CHAPTER 13

TEMPORARY ASSISTANCE FOR NEEDY FAMILIES IN LOUISIANA

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About The Author

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1. INTRODUCTION

The Family Independence Temporary Assistance Program ("FITAP") and Kinship Care Subsidy Program ("KCSP") provide cash assistance to needy families and are Louisiana's primary implementation of the federal Block Grant for Temporary Assistance for Needy Families ("TANF"). These two programs are designed on the state level as entitlement programs: all who qualify are to receive the assistance.[1] The state also uses TANF funds to fund other programs that do not provide cash assistance and under which there is no assurance of assistance for all who meet their eligibility criteria. The latter are called "TANF Initiatives."

This Chapter focuses on FITAP, KCSP, and the work participation requirements to receive FITAP (called Strategies to Empower People, or "STEP").

The TANF initiatives are set out at Louisiana Administrative Code (hereafter, LAC) Title 67, Part 3, Chapter 55. For an initiative to be a proper use of TANF funds, it must: 1) provide assistance to needy families, or 2) promote job preparation, work, or marriage of needy parents, or 3) prevent or reduce out-of-wedlock pregnancies, *or* 4) encourage the formation and maintenance of two-parent families.[2] Recipients of the assistance need only be indigent with respect to the first two goals. The state's TANF initiatives are fluid rather than static: the state is free to and does end some and start new ones, at its discretion, exercised through rulemaking in the Louisiana Register.

The federal TANF program is a block grant. In Louisiana all of its aspects, thus far, are administered by the Department of Children and Family Services ("DCFS"). Though the state must act within federal constraints, all rules are set at the state level. The federal requirements may help in interpreting the state provisions, and the need to comply with the federal requirements can inform policy arguments about program design. But the requirements placed on recipients are determined by state law and policy.

2. DEALING WITH ADVERSE ACTIONS: REAPPLYING, NEGOTIATION, ADMINISTRATIVE APPEALS, AND JUDICIAL REVIEW

Most TANF program parameters are decided only as a matter of state law; federal statutory or regulatory law rarely determines an issue. (For example, even where compliance with federal "work participation" requirements is at issue, those requirements do not require 100% compliance. So it is not federal law that requires a client be sanctioned.) As a result, unless a denial of due process or violation of the Americans with Disabilities Act or other federal statute occurs, if the fair hearing decision is not favorable, the only formal relief available is through state court "judicial review." As a result, the decision as to how to preserve the client's rights is very straightforward, unlike under some other programs, where direct resort could be made to federal court based on violation of federal law.

This also means that the administrative appeal must be utilized before court review is possible, unless there is a federal statutory or due process claim. The state court review will be based exclusively on the record created at the hearing.

[1] *See Due Process section, infra.*

[2] 42 U.S.C. § 601(a).

2.1 REAPPLYING

If the issue is one where the outcome could change by reapplying, the applicant should usually be advised to reapply, *even if a fair hearing is requested*. The reapplication decision may come faster than a hearing decision. If the adverse action was for a failure to return paperwork, the applicant may be able to avoid the problem coming back up on the new application. Sometimes agency staff will use the information obtained in reviewing the new application to favorably resolve an appeal the client files.

Where the termination was caused by a STEP sanction, reapplying will not help resolve the matter. Fortunately, continued benefits pending appeal may be available in appeals from STEP sanctions.

2.2 FILING A FAIR HEARING REQUEST

Recipients have a right to a fair hearing and access to state court regarding denials, terminations or reductions of assistance, or delays in obtaining it.[3]

Fair hearing requests are to be filed with DCFS, as stated on the notice under appeal. But the fair hearings are now conducted by a separate state agency, the Division of Administrative Law (DAL).[4] There are no federal statutory or regulatory requirements regarding TANF fair hearings. Even food stamp issues (which are often present along with TANF issues in a TANF appeal) can be heard by the outside agency.[5]

An appeal sent or made directly to the DAL is not considered docketed. DAL will instead forward the appeal to DCFS.[6] Filing with the DAL therefore risks both that the appeal may be mislaid and an uncertain filing date.

A person whose FITAP or KCSP assistance has been denied, terminated, or reduced, or who is contesting a STEP sanction has 30 days to file an administrative appeal from the agency decision.[7] If the recipient is certified and contesting the amount of their assistance, they can appeal at any time during their current certification period.[8] The administrative appeal is a required step before being able to go into court, unless the client has a claim under a federal statute.

Appeals can be requested orally or in writing.[9] An appeal is treated as filed the day it is postmarked, orally requested, or phoned in.[10] If the agency receives the request by U.S. mail and there is no postmark, it is treated as mailed the previous working day before received by the agency.[11]

If the 30 day period for requesting a fair hearing has passed and there is no federal claim (such as denial of due process or violation of the Americans with Disabilities Act), the recipient is left to re-apply, and client will lose the benefits at issue for the period before filing the new application.

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3 La.R.S. 46:107(A),(C).

4 La.R.S. 49:992(D)(2). While La.R.S. 46:107(A)(4) & (B) state that hearings are conducted by the Department of Children and Family Services, 49:992 provides that it overrides all but federal requirements.

5 7 C.F.R. § 273.15(m)(1)(iii).

6 Memorandum of Understanding between La. DCFS and La. DAL, Dec. 21, 2010, § 3.2.

7 LAC Title 67, Part 3 § 307(A)(1).

8 LAC Title 67, Part 3 § 307(A)(2).

9 Office of Family Support Administrative Procedures Manual § K-100.

10 LAC Title 67, Part 3, § 307(B).

11 *Id.*

2.3 ATTEMPT TO WORK ISSUES OUT WHILE AWAITING A FAIR HEARING

The administrative appeals can pend 90 days (60 if food stamps are also at issue).[12] Particularly when the recipient is without assistance pending appeal, consideration should also be given to attempting to work the issue out with the agency worker before the hearing, except where showing one's cards in advance of the hearing would instead weaken the case.

In addition, as noted in the section on STEP sanctions, *infra,* the agency Manual requires that "good cause" be asserted within 30 days after the advance notice period, so that leaving a case inactive may prejudice the client.

Many compliance issues can be resolved by submitting additional paperwork to the agency, reaching agreement with the client's worker, or by re-applying for assistance. Reapplying is especially likely to be fruitful if actions or omissions of the client, agency, or third parties resulted in the denial, and might not recur with respect to the new application. But if there are system issues the client does not want mooted, or gray issues not developed regarding the prior application, which would complicate the appeal, reapplying may be against the client's interests. And if agency policy precludes the client's eligibility, there is no reason to put the client through the unnecessary work of a new application.

It is often particularly advantageous to pursue this other relief *soon after filing* a fair hearing request. Resolving the matter can end the need for the worker to prepare a Summary of Evidence for the hearing, as well as avoid the need to attend a hearing. The more work that remains available at the point a potential resolution is available, the more likely many workers may be willing to end the whole matter, fully in favor of the client.

2.4 PROCEDURAL RULES GOVERNING THE FAIR HEARING

The appeals are governed by a public assistance statute, La.R.S. 46:107, the Administrative Procedure Act, La.R.S. 49:951, 955-964, and the Division of Administrative Law statute, La.R.S. 49:991-999. (Be careful, the copy of the DAL statute posted on its website is not necessarily up to date. For instance, as of December 2012, it does not reflect legislative changes from 2010.)

The Division of Administrative Law also has its own set of procedural regulations.[13] The applicable regulations were last updated in 2012, though as of the publication of this Manual, the version linked on the DAL website has not been updated.

DCFS has its own set of hearing policies, in its Administrative Procedures Manual, "Chapter 7."[15] These policies certainly still govern the DCFS staff. Since DAL staff that hear DCFS cases are used to operating under them, they, too, will likely continue for at least the immediate future to defer to these DCFS policies when invoked.

[12] LAC Title 67, Part 3, § 309.
[13] LAC Title 1, pt. III, § 101 et seq.
[14] LAC Title 1, pt. III, § 305.
[15] https://stellent.dss.state.la.us/LADSS/outlineSections.do?partID'88&agency'OFS&chapterID'5

These rules require that the DAL send a "summary of evidence" with exhibits the agency anticipates using, and policy cites, with or before the hearing notice.[16] Notice of a hearing date and time is to be sent out at least 10 days before the hearing.[17] These policies assure access to the client's file (except in some instances confidential parts, which cannot be used at the hearing) in advance of the hearing.[18]

2.4.1 Theoretical availability of discovery

All discovery tools and subpoenas are theoretically available within the fair hearing proceeding.[19] Because fair hearing proceedings must usually be concluded within 90 days, if the opposing party does not promptly cooperate, the tools may have limited usefulness.

Clients and their representatives are to have access to the agency file in advance of any hearing.[20] As a result, the most likely application for discovery would be if an application has been denied because of non-cooperation by, or misinformation from a third party, such as an employer.

2.4.2 The hearing should not be limited to consideration of what was before the agency at the time of the adverse decision

ALJs sometimes contend that the issue at a fair hearing concerns whether the agency made the correct decision based on the facts that were before the agency when it took the adverse action. The state Administrative Procedure Act specifies that appellants are permitted to add evidence to the administrative record and argue all issues of law.[21] Another agency's ALJ has been reversed as having denied a "fair hearing" for limiting the record to what was before the Medicaid agency at the time of its original decision.[22] Other states' courts have made similar rulings. And the state Administrative Procedure Act allows reopening of a fair hearing decision even *after* a hearing if "The party has discovered since the hearing evidence important to the issues which he could not have with due diligence obtained before or during the hearing; [or]…There is a showing that issues not previously considered ought to be examined in order properly to dispose of the matter."[23] So certainly additional evidence should be accepted at the hearing, too.

2.4.3 Improper dismissal of appeals

If an appellant misses their hearing without having advised the ALJ of good cause, the appeal will be dismissed; later requests to re-schedule the hearing based on good cause should be entertained.[24] But given appeals are now being decided by a different agency, it cannot be assured that this procedure will be followed.

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[16] LAC Title 67, Part 3, § 301 (definition), §321. Due process and the state Administrative Procedure Act, La.R.S. 49:955(B), would require the same as to at least some elements of the summary of evidence.

[17] LAC Title 67, Part 3, § 319(A).

[18] LAC Title 67, Part 3, § 315(A)(5)); Administrative Procedures Manual § K-510.

[19] La.R.S. 49:956(5, 6); costs are not to be charged if the client is indigent. La.R.S. 46:107(B).

[20] LAC Title 67, Part 3, § 315(A)(2, 5).

[21] La.R.S. 49: 955(C)("Opportunity shall be afforded all parties to respond and present evidence on all issues of fact involved and argument on all issues of law and policy involved and to conduct such cross-examination as may be required for a full and true disclosure of the facts.") At worst, this provision should authorize the appellant to evidence facts other than those initially before the agency as part of an argument that review should not be limited to what was originally before the agency.

[22] *Bell Oaks v. DHH*, 96-1256 (La. App. 1 Cir. 1997), 697 So.2d 739, 749. *Bell Oaks* deals with agency scoring of Requests for Proposal-essentially private bids to do business with DHH. An argument that agency review should be limited to the prior record is particularly strong in that context, but the agency attempt to do this was not upheld.

[23] La.R.S. 49:959(A)(2 & 3).

[24] LAC Title 67, Part 3, § 325(A)(2).

The agency will also dismiss appeals if resolved in advance of the hearing in the client's favor.[25] But due process requires that DAL not simply take a worker's word that this has occurred without confirming with the adverse party or their representative.

Appeals may also be dismissed if the *DCFS* decides there is no jurisdiction over the appeal or that the request is untimely, or that the only thing at issue is an automatic adjustment to benefits required by state or federal law.[26] This decision is often made ex parte, based on input only by the agency, denying due process.[27]

2.4.4 Right to an in-person hearing

The Division of Administrative Law is set up to conduct its hearings by phone. This enables tighter scheduling and reduces transit costs. Its staff have said they cannot do hearings from sites other than a few DAL offices, because of the size of the equipment to digitally record the hearings.[28]

But the FITAP/KCSP regulations assure the right to an in-person hearing, unless the record reflects that the applicant/recipient consented to a hearing conducted by phone.[29] The regulations also inaccurately state that the DCFS will conduct the hearing, whereas a statute has moved the hearings to DAL.[30]

It is likely that if an applicant requests an in-person hearing DAL will agree to this. Even if the hearing has already been scheduled to be by phone, DAL is likely to accommodate by re-setting for an in-person hearing. But DAL will usually set the hearing in Baton Rouge, or possibly in one of its few offices outside of Baton Rouge.

The state regulation does not assure the hearing will be held in the local parish. Because the regulation can be characterized as only applying if DCFS conducts the hearing (which it no longer does), because the regulation can be changed through rulemaking, and because nothing assures that an in-person hearing must occur in the parish, an effort to get the agency to conduct local in-person hearings would probably be best pursued with a client challenging an action which also affects their food stamps. There may be other, federal guidance to draw on requiring that food stamp hearings be conducted locally and in-person. For example, the food stamp regulations require that "The time, date, and place of the hearing shall be arranged so that the hearing is accessible to the household."[31]

2.4.5 Review of proposed ALJ decisions by the DCFS

Though DAL conducts the hearing, the ALJ writes only a recommended decision, which it then forwards with the exhibits and audio track to DCFS for review. DCFS then has 35 days reject, modify, or approve the recommended decision.[32] If it does not take action within that period, the recommended decision becomes the final decision.[33]

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[25] LAC Title 67, Part 3, § 325(A)(3).
[26] LAC Title 67, Part 3, § 305(B); Memorandum of Understanding between LA. DCFS and La. DAL, Dec. 21, 2010, § 3.3.
[27] *Accord Georgia Gulf Corp. v. Board of Ethics for Public Employees,* 96-1907 (La. 5/9/97), 694 So.2d 173 (holding that prosecuting counsel's drafting administrative opinion denies due process).
[28] The advocate can point out that the hearing can still be recorded by phone, using that digital equipment, even if the ALJ is present with the parties in a local parish.
[29] LAC Title 67, Part 3, § 319(B).
[30] LAC Title 67, Part 3, § 303(A); *compare* La. R.S. 49:992(D)(2)(b)(iii)(bb).
[31] 7 C.F.R. § 273.15(l).
[32] Memorandum of Understanding between LA. DCFS and La. DAL, Dec. 21, 2010, § 4.1.
[33] *Id,* at § 4.2.

If the actual decision maker at DCFS has not reviewed the entire record, then a proposed decision must be served on the applicant or recipient.[34]

Even if DCFS has rejected the DAL ALJ's decision, that decision should remain part of the record and its rejection should be explicit in the final decision.[35]

Because DCFS has reserved 35 days to review the ALJ decision, and 25 days to get paperwork to DAL after the hearing is requested, the DAL may only have 25 days to actually set and hear the case and write its recommended decision.[36]

2.4.6 Rare access to continued benefits pending appeal

When the recipient is eligible for continued benefits pending appeal, there are thirteen days to appeal and maintain continued benefits pending appeal.[37]

But because DCFS usually certifies FITAP and KCSP cases for benefits for a specific time period, continued benefits pending appeal usually are not available on most FITAP issues. The recipient is only entitled to continued benefits if the agency takes an adverse action that cuts benefits for a period that was previously approved, and then only for the remainder of the period previously approved.[38]

Usually the agency instead takes its adverse action when the recipient is nearing the end of a certification, and makes the action effective at the end of the certification period.

The state statutes discussed in the due process section of this Chapter, *infra,* may create a property right in continued FITAP and KCSP assistance. That could provide a basis for invalidating the state's regulation that FITAP assistance is only granted for periods of a number of months, and that each application for a new set of months is separate and independent. This regulation is relied on to deny any pre-deprivation hearing or continued benefits pending appeal when benefits are cut or ended at redetermination.[39]

But there is federal precedent even in a program recognized as creating a property interest, for holding that continued benefits are not a required element of due process when a certification for a set number of months has ended.[40]

A notable exception is STEP violations. These can come to the agency's attention at any time, and so are more likely to be imposed during a certification period. As a result, agency policies require advance notice of the sanction, meaning that the recipient has the right to continued benefits pending appeal (but only through the end of their certification period).[41] That right includes the right to continued supportive services.[42] But because the agency can review for "good cause" for a STEP violation (possibly only in advance of the hearing, as discussed in the STEP section *infra*), other advocacy steps should be taken in addition to appealing for STEP violations.

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[34] La.R.S. 49:957.

[35] *See Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 493 (1951).

[36] Memorandum of Understanding between LA. DCFS and La. DAL, Dec. 21, 2010, § 4.2.

[37] LAC Title 67 Part 3, § 313(A).

[38] LAC Title 67 Part 3, § 313(B).

[39] See LAC Title 67 Part 3, §§ 1207(A), 1209(A)(9); see also §313(B)(benefits continued at the prior level only through the end of the certification period).

[40] *Banks v. Block*, 700 F.2d 292, 297 (6th Cir.) *cert denied* 464 U.S. 934 (1983).

[41] FAM4 § P-550-STEP.

[42] FAM4 § P-610-STEP.

2.4.7 Substitute for continued benefits: possibility of getting a state court stay while a fair hearing is pending

A stay can be sought from state court in conjunction with a state court judicial review proceeding.[43] The state court proceeding can be filed immediately if a non-final agency ruling (such as the decision to terminate continued benefits or the underlying action at issue) will otherwise inflict irreparable injury.[44] The judicial request for a stay could be concurrent with an ongoing fair hearing proceeding.

Most state courts will want all administrative remedies exhausted before injecting the court into an agency proceeding, so it is prudent to have exhausted as many as possible before seeking such relief. Even so, getting a court to issue the stay while other proceedings are still pending and with little record to rule on is bound to be an uncertain proposition.

The agency, too, can issue a stay, in lieu of the court's doing so.[45] Since a stay is not exactly a preliminary injunction, there is no automatic requirement that security be posted in order for the relief to issue.

2.5 AFTER AN ADVERSE HEARING DECISION, 10 DAYS TO REQUEST ADMINISTRATIVE RECONSIDERATION

If the client has a hearing decision that is less than ten days old and a fairly clear legal claim has been missed by the agency, a petition for reconsideration or rehearing and/or demand letter to the agency are the fastest ways to seek relief. During the first ten days, a petition for reconsideration or rehearing can be filed with the DAL.[46] Even though a new ***hearing*** is not usually expected or needed, it is prudent to label the request as a petition for "reconsideration or rehearing." This is because the statutes refer to the latter as extending the time period for judicial review, even if not granted by the agency.[47]

There are no specific format requirements (it can even be a letter memo), but the petition must be specific as to the grounds under which rehearing is sought, including the specific statutory reason for seeking review.[48]

Theoretically, rehearing can be requested even later where challenging fraud, use of perjured testimony, or fictitious evidence.[49] But the author is unaware of such requests having been granted.

The rehearing or reconsideration decision will be made by the same person that made the original decision.[50] If a DAL ALJ is at issue, the ALJ will consider the petition for rehearing or reconsideration. If DCFS overrode the ALJ, then DCFS will consider the petition, though the petition must be filed with DAL.

The agency does not usually hold a supplemental evidentiary hearing. However, sometimes, where there is a very strong argument against the hearing decision, relief will be granted, with shorter delays than in going to court, without exposure to court fees, and with less work needed to explain the issue, since the ALJs are more familiar with the program than district court judges.

[43] La.R.S. 49:964(C); *Division of Administration v. Department of Civil Service*, 345 So.2d 67 (La. App. 1st Cir. 1977)(granting stay of administrative order); *Summers v. Sutton*, 428 So.2d 1121, 1125 (La App. 1st Cir. 1983)(denying stay of administrative order).
[44] La.R.S. 49:964(A).
[45] La.R.S. 49:964(C).
[46] La.R.S. 49:959(A).
[47] La. R.S. 46:107 (C); La. R.S. 49:959(B)(final sentence).
[48] La.R.S. 49:459(B).
[49] La. R.S. 49:959(B); CMS State Medicaid Manual §2904.1(D & E)(allowing reopening within a year for various reasons, including new evidence, and without time limit for fraud).
[50] Memorandum of Understanding between La. DCFS and La. DAL, Dec. 21, 2010, § 4.4.

2.6 NON-COURT REVIEW AFTER THE 10 DAYS FOR ADMINISTRATIVE RECONSIDERATION OF APPEAL DECISIONS

Even after the ten day period for rehearing or reconsideration, demand letters or other approaches to the Secretary of DCFS or DCFS Legal Unit can be effective, especially if made within the period for seeking judicial review. Such requests do not suspend the period for judicial review. But they may get attention from the agency, by persons more familiar with the program, who are freer to delve into policy issues,[51] and can get a review that goes beyond the evidence in the administrative record.

2.7 STATE COURT JUDICIAL REVIEW OF HEARING DECISIONS

1. Beginning suit and time limitations

   Appellants can file for judicial review under the state Administrative Procedure Act within 30 days of an adverse fair hearing decision.[52] As noted above, a timely filed petition for rehearing extends the period. A two page, non-substantive form petition is usually used to start the proceeding. Petitions are often styled "in re" the claimant, or the Office of the Secretary of DCFS can be named as defendant. The Division of Administrative Law is not named as a party in cases available on Westlaw (seeking review of adverse actions by other agencies). This is consistent with La. R.S. 49:992(B)(3).[53] Service of the petition on DCFS must be arranged.[54]

   Judicial review is of the existing administrative record, including hearing transcript. Court review cannot take place until the record is received.[55] But the petitioner can file a motion to stay the adverse action in the meantime, if enough evidence can be presented to the court to justify this,[56] or other sanctions can be ordered by the court for transcript delays.[57]

   If the petition is filed in Baton Rouge (as well as some other parishes), the Local Rules require that the plaintiff's attorney "immediately notify" the Judge that a judicial review proceeding is pending.[58] On receiving notice, the judge often schedules a status conference to set a briefing schedule.

2. Venue

   The plaintiff can choose between Baton Rouge venue and the parish of his or her domicile.[59] But if the proceeding will seek a declaratory judgment that an agency rule or policy is invalid or inapplicable this request should be explicit in the petition and exclusive venue may be in Baton Rouge.[60]

3. Limitations on judicial review

   Judicial review is limited to the record from the fair hearing.[61] The governing statute does not require that courts accept agency fact-findings, but

[51] The Division of Administrative Law is only empowered to reverse for legal errors, though this can include arbitrary and capricious action.

[52] La.R.S. 49:964(B); 46:107(C). As noted above, a timely filed petition for rehearing extends the period.

[53] "Nothing in this Section shall affect the right to or manner of judicial appeal in any adjudication, irrespective of whether or not such adjudication is commenced by the division or by an agency."

[54] La.R.S. 49:964(B).

[55] *Compare* La. R.S. 49:964(D).

[56] La.R.S. 49:964(C).

[57] *In re Forgione*, 36130 (La. App. 2 Cir. 6/12/ 02), 821 So. 2d 673, 677; *Bruce v. State, Department of Health and Hospitals*, 95-1175 (La. App. 3rd Cir. 3/6/96) 670 So.2d 680.

[58] *See e.g.*, Louisiana Rules for District Courts, Appendix 9.14, 19th JDC, "Judicial Reviews and Appeals."

[59] La.R.S. 46:107(C).

[60] *See* La.R.S. 49:963(A)(1); *Star Enterprises v. State, Department of Revenue*, 95-1980 (La. App. 1st Cir. 6/28/96), 676 So.2d 827, 833.

[61] La.R.S. 49:964(F).

just give them "due regard," which is lessened when the hearing was not conducted in person.[62] There is a split as to whether the Court of Appeal should defer to the District Court as to the facts.[63] The First Circuit has also noted that an ALJ's disbelief of the recipient or applicant does not create sufficient evidence to support an agency ruling.[64]

A paucity of relevant facts in the record or of explanations of the legal context can defeat the legal claim for relief or can reduce the judge's comfort level (that he or she understands everything he or she needs to in order to avoid making a mistake), thus increasing deference to the agency, which may argue that its decision is based on important policy concerns.

It is unlikely that class-wide relief can be sought in an APA proceeding, since it is a summary proceeding and class actions are ordinary proceedings. However, declaratory relief, which can be sought in a Baton Rouge APA proceeding,[65] may benefit others.

2.8 IS THERE A FEDERAL QUESTION IF DUE PROCESS HAS BEEN DENIED?

The Eleventh Amendment bars federal court jurisdiction over non-federal claims against a state.[66] This leaves state court as usually the only forum for pursuing issues unless there has been a violation of due process or the Americans with Disabilities Act. The presence of a federal claim could allow one to file a federal civil suit, not bound by an administrative hearing record or the short time limitations for administrative appeals or judicial review.[67]

As noted throughout the text, one of the few possible federal claims under the TANF program would concern denials of due process. But an agency's use of improper procedure is not enough to state a due process claim. Due process protects property and liberty interests. If the assistance at issue does not qualify as property, then the agency is not obligated under federal law to provide due process.

The federal TANF statute explicitly attempts to avoid creating any entitlement that could be enforced through litigation.[68] But state statutes pre-dating and surviving the enactment of the state's FITAP program do create or recognize an entitlement. La.R.S. 46:233 provides that "Assistance ***shall be granted*** to or on behalf of any child found to be in necessitous circumstances as defined by" state agency regulations.[69] La.R.S. 46:231.2 also repeatedly uses the term "shall"

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[62] La. R.S. 49:964(G)(6).

[63] *Carpenter v. State, Dept. of Health and Hospitals*, 2005-1904 *8 (LA.APP. 1 CIR. 9/20/06), 944 So.2d 604, 610 (approving District Court's reversal of ALJ credibility decision, and holding that appellate court need not defer to District court in APA proceedings); *Wild v. State, Dept. of Health and Hospitals*, 2008-1056 *6 (La.App. 1 Cir. 12/23/08), 7 So.3d 1, 4-5 (Court of Appeal's review is plenary, without deference); *Compare Bueche v. Dep't of Health & Hospitals*, 2000-1473 (La.App. 1 Cir. 6/21/02), 822 So. 2d 25 (Court of Appeal defers to the District Court on facts in APA proceeding); *Multi-Care, Inc. v. Multi-Care, Inc. v. State, Dept. of Health & Hospitals*, 2000-2001 *4 (La.App. 1 Cir. 11/9/01), 804 So.2d 673, 675 (deference runs to the District Court, not the agency); *St. Martinville, L.L.C. v. Louisiana Tax Com'n*, 2005-0457 *4 (La.App. 1 Cir. 6/10/05) 917 So.2d 38, 41-42; *but see Feliciana Consultants, Inc. v. State, Dept. of Health & Hospitals*, 2009-1098 *5 (La. App. 1 Cir. 12/23/2009) 2009 WL 4981283 (concurrence articulating this position, but majority not).

[64] *Carpenter v. State, Dept. of Health and Hospitals*, 2005-1904 *8 (La.App. 1 Cir. 9/20/06), 944 So.2d 604, 610, *quoting Stroik v. Ponseti*, 97-2897, p. 11 (La.9/9/97), 699 So.2d 1072, 1080, *citing New Orleans & Ne. R.R. Co. v. Redmann*, 28 So.2d 303, 309 (La.App. 4 Cir. 1946))

[65] La.R.S. 49:963.

[66] *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984).

[67] *Wooley v. State Farm Fire and Cas. Ins. Co.*, 2004-CA-882 *36 (La. 1/19/05) 893 So.2d 746, 771 (ALJ decisions not entitled to res judicata in Louisiana); *Burnett v. Grattan,* 468 U.S. 42 (1984)(general tort period applies to § 1983 action, not a shorter period for filing administrative actions).

[68] 42 U.S.C. § 601(b)("This part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part.")

[69] Emphasis added.

in describing the FITAP assistance to be provided. La. R.S. 46:108 provides that assistance amounts can be changed if the Department finds a change in the recipient's circumstances and that assistance can be revoked, canceled, or suspended "for cause." Other statutes are to the same effect.[70]

Because of the state statutes cited above and because of the objective standards used to determine who does and does not get assistance, the state has established an interest that can only be removed "for cause." Interests that can only be removed "for cause" qualify as "property," protected by the Fourteenth Amendment's due process clause.[71] As noted above, La. R.S. 46:108 explicitly provides that assistance cannot be canceled, revoked, or suspended except "for cause." At least one court has ruled, based on the existence of state standards and policies governing who gets assistance, that its state's TANF benefits are protected by due process, even though the state's legislation, like the federal statute, purported to create "no entitlement."[72] Due process coverage creates rights to fair process, to adequate notice of the reason for actions, to advance notice of actions, and to continued benefits pending appeal, and possibly to notice of exemptions and policies that could protect the recipient from adverse action.[73]

Nonetheless, no federal claim lies for a denial of property that was protected by due process if the loss was due to a random and unauthorized action, unless improved procedures could prevent such losses.[74]

Even if there is a federal claim, the Eleventh Amendment bars a federal court from granting retrospective relief that will impact the state Treasury (back-benefits).[75] The TANF program is set up so that states are required to put up a block of money ("maintenance of effort") and then can draw down federal TANF funds, up to a specified amount. Some states might then spend more, which would come solely from state funds. Louisiana does not. It could be argued that because the state must pay the same share regardless of how much federal money is spent,

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[70] *See* La.R.S. 46:106(A)(providing that FITAP assistance amounts are binding until modified or vacated); La.R.S. 46:115 (making the public assistance statutory requirements mandatory on parishes).

[71] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 12 (1978); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 600-603 (1972)(holding that expectations created by faculty guide, guidelines, and existing rules and understandings could create an interest protected by due process); *Ridgely v. Federal Emergency Management Agency*, 512 F.3d 727, 739-40 (5th Cir. 2008)(court refusing to foreclose possibility of a property interest on a limited record, since it can "arise from 'rules or understandings' created by an agency's policies or practices, even in the absence of explicitly mandatory statutory or regulatory language," citing *Perry v. Sinderman*, 408 U.S. 593, 601-02, (1972). S*ee also* L.S.A. C.C. Art. 3 (custom can have the force of law in Louisiana); *but see Coghlan v. Starkey*, 845 F.2d 566, 570 n. 3 (5th Cir. 1988)(court, in dicta, stating it is improper to review a charter and other sub-statutory sources in looking for a property interest in continuing to receive free water hook-up).

[72] *Weston v. Hammons*, 37 P.3d (Colo. App. 2001)(requiring class-wide reinstatements because deficient notices of work-participation sanctions violated due process). *Compare*, *State ex rel. K.M. v. West Virginia Dept. of Health and Human Resources*, 575 S.E.2d 393, 409, 212 W.Va. 783, 799 (W.Va. 2002) (seeming to hold no property interest, but nonetheless enjoining the state agency's policy precluding appeals from denials of extensions to 60-month TANF limit, as inconsistent with due process). *See also Kapps v. Wing*, 404 F.3d 105, 114 (2d Cir. 2005)(funds provided under federal block grant qualified as property based on assurances in state regulations and statute).

[73] As to the latter, *see Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 & n. 14 (1978)(holding that termination of public utility services with notice of the pretermination protections only through "the vagaries of word of mouth referral" denied due process); *Turner v. Rogers*, 564U.S.__, 131 S.Ct. 2507, 2519 (2011)(notice of legal defense, eliciting relevant information and explicitly addressing the issue in judgment could provide due process); *Bliek v. Palmer*, 102 F.3d 1472, 1476 (8th Cir. 1997)(holding that food stamp recoupment notices that fail to advise of agency's power to settle the claim for a reduced amount violate due process); *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980)(en banc)(holding that debtor's bank account could not be garnished without notice of the state-law exemptions from garnishment and procedures for claiming them); *Hill v. O'Bannon*, 554 F.Supp. 190 (E.D.Pa. 1982)(holding that termination notices to General Assistance recipients must describe the eight potential exemptions to termination in order to satisfy due process).

[74] *Hudson v. Palmer*, 468 U.S. 517, 532-33 (1984). The Fifth Circuit tries to deal with this and yet grant relief in *Cuellar v. Texas Employment Com'n*, 825 F.2d 930, 936 (5th Cir. 1987).

[75] *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

the funds at issue are exclusively federal funds. A court is likely to reject that characterization. Even if it does not, it is an open question in the U.S. Fifth Circuit whether the funds at issue being solely federal funds can avoid the Eleventh Amendment bar.[76] If this theory is pursued the attorney should be careful not to let the suit remain inactive. If it becomes too late for the state to claim TANF funds, this reasoning will not apply.

3. SOURCES OF LAW

Federal statutory and regulatory TANF requirements are found at 42 U.S.C. 601, et seq., and 45 C.F.R. Parts 260-286. They rarely dictate the outcome of any particular client's case. They are more relevant in shaping state programs and program options. For example, the federal statute seems to require that assistance be terminated if an adult has received it for "60 months (whether or not consecutive)" in a lifetime.[77] But there are numerous ways for months not to be counted or to continue to assist families within the TANF program.[78]

The federal TANF statute was set to expire in 2010. It is currently being extended for short time periods until Congress reauthorizes or reworks the statutes. Program rules could change once reauthorization occurs.

The law and policy governing clients' cases is more often based on state statutes and regulations.

- The governing statutes can be found in Title 46 of the Revised Statutes, §§ 52.1-52.2, 54-59, 101-116, 230.1-235, 447, 450.1, and 460.1-460.10.
- The regulations can be found in Chapter 67 of the Louisiana Administrative Code, especially LAC 67, Part 3, § 901 (FITAP), et seq., § 5301 et. seq. (KCSP), and § 5701 et. seq. (STEP).[79] These LAC provisions can be found on the state website,[80] or accessed through the Department's policy page,[81] as well as through electronic research services. These legally operative regulations are fairly well-organized and succinct.
- Department policies are currently found on-line, in the Family Assistance Manual, abbreviated as "FAM 4."[82] The site with the Manual does not come up by searching the Department's website. (The website currently remains at http://www.dss.state.la.us, reflecting the Department's prior acronym.) Nor can global searches of the Manual be performed at this time. *Care must be taken to look at "FITAP" policy sections, rather than "SNAP" (food stamp) policies, which can be accessed the same way.*
- The "TANF state plan," submitted to the federal government for approval, has assurances the state has made to the federal government as to the configuration of elements of its program that must meet federal requirements.[83]

[76] *See Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 938 (5th Cir. 1992). The case does, though, make clear that if a federal suit is filed, it needs to be as an official capacity action against an individual officer, rather than against the agency itself. As to other Circuits, *see Robinson v. Block,* 869 F.2d 202 (3d Cir. 1989); *Foggs v. Block,* 722 F.2d 933 (1st Cir. 1983); *GNOFHAC v. HUD,* 639 F.3d 1078, 1084 (D.C. Cir. 2011)(collecting other cases).

[77] 42 U.S.C. § 608(a)(7)(a).

[78] *See e.g., "Temporary Assistance For Needy Families (TANF), Eighth Annual Report to Congress,"* http://www.acf.hhs.gov/programs/ofa/data-reports/annualreport8/chapter01/chap01.htm, section on "Time Limits"

[79] The regulations posted as part of the Louisiana Administrative Code ("LAC"), can be found at <http://www.state.la.us/osr/lac/67v01/67v01.pdf> and are updated periodically. Subsequent changes can be found using the Louisiana Register.

[80] http://doa.louisiana.gov/osr/lac/67v01/67v01.doc.

[81] https://stellent.dss.state.la.us/LADSS/outlineParts.do?agency'OFS&chapterID'161.

[82] http://stellent.dss.state.la.us/LADSS/outlineParts.do?agency'OFS&chapterID'3.

[83] www.dss.state.la.us/assets/ docs/searchable/OFS /TANF/TANFStatePlanAmended1209.pdf

Importantly, the Department's published regulations are often extremely terse. Any additional specifications included in the Family Assistance Manual but not included in the regulations have not been legally promulgated, and therefore should be unenforceable.[84] Alternatively, because the regulations set out only very general standards, any other written agency standards have effect only to the extent that they have the "power to persuade," leaving the courts to apply the promulgated terms in a fair fashion appropriate to the claimant's circumstances (in the same way that courts, rather than the agency, give content to the unemployment compensation statute's "misconduct" and "good cause" standards).[85]

It also merits note that ALJs' citing and relying on policies in their decisions is improper, with regard to policies that have not been formally promulgated and were not made part of the hearing record.[86]

Unless the family is already certified for Food Stamps and Medicaid, a Louisiana FITAP application is also an application for Food Stamps and Medicaid assistance. When trying to challenge procedural steps the agency took on an application, the federal food stamp regulations may produce a basis for a challenge. To the extent that the state agency has not promulgated different standards for dealing with TANF assistance, the food stamp protections may carry over to protect the TANF aspects of the application, as well.

If favorable to the client, the state is also bound to comply with its internal TANF policies, like those published in its FITAP and FAM-STEP manuals. (Much in the Manuals has been submitted to the federal government as the agency's "state plan" under which assistance is provided.[87]) It would be arbitrary and capricious for the agency not to conform to its own policy pronouncements.[88] State equal protection law, too, may preclude the agency from departing from a standard it applies to others.

The federal TANF program is also explicitly subject to other general federal laws, especially those governing recipients of federal funds, like the prohibition against discrimination and actions that have a disparate impact based on race, color, national origin, disability, age, and sometimes gender or religion.[89] The TANF statute[90] explicitly requires that program activities comply with the requirements of the Age Discrimination Act of 1975 (unlike the Age Discrimination in

[84] La.R.S. 49:951(6) ("each agency...requirement...implementing or interpreting ...substantive...policy" is a rule) and La.R.S. 49:954(A) (precluding enforcement of eligibility qualifications that are not promulgated under the APA). *See also* La.R.S. 49:963(E).

[85] *See Christensen v. Harris County,* 120 S.Ct. 1655, 1662-63 (2000), *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[86] *See* La. R.S. 49:956(2,3) (documents must be offered at the hearing); La.R.S. 49:966(C) (authorizing courts to take judicial notice only of properly promulgated regulations); *Labbie v. Robinson,* 544 So.2d 734, 735, n. 1 (La. App. 3 Cir. 1989) (in the absence of policies or regulations in the record that support the agency's action, the action would not be upheld).

[87] www.dss.state.la.us/assets/ docs/searchable/OFS /TANF/TANFStatePlanAmended1209.pdf

[88] *Washington-St. Tammany Elec. Co-op., Inc. v. Louisiana Public Service Com'n*, 1995-1932 p. 11, n. 3 (La. 4/8/96); 671 So.2d 908, 915 ("it is arbitrary and capricious for the Commission to fail to apply its own rules in an adjudication before it"); *Central Louisiana Electric Co. v. Louisiana Public Service Com'n*, 377 So.2d 1188, 1194 (La.1979) ("If a public agency is not required to abide by its own rules and procedures, then the standard of review for 'arbitrary and capricious' action is without meaning."); *Carpenter v. Dept. of Health and Hospitals*, 2005-1904 p. 14 (La.App. 1 Cir. 9/20/06); 944 So.2d 604, 613 (agency rejection of document that met the terms of agency's published policies presented an "unwarranted exercise of discretion"); *Doc's Clinic v. Dept. of Health and Hospitals*, 2007-0408 p. 36-37 (La.App. 1 Cir. 11/2/07); 984 So.2d 711, 726 (agency issuance of decision through procedures that did not conform to its own policies found "arbitrary and capricious and based on improper procedure").

[89] Religion and sex discrimination (including on the basis of pregnancy) are covered under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., which only governs all aspects of employment relationships.

[90] 42 U.S.C. § 608(d); *see also "Laws and Welfare Reform Overview" http://www.hhs.gov/ocr/civilrights/resources/specialtopics/tanf/crlawsandwelfarereformoverview.html*..

Employment Act, this Act's protections are not limited to persons over age 40),[91] § 504 of the Rehabilitation Act of 1973,[92] the Americans with Disabilities Act of 1990,[93] and Title VI of the Civil Rights Act of 1964.[94] Other laws that can apply include Title IX (prohibiting gender discrimination in education),[95] the Age Discrimination in Employment Act,[96] and anti-discrimination provisions of the Immigration Reform and Control Act of 1986 (IRCA).[97] The regulations make it clear that federal minimum wage, occupational safety and health, minimum wage and other federal non-discrimination laws apply.[98]

The requirements of these laws may invalidate actions that would be permissible if one just considered the TANF law. For example, if program staff or contractors refer men to particular training opportunities that receive federal funding (including TANF funds) and women to others, instead of making the same opportunities available to all qualified recipients, this violates the anti-discrimination provisions.[99] Or if both men and women are admitted into the training programs, post-training ***placement activities*** that favor one gender are illegal. If these results occur not as a matter of official policy, but through case managers exercising their discretion and pairing applicants to the opportunities they think make the best "match," that may not excuse the system's discriminatory impact.[100]

Similarly, the agency may illegally discriminate if it or some of its staff always exempt individuals with recognized disabilities from work and training requirements, instead of offering them the chance to participate, with accommodations, if they want to. And the agency may discriminate by accepting employers' job descriptions and the capabilities they say they are seeking in employees, when reasonable accommodations to the position description could make a job accessible to a person with disabilities. The agency also impermissibly discriminates if it requires different or additional verification of citizenship from Hispanic person than from others,[101] or if it fails to provide foreign language interpreters, requiring that persons with limited English proficiency supply their own.[102] In a similar vein, the agency must provide accommodations if persons with a mental or emotional disability are unable to deal with the agency's application paperwork or procedures.[103]

There is an uncertain line as to when damages actions against states are properly authorized by the ADA.[104] However, the Supreme Court has ruled that Congress' separate authority to impose conditions in exchange for states taking

[91] 42 U.S.C. § 6101 et seq.
[92] 29 U.S.C. § 794.
[93] 42 U.S.C. § 12101 et seq.
[94] 42 U.S.C. § 2000d et seq.
[95] 20 U.S.C. ''1681-1688.
[96] 29 U.S.C. ' 621 et seq.
[97] 8 U.S.C. § 1324b.
[98] 45 C.F.R. § 260.35.
[99] There may not be a federal statutory ban on gender discrimination apart from in education, except through Title VII's coverage of private employment actions.
[100] *See Shipes v. Trinity Industries*, 987 F.2d 311, 316 (5th Cir. 1993); *Carpenter v. Stephen F. Austin State University*, 706 F.2d 608 (5th Cir. 1983).
[101] Office of Civil Rights, *Technical Assistance for Caseworkers on Civil Rights Laws and Welfare Reform, http://www.acf.hhs.gov/programs/ofa/policy/im-ofa/1999/im99-5.htm.*
[102] *Id.*
[103] *Id.*
[104] *Compare The University of Alabama at Birmingham Board of Trustees v. Garrett*, 531 U.S. 356 (2001)(equal protection clause did not provide Congress with the authority to unilaterally impose liability on the states through the Americans with Disabilities Act, precluding damage action for employment discrimination) and *Tennessee v. Lane*, 541 U.S. 509 (2004)(the Fourteenth Amendment's due process clause does allow Congress to impose damages liability on states who violate the ADA on court access issue).

federal funds presumably remains unimpaired.[105] Obligations to accommodate disabilities were imposed under § 504 of the Rehabilitation Act of 1973, and so may authorize damages actions.

To the extent that § 504 and ADA obligations or interpretations may differ, since the federal TANF act requires compliance with the Americans with Disabilities Act in exchange for accepting TANF funds,[106] even if the ADA is ruled unconstitutional as a unilateral regulation on the states, states may remain obligated to comply with respect to TANF funds.

4. THE KINSHIP CARE SUBSIDY PROGRAM: MORE GENEROUS BENEFITS TO CHILDREN NOT LIVING WITH THEIR PARENTS

Assistance under the Kinship Care Subsidy Program ("KCSP") is more generous, and there are fewer financial and other requirements than under FITAP. The basic difference between the two programs is that for KCSP the needy child or children are living with a relative other than a parent. (But the caretaker relative must be within the fifth degree of relationship to the child).[107]

The KCSP payment is currently $222 per month for each eligible child. (It had been $280 a child from 2006 until December 2011.)[108] Although no assistance is paid on behalf of the adult caretaker relative, the KCSP assistance comes out much higher than FITAP's.

To qualify:[109]

- The needy child must be living with a relative within the fifth degree of relationship, *but not with either parent*.
- The relative caring for the child must obtain legal custody or guardianship of the child within a year of being certified. DCFS has a detailed chart setting out the requirements that must be met, including which parents must give the custody by mandate, depending on familial circumstances.[110]
- The child must be under age 18.
- The household must have countable income under under 150% of the federal poverty line for a family size including the caretaker, children to be assisted, and any other children in the home that the caretaker is financially responsible for (foster care and SSI payments are not considered in the calculation). No earned income disregard is applied in determining this.[111]
- The child's own income must be less than the grant amount (currently $222 a month).[112]

[105] *See Alden v. Maine,* 527 U.S. 706, 756 (1999)(recognizing the continuing validity of official capacity actions to enforce valid federal laws against states); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 119 S.Ct. 2219, 2231 (1999), citing *South Dakota v. Dole*, 483 U.S. 203 (1987)(permitting the federal government to regulate even non-funded activities (states' permissible drinking ages) in exchange for accepting federal funding).
[106] 42 U.S.C. § 608(d)
[107] La.R.S. 46:237(A); LAC Title 67, Part 3, § 5327(A).
[108] Executive Bulletin, E-2470-00 (November 10, 2011).
[109] Unless otherwise noted, these requirements are set out at LAC Title 67, Part 3, §§ 5321-5345.
[110] FAM4 § M211-1-KCSP.
[111] FAM4 § M310-KCSP.
[112] LAC Title 67, Part 3, § 5329(C,D).

The following requirements from the FITAP program also apply:

- Household members must have Social Security numbers ("Enumeration").
- Assignment of child support rights and payments to the state and cooperate with Support Enforcement Services (if amounts received exceed the assistance amount, it should be forwarded to the child and assistance terminated).[113]
- Louisiana residence.
- U.S. Citizenship or "qualified alien" status.
- Child is current on immunizations.
- If the minor is pregnant or a parent, they must go through parenting skills education.
- If the minor is pregnant or a parent, they must be attending high school, GED, or other approved educational program.[114]
- The child is not receiving SSI or foster care payments.[115]
- The child must not be fleeing to avoid prosecution or confinement for a felony or violating a condition of probation or parole.
- Ineligibility for one year after the latter of conviction or release from incarceration for conviction of possession, use, or distribution of a controlled substance. Children cannot be paid and caretakers cannot be the payee if within the year.[116]

The Domestic Violence protections are available for KCSP recipients, including ability to waive rules that would usually apply.

The family must apply for the kinship care assistance through the state's FITAP program.[117]

If a child qualifies under both the FITAP and kinship care rules, the caretaker needs to elect the one that is more advantageous (usually KCSP).[118]

If anyone in the household receives KCSP, the whole household is considered "categorically eligible" for food stamps, with rare exceptions specified in the regulation.[119] This means the household does not have to meet the food stamp program resource limits, or its gross and net income caps.

If a child loses eligibility for KCSP, the agency must make sure they do not qualify for FITAP before terminating their assistance.[120]

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[113] For appointments other than court appearances, two must be missed to qualify as non-cooperation. Good cause is that cooperation would endanger the child or the caretaker's ability to care for the child, the child having been conceived through incest or rape, or adoption proceedings are in court or specified steps are being taken to consider surrendering a child for adoption. LAC Title 67, Part 3, § 5337(B)(4).

[114] FAM4 §§ M212-STEP, B1900-FITAP.

[115] FAM4 § M211-STEP.

[116] FAM4 § M211-STEP.

[117] LAC Title 67, Part 3, § 5301.

[118] FAM4 §§ M-110-KCSP, M-111.1-KCSP.

[119] LAC Title 67, Part 3, §1987. Those ineligible for categorical eligibility are persons serving out a food stamp intentional program violation, work sanction (LaJET), ineligible aliens, ineligible students, institutionalized persons, and strikers.

[120] FAM4 § M-111-2-KCSP.

5. BASIC FITAP ELIGIBILITY REQUIREMENTS

Louisiana's FITAP program replaced the New Deal "Aid to Families with Dependent Children" (AFDC) program with a new form of welfare, with time limits, strict work participation requirements, and sanctions for various types of proscribed conduct. Its work component is now called STEP (Strategies to Empower People).

There are three basic types of hurdles a family must meet to qualify for FITAP:

- It must include a child living with relative of the proper degree of relationship, or woman in her third trimester.
- Its income must be within the program limits.
- It is not disqualified by other technical requirements, like needing to be a resident of the state, U.S. citizen (with certain specific exceptions), presenting a Social Security number, complying with verification requirements, and not sanctioned for being on the program too long, failing the work participation requirements, or failing to comply with other behavioral requirements.

At this time the program has no resource limits.

The child also need not be "deprived of parental support or care" as had been the case under the long-standing AFDC program. The death, absence, incapacity, or technically defined un- or under-employment of a parent is no longer required. So, in theory at least, the program is just as available for two-parent families as for single-parent families. But, unless incapacitated, both parents will be required to register for work or participate in work activities[121] (educational attendance for those who have not completed high school and lack a GED).

As set out in the "Sources of Law" section above, the agency's governing legal regulations are accessible on-line and fairly brief. This Chapter will not set out all the details specified by those regulations, like the types of income that are exempt. Instead, it will identify major types of issues clients face and areas in which the governing law has subtleties or complexities that may not be apparent on the face of those regulations.

5.1 A CHILD MUST BE LIVING WITH A RELATIVE WITHIN THE FIFTH DEGREE OF RELATIONSHIP

To receive assistance a family must include a minor child who is living with a relative within the fifth degree of relationship.[122] (As examples, this extends to great-great aunts, and great-great-great grandparents, and the child of a first cousin.) Relationships created by adoption qualify, as long as within the appropriate degree of relationship.[123] Relationships are recognized even after divorce or death of one of the relatives in the chain of relationship.[124] ***Custody decrees do not create a qualifying relationship.***[125] If the relationship cannot be documented within 30 days but is expected within three months, the agency can certify for the three months.[126]

[121] FAM4 § B-1410-FITAP.
[122] La.R.S. 46:231(4)(b); FAM4 § B-810-FITAP.
[123] *Id.*
[124] *Id.*
[125] FAM4 § B-810-FITAP.
[126] FAM4 § B-840-FITAP.

The child or caretaker relative can be temporarily absent without reducing the assistance, for up to 45 days. The period can be extended to 180 days if the Department agrees to "good cause."[127]

Assistance is to be denied adult caretakers who fail to notify the agency within 5 days of when it becomes apparent a child's absence should result in a reduction of assistance (i.e., usually an absence of over 45 days, but 180 days for good cause).[128] The state's implementation allows defenses, by requiring notice within 5 days of when it becomes clear the child will be absent 45 days, but exempting absences meeting its good cause definitions.[129]

Joint custody: a child is considered to be living with a relative if living there "at least one-half of the time."[130] If the child splits time evenly between two parents, only one can claim FITAP assistance. The other will become the subject of a child support enforcement action.[131]

5.2 TO BE CONSIDERED A "CHILD" ONE MUST BE UNDER AGE 18, BUT WOMEN PAST FIFTH MONTH OF PREGNANCY QUALIFY WITHOUT A CHILD

FITAP benefits can be paid on behalf of eighteen year olds only if they are in secondary school or something considered equivalent.[132]

Women in the sixth or later month of pregnancy qualify for assistance without a child. The unborn is not counted in determining the assistance unit size.[133]

5.3. PERSONS WHO CANNOT BE EXCLUDED IN DETERMINING INCOME ELIGIBILITY AND WORK PARTICIPATION REQUIREMENTS

Persons with the following relationships to the child must be included in the assistance unit for determining eligibility, if living in the household:

- parents,
- siblings,
- half-siblings,
- the parent of any half-sibling
- a child's legal step-parents and
- the step-parents' children.

If the child has a minor, unmarried parent, the following must also be included if living in the household:

- Parents of the minor unmarried parent,
- siblings of the minor unmarried parent, and
- children of the minor unmarried parent.[134]

[127] LAC Title 67, Part 3. § 1227(A).
[128] 42 U.S.C. § 608(a)(10)(C).
[129] LAC Title 67, Part 3. § 1506.
[130] FAM4 § B-511-FITAP.
[131] *Id.*
[132] La.R.S. 46:231.2(A)(1)(b), (B)(1); LAC Title 67, Part 3, § 1221(A)(2).
[133] *Id.*
[134] LAC Title 67, Part 3, § 1203.

(As noted in the section, *infra*, about Minor Unmarried Parents, they usually will not qualify for the program unless living with an adult relative.)[135]

If the required persons have income, it usually reduces assistance to the family, often totally precluding it. No more of the income of these relatives gets disregarded than of a parent's. ***Their inclusion also makes them subject to the work participation requirements, unless age 60 or above, disabled or incapacitated, caring for a family member who is disabled or incapacitated, or a minor who is not a parent of an included child***.[136] SSI and Kinship Care Subsidy Program recipients are not counted as part of the assistance unit: the person and their income and resources are excluded from all financial eligibility calculations.[137]

5.4. RULES CAN BE WAIVED FOR VICTIMS OF DOMESTIC VIOLENCE

State statutes provide that "***any***" program requirements ***"shall"*** be waived, "as long as necessary, pursuant to a determination of good cause, if it would create obstacles for a victim of domestic violence to escape a domestic violence situation" or "penalize that victim for past, present, and potential for abuse." Rules that can be waived explicitly include time limits, work or education requirements, and residency requirements.[138] This would also excuse compliance with the Family Success Agreement.[139] The state statute, DCFS regulations, and FAM4 Manual do not include a definition of domestic violence. Advocates should therefore draw on either the state domestic violence statutes or federal TANF statute's definitions if necessary. The federal definitions do not directly govern what the state must do and are not explicitly incorporated in any of the state TANF laws, but the language of the federal statute is very similar, making it likely the state intended to adopt the federal standard. Under the federal definition, domestic violence includes being physically battered, sexual abuse, or threats or attempts at either, sexual activity involving a dependent child, mental abuse, medical neglect, or "being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities."[140]

A regulation provides that a worker may grant the exemption even without corroboration of the domestic violence, but corroboration is to be pursued, and discusses the types of records or statements that can substantiate the exception.[141] Another statute specifically recognizes that having to move to a protective shelter or other protected environment may temporarily preclude meeting job or training attendance requirements.[142] The statute also includes a privacy protection.[143]

Under the statute, the agency and domestic violence victim must develop a specific plan that may enable her or him to become free from a domestic violence situation and incorporate such plan into the Family Success Agreement.[144]

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[135] LAC Title 67, Part 3, § 1227(B).
[136] LAC Title 67, Part 3, § 5705 (definition of "work-eligible recipient"); FAM4 §P-411-STEP.
[137] LAC Title 67, Part 3, § 1203
[138] La. R.S. 46:460.9(A).
[139] Temporary Assistance for Needy Families (TANF) State Plan, § D-130.
[140] 42 U.S.C. §§ 602(a)(7)(B), 608(a)(7)(C)(iii).
[141] LAC Title 67, Part 3, § 1213(C).
[142] La.R.S. 46:460.8(B).
[143] La. R.S. 46:460.9(B).
[144] La. R.S. 46:460.9(A); LAC Title 67, Part 3, §1213(A).

The domestic violence exception is not specifically referenced in the Department's time limit regulation, minor unmarried parent regulation, or other regulations dealing with specific situations except STEP participation, and is not prominent in the FAM-4 Manual.[145] A STEP regulation seems to limit the domestic violence exception to 6 months a year, which in some circumstances could violate the statute.[146] Though many of these other regulations include good-cause exceptions, the statutory domestic violence protection is broader, prohibiting sanctions based on either current need, or to avoid penalizing victims for past, present, and potential abuse. Department staff are more likely to be guided by the FAM4 Manual than the formal regulation. Advocacy may be necessary to access the broader regulatory and statutory domestic violence protections.

5.5 EARNED INCOME DISREGARDS

Income rules and disregards are set out at LAC Title 67, Part 3, § 1229. For recipients already on assistance (not applicants) they include for each earner in the family a time-limited $900 per month earned income disregard, as well as an unlimited disregard of the first $120 a month in earned income.

The $900 disregard is available to recipients for only six months in their lifetime.[147] Under the Department's regulations, the months need not be consecutive.[148]

Under the state statute, the $900 disregard only applies if the "work activity...has been ***approved by the department*** as part of his work participation requirement under TANF." [149] This limitation is not in the promulgated regulation or FAM4 Manual.[150] Because the Department gets federal work-participation credits for having recipients who are working, if the job is contemporaneously reported, the disregard should be allowed.

A state statute provides that the months when the family receives the $900 earned income disregard do not count against the state-imposed 24 month time limit on receiving FITAP.[151]

The cost of dependent care can be deducted from earned income, if needed for an incapacitated adult or a child age 13 or older so that a household member can work.[152] Children in certified households who are under age 13 can get child care assistance paid for by the agency. The formal regulations state that if their child care provider charges more than the maximum provided under the child care program schedule, the family can get a deduction of the excess from their earned income.[153]

All earned income of children complying with school attendance requirements is disregarded.[154]

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[145] There is a mention of domestic violence in FAM4 §P500-STEP, regarding STEP, and §B-1744-FITAP regarding time limits.
[146] *Compare* LAC Title 67, Part 3, §5715.
[147] La.R.S. 46:460.5(A),(B).
[148] LAC. Title 67, Part 3, § 1229(C)(2).
[149] La.R.S. 46:460.5(A)(1).
[150] LAC. Title 67, Part 3, § 1229(C); FAM4 § B-651-3-FITAP.
[151] La.R.S. 46:460.5(C).
[152] FAM4 § B-651-2-FITAP; LAC Title 67. Part 3, § 1229(C)(3).
[153] LAC Title 67, Part 3, § 1229(C)(3)(c). This is not replicated in the FAM4 § B-651-2-FITAP, so may require advocacy to access.
[154] LAC Title 67, Part 3, § 1229(A)(2); FAM4 B-620-9-FITAP.

5.6 OTHER INCOME EXEMPTION RULES

A long list of specific types of income are exempted from counting against eligibility.[155] It should be reviewed when representing a client with an unusual type of income. Most exemptions are either required by other federal statutes or simply carry over an exemption that existed under the old AFDC program. Examples include earned income tax credits or refunds, education assistance, foster care payments, energy assistance, HUD payments and subsidies, and "Developmental Disability payments." Several types of exempted income merit discussion.

Importantly, the Department's regulations exempting these and other types of income are extremely terse. Additional specifications included in the FITAP Manual are not included in the regulation. As a result, if a client's income could fit within the promulgated exemption, there is a claim that it should be exempted, even if the unpromulgated FITAP Manual specifies otherwise.[156]

Lump sums are not counted as income at all.[157]

In-kind income does not get counted against eligibility. [158] But where an employer makes certain third party payments instead of paying salary, those count as income.[159]

Bona fide loans do not count as income.[160]

Income that is designated by law for a particular beneficiary ("restricted income"), who is outside the household is not counted against eligibility or benefits.[161] For example, if someone in the household is the representative payee of an SSI check for someone outside the household, the SSI check will not count against the household's eligibility. Court-ordered support payments and Veterans Administration benefits received for a person outside the assistance or income unit are also recognized as restricted income.

5.7 INDIVIDUAL DEVELOPMENT ACCOUNTS

Louisiana's program recognizes "individual development accounts", in which TANF recipients can accumulate up to $6,000 from earned income for three specific qualified uses (education, buying a home, or starting a business), subject to some very specific conditions.[162] Only one Individual development account is allowed per household. Federal law allows states to authorize that TANF Individual Development Accounts, which cannot be counted against eligibility for any federal means tested program.[163]

Louisiana's FITAP, KCSP, and food stamp (for all but very unusual households) programs, and its Medicaid eligibility for families, have no resource limits. This makes the Individual Development Accounts of limited relevance unless the recipient gets the benefit of matching funds from the state or a non-profit to deposit into the account. There might be some households with an SSI recipient and earned income that the exempt status of the account could benefit.

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[155] *See generally* LAC Title 67, Part 3, § 1229.

[156] *See* La.R.S. 49:951(6)("each agency...requirement...implementing or interpreting ...substantive...policy" is a rule) and La.R.S. 49:954(A) (precluding enforcement of eligibility qualifications that are not promulgated under the APA). *See also* La.R.S. 49:963(E).

[157] LAC Title 67, Part 3, § 1229(A)(15).

[158] LAC Title 67, Part 3, § 1229(A)(12).

[159] FAM4 § B-620-22-FITAP.

[160] LAC Title 67, Part 3, § 1229(A)(19); FAM4 § B-620-26-FITAP

[161] LAC Title 67, Part 3, § 1229(A)(27); FAM4 § 620-40-FITAP.

[162] La. R.S. 46:460.6; LAC Title 67, Part 3, § 5555; 45 C.F.R. § 263.20-23.

[163] 42 U.S.C. § 604(b)(4).

6. TIME LIMITS FOR PARENTS CARING FOR THEIR CHILDREN

6.1 OVERVIEW

Two time limits apply to receiving assistance from the state's FITAP program. The state has adopted a 60 month lifetime limit on receiving assistance, and a separate limit for families that have received assistance in 24 of the last 60 months.

As discussed above, the state's domestic violence protection exempts victims of domestic violence from either time limit, as necessary to escape domestic violence or to avoid penalizing them for being victims of domestic violence.

Clients terminated from FITAP because of the time limits or requesting to terminate FITAP to avoid hitting the time limits should continue to receive Medicaid independently, without the FITAP assistance.[164] Any request to end assistance should specify the family no longer wishes to receive "cash assistance." Their Medicaid should continue without break, though an intervention may be needed to assure the result.[165]

Also consider whether clients terminated from FITAP because of the time limits may have a claim to unemployment compensation that can replace the lost income. One or more STEP placements with private employers may have qualified as "employment" under the unemployment compensation statute.[166] The employer may not have recognized this and may not have paid wages or unemployment taxes on the placement. To prevail in claiming unemployment benefits, the recipient may have to establish: that the placement met the standards for an employment relationship, that wages were paid (by the TANF agency), *or should have been paid* by the employer, and that the recipient left the last placement under non-disqualifying circumstances. The recipient may also have a minimum wage claim for back-wages.[167]

6.2 DISADVANTAGE OF RECEIVING FITAP IF CHILD SUPPORT IS NEARLY THE AMOUNT OF THE ASSISTANCE

As currently structured, all months that the family receives any FITAP funds on its electronic benefits card count against the 24 and 60 month time limits (except as exempted under the state's domestic violence protection or otherwise discussed below). This is true ***regardless of the amount*** of FITAP assistance the family receives. *If the family is receiving only a small amount of FITAP assistance, or if most of that assistance is being reimbursed by child support collections, the family may do better to save their remaining months, for times when child support is not available.*

It is therefore important for families to be aware of whether the state is collecting child support on their behalf. Families should be sent monthly or quarterly written statements regarding the amount of child support collected on their behalf.[168] The state also has a toll-free number that families can access to see the amount of child support being collected on their cases: 1-800-256-4650.

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[164] If the family would have been eligible to continue to receive FITAP, they remain eligible for Medicaid under the "Low Income Families Category", Louisiana Medicaid Eligibility Manual § H 200.1. This is true even though La.R.S. 46:231.6(A) seems to apply the time limits to Medicaid, too. But the provision is preempted by 42 U.S.C. §1396u-1(b)(1)(A).

[165] Louisiana Medicaid Eligibility Manual § K 100.

[166] *Accord* 45 CFR § 260.35(b)(unemployment compensation laws apply). U.S. Department of Labor, *Labor Protections and Welfare Reform,* May 1997 (Rev. 2/99), p. 5.

[167] 45 CFR § 260.35(b)(minimum wages laws apply, too).

[168] 45 C.F.R. § 302.54.

6.3 DISADVANTAGE IN APPLYING FOR FITAP LATE IN THE MONTH

If they have the wherewithal to avoid doing so, families should avoid applying extremely late in the month for FITAP assistance, because the agency will pay a prorated fraction of a month's assistance for the days remaining in the month after the application was filed.[169] Systemic advocacy may be able to stop such partial months from being counted as months of receiving assistance, especially because in most instances the pro-rated assistance is received in the next month, which is a month already being counted against the time limit.[170]

6.4 BOTH TIME LIMITS APPLY ONLY TO MONTHS WHEN AN ADULT OR MINOR UNMARRIED PARENT IS ON THE GRANT (EVEN IF THE ASSISTANCE AMOUNT IS ZERO)

Only months when someone was an adult, or a minor unmarried parent, when receiving assistance count against the limit.[171] Once the parent reaches the time limit, assistance to both the parent and the children living with the parent stops.

The state counts some months against the limits even if no FITAP assistance was received: months when no payment was made because the amount would have been under $10.[172]

Non-parental caretakers need not be subject to the time limits, unless they make a serious mistake, because they need not be on the grant. The limits apply to months when an ***adult*** (or minor unmarried parent) received assistance, and disqualifies any children in his or her care along with the adult. Only parents and step-parents need be included in the FITAP assistance unit. Any other relative should avoid the serious mistake of receiving 60 months of assistance, or assistance in 24 of the last 60 months, thereby losing assistance for both themselves and the children in their care. Under the Kinship Care Subsidy Program, children with non-parental caretakers receive higher grants through the KCSP, and the caretaker adult is not on the KCSP grant. Taking advantage of that program makes it easy for children living with a non-parent to not reach the limit.

6.5 THE 24 MONTH LIMIT ON ASSISTANCE TO FAMILIES THAT INCLUDE PARENTS

The 24 month limit prohibits receipt of assistance more than 24 of the last 60 months, unless certain exceptions are met.[173] Each five years, the family can qualify for another 24 months of assistance, even without meeting an exception to the 24 month limit. (They must, however, meet all other program requirements, including the 60 month lifetime limit on receiving assistance.)

6.6 THE 60 MONTH LIMIT ON ASSISTANCE TO FAMILIES THAT INCLUDE PARENTS

Louisiana's 60 month limit is based on a 60 month limit set out in the federal TANF statute.[174] Federal law allows states to exempt from the limit 20% of the cases on assistance at any one time for "hardship," or because of domestic vio-

[169] LAC Title 67, Part 3, §§ 1201, 1229(E).
[170] *Compare* 7 CFR § 273.24(b)(1)(iv)(partial months of assistance do not count against the against the Supplemental Nutrition Assistance Program (food stamp) time limit for able bodied adults without dependents to receive assistance).
[171] LAC Title 67, Part 3, § 1247(E); 42 U.S.C. § 608(a)(7).
[172] FAM4 §§ B-1721-FITAP; B-1731-FITAP.
[173] LAC Title 67, Part 3, § 1247(A); La.R.S. 46:231.6(A)(1).
[174] 42 U.S.C. § 608(a)(7).

lence, discussed in an earlier part of this Chapter.[175] (Also, months living in "Indian country" or in an Alaskan native village with over 50% unemployment *cannot* be counted against the federal sixty month limit.[176])

The federal limit only applies to cases receiving federal TANF funds. The federal agency has promulgated regulations recognizing that months can be excepted from the limit if the state funds the cases with only state maintenance of effort funds.[177]

The state is required to contribute about $60 million a year to the TANF program as its "maintenance of effort" requirement. It is not required to mix these funds with the federal money. The state maintenance of effort funds could pay for the "checks" of approximately 25,000 families, thus exempting far more cases than the 20% exemption can cover. It would be particularly equitable to direct the state maintenance of effort funds to families receiving less than the maximum assistance amount or largely supported by child support. Louisiana has not taken advantage of this.

Assistance to still other cases could be continued if they had been put on solely state funds earlier. That would keep them from reaching the 60 month time limit, for the number of months they were on state-only funds.

Still other options are available under the federal TANF statute once the 60 months are reached, such as providing the family with TANF-subsidized employment or supportive services other than income-supports, or in-kind assistance under Title XX (and transferring TANF funds to Title XX for that purpose).[178] Louisiana does not provide these options, however.

6.7 EXTENSIONS AVAILABLE TO BOTH LIMITS

Agency policy makes extensions to both limits available. Local staff can give extensions up to six months at a time.[179] The following grounds are available for extensions of both time limits, if present at the time the extension is sought: [180]

- factors relating to job availability are unfavorable (which can include education, training, literacy level, skills, and the unavailability of jobs for which the recipient is qualified[181]);
- an individual loses his or her job as a result of factors not related to his or her job performance;
- other hardships which affect the individual's ability to obtain employment (see below);

The "other hardships" which affect the individual's ability to obtain employment include:

- a parent or caretaker is under treatment for a serious addiction and the treating organization recommends against working,
- adequate child care or transportation is not available,

[175] 42 U.S.C. § 608(a)(7)(C).
[176] 42 U.S.C. § 608(a)(7)(D).
[177] *See* 45 C.F.R. § 264.1(b)(2); *see also* 45 C.F.R. § 263.2.
[178] *See e.g.*, 45 C.F.R. § 260.31(b)(2,3).
[179] FAM4 §§ B-1741-1-FITAP; B-1741-2-FITAP; B-1751-1 (disability).
[180] LAC Title 67, Part 3, § 1247(C,D); FAM4 §B-1744-FITAP.
[181] FAM4 § B-1744-FITAP.

- a temporary family crisis such as death of a family member, eviction, serious illness or accident,
- domestic violence situations,
- the parent(s) is/are disabled or incapacitated,
- a parent is required to provide full-time care to an incapacitated or disabled household member.[182]

Because these hardship examples are not set out in promulgated rules, they are subject to change without notice. One should consult a current FITAP manual before advising a client.

6.8 ADDITIONAL PROTECTIONS AVAILABLE FROM THE 24 MONTH LIMIT

In addition, the following grounds are available for extension, only for persons who have reached the 24 month limit:

- family is in compliance with their Family Success Agreement[183]
- the parent(s), or a child is disabled or incapacitated. (The extension where a child is incapacitated is just for that particular child's assistance.[184])

And the following months, occurring earlier, should not count against the 24 months:

- months in which the family received the $900 earned income disregard, and possibly any earned income disregard;[185]
- months in which a parent has been certified by the Department as disabled or incapacitated.[186]

As to incapacity or disability exceptions, the state statute provides that the 24 month limit shall not "shall not apply to an incapacitated or disabled individual…"[187] If the person with a disability is one of the children, only their assistance continues.[188] If all parents in the household have a disability, then assistance for the whole household continues.

The "incapacity" of a child in the household is rarely pertinent to families' FITAP or food stamp eligibility in other circumstances. As a result, the Department may fail to identify and protect assistance for such individuals. In addition, the FAM4 Manual does not list the ability to continue the child's benefits with the other extensions.[189]

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[182] FAM4 § B-1744-FITAP.

[183] LAC Title 67, Part 3, § 1247(C)(1); consideration of this factor is required by the statute. La.R.S. 46:236.1(D)(1).

[184] FAM4 § B-1724-FITAP. The extension for a disabled child is not referenced in the FAM 4 policies that include the other extensions. *Compare* FAM4 § B1750-FITAP.

[185] The formal regulations disregard months in which any earned income disregard was received. LAC Title 67, Part 3, §1247(B)(2). The statute exempts only the six lifetime months in which a recipient receives the $900 earned income disregard. La.R.S. 46:460.5(C), and the FAM 4, which workers look to, is to the same effect. FAM4 § B-1721-FTAP. But the legally promulgated regulation should govern over the Manual, and the agency has the authority to create the wider exemption set out in the regulation. La.R.S. 46:231.6(D).

[186] FAM4 § B-1721-FITAP. Women in the third trimester of pregnancy have in the past been exempted from the time limit rules, but this exception is not in the statutes or regulations.

[187] La.R.S. 46:231.6(B).

[188] FAM4 § B-1724-FITAP.

[189] *Compare* FAM4 § B1750-FITAP; FAM4 § B-1744-FITAP.

The FITAP incapacity/disability standard is a much more liberal standard than use by Social Security for SSI and Disability Insurance Benefits. It requires a condition supported by competent medical evidence; of such a debilitating nature so as to substantially *reduce* or eliminate the parent's ability to support or take care of the child; and expected to last for at least 30 days.[190]

6.9 DUE PROCESS REQUIRES NOTICE TO THE FAMILIES OF THE GROUNDS FOR EXEMPTION

Specific notice to the recipient of the possible bases for exemption may be required by due process.[191] The Department has agreed to provide it to recipients approaching or exceeding the 24 month limit.

7. THE WORK PARTICIPATION REQUIREMENTS

Federal law requires that states "[e]nsure that parents and caretakers receiving assistance engage in" specified types of work activities.[192] The statute later stipulates that only specific percentages of the adult recipients must participate for states to avoid fiscal sanctions.[193] Advocates should understand that there is no federal requirement that *all* families be engaged in work activities at all times.

The federal statute does separately mandate that states participating in the program require parents and caretakers receiving TANF assistance to do work once "ready to engage in work, or" once they have received 24 months of assistance "whichever is earlier."[194] This is a ***different*** 24 month requirement than the time limit.

The exceptions to the work participation requirement differ from the exemptions to the time limits, though many are similar. Care must be taken in analyzing the client's potential defenses, since it is easy to confuse time limit exceptions and work participation exceptions or excuses.

The FAM4 manual exempts from *federal participation calculation rates* only those FITAP cases where parents or caretaker relatives are providing care for a child under age one (limited to a total of 12 months per individual), cases where a parent is providing support for a disabled family member, and cases where families do not have an adult parent, caretaker relative, or minor parent head of household included in the FITAP certification.[195] Exemption from the participation rate calculation does not necessarily exempt the individual from STEP requirements.[196]

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[190] FAM-4 § B-1751-FITAP.

[191] *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 14 & n. 14 (1978)(holding that termination of public utility services with notice of the pretermination protections only through "the vagaries of 'word of mouth referral'" denied due process); *Turner v. Rogers*, 564 U.S. __,131 S.Ct. 2507, 2519 (2011)(notice to defendant in child support proceedings of critical issue and eliciting information as to same would satisfy due process); *Bliek v. Palmer*, 102 F.3d 1472, 1476 (8th Cir. 1997)(holding that food stamp recoupment notices that fail to advise of agency's power to settle the claim for a reduced amount violate due process); *Finberg v. Sullivan*, 634 F.2d 50 (3d Cir. 1980)(en banc)(holding that debtor's bank account could not be garnished without notice of the state-law exemptions from garnishment and procedures for claiming them); *Hill v. O'Bannon*, 554 F.Supp. 190 (E.D.Pa. 1982)(holding that termination notices to General Assistance recipients must describe the eight potential exemptions to termination in order to satisfy due process).

[192] 42 U.S.C. § 602(a)(1)(A)(iii).

[193] 42 U.S.C. § 607(a)

[194] 42 U.S.C. § 602(a)(1)(A)(ii).

[195] FAM-STEP Manual, § P-441-STEP.

[196] LAC Title 67, Part 3, § 5713; FAM4 § P-441-STEP.

The **participation requirements** are as follows:[197]

Type of family	Hours required	# of the hours that must be met with "basic" activities	% of the families that that supposedly must meet the requirement[198]
state's whole caseload	30	20	50
single parent with a child under age 6	20[199]	20	NA
total hours from two-parent families	35 or 55[200]	30 or 50[201]	90

The "basic" hours must come from private-sector or public-sector employment, whether subsidized or not; work experience; on-the-job training; job search and job readiness assistance (for limited amounts of time); community service programs; vocational educational training; or providing child care services to an individual who is participating in a community service program.

The following three activities may count as participation beyond those "basic" hours: job skills training directly related to employment; education directly related to employment; and satisfactory attendance at secondary school or in a course of study leading to a certificate of general equivalence.

Note though that the "basic activities" hours can be met by a lower number of hours in Community Service Employment and Work Experience Employment, which must be determined case by case, by dividing the amount of the family's FITAP and food stamp assistance by the federal minimum wage.[202]

Because case managers may be required or expected to meet the fourth column's percentages within their caseload, including that 90% of the two-parent families must meet the work participation requirement, there can be a strong incentive for caseworkers to find reasons to deny assistance to two-parent families. This incentive can be countered by documenting that one family member meets the "incapacity criteria" — this gets the family treated as a single-parent household with regard to work participation requirements[203]— or by requiring that the agency develop systems to protect the rights of two-parent households.

Recipients can be sanctioned for not meeting the requirements of the employment-related Family Success Agreement that they sign with the agency, even if it requires ***more*** than the hours set out above.[204] Clients therefore need to pay attention to the requirements of the Plan, and negotiate a realistic one, since noncom-

[197] *See* FAM4 § P-442-STEP and 42 U.S.C. § 607.

[198] Louisiana gets a credit against these percentages for having a reduced number of families receiving assistance. *See* 42 U.S.C. 607(b)(3).

[199] 42 U.S.C. § 607(c)(2)(B); FAM4 § P-442-2-STEP.

[200] The higher requirement must be met if a two parent family receives federally funded child care assistance and neither parent is incapacitated or caring for a severely disabled child. If one parent is incapacitated, the family is treated as a one-parent household. 42 U.S.C. § 607 (b)(2)(C); FAM4 § P-443-STEP.

[201] The higher requirement must be met if a two parent family receives federally funded child care assistance and neither parent is incapacitated or caring for a severely disabled child. If one parent is incapacitated, the family is treated as a one-parent household. 42 U.S.C. § 607(b)(2)(C); FAM4 § P-443-STEP.

[202] 45 CFR § 261.31(d)(1), 45 CFR § 261.32(d)(1),(f)(1); FAM4 §§ P-425-STEP, P-426-STEP.

[203] FAM4 § P-443-STEP.

[204] FAM4 § P-442-STEP, *et.seq.*

pliance with it provides an independent basis for sanctions. If a sanction has been proposed even though the client met the hourly requirements set out above, advocates should consider trying to re-negotiate the agreement.

The strong push is towards work, but school attendance and vocational training can in some instances be counted as the required work participation. Most hours (those designated in the third column above) must be met with "basic" activities. Any hours exceeding the number in that column can be met with either basic activities or others.

The state's regulations, based on the federal statute, specify the basic work activities: employment, unpaid work experience, on-the-job training, short-term job search or job readiness preparation, community services, providing child care to a participant in community service, and up to 12 months of vocational education. The non-basic, but countable activities are job skills training, employment-related education, GED course work, or high school attendance.[205]

Teenagers who are heads of a FITAP household must attend high school or GED training and must participate in employment education for an average of 20 hours per month.[206]

Because the work participation requirements have to be met by only a specified percentage of the caseload, the agency could meet the percentages while allowing particular clients to participate solely in non-basic activities. But the state regulations are not structured to allow this; they require that every STEP participant put in the hours in "basic" activities set out above.[207] The amount of work required of clients under this structure, as discussed below, may also violate minimum wage requirements.

If a case manager will not agree that a particular client need not meet the hourly requirements, the next best option for a client seeking education or skills training is to commit to the required number of basic hours, and press vigorously to obtain educational or training activities in his or her remaining hours.

7.1 WORK PARTICIPATION SANCTIONS

7.1.1 STEP sanctions

Under the Department's regulations, sanctions for noncompliance with the STEP program requirements shall only be imposed as a last resort and is to be rescinded if it is determined that the client had good cause.[208] The first sanction results in the family's removal from assistance for one month, or until compliance, whichever is longer.[209]

Second and third violations will result in a loss of benefits for a minimum of two and three months, respectively.[210] *These increased future penalties make it important to try to get any first penalty completely reversed or rescinded, even if the client has already served the penalty by the time of a hearing or other review.*

[205] The regulations describe all of the above-listed activities as "work activities." LAC Title 67, Part 3, § 5713. The STEP manual indicates that those in the last sentence are non-basic, and do not count towards meeting the threshold limits. FAM4 §§ P-442-STEP, P-443-STEP.
[206] LAC Title 67, Part 3, § 5709(B); FAM4 § P-442-1.
[207] LAC Title 67, Part 3, § 5713(A).
[208] LAC Title 67, Part 3, § 5717; FAM4 § P-530-STEP.
[209] LAC Title 67, Part 3, § 5717(B)(1); FAM, § P-540-STEP.
[210] LAC Title 67, Part 3, § 5717(B)(2)–(3); FAM4 § P-550-STEP.

The client can get a sanction reversed or rescinded for having "good cause" for noncompliance (defined in the regulation)[211] or by establishing that he or she should be exempt from STEP participation or the particular requirement at issue.

The agency is required to send clients subject to FITAP sanctions an Advance Notice of Adverse Action 13 days before imposing a sanction.[212] After notification, the client is expected to contact the agency before the 13-day period ends to claim a good cause reason for noncompliance or to claim a temporary exception.[213] If a STEP sanction is imposed, two weeks of compliant participation are usually required to determine that noncompliance has ended.[214] It is important to realize that the 13-day period after notice of adverse action is sent is the only pre-termination opportunity to prevent a sanction. The client can, however, request a fair hearing at any time, which can include seeking a determination of good cause. (Note, though that a FAM4 policy purports to require that good cause be reported within 30 days after the end of the 13 day period.[215])

Once a sanction is imposed after the 13-day advance notice period ends, the case is closed. Benefits cease beginning the first month following case closure. If the client subsequently wins on appeal, then corrective payments are to be made. The client *will not* get continued benefits pending appeal if they miss the 13-day period to request continuance of FITAP benefits pending a fair hearing.[216]

7.1.2 Food stamp sanctions for STEP violations

In addition to sanctioning a family's FITAP assistance for noncompliance with the STEP requirements, the agency may attempt to reduce or end the family's food stamp assistance. The Food Stamp sanction structure that would apply with respect to a TANF sanction is complex. The advocate should review food stamp materials and state regulations before advising or attempting to assist the client. The food stamp program is beyond the scope of this Chapter, but the reason for carefully consulting food stamp materials is that there are several different types of sanctions that the agency could try to invoke, and there are important arguments for precluding the worst one.

The food stamp sanction if a "non-exempt head of a household" does not comply with "employment and training" requirements is to terminate all food stamps to the household for a minimum of 3 months for the first infraction and 6 months for subsequent infractions.[217] For infractions by non-exempt household members other than the head of household, the allotment is reduced by one household member for those same minimum time periods, causing a loss of over $100 in food stamps per month.

An important goal is therefore to either establish that the client is *exempt* from food stamp employment and training requirements, or that a different sanction should be imposed, rather than the food stamp employment and training sanction. Numerous groups of food stamp recipients are exempt from employment and training requirements, including persons caring for children under age 6, per-

[211] LAC Title 67, Part 3, § 5717(C); FAM4 § P-530-STEP
[212] LAC Title 67, Part 3, § 1209(A); FAM4 § P-530-STEP.
[213] FAM4, § P-530-STEP.
[214] FAM4, § P-570-STEP.
[215] FAM4 § P-530-STEP
[216] FAM4 §§ P-550-STEP, P-620-STEP.
[217] *See* LAC Title 67, Part 3, § 1938(A)(2,3).

sons over age 60, various types of students, and persons with physical or mental incapacities. In fact, all FITAP recipients are exempt from food stamp employment and training requirements as long as they are compliant with STEP.[218] As a result, it can be argued that any STEP violation that occurred was not a food stamp violation at the time it occurred, but *thereafter* subjects the client to the food stamp employment and training regime, ***prospectively***.

In addition, the Food Stamp program has a different conciliation procedure than FITAP, which may take up to 30 days and does not require a full two weeks of compliance to end a violation.[219] If any conciliation that occurred did not comply with the food stamp requirements, it may be improper to impose the food stamp sanction.

Finally, as Louisiana construes penalties narrowly,[220] one can argue that the more appropriate Food Stamp sanction is not the employment and training sanction, but the one that is set out in the food stamp regulations specifically for a STEP violation. There is a Food Stamp sanction that refuses to increase food stamps in response to a client's decreased income caused by sanctions for program violations in another program.[221] The purpose of that sanction is "to reinforce sanctions imposed by the public assistance programs."[222] Imposing multiple penalties for the same offense should be disfavored unless unequivocally intended and announced for public review by the Department's regulations. The sanction of not increasing the food stamps is less harsh, and lasts only through the end of the client's current food stamp certification period.

7.2 PERMANENT AND GOOD CAUSE EXEMPTIONS FROM STEP SANCTIONS

Families are not subject to the work participation requirements unless they include a "Work-Eligible Recipient." This is a FITAP recipient (even if not receiving assistance because their benefit would be less than $10) who is an adult under age 60 or a teen head of household who is not disabled or incapacitated, or who is not caring for a family member who is disabled or incapacitated as documented by a medical professional.[223]

The Department has recognized the following as good cause exemptions from sanctions:[224]

- Temporary illness or injury;
- Situations related to the treatment of a mental or physical illness, including substance abuse, when participation in required activities would impede such treatment.
- Temporary care of a family member who is ill;

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[218] LAC Title 67, Part 3, § 1941(A)(2); *see also* FAM4 § B-1420-FS, exempting from food stamp employment and training requirements persons who are "complying with STEP ***or*** who have met the minimum work registration requirement through STEP within the past 12 months" (emphasis added).

[219] LAC Title 67, Part 3, § 1941(C)(4).

[220] *See International Harvester Credit v. Seale* 518 So.2d 1039, 1041 (La. 1988); *Matter of Woodrow Wilson Construction Co. Inc.,* 563 So.2d 385, 391 (La. App. 1 Cir. 1990); *Turner v. Brown*, 134 So.2d 384, 387 (La. App. 3 Cir. 1961) (unemployment compensation statute's disqualification provisions are penal and therefore subject to strict construction).

[221] LAC Title 67, Part 3, § 1978.

[222] FAM4 § E-410-FS,

[223] LA.R.S. 46:231(14); LAC Title 67, Part 3, §§ 5705, 5709, 5713; FAM4 § P-410-STEP.

[224] LAC Title 67, Part 3, § 5717(C).

- Unavailability of appropriate child care or transportation within a reasonable distance from a participant's home or worksite. (See below);
- Temporary emergency or crisis (such as fire, homelessness, accident, or a natural disaster);
- Domestic violence.

7.3 TEMPORARY EXCEPTIONS TO STEP REQUIREMENTS

Recipients may also be excepted from required work and participation activities under STEP in certain situations. However, such temporary exceptions shall not exceed six months in a twelve-month period.[225] These temporary exceptions include:[226]

- Inability to obtain appropriate child care;
- Status as a domestic violence victim.

The child care exception is mandated by federal law for a single custodial parent of a child under age six, though the state statute does not place an age limit on the child.[227] The state agency is required to inform parents of this exception when there is a child under age 6, and the criteria and procedures for meeting it.[228]

The good cause exemptions to sanctions (discussed in the Section B, immediately above) and the temporary exceptions to work requirements have much overlap. It is possible for good cause reasons to become temporary exceptions and vice versa. The Department specifies that good cause should only be explored when a recipient fails to meet program requirements whereas temporary exceptions should be explored when a situation necessitates that a recipient be excused from STEP participation for a period of two to six months.[229]

7.4 EXEMPTIONS NOT EXPLICITLY RECOGNIZED

This section addresses situations not explicitly recognized by the Department's regulations, but which should be recognized by the Department as good cause, or the Department would be approving the imposition of sanctions that violate the law.

7.4.1 Disability accommodations

The Americans with Disabilities Act and § 504 of the Rehabilitation Act of 1974 require that the Department not discriminate against persons with disabilities, make reasonable accommodations that will allow them to participate in its programs, and prohibit segregating persons with disabilities from other program participants. Examples of what these could require include: allowing recipients with disabilities or caretakers for children with disabilities to put in fewer than the normally required hours; allowing them to continue in STEP and continue to receive FITAP assistance even if they cannot meet the participation requirements; designing special placements for them, rather than just offering what the market offers; or requiring that private employers make reasonable accommodations needed by the individual with a disability.

[225] LAC Title 67, Part 3, § 5715.
[226] *Id.*
[227] 42 U.S.C. § 607(e)(2); LAC Title 67, Part 3, § 5715.
[228] 45 C.F.R. § 261.56(c).
[229] FAM4 § P-532-STEP.

7.4.2 Failure to comply with the minimum wage

If the client's STEP placement significantly benefits the party that supervises the placement, and the client has not been paid minimum wage for the placement, then the placement may be illegal. The TANF statute does not include a provision exempting work experience placements from minimum wage requirements.[230] The federal Department of Labor has issued guidance setting out the factors to be considered in determining whether an employment relationship exists; minimum wage must be paid for most relationships that are not purely training.[231]

If minimum wage requirements apply, the hours the agency is requiring of the client would not pay at least minimum wage, then its illegality should bar the agency from imposing a sanction. The FITAP grants do not pay minimum wage for the number of hours required of recipients. At the current $7.25 an hour minimum wage, a 20 hour work placement would require wages of $145 ***per week***; a 30 hour placement would require $217.50 per week; and 55 hours in a two-parent placement would require $398.75 per week. Additionally, if any child support is being collected by the state, that must be deducted in determining the amount of assistance that can be counted as wages.

Louisiana has adopted a "Simplified Food Stamp Program."[232] This allows the state to count both food stamps and the FITAP benefits in determining whether minimum wage has been complied with as to "Community Service Employment" and "work experience" placements[233] In this state food stamps and FITAP together would rarely pay the amounts set out above, so if clients in these placements are working the full number of hours usually expected, the math would usually make the placement illegal.

For "Community Service Employment" and "work experience" placements, the maximum hours should be determined by dividing the combined monthly FITAP and food stamps by the the Federal minimum wage. Clients who participate in a work experience or community service activity for the maximum number of hours per month are deemed to have participated for twenty hours a week. This in turns allows those families to fulfill participation with fewer hours than would regularly be required.

Older federal guidance, no longer posted on the internet, interpreted minimum wage laws to apply to more activities and imposed additional compliance requirements, which would make many of the state's placements illegal.[234]

If there is what qualifies as an employment relationship, it is the employer that is liable to pay the STEP participant (not the STEP agency). If minimum wage requirements have been violated, the recipient also has a claim to back-payments, which can be pursued administratively, through the Department of Labor's Wage and Hour Division, through a suit and injunction brought by the Secretary of Labor, or in court through private suit.

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[230] *See* 45 C.F.R. § 260.35(b).

[231] U.S. Department of Labor, *Fact Sheet #13: Employment Relationship Under the Fair Labor Standards Act*, (Rev. 7/09) <http://www.dol.gov/whd/regs/compliance/whdfs13.htm>.

[232] *See* U.S. Department of Agriculture, *Food Stamp Program State Options Report*, 7th ed., Nov. 2007,<http://www.fns.usda.gov/snap/rules/Memo/Support/State_Options/7-State_Options.pdf> at 16.

[233] 45 CFR § 261.31(d)(1), 45 CFR § 261.32(d)(1),(f)(1); FAM4 §§ P-425-STEP, P-426-STEP.

[234] U.S. Department of Labor, *Labor Protections and Welfare Reform,* May 1997 (Rev. 2/99).

8. OTHER SANCTIONS

Almost all sanctions result in case closure for at least one month. If a family is work-eligible and the requirement is also mandated by STEP, then the STEP sanction is the one that is applied.

As to the rare sanctions that apply to the individual, rather than the household, once the grant is reduced for one sanction it cannot be reduced still lower by a second sanction against the same individual. So, for example, if someone is excluded from the grant for having a drug conviction within the last year, his or her share of the family's assistance is terminated, and no additional sanction can be imposed for his or her being a fleeing felon.

No sanction should apply if waiving it is necessary to escape domestic violence (broadly defined, as discussed above), or to avoid penalizing the family for domestic violence.

None of the sanctions should affect children's Medicaid. And only one of the sanctions can affect parent's Medicaid: for not adequately cooperating with child support enforcement requirements. There is a split in authority as to whether a child support sanction can be applied against a pregnant woman under Medicaid.[235] Louisiana Medicaid no longer applies TANF work sanctions in the Medicaid program.[236] Other TANF/FITAP disqualifications do not carry over to Medicaid eligibility unless they were part of the AFDC statute or regulations in 1996, and the client has no other basis for Medicaid eligibility.[237]

8.1 NON-COOPERATION WITH CHILD SUPPORT ENFORCEMENT

If a parent does not cooperate in establishing paternity or with child support enforcement, all FITAP assistance to the family ends, unless the family establishes good cause.[238] Good cause is defined as: a reasonable anticipation of physical or emotional harm to the child or to the caretaker if affecting their ability to care for the child; conception was through incest or rape; or that legal adoption proceedings are pending or the client has been assisted for at least three months by a licensed or private social agency to resolve the issue of whether to keep the child or relinquish him for adoption.[239] For a non-cooperation finding for missing out-of-court appointments, the client must have missed two consecutive appointments.[240]

Non-cooperation determinations are made by Support Enforcement, rather than the FITAP case manager.

As a condition of eligibility, FITAP recipients assign their rights to receive child support to the state. If the amount received for current support exceeds their grant amount, then the recipient should receive the excess and is likely to be terminated

[235] The federal Medicaid agency's State Medicaid Manual § 3905 (https://www.cms.gov/Manuals/PBM/itemdetail.asp?filterType'none&filterByDID'0&sortByDID'1&sortOrder'ascending&itemID'CMS021927&intNumPerPage'10) excludes pregnant women from this requirement. But at least one court has limited the child support pregnancy exception to women whose only basis for Medicaid eligibility is under the poverty-level pregnant women category. *Douglas v. Babcock*, 990 F.2d 875 (8th Cir.), cert. denied 510 U.S. 825 (1993).
[236] *See* 29 La. Reg. 1833 (Sept. 20, 2003).
[237] *See* 42 U.S.C. § 1396u-1(a), (b)(1).
[238] LAC Title 67, Part 3, § 1239(B)(3).
[239] LAC Title 67, Part 3, § 1239(B)(2).
[240] LAC Title 67, Part 3, § 1239(B)(4)(a).

from the program.[241] (If an absent parent has failed to make support payments in the past, part of his or her payments may be for arrearages, rather than current support; this usually goes to the state to reimburse past TANF payments.)

If the recipient receives a payment directly while receiving assistance, the agency considers the child support to have been overpaid. The agency is to obtain a repayment agreement from the recipient. The agency's regulations consider it "non-cooperation" with Support Enforcement Services if the recipient will not enter, or does not comply with, a repayment agreement.[242] This should result in closure of the FITAP case.[243]

8.2 SPECIAL REQUIREMENTS ON MINOR UNMARRIED PARENTS

FITAP parents who are under age 18 must be in school or training and live in an adult-supervised setting.

The supervised setting can be with an adult relative within the fifth degree of relationship or legal guardian, or in a foster home, maternity home, "or other adult-supervised supportive living arrangement."[244] The latter can include the home of an adult non-relative.[245] The adult supervisor must usually be the payee.[246]

A variety of exceptions to the adult-supervised setting requirement are allowed, under the domestic violence standard, for the death or unwillingness of the adult relative, or if the minor parent lived apart from relatives for over a year before the birth of their child or a year before applying for FITAP, or other "good cause," many instances of which are set out in the FAM-4 manual, and others left to be decided case by case.[247]

See the discussion above, in "Persons who cannot be excluded in determining income eligibility and work participation requirements," as to who must be included in the assistance unit when there is a minor unmarried parent.

8.3. SCHOOL ATTENDANCE REQUIREMENT

FITAP recipients who are required to participate in STEP must participate in their children's school conferences and see to their children's school attendance (and homework).[248] As mentioned above, minor unmarried parents are ordinarily to complete high school or obtain a GED. For work-eligible minor unmarried parents who do not have a high school diploma or GED, attending school or GED classes is the "primary work activity."[249]

Recipients must agree in the FSA to actively participate in their child's education through parent-teacher conferences, homework assistance, or other activities and provide documentation to the department that they are ensuring school attendance and are engaged in the child's learning.[250]

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[241] LAC Title 67, Part 3, § 2514.
[242] LAC Title 67, Part 3, § 1285(C).
[243] LAC Title 67, Part 3, § 1239(B)(3); see also § 5385(B)(2)(a), though it cites a federal regulation which has been repealed. The current federal regulation is 45 CFR § 264.30(c).
[244] LAC Title 67, Part 3, § 1227(B).
[245] FAM4 § E-312.
[246] FAM4 § E-312.
[247] LAC Title 67, Part 3, § 1227(B); FAM4 §E-312.
[248] LAC Title 67, Part 3, §§ 1237; 5709.
[249] LAC Title 67, Part 3, § 5709(B).
[250] LAC Title 67, Part 3, § 5709(A).

8.4 PARENTING SKILLS TRAINING REQUIREMENT

FITAP recipients who are pregnant or who have a child under one year of age must attend parenting skills education, and doing so counts as the primary work activity if they are required to participate in STEP. The statute requires that transportation and child care shall be provided to enable participation.[251]

8.5 IMMUNIZATION REQUIREMENT

The family's grant also can be closed for at least one month if a recipient fails to get required immunizations for minor children. Noncompliance is allowed for medical contraindications and religious reasons. The statute provides that the sanction can only be imposed after advance written notice of the requirement.[252] The promulgated regulation adds that the sanction can only be imposed if noncompliance is without "good cause."[253] If the child is on a schedule for coming into compliance, that suffices.[254]

This regulation does not just require shots during infancy or before school entry. Immunizations must be updated through the teen years. Because records may be scattered among different providers, clients may have documentation problems, even if their child has had all required immunizations. Again, defenses may be available under the statute (such as whether the immunization schedule has been properly promulgated by the state's Department of Health and Hospitals).[255] When there are difficulties assembling the documentation, if the child has always lived in-state, consider requesting Medicaid's records of payments made on behalf of the recipient to prove the shots were obtained.

8.6 REFUSING A FULL TIME JOB

State law also applies a sanction if an adult recipient declines or refuses to take full time employment as specified in their STEP agreement.[256]

The sanction does not apply with regard to actions of a disabled or incapacitated parent.[257] As with the state's 24 month time limit, under the statute assistance should continue for any disabled or incapacitated household member(s) other than the parent, even if the sanction is applied. This is not set out in the regulations and may not be set out in the FAM4Manual.

In addition, the the sanction applies only to those required to participate in STEP ("work eligible"), which excludes still others from the sanction.[258]

The Department's STEP policies allow a sanction for refusing *any* job.[259] The Department may have authority to impose that wider sanction if specified as a condition of the recipient's STEP agreement. But it can be argued that the statute's specification of "full-time employment" eliminates the agency's discretion to require more in the agreement. One should argue that "full time" means employment that is approximately 40 hours a week and that has some longevity (the latter since the Department can take 30 days to re-initiate assistance[260]).

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[251] La.R.S. 46:231.5.
[252] La.R.S. 46:231.4(B).
[253] LAC Title 67, Part 3, § 1231.
[254] La.R.S. 46:231.4(A).
[255] La.R.S. 46:231.4(A) and (D); LAC Title 67, Part 3, § 1231(A).
[256] La.R.S. 46:231.6(A)(2).
[257] La.R.S. 46:231.6(B).
[258] La.R.S. 46:231.6(A)(2); La.R.S. 46:231(14); LAC Title 67, Part 3, §§ 1241.
[259] FAM4 § P-520-STEP.
[260] LAC Title 67, Part 3, § 1205.

8.7 DRUG SCREENING AND TREATMENT

The state has also imposed a requirement that adult recipients be screened for possible drug abuse, be tested if they fail the screen, and comply with a drug treatment program if they fail the test.[261] Under the promulgated regulation a sanction can only be imposed if noncompliance is without "good cause."[262] The appropriate STEP sanction applies for a work-eligible family, and for those exempt from STEP the sanction is case closure for at least one month and until compliance.[263]

If a recipient has been through the treatment program, and is again found to be using illegal drugs, their portion of the family's grant is not paid, but the rest of the family can continue to get assistance as long as the offender is in an education and rehabilitation program.[264]

A number of federal challenges may exist to these requirements, such as whether there is reasonable cause for the "search" involved in drug testing, and whether it is permissible for the drug treatment center to release information back to the welfare agency under any federal drug treatment funding it receives. Even the state statute specifies that "No participant shall be tested if such testing is prohibited by federal law," and requires that the constitutional rights of participants be protected.[265]

8.8 INTENTIONAL PROGRAM VIOLATIONS

FITAP recipients can be disqualified from eligibility for benefits as a result of conviction or administrative hearing findings that they committed an intentional program violation. The grant is reduced by the portion attributable to the offender. The recipient is disqualified 6 months for the first intentional program violation, 12 months for the second, and barred forever for a third offense.[266] The Department's staff is required to give written notice of this the first time an individual applies for FITAP.[267]

8.9 ONE-YEAR DRUG CONVICTION BAN

Louisiana bans persons from receiving FITAP (and food stamps) for a year after a conviction for use, possession, or distribution of illegal drugs, or a year after release from incarceration, whichever is later.[268] According to the Department's regulation, the bar applies only with respect to offenses that occurred after August 22, 1996.[269]

8.10 PROBATION AND PAROLE VIOLATORS, AND PERSONS FLEEING PROSECUTION OR CONFINEMENT

Persons in violation of their parole obligations, or fleeing prosecution or confinement for a felony are also disqualified for FITAP (unless they have been pardoned by the President).[270] Presumably this provision should be given the same narrowing interpretation established through litigation as to Social Security assistance, discussed in another Chapter of this Manual.

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[261] La.R.S. 46:460.10; LAC Title 67, Part 3, § 1249.
[262] LAC Title 67, Part 3, § 1249(E).
[263] LAC Title 67, Part 3, § 1249(E).
[264] LAC Title 67, Part 3, § 1249(F).
[265] La.R.S. 46:460.10(B). *See also*, Please Leave Your Constitutional Protections at the Door: A Challenge to Louisiana's Mandatory Drug Testing Statutes, Tina L. Wilson, 60 La. L. Rev. 585 (2000)).
[266] LAC Title 67, Part 3, § 1501(C).
[267] LAC Title 67, Part 3, § 1501(D).
[268] La.R.S. 46:233.2; LAC Title 67, Part 3, § 1255.
[269] LAC Title 67, Part 3, § 1255.
[270] LAC Title 67, Part 3, § 1251; 42 U.S.C. § 608(a)(9).

8.11 STRIKERS

The families of caretaker relatives or stepparents who strike are ineligible. As to other strikers in the household, the portion of the grant attributable to their needs is not paid.[271]

8.12 CONVICTIONS FOR CLAIMING BENEFITS IN TWO STATES

Persons convicted for fraudulently receiving TANF, Food Stamp, Medicaid or SSI assistance are disqualified from receiving federally funded TANF for ten years after the conviction.[272]

9. CONTINUED ASSISTANCE FOR RECIPIENTS EARNING THEIR WAY OFF ASSISTANCE, ESPECIALLY MEDICAID

Recipients who become ineligible for FITAP because of earnings can qualify for six months of "Transitional Medicaid," as long as reporting requirements are met and can qualify for an additional six months if income remains under 185% of the federal poverty levels.[273]

There are over 30 categories of Medicaid eligibility, dealt with in a separate Chapter of this Desk Manual. So still others may be eligible for Medicaid, even if denied FITAP.

But persons denied on the following grounds are especially likely eligible for Medicaid:

- Work participation requirements.
- Support enforcement.
- State-engrafted requirements: time limits, school attendance, parenting skills, and immunization requirements and job refusals, drug screening, drug convictions, intentional program violations.

Employed former recipients also qualify for child care assistance on a sliding fee scale.[274]

Transportation assistance and "other supportive services" for twelve months after recipients earned their way off the program were terminated in 2011.[275]

[271] LAC Title 67, Part 3, § 1253.
[272] 42 U.S.C. § 608(a)(8); LAC Title 67, Part 3, § 1501(B)(3)(the regulation does not make it clear that convictions with respect to the other programs invoke the penalty).
[273] 42 U.S.C. § 1396r-6; Louisiana Medicaid Eligibility Manual § H1530.
[274] LAC Title 67, Part 3, § 5103(B).
[275] Executive Bulletin E-2470-00, November 10, 2011. 38 La. Reg. 3399 (December 20, 2011).

10. PROTECTION FROM GARNISHMENT AND DEBIT CARD TRANSFER FEES

Under state law, FITAP income cannot be assigned by the recipient and is exempt from levy and execution.[276]

In addition, retailers are prohibited from charging recipients more than their usual check-cashing fee for accessing cash for them from their electronic benefits cards. They cannot charge at all if the cash is accessed in conjunction with a purchase.[277] The retailers cannot cap the amount that can be withdrawn per transaction.[278]

11. CONCLUSION

In sum, the complexity of the state's TANF program creates opportunity for error by agency case managers, and a need for careful analysis by client advocates. In addition, many of the program policies and practices are subject to legal challenge.

[276] La.R.S. 46:111.
[277] La.R.S. 46:231.13; LAC Title 67, Part 3, § 407.
[278] La.R.S. 46:231.13.