Proposed Revisions to the MPP and WPP portions of the Extended TANF regulations, with annotations

Amendments to 133.23:

(vi) a ~~complete~~ partial[1] redetermination is required when a budget group transfers from TANF to Extended TANF.

Amendments to 141.51 (a):

(2) ~~The adult in~~ A[2] family which does not qualify for Extended TANF under paragraph (1) may qualify for Extended TANF under this paragraph if the adult:

(i) Establishes good cause as specified in § 165.52 (relating to good cause) for not meeting the requirements of the RESET Program, as defined in § 141.52 (relating to definitions), or is exempt from participation in RESET because the person is one of the following:

(A) Mentally or physically disabled as verified by a physician or licensed psychologist and the disability temporarily or permanently precludes any form of employment or work-related activity.

(B) The parent or other caretaker who is personally providing care for a child under 6 years of age or a disabled child of any age for whom an appropriate [3]~~alternate~~ child care arrangement is unavailable.

(C) ~~The custodial~~ A parent ~~in a one-parent household~~[4] who is caring for a child who has not attained 12 months of age. This exemption is limited to a maximum of 12 months in the parent's lifetime.

(ii) Agrees to enroll in the MPP, as defined in § 141.52, and, if appropriate to confirm disability of the parent,[5] cooperate in obtaining a WCA, also defined in § 141.52. The agreement to enroll in MPP and to cooperate in obtaining a WCA will be documented, ~~as a requirement of the~~

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[1] A partial redetermination gives the Department more flexibility and avoids unnecessary verification of items that have not changed.

[2] As written, the regulation seems to provide eligibility only for the adult, especially given the difference in wording between 141.51(a)(1) and this regulation.

[3] As we have stated in our comments, the need to care for disabled children is one of the main obstacles encountered by many families. Appropriate child care is, of course, crucial.

[4] If this change is not made, DPW will actually be disfavoring two parent families.

[5] This change is necessary since there are other reasons that may cause individuals to be enrolled in MPP.

~~client,~~[6] on the AMR, as specified under section 405.3 of the Public Welfare Code (62 P. S. § 405.3).

(A) If the results of the MPP assessment, including the WCA, indicate that the adult has a medical condition, functional limitation or good cause situation that precludes the individual from complying with RESET requirements a service plan will be developed to address the individual's and family's needs, in consultation with the individual. The adult shall comply with a service plan developed by the MPP Team, as defined in § 141.52, and documented on the AMR.[7]

(B) If the results of the WCA indicate that the adult does not have a medical condition, functional limitation or good cause situation that precludes the individual from complying with RESET requirements, the adult will be referred to the WPP, along with any findings of the WCA that limit participation or that need to be addressed in order for the individual to become self sufficient, as described in paragraph (3), and defined in § 141.52.[8]

(i) Prior to any referral from MPP to WPP, a individual who disagrees with the findings of the WCA may: (a) request and obtain a second opinion WCA from a different provider than the one who made the first decision; (b) provide evidence to the MPP team from treating physicians, psychologists and other sources that will be carefully weighed prior to any final decision; and/or (c) request and obtain a fair hearing prior to any adverse action being taken. [9]

(3) The ~~adult in a~~ family which does not qualify for Extended TANF under paragraph (1) or (2) may qualify for Extended TANF under this paragraph if the adult:

(i) Agrees to enroll in the WPP, as documented on the AMR.

(ii) Cooperates in obtaining a vocational assessment, as defined in § 141.52.

(A) If the results of the Work Capacity Assessment (if available) and vocational assessment indicate that the adult is able to comply with RESET requirements, the adult shall participate

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[6] This would appear to be a drafting error, since the client can not document the set up of the WCA in the case record.

[7] These changes reflect the fact that the MPP program will deal with more than disability and that any plan should involve the recipient, as a matter of policy and state law.

[8] This change is meant to insure that any significant medical findings, even those that are less that fully disabling, are reported to and used by WPP in developing work and work activities.

[9] All these procedural protections are meant to insure a fair and thorough process of evaluation. DPW has assured us that second opinions are contemplated and that evidence from treating physicians will be accepted.

in ~~a minimum of 30~~ 20 hours per week in a combination of work and work-related activities, ~~as specified in section 402 of the Public Welfare Code (62 P. S. § 402).~~ If an individual is working or has recently lost employment (e.g. within the last 4 months) the individual may satisfy the requirements of this paragraph by participating in job retention and advancement activities. In no event will the activities of WPP interfere with paid employment and ongoing education and training activities.[10]

(B) If the results of the vocational assessment indicate that the adult may have a medical condition, functional limitation or good cause situation that precludes the individual from complying with RESET requirements, the adult shall be referred to the MPP, as described in paragraph (2).

(i) Even if the results of the vocational assessment indicates that the individual is not precluded from complying with RESET requirements, an assessment shall be made as to whether the individual is fully capable of participating in RESET, or whether the individual needs a reasonable accommodation of program rules and requirements in order to participate, because of disability, or other medical condition, functional limitation or good cause situation. In such instances, such reasonable accommodation shall be made, pursuant in part, to the Americans with Disabilities Act.[11]

(b) An individual or family is ineligible for Extended TANF if:

(1) The adult wilfully[12] fails, without good cause, to cooperate in establishing eligibility for Extended TANF through WPP. ~~and other Federal programs, as specified under § 141.21(n)(relating to policy).~~ The family is also ineligible for GA. ~~, as specified under § 141.21(n) and § 141.61(a)(1)(xii) (relating to conditions of eligibility).~~[13]

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[10] These changes are meant to insure that the one third of recipients reaching 60 months who are working are not channeled into programs that will distract them from the need to continue working and not send them to workfare activities that afford no pay and little if any real training or advancement. We would also recommend dropping references to the statute in the regulations, since it requires another source to make sense of the regulations.

[11] This paragraph is meant to insure that WPP makes assignments that reflect any physical or mental limitations that DPW has already discovered in the WCA. New York City in particular has been plagued by workfare assignments that do not reflect the physical limitations, e.g., back problems, heart disease, that limit individuals. Pennsylvania should avoid such problems.

[12] DPW has dropped "willfulness" from its criteria in some of the regulations without explanation. Individuals and families should only be sanctioned for voluntary behavior.

[13] This whole section has been edited to eliminate DPW's strained interpretation of TANF as a federal program that must be used first and that failure to qualify for TANF automatically disqualifies children from GA. DPW's reading would require every Medicaid

(2) The adult wilfully fails, without good cause, to obtain a WCA or to comply with the MPP service plan or the domestic violence plan, whichever applies. The family is, however, ~~also~~ ineligible for GA~~, as specified under §§ 141.21(n) and 141.61(a)(1)(xii).~~

(3) The adult willfully fails, without good cause, to obtain a vocational assessment or to comply with the WPP, whichever is applicable. A sanction will be imposed on the family as follows:

(i) For the first occurrence, 30 days or until the adult is willing to comply, whichever is longer.

(ii) For the second occurrence, 60 days or until the adult is willing to comply, whichever is longer.

(iii) For the third occurrence, permanently.

Amendments to 141.52:

§ 141.52. Definitions.

The following words and terms, when used in this section and §§ 141.51 (relating to policy), have the following meanings, unless the context clearly indicates otherwise:

Adult--A parent or other related individual who is 19 years of age or older or who is 18 years of age and not a full-time student in a secondary school or in the equivalent level of vocational or technical training and who is on the TANF grant and functioning as the head of the household.[14]

Extended TANF--Federally-funded TANF cash assistance for eligible families in which an adult has exhausted 60 cumulative months of TANF cash assistance.

MPP--Maximizing Participation Project--A program to assist individuals address and, where possible, remedy medical conditions, functional limitations and good cause situations that preclude the individual from complying with RESET requirements. Such program will include the provision of child care and other supplemental services as are necessary to participate in all program activities.[15]

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recipient to apply for TANF and would require anyone who began receiving state funded TANF through the Time Out program to immediately reapply for federally funded TANF, making the Time Out program a dead letter.

[14] This change in definition is meant to make it clear that the Extended TANF responsibilities fall on the parent or other adult on the grant, but that if the adult does what is expected of him or her, the whole family qualifies. We do not anticipate that DPW will take issue with this approach.

[15] It is crucial that child care and transportation be provided as needed for all Extended TANF activities.

MPP team--A multidisciplinary group consisting of a CAO worker or an agent authorized by the Department and other individuals including representatives from State and local agencies.

RESET--Road to Economic Self-Sufficiency Through Employment and Training--A program operated by the Department, within the constraints of available funds, to enable recipients of cash assistance to secure permanent full-time unsubsidized jobs, entry-level jobs or part-time jobs which can establish a work history, preferably in the private sector, with wages and benefits that lead to economic independence and self-sufficiency as soon as practicable.

Service plan--A document developed by the MPP team in consultation with the affected individual to outline the steps and services necessary to enable an adult to engage in work, increase work participation, develop other means of support or otherwise increase self-sufficiency. [16]

Victim of domestic violence--An individual who is or has been battered or subjected to extreme cruelty, as defined in section 408(a)(7)(C)(iii) of the Social Security Act (42 U.S.C.A. §§ 608 (a)(7)(C)(iii)).

Vocational assessment--An evaluation by DPW or its agents of the factors that impact the client's ability to perform work, including the client's physical and mental health, educational level, including literacy and numeracy, ability to speak and read and write English, employment preferences, work history, skills, abilities and life circumstances.[17]

WCA--Work Capacity Assessment--An independent medical, vocational or functional evaluation, or a combination of these, the medical part of which will be conducted by a physician or psychologist approved by the Department. Other professionals may be used to assess vocational needs and other good cause situations. The purpose of the WCA is to take an independent, comprehensive look at the individual whose barriers to employment preclude the individual from complying with RESET requirements. The WCA will include a reevaluation of documented medical conditions and functional limitations and consideration of previously undiagnosed conditions and limitations. The WCA will seek to identify: 1) the nature and extent of medical conditions, functional limitations or good cause situations that preclude the individual from complying with RESET requirements; and 2) the individual's range of ability to engage in work and work-related activities, with and without appropriate treatment.[18]

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[16] These changes are meant to include the individual in any plan or assessment, as required by the statute, and to reflect the fact that, for some disabled recipients, pursuit of disability benefits is the most realistic option.

[17] We anticipate that proper assessment of individuals may require more sophisticated evaluation than is envisioned in the proposed regulations. We have attached a brief paper we have done outlining some of the concerns and issues we have already raised with DPW.

[18] These changes are meant to reflect the scope of MPP, as explained by DPW, and to clearly separate the medical issues that require physician evaluation of disability from the other issues that may be raised.

(i) If the client has a medical condition or functional limitation, the WCA is to be conducted based upon accepted medical standards for the evaluation of impairments, ~~as well as~~ using a standard framework and method of analysis.

(ii) The standard framework and method of analysis used for the evaluation of permanent disability will be the most recent edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* and the policies and procedures developed for the evaluation of disability used by the Social Security Administration and found in the current federal regulations, 20 C.F.R. § 416.900 et seq. Disability will be considered to be established in any case where the impairment(s) is (are) greater than 50%, according to the *Guides*, or where it is established that the individual is otherwise unable to sustain full-time, competitive employment. For the evaluation of temporary disabilities, the determination of disability will be made by the individuals's physician or psychologist, using the Employment Assessment Form (EAF).[19]

(iii) If the client has a good cause situation other than a medical condition or functional limitation, the WCA may or may not require an examination of the client or family member, but only if necessary and relevant to the determination of the situation.[20]

(iv) The WCA will always include an evaluation of existing documentation of the exemption or good cause situation. The WCA is premised on the Department's commitment to determine why an individual continues to need cash assistance, and what that individual can do to maximize employability and financial independence or find alternative means of support. For the most current, comprehensive evaluation of the individual's limitations and abilities, the WCA will be much more than a mere snapshot of that individual. To facilitate this, all available records of the individual's treating physician and psychologist will be obtained and considered by the Department or its agent and additional testing will be performed as needed. The Department or its agent will give substantial weight to the clinical findings and opinions of treating physicians and psychologists familiar with the individual. Existing records may or may not provide an updated, detailed diagnostic and therapeutic picture of the individual, even if that individual was exempt or had good cause from work requirements due to a medical condition, functional limitation or good cause situation that precluded the individual from complying with RESET requirements. These records and test results, and the individual's own statement regarding known

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[19] These changes reflect the issues raised in our comments about the *Guides* and the inherent limitations of that publication, concerning standards for disability and the evaluation of temporary impairments. They also incorporate by reference the standards used by Social Security to evaluate disability, weigh evidence from treating physicians, assess pain and other limitations and the myriad issues that become involved in the evaluation of disability. Rather than reinvent the wheel, DPW would do well to use the experience of the agency that does the most disability evaluations in the world. Nothing in the proposed incorporation, however, is meant to adopt SSA's multi-step appeal process for the evaluation of disability.

[20] This revision is meant to cover the situation of the disabled child whose care is crucial in evaluating employability.

or potential conditions and limitations, will supplement the current examination portion of the WCA.[21]

WPP--Work Plus Program--An employment and training program funded by the Department providing work and work-related activities for ~~at least 30~~20[22] hours per week.

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[21] Much of this language is taken from DPW's preamble to the regulations and to flesh out procedures for the WCA.

[22] It is our contention, as laid out in our comments, that DPW is not authorized in the statute to require 30 or more hours of work per week.

Confidential: Not for Inclusion in the Public File

SUMMARY OF REGULATION #7-451 (IRRC #2821)

ENVIRONMENTAL QUALITY BOARD

WATER QUALITY STANDARDS IMPLEMENTATION

COMMISSIONER: Silvan B Lutkewitte III **TEAM:** Totino/Wilmarth

PROPOSED RECEIVED: 2/3/2010

FINAL RECEIVED: 7/16/2010 **STG. COMT. RESPONSE DATE:** 8/18/2010

SENATE ACTION: None. **HOUSE ACTION:** None.

DESCRIPTION AND IMPACT

In response to new water quality standards imposed by the federal Clean Water Act in 2005, the U.S. Environmental Protection Agency (EPA) and affected states developed a maximum nutrient load, or "cap load," for each major tributary to the Chesapeake Bay. Approximately 200 municipal sewage treatment plants and others discharging into Pennsylvania tributaries of the Chesapeake Bay must cap their discharges or they will be in violation of downstream water quality standards under both state and federal law.

One component of the Department of Environmental Protection's (DEP) response to these new legal requirements was the development of a "Nutrient and Sediment Reduction Trading Program." In December 2006, DEP issued a document entitled "Final Trading of Nutrient and Sediment Reduction Credits - Policy and Guidelines" (No. 392-0900-001).

This regulation is a codification of the policy and guidelines issued by DEP in 2006. It provides methods for facilities subject to limits for nitrogen, phosphorus and sediment to meet those limits by working with other facilities and/or nonpoint sources. The regulation also assists with achievement of Chesapeake Bay nutrient reduction goals from the agriculture sector. Finally, it codifies, with revisions, the DEP's existing guidance on nutrient and sediment credit trading.

PUBLIC INPUT

To date, we have received no public comments on this final-form regulation.

REMAINING ISSUES

In preparing the final-form regulation, the Board made extensive revisions to improve clarity in response to our comments on the proposed rulemaking.

As noted above, the regulated community has not expressed any objections to this final-form regulation.

Therefore, there currently are no remaining issues. We will inform you should existing circumstances change.

THE WELFARE COALITION

A statewide coalition with the following members:

Bucks County Housing Group

Community Justice Project

Community Legal Services

County Commissioners Association of PA

Episcopal Community Services

Just Harvest/Welfare Justice Protect

Lutheran Advocacy Ministry in PA

Maternity Care Coalition

Mon-Valley Unemployed Committee

National Association of Social Workers-Pa Chapter

PA AFL-CIO

PA Alliance for Children and Families

PA Catholic Conference

PA Council of Children, Youth, And Family Services

PA Council of Churches

PA Episcopal Public Policy Network

PA Hunger Action Center

PA Jewish Coalition

PA League of Women Voters

Pa Social Services Union

People's Emergency Shelter

Philadelphia Citizens for Children and Youth

Philadelphia Unemployment Project

Regional Workforce Partnership

Reinvestment Fund

Success Against All Odds

United Way of PA

United Way of SE PA

Women's Ass'n for Women's Alternatives

ORIGINAL: 2244

February 25, 2002

Mr. Edward J. Zogby
Director, Bureau of Policy
Office of Income Maintenance
Pennsylvania Department of Public Welfare
431 Health and Welfare Building
Harrisburg, Pennsylvania 17120

RE: DPW Proposed Regulations on Extended TANF

Dear Mr. Zogby:

On behalf of the Welfare Coalition – a community of parents, religious leaders, community-based organizations, employers, labor, public officials, providers and advocates – I am writing first to offer our sincere appreciation for the continued opportunity for dialogue that has been afforded our Coalition. We think you will agree that this dialogue has been productive and has more than served our mutual education and action on behalf of Pennsylvania's low-income children and families striving to secure sustained self-sufficiency.

Before offering some abbreviated comments on the proposed Extended TANF Regulations published in the January 26, 2002 edition of the Pennsylvania Bulletin, I would like to acknowledge that while we believe there is still work to be done to shape an agenda and, more importantly, to implement uniform and fair policies for Pennsylvania's population seeking Extended TANF benefits, we are heartened by the caliber of your initial efforts. The Department is to be commended for choosing compromise, flexibility, and support – not sanctions – for those Pennsylvanians who, of no fault of their own, still require access to assistance.

While we will not offer exhaustive comments on the Extended TANF Regulations, we would like to offer a few overriding reflections about concerns that remain for our Coalition. While the Coalition's comments will be abridged, I am assured that the Department continues to benefit from the insight and experienced comments and clarifications being offered by the many diverse, grassroots, and committed members of our Coalition.

Many lessons have been learned throughout the implementation of welfare reform. Eventually there was greater understanding of and emphasis on the need for education, literacy training, enhanced job skills, and paid work experience. Additionally, recognition was also finally achieved that for some Pennsylvania families, there remain complex multi-faceted barriers that may not have been appropriately assessed or addressed during the initial phase of welfare reform.

Recognizing these challenges, it appears that the Extended TANF program being promulgated and promoted by the Department strikes the necessary and progressive balance among – responsibility and work with enhanced and individualized supports – toward the ultimate goal of self-sufficiency. The regulations also attempt to remedy the reality that many Pennsylvanians have not necessarily been provided access to or have not been able to avail themselves of the vital educational,

social, medical or literacy supports needed to achieve self-sufficiency. The Department's willingness to offer Extended TANF options including opportunities for counseling, treatment, individualized assessment, and life skills training, to mention a few, is greatly appreciated.

Again, we are heartened by your overall intentions. However, we would suggest that the next challenge for the Department, our Coalition and all facets of Pennsylvania's local and state government will be an effort to ensure that we are all *on the same page* about what Extended TANF means, how a family remains eligible, and under what conditions a family might be denied continued assistance. As we have mentioned repeatedly in our meetings, we are never without concerns about how the policies crafted within the halls of DPW are implemented in Butler, Cambria, Dauphin, Allegheny, Philadelphia Counties and all across the Commonwealth. To that end, we look forward to the language included and the direction outlined within the Operations Memo (OPS) that you will provide to the county assistance offices.

The Coalition challenges the Department to be vigilant in its monitoring efforts about how families are notified about Extended TANF, data about how many families take advantage of this option, whether families encounter barriers with the higher threshold of standards (specifically the work requirements) and thus are refused or voluntarily withdraw from Extended TANF. In this vigilance, we hope that the Department will continue to be flexible in its continued implementation recognizing that as Extended TANF continues there may be a need for minor and, at times, significant overhaul in its continued enactment.

We are concerned by an issue unaddressed within the proposed regulations – the plight of Pennsylvania families that left the welfare rolls, but due to economic and employment conditions in Pennsylvania now find themselves, yet again, without a job. We had hoped that Governor Schweiker's 2002-2003 budget might provide some utilization of TANF dollars to offer a short term cash grant to families – many of whom may not be eligible for unemployment compensation benefits – to ensure that they do not spiral back into financial depravity while they search again for work. We remain intent on working with the Schweiker Administration to ensure that this population of Pennsylvanians is not overlooked.

As I mentioned at the onset, the unprecedented dialogue – a dialogue that was at times difficult and tense, but always respectful and productive – has been extraordinarily necessary as this Commonwealth undertook this awesome responsibility of redesigning the state's welfare system. We believe that our advice, comments, and at times very vocal pleas have helped shape an appreciation about the mothers, fathers and children that are the faces of welfare reform. We look forward to a continued invitation to dialogue and learning together.

Sincerely,

Joel Weisberg
Chair, Welfare Coalition
Executive Director, PA Jewish Coalition

cc: Secretary Feather Houstoun
Senator Harold F. Mowery, Jr.
Senator Vincent J. Hughes
Representative George Kenny
Representative Frank Oliver
John R. McGinley, Jr.

CATHLEEN L. PALM & ASSOCIATES
FORGING INFORMATION, EDUCATION, AND ADVOCACY

FACSIMILE TRANSMITTAL SHEET

TO: **John R. McGinley, Jr.**	FROM: **Cathleen Palm on behalf of the Welfare Coalition**
COMPANY: Chairman, IRRC	DATE: 2/25/02
FAX NUMBER: **717-783-2664**	TOTAL NO. OF PAGES INCLUDING COVER: 3
PHONE NUMBER:	SENDER'S REFERENCE NUMBER: 717-697-7502
RE: **Coalition's Comments on Extended TANF**	YOUR REFERENCE NUMBER:

☑ URGENT X FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

On behalf of Joel Weisberg and the Pennsylvania Welfare Coalition, I am providing you with the following letter expressing the thoughts of the Coalition on the Extended TANF proposed regulations. We look forward to our continued conversation on April 12th. You can contact Joel at 233-1110 or myself at 697-7502 with any questions or concerns. Thank you!

ORIGINAL: 2244

LEHIGH VALLEY LEGAL SERVICES

February 25, 2002

The Honorable Feather O. Houstoun
Commonwealth of Pennsylvania
Department of Public Welfare
Health & Welfare Building–Room 431
Harrisburg, PA 17120

Re: Proposed Extended TANF Regulations

Dear Secretary Houstoun:

First, we commend the Department of Public Welfare on the time, effort, and insight devoted to development of the proposed regulations concerning TANF (Welfare Reform and Five Years). We are extremely pleased with the Department's decision to allow TANF recipients who reach their five year time limit on cash assistance to continue to qualify. Given the current economy and the fact that many communities continue to lose jobs, this decisiveness is particularly meaningful to families and individuals who will be affected.

We do, however, have a few areas where we believe there should be improvement as follows:

1. The regulations should consider the needs of families with limited English proficiency, in violation of Title VI of the Civil Rights Act of 1964. Families with limited English capability, including immigrants and refugees, face pointed barriers to employment. We are extremely concerned that DPW has not provided English as a Second Language programs or vocational training in languages other than English, and has not given these individuals and families access to the full range of welfare to work programs. The regulations should provide for extended TANF benefits for families with limited English proficiency and should provide for services to address their needs.

2. The regulations do not properly protect survivors of domestic violence. This proposal does not fully implement the Family Violence Option adopted by DPW and the recommendations of DPW's own Domestic Violence Task Force. The regulations should provide for waivers of the time limit "as long as necessary" for families at risk of further domestic violence as provided for in the federal statute. They should also permit families to qualify for extended TANF benefits whether or not they previously got a waiver of child support or work requirements.

65 EAST ELIZABETH AVENUE - SUITE 903 BETHLEHEM, PA 18018 TEL. 610-317-8757 FAX. 610-317-8778

3. The regulations do not provide for the Time Out Program, or other situations in which months of assistance don't count towards the Sixty (60) month time limit on federally funded TANF assistance. Months should not count towards the time limit if the family has been given a Time-Out, or is getting cash assistance that is state funded, rather than federally funded, or if DPW has been fully reimbursed. Child support would be an example.

4. DPW's plans for assessing disabilities and other barriers to employment are problematic.

5. The regulations regarding the Work Plus Program violate state and federal law. They require thirty (30) hours per week of participation in work activities, in violation of Act 35 which requires twenty (20) hours per week. Further, this proposal does not acknowledge that the federal Fair Standards Act requires payment of the minimum wage for required work activities.

6. There is no provision for short-term emergency benefits. Federal law clearly allows the state to use federal TANF funds to provide up to four months of benefits for families dealing with a crisis, including unemployment, homelessness, or other problems without those months counting towards the sixty (60) month time limit. Newly unemployed parents may just need temporary assistance while they are seeking another job. A short-term emergency assistance program would make more sense than putting these parents into DPW's proposed MPP or WPP programs.

Please accept these comments in the spirt they are submitted. We would appreciate you making every effort possible to improving upon the proposal.

Sincerely yours,

Linda D. Renick
Director of Community Services

cc: Independent Regulatory Review Committee
333 Market Street
Harrisburg, PA 17120

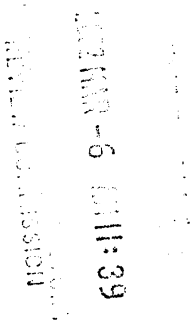
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
OFFICE OF GENERAL COUNSEL

DATE: March 5, 2002

SUBJECT: **Extended TANF #14-474 - Public Comment #14-474-53**

TO: Richard Sandusky
Deputy Director for Regulatory Analysis
Independent Regulatory Review Commission

FROM: Ruth O'Brien RÓB.
Senior Assistant Counsel



Attached is an updated copy of Public Comment #14-474-53, that was originally forwarded to you on Tuesday, February 26, 2002 regarding the proposed Extended TANF Regulations. I am forwarding Public Comment #14-474-53 in its entirety, including the Exhibits referenced in the Public Comment, which were not included in the original submission.

Attachments

cc: Scott Johnson
Niles Schore
Melanie Brown
Sandra Bennett

Ruth O'Brien
OLC

COMMUNITY
LEGAL SERVICES, INC.

1424 Chestnut Street, Philadelphia, PA 19102-2505
Phone: 215.981.3700, Fax: 215.981.0434
Web Address: www.clsphila.org

Revised 14-474-53 Donna

make sure Ruth, Gail, E+T get a copy

February 25, 2002

Office of Income Maintenance
Bureau of Policy

MAR 0 1 2002

REFER TO:

Edward Zogby
Bureau of Policy
Office of Income Maintenance, DPW
Health and Welfare Building
Harrisburg, PA 17101

Re: Proposed TANF Regulations, 32 Pa. Bull. 432 (January 26, 2002)

Dear ~~Mr. Zogby~~ Ed:

Enclosed please find our comments and accompanying exhibits concerning the proposed TANF regulations. We look forward to the opportunity to sit down with you to discuss necessary changes and improvements.

Very truly yours,

Richard

Richard P. Weishaupt
For Community Legal Services, Inc.

RPW:jmp

cc: Linda Hicks, Official in Charge, OIM
John A. Kane, General Counsel

Enclosures

Revised 14-474-53

BEFORE THE INDEPENDENT REGULATORY REVIEW COMMISSION

Comments Regarding the Adoption of

Department of Public Welfare's

Regulations

(Extended TANF Regulations)

32 Pa. Bull. 432 (January 26, 2002)

Submitted by
Community Legal Services, Inc.
Community Justice Project
Women's Law Project

February 25, 2002

TABLE OF CONTENTS

Executive Summary:
DPW's Extended TANF Regulations Establish a Needed Safety Net, But Some Changes Are Required

The proposed regulations that are the subject of these comments provide for "Extended TANF" benefits for families that have used 60 months of federally funded TANF benefits. Extended TANF benefits are especially critical given the current recession and loss of jobs in many of the industries that employ low-income parents.

The Positives:

DPW is to be commended for recognizing that cash assistance should be extended beyond 60 months for families that have not achieved self-sufficiency on a rigid five-year schedule. By allowing unemployed or under-employed families, families with barriers to work, and families with domestic violence to continue receiving benefits if they comply with plans to reduce or remove their barriers, DPW is appropriately exercising discretion under federal and state law to allow these families to continue receiving benefits.

Likewise, DPW is right to extend TANF to those hitting their 60th month on TANF on March 3rd or in the next few months. This modest extension allows full public participation in the rulemaking and an orderly implementation of the new rules.

The Changes that are Needed:

1. ***DPW should implement the TANF time limit to include "non-assistance" and to incorporate its current policies that disregard time from the TANF clock.***

- DPW is missing opportunities provided by the HHS regulatory definition of "non-assistance" to use TANF funds in ways that do not count against the TANF time limit. For instance, DPW should create short term emergency benefits funded by TANF.
- DPW's proposed regulations do not stop the TANF clock for "Time Outs," even though clock-stopping is the entire point of that DPW program.
- DPW's TANF time limit regulation does not incorporate provisions in its Cash Assistance Handbook on counting of TANF time.

2. ***DPW's plans for assessing and remediating disabilities and other barriers to employment are too vague and lack standards.***

- The Work Capacity Assessment fails to include procedural protections.
- Connecting severely disabled adults with SSDI/SSI should be an explicit goal in MPP.
- The regulations do not include procedures for families with disabled family members.

- The regulations do not address the specific needs of persons with limited English proficiency, nor do they provide benefits for permanently disabled immigrant parents on TANF.
- Child care subsidies and other supportive services are not provided as part of the TANF package.
- There is no standard for exemption from MPP when appropriate.

3. ***The design of the Work Plus Program must be improved.***

- The 30-hour work requirement is both illegal and bad policy. It violates Act 35, which requires only 20 hours per week of work, and the Americans with Disabilities Act, which prohibits such rigid rule enforcement. Moreover, many single parents cannot balance working 30 hours/week with the demands of raising their children, many of whom have severe disabilities, and other responsibilities as heads of households.
- The proposed regulations do not require that WPP and other work programs will be administered in compliance with employment laws, most notably the minimum wage.

4. ***The regulations punish children whose parents are not eligible for extended TANF benefits in violation of the General Assistance statute.*** By providing that an entire family is ineligible for GA if the TANF adult fails to obtain a Work Capacity Assessment, comply with the MPP service plan, or comply with the domestic violence plan, DPW violates the provision of the Public Welfare Code that states that children are eligible for GA up to age 18 (or up to age 21 if they are in secondary school).

5. ***The proposed regulations for Extended TANF based on domestic violence omit provisions consistent with the federal Family Violence Option and the recommendations of the DPW Domestic Violence/TANF Task Force.*** The regulations fail to provide comprehensive descriptions of:

- Eligibility for an extension based on domestic violence (they do not indicate that Extended TANF will be provided to persons faced with current, past or future domestic violence, whether or not these persons had waivers of program requirements).
- Verification procedures (they do not state that persons who previously verified domestic violence will not have to do so again, nor do they set forth the verification method for those who must still verify).
- The time period for Extended TANF for domestic violence (they do not provide Extended TANF for "as long as necessary").
- The six-month review (they doe not describe the verification process to be used at that time).
- The domestic violence service plan (Extended TANF is to be "accompanied" by a domestic violence service plan).

These comments are filed on behalf of the hundreds of individual TANF recipients represented by Community Legal Services, Inc. (CLS), the Women's Law Project (WLP), and the Community Justice Project (CJP). They are also filed on behalf of several organizations of poor people represented by CLS, WLP, and CJP, including the Philadelphia Welfare Rights Organization, the Philadelphia Unemployment Project, the Kensington Welfare Rights Union, the Mon Valley Unemployed Committee, and Success Against the Odds.

The proposed regulations that are the subject of these comments, 32 Pa. Bull. 431(January 26, 2002), represent the Department of Public Welfare's (DPW) attempt to adopt rules for the treatment of recipients of cash assistance under the Temporary Aid to Needy Families (TANF) program, after they have received 60 months of TANF cash assistance. We applaud DPW for acting to help needy families, who, for whatever reason, have been unable to become self sufficient. These are families who have played by the rules and have done what they can to find employment and become self supporting. Many have even worked for long periods of time during their five years of TANF, but now find themselves, unemployed or underemployed.

These regulations provide much needed help for populations who are hard to place in employment and are unable to achieve self sufficiency, at least on a rigid five year schedule. In fact, as our comments below explain, we encourage the Department to do even more. We recognize that under this proposal, the Department plans to offer cash assistance to all those in need who demonstrate a real willingness to do what they can to support their family and we most heartily agree with that goal. We recognize that there is some resistance to providing any assistance to these families, and we encourage DPW to maintain their position.

The proposed regulations at issue represent a particularly difficult set of regulations to comment upon, since DPW has not finalized its previous set of TANF proposed regulations, 31 Pa. Bull. 5875 (October 20, 2001), IRRC Number 2224, 14-472. Moreover, many of the procedures described are extremely vague. Nonetheless, these new proposed regulations are an important part of the TANF program and deserve our attention.

Under federal law, there is a general lifetime limit of 60 months of federally funded TANF assistance for adult parents and their minor children. 42 U.S.C § 608(a)(7)(A). This general lifetime limit, however, is modified by a provision of the same federal law that allows states to waive this requirement for 20% of the TANF caseload. 42 U.S.C. § 608(a)(7)(C)(ii). In addition, federal law allows states to elect a Family Violence Option (FVO) that provides an additional exception to the time limit for victims of domestic violence. 42 U.S.C. § 602(a)(7)(C)(i)&(ii). Finally, there are other exceptions to the general time limit under federal law for state funded TANF assistance, 42 U.S.C. §608(a)(7)(F); 45 C.F.R. §264.1(b)(2), and for aid that is not considered "assistance," 42 U.S.C. § 608(a)(7)(G); 45 C.F.R. § 260.31(b). All of these exceptions are well established features of the federal law. These proposed regulations take advantage of the 20% hardship waiver provided under federal law, and other DPW practices have implemented many of the other exceptions, although they have yet to be codified in regulations.

Some opponents have argued against these regulations and maintain that "welfare reform" means that all help should end at 5 years. They further argue that that is what the Congress and state legislature intended. Such an argument is not consistent with the history of the federal welfare debate, nor with Pennsylvania's version of welfare reform, which was predicated on the federal law. Even in the initial enthusiasm to "end welfare as we know it," Congress recognized that a time limit would create insurmountable problems for some families and enacted a hardship waiver, as well as other exceptions, to protect the most vulnerable and to offer states needed flexibility. Pennsylvania, although its welfare reform law actually preceded final enactment of the federal law, anticipated the need for exceptions in state law, 62 P.S. § 401, and, in fact, avoided enacting any specific time limit. Those who would argue for an absolute time limit and against any kind of exception for those families experiencing hardship, domestic violence and other extenuating circumstances, are not making an argument that is consistent with state and federal law.

DPW should be applauded for providing *all* families who need more time to become self-sufficient with an opportunity to receive continued benefits. DPW's commitment to identifying barriers to employment – and to providing services to address those barriers – is a positive development, and a sign that advocates and community members, who know first-hand the deprivation and suffering that would be caused by an overly strict policy.

Despite the positive steps that DPW has taken in these regulations, however, there remains considerable room for improvement. Our concerns with the shortcoming of specific provisions are laid out below.

141.41 Policy -- Implementation of TANF time limit and counting of TANF time

This proposed regulation would implement the general 60 month TANF time limit and set forth what time counts against that limit (and what time does not). As in its earlier proposed regulations regarding the TANF program, DPW's latest proposed regulations fail to provide for essential exceptions to the 60 month time limit, including several exceptions which already exist in DPW policy and are currently being implemented. The proposed regulations should be consistent with actual DPW policy.

Further, the proposed regulations should take advantage of the opportunity to provide short-term non-assistance where it would be the most efficient response to short term unemployment or other emergency situations. Because they fail to do so, they squander an opportunity to use TANF funds in a manner that does not count against the TANF time limit, and they fail to recognize that the current MPP/WPP tracks make little sense for people with short-term needs.

<u>"Non-Assistance"</u>

Under federal law, states may avoid the harshness of the 5 year limit by providing what is referred to in the federal regulations as "non-assistance." 42 U.S.C. §608(a)(7)(G); 45 C.F.R.

§260.31(b). This "non-assistance" neither triggers the counting of a month toward the 60 month time limit, nor counts as extended TANF, even if given after 60 months. Pennsylvania already provides a considerable amount of help to TANF families through non-assistance, such as services and stipends to those obtaining jobs, usually for transportation assistance. We urge that the state go farther and use the opportunity presented by the federal regulations to provide short term aid of up to 4 months to the recently unemployed

Provision for "non-assistance" in the proposed regulations would create an efficient mechanism with which DPW could address the short term needs of families moving towards employment and keep Pennsylvania's options open to provide aid in the future, even if it does not do so immediately.

Emergency non-assistance could include a program similar to unemployment compensation for those who are in between jobs but are ineligible for unemployment compensation benefits for a variety of reasons (retaining TANF as the ultimate safety net for low wage workers). Such aid could provide a short-term disability benefit for a temporary illness that keeps someone from working (and from receiving UC) or for workers who simply do not have enough of a work history to qualify for UC..

Despite the flexibility that HHS's regulations bestow on DPW to use TANF funds for such purposes without concern with the time limit, DPW has thusfar ignored this important option. Indeed, far from giving itself discretion in its regulations set up new non-assistance benefits, DPW seems determined to preclude the flexibility it might want to have. DPW's plans for Extended TANF recipients to participate in MPP or WPP (if they are not victims of domestic violence) do not seem to recognize that some persons who have reached their TANF time limit will not need long-term assistance.

For instance, many families who have reached the TANF time limit may have considerable work histories. If such a person loses her job, chances are that her best next step is a job search, not working for 30 hours a week in WPP (which may in fact interfere with finding a job, as has happened with workfare participants in New York City). Similarly, another employed former TANF recipient, if she is involved in an automobile accident, needs time to recover, but does not necessarily need to go to MPP to address long term employment barriers.

DPW's failure to provide for short-term assistance, or even acknowledge the possibility, is both a failure to maximize flexibility of TANF funds and a flaw in its program design for eligibility for Extended TANF. These flaws should be rectified in the final regulations.

<u>"Time Out"</u>

Once again, as in the earlier proposed TANF regulations, the current proposed regulations on implementing the 60-month TANF time limit fail to mention the Time Out" program already in effect. This program stops the 60 month clock by using state funded TANF for certain people -- some working families, early engagers in training programs, some kinship caregivers, some

victims of domestic violence and those exempt from work requirements but who nonetheless volunteer to participate in training programs. (DPW began implementing the Time Out program on July 2, 2001 by Operations Memorandum 01-06-09, Implementation Instructions for the Time-Out Initiative, attached, Exhibit 1).

Despite the fact that the entire raison d'etre of the Time Out program is to stop the 60-month clock, proposed § 141.41, as written, would not exclude the months spent in the Time Out program from a recipient's 60 months! This failure is inexplicable. Families in the state of Pennsylvania (especially the 3,125 families already enrolled in the Time Out program) have an overwhelming interest in the accurate codification and regulation of the TANF program, particularly in exceptions to the 60 month time limit. This proposed regulation is inconsistent with existing programs and policy and must be written so as to embody current policy.

Cash Assistance Handbook Provisions that Belong in the Regulations

The proposed regulation should also incorporate the provision in DPW sub-regulatory policy, Cash Assistance Handbook 105.251 (attached, Exhibit 2). This provision lists various circumstances under which participation in the TANF program shall not be considered receipt of TANF cash assistance for the purpose of counting days towards the time limit. Examples of these circumstances include: (1) a period when a recipient or budget group is under a sanction (and hence is not receiving actual cash assistance), (2) when cash assistance is issued, but not received or utilized, and (3) situations where recipients have fully reimbursed the Department for the TANF provided. Such reimbursement often takes place when recipients receive retroactive benefits from public programs such as Unemployment Compensation or Social Security disability insurance, or from private sources, such as child support or successful litigation of personal injury claims. If, for example, a family repays a year's worth of TANF under the handbook procedure, DPW removes that year's worth of TANF from that family's "clock."

This sensible policy has been the rule for the new Pennsylvania TANF program since its onset in March 1997 and was reiterated in OIM Policy Clarification 09-02-98, Entitlement to an Adjustment of the TANF Benefit Days (attached, Exhibit 3).

Other, similar provisions that refine the rules for computing the 60 months of receipt of TANF are currently included in the Cash Assistance Handbook, but are not mentioned or referenced in the regulations. These exceptions include periods of zero cash issuance, emergency shelter allowances, and receipt of interim benefits pending a hearing. These provisions prevent the inequitable counting of days against a person's or a family's 60 months and should be included in DPW's proposed regulations.

To exclude DPW sub-regulatory policy on counting TANF time from the proposed regulations would create unnecessary confusion. The discrepancy between the proposed regulations and the sub-regulatory policy should be resolved by referencing or explaining DPW's sub-regulatory policy. This policy provides a strong incentive for repayment and is equitable, since repayment in full means that the family has not actually received any net benefit from the TANF program for the period in

question. The failure to include these policies in the proposed regulations is inexplicable, especially since DPW has given no indication that it intends to change or reject these policies.

Remedy: Revise the proposed regulations to provide for stopping or resetting the TANF clock for (1)"non assistance," (2)"TANF Time Out" programs and (3) existing policies that cover instances of non-receipt, reimbursement or other particular circumstances.

141.51(a)(2) — Eligibility for Extended TANF through MPP Participation
141.52 Definitions -- Work Capacity Assessment

According to §141.51(a)(2), every family seeking extended TANF that has an adult who cannot meet the requirements of RESET (to work 30 hours per week) or is not a victim of domestic violence must agree to participate in the MPP program, and to "cooperate in obtaining a Work Capacity Assessment (WCA), also defined in §141.52." However, neither §141.51 nor the definitional section, §141.52, provides sufficient detail as to how the WCA will actually work and what standards will be used to administer the WCA or MPP.

From informal briefings, DPW has made it clear that the WCA will be used to determine whether the person is to be considered disabled, what problems a recipient has that preclude employment and how they are to be addressed. DPW has also made several representations about the nature of the WCA process that do not appear in the proposed regulations. Similarly, the nature of participation in MPP is not addressed in the regulations, but can only be surmised from recent experience with the Time Out program (MPP has been operating on a limited basis as part of the Time Out program since July, 2001, but it is unclear whether the same version of the program will be offered to persons receiving Extended TANF).

The role of the WCA in the Extended MPP process is crucial. The WCA will be used to decide whether people are to be considered exempt. Potentially exempt adults are to be sent to MPP, where there is no set number of hours of work required, and treatment and rehabilitation are the norm. Those who are not exempt are sent to WPP, which requires a minimum of 30 hours per week of work and work activity; failure to comply leads to sanction, in stark contrast to MPP, where failure to comply only means that a person's benefits are temporarily halted.

<u>Need to include SSI/SSDI option for the most severely disabled</u>

DPW has maintained that the WCA will be the first effort to carefully look at the medical and functional limitations that hinder or prevent the recipient from working and develop a "service plan" that will "remedy medical conditions, functional limitations and good cause situations that preclude the individual from complying." §141.52 Definition of "service plan." Nowhere do the regulations address the possibility that the conditions that preclude the individual from working may not be remediable. We assume these people are to be referred to disability programs, such as Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI), as has been done by the unregulated Time Out version of the MPP program in operation since July, 2001. Nothing in the

regulations, however, gives any recognition that some recipients are so seriously disabled that they cannot be considered appropriate candidates for rehabilitation in the foreseeable future.

DPW needs to address standards for how individuals are to be referred to these permanent disability programs, what assistance they will be given in the application process and how they will be treated in the MPP program while their application and appeal are pending, should an appeal be necessary. DPW should adopt a regulatory provision that would encourage those with serious, permanent disability to apply for the appropriate program, with assistance where necessary from both the MPP and Disability Advocacy Program (DAP). While an application or appeal is pending, recipients should certainly be encouraged to seek treatment for their condition, but should not be required to participate in a work project, since working maybe inconsistent with the disability application. On the other hand, such individuals with applications pending may wish to engage in work activities or training and should be given the opportunity to do so, since they may wish to pursue employment despite their disability.

Failure to include procedural protections

The proposed regulation also says that the WCA is to be an "independent medical, vocational, or functional evaluation, that must be performed by a physician or psychologist approved by the Department." Apparently, DPW plans to subcontract with organizations that provide such evaluations under contract to Workers' Compensation and other private insurance carriers.

Although one aim of the examination is to determine what treatment and services may be necessary,[1] another purpose of the WCA is a more adversarial role, since DPW has announced that the WCA may result in a finding that the person is not disabled and therefore should be considered work ready and referred to the WPP program. Given the importance and possible adversarial nature of the exam, it is disappointing that nothing in the regulation requires that the examining physician have any particular expertise in functional or vocational limitation, even though it is the rare physician that has such knowledge. The proposed regulation does not even say that the examining physician must have expertise in the appropriate medical specialty to examine a particular patient, e.g., the regulations do not require a psychiatrist to examine recipients whose EAF indicates that they have a mental disorder.

Moreover, even if the appropriate physician is obtained, it is unclear whether he or she will have the authority to order further testing. For example, a mental status examination may suggest to the examining psychiatrist that the recipient may be mentally retarded. Will the doctor have the authority to order such a test and, if so, under what circumstances? What if the recipient or his

[1] The role of the WCA examiner in determining the treatment and service needs of the recipient is somewhat questionable in that all of those examined will have been certified as disabled by a physician using the Department's Employment Assessment Form (EAF), attached, Exhibit 4. These EAFs are filled out by the recipient's primary care physician (PCP) or psychiatrist, or in some cases by a specialist; all of these physicians are compensated by the Department, through the Medicaid program. Almost all of them are PCPs who work for managed care organizations and are required to be familiar with the recipient's case and are charged with the responsibility of coordinating all patient care.

representative or treating physician requests further testing? To whom do they make this request and how quickly must they do so?

DPW has publicly represented that the WCA process will obtain all evidence from all relevant medical sources, including treating physicians who best know the client. Yet the proposed regulation only states "The WCA will always include an evaluation of existing documentation of the good cause situation." § 141.52, Definition of WCA, (iv). This statement raises several questions, rather than explain what will be done. First, disability is not a good cause situation, rather, it is an exemption. Is this an error in drafting or is existing documentation only examined in "good cause" cases? Even assuming that this is meant to apply to exemptions as well, what does "existing" mean -- that only documents already in the file will be reviewed? Or that any documents that exist anywhere will be obtained and reviewed? If it is the later, as DPW has suggested in briefings, who will obtain the documents? Especially since at least 28% of the exempt population is suffering from mental illness, see attached, Exhibit 5, it would be clearly inappropriate to require the recipient to collect such data. If it is not the recipient who will be charged with obtaining the documentation, who will do it? The choices are DPW personnel, the firm with whom the WCA doctor contracts, or the doctor him or herself. Regardless of which is chosen, the regulations need to make it clear whose obligation it is to collect existing health care records.

DPW also claims in its presentations that, as part of the WCA, treating physicians will be consulted and asked to perform tests and write reports on at least some of their patients. However, despite this representation, DPW hasn't imposed that requirement — the proposed regulations are completely silent on the role of the treating physician, who frequently knows the recipients best of all. The Social Security Administration, on the other hand, runs the world's biggest disability program and relies heavily on treating sources, and affording the evidence of such sources great weight. See 20 C.F.R. § 404.1527.

DPW also says publicly that in the event that the recipient disagrees with WCA, the recipient can voice his or her disagreement with the decision and request a second opinion. But nowhere does the proposed regulation create any right or procedure for requesting a second opinion. The proposed regulation also says absolutely nothing about the possibility of obtaining such an opinion, or what is to be done once it has been obtained. For example, if the first WCA opinion is that the recipient is not disabled and the second opinion is to the contrary, which opinion controls? Moreover, is the second opinion the only way to challenge a conclusion that someone is not disabled? In other words, if a person's treating physician strongly supports the assertion of disability, can that opinion be used to rebut the WCA decision? Nowhere do the regulations afford any weight to treating physician reports nor how they are factored into the overall equation.

Most importantly, the regulations are silent as to how to resolve disputes. From the Department's point of view, does the second opinion control, or does the DPW worker (or the MPP team) have the final say about which evaluation to choose? May the recipient challenge both opinions and bring in the opinion of his treating physician, even though the treating physician was not retained to perform the WCA? What if the WCA physician decides that the answer for the recipient's bad back (one of the leading causes of disability among the TANF population, according to DPW) is physical

therapy (PT), but the treating physician is of the opinion that PT was tried previously and is too dangerous because of the recipient's heart condition? What if the Medicaid HMO refuses to pay for the PT, or the PCP won't request it? Who then decides? Does the treating physician decision control automatically, or does the WCA opinion control? Or does the question get referred to the MPP, which apparently does not have medical expertise at its disposal? These are not rhetorical questions -- snapshot decisions by doctors who see the recipient only once will undoubtedly create controversy, and issues of appropriate treatment can be extremely delicate and the stakes may be high.

Standard for exemption from work requirements

Putting aside these difficult questions, let us look at the standard that DPW intends to use to adjudicate disability. Previously, DPW gave physicians EAF forms to fill out where they could check one of four boxes that indicated whether the person was permanently disabled, temporarily disabled, or was not disabled. See Exhibit 4. If the recipient did not agree with the decision of the doctor, she could either take the form to another doctor, or acquiesce.

Now, however, DPW has chosen a process that is at least potentially more adversarial. Under the proposed regulation, the recipient's impairments are measured to determine whether they are disabling by a WCA doctor using "accepted medical standards, as well as standard framework and method of analysis." (Sic) See WCA definition, subparagraph (ii). Aside from the unintelligibility of the phrasing, according to DPW, the "standard framework and method of analysis" will be the most recent edition of the AMA's Guides to the Evaluation of Permanent Impairment (Fifth Edition 2001). Such an approach has several problems.

First, by its very title, the Guides deals only with "permanent" impairments, even though DPW, following state law, 62 P.S. 405.1(a.3)(1), must recognize both temporary and permanent impairments. Second, the Guides are a tool for the evaluation of the severity of a particular impairment or impairments — they do not set out a definition of disability and, in fact, the Guides eschew that role.

> "The Guides is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the Guides criteria do not measure work disability. Therefore, it is inappropriate to use the Guides' criteria or ratings to make direct estimates of work disability."

Guides at 9. For example, the Guides separate breathing impairments, such as asthma, into four groups — 0%, no impairment; 10-25%, mild impairment; 26-50%, moderate impairment; and 51-100%, severe impairment. Guides at 107. All but the first group obviously have some degree of limitation — the Guides do not take a position as to which level of impairment means disability, but rather they merely lay out the various functional groups for policy makers to choose from in defining disability. "[I]mpairment ratings are not intended for use as direct determinants of work disability." Guides at 5. The Guides merely afford physicians a tool to evaluate impairments of different levels of severity, scoring them in ranges.

The DPW regulations do not say at what level a recipient is to be considered unable to work; in fact, the proposed regulation are silent on the subject. DPW refuses to make this choice, however. Instead, the Department tells us that the decision of disability will be left up to the companies that successfully bid on the WCA contract, using the criteria in the Guides.

This is not satisfactory rulemaking and is legally unacceptable. Allowing private entities and even individual doctors to set the actual definition of disability is an unlawful delegation of executive power. DPW simply must give more guidance to examining physicians as to what standards it plans to have them use. The delegation to private medical contractors and a heavy incidence of of terminations led to a Massachusetts court enjoining the state's TANF agency from continuing the arrangement. Thibault v. Dept. Of Transitional Assistance, C.A. No. SUC 97-04760B (Super. Ct. 1997). Auditor General Casey noted the high denial rate in his letter to Secretary Houstoun, urging DPW "tp learn from the Massachusetts experience and avoid not only risks to TANF families but also potentially costly litigation." Letter of November 20, 2001, attached, Exhibit 6.

Essentially what this rulemaking does is grant the successful bidders on the WCA contract and the publishers of the Guides the power to determine who continues to get TANF benefits. In such a system, the citizens of Pennsylvania find themselves in a situation where they have no say as to who is considered disabled and who is not. This is clearly an unlawful delegation of power, not to an executive agency (the usual case), but even more remarkably, to private agencies that have no mechanism for public input.

DPW may say that the standard is being left intentionally vague because the *main* purpose of the WCA is to develop a service plan aimed at rehabilitation. If DPW were willing to say that that was the *only* function of the WCA, that might be a defensible position. However, as noted previously, the consequence of being rejected from MPP because of the WCA is that a person will be referred to WPP, where a perceived failure to comply with the rigid 30-hour work requirement can lead to a full-family sanction and where rehabilitative services are not envisioned. In short, the standard of disability used will have serious implications for those being evaluated.

Failure to develop procedures for families with disabled members

Next to disability of the adult head of the family, the most common reason we encounter as to why TANF recipients in Pennsylvania cannot work is the disability of a child or other family member. National data from the study of TANF populations in different states suggests that this is a widespread problem. Danziger, S., et al, Barriers to the Employment of Welfare Recipients, (Poverty Research and Training Center, U. Of Michigan 2000), available at http://wwwssw.umich.edu/poverty/wesppam.pdf; LeRoy, B., et al, Welfare Reform and Families Whose Children Have Disabilities, (Skillman Center for Children, Wayne State University 1999). Despite the prevalence of this barrier to employment, the proposed regulations do not have any mechanism for evaluating and assisting families with a member who is profoundly disabled.

For example, many families have children who suffer from severe mental retardation, who cannot be left alone. As these children mature, they become too old for the child care system, which is

primarily designed for preschoolers, and their parents often find that they must provide daily care and a stable living arrangement. Even though they can theoretically work a few hours per day, parents of such children often find it difficult to hold down a permanent, full-time jobs, because they must be free to leave to care for their child on a moment's notice and they must be home to receive their child when school is dismissed or on the many days when there is no school. School holidays, vacations, summer vacation, and early dismissals, let alone medical emergencies and ongoing treatment, make such parents unreliable employees at best. Still other parents have children who must be attended at all times and have no ability to work. Depending on the medical and behavioral issues involved, child care is often unavailable.

The WCA as written is not designed to evaluate and assist in such situations. The WCA definition requires that the WCA be performed by a physician or psychologist, who is to perform an "independent medical, *vocational* or *functional evaluation, or combination of these*." (Emphasis added.) Neither a physician nor a psychologist will necessarily be steeped in the availability of child care for a disabled child,[2] although a doctor who knows the child well and can give a longitudinal view of the child's condition could provide valuable evidence to someone qualified to assess the situation. The problem is that the regulation as proposed does not make it clear if physician input is to be sought in such cases and if it is, who is to decide and based on what standard. All that the WCA definition says is that the WCA may or may not require an examination of the client, *but says nothing about examining the child, or assessing his or her needs.*

The definition of the WCA concludes by stating, "The WCA will always include an evaluation of existing documentation of the good cause situation." Given what has been said earlier about the unsuitability of a physician evaluation of social factors, such as education or child care, which is clearly beyond a physician's expertise, it is unclear what DPW proposes to do. It is also unclear whether the physician's evaluation of the situation is to be followed by the welfare department personnel, especially if the evidence being given is not particularly germane to a physician or psychologist. In other words, the caseworker might defer to a medical judgment, but what about opinions that are not medical? Again, the regulations need to be much more clear about this difficult issue. Physicians and psychologists simply do not have any special expertise in vocational or even functional evaluations.

Failure to develop procedures for Extended TANF recipients with other employment barriers

As lacking as the procedures set out in the regulations are for families in which there is a disabled family member, they are even more deficient for persons with other barriers. Consider the following situations.

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[2] Current practice supports the need to be clear that doctors may play only a limited role in such cases. Frequently we see recipient families with disabled children told to produce documentation of a child's disability and the unavailability of appropriate child care from the child's physician. Documentation of disability is often not necessary, since the child is often receiving SSI on the basis of disability, and doctors are often understandably reluctant to offer their opinion as to the availability of child care in a particular community.

One basis for exemption from WPP and enrollment in MPP is lack of child care for a child under age 6. Proposed § 141.51(a)(2)(i)(B). While such a person may be completely unaffected by disability, she is required to cooperate with a WCA, in which, if we read the proposed regulation as written,[3] she will be examined by a doctor or psychologist. Proposed § 141.51(a)(2)(ii).

Aside from the reasons for an exemption, an adult could have "good cause" for not being able to meet RESET/employment requirements. Indeed, an adult who has reached her 60-month time limit may have multiple barriers to employment in addition to health and domestic violence: low education levels, limited English proficiency, learning disabilities, lack of stable housing, little work experience or skills, or lack of transportation, to name but a few.[4] Will a physician or psychologist evaluate these barriers and their combined effect? Will Extended MPP have the resources and regulatory authority to offer remedies that address their needs?

Finally, DPW should not foreclose the possibility that a person determined to be "exempt" should not have to participate in Extended MPP in order to continue receiving benefits. What about a person who is so sick, infirm or disabled that program participation is not possible? Recently, a service provider related to us the story of a person whose TANF time limit is approaching whose teen-age son has cancer and is rapidly deteriorating, and she is unable to leave him. The Extended TANF regime should be flexible enough to allow a mother to be excused from compliance with MPP.

Failure to provide for child care and other supportive services as part of the MPP package

Some of the activities that are part of the Extended MPP service plan will undoubtedly be treatment and rehabilitation activities that, although extremely necessary, are not "work activities." As such, under present regulations, these activities are not supported with child care and other necessary supportive services. (The Time Out MPP program pays for such supportive services, but exists and operates without regulatory authority.)

If parents are to be served under Extended MPP, appropriate child care and transportation must be provided. Mental health services and drug and alcohol counseling and treatment, both of which can be extremely time consuming, require child care, if parents are to participate. Parents should not have to leave their children unsupervised in order to get the services they need.

Address the Needs of Parents with Limited English Proficiency (LEP)

DPW has acknowledged that people with disabilities and survivors of domestic violence need

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[3] DPW has informed us that it has no intention of using physicians for some such determinations, but the proposed regulations give no indication as to when physicians will be used and when they will not be used. Read literally, they are to be used in all cases and are charged with making all final decisions.

[4] See generally Goldberg, H., Improving TANF Program Outcomes for Families with Barriers to Employment (Center on Budget and Policy Priorities January 22, 2002), available at http://www.cbpp.org/1-22-02tanf3.pdf.

additional help and may have trouble leaving TANF within the prescribed time-limit. Unfortunately, no such recognition is given to LEP parents, despite the fact that many have not had the opportunity to use their time on TANF to participate in English as a Second Language (ESL), vocational training, job readiness, or work experience programs that enhance their preparation for moving from welfare to work. Whereas DPW has directed substantial resources toward creation of a wide range of training programs aimed at moving people on welfare to work, such programs have generally been foreclosed to LEP persons. No vocational training programs have been offered in languages other than English. Nor has DPW funded ESL programs for LEP persons, so to enable them to gain the English proficiency needed to participate in English language vocational training programs. Absent DPW funding of ESL programs, LEP persons on TANF are effectively barred from participating in ESL programs of the intensity level needed to significantly advance in English proficiency. Those programs available for free or at low cost typically provide only four hours per week of instruction.

Title VI of the Civil Rights Act of 1964 requires DPW to ensure that LEP persons may meaningfully participate in TANF programs. As a result of a review by the Office of Civil Rights (OCR) of the Department of Health and Human Services, DPW is now devising policies aimed at achieving compliance with Title VI requirements towards LEP persons.[5] However effective such policies will be in implementing future improvements at welfare office and welfare-to-work programs for LEP parents on TANF, they have not addressed the fact that thousands of LEP parents, many approaching the five year time-limit, have been denied the opportunity to participate in training programs.

As the five year time-limit approaches, DPW should take people who lack English proficiency "off-the-clock" and provide them with opportunities to enroll in programs which enhance their self-sufficiency and assist them in overcoming language barriers to employment, such as ESL, job readiness and vocational training programs. At minimum, DPW's "Extended TANF" policy must specifically address the particular needs of families with LEP parents who reach the five-year limit, providing sufficient flexibility to assure that LEP parents may engage in training programs to which they never had access. Given that LEPs currently approaching the time-limit did not have the opportunity to engage in programs which could enable them to enhance their skills and prepare to move from welfare to work, specific accommodations under the time-limit are required by Title VI, which holds that "affirmative actions must be undertaken to overcome the effects of prior discrimination." 45 C.F.R. § 80.3(b)(6)(i).

Exempt TANF families with permanently disabled immigrant parents from the Five Year Lifetime

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[5] Over the past two years, CLS has submitted ten civil rights complaints with the OCR on behalf of individual clients who have faced language barriers at welfare offices and welfare to work programs throughout Philadelphia, in violation of Title VI. The individual complainants represent diverse cultures and languages, including Spanish, Serbo-Croatian, Russian, Khmer, Cambodian, Arabic, and Vietnamese. CLS is also representing the Refugee Communities Coalition of Philadelphia (RCCP) in a more comprehensive OCR complaint against DPW filed on January 10, 2001. RCCP is a coalition of eight mutual aid organizations serving refugees and immigrants from Cambodia, Russia, China, Vietnam, Ethiopia, Laos, and other countries. See Monica Rhor, "Refugee Groups say Pennsylvania Fails to help Non-English speakers," Philadelphia Inquirer, January 11, 2001. A copy of this complaint is available on CLS' website, www.clsphila.org.

Limit

Some permanently disabled legal immigrants -- those arriving after August 22, 1996 -- are on TANF rather than SSI solely because of SSI restrictions imposed against non-citizens by federal law. Immigrants already ineligible for food stamps and SSI due to PRWORA's restrictions face especially grave threats of extreme hunger and poverty if they lose their TANF, since this help may be the only subsistence benefit for which they qualify.

The purpose of the time-limit is to move parents from welfare to work. It would be unfair to subject permanently disabled parents (and their families) to the TANF time-limit at all. The time-limit does not run for families of citizen parents on SSI, as it would be nonsensical to require persons who have been determined to be permanently incapable of employment to move from welfare to work. Similarly it should not run for families of immigrant parents who would qualify for SSI but for the restrictions against non-citizens.

"Extended TANF" as currently proposed aims either to place an employable person into work or community service; to move a temporarily disabled person toward work by addressing their barriers to employment; or to move a permanently disabled person onto SSI. This set of options clearly does not address the status of those permanently disabled immigrant parents on TANF who are ineligible for SSI due to immigration status.

If the single parent (in a one parent household) or both parents (in a two parent household) is permanently disabled, as determined by the State's Medical Review Team, yet ineligible for SSI due to non-citizen status, fairness dictates that this family not be subject to the time-limit.

Remedy: (1) adopt an option for pursuit of SSI and other benefits for the most severely disabled; (2) carefully delineate the design of WCA, resolve inconsistencies, explain the role of the examining physician and other decision makers and protect the rights of recipients to second opinions and other procedural protections; (3) adopt a clearcut standard of temporary and permanent disability, using a rating of 50% or greater as a benchmark; (4) insure that WCA provides clear and effective procedures for families with disabled members; (5) design Extended MPP to afford flexibility and common sense in the development of service plans; (6) explicitly provide for child care and other supportive services for those participating in MPP related activities: (7) explicitly address the needs of those with limited English speaking proficiency in the Extended TANF process; (8) address the needs of permanently disabled noncitizens who are not be eligible for SSI.

141.52 Definitions -- Vocational Assessments

A similar lack of specificity plagues the vocational assessment given to those assigned to the Work Plus Program, which requires 30 hours per week for continued eligibility. We support the idea of an assessment prior to assignment but the definition of the assessment and the WPP leaves much unsaid. Nowhere does the regulation explain who will perform the assessment and how the recipients' input will be obtained, despite the express command of the Legislature, 62 P.S.

§405.1(a.2)(4), to involve the recipient in the process of assessment (indeed, we made this comment concerning of lack of recipient involvement in the assessment process, in the earlier TANF package). Moreover, such an assessment is a complex task, that should involve measuring a person's literacy and numeracy, which is not the same as the proposed regulation's measurement of educational level, which merely measures the highest grade completed. No mention is made how any of the factors mentioned in the proposed regulation will be measured. In patent disregard of the requirements of the Americans with Disabilities Act, there is no mention of a person's physical or mental disabilities. Even if person is not fully disabled, so as to preclude all employment, the ADA calls for the assessment of known disabilities that may effect the ability to perform particular work and the need for reasonable accommodation. Moreover, such an inquiry is good policy — it makes no sense to assign people to jobs and work activity that they are incapable of doing, and which may endanger their health or that of their co-workers.

Finally such assessments should be reduced to written form, so that they can reviewed, and where necessary, corrected or augmented by recipients. If recipients are to receive serious and helpful assessments, there must be some order to the process.

Design of WPP

Despite the fact that the WPP will be the most intensive work program that the Department has, the regulations say virtually nothing about its design and operation. For example, the proposed regulation says nothing about how the 30 hours of work and work activity will be structured. Nothing is said about whether the recipient is supposed to come up with 30 hours of activity or whether they are merely assigned to existing activities or prepackaged program. Not only do we object to the 30 hour minimum, *see infra,* but, whatever the level of participation ultimately selected, we urge the Department to design the WPP so that it addresses individual barriers to employment in close consultation with recipients so that, for example, a person with limited English skills could take a course in English as a second language, while another person who had previously done heavy work (i.e. lifting 50 pounds or more) but who now has a health problem, could be trained to do sedentary work. Nothing in the proposed regulation speaks to choosing the mix of work and work activities that will comprise the WPP assignment, nor how a recipient may have input or voice disagreement with proposed activities.

We are also extremely troubled by the Department's reluctance to use existing work opportunity programs to help those reaching their 5-year limit. Through a program it calls its "Paid Work Experience" program, DPW has already established a program that provides paid employment for unemployed recipients with substantial barriers to employment. Such a program, when properly designed and implemented, is invaluable in providing real on the job training for the hard to employ. Not only is DPW not planning to use this program for WPP, but it has announced that it will continue to enforce its unpublished policy that limits people to no more than 6 months of Paid Work Experience in their lifetime. Such an inflexible rule is unwise, legally unauthorized and illegal. The result also makes for bad policy, excluding a successful paid work option and relegating all recipients to a costly and ineffectual "workfare" option.

Another important fact that the proposed regulations do not adequately reflect is the fact that many of those reaching the 60 month threshold are already working, according to DPW data. Care must be taken to augment their effort, rather than undermine it. Given that the amount of the grant such workers receive is small, the number of hours of workfare that can be required is going to be very small. Finding and scheduling such work in such a way as to avoid interference with existing employment should be the highest priority. In fact, we would propose that those with significant work should be in a separate program, given that their needs and the constraints on their time are so different from those of other recipients. Such individuals are already working hard to become self sufficient, and should be given the skills and support to continue to make progress — they do not need a program that is aimed at giving people an intensive work experience. Indeed, the Department already has yet another (unregulated) program for helping working recipients retain their current positions and to advance in their careers — that program is called the JRARRE (Job Retention, Advancement and Rapid Re-Employment) program, and it offers "non-assistance" supports to TANF and former TANF recipients, to keep them employed and help them become self sufficient. The interplay of JRARRE and Extended TANF should be addressed in the proposed regulations, to avoid confusion and conflicting obligations. Given that unpublished DPW rules generally preclude participation in more than one welfare-to-work program at the same time, it is essential that the two programs be explicitly coordinated.

The 30-Hour Work Requirement for WPP Is Both Illegal and Bad Policy

Proposed § 141.51(a)(3)(ii)(A) provides that if an adult seeking Extended TANF is assessed as able to comply with the RESET (i.e., work) requirements, the adult must participate in "a minimum of 30 hours per week" of work activities. Similarly, "Work Plus Program" ("WPP") is defined as providing work activities for "at least 30 hours per week." Proposed § 141.52.

Although not explained in DPW's comments to the proposed regulations, the proposed requirement of a minimum of 30 hours of work activities doubtlessly is driven by DPW's concerns about meeting its work participation rates under TANF. Beginning in Fiscal Year 2000, a TANF recipient counts towards the State's work participation rates for "all families" if he or she is engaged in at least an average of 30 hours of work activities per week. 42 U.S.C. § 607(c)(1)(A). Notably, DPW has not had any problem meeting its work participation rates since TANF went into effect.[6]

Putting aside that a 30 hour work requirement is not necessary for DPW to meet its work participation rates, it is not legal. It is not consistent with Act 35's requirement of 20 hours per week of work activities. Moreover, an inflexible 30 hour per week requirement will violate the Americans with Disabilities Act ("the ADA") for persons with disabilities who are unable to work those hours.

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[6] Even though the percentage of people working the is less than the work participation rate set out in the statute, the "caseload reduction credit" has greatly lowered the adjusted goal. See 42 U.S.C. § 607(b)(3). For instance, in Fiscal Year 1999, Pennsylvania's caseload reduction credit was 34.1%, reducing the work participation rate from 35% to 0.9%. Pennsylvania had 16.2% of its TANF recipients meeting the federal work requirement, easily satisfying the 0.9% goal. See DHHS, Ofice of Planning, Research and Evaluation, TANF Reports, TANF Participation Rates, Tables 1B and 1A, located at http://www.acf.dhhs.gov/programs/opre/particip/index.htm#participation.

And in addition to being illegal, the 30 hour requirement is bad policy, because many TANF recipients cannot comply with it.

The 30-hour requirement violates Act 35

DPW's attempt to add a 30-hour work requirement for Extended TANF is in stark contrast with the Welfare Code. 62 P.S. § 405.1(a.2)(6). The applicable provision is the following:

> A recipient who has received assistance for twenty-four months, whether those months are consecutive or interrupted, must work, participate in subsidized employment, work experience, on-the-job training, community service or workfare **for an average of at least twenty hours per week.** Information indicating noncompliance with the minimum twenty-hour per week requirement shall be cause for a review of eligibility.

62 P.S. § 405.1(a.2)(6)(emphasis added). Given that this statutory provision is clearly applicable by its terms to persons working for Extended TANF, DPW's 30-hour requirement is legally indefensible.

Moreover, it should be noted that proposed § 141.51(a)(3)(A) requires "a minimum of 30 hours per week" of work activities. This language is inconsistent with the statutory mandate of an **average** of at least 20 hours per week. 62 P.S. § 405.1(a.2)(6). The statutory language recognizes that some persons who are unable to meet the minimum number of hours in one week (such as because a work site is closed for holidays) may offset that shortage by working more hours in another week.

Over the past several years, DPW has circumvented the 20-hour per week minimum of Act 35 in numerous contexts. Virtually all its welfare to work programs are designed to require more than 20 hours for eligibility.[7] In its prior set of TANF regulations (Regulation #14-472; IRRC #2224), DPW attempted to circumvent the statutory 20-hour minimum by requiring that TANF recipients "maximize and maintain" employment. See, e.g., proposed § 165.31(b)(2).

The IRRC determined that the expansive, extra-statutory language which DPW included in the prior regulatory package is inconsistent with the 20-hour requirement of Act 35 and recommended that the requirement to "maximize employment" be deleted. Comments of the Independent Regulatory Review Commission on Department of Public Welfare Regulation No. 14-472 — TANF Program — December 20, 2001, at 1-2. DPW's attempt to much more directly override the 20-hour requirement in this package is surely even more objectionable.

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[7] A 25-hour per week work requirement has been codified in the subsidized child care program. See 55 Pa. Code § 3040.34(a)(3)(i). Although not implemented by regulation, DPW's "Time Out" program requires 30 hours per week of work activities for a person to qualify by working. And in its contracting for employment and training programs, DPW has mandated that its contractors provide 30 hours per week of work activities; recipients are then forced to comply with these additional hours above the 20-hour minimum (for which they seldom receive pay) when participation in these programs is written in to their AMRs.

The rigid 30-hour requirement violates the ADA

In our comments to proposed Regulation # 14-472, we set forth the ADA principles applicable to DPW's administration of its TANF program, as laid out in a policy guidance issued by the Office of Civil Rights ("OCR") of HHS (our comments are attached, Exhibit 7).[8] While most people with disabilities will be in the MPP program (i.e., those whose untreated disability seems to preclude full time employment), WPP will still have a considerable number of people who have a "disability" as the ADA defines it, namely, an impairment that interferes with a major life activity, even though it may not preclude the person from all employment. For example, a person with an exertional limitation caused by a bad back or a heart problem might be unable to work in a strenuous job but may be able to fill a less demanding position.

The ADA principle implicated by the 30-hour requirement is that where necessary to avoid disability discrimination, a public entity is required to make reasonable modifications in policies, practices, or procedures, unless these changes would fundamentally alter the nature of the program. 28 C.F.R. § 35.130(b)(7); see OCR ADA guidance at Part D.2. In the case of the appropriate person with a disability, this could mean reducing the number of required work hours to less than 30.

DPW has already acknowledged this principle in another context. When presented with an ADA challenge in the subsidized child care program, which required 25 hours of work per week in order to qualify, DPW modified its position to provide that a parent could have "good cause" for not satisfying the 25-hour work requirement if the reason that they could not perform 25 hours was due to the disability of the adult or a child. DPW Temporary Exception Policy (attached, Exhibit 8). While this "good cause" exception was written to apply only to a parent generally able to work 25 hours per week who is occasionally unable to meet those hours because of disability, the same ADA principle applies to a TANF recipient who as a rule cannot work the requisite number of hours. Without a modification to the 30-hour work rule in the Extended TANF program, persons with partial disabilities (or adults caring for children with disabilities), will be excluded from participation in the program.[9] This is simply impermissible.

The 30-hour requirement is bad policy

When the state legislature selected a 20-hour work requirement, it apparently recognized that TANF recipients face competing demands that make more hours of employment difficult. During the first

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[8] The OCR ADA guidance is available at http://www.hhs.gov/ocr/prohibition.html.

[9] Notably, under Title I of the ADA (the rules applicable to employers), an employer must allow an employee with a disability to work a modified or part-time schedule as a reasonable accommodation, absent undue hardship. Equal Employment Opportunity Commission, Enforcement Guidance on Reasonable Accommodation (eff. March 1, 1999), Q&A 22, attached, Exhibit 9 and available at http://www.eeoc.gov/docs/accommodation.html#12 (citing Ralph v. Lucent Technologies, Inc., 135 F.3d 166, 172 (1st Cir. 1998)). If DPW were not required to modify its 30-hour requirement in appropriate cases, that could create the incongruous situation where an employer would be legally required to modify its attendance requirements, but DPW could find the TANF recipient in non-compliance with the requirements of the Extended TANF program.

years of welfare reform implementation, these difficulties have played out in practice, with many TANF recipients not working close to 30 hours per week.[10] They have worked fewer hours despite obvious financial incentives to work more and DPW-created disincentives to work less (i.e., DPW's unofficial policies requiring more than 20 hours per week).

In our experience, there are many reasons that TANF recipients' work hours are often closer to 20 than 30 per week. These include:

- Demands of bureaucracies with which TANF recipients often have business, such as public housing authorities, family court, and the county assistance offices, which often demand visits (and waits) during work hours. (Persons with higher income do not have to make time for these bureaucracies.)

- Demands of being single parents, such as children in trouble or requiring medical care (or even typical parenting requirements such as helping children with homework).

- Long commutes to suburban jobs on public transportation (which can easily reach 3 hours per day), for which they get no credit toward their minimum numbers of work hours.

- Second or third shift jobs, which interfere with a normal sleep schedule and reduce opportunities to care for children and/or work additional hours during their waking times. (Low wage workers are more likely to work these shifts.)

- Missing work for illness, holidays, or personal needs (absences for which non-TANF workers usually are not required to make up time). (In better jobs, workers often are afforded paid time off for sickness, personal needs, vacations, or religious holidays.)

- In today's economy, many employers only staff on an as needed basis, paying workers for less than full time hours. Indeed, for a variety of reasons, many employers avoid taking on a large number of more expensive, full time employees. Frequently, these jobs pay enough so that a 20-hour job paying $10 per hour is more lucrative than a 30-hour job paying $6 per hour.

We have repeatedly seen situations such as these prevent many a single parent from working the additional hours, even where more hours would be in a person's financial self-interest. It is particularly unlikely that the cohort that first reaches the 60-month TANF time limit, whom virtually all agree will have the most severe employment barriers, will be able to routinely work 30 hours per week. For them, the 30-hour requirement essentially renders the safety net of Extended TANF illusory.

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[10] In Fiscal Year 1999, for example, the average monthly number of work hours by Pennsylvania TANF recipients was 22.8 (the national average was 27.5). See DHHS, Average Hours of Participation, Excluding Waivers, for All Adults Participating in Work Activitiesin Work Activities, Table 5, attached, Exhibit 10, and located on HHS's website at http://www.acf.dhhs.gov/programs/opre/particip/index.htm#participation.

Moreover, the 30-hour minimum also creates an "all or nothing" approach to work that makes no sense. If a person, trying as hard as she can, can find a job for 25 hours per week, should she be treated the same as a person who is not meeting the work requirement?

The Proposed Regulations Should Require Compliance with the Fair Labor Standards Act and other Employment Laws

As explained in a U.S. Department of Labor ("DOL") guidance entitled "How Workplace Laws Apply to Welfare Recipients" (May, 1997, revised February, 1999), available at http://www.dol.gov/asp/w2w/welfare.htm, and later codified in the TANF regulations, 45 C.F.R. § 260.35(b), federal employment laws apply to TANF recipients in the same manner as they apply to other workers. These laws include the Occupational Safety and Health Act, unemployment insurance, and nondiscrimination laws. However, the most important federal law, in light of DPW's desire to require TANF recipients to work in return for small welfare grants, is the Fair Labor Standards Act ("FLSA"), which requires the payment of minimum wage for hours worked. See also 62 P.S 405.2 (b). Despite the clear applicability of these laws to the TANF program, none of these employment standards are set forth either in Regulation # 14-472 or in this package.

We understand that DPW anticipates that the vast majority of Extended TANF recipients will meet their work requirement through workfare,[11] whereby they are compensated for their work only with their welfare checks.[12] Particularly for those typical families with smaller grants ($316 or $403 per month for families of two and three respectively), DPW cannot require 30 hours of work (or even 20 hours) without running afoul of the FLSA minimum wage of $5.15 per hour. (A family of 2 would be able to participate in 14 hours per week of workfare; a family of 3, 18 hours per week. Of course, if the Department collected child support for them, their net TANF payment would be less and therefore their work obligation would be substantially less.)

DPW has acknowledged its requirement to comply with the FLSA. It has set forth its procedures for so doing, including subtraction of child support from the portion of the TANF grant which can be worked off, in Operations Memorandum 99-07-07 (July 13, 1999)(attached, Exhibit 11). Similarly, prior DPW regulation, 55 Pa. Code § 166.21, although using antiquated procedures no

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[11] By workfare, we mean the generally accepted usage of requiring recipients to work in return for receiving their welfare check, working off their check at a rate equal to the minimum wage.

[12] DPW calls its program "community service," but if DPW continues its current approach, the program is more accurately characterized as "workfare." See 62 P.S. §402 (defining "community service"as an unwaged activity arranged by the recipient). Whatever the label, the design of the program to require Extended TANF recipients to work off their benefits, rather than to pay them a wage, is unfortunate and ill-considered, as it means that the participants will not be able to draw down federal Earned Income Tax Credit to supplement their earnings. It also means that there can be no uniformity of work obligation, as the amount of work required depends on the size of the welfare grant, which in turn depends on the size of the family, as well as the receipt of income from other sources (e.g., child support) that reduce the net amount of the grant. Faced with an unpredictable work obligation, many potential sponsors find it too difficult to design a meaningful work experience, and instead assign recipients only menial, unskilled and repetitive tasks, that require little continuity or supervision. These positions generally do not impart skills or provide training and are hardly the way to overcome barriers to employment.

longer applicable, also requires a work effort commensurate with the minimum wage, but it is unclear whether the Department considers these regulations still in effect, since it has not seen fit to update them. What is clear, however, is that the mandatory federal and state standards are applicable and must be set forth in the TANF regulations, so that they are easily available to the public and fully enforceable.

Remedy: (1) redesign the Vocational Assessment procedures to be much more explicit and to afford recipients that right to have input in the assessment process and the protections they are entitled to under the Americans with Disabilities Act (ADA); (2) make explicit use of paid work experience, without the artificial limits currently being imposed and design a program appropriate for those who are already working; (3) eliminate the 30 hour requirement in the Extended TANF program in favor of one consistent with law; (4) insure compliance with minimum wage law.

§ 141.51(b) (2) Eligibility of Children for General Assistance

This section of the proposed regulations states that an entire family is ineligible for GA if the TANF adult fails to obtain a Work Capacity Assessment or to comply with the applicable MPP service plan or the domestic violence plan. This language violates the provisions of the Public Welfare Code, which specifically states that children are eligible for GA until age 18 (or, if they are in secondary school, up until age 21). 62 P.S. § 432(3)(i)(A). The Public Welfare Code only authorizes cutting off children's cash assistance for their parents' misconduct in one circumstance: if the non-exempt parent is from the work requirements and willfully and without good cause does not satisfy the work requirements. 62 P.S. § 432.3(a). In other situations where a parent fails to satisfy requirements, only the offending person is ineligible.

DPW bases this position on an erroneous interpretation of the law. It argues that recipients are required to apply for "federal benefits" as required by 62 P.S. 432.21(a). It further argues that, despite the statute's reference to federally financed and administered programs such as SSI (Supplemental Security Income, paid for and administered by the Social Security Administration) or RSDI (Retirement, Survivor's and Disability Insurance, also administered by SSA), that the state run (and partially state financed) TANF program should be considered a federal benefit.

First of all, even if the Department has authority to define TANF and extended TANF as "federal programs" that GA applicants must first seek, there is no statutory authority for barring otherwise eligible children from GA if their parents do not cooperate in seeking those benefits. The statute requiring such cooperation bars only the "person" who fails to cooperate from receiving benefits. 62 P.S. § 432.21(a) ("Any person who, without good cause, fails to cooperate with the department in an effort to establish such person's eligibility for SSI, RSDI or other federal benefits shall have assistance terminated ....")

DPW attempts to bolster its "TANF first" argument by making a subtle but important change in the regulations, by proposing what it claims to be a "technical amendment," changing the requirement from applying for a "federal benefit" to a "federal program." The significance of this "technical" amendment is twofold. First, it is a departure from the statute, which requires that applicants and

recipients apply for "federal benefits," that is, programs administered and paid for with federal revenues, such as SSI. While reliance on more generously funded federal benefits is exactly what is intended by the statute, since if a person receives state aid in the interim, the individual must reimburse the state out of his or her federal benefits when those benefits are received. 62 P.S. § 432.21(b). TANF, however, is simply not such a "federal benefit" — it is a block grant of money paid to the states to be used to benefit needy children, in whatever way the state wishes to do so. See generally, 42 U.S.C. § 601, *et seq.* The money is distributed by the state after the state commingles it with state money that it is required to spend as part of its "Maintenance of Effort," 42 U.S.C. § 609(a)(7). It is in no way a "federal benefit" for individuals.

Apparently acknowledging that TANF is not a "federal benefit," DPW now attempts to deviate from the wording of the statute and change the regulation to require that applicants and recipients avail themselves of "federal programs," a categorization which TANF arguably fits under.[13] However, this brings us to our second point, namely that attempting to recast the statutory requirement as a n obligation to apply for any federally funded program requires every applicant or recipient to apply for a vast array of federally funded programs, such as public housing, food stamps, school breakfast and lunch, Head Start, WIC, etc. While application for such voluntary programs may sometimes be advisable, it is by no means mandatory, nor should it be. DPW has no intention of making such a requirement, instead, it is only driven by its desire to require TANF instead of GA, which the state statute never intended. Indeed, if the state statute had so intended, reimbursement from all the federally funded programs would have to be sought, under §432.21(b), a result that is clearly absurd.

Of course, a "person" who does not meet a definitive condition for TANF solely because of her refusal to cooperate in establishing eligibility for TANF is also ineligible for GA. 62 P.S. § 432(8). But this provision only authorizes disqualification of the "person," so refusing to cooperate . It does not provide any authority for disqualifying children, who are not responsible for establishing eligibility for TANF.

In sum, then, DPW lacks the authority to deny the GA benefits of children for their Parent's misconduct, if the parent is not a mandatory work participant. This, of course, is not a surprising result: punishing children for the misdeeds of their parents is an extremely harsh result, especially where the parent is unable to work. It is not surprising that the General Assembly has not authorized such a draconian measure.

Moreover, cooperation with the Work Capacity Assessment, Maximizing Participation Program, or a domestic violence service plan are not definitive conditions of TANF eligibility, so a parent who does not cooperate with these cannot herself be denied GA (if otherwise eligible) on this basis. Although the Public Welfare Code and its implementing regulations do not specifically define what constitutes a "definitive condition," the definition can be readily inferred. Work requirements cannot

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[13] Even this position is undercut by the existence of the "Time Out" program. As we have already seen, the Time Out program takes people off the 60 month clock by funding their assistance with state Maintenance of Effort dollars. If DPW was correct in its assertion that TANF is a federal program that must be accessed first, before any state funds are utilized, there would be no way to administer the Time Out program, since recipients would always be required to immediately reapply for the federally funded part of the program.

be a TANF "definitive condition" because all statutory and regulatory provisions relating to employment and moving toward self-sufficiency apply equally to TANF and GA recipients. See, e.g., 62 P.S. § 405.1(a.1) (establishing RESET as a program for "recipients of cash assistance").

The only conditions of AFDC (the program referred to in 62 P.S. § 432(8), now of course TANF) that truly distinguish it from GA is that AFDC/TANF requires (1) a deprived child, and (2) a specified relative. This can be seen by comparing the eligibility requirements for TANF with those of GA in 55 Pa. Code §§ 141.41(a) and 141.61(a), which are identical except for the reference in § 141.41(a) to Chapters 151 and 153 (specified relatives and deprivation of support or care). It is these two provisions that determine that a disabled grandmother living with her grandchild receives TANF, whereas her equally disabled neighbor living with an unrelated child receives GA for herself (pursuant to 62 P.S. § 432(3)(i)(C)) and the child (pursuant to 62 P.S. § 432(3)(i)(A)). All work requirements, income and resource rules, and verification rules for these two households are identical, but because of the specified relative and deprivation factors, one receives TANF benefits and the other GA. There are no other rules that distinguish the two programs, and DPW cannot attempt to create new differences that the General Assembly not authorized.

§ 141.61(a)(1)(xii) Disqualification from all cash assistance for failure to meet a definitive condition of eligibility

As discussed above, in our comments under § 141.51(b) (2), DPW has no authority whatsoever to terminate an entire family's cash assistance if the adult fails to meet a "definitive condition" of TANF or Extended TANF eligibility. 62 P.S. § 432(8) only provides authority for terminating the AFDC (now TANF?) of the "person" who fails to meet such a definitive condition. Moreover, as discussed above, DPW has misconstrued what constitutes a "definitive condition," which cannot refer to any work or self-sufficiency requirements, which the General Assembly has explicitly made applicable to TANF and GA recipients alike.

Remedy: Provide for eligibility for General Assistance consistent with state law.

EXTENDED TANF BASED ON DOMESTIC VIOLENCE

We commend the Department of Public Welfare (DPW) for including families with domestic violence in Extended TANF. By doing so, DPW provides domestic violence victims an essential safe haven in the form of additional time to overcome the barriers to self-sufficiency imposed by domestic violence. Extending TANF benefits is also consistent with DPW's adoption of the Family Violence Option (FVO), 42 U.S.C.§ 602(a)(7). The FVO includes procedures to identify victims of abuse in the TANF population, provide referrals to community services, and waive, for as long as necessary, program requirements, **including time limits**, that would harm or penalize battered women and their families. Id. DPW's Domestic Violence/TANF Task Force has developed proposals for implementation of Extended TANF under the FVO.

The Family Violence Option

The FVO was included in the legislation authorizing TANF in response to extensive research findings regarding the relationship between welfare and domestic violence. This research found that a majority of women receiving welfare have experienced abuse, and that victims of abuse look to public assistance as a safety net to assist them in escaping the abuse. At the same time, research also showed that abuse interferes with compliance with welfare requirements, placing women in danger of losing needed benefits, and that welfare requirements themselves can place families at risk of further abuse. For example, batterers who try to prevent victims from gaining independence by interfering with efforts to engage in work and education will interfere with the victim's compliance with work requirements. Support requirements which result in the filing of a support action, disclosure of a woman's address to the batterer, and contact in proceedings to obtain support, often result in, or even facilitate, retaliatory abuse against the woman. As a result, victims of abuse may not be in a position to pursue steps towards self-sufficiency and may need additional time on TANF.

In recognition of the special nature of the barriers facing victims of domestic violence, families with federally recognized time limit waivers based on domestic violence do not count towards the 20% that the state may exempt from time limits on federally funded TANF assistance. 45 C.F.R. § 260.59(a)(2)(ii). Pennsylvania is therefore permitted to address the needs of domestic violence victims without denying other TANF participants the additional time they may need to overcome barriers to self-sufficiency.

DPW must implement Extended TANF for domestic violence victims pursuant to the statutory and regulatory authority promulgated by Congress and the Department of Health and Human Services (DHHS) regarding the FVO. DHHS has adopted regulations governing the FVO which provide extensive guidance on the use of time limit extensions to assist victims of domestic violence. 45 C.F.R. § 260.50 – 260.58, 261.52(b)(1), 264.3(b); see also 64 Fed.Reg. 17741-46 (April 12, 1999) for explanatory comment. DPW's adopted the FVO in its entirety in the state plan submitted to DHHS in January 1997, 27 Pa. Bull. 342 (January 18, 1997)(Optional Certification and VI. 15) and renewed this election in the 1999 state plan, 29 Pa. Bull. 5658 (October 30, 1999)(Optional Certification and section VI 18). This adoption binds DPW to full implementation of time limit waivers as set forth in federal law. Copies of DPW's Optional Certifications are attached, Exhibit 12.

DPW's Domestic Violence/TANF Task Force

Implementation of Extended TANF must also be evaluated in light of the proposals by and DPW's agreements with the Domestic Violence/TANF Task Force appointed by DPW to assist it in implementation of the Family Violence Option. Under the leadership of Carolyn Chester, Director, Bureau of Social Services, DPW, the Task Force includes representatives of DPW's Office of Income Maintenance, and Bureaus of Child Support Enforcement, Operations, and Training as well as representatives of local County Assistance Offices. Advocates knowledgeable about domestic violence and welfare also participate, including the Pennsylvania Coalition Against Domestic Violence, Women's Law Project, Community Legal Services, Community Justice Project, and

domestic violence service providers. In operation since April, 1997, the Task Force has worked diligently to develop procedures for notifying TANF recipients about the Family Violence Option, protecting the confidentiality of domestic violence victims, providing referrals to services, and where appropriate, waiving work, child support, and time limit requirements. Relevant to the Extended TANF regulations is Task Force work on time limit waivers and uniform procedures for all program waivers, which includes waivers of time limits.

Assessing DPW's Regulations Governing Extended TANF for Domestic Violence Victims

While DPW's proposed regulations suggest that it intends to implement Extended TANF consistent with federal authority and Task Force recommendations and DPW representations to that effect, significant provisions are omitted from the limited information provided in § 141.51(a)(1). As discussed below, the regulations fail to include a comprehensive description of: (1) who is eligible for a time limit waiver based on domestic violence, (2) verification procedures, (3) the period of time for which Extended TANF will be granted, (4) the 6 month review and (5) the domestic violence services plan.

Eligibility For Extended TANF Based on Domestic Violence

Proposed regulation § 141.51(a)(1) states that Extended TANF is available for families that include a person who is or has been a victim of domestic violence, but refer in subsections (i), (ii), and (iii) **only** to those who already have past or present child support and work waivers. The regulations do not provide guidance on Extended TANF for victims of domestic violence who:

(1) have or had waivers of other program requirements (including those with a time-out),
(2) are experiencing or have experienced domestic violence, but do not currently have, and did not previously obtain waivers of program requirements, or
(3) will experience domestic violence in the future and need to return to TANF after a period of time off TANF.

Victims of domestic violence in all of these circumstances are encompassed within the Family Violence Option as defined by federal regulatory authority and provision should be made in the regulations for their eligibility. HHS regulations provide that time limit relief should be made available to TANF parent/caretakers who are **currently** experiencing domestic violence; those who have been subjected to domestic violence in the **past** and who are struggling to overcome its effects; and those who are at **risk of future** domestic violence. 45 C.F.R. §260.59(a)(1), (2). Accordingly, states may provide time limit relief where, for example, a "current or prior unstable housing situation creates a need for extended assistance", 64 Fed. Reg. at 17,746, or a victim was "unable to pursue work or child support for any period of time while [she was] on assistance." Id. Time limit relief should also be made "available in the future" based, for instance, "upon [a victim's] current inability to move forward." Id.

We do not believe there is disagreement with DPW on the scope of Extended TANF due to domestic violence. DPW has consistently represented to the Domestic Violence/TANF Task Force its intent

to provide Extended TANF to those with current, past or future domestic violence whether or not they have a current or past good cause waiver or time-out due to domestic violence. Our recommendations for modification of the regulations are therefore consistent with our understanding of DPW's intention and simply represent necessary edits to fulfill this intent.

Providing Extended TANF to those experiencing domestic violence, the effects of domestic violence or at risk of domestic violence, regardless of whether they have or had a good cause waiver or time-out, is essential. Domestic violence victims, like all TANF recipients, have been encouraged to pursue self-sufficiency and have had no prior notice or expectation that extended TANF would be available. They may have chosen not to seek a waiver, but nevertheless been held back from progressing towards self-sufficiency by domestic violence. Moreover, because development of policy and procedures governing family violence option waivers has taken several years, and implementation has not gone smoothly due to the lack of comprehensive training and a single set of clear instructions, domestic violence victims who may have wanted or needed good cause waivers may not have been informed of their availability or been properly evaluated for eligibility. They must not now be deprived of the continuing safety net afforded by Extended TANF. Additionally, Extended TANF should be available to families that first experience domestic violence, and therefore need to return to TANF, after having received five years of benefits. Of course, families that had not previously experienced domestic violence would not have previously received a good cause waiver.

Verification

Although proposed § 141.51(a)(1)(i) states that verification of domestic violence is required, the proposed regulations do not set forth the verification procedure itself. Instead, the regulations only state that those with child support and work waivers are not required to provide further verification. Thus, the proposed regulation is deficient in two respects. It fails to include the verification procedure for those who have not previously provided verification of domestic violence and it fails to comprehensively define the class of individuals who have previously verified and need not produce further verification.

Those who do not have to provide further verification include all who have previously verified. This includes anyone who currently has or previously obtained good cause for **any** program requirement, including those who have verified domestic violence in order to obtain time-out.

With respect to those who must still verify, we recommend the use of a uniform verification form that includes Extended TANF in addition to other program requirements and time-out. Use of such a form has been recommended by the Domestic Violence/TANF Task Force and will make the procedures for Extended TANF consistent with the procedures adopted for support waivers and time-out as well as with recommendations submitted by the Task Force with regard to time limit extensions, waivers of other program requirements, and uniform procedures. As with the support waivers and time-out, this form would be used to accompany any one of the following types of verification:

- Documentation;
- Third party verification;
- Self-affirmation.

In addition, the regulations should clearly state that any one of these types of verification is sufficient to establish eligibility for Extended TANF.

Six Month Review

Consistent with federal statutory and regulatory authority, § 141.51(a)(1)(v) requires 6 month review. However, the regulations do not describe the verification process required at the 6 month review. While discussion between DPW and the Task Force is ongoing and a comprehensive policy on this point has not been finalized, agreement has been reached regarding one point that should be included in the regulations. To the extent that an applicant or recipient has provided verification to support a waiver of any program requirement, DPW has agreed that no further verification will be required at the 6 month review unless circumstances have changed.

Time Period of Extended TANF

With respect to the period of time for which Extended TANF is granted, the proposed regulation fails to: (1) include the general Family Violence Option provision that domestic violence waivers shall be "for so long as necessary," 42 U.S.C. §602, and (2) provide the duration of Extended TANF for victims of domestic violence other than those with good cause waivers for child support or work requirements.

The regulations only provide the time period of Extended TANF for those with past or current child support or work waivers. They do not address the time period of Extended TANF for all of those persons to whom DPW intends to provide Extended TANF. As discussed above, this includes victims of domestic violence who:

(1) have or had waivers of other program requirements (including those with time-out),
(2) are experiencing or have experienced domestic violence, but do not currently have and did not previously obtain, waivers of program requirements, or
(3) will experience domestic violence in the future, and need to return to TANF after a period of time off TANF.

The regulations do not provide that Extended TANF should be "for as long as necessary." This federal standard recognizes that domestic violence causes long-term problems that are not within the victim's control to stop and should be explicitly set forth in the regulations. Thus, with respect to those victims of domestic violence who currently have or previously had good cause waivers of program requirements or time-out due to domestic violence, the time period of such waivers or time-out should be the minimum duration of Extended TANF, supplemented by an assessment of need based on current experience of domestic violence or the effects of domestic violence or risk of future domestic violence.

Domestic Violence Plan

Section 141.51(a)(iv) of DPW's proposed regulations provides for a domestic violence plan that is not entirely consistent with the federal regulations requiring that waivers be "accompanied" by a services plan. 45 C.F.R. § 260.55(c). The simple solution to correct this problem is to track and cross-reference the federal rule by rewriting the regulation to state:

> "Extended TANF for a family in which a member is or has been a victims of domestic violence shall be accompanied by a domestic violence services plan that meets the requirements of 45 C.F.R. § 260.55(c)."

Conclusion

DPW has repeatedly asserted its intent to fully implement Extended TANF for past, present and future victims of domestic violence. We believe the changes recommended in these comments and reflected in the attached edited regulations are consistent with DPW's assurances and more accurately express the stated intent. A marked up copy of DPW's regulations with our proposed changes is attached, Exhibit 13.

Respectfully submitted,

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