.9. This exemption is not recognized under the TANF regulations and would not, on its face, appear to apply to a sufficient number of recipients to preclude compliance with the five year time limit, as these recipients could be included in the 20 percent hardship exemption. In order to establish that this exemption is inconsistent with the five year time-limit requirement, DHS would have to establish that this exemption included sufficient numbers to preclude compliance with the 20 percent hardship exemption.

3. You have also asked whether Tenn. Code Ann. § 71-3-158(d)(2)(D) would permit DHS to abrogate Families First statute exemptions or activities that are not directly inconsistent with or specifically prohibited by TANF laws or regulations, and are not recognized for purposes of

meeting certain performance standards under TANF law or regulations, based on loss or potential loss of federal funding. Tenn. Code Ann. § 71-3-158(d)(2)(B) provides that:

> If at anytime: (i) The congress of the United States terminates or modifies the Title IV-A block grant program for federally funded economic or welfare assistance to families and children to the states under the temporary assistance to needy families program (TANF) as provided in Public Law 104-193 (1996), as amended; [or] (ii) The congress of the United States, or the United States department of health and human services or its successor terminates, or modifies, Tennessee's Section 1115 waiver obtained pursuant to subdivision (d)(1) on July 26, 1996, that resulted in the creation of the families first program; . . . then, in that circumstance, the department shall continue to administer, pursuant to the requirements of federal statutes and regulations existing at that time or subsequently enacted, the programs of economic or welfare assistance to families and children under Titles IV-A and IV-D of the Social Security Act as they may continue to exist on or after the date of such termination or modification or until the granting of a new waiver, *and the provisions of §§ 71-3-151--71-3-165, chapter 3, parts 9 and 10 and chapter 5, part 12 of this title shall be superseded to the extent:* (i) Those provisions are inconsistent with any federal requirements for which no waiver exists; or (ii) *No further federal funding is available, unless the general assembly specifically authorizes and funds the continuation of such provisions that do not otherwise conflict with federal law, regulation or waiver requirements.* (Emphasis added.)

Tenn. Code Ann. § 71-3-158(d)(2)(D) provides that DHS has the statutory authority to promulgate public necessity rules "[n]otwithstanding any law to the contrary, . . . that are necessary to . . . maintain compliance with . . . termination or modification [of the waiver or the TANF block grant program]; . . . *maintain federal funding*; . . . [or] comply with any federal regulation that has not been waived." (Emphasis added.) However, funding under the TANF block grant program is not designated for any particular provision in Tennessee statute, but is granted to the overall state program based on historical expenditures and the plan submitted by the state. 42 U.S.C. §§ 602 and 603. A state may use a TANF block grant "in any manner that is reasonably calculated to accomplish the purpose" of the block grant program. 42 U.S.C. § 604(a)(1). The purpose of the TANF block grant program is broadly defined as follows:

> (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
> (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
> (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for

> preventing and reducing the incidence of these pregnancies; and
>
> (4) encourage the formation and maintenance of two-parent families.

42 U.S.C. § 601(a); 45 C.F.R. § 260.20. Federal funding is lost under the TANF block grant program by way of retrospective audits and assessment of penalties for certain specified noncompliance. 42 U.S.C. § 609; 45 C.F.R. § 262.1 - 262.3. Thus, any exemptions or activities in the Families First statute which are not required by or inconsistent with TANF law or regulation, but which have been added based on policy decisions, do not affect federal funding and will not be superseded pursuant to Tenn. Code Ann. § 71-3-158(d)(2)(D).

4. Finally, you have asked whether DHS can use public necessity rules to "abrogate other existing Families First statutes" in order to revise and/or update all existing Families First program regulations (Tenn. Comp. Rules and Regulations, 1240-1, Chapters 1-56) as part of a general program re-design if necessary to maintain federal funding. As set forth above, DHS cannot promulgate public necessity rules to "abrogate existing Families First statutes." Further, while DHS has the statutory authority to promulgate public necessity rules necessary to maintain federal funding, funding will not be affected by updating the Families First rules. Funding under the TANF block grant program is not tied to any particular provision in Tennessee statute or rule, but is granted to the overall state program based on historical expenditures and the plan submitted by the state, and funding is only lost by way of retrospective audits and assessment of penalties for certain specified noncompliance. Therefore, DHS may not promulgate public necessity rules to revise and/or update existing Families First program regulations as part of a general program re-design necessary to maintain federal funding.

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