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Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance

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November 18, 2015

Congressional Research Service
7-5700
www.crs.gov
R42394

CRS REPORT
Prepared for Members and
Committees of Congress

Summary

Throughout the history of social assistance programs, administrators have attempted to limit access only to those families considered "worthy" of assistance. Policies about worthiness have included both judgments about need—generally tied to income, demographic characteristics, or family circumstances—and judgments about moral character, often as evidenced by behavior. Past policies evaluating moral character based on family structure have been replaced by today's policies, which focus on criminal activity, particularly drug-related criminal activity. The existing crime and drug-related restrictions were established in the late 1980s through the mid-1990s, when crime rates, especially drug-related violent crime rates, were at peak levels. While crime rates have since declined, some remain interested in expanding these policies.

The three programs examined in this report—the Temporary Assistance for Needy Families (TANF) block grant, the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), and federal housing assistance programs (public housing and Section 8 tenant and project-based assistance)—are similar, in that they are administered at the state or local level. They are different in the forms of assistance they provide. TANF provides cash assistance and other supports to low-income parents and their children, with a specific focus on promoting work. SNAP provides food assistance to a broader set of poor households including families with children, elderly households, and persons with disabilities. The housing assistance programs offer subsidized rental housing to all types of poor families, like SNAP.

All three programs feature some form of drug- and other crime-related restrictions and all three leave discretion in applying those restrictions to state and local administrators. Both TANF and SNAP are subject to the statutory "drug felon ban," which bars states from providing assistance to persons convicted of a drug-related felony, but also gives states the ability to opt-out of or modify the ban, which most states have done. The 2014 farm bill also added new restrictions for certain ex-offenders seeking SNAP assistance. Housing assistance programs are not subject to the drug felon ban, but they are subject to a set of policies that allows local program administrators to deny or terminate assistance to persons involved in drug-related or other criminal activity. Housing law also includes mandatory restrictions related to specific crimes, including sex offenses and methamphetamine production. All three programs also have specific restrictions related to fugitive felons.

Recently, the issue of drug testing in federal assistance programs has risen in prominence. In the case of TANF, states are permitted to drug-test recipients; however, state policies involving *suspicionless* drug testing of TANF applicants and recipients have been successfully challenged in courts. Most state policies on drug testing TANF applicants and recipients require the state to have a "reasonable suspicion" that he or she is using illegal drugs. SNAP law does not explicitly address drug testing, but given the way that SNAP and TANF law interact, state TANF drug testing policies may affect SNAP participants. The laws governing housing assistance programs are silent on the topic of drug testing.

The current set of crime- and drug-related restrictions in federal assistance programs is not consistent across programs, meaning that similarly situated persons may have different experiences based on where they live and what assistance they are seeking. This variation may be considered important, in that it reflects a stated policy goal of local discretion. However, the variation may also be considered problematic if it leads to confusion among eligible recipients as to what assistance they are eligible for or if the variation is seen as inequitable. Proposals to modify these policies also highlight a tension that exists between the desire to use these policies as a deterrent or punishment and the desire to support the neediest families, including those that have ex-offenders in the household.

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Introduction

This report describes and compares the drug- and crime-related policy restrictions contained in selected federal programs that provide assistance to low-income individuals and families: the Temporary Assistance for Needy Families (TANF) block grant, the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), and the three primary federal housing assistance programs (the public housing program, the Section 8 Housing Choice Voucher program, and the project-based Section 8 rental assistance program). These programs were chosen because they serve many of the same families. However, the programs also differ. They have different drug- and other crime-related restrictions, with varying levels of federal administration and discretion for state or local administrators.

The drug- and crime-related restrictions in TANF, SNAP, and the housing assistance programs were developed at different times in different laws, but it appears they are intended to serve similar purposes. To some extent, they are intended to deter people from engaging in drug-related and other criminal activity. They may also be intended to punish individuals for engaging in undesirable behavior. Further, when resources are limited, these policies may be intended to direct assistance to other households who are deemed more worthy of assistance. Additionally, particularly for housing assistance programs, drug- and crime-related restrictions may be intended to protect vulnerable communities from the consequences of drug-related and other criminal activity.

The report begins by providing a brief overview of the history and evolution of policies establishing drug- and crime-related restrictions in federal assistance programs. It then briefly describes TANF, SNAP, and the three housing programs, and then discusses the specific policies in those programs related to drug testing and drug-related and other criminal activity. It concludes by comparing and contrasting those policies and highlighting considerations for policymakers.

Evolution of Federal Policies

Since governments began providing assistance to the poor, policymakers have been concerned with whether those receiving benefits were worthy of assistance.[1] "Worthiness" has been defined both by judgments of economic need—are families or individuals truly unable to meet their needs without assistance?—and judgments of character, often as evidenced by certain behaviors. When the federal cash assistance program began in the 1930s,[2] states were permitted to consider the "moral character" of an applicant as a factor in determining eligibility.[3] This led to states adopting policies that reflected dominant societal expectations at the time about behavior and family structure. Examples of such policies included so-called "suitable home" rules, giving state or local administrators wide discretion to disqualify applicants for assistance, and "man in the house" rules, penalizing unmarried mothers for cohabiting with men. These moral character

[1] According to *Regulating the Poor* by Francis Fox Piven, as early as 1550 when relief for the poor began in Lyons, France, there were provisions to distinguish the "worthy" poor from the "unworthy" and assist only those deemed "worthy." Frances Fox Piven and Richard A. Cloward, *Regulating the Poor*: *The Functions of Public Welfare* (New York: Pantheon Books, 1971).

[2] The original program under the Social Security Act of 1935 was titled Aid to Dependent Children. It was renamed Aid to Families with Dependent Children (AFDC) in 1962 and was replaced by the Temporary Assistance for Needy Families (TANF) program in 1996.

[3] Roger E. Kohn, "AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith," University of Pennsylvania Law Review, Vol. 118, No. 8 (July 1970), pp. 1219-1250.

policies were the subject of controversy and legal challenge; critics condemned such policies, arguing that, among other concerns, they had racial overtones and disproportionately affected black families, particularly black mothers.[4] States that had adopted these policies argued that they discouraged immoral behavior.[5] By the late 1960s and early 1970s, many of the policies related to family structure and behavior were struck down by federal administrative rulings and the courts.[6]

Around the same time that morality tests based on family structure were being eliminated in AFDC, worries about rates of crime and drug use were increasing across the nation. Between 1960 and 1980, violent crime rates more than tripled,[7] and rates of drug use also increased significantly.[8] After first declaring a "War on Poverty," the Johnson Administration formed the *Commission on Law Enforcement and Administration of Justice* and declared a "War on Crime."[9] Several years later, the Nixon Administration declared drug abuse "public enemy number one in the United States."[10] The federal "War on Drugs" was intensified by the Reagan Administration, particularly in response to the "epidemic" of crack-cocaine and its associated violence. During this period, policymakers grappled with how best to address concerns about crime and drug use, their causes, and their disproportionate effects in poor communities, particularly predominantly African American urban communities.[11] Policymakers also struggled with the challenge of how to distinguish between drug use as a crime and drug addiction as a public health problem.

Specific drug-related sanctions were added to certain federal assistance programs for the first time by the Anti-Drug Abuse Act of 1988 (P.L. 100-690). The act made it the policy of the U.S. government to create a drug-free America and included both penalties for drug offenders as well as support for drug abuse education and prevention. So-called "user accountability" provisions denied certain federal benefits—namely all grants, loans (including student loans), licenses, and contracts—to persons convicted of certain drug-related crimes. Social Security, welfare programs (including AFDC [now TANF], Food Stamps [since renamed SNAP],[12] and housing assistance), and veterans' benefits were all exempted from these user accountability provisions in the final law, although earlier versions of the provision had included housing assistance and veterans' benefits in the definition of federal benefits.[13] During debate on these user accountability

[4] The concern about such policies being used to disguise systematic racial discrimination can be found in King v. Smith, 392 U.S. 309, 321-322 (1968).

[5] Roger E. Kohn, "AFDC Eligibility Requirements Unrelated to Need: The Impact of King v. Smith," University of Pennsylvania Law Review, Vol. 118, No. 8 (July 1970), p. 1226.

[6] For example, suitable home provisions were restricted in 1960 by the so-called "Flemming Rule," and in King v. Smith, 392 U.S. 309 (1968), the Supreme Court struck down Alabama's substitute father regulation.

[7] Department of Justice, Bureau of Justice Statistics, Uniform Crime Reporting Statistics, Violent Crime Rates, 1960-2009.

[8] Robert Wood Johnson Foundation, Substance Abuse: The Nation's Number One Health Problem, Key Indicators for Policy, Update, February 2001, pg 15.

[9] President Lyndon B. Johnson's Annual Message to the Congress on the State of the Union, January 17, 1968, available at http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/680117.asp.

[10] Richard M. Nixon, Remarks About an Intensified Program for Drug Abuse Prevention and Control, June 17, 1971, available at http://www.presidency.ucsb.edu/ws/index.php?pid=3047#axzz1kxlMtfYk.

[11] Roland G. Fryer, "Measuring the Impact of Crack Cocaine," National Bureau of Economic Research, Cambridge, MA, 2005, available at http://papers.nber.org/papers/w11318.

[12] P.L. 110-246 renamed the Food Stamp program the Supplemental Nutrition Assistance Program, beginning October 1, 2008.

[13] While housing assistance programs and veterans' benefits were ultimately excluded from the definition of federal benefit, they were included in the House version of the Anti-Drug Abuse Act, H.R. 5210, 100th Congress. The Senate version of the bill included public housing among the exempted programs. For a discussion, see Christopher D. Sullivan, "'User-Accountability' Provisions in the Anti-Drug Abuse Act of 1988: Assaulting Civil Liberties in the War (continued...)

provisions, supporters argued that they would serve as a deterrent to drug use,[14] while detractors criticized these provisions as "post-conviction penalties" to further punish drug offenders.[15]

The act included congressional findings expressing specific concern about the role drugs and drug-related crimes were playing in public housing communities. While the act excluded housing assistance programs from the federal user accountability bans, it did include provisions permitting local administrators to adopt policies restricting persons involved with drugs or drug-related criminal activity from receiving federal public housing assistance and allowing for drug-related and other criminal activity to serve as grounds for termination of tenancy.

Less than a decade later, Congress passed and President Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA; P.L. 104-193). PRWORA ended almost four decades of debate about how to reform the nation's cash welfare program. During the welfare reform debates of the 1980s and 1990s leading up to PRWORA, welfare receipt was often mentioned together with crime and drug addiction as problems afflicting the urban "underclass."[16]

While the focus of PRWORA was to fundamentally restructure cash assistance to make it time-limited and work-conditioned, it also included provisions to address the associated social ills of crime and drugs. The law made persons convicted of drug felonies subject to a lifetime ban on receiving assistance under both the newly created TANF program as well as the federal Food Stamp program (now SNAP).[17] This provision was added during Senate floor consideration of the bill and was the subject of only limited debate, with four Senators speaking briefly on the topic. The sponsor, Senator Phil Gramm, argued "if we are serious about our drug laws, we ought not give people welfare benefits who are violating the Nation's drug laws." Opponents raised concerns about the implications for people who are addicted and their children.[18] The act also authorized states to drug-test TANF recipients and to sanction recipients who test positive for drug use. It also added prohibitions on assisting "fleeing felons" to all federal assistance programs, including TANF, SNAP, and housing assistance.[19]

Just prior to PRWORA, Congress passed a housing law (P.L. 104-120) that significantly expanded crime- and drug-related restrictions in assisted housing programs. The primary focus of the law was to extend the expiring authorizations for a number of housing programs, but it also included a section related to the "safety and security of public and assisted housing." Specifically, the section made people who had been evicted from assisted housing for drug-related activities ineligible for assistance for three years and permitted local administrators to restrict assistance to families based on demonstrated patterns of drug use or alcohol abuse. This law was enacted

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on Drugs," 40 Hastings L.J. 1223 (1989).

[14] Representative McCollum, *Congressional Record*, vol. 134 (September 8, 1988), p. H23000.

[15] Representative Cardin, *Congressional Record*, vol. 134 (September 8, 1988), p. H23002.

[16] For example, journalist Ken Auletta opens his 1982 book *The Underclass* with the question: "who are the people behind the bulging crime, welfare, and drug statistics—and the all-too-visible rise in anti-social behavior that afflicts most American cities?" Ken Auletta, *The Underclass* (New York: Random House, 1982).

[17] See footnote 12.

[18] *Congressional Record*, daily edition, vol. 142 (July 23, 1996), p. S8498.

[19] The fleeing felon restrictions were incorporated from stand-alone legislation, S. 599 (104th Congress). During his introductory remarks, the sponsor of the legislation, Senator Santorum (PA), cited a need for information sharing with law enforcement and cited several instances of specific persons who had been receiving public assistance while they were fugitives. *Congressional Record*, vol. 53 (March 22, 1995), p. S4383.

following President Clinton's 1996 State of the Union address in which he claimed that the nation faced a great challenge to take its streets back from crime, drugs, and gangs.[20] In reference to assisted housing, he stated that "criminal gang members and drug dealers are destroying the lives of decent tenants."[21]

Just two years after enactment of PRWORA and P.L. 104-120, Congress passed the Quality Housing and Work Opportunity Reconciliation Act of 1998 (QHWRA; P.L. 105-276), a major assisted housing reform law. The law modified and expanded the crime- and drug-related provisions previously enacted in 1988 and 1996. QHWRA also included several provisions to restrict access to housing assistance for persons involved with several specific crimes, namely, production of methamphetamines and sex offenses. In the case of the methamphetamine restriction, the provision was added during floor debate in the Senate, and the discussion of the amendment by its sponsors recounted the dangers associated with exploding methamphetamine production labs, citing several anecdotes related to such labs in assisted housing.[22] The amendment related to sex offenders was also offered as a House floor amendment.[23] The sponsor spoke of a specific anecdote in which a child living in public housing had been assaulted by a person previously convicted of a sex offense, as well as the dangers sex offenders may pose to communities more generally.[24]

Overview of Selected Federal Assistance Programs

The following section of the report briefly describes TANF, SNAP, and major housing assistance programs. The next section of the report specifically discusses the drug- and crime-related provisions of these programs.

TANF

The Temporary Assistance for Needy Families (TANF) block grant provides grants to states, Indian tribes, and territories for a wide range of benefits, services, and activities that address economic disadvantage. TANF is best known for funding state cash welfare programs for low-income families with children. However, in FY2014, cash welfare represented only 27% of TANF funds. TANF funds a wide range of activities that seek both to ameliorate the effects of and address the root causes of child poverty. In addition to state block grants, TANF includes competitive grants to fund healthy marriage and responsible fatherhood initiatives.

The TANF cash assistance program provides aid to very poor families with children. Many of these families are headed by a single mother, though TANF also provides aid to families of children cared for by non-parent relatives (e.g., grandparents, aunts, and uncles). States determine the rules that govern financial eligibility for TANF cash assistance. States also determine the rules for how much a family receives in assistance (there is no federal eligibility floor). In July 2013, the maximum benefit for a family of three was $923 per month in Alaska, or 45% of poverty-level income. New York had the highest benefits in the lower 48 contiguous states and the District of Columbia, paying $789 per month (49% of poverty guidelines). Mississippi, the state with the

[20] Statement of President William Jefferson Clinton, State of the Union Address, U.S. Capitol, January 23, 1996.

[21] Ibid.

[22] Senate debate, *Congressional Record*, daily edition, vol. 144 (July 16, 1998), pp. S8366-S8367.

[23] The amendment was added during floor debate of H.R. 2 (105th Congress), which was incorporated into P.L. 105-276. *Congressional Record*, daily edition, vol. 143 (May 6, 1997), p. H2191.

[24] Ibid.

lowest benefit levels, paid a family of three a maximum of $170 per month, 10% of poverty guidelines. The maximum benefit is generally the amount paid for a family with no other income who is complying with program requirements. Federal law limits cash assistance to a family with an adult to 60 months (five years of benefits). Additionally, states are subject to work participation standards and are required to have a specified percentage of their cash assistance families engaged in work or job preparation activities. In December 2014, TANF cash assistance was received by 1.7 million families, which had 1.2 million recipient adults and 3.1 million recipient children.

Almost all federal policy for TANF relates to its cash assistance programs. However, TANF also funds a wide range of other benefits and services, including help to the working poor (child care, refundable tax credits), subsidized jobs, pre-kindergarten early childhood education, and benefits and services for families at risk of having their children removed from the home because of abuse and neglect. States have considerable discretion in designing these programs, which are not subject to time limits, work requirements, or the drug testing and crime-related restrictions discussed in this report. There are no caseload figures to describe the number of families receiving TANF benefits other than cash assistance.

The TANF block grant is administered at the federal level by the Department of Health and Human Services (HHS). State or local welfare offices administer the cash assistance funded through TANF. TANF benefits or services other than cash assistance are administered by a range of state and local governmental entities as well as local (governmental, nonprofit, or for-profit) service providers. The federal government has appropriated $17.3 billion for the block grant in FY2015, and states are required to contribute at least another $10.4 billion that year.[25] States participating in the program must also meet a maintenance of effort requirement by expending a certain amount of their own funds on TANF-related populations and programs.

SNAP

SNAP (formerly Food Stamps) provides benefits (through the use of electronic benefit transfer cards) that supplement low-income recipients' food purchasing power. Benefits vary by household size, income, and expenses (like shelter and medical costs) and averaged approximately $125 per person per month for FY2014. All 50 states, the District of Columbia, Guam, and the Virgin Islands participate in SNAP.[26] In FY2013, SNAP had average monthly participation of approximately 47.6 million individuals in 23.1 million households. 44% of participants were under age 18; another 9% were age 60 or older.

In general, eligible households must meet a gross income test (monthly cash income below 130% of the federal poverty guidelines), a net income test (monthly cash income subtracting SNAP deductible expenses at or below 100% of the federal poverty guidelines), and have liquid assets under $2,000. However, households with elderly or disabled members do not have to meet the gross income test and may have greater assets (under $3,250).[27] Recipients of TANF cash

[25] This amount includes $16.5 billion for the basic block grant to the states, $0.1 billion for the territories, $0.2 billion for TANF supplemental grants, and $0.3 billion for TANF contingency funds (detail does not add to total because of rounding). For more information, see CRS Report RL32760, *The Temporary Assistance for Needy Families (TANF) Block Grant: Responses to Frequently Asked Questions*, by Gene Falk.

[26] In lieu of SNAP benefits, (1) Puerto Rico operates a nutrition assistance block grant program using rules very similar to the SNAP; (2) over 250 Indian reservations operate a food distribution program with eligibility rules similar to SNAP; and (3) American Samoa and the Northern Marianas receive nutrition assistance block grants for programs serving their low-income populations.

[27] The Food and Nutrition Act adjusts SNAP asset limits for inflation and rounds down to the nearest $250. For (continued...)

assistance, Supplemental Security Income (SSI), or state-funded General Assistance are categorically eligible for SNAP. The state option of broad-based categorical eligibility also allows for the modification of some SNAP eligibility rules and has resulted in the vast majority of states not utilizing an asset test for the SNAP program because states deem an applicant eligible based on a TANF-funded benefit.[28]

SNAP is administered by the U.S. Department of Agriculture's Food and Nutrition Service (USDA-FNS). The program is co-administered by state agencies, usually the same human services entities that administer the states' TANF cash assistance programs. SNAP law includes many state options and opportunities to seek waivers, such that for some aspects of the law there can be considerable state-to-state variation.[29] This is particularly the case for some of the crime-related policies discussed in this report.

Virtually all of the funding for SNAP is mandatory, although it is still subject to the congressional appropriations process as an "appropriated mandatory." SNAP benefits are 100% federally funded, and the federal government shares state administrative costs 50/50. In FY2014, SNAP obligated approximately $75 billion.[30]

Housing Assistance

The federal government funds three primary direct housing assistance programs for low-income individuals and families: the public housing program,[31] the Section 8 Housing Choice Voucher program,[32] and the Section 8 project-based rental assistance program.[33] Combined, these programs serve roughly 4 million low-income households, including households made up of persons who are elderly and persons who have disabilities, families with and without children, and single adults. All three programs are 100% federally funded, and due to resource constraints, combined serve roughly only one out of every three or four eligible families. All three programs offer housing to low-income families that costs no more than 30% of family income; however, the form the assistance takes varies across the three programs. Further, while all three programs are administered at the federal level by the Department of Housing and Urban Development (HUD), the programs vary in their local administration.

In the case of the public housing program, assistance is provided in the form of low-rent housing units that are subsidized by the federal government but owned and administered by local, quasi-governmental public housing authorities (PHAs). In the case of the Section 8 voucher program,

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FY2015, the limits are $2,250 and $3,250, as described in this paragraph.

[28] For more on categorical eligibility, see CRS Report R42054, *The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility*, by Gene Falk and Randy Alison Aussenberg.

[29] U.S. Department of Agriculture, Food and Nutrition Service, Program Development Division, *Supplemental Nutrition Assistance Program: State Options Report*, Ninth Edition, November 2010.

[30] USDA-FNS, FY2016 Congressional Budget Justification, page 32-86, http://www.obpa.usda.gov/32fns2016notes.pdf.

[31] The program is codified at 42 U.S.C. §1437d. For more information about the public housing program, see CRS Report R41654, *Introduction to Public Housing*, by Maggie McCarty.

[32] The program is codified at 42 U.S.C. §1437f(o). For more information, see CRS Report RL32284, *An Overview of the Section 8 Housing Programs: Housing Choice Vouchers and Project-Based Rental Assistance*, by Maggie McCarty.

[33] The program is codified at 42 U.S.C. §1437f. For more information about the project-based Section 8 program, see CRS Report RL32284, *An Overview of the Section 8 Housing Programs: Housing Choice Vouchers and Project-Based Rental Assistance*, by Maggie McCarty.

assistance is provided in the form of rental vouchers that families can use to secure the housing of their choice in the private market. Like in the public housing program, vouchers are federally funded but administered at the local level by PHAs. In the case of the Section 8 project-based rental assistance program, assistance is provided in the form of low-rent housing units subsidized by the federal government but owned and administered by private property owners (both for-profit and nonprofit).

In the case of all three programs, federal policies govern basic income eligibility and the method for determining tenant rent and subsidy level. However, owners and PHAs have discretion to set their own policies related to screening tenants for suitability for entrance to the program and for tenancy in a given unit. In the case of public housing and the Section 8 voucher program, suitability for admittance to the program is determined by the PHAs that administer the program and their discretionary screening policies are generally contained in administrative plans developed by the PHAs. After families have been screened by PHAs for suitability for the programs, landlords can further screen tenants for suitability for tenancy in their units. In the case of the voucher program, private landlords can screen tenants wishing to lease from them using any criteria they wish.[34] In the case of the public housing program, since PHAs are the landlords, they can choose to do additional screening for suitability for specific public housing developments. In the case of the Section 8 project-based rental assistance program, since the private property owner is both the program administrator and the landlord, s/he screens tenants for both suitability for the program and suitability for tenancy.

In FY2015, the three housing assistance programs combined received over $35.5 billion in discretionary appropriations.[35]

Drug Testing and Crime-Related Restrictions

This section of the report describes specific federal TANF, SNAP, and housing assistance policies on drug testing and pertaining to drug-related and other criminal activity engaged in by applicants and recipients. In some cases, the federal policies are prescriptive; in other cases, they leave discretion to the state or local administering entity.

TANF

As mentioned above, all federal drug and crime-related restrictions in TANF are for TANF "assistance"—essentially, the monthly ongoing cash benefit provided to needy families with children.[36] These restrictions do not apply to the broader set of benefits and services that are funded through the TANF block grant. States have broad latitude in determining for whom and how these non-cash benefits and services are structured, and though not required by federal law, they may include restrictions related to drugs and crime.

[34] As long as those criteria comply with federal, state, and local law, including Fair Housing laws.

[35] See Table 2 CRS Report R43548, *Department of Housing and Urban Development: FY2015 Appropriations*. Total includes the following accounts: Tenant-Based Rental Assistance, Project-Based Rental Assistance, Public Housing Operating Fund, Public Housing Capital Fund, Choice Neighborhoods, and Family Self Sufficiency.

[36] In addition to basic cash assistance, "assistance" includes both transportation aid and child care subsidies provided to nonworking families with children.

TANF Drug Testing[37]

The 1996 welfare reform law gave states the option of requiring drug tests for TANF recipients and penalizing those who fail such tests.[38] Many states have adopted policies to require such drug tests. However, there have been two high-profile court challenges to state policies to conduct drug tests on all applicants and recipients of TANF, whether or not there was suspicion to believe they were using illegal drugs, as a violation of constitutional protections against unreasonable searches.[39] One was in the early post-welfare reform case in Michigan, and the other was a more recent case in Florida. As is discussed in the "Legal Issues Involving Drug Testing Policies: Recent Developments" section below, the TANF beneficiaries received favorable rulings in both cases.

Table A-1 provides a listing of state policies for drug testing TANF applicants or recipients. Information on these policies is not available from TANF state plans or in states' TANF reports to the federal government. Therefore, the table's information is based on a database search of state laws.[40] The search, conducted in July 2015, identified TANF drug testing policies in 26 states. These 26 states include Florida's program, which was not implemented because a federal court of appeals ruled that it was unconstitutional.[41] It also includes Georgia's program. In light of the litigation against the similar Florida program, Georgia modified its policies so that only those applicants and recipients for whom the state has "reasonable suspicion" are using illicit drugs will be tested. Its law is effective January 1, 2016.

State policies (other than Florida) generally require actual testing of only certain applicants and recipients. Some policies require testing of only those who have had past drug convictions. Other states first "screen" for substance abuse, and then conduct the actual chemical drug test only when that screening leads the state to have reasonable suspicion of drug use. A positive drug test generally makes that individual ineligible for TANF assistance. However, some states allow recipients to either retain eligibility or regain eligibility by participating in, or completing, a substance abuse treatment program.

TANF Drug Felon Ban

The 1996 welfare law bars states from providing TANF assistance to persons convicted of a felony for possession, use, or distribution of illegal drugs, but it also gives states the ability to opt-out of the ban or modify the period for which the ban applies.[42] States can opt-out or modify the ban only through enacting a law, so it requires an affirmative act by the state's legislature and governor. (The statutory requirement, and the ability of states to opt-out of it, also applies to SNAP benefits; see "SNAP" later in this report.)

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[37] For an overview of drug testing and screening policies in states, see Office of the Assistant Secretary for Policy and Evaluation, *Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies*, November 2011, http://aspe.hhs.gov/hsp/11/DrugTesting/ib.shtml.

[38] Section 902 of P.L. 104-193.

[39] For a discussion of constitutional issues raised by drug testing policies for public benefits, see CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[40] The search was conducted by CRS using the LexisNexis database.

[41] See CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[42] Section 115 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193).

Definitive information on state policies regarding the drug felon ban is not available. As with drug testing, TANF state plans or program reports do not require that states indicate whether they have retained the full ban, modified it, or lifted it entirely. **Table 1** shows the results of a search of the LexisNexis database (corroborated with some additional information) on state legislation to classify state TANF policies regarding the drug felon ban. According to this search, the majority of states have either opted-out of or modified the drug felon ban in their TANF programs. As of July 2015, 27 states modified the lifetime ban. This includes states that shortened the ban or allowed eligibility for some ex-offenders or established conditions for ex-offenders to be eligible for assistance (e.g., submit to drug testing or treatment). In that month, 11 states and the District of Columbia had opted out of the ban on drug felons entirely, and 12 states maintained the lifetime disqualification for those convicted of drug felonies.

Table 1. State Policies on TANF Drug Felony Disqualification for Applicants and Recipients

Information as of July 2015; 50 States and District of Columbia

Lifetime Disqualification for Drug Felons (12)	No Disqualification for Drug Felons (12)	Modified Disqualifications (27)
Alaska	Alabama (effective 1/30/16; currently full ban)	Arkansas
Arizona	District of Columbia	California
Delaware	New Hampshire	Colorado
Georgia	New Mexico	Connecticut
Mississippi	New York	Florida
Missouri	Ohio	Hawaii
Nebraska	Oklahoma	Idaho
South Carolina	Oregon	Illinois
South Dakota	Rhode Island	Indiana
Texas	Vermont	Iowa
Virginia	Washington	Kansas
West Virginia	Wyoming	Kentucky
		Louisiana
		Maine
		Maryland
		Massachusetts
		Michigan
		Minnesota
		Montana
		Nevada
		New Jersey
		North Carolina
		North Dakota
		Pennsylvania
		Tennessee
		Utah
		Wisconsin

Source: Congressional Research Service (CRS), based on information in the LexisNexis legal database July 2015; U.S. Government Accountability Office, *Drug Offenders. Various Factors May Limit the Impacts of Federal Laws that*

Provide for Denial of Selected Benefits, GAO-05-238, September 2005; and USDA-FNS SNAP State Options Report, September 2013.

Notes: It is difficult to ascertain whether states have maintained the full lifetime ban on drug felons as it applies to TANF assistance. Modifying or opting out of the drug felon ban requires an affirmative action of the state legislature. However, maintaining the ban requires only inaction. Thus, states listed as maintaining the lifetime ban on drug felons for TANF are those where the search on state legislature resulted in no legislation. Attempts were made, however, to corroborate this information with other sources, including the GAO report cited above.

The ban on drug felons in TANF applies only to TANF "assistance," which is essentially ongoing cash assistance benefits. It does not apply to other TANF benefits and services such as child care for working families, refundable tax credits, or subsidized jobs.

Fleeing Felons and Other Crime-Related Restrictions in TANF

The 1996 welfare law bars "fugitive" or "fleeing" felons from assistance under TANF and other specified public assistance. That is, a person fleeing to avoid prosecution, custody, or confinement after conviction for a felony or violating a condition of probation or parole is ineligible for assistance. HHS regulations are generally silent on how states are to implement and enforce this ban under the TANF program. However, USDA has proposed detailed regulations for SNAP, a program administered at the state level, usually in the same office as TANF cash assistance. States sometimes adopt SNAP procedures for their TANF cash assistance programs as well, to ease administrative burdens. (See "Fleeing Felon" Ban in SNAP" later in this report.)

In addition to the drug felon ban and fleeing felon ban, TANF law includes a 10-year prohibition on assisting those who have committed welfare fraud by applying for benefits in more than one state.[43] The fraud could involve applying in multiple states for TANF, SNAP, or Supplemental Security Income (SSI). The 10-year prohibition begins on the date the individual was convicted in a federal or state court for such a crime.

Applicability of Policies in TANF

Generally, TANF provides benefits to families with dependent children. TANF financial eligibility rules and benefit amounts are solely determined by the states. Federal law is silent on these two matters. Most states base TANF cash assistance benefits on family size, with larger families receiving larger benefits (all else being equal).

States have a great deal of flexibility in how to apply drug- and other crime-related restrictions on benefits. The federal drug felon ban, fleeing felon provisions, and welfare fraud provisions apply specifically to individuals, who individually may be barred from participation under these policies.

SNAP

This section discusses SNAP current law with regard to drug testing, drug felony, and fleeing felon policies, as well as the mechanisms by which these policies can affect an entire SNAP household. New additions to this area of SNAP law were contemplated and added in the 2014 farm bill (P.L. 113-79); these additions are discussed in a text box on p. 15.

[43] 42 U.S.C. §602(a)(8).

SNAP Drug Testing

For the most part, USDA does not allow states to use drug testing in determining eligibility for the Supplemental Nutrition Assistance Program.[44] There are two exceptions to this rule; both give states discretion[45] and relate to the interrelationship of SNAP with TANF and the law that created TANF (PRWORA, P.L. 104-193).

As described earlier, PRWORA permanently disqualified applicants with a felony drug conviction from participating in TANF or SNAP. However, state legislatures are permitted to opt-out or modify the drug felon ban.[46] Some states have chosen to modify the ban by legislating that those convicted of a drug felony may be eligible for SNAP benefits subject to a drug test. As of August 2015, five states—Kansas, Maryland, Minnesota, Missouri, and Wisconsin—use drug testing as part of their modified drug felon ban.[47] (The drug felon ban and state options within are discussed further below.)

A SNAP participant may also be disqualified from SNAP based on noncompliance with a drug testing requirement in other programs in states that implement such a requirement. SNAP state agencies may choose to disqualify a SNAP recipient who fails to perform an action required by another means-tested program, such as TANF.[48] For example, a state that disqualifies someone from TANF (or another means-tested program) for not participating in or failing a drug test may also disqualify that individual from SNAP. Federal regulation is clear that this comparable disqualification policy applies only to ongoing SNAP cases and not to new applicants. Therefore, a past TANF disqualification will not, in and of itself, disqualify an applicant to the SNAP program.

SNAP Drug Felon Ban

As noted earlier, although federal SNAP law bars drug felons from participating in the program, a state may opt to serve such felons by waiving or modifying the requirement.

PRWORA prohibited states from providing SNAP (then, Food Stamps) to convicted drug felons unless the state passes legislation to extend benefits to convicted drug felons. As of July 2015,[49] the majority of states have either modified or eliminated the ban on SNAP benefits for convicted drug felons. (See **Table 2**.) In addition to some states' addition of a drug test, other state modifications to disqualification include limiting the types of drug felonies, disqualifying those

[44] Section 5(b) of the Food and Nutrition Act, codified at 7 U.S.C. §2014(b), "No plan of operation submitted by a State agency shall be approved unless the standards of eligibility meet those established by the Secretary, and *no State agency shall impose any other standards of eligibility as a condition for participating in the program*" (emphasis added). USDA has typically cited this provision in denying states the authority to drug test SNAP applicants. In July of this year, the Wisconsin Department of Justice announced it had filed a lawsuit against USDA over this determination. See Wisconsin Department of Justice, "DOJ Files Lawsuit Against Federal Government Over Drug Testing Requirements for Welfare Recipients," press release, July 15, 2015, http://www.doj.state.wi.us/media-center/2015-news-releases/lawsuit-over-drug-testing-requirements.

[45] SNAP State Options Report, August 2012, http://www.fns.usda.gov/snap/rules/Memo/Support/State_Options/10-State_Options.pdf.

[46] 7 C.F.R. §273.11(m)

[47] Based on August 2015 communication with USDA-FNS.

[48] 7 U.S.C. §2015(i); 7 C.F.R. §273.11(k).

[49] Based upon SNAP State Options Report, September 2013, http://www.fns.usda.gov/snap/rules/Memo/Support/State_Options/11-State_Options.pdf, and communication with FNS.

with more than one drug felony, requiring participation in drug treatment, or requiring only a temporary disqualification.

The Federal Interagency Reentry Council, a group that includes USDA, published a fact sheet outlining the ways in which SNAP remains open and accessible to formerly incarcerated individuals in general (not specifically drug felons).[50] They emphasize several ways that the SNAP program remains accessible to those who may be in transition due to a recent incarceration. For instance, an applicant may still receive SNAP benefits if the applicant does not have a mailing address and may apply for SNAP without a valid state-issued identification card.[51]

Table 2. State Policies on the SNAP Drug Felony Disqualification for Applicants and Reapplicants

Information as of September 2013, except where noted

Lifetime Disqualification for Drug Felons (12)	No Disqualification for Drug Felons (23)	Modified Disqualification (18)
Alaska	Alabama[b]	Arkansas[d]
Arizona	California[c]	Colorado
Florida[a]	Delaware	Connecticut
Georgia	District of Columbia	Hawaii
Guam	Illinois	Idaho
Indiana[a]	Iowa	Kansas[e]
Mississippi	Maine	Kentucky
Nebraska[a]	Massachusetts	Louisiana
South Carolina	New Hampshire	Maryland[e]
Virginia[a]	New Jersey	Michigan
Virgin Islands	New Mexico	Minnesota[e]
West Virginia	New York	Missouri[e]
	Ohio	Montana
	Oklahoma	Nevada
	Oregon	North Carolina
	Pennsylvania	North Dakota[d]
	Rhode Island	Tennessee
	South Dakota	Wisconsin[e]
	Utah	
	Vermont	
	Texas[b]	
	Washington	
	Wyoming	

Source: Table prepared by CRS based on USDA-FNS SNAP State Options Report (data from September 2013), and July and August 2015 communication with USDA-FNS staff.

a. Between August 2012 and July 2015, this state changed from modified disqualification to lifetime disqualification.

[50] Federal Interagency Reentry Council, "Reentry Mythbuster on SNAP Benefits," http://www.fns.usda.gov/snap/government/pdf/SNAP_mythbusters.pdf, accessed May 2012. Note that the list of states that have eliminated the lifetime disqualification is out of date.

[51] Federal Interagency Reentry Council, pp. 2-3.

b. In 2015, Alabama and Texas enacted state laws to repeal their lifetime bans. Alabama's repeal will become effective January 2016; Texas's will become effective September 2015.

c. Effective April 1, 2015, California eliminated the drug felony disqualification. See state agency's revised policy at http://www.cdss.ca.gov/lettersnotices/entres/getinfo/acl/2014/14-100.pdf.

d. Between August 2012 and July 2015, these states changed from lifetime disqualification to modified disqualification.

e. As of August 2015, these states include drug testing as part of their modified disqualification policy.

"Fleeing Felon" Ban in SNAP

As discussed earlier in this report, PRWORA included provisions that prohibit so-called "fugitive felons" from receiving certain public assistance benefits, including SNAP benefits. Specifically, persons fleeing to avoid prosecution, custody, or confinement after conviction for a felony or violating a condition of probation or parole are ineligible for SNAP benefits. In 2008, the farm bill required that USDA define related terms and "ensure that State agencies use consistent procedures."[52] Following the 2008 law, USDA-FNS recently proposed revisions to the regulations on fleeing felons' treatment in SNAP.

The current regulations related to the "fleeing felon" provision simply restate the 1996 statute:

> no member of a household who is otherwise eligible ... shall be eligible to participate in the program as a member of that or any other household during any period during which the individual is (A) fleeing to avoid prosecution, or custody or confinement after conviction, under the law of the place from which the individual is fleeing, for a crime, or attempt to commit a crime, that is a felony under the law of the place [or a high misdemeanor in New Jersey], (B) violating a condition of probation or parole imposed under a Federal or State law.[53]

USDA-FNS promulgated this final rule in January 2001 together with the implementation of other PRWORA provisions;[54] the agency also released guidance at that time.[55]

In August 2011, USDA-FNS proposed a rule to implement the 2008 farm bill's changes.[56] The proposed rule discusses the policy problems at length in the preamble, including such issues as accessing law enforcement data, interstate law enforcement issues, variable impact of warrants that are not being enforced, and inconsistent interpretation between agencies.[57] As of the date of this report, a final rule has not yet been issued.

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[52] Section 4120 of the 2008 farm bill (P.L. 110-246) added the following to this section of the law: "(2) The secretary *shall* (A) *define* the terms 'fleeing' and 'actively seeking' for purposes of this subsection; and (B) *ensure that State agencies use consistent procedures* ... that disqualify individuals who law enforcement authorities are *actively seeking* for the purpose of holding criminal proceedings against the individual" (emphasis added).

[53] 7 C.F.R. §272.1(c)(1)(vii) (disclosure), §273.1(b)(7)(ix) (special household requirements), §273.2(b)(4)(ii) (privacy act statement), and §273.11(n) (fleeing felons and probation or parole violators).

[54] U.S. Department of Agriculture, "Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 66 *Federal Register* 4438-4471, January 17, 2001.

[55] http://www.fns.usda.gov/snap/rules/Memo/2001/Fleeingfelons.htm;

[56] *Federal Register*, August 19, 2011, http://www.gpo.gov/fdsys/pkg/FR-2011-08-19/pdf/2011-21194.pdf.

[57] The proposed rule includes more detailed definitions for "fleeing" and "actively seeking." The proposed rule also specifies that for a probation or parole violator to be "fleeing," the individual "must have violated a condition of his or her probation or parole *and law enforcement must be actively seeking the individual*" (emphasis added). The proposed rule also lays out procedural protections and consistencies; it assigns timeframes for law enforcement and SNAP agency responsibilities, and it also requires that the SNAP agency continue to process the SNAP application "while verifying fleeing felon or probation or parole violator status." The proposed rule appears to address situations where law enforcement is no longer enforcing a warrant as well as clarifying what officially constitutes a probation violation.

Applicability of Policies in SNAP

Many factors are considered in calculating the size of the monthly SNAP benefit that a household receives, but two of the main considerations are the *size of the household* (the larger the household, the larger the monthly benefit) and the *household's income* (the higher the income, the smaller the monthly benefit).[58] For these reasons, drug testing and criminal justice disqualifications can affect even those household members that have not been disqualified. When it comes to disqualifying a drug-related felon or imposing other PRWORA-related disqualifications, to what extent that individual, the individual's assets, and the individual's income are included in the household's eligibility determination and benefit calculation are significant for the entire household's benefits.

Generally, everyone who lives together and purchases and prepares meals together is considered a SNAP household. Some individuals who live together, such as spouses, are included in the same household, even if they purchase and prepare meals separately. If a member of the household is elderly or disabled, that member (and the member's spouse) may be able to qualify as a separate household if they have income below 165% of the federal poverty guidelines.

As certain household members may be ineligible for SNAP (for example, certain legal immigrants), whether and the extent to which the income of such ineligible members is included in the calculation for SNAP benefits depends on the member's reason for ineligibility. In the case of disqualified drug-related felons, per current USDA-FNS regulations, the individual is excluded from the household size but the household (if the drug-related felon is part of a larger household) remains eligible for benefits.[59] As an illustration, if an apartment houses a mother subject to the drug-felon ban, an eligible father, and an eligible toddler, the household would be considered to have two members for purposes of SNAP.

SNAP law defines income as "income from whatever source" but also explicitly excludes dozens of income sources.[60] USDA-FNS regulations, in response to comments at the time of final promulgation,[61] require state agencies to count *all of the disqualified individual's assets* and only *a pro rata share (as opposed to all) of the disqualified individual's income*.[62] This applies to individuals disqualified due to a modified drug-related felon ban as well as those disqualified due to comparable disqualification. Recalling the example household above, if the disqualified mother is the only household member with an income, two-thirds of her income will be used to determine eligibility and benefit level for the household of two (father and toddler).

As an additional caveat, USDA-FNS regulations give states the option, within certain parameters, to align SNAP income requirements with state TANF or Medicaid policy. As of November 2010, 39 states have opted for this alignment (either assets, income, or both).[63] It is possible that

[58] This report is not intended to be a thorough treatment on SNAP eligibility. For a more detailed discussion of eligibility in the SNAP program and state-based options within, please see CRS Report R42054, *The Supplemental Nutrition Assistance Program (SNAP): Categorical Eligibility*, by Gene Falk and Randy Alison Aussenberg.

[59] 7 C.F.R. §273.11(k).

[60] Income exclusions are listed in §5(d) of the Food and Nutrition Act of 2008, codified at 7 U.S.C. §2014(d).

[61] U.S. Department of Agriculture, "Food Stamp Program: Personal Responsibility Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996," 66 *Federal Register* 4448-4449, January 17, 2001.

[62] Formula in 7 C.F.R. §273.11(c)(2), "This pro rata share is calculated by first subtracting the allowable exclusions from the ineligible member's income and dividing the income evenly among the household members, including the ineligible members. All but the ineligible members' share is counted as income for the remaining household members." This same formula is applied for Social Security number disqualifications, child support disqualification, and those ineligible Able-Bodied Adults without Dependents (ABAWDs).

[63] See 7 C.F.R. §273.9(c)(19) and SNAP State Options Report, November 2010, http://www.fns.usda.gov/snap/rules/ (continued...)

TANF's or Medicaid's policies on the calculation of income and assets thereby have an impact on how a disqualified individual's assets or income are treated.

SNAP: Proposed Changes to Drug Testing, Enacted Changes to Criminal Conviction Disqualification in 2014 Farm Bill

After action to reauthorize the 2008 farm bill in both the 112th and 113th Congresses, the Agriculture Act of 2014 (P.L. 113-79; "2014 farm bill") was enacted on February 7, 2014. In addition to farm programs and other agricultural policies, this newest omnibus farm bill reauthorizes the Supplemental Nutrition Assistance Program (SNAP) and other related nutrition programs.[64] Proposals related to SNAP drug testing and crime-related restrictions were part of the formulation of this new farm bill; ultimately, a new disqualification for ex-offenders was enacted.

Drug testing changes were proposed by the House but were not enacted: The 2014 farm bill does not give states the option to administer drug testing as part of the eligibility determination processes.[65]

2014 farm bill disqualifies ex-offenders with convictions for non-drug crimes, but in a narrower way than was proposed in Senate- and House-passed bills:[66]

The 2014 farm bill disqualifies individuals convicted of specified federal crimes (including murder, rape, and certain crimes against children) and state offenses determined by the Attorney General to be substantially similar from receiving SNAP, *but—unlike House and Senate proposals—only when such individuals are not compliant with the terms of their sentence or are "fleeing felons."* The law still allows the disqualified ex-offender's household members to apply for and potentially receive benefits, but the household's benefit amount will likely be smaller than if the ex-offender were included.[67] The law requires the state agency that administers SNAP benefits to collect, in writing, information on SNAP applicants' convictions. The law also specifies that this disqualification is not to apply to convictions that occurred before the new law's enactment (February 7, 2014); this specification had been included in the House bill but not the Senate bill. The exact timing and implementation of this policy will depend on federal rulemaking.[68]

The new law is expected to affect fewer people than the broader disqualifications included in both the House and Senate conference bills. Both Section 4020 of the Senate conference proposal and Section 4037 of the House proposal would have barred from receiving benefits individuals *solely convicted of those same crimes* listed in the final law (specified federal crimes, including murder, rape, and certain crimes against children, and state offenses determined by the Attorney General to be substantially similar).[69]

(...continued)

Memo/Support/State_Options/9-State_Options.pdf.

[64] For information on all Nutrition Title policies in the 2014 farm bill, see CRS Report R43332, *SNAP and Related Nutrition Provisions of the 2014 Farm Bill (P.L. 113-79)*, by Randy Alison Aussenberg.

[65] A change had been proposed and incorporated into the House's bill during floor consideration. During House floor consideration of H.R. 1947 the House passed an amendment (H.Amdt. 196) by voice vote to give states the option to enact legislation to provide for testing SNAP applicants for the unlawful use of controlled substances. The amendment did not provide any additional funding for such testing and provided that such an option would be "at the full cost to [the] State." The language was also included in the House-passed SNAP bill, H.R. 3102, the Nutrition Reform and Work Opportunity Act of 2013. Drug testing was not proposed during Senate consideration of S. 954.

[66] For further discussion of these ex-offender disqualification proposals, including crimes specified, CRS has released a congressional memorandum. Congressional clients may request a copy from Randy Alison Aussenberg at raussenberg@crs.loc.gov or Richard M. Thompson II at rthompson@crs.loc.gov.

[67] Similar to the current law discussion in "Applicability of Policies in SNAP," this is because the newly enacted provision would exclude the ex-offender from household size but include the member's income and assets.

[68] Jessica Shahin, *Supplemental Nutrition Assistance Program Provisions of the Agricultural Act of 2014 - Implementing Memorandum*, USDA-FNS, March 21, 2014, http://www.fns.usda.gov/sites/default/files/SNAP%20Provisions%20of%20the%20Agricultural%20Act%20of%202014%20-%20Implementing%20Memo.pdf. See also Lizbeth Silbermann, *Questions & Answers Concerning the Agricultural Act of 2014: Sections 4005, 4007, 4008, 4009, 4015, 4022, 4025, 4031*, USDA-FNS, June 10, 2014, pp. 3-4, http://www.fns.usda.gov/sites/default/files/SNAP%20Questions%20and%20Answers%20Concerning%20the%20Agricultural%20Act%20of%202014%20Sections%204005%2C%204007%2C%204008%2C%204009%2C%204015%2C%204022%2C%204025%2C%204031.pdf.

[69] In addition to their cost estimate of the Senate-reported bill, CBO composed an official cost estimate for the Senate (continued...)

Housing Assistance

Drug Testing in Housing Assistance

There are no federal policies explicitly permitting or prohibiting administrators of federal housing assistance programs from drug testing applicants or recipients. Anecdotally, it appears several PHAs have adopted, or considered adopting, drug testing policies in their public housing programs.[70]

The Norwalk Housing Authority in Connecticut has a policy of suspicionless drug testing for all applicants for public housing.[71] The ACLU of Connecticut has contended that the policy is unconstitutional, and has stated it is seeking a client on whose behalf they can file a constitutional challenge.[72] A proposal by the Chicago Housing Authority to apply suspicionless drug testing to all public housing residents was dropped following opposition, including a letter from the Illinois chapter of the American Civil Liberties Union opposing the proposed policy.[73] Similarly, the Flint (MI) Housing Commission was reportedly considering adopting a policy of drug testing all public housing residents in 2010.[74] In response, the Michigan chapter of the American Civil Liberties Union sent a letter to the commission urging them to reconsider adopting this policy and indicating that its adoption may lead to expensive and protracted litigation.[75] It does not appear that a drug testing policy has been adopted by the Flint Housing Authority.

In the case of mixed-income public housing, where the properties are often managed by private entities in partnership with local PHAs, suspicionless drug testing also appears to take place. Several of the Chicago Housing Authorities' redeveloped mixed-income public housing communities have suspicionless drug testing policies in place.[76] These policies have also proved controversial and the American Civil Liberties Union (ACLU) of Illinois has filed a class action lawsuit challenging them in Chicago.[77]

(...continued)

floor amendment that added the ex-offender provision to the bill before it passed the Senate. See CBO website, http://cbo.gov/publication/44905. They estimate that the provision would reduce spending by as little as $21 million or as much as $185 million over 10 years (FY2014-FY2023), depending on whether the provision is interpreted to apply to convictions that occurred before the change to SNAP eligibility law.

[70] In the draft Admissions and Continued Occupancy Plan for one development owned by the Indianapolis Housing Authority, there is a requirement for mandatory drug testing of applicants, http://www.indyhousing.org/annualPlan/ACOP_16%20Park-draft%2007%2019%2010.pdf.

[71] See Norwalk Housing Authority's Admissions and Continued Occupancy Plan, available at http://www.norwalkha.org/uploads/files/163.pdf#page=37, accessed July 7, 2015.

[72] See ACLU of Connecticut website for more information: https://www.acluct.org/weeklynews/government-drug-testing/, accessed on July 7, 2015.

[73] See ACLU Press Release, CHA Drops Proposal for Suspicionless Drug Testing of All Residents, June 22, 2011

[74] Ron Fonger, "Flint Housing Commission chief looks at drug tests for tenants in some public housing," *Flint Journal*, May 13, 2010, http://www.mlive.com/news/flint/index.ssf/2010/05/flint_housing_commission_chief.html.

[75] See letter from Michael J. Steinberg, Legal Director, American Civil Liberties Union of Michigan, and Gregory T. Gibbs, Law Office of Gregory T. Gibbs, to Ron Slaughter, Flint Housing Commission, Executive Director, August 12, 2010, http://www.aclumich.org/sites/default/files/file/flinthousingcommission.pdf.

[76] Chicago Housing Authority, Tenant Selection Plan, Lake Parc Place, Selection and Screening Policy, Board Approved, October 20, 2009, http://www.thecha.org/filebin/pdf/MixedIncome/LPP_TSP.pdf.

[77] See ACLU of Illinois website for information on Peery v. CHA, http://www.aclu-il.org/peery-v-cha22/, accessed on July 7, 2015.

There are no federal laws explicitly prohibiting private property owners from drug testing potential tenants or making drug testing a requirement of a lease for tenancy.[78] This is particularly relevant for the Section 8 voucher program and the Section 8 project-based rental assistance program, which involve leases between private property owners and families. Anecdotally, it appears some private property owners have adopted drug testing policies.[79]

Fourth Amendment protections, as discussed in "Legal Issues Involving Drug Testing Policies: Recent Developments" in the next section of this report, do not extend to purely *private* action.[80] However, Fourth Amendment protections might be triggered if there is sufficient governmental involvement in a private landlord's drug testing program. Certain state laws also might provide individuals protections from drug testing that go beyond those afforded under the Fourth Amendment, which could further constrain the ability of a landlord to test tenants for illicit drug use. Additionally, it is possible that a private landlord's drug testing program could be implemented so as to discriminate against a protected class in violation of a state or federal antidiscrimination law, such as the federal Fair Housing Act (42 U.S.C. §3601, *et seq*.).[81]

Drug- and Other Crime-Related Restrictions in Housing Assistance Programs

The federal policies governing the treatment of drug-related and other criminal activity among applicants for and recipients of federally assisted housing are complicated. They are governed by several different laws, enacted at different points of time, with different levels of specificity and discretion. For example, federal policies mandate that PHAs deny admission to the programs or terminate assistance under the programs in some circumstances, but leave discretion to the PHAs and private property owners who administer the programs in others. Some of the federal policies apply only to eligibility for initial assistance or initial tenancy, some apply only to eligibility for ongoing assistance or termination of tenancy (eviction), and some apply to both. Finally, in many cases, the federal policies differ, sometimes significantly and sometimes slightly, across the three programs.

In addition to federal policies, PHAs and property owners may adopt their own optional criteria to screen applicants for suitability and set their own rules governing grounds for termination of assistance, as discussed earlier in this report.[82] In 2011 and 2012, then-HUD Secretary Shaun Donovan sent a letter to PHAs and a letter to property owners reminding them of the discretion they have to consider individuals' circumstances and take them into account when making admissions and termination decisions and encouraging them to allow ex-offenders to rejoin their

[78] For a discussion of legal issues involving drug testing in housing, see Robert J. Aalberts, "Drug Testing Tenants: Does it Violate Rights of Privacy?" Journal of Real Property Probate and Trust, vol. 38, 2003-2004.

[79] Ibid.

[80] See, for example, United States v. Jacobsen, 466 U.S. 109, 113-14 (1984) ("This Court has also consistently construed this protection as proscribing only governmental action; it is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.") (internal citations and quotations omitted) and Chandler v. Miller, 520 U.S. 305, 323 (1997) ("And we do not speak to drug testing in the private sector, a domain unguarded by Fourth Amendment constraints.").

[81] For more information on private landlord drug testing, see David Lang, "Get Clean or Get Out: Landlords Drug-Testing Tenants," 2 Wash. U. J. L. & Pol'y 459, (2000), and Alberts, 2002.

[82] In the case of the public housing program and the project-based Section 8 program, since the administrator and the landlord are the same entity, termination of assistance generally means eviction. In the case of the Section 8 voucher program, termination of assistance does not necessarily have to mean eviction, because a tenant could potentially negotiate with the private landlord to remain in the unit without assistance. However, in most cases it is reasonable to assume that termination of assistance will lead to eviction.

families, when appropriate.[83] In 2015, HUD issued additional formal guidance to PHAs and owners, again reminding them of their discretion and providing best practices and peer examples of crime-related policies. [84]

Applicants

PHAs and property owners across all three programs—public housing, Section 8 voucher, and project-based Section 8—are required under federal law to deny admission to the programs to persons subject to lifetime registration on a sex offender registry under a state program.[85]

In the case of the public housing and Section 8 voucher programs, PHAs are required under federal law to deny admission to the programs to persons convicted of producing methamphetamines on the premises of federally assisted housing.[86] This mandatory federal prohibition does not apply to the project-based Section 8 program.

PHAs and property owners across all three housing assistance programs are required under federal law to establish policies that deny admission to the programs to households that include tenants

- who are determined by the administrator to be currently engaging in illegal use of a drug;[87]
- whose illegal use of a drug or pattern of illegal use of a drug is determined by the administrator, based on reasonable cause, to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents;[88]
- whose abuse of alcohol or pattern of alcohol abuse is determined by the administrator, based on reasonable cause, to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents;[89] or
- who were evicted from federally assisted housing within the last three years for drug-related criminal activity, unless the tenant has completed a drug rehabilitation program or the circumstances leading to the eviction no longer exist (i.e., the offending tenant is no longer a member of the household).[90]

In the last three circumstances, owners and PHAs may take into account whether or not the tenant has completed, or is participating in, substance abuse treatment.[91] Unlike the prohibitions related to persons convicted of producing methamphetamines and persons subject to lifetime registration

[83] See Letter from Shaun Donovan, Secretary of HUD, and Sandra B. Henriquez, Assistant Secretary of Public and Indian Housing, to PHA Executive Director, June 17, 2011, http://usich.gov/resources/uploads/asset_library/Rentry_letter_from_Donovan_to_PHAs_6-17-11.pdf and Letter from Shaun Donovan, Secretary of HUD, and Carol J. Galante, Acting Assistant Secretary for Housing-Federal Housing Commissioner, to Owners and Agents, March 14, 2012, http://nhlp.org/files/HUD%20Letter%203.14.12.pdf.

[84] HUD Notice PIH 2015-19, "Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions," issued November 2, 2015.

[85] 42 U.S.C. §13663

[86] 42 U.S.C. §1437n(f)(1)

[87] 42 U.S.C. §13661(b)(1)

[88] 42 U.S.C. §13661(b)(1)

[89] Ibid.

[90] 42 U.S.C. §13661(a)

[91] 42 U.S.C. §13661(b)(2)

on a sex-offender registry, each of the mandatory grounds for denial of admission in the bulleted list above leave some discretion in implementation to the administering entity.

In addition to the mandatory denials of admission to the programs already described, federal law explicitly lists other categories of criminal activity that *may* be grounds for denial of admission. For all three programs, administrators may deny admission to households if a member is engaged in or has, during a reasonable period of time[92] prior to admission, been engaged in violent or drug-related criminal activity.[93]

As noted earlier, in addition to these federal policies, PHAs and owners are permitted to adopt their own discretionary screening criteria to determine whether households are suitable for tenancy.[94] For example, a PHA could adopt screening criteria that make persons convicted of felonies ineligible for assistance. Any screening criteria adopted by a PHA or owner must be in compliance with federal fair housing and civil rights laws, as well as state and local nondiscrimination laws, and must be supported by sufficient evidence. [95]

Recipients

The laws governing both the public housing and Section 8 voucher programs require that PHAs terminate assistance to tenants convicted of producing methamphetamines on the premises of federally assisted housing.[96] The law does not extend this mandatory requirement to the Section 8 project-based rental assistance program. Federal law does not require PHAs to terminate assistance to persons subject to lifetime registration on a sex offender registry; however, HUD has issued guidance "strongly encouraging" PHAs and property owners to adopt such policies.[97]

PHAs and property owners across all three programs—public housing, Section 8 vouchers, and project-based Section 8—are required under federal law to adopt policies that *allow for* the termination of assistance to households including tenants

- who are determined by the administrator to be currently engaging in illegal use of a drug;[98]
- whose illegal use of a drug or pattern of illegal use of a drug is determined by the administrator to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents;[99] or
- whose abuse of alcohol or pattern of alcohol abuse is determined by the administrator to interfere with the health, safety, or right to peaceful enjoyment of the premises by other residents.[100]

[92] "Reasonable period of time" is not defined in regulation, and thus is left to be defined by PHAs and property owners.

[93] 42 U.S.C. §13661(c)

[94] See Chapter 4 of the Public Housing Occupancy Guidebook, 42 U.S.C. §1437f(o)(6)(B), and Chapter 4 of the Occupancy Requirements of Subsidized Multifamily Housing Programs Handbook (4350.3).

[95] HUD Notice PIH 2015-19, "Guidance for Public Housing Agencies (PHAs) and Owners of Federally-Assisted Housing on Excluding the Use of Arrest Records in Housing Decisions," issued November 2, 2015.

[96] 42 U.S.C. §1437n(f)(2)

[97] See HUD Notice PIH 2009-35(HA).

[98] 42 U.S.C. §13662(a)(1)

[99] 42 U.S.C. §13662(a)(2)

[100] Ibid

In the latter two cases, owners and PHAs may take into account whether or not the tenant has completed rehabilitation.[101]

A separate section of the governing statute requires that certain criminal activities serve as cause for termination of assistance; however, these rules vary by program.[102] In the case of public housing, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of other tenants, or any drug-related criminal activity on *or off* the premises, engaged in by a tenant, member of the tenant's household, or guest or other person under the tenant's control is cause for termination of tenancy.[103]

In the case of the project-based Section 8 program, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents in the immediate vicinity or any drug-related criminal activity on *or near* the premises engaged in by a tenant, member of the tenant's household, or guest or other person under the tenant's control is cause for termination of tenancy.[104]

Restrictions on Legal Services Corporation Assistance to Public Housing Tenants

Since 1996, Legal Services Corporation (LSC)- funded legal services agencies have been prohibited from defending a public housing tenant in an eviction proceeding if (1) the person has been charged with the illegal sale or distribution of a controlled substance, and (2) the eviction proceeding is brought by a public housing authority because the illegal drug activity of the person threatens the health or safety of another tenant residing in the public housing project or an employee of the public housing agency. For more information, see CRS Report R40679, *Legal Services Corporation: Restrictions on Activities*, by Carmen Solomon-Fears.

In the case of the Section 8 voucher program, any criminal activity that threatens the health, safety, or right to peaceful enjoyment of other residents in the immediate vicinity or any drug-related *or violent* criminal activity on *or near* the premises engaged in by a tenant, member of the tenant's household, or guest or other person under the tenant's control is cause for termination of tenancy.[105]

In all of these cases in which federal law requires the adoption of policies that *allow for* or make *cause for* termination of tenancy, the law does not go so far as to *require* the termination of tenancy (except in the case of production of methamphetamines on federally assisted property). Instead, discretion is left to the program administrators as to whether and when to pursue termination of assistance if these circumstances arise.

Fleeing Felons

As noted earlier, PRWORA restricted access to assistance for fugitive felons. As a result, fugitive felon status is cause for termination of tenancy in the three housing assistance programs.[106] However, while federal law makes fugitive felon and probation or parole violation status cause

[101] 42 U.S.C. §13661(b)(2)

[102] All of these rules include special provisions designed to protect victims of domestic violence, dating violence, and stalking.

[103] 42 U.S.C. §1437d(l)(6).

[104] 42 U.S.C. §1437f(d)(3)

[105] 42 U.S.C. §1437f(o)(7)(D)

[106] 42 U.S.C. §1437(d)(l)(9) (Public Housing); 42 U.S.C. §1437f(d)(1)(B)(v) (project-based Section 8 and Section 8 vouchers).

for immediate termination of assisted housing tenancy, the statute does not actually require termination of tenancy.[107] As is the case in TANF and SNAP, current HUD regulations provide no additional guidance on who is to be considered a fugitive felon or what is to be considered a probation or parole violation.

Table 3. Summary of Federal Drug- and Other Crime-Related Restrictions in Federal Housing Assistance Programs

(denial=denial of admission to applications; termination=termination of assistance and/or tenancy)

Activity	Public Housing	Section 8 Vouchers	Project-Based Section 8
Drug-related criminal activity	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Violent criminal activity	Grounds for denial	Grounds for denial; grounds for termination	Grounds for denial
Criminal activity that interferes with health, safety, peaceful enjoyment of other residents	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Determined to be currently using illegal drugs	Mandatory denial; grounds for termination	Mandatory denial; grounds for termination	Mandatory denial; grounds for termination
Abuse of drugs or alcohol that interferes with health, safety, peaceful enjoyment of other residents	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination	Grounds for denial; grounds for termination
Subject to lifetime registration on a state sex-offender registry	Mandatory denial	Mandatory denial	Mandatory denial
Convicted of producing methamphetamines on federally assisted property	Mandatory denial; mandatory termination	Mandatory denial; mandatory termination	No provision
Fugitive felon	Grounds for termination	Grounds for termination	Grounds for termination
Drug testing	No provision	No provision	No provision

Source: Table prepared by CRS.

Note: This table summarizes only federal policies. While there may be no federal policies in a given category, local administrators may have adopted a policy in that category using their discretionary authority.

Applicability of Policies

Housing assistance benefits are provided to households. As a result, the background of all the members of the household is taken into account when determining household eligibility and screening households for suitability. Generally, if one member of the household is deemed ineligible or unsuitable, the entire household is deemed ineligible or unsuitable, unless the offending member is removed from the household. When it comes to ongoing assistance and termination of tenancy, the behavior of all members of the household is considered. So, if one member of the household engages in actions that provide grounds for termination of assistance,

[107] 24 C.F.R. §5.859.

then the entire household is at risk of having their assistance terminated, at the discretion of the local administrator. Further, in the case of drug-related criminal activity, the household may be evicted based on actions of a guest or other person under the tenant's control, again, at the discretion of the local administrator.

"One Strike and You're Out" and "No-Fault" Evictions

President Clinton, in his 1996 State of the Union speech, stated "I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be one strike and you're out." Following President Clinton's address, HUD issued guidance to PHAs regarding how to implement the crime and drug-related sanctions, including eviction based on the actions of other household members and guests, that had been in the law since the Anti-Drug Abuse Act of 1988, described earlier in this report. The "One Strike" policy included so-called "no-fault" eviction rules, which permit PHAs to evict assisted households because of the actions of a guest and for events that take place outside the assisted unit. These rules proved controversial and were the subject of legal challenge.

In 2002, the Supreme Court upheld HUD's no-fault eviction rules. The case in *Department of Housing and Urban Development v. Rucker* began when the Oakland Housing Authority sought to evict four tenants: two whose resident grandchildren were caught smoking marijuana in a housing project parking lot, one whose daughter was found with cocaine three blocks from the apartment, and a disabled 75-year-old man whose caretaker was found with cocaine in his apartment. The housing authority did not claim that the elder tenants knew about, facilitated, or condoned the drug activity. The U.S. Supreme Court held that the federal law was not ambiguous and that it permitted eviction of tenants for the actions of third parties regardless of their knowledge of drug or criminal activity.[108]

Legal Issues Involving Drug Testing Policies: Recent Developments[109]

As noted earlier in this report, several states have recently proposed or adopted new or expanded drug testing policies for recipients of federal assistance, including TANF. Federal or state laws that condition the initial or ongoing receipt of governmental benefits on passing drug tests without regard to individualized suspicion of illicit drug use are vulnerable to constitutional challenge. To date, two state laws requiring suspicionless drug tests as a condition to receiving TANF benefits have sparked litigation and both cases resulted in favorable rulings for the plaintiff TANF beneficiaries.[110] The U.S. Supreme Court has not yet rendered an opinion on such a law;

[108] CRS Report RS21199, *No-fault Eviction of Public Housing Tenants for Illegal Drug Use: A Legal Analysis of Department of Housing and Urban Development v. Rucker*.

[109] This discussion is excerpted from a more complete discussion found in CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

[110] Lebron v. Sec'y, Fla. Dept. of Children and Families, 772 F.3d 1352 (11th Cir. 2014) (affirming district court ruling that Florida's drug testing law violated the Fourth Amendment of the U.S. Constitution). Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000) (granting the plaintiffs' motion for a preliminary injunction, concluding that the "Plaintiffs have established a strong likelihood of succeeding on the merits of their Fourth Amendment claim."); Marchwinski v. Howard, 60 Fed. App'x 601 (6th Cir. 2003) (affirming the district court decision in accordance with Stupak-Thrall v. United States, 89 F.3d 1269 (6th Cir. 1996), because a 12-member en banc panel of appellate judges was evenly split, with 6 judges wanting to affirm and 6 judges wanting to reverse the district court's opinion).

however, the Court has issued decisions on drug testing programs in other contexts that have guided the few lower court opinions on the subject.[111]

Constitutional challenges to suspicionless governmental drug testing most often focus on issues of personal privacy and Fourth Amendment protections against "unreasonable searches." The U.S. Supreme Court, on a number of occasions, has held that drug tests are searches under the Fourth Amendment.[112]

The reasonableness of searches generally requires individualized suspicion, unless the government can show a "special need" warranting a deviation from the norm. However, governmental benefit programs like TANF, SNAP, unemployment compensation, and housing assistance do not naturally evoke special needs grounded in public safety that the Supreme Court has recognized in the past. Thus, if lawmakers wish to pursue policies requiring drug testing of public assistance recipients, policies that only require individuals to submit to a drug test based on an individualized suspicion of drug use are less likely to run afoul of the Fourth Amendment. Additionally, governmental drug testing procedures that restrict the sharing of test results and that minimize the negative repercussions of failed tests will be on firmer constitutional ground.

State Medical and Recreational Marijuana Laws

Under the federal Controlled Substances Act (CSA),[113] the cultivation, distribution, and possession of marijuana are prohibited for any reason other than to engage in federally approved research. Nevertheless, without federal statutory sanction, more than 20 states have established medical marijuana regulatory regimes. Four have gone further and "legalized" marijuana under state recreational marijuana laws.[114] The U.S. Constitution's Supremacy Clause[115] preempts any state law that conflicts with federal law. Although there is some division, the majority of state courts have concluded that the federal-state marijuana law conflict does not require preemption of state medical marijuana laws.[116] Thus, the current legal status of marijuana is contradictory: as a matter of federal law, activities related to marijuana are generally prohibited and punishable by criminal penalties; whereas at the state level, certain marijuana usage is increasingly being permitted. Consequently, individuals engaging in marijuana-related activities—even those that are authorized under state law—could be subject to criminal punishment under federal law.[117]

TANF

TANF basic assistance is paid in the form of cash, and its potential use to purchase marijuana has raised some concerns in Congress. TANF benefits, while cash, are typically paid on an electronic benefit transfer card and can be used either at Automated Teller Machines to withdraw cash or used to make purchases directly. In the 113th Congress, the House passed H.R. 4137, which

[111] See, for example, Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602 (1989); Nat'l Treasury Emp. Union v. Van Raab, 489 U.S. 656 (1989); Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Chandler v. Miller, 520 U.S. 305 (1997); and Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls, 536 U.S. 822 (2002).

[112] Ibid.

[113] 21 U.S.C. §§801, *et seq*.

[114] See CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey, Charles Doyle, and David H. Carpenter, at n. 50-52.

[115] U.S. CONST., Art. VI, cl. 2.

[116] See the "Preemption" section of CRS Report R43435, *Marijuana: Medical and Retail—Selected Legal Issues*, by Todd Garvey, Charles Doyle, and David H. Carpenter.

[117] See the "Controlled Substances Act Today" section of *id*.

would have prohibited recipients of TANF assistance from electronically accessing their benefits in establishments that sell marijuana. The bill would not have distinguished between recreational and medical uses of marijuana. The bill was not considered in the Senate. It has been reintroduced for the 114th Congress (H.R. 3010).

SNAP

SNAP benefits are not the same as cash and are redeemable only for SNAP-eligible products at SNAP-authorized retailers.[118] A household's SNAP benefit amount depends upon the deductions for which the household is eligible; one of those deductions is for medical expenses. In recent years, SNAP's authorizing statute and regulations have been amended to explicitly make expenses for medical marijuana ineligible for the medical expense deduction.[119]

Federal Housing Assistance

"Illegal drug users" are ineligible for federally assisted housing.[120] Public housing agencies and owners of federally assisted housing must establish standards that would allow the agency or owner to prohibit admission to, or terminate the tenancy or assistance of, any applicant or tenant who is an illegal drug user.[121] An agency or an owner can take these actions if a determination is made, pursuant to the standards established, that an individual is "illegally using a controlled substance," or if there is reasonable cause to believe that an individual has a "pattern of illegal use" of a controlled substance that could "interfere with the health, safety, or right to a peaceful enjoyment of the premises by other residents."[122] Thus, any individual whom the housing authority reasonably believes is using marijuana could be denied access to, or evicted from, federally assisted housing.

With respect to medical and recreational marijuana, HUD has concluded that public housing agencies or owners "are required by [law] to deny admission" to applicants who are using medical marijuana, but "have the *discretion* to evict or not evict current tenants for their use of marijuana."[123]

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[118] These concepts are discussed earlier in this and are elaborated upon in CRS Report R42505, *Supplemental Nutrition Assistance Program (SNAP): A Primer on Eligibility and Benefits*.

[119] 7 U.S.C. §2014(e)(5)(C) (as added by P.L. 113-79 §4005). See, also, 7 C.F.R. §273.9(d)(3)(iii). This deduction is called the excess medical expense deduction. Households that contain an elderly or disabled member are eligible to have this deduction included in their benefit calculation. Prior to the change in law and regulation, in a July 10, 2012, memorandum to regional directors, FNS "reaffirmed its longstanding policy that a household may not use the SNAP medical deduction for the cost of any substance considered illegal under Federal law," and went on to say that, "states that currently allow for the deduction of medical marijuana must cease this practice immediately and make any necessary corrections to their State policy manuals and instructions. Cases that cannot be readily identified must be corrected at the time of recertification or periodic report, whichever is sooner. States that are not in compliance may face penalties for any overissuance of SNAP benefits." Lizbeth Silbermann, Director, Program Development Division, *Medical Deductions - Medical Marijuana and Other Illegal Substances*, USDA Food and Nutrition Service, Memorandum to All SNAP Regional Directors, July 10, 2012.

[120] 42 U.S.C. §§13661-13662. *See, generally, Medical Marijuana and the Effect of State Laws on Federally Subsidized Housing*, 57 WAYNE L. REV. 1437 (2011).

[121] 42 U.S.C. §§13661-13662.

[122] Ibid.

[123] Memorandum from Benjamin T. Metcalf, HUD Deputy Assistant Director for Multifamily Housing Programs, *Use of Marijuana in Multifamily Assisted Housing*, available at http://portal.hud.gov/hudportal/documents/huddoc?id=useofmarijinmfassistpropty.pdf (citing 42 U.S.C. §13662) (emphasis in the original). See also Assenberg v. Anacortes Hou. Auth., 268 Fed.Appx. 643 (9th Cir. 2008) (Under the Fair Housing Act, tenant in publicly (continued...)

Conclusion

As is evident in this report, there are similarities and differences in federal policies governing drug- and crime-related restrictions in TANF, SNAP, and federal housing assistance programs. Some may reflect the intentions underlying the policies. As noted earlier in this report, those policy goals may include the desire to deter people from engaging in undesirable behavior, to punish people for engaging in undesirable behavior, to direct limited resources to persons deemed most "worthy" of assistance, or to protect vulnerable communities. They may also reflect the similarities and differences in the programs themselves, including the goals of the programs, how they are administered, the populations they serve, and what benefits are provided.

The following section of the report summarizes the similarities and differences between TANF, SNAP, and the major housing assistance programs and how they may affect the drug- and crime-related policies in those programs. The information provided in this report may raise considerations for policymakers, which are presented at the end of this report.

Similarities and Differences

TANF, SNAP, and the major housing assistance programs are all administered either at the state or local level, and they have left a great deal of discretion to state or local decision-makers. As a result, the experiences of similarly situated families will differ based both on where they live and in which assistance programs they wish to participate.

The programs also differ in terms of the way they are funded, which may affect how assistance is provided or rationed. SNAP benefits are a 100% federally financed entitlement to eligible individuals. As a result, when states adopt SNAP rules that are more expansive or inclusive, they do not affect state budgets, but do affect federal spending. TANF, on the other hand, is both federally financed and state financed. Since federal funding is limited and states are required to pay a portion of the costs of the program, state TANF program administrators may have an incentive to limit the number of persons who can receive benefits. Assisted housing is 100% federally funded, but it is not an entitlement and, given limited federal resources, the program only serves roughly one in four eligible families. This scarcity of resources leads housing program administrators to prioritize who receives assistance, which may involve weighing who is most in need of assistance versus who is most worthy of assistance.

In terms of populations served, SNAP and federal housing assistance programs serve a wider population than does TANF. SNAP and housing assistance are received by households of all types, including those made up of persons who are elderly and/or disabled, in addition to other families with children and childless nonelderly and nondisabled adults. On the other hand, TANF predominately serves families with children headed by an able-bodied adult of working age. Further, TANF generally serves only the poorest of families with children, as its state-determined income eligibility standards tend to be lower than those of SNAP and federal housing assistance programs. Since societal concern about crime and drug use is not generally associated with persons who are elderly or have disabilities, SNAP and housing program administrators have a

(...continued)

assisted housing is not entitled to medical necessity defense and termination of lease based on tenant's drug use did not violate HUD policy).

different set of considerations about how and to whom to apply crime- and drug-related policies than do TANF administrators.

The goals and benefit structures of the programs also vary. SNAP and housing assistance are intended to meet two of the basic needs of all families: food and shelter. SNAP provides assistance that can only be used for food; housing assistance provides subsidies that only can be used for housing expenses. TANF cash assistance, on the other hand, while intended to also help meet a family's basic needs, is used to purchase goods and services at the discretion of the recipient. Given these different goals and benefit structures, the potential consequences of limiting access to SNAP and housing assistance are much more clear—hunger and homelessness—than those of limiting access to TANF. Concern about these potential consequences may make it more difficult for SNAP and housing assistance administrators to broadly apply sanctions. Since the spending of TANF cash cannot be easily regulated, policymakers and program administrators may place recipients of TANF cash assistance under greater scrutiny to ensure that federal tax dollars are not being used for undesirable purposes, such as illicit drug use.

In the case of the housing assistance programs, the structure of the benefit is place-based. If a family did not receive the assistance, arguably, the family could not afford to live where it does. As a result, assisted housing administrators may feel an added responsibility to ensure that assisted tenants not engage in activities that could have negative spillover effects for other residents or the surrounding neighborhood. This concern may be most evident in the public housing program, where an assisted tenant is surrounded by other assisted tenants and the PHA, which owns the property, is responsible for providing safe and decent housing to all tenants. TANF and SNAP program administrators do not have these place-based considerations.

Considerations for Policymakers

In recent years, there have been calls for expansions of crime- and drug-related policy restrictions, and conflicting calls for reforms to current policies meant to limit their impact. This report raises several considerations that policymakers may wish to evaluate when contemplating changes to federal crime- and drug-related restrictions.

This report highlights the variations in federal crime- and drug-related restrictions in the TANF, SNAP, and housing assistance programs. These variations in policy exist across programs, in part, due to the differences in the goals and design of the programs, as well as the laws that govern them. There is also the potential for geographic variation in these policies, attributable to the discretion that federal law leaves to local policymakers. The policy goal behind the devolution of social programs is to allow states and localities to design their programs differently, to reflect their interests, values, and needs. State and local variations in crime- and drug-related restrictions are consistent with that goal. However, inconsistencies in crime- and drug-related policies may have unintended consequences. For example, inconsistent policies may cause confusion among potential recipients, possibly limiting their access to federal assistance for which they are eligible. Variations may also raise questions of equity and fairness.

This report also observes that while some states are increasing their drug-related sanctions (specifically, implementing drug testing policies), most states are opting-out of or modifying the federal drug felon ban in TANF and SNAP. This may raise questions about the appropriateness of current federal policy. For example, some may ask whether the federal policy intentions underlying drug- and crime-related sanctions should override the desires of state and local administrators.

In order to inform the federal policy debate, it may be useful to better understand state policy choices. For instance, the drug felon ban is the default policy, which raises questions as to whether states are actively choosing the default or passively choosing not to pursue legislation to opt out—a subtle but possibly significant policy difference. While some of the factors that might influence state and local policies are identified in this report—including budget constraints, value judgments, and other policy goals—this report does not attempt to answer the question of which factors are actually driving state and local policy choices. There appears to be an overall absence of evidence about the impact and effectiveness of crime- and drug-related restrictions in federal assistance programs. In part, the challenge of this is identifying the desired objectives of crime-related restriction policies—decreasing drug use, deterring criminal activity, reducing or prioritizing applications—and whether the desired objectives apply to the entire population or only certain program participants. More research in this area could be useful for policymakers.

There are several other considerations that may be of interest to policymakers, but they are beyond the scope of this report. One such consideration may be the populations affected by crime- and drug-related restrictions. Since the War on Drugs began, incarceration rates have risen sharply, particularly among young black men.[124] Given this, questions may be raised about whether crime- and drug-related restrictions have disproportionate implications for racial minorities. The Government Accountability Office (GAO) attempted to evaluate this question in a 2005 report, but found that the data needed to fully assess the question were not available.[125] The same GAO report raised a related question for policymakers regarding how current crime- and drug-related restrictions may interact with recent federal initiatives to support prisoner reentry[126] and responsible fatherhood,[127] and whether these policies may be at cross purposes.[128] Also, the current sets of crime- and drug-related restrictions were established in the 1980s and 1990s, when rates of violent crime, particularly drug-related violent crime, were much higher than they are today. Given this shift, policymakers may wish to reevaluate current federal policies to ensure that they appropriately address today's concerns.

A final consideration is whether current policies related to drug testing will withstand legal challenge as they are currently designed, or whether modifications will be necessary.[129]

[124] For an illustration of the trend, see The Pew Charitable Trusts, *Collateral Costs: Incarceration's Effect on Economic Mobility*, Washington, DC, September 2010, Figure 3.

[125] U.S. Government Accountability Office, *Drug Offenders: Various Factors May Limit the Impacts of Federal Laws that Provide for Denial of Selected Benefits*, GAO-05-238, September 2005.

[126] For more information, see CRS Report RL34287, *Offender Reentry: Correctional Statistics, Reintegration into the Community, and Recidivism*, by Nathan James.

[127] See CRS Report R41431, *Child Well-Being and Noncustodial Fathers*, by Carmen Solomon-Fears, Gene Falk, and Adrienne L. Fernandes-Alcantara.

[128] U.S. Government Accountability Office, *Drug Offenders: Various Factors May Limit the Impacts of Federal Laws that Provide for Denial of Selected Benefits*, GAO-05-238, September 2005.

[129] For more information, see CRS Report R42326, *Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits*, by David H. Carpenter.

Appendix. State Policies on Drug Testing in TANF

Table A-1. State Policies on Drug Testing for TANF Assistance Applicants and Recipients (As of July 2015)

State	Citation	Coverage	Description	Family Implications	Other
Alabama	2014 Al. Pub Act 438	Requires applicants and certain recipients upon reasonable suspicion of illegal substance abuse to undergo screening to detect the presence of drugs. Effective Oct. 1, 2015.	A positive screening results in a warning that benefits may be lost. Subsequent positive screenings will result in a loss of benefits.	If parents lose benefits, the child(ren) may still receive benefits through a third party.	
Arizona	2014 Ariz. Sess. Laws 11	Requires any recipients "who the department has reasonable cause to believe engages in the illegal use of controlled substances" to be screened and tested. Applies to FY2012-FY2013.	Individuals who test positive are ineligible for TANF benefits for one year.		
Arkansas	2015 Ark. Acts 1205 (SB 600)	All applicants and recipients are screened, and if there is a reasonable suspicion of drug use they are required to take a drug test. Effective Dec. 31, 2015, and expires after two years unless extended (considered a two-year pilot).	Individuals who refuse to take a test or test positive are ineligible for six months. However, a person testing positive may retain benefits if they comply with a treatment plan.		

State	Citation	Coverage	Description	Family Implications	Other
Colorado	2008 Colo. Ch. 396	At the election of a county, if the use of a controlled substance prevents the participant from successfully engaging in a work activity, the participant may be required to engage in a substance abuse control program. The program may require drug testing.			
Connecticut	Conn. Gen. Stat. §17b-112d	TANF recipients convicted of felony possession or use of controlled substance are covered.	Individuals are eligible if sentence is completed or if recipient is on probation or enrolled in substance abuse treatment or testing program.		
Florida	Fla. Stat. §414.0652	All TANF applicants are drug tested, including any parent or caretaker relative included in the cash assistance group. NOTE: Law is not being implemented because it was found to violate constitutional protections against unlawful searches and seizures.	Individuals who test positive are ineligible for TANF benefits for one year. Individuals who reapply after one year and test positive again are ineligible for three years. Individuals who complete a substance abuse treatment program may reapply after six months.	The child's benefits are unaffected. Dependent children may receive benefits through a "protective payee." The parent may choose another person to receive benefits on behalf of the children. The parent's designee also must pass a drug test.	The cost of the drug test is to be borne by the applicant family. The applicant must be informed that s/he can avoid the drug test by not applying for TANF benefits. Individuals who test negative for controlled substances are reimbursed for the cost of the test through an increase in initial TANF benefit.

State	Citation	Coverage	Description	Family Implications	Other
Georgia	2014 Ga. Laws 664	Applicants or recipients if there is "reasonable suspicion" of drug use.	The first positive test results in loss of benefits for at least one month, or longer until he or she tests negative. A second positive test results in loss of benefits for at least three months, or longer until he or she tests negative. A third positive test results in loss of benefits for one year, or longer until he or she tests negative.	The child's benefits are unaffected. Dependent children may receive benefits through a "protective payee." The parent may choose another person to receive benefits on behalf of the children. The parent's designee also may be required to take a drug test.	
Idaho	Idaho Code §56-209j IDAPA 16.03.08.111	All TANF applicants are screened for substance abuse and tested if the screening indicates the person is engaged in or at high risk for substance abuse.	Participants must enter a substance abuse treatment program and cooperate with treatment, if screening, assessment, or testing shows them in need of substance abuse treatment.	If the applicant chooses not to comply with substance abuse screening and testing requirements, the children in the case can still be eligible for assistance.	
Indiana	Burns Ind. Code Ann. §12-14-28-3.3	TANF recipients convicted of felony possession or use of controlled substance are covered.	TANF recipients convicted of a drug felony must be tested once every two months.		

State	Citation	Coverage	Description	Family Implications	Other
Louisiana	La. R.S. 46:460.10 LAC 67:III.1249	All adult applicants for and recipients of TANF are screened for illegal drug use. When indicated by the screening or other reasonable cause, recipient undergoes formal assessment, which may include urine testing.	Failure to cooperate in screening, assessment, or drug treatment results in case closure. If the formal assessment determines the recipient is using or is dependent on illegal drugs, the most appropriate and cost-effective method of education and rehabilitation will be determined. Individuals determined to be using drugs after completion of a treatment program are ineligible for cash benefits until they are determined to be drug free.	Eligibility of other family members is not affected as long as the individual participates in a treatment program.	The assessment of a recipient determined to be using illegal drugs will determine his/her ability to participate in activities other than rehabilitation. If residential treatment is recommended and the recipient is unable to arrange temporary care for children, arrangements will be made for the care of children.
Maine	2011 Me. Laws 380 Sec. LL-1. 22 MRSA Section 3762, sub-Section 18	TANF recipients who have been convicted of a drug-related felony may be drug tested.	Individuals who test positive must request a fair hearing and submit to a second drug test or TANF assistance is terminated. Individuals whose second drug test is positive may maintain benefits by enrolling in a substance abuse treatment program.		
Maryland	Md. Human Services Code Ann. §5-601 COMAR 07.03.03.09	TANF applicants and recipients convicted of a drug-related felony are subject to testing for substance abuse for two years.	Applicants who do not comply are denied assistance. Benefits for recipients who do not comply are reduced by the individual's incremental portion.	Benefits for other household members are paid to a third party.	

State	Citation	Coverage	Description	Family Implications	Other
Michigan	2014 Mi. P.A. 394	A suspicion-based drug screening and testing program for applicants and recipients. Pilot program in at least three counties, subject to funding.	An applicant or recipient who refuses to take or fails a drug test is ineligible for benefits for at least six months.		
Minnesota	Minn. Stat. §609B.435 Minn. Stat. §256J.26	All applicants who have been convicted of a drug offense must submit to random drug testing.	TANF benefits are reduced by 30% of the MN family investment program standard if the drug test is positive. A second positive test results in permanent disqualification from assistance.		
Mississippi	2014 Miss. General Laws 430	All applicants are required to complete a questionnaire to determine the likelihood of a substance abuse problem. If there is likelihood that there is such a problem, the applicant must submit to a drug test.	If the applicant tests positive, the person may remain eligible for benefits if they comply with an approved substance abuse treatment program. Failure to comply with such a program or testing positive after completing a program results in loss of benefits.		
Missouri	R.S. Mo. §208.027	Requires all applicants and recipients to be screened. Testing is required if the screening determines "reasonable cause to believe" the applicant/recipient "engages in illegal use of controlled substances."	Requires a urine dipstick five panel test. Positive test results in an administrative hearing. Those tested positive are referred to an appropriate substance abuse treatment program. Individuals continue to receive benefits while in the substance abuse treatment program. Those who do not successfully complete the program are ineligible for TANF benefits for three years unless they successfully complete a substance abuse treatment program and test negative for illegal substances for six months.	Other members of the household may continue to receive TANF benefits if otherwise eligible. Benefits are paid to a vendor or third-party payee.	

State	Citation	Coverage	Description	Family Implications	Other
Montana	Mont. Code Anno., §53-4-212	Requires the department to adopt rules concerning random drug testing or reporting requirements for convicted drug felons.			
New Jersey	N.J. Stat. §44:10-48 N.J.A.C. 10:90-18.6	In order to be eligible, individuals convicted of a drug-related offense must complete drug treatment program, and undergo drug testing while in the program and for a 60-day period after completion.	Eligibility is terminated if the individual fails a drug test while in treatment or for a 60-day period following treatment.		
New York	1997 NY Laws 436	When the screening process indicates that there is reason to believe an applicant or recipient is abusing drugs or alcohol, a formal substance abuse assessment is required that may include drug testing.			
North Carolina	2013 N.C. Sess. Laws 417	Requires drug tests for all applicants and recipients who are "reasonably" suspect of using illegal controlled substances.	Those who refuse or fail drug tests may re-establish eligibility after 30 days if they document successful completion of a substance abuse treatment program. Otherwise those who refuse or fail drug tests are ineligible for one year (or if second or subsequent failure, three years).		

State	Citation	Coverage	Description	Family Implications	Other
Oklahoma	2012 OK. Laws 263; 56 O.S. 2011, §230.52	Requires all applicants to be screened using a "Substance Abuse Subtle Screening Inventory" (SASSI) process. If "reasonable cause" is determined, drug tests may be administered.	Applicants with a confirmed positive test result are ineligible for benefits for one year. Individuals can reapply for benefits after six months upon completion of a substance abuse treatment program.	The child's benefits are unaffected. Dependent children may receive benefits through a "protective payee." The parent may choose another person to receive benefits on behalf of the children. The parent's designee also must pass a drug test.	
Pennsylvania	PA Public Welfare Code 62 P.S. §432.24	All public assistance (TANF, food stamps, general assistance, State supplemental assistance) applicants convicted of a felony drug offense. At least 20% of recipients convicted of a felony must undergo random drug testing during each six month period following enactment.	Individuals who fail the test are provided treatment. If the individual fails a second test, benefits are suspended for 12 months. Individuals who fail a third test are no longer eligible for assistance.		
South Carolina	S.C. Code Ann. §43-5-1190 S.C. Code Regs. 114-1130	TANF recipients who are "identified as requiring alcohol and other drug abuse service," or convicted of an alcohol- or drug-related offense or give birth to a child with evidence of maternal substance abuse must submit to random drug testing and/or participate in a treatment program.	Individuals who complete a treatment program are monitored through random drug tests. Individuals who subsequently test positive for drugs or are convicted for a controlled substance violation are ineligible for assistance.	"The Department may impose a full-family sanction for noncompliance with the Individual Self-Sufficiency Plan participants who complete treatment and fail to pass a random test for use of illegal drugs."	

State	Citation	Coverage	Description	Family Implications	Other
Tennessee	Tenn. ALS §1079	Applicants will be screened using a "Substance Abuse Subtle Screening Inventory" (SASSI) process to determine "reasonable cause that an applicant for TANF is using a drug." If "reasonable cause" is determined, drug tests may be administered.	Applicants with a confirmed positive test result are ineligible for benefits for one year. Individuals can reapply for benefits after six months upon completion of a substance abuse treatment program and two negative drug tests.	In a two-parent household, only one parent is required to undergo a drug test. Dependent children may receive benefits through a "protective payee."	
Utah	Utah Code 35A-3-304.5	Requires applicants to complete a written drug screening questionnaire. If "reasonable likelihood" is determined, drug tests may be administered.	Applicants with confirmed positive test results may receive benefits after completing at least 60 days at a substance abuse treatment program and a negative drug test.		Written drug screening done during the employment assessment. If a parent tests positive, the employment plan shall include an agreement to participate in treatment for a substance abuse disorder.
Wisconsin	Wis. Stat. §49.148 Wis. Stat. §49.79	Wisconsin Works participants in community service jobs or transitional placements who have been convicted of a drug felony must submit to drug testing.	Benefits for individuals who test positive are reduced by 15% or less for at least 12 months. After 12 months, individuals who test negative may have full benefits restored.		

Source: Congressional Research Service (CRS), based on information in the LexisNexis legal database July 2015.

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Acknowledgments

The authors would like to thank Meredith Sund, Abigail Overbay, and Dana Deseck-Piazzon for their assistance with identifying state drug testing laws.