BEFORE THE INDEPENDENT REGULATORY REVIEW COMMISSION

COMMENTS REGARDING DPW'S TANF PROGRAM

31 Pa. Bull. 5875 (October 20, 2001)
IRRC Number
2224
14-472

Prepared by:
Richard P. Weishaupt
Sharon M. Dietrich
Louise Hayes
Amy E. Hirsch
Jonathan M. Stein

COMMUNITY LEGAL SERVICES, INC.
1424 Chestnut Street
Philadelphia, PA 19102
215-981-3700
Email: www.clsphila.org

November 2, 2001

TABLE OF CONTENTS

Executive Summary to Community Legal Services' Comments on DPW's TANF Regulations

Community Legal Services, Inc. And the clients it represents in this rulemaking are concerned that the proposed Department of Public Welfare regulations, 31 Pa. Bull. 5875 (October 20, 2001), are critically flawed. They violate federal and state law and the all-important time limit regulation (section 141.41), is not in complete form, even though the five year time limit for lifetime TANF is rapidly approaching. Most significantly, DPW proposes to implement the TANF time limit without also implementing any exceptions -- including a program that already exists to take recipients off the TANF clock. These regulations come as an impending recession makes TANF parents, especially those facing the five year time limit, much more vulnerable to today's economy. This bifurcated approach simply is not an acceptable answer -- too much is at stake for too many families.

Implementing the TANF time limit without the exceptions jeopardizes the income and well-being of the nearly 12,000 families that will be reaching the time limit beginning on March 3, 2002.

With respect to the other regulations, we commend DPW for correcting some of the flaws that we noted in the previous "final form omitted" package and for publishing these regulations in proposed form to allow the public to comment. However, several serious problems remain in this version. Our main concerns are the following (and detailed comments follow).

We object strenuously that the proposed regulations would implement the 60 month TANF time limit without implementing any exceptions (Section 141.41(f)).

- The regulations don't even make an exception for DPW's new "Time-Out" program, which went into effect in July and allows families to stop their TANF clocks.

- Nor do they provide any grounds for "Overtime," a forthcoming program in which DPW has promised to provide TANF beyond 60 months. The proposed regulations do not provide for "20% hardship extensions," domestic violence extensions, or "TANF non-assistance" stipends — all authorized by federal TANF law.

- The regulations do not provide for persons who are eligible for General Assistance (the state-funded welfare program) to

begin receiving those benefits when TANF ends. People who are eligible for GA include children, pregnant women, people with disabilities, caregivers for the sick or disabled, and nonparental caregivers for children under age 13.

The protections to prevent inappropriate sanctions have been gutted. These changes include unauthorized dilution of the conciliation process (Section 165.51) and increased power to sanction based on a list of sanctionable conduct four times longer than the statute (Section 165.61). As a result, families will lose their benefits even though they are trying their best to comply with work requirements.

The regulations don't include policies to allow for more education and training for TANF parents that DPW adopted to avoid legislation that was en route to passage (Section 165.31(g)(5). Also, policy modifications that permit young people to finish high school or GED programs are not included (Section 165.31(d)(4)). Far too many TANF parents have been denied access to education and training because they have been discouraged or confused.

Without statutory authority to do so, DPW is trying repeal the duty to assess and consult with recipients and to take choice of work activities away from them and instead allow its case workers to dictate what work or training they will perform (Sections 165.31(c), 165.31(e), 165.31(f), 165.31(g)(4)). DPW is also undermining the legislatively developed Agreement of Mutual Responsibility and trying to replace it with a system where recipients are obligated to do things that are not part of their AMR.

The regulations do not adequately address the needs of victims of domestic violence. Waivers of support cooperation requirements are necessary to protect victims of domestic violence from the dangers they face when support papers inform batterers where they live, provoke retaliatory violence, and place women in direct contact with abusers in court. DPW's proposed regulations fail to provide adequate procedures to make waivers a true option for victims of domestic violence:

- Waivers can provide meaningful protection only if people know about them. The volumes of paper notices given to TANF participants by DPW makes written notification inadequate. Yet, DPW's proposed regulations fail to include critical oral notification of waivers.

- Federal law provides waivers should be for as long as necessary to ensure ongoing protection. DPW's regulations, however, set expiration dates, placing victims at immediate risk.
- It is essential that waivers are available for victims who are unable to provide documentary evidence. But DPW's proposed regulations impose documentary requirements that will unnecessarily burden both domestic violence victims and service providers.

GENERAL COMMENTS

ELIGIBILITY PROVISIONS FOR TANF

1. The Proposed Regulations Ignore the Concepts of Assessment and Consultation.

141.41(e) Policy - *Assessment and Consultation*

Pennsylvania law is clear that DPW is to assess the needs of welfare applicants and recipients and develop plans in consultation with these applicants and recipients for addressing additional measures needed to make the individual employable. 62 P.S.§ 405.1 In contrast to the approach set out in the statute, however, the regulation that is supposed to set out the overarching policy of the Department for the TANF program merely states that all non-exempt recipients (without regard to good cause) must participate in work or a work related activity if they are not working 20 hours per week, or face sanction or termination. This broad policy statement fails to incorporate the directions found in 62 P.S. § 405.1 (a.2)(4) and (6), for consultation with unemployed recipients and assessment of their needs. Omitting these crucial details is contrary to state law. The statute says that in the event that there are nonexempt individuals who have not found work averaging 20 hours per week,

> the county assistance office, *in consultation with the applicant or recipient*, shall *assess* the additional measures that may be necessary for the applicant to seek and accept employment, including the type of work-related activities that will be used to meet the ongoing work-related activity requirement. These measures shall be incorporated into the ... agreement of mutual responsibility pursuant to section 405.3."

62 P.S. § 405.1(a.2)(4)(emphasis added). In contrast, the language used in the proposed regulation is much less aimed at working with the recipient and instead reads like a penalty for noncompliance. Such a harsh approach is contrary to the public interest and is not what the General Assembly intended. Moreover, the vital role of assessment and consultation is completely ignored. Unfortunately, this is more than mere semantics. Despite the language of the statute, DPW does not in practice consult with the recipients about how they want to achieve self sufficiency, and even more seriously, does no organized, independent assessment of unmet needs.

Similarly, making 20 hours of "work activity" a condition of eligibility is to an extent, over-reaching, since the statute says that those who are not working 20 hours per week shall be subject to a "review of eligibility." This review of eligibility allows recipients the opportunity to come into compliance, since many are unemployed at the 24 month mark through no fault of their own, because of disability, barriers to unemployment, recent layoff or reduction of hours or other good reason. The review of eligibility (which is now done at 24 months) allows these problems to be addressed prior to a sanction or termination of benefits. 62 P.S. § 405.1(a.2)(6).

Remedy: Revise the regulation to follow the wording of the statute, including assessment and consultation. Institute appropriate changes in practice to assure that individuals are properly assessed. Revise policy to insure that a review of eligibility takes place before any adverse action takes place.

2. DPW's Time Limit Policy Is Deeply Flawed.

141.41(f) Policy -- *Counting the Time on TANF*

Failure to include federal exceptions, even when already implemented

This section is undoubtedly the most important regulation in the regulatory package, since it contains the language concerning treatment of those families that have received federal TANF cash assistance for more than five years. Under federal law, adult-headed families generally are ineligible for *federal* TANF assistance beyond five years. 42 U.S.C. § 608(a)(7)(A). It is important to note that there is no specific provision in state law establishing a time limit.

Under federal law, there are four notable exceptions to the general five year time limit. First, a state may choose to continue assistance under a 20% "hardship" exception. 42 U.S.C. § 608(a)(7)(C)(ii). States are free to develop their own definition of "hardship."

Second, states may provide assistance at any time with state funds[1] without being subject to any federal time limits. States have even more flexibility under this exception than under the 20% hardship exception, both in counting the five year period and in continuing

---

[1] This includes state funds that a state is required to spend to draw down the federal TANF block grant. Such funds are called Maintenance of Efforts (MOE) funds.

assistance beyond five years as long as they use only state funds for the selected families. Under this exception, states are specifically permitted to provide state funds to children or families beyond 60 months. 42 U.S.C. §608(a)(7)(F). Moreover, state funded assistance given within the 5 year period also does not count toward the time limit. 45 C.F.R. §264.1(b)(2).

Third, 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" concept includes short term cash payments that do not extend beyond 4 months that neither triggers the counting of a month toward the 60 month time limit, nor does it run afoul of the 60 month limit, even if given after the receipt of 60 months of federally funded TANF assistance. Non-assistance also encompasses cash payments that are not directly related to family need; for example, paying transportation costs for a successful welfare-to-work participant would be considered "non-assistance," since it was not based on family size and income. 45 C.F.R. §260.31(b).

Fourth, states may exempt victims of domestic violence from the time limit. 42 U.S.C. § 608(a)(7)(C)(i)&(iii); 45 C.F.R. §§260.59(a)(1), 264.1(c)(2). These domestic violence waivers do not affect a state's 20% hardship limit.

Despite DPW's announced intention to utilize the 20% hardship exception and having already initiated the state funds and domestic violence options, the proposed regulation ignores these crucial features. Rather, DPW proposes to implement the time limit without any exception, including exceptions already in effect. In so doing, DPW puts thousands of families at risk since there would be no legal protection for their status.

The proposed regulation fails to incorporate programs publicly announced by the Department designed to alleviate the hardships of the 60 month time limit, namely the 20% hardship exception allowed under federal law (which DPW calls its "Over Time" program), and the program DPW has named its "Time Out" program, which stops the 60 month clock by using state funded TANF under certain circumstances. (The Time Out program, which took effect in July, 2001, takes certain families "off the clock" - some working families, early engagers in training programs, some kinship caregivers, some victims of domestic violence and those exempt from work requirements because of disability but who nonetheless volunteer to participate in training programs.) Both the Time Out and Over Time these programs should be incorporated into the regulations, since otherwise the only policy with the force of law will not accurately reflect what DPW is actually doing or intends to do in the near future to pursue federal policy options.

The first group of people[2] to reach the 60 month barrier will do so within a few months, in March 2002. Given how soon this date will be upon us, there is no time to revisit these regulations. The regulations that are actually adopted must accurately reflect the rules that will determine how Pennsylvanians will actually be treated. At risk is the income supporting families with children, at a time when a deepening recession makes this safety net crucial.

Even though it has not made final decisions as to treatment under the 20% hardship waiver policy, DPW has made it clear that it intends to do so,[3] and other decisions have already been made about stopping the clock for some groups. Inexplicably, even the decisions that have been made have not been incorporated into the regulations. For example, DPW has already begun the Time Out program beginning July 2, 2001. Operations Memorandum 01-06-09, Implementation Instructions for the Time-Out Initiative. (attached, Exhibit 1). As stated above, there are five groups of people that are afforded "Time Outs." No regulation should be adopted that do not reflect the full policy. IRRC must reject this regulation because the proposed regulations are inconsistent with existing programs and new plans that take effect in four months. It is our position that only if the time limit regulation is removed can the rest of the regulatory package go forward.

DPW may argue that it is still shaping this "experimental" Time Out and "Over Time" programs and plans to make further changes that will "fine tune" the eligibility rules. But even if this argument is accepted, the regulation can and must embody the general rules of the program, especially given the nearness of the time limit for so many families. It is irresponsible not to put the general provision into regulation now.

Both the Time Out and Over Time programs should be incorporated into the regulations, since otherwise the only policy with the force of law will not accurately reflect what DPW is actually doing or intends to do in the near future to pursue federal policy options. DPW has committed to proposing regulations on its Over Time policy and has said that it will be submitting these regulations to the IRRC very soon. Rather than amending this TANF regulatory package to include the Time Out and Over Time policies,

---

[2] DPW now estimates that this first group will include roughly 10,000 Pennsylvania families, who will have exhausted their lifetime limit on federal TANF assistance on March 3, 2002 or within a few months thereafter.

[3] DPW has announced that it is developing a set of regulations to govern how it will deal with the 20% hardship waiver, its so-called "Over Time" program.

DPW should remove the time limit regulation from this package and include it instead in its forthcoming Over Time regulatory package. All matters relating to the time limit should be addressed together in that regulatory package, so as to allow the public, the General Assembly, and the IRRC the opportunity to provide input into DPW policy as a whole, rather than piecemeal.

Finally, we would be remiss if we did not mention the failure of DPW to include a regulation providing for an orderly transition to the General Assistance (GA) program for those who qualify. Pennsylvania statute, 62 P.S. §432, provides for GA eligibility for children, disabled adults, those caring for the ill and disabled, certain two parent families and those caring for children other than their own. DPW has, on several occasions, conceded that recipients in these groups will continue to qualify for benefits. Given that transfer between TANF and GA have always been smooth and done without the need for a new application, any removal of TANF recipients because of the new time limit would require a reevaluation under the GA program.

Failure to incorporate existing Cash Assistance Handbook policy

Another shortcoming of the time limit regulation is the failure to incorporate the provision in DPW subregulatory policy, Cash Assistance Handbook 105.251 (attached, Exhibit 2), which lists various circumstances under which participation in the TANF program shall not be considered receipt of TANF cash assistance for the purpose of calculating 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. Many families have relied on this rule in making repayment. To reverse this policy now would be extraordinarily unjust, if not illegal, since many have relied on the policy in ordering their lives. Such a policy also provides a strong incentive for repayment, an incentive that is needed since many of the retroactive sums are immune from legal

process or otherwise difficult for the Department to obtain. Additionally, such a policy is firmly grounded in principles of equity, since repayment in full means that the family has not actually received any net benefit from the TANF program for the period in question. To remove the legal underpinning for such a logical policy is contrary to the general public interest, which benefits from the repayments received. The failure to include these policies is inexplicable, especially since DPW has given no indication that it intends to change or reject these policies.

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, uncashed checks, periods where a sanction denies assistance, emergency shelter allowances, and receipt of interim benefits pending a hearing. These provisions prevent situations that are totally unfair -- how could a month possibly count when no assistance was actually received? It is impossible to imagine why DPW would not have included these exceptions in its regulations.

Remedy: Remove this rule from the regulatory proposal altogether so that the general rule and its exceptions will be implemented concurrently. Failing that, revise the regulation to read that only *federally* funded TANF assistance is precluded after 60 months of "countable TANF assistance." Further clarify the regulation to include exceptions for receiving TANF beyond 60 months in the case of "hardships, including experience of domestic violence," state funded TANF programs and non-assistance programs. Revise the regulations to make clear that receipt of state funded "TANF Time Out" programs will not count against the 60 month limit, amounts of TANF that have been repaid, and other exceptions found in existing policy. Finally, include a provision setting forth the process for people who have reached their 5 year limit to transition seamlessly to GA.

3. The Definition of "Family" Will Lead to Excessive Numbers of Children Being Disqualified.

141.42 Definitions — *Family*

The proposed regulation further defines "family" as including adult specified relatives other than parents for the first time. This relatively innocuous sounding change will have serious ramifications in the future of the TANF program and is profoundly anti-family. The reason that this change will have adverse effects is because subsequent provisions rely on this definition of family to disqualify any "family" where an adult member has exhausted his

or her 60 months of eligibility.[4] While we agree that parents who have used up their 60 months of cash assistance and who are present in the household make their children ineligible for federal TANF cash assistance (unless, of course, they qualify for an exception), it makes no sense to disqualify children who are being cared for by relatives who are not mandatory members[5] of the grant group. Yet DPW's revised definition of "family" would do just that.

The effect of this change would be to disqualify entire families where a grandmother, or other non-parent specified relative, who previously exhausted her 60 months of TANF, is present in the home, even if he or she is not on the TANF grant. Such a grandparent/caretaker relative, and the children living with her, will no longer be eligible to receive TANF, even if she seeks aid only for the children. For example, if the grandmother as a younger woman uses up her five years of TANF and then goes off TANF, any grandchild or other young relative who later lives with her will be forever disqualified, including a grandchild that comes to live with her because of parental absence or incapacity. Surely the goal of welfare reform is not to drive a wedge between family members and discourage them from exercising familial responsibility. This proposed regulation would do just that, however.

The new definition of family is contrary to pre-existing DPW policy that allows kinship care givers to receive aid for their grandchildren, regardless of their own TANF eligibility status. Cash Assistance Handbook §127.4; 55 Pa. Code §§151.43(b)(2); 171.21(b)(1). The federal time limit regulation, 45 C.F.R. §264.1, prohibits aid to adult parents and their own children, where the adult has received 60 months of federal TANF assistance, but federal law does not require that non-parental caretakers be "included" in TANF households, especially where their presence would lead to entire family disqualification. Moreover, there is nothing in state law that authorizes this result. Such a unauthorized policy will punish kinship caregivers and family trying to help each other and will inevitably lead to increases in child welfare costs.

---

[4] The previous section, 141.41(f), says, "A *family* is ineligible for TANF cash assistance if it includes an adult who has received 60 months of TANF cash assistance." (Emphasis added.)

[5] Existing policy, developed under the former AFDC program, defines mandatory members as parents of children on the TANF grant and siblings of such TANF children. Other adults, who are not legally obligated to support a child, are not mandatory members. Because of this sensible policy, optional members, such as grandparents, aunts and uncles, may choose to be excluded from the TANF grant.

Remedy: revise the regulatory definition of "family" to exclude non-parental caretakers as well as other non-TANF participating adults, if they do not seek to apply for TANF for themselves.

4. The Proposed Regulations Attempt to Evade the Ascendancy of the AMR.

141.61 Policy

This section includes the oft-repeated requirement found throughout this proposed regulation that recipients perform work related activities "including, those specified on the AMR." The whole point of having an AMR is to make it clear what a recipient is required to do and give recipients and DPW a firm and complete statement of what is expected. Nothing in state law even remotely gives DPW the authority to require people to engage in activities beyond those specified in the AMR. In fact, the welfare code specifically states, that all work related activity measures shall be incorporated into the ... agreement of mutual responsibility...." 62 P.S. §405.1(a.2)(4). Moreover, in addition to being contrary to state law, such a provision is also bad policy, since it will lead to confusion and conflicting obligations.

Remedy: Drop the language requiring people to engage in activities "including those specified on the AMR" and make it clear that the work requirements of individuals are to be set out in their AMR, as required by the statute.

5. There Are Problems with the Temporary Absence Policy.

151.43(d)(1) Requirements -- *Temporary absence of the child or relative.*

This proposed regulation commendably utilizes a federal option, 42 U.S.C. § 608 (a)(10), to permit a family to continue to receive TANF for a child who is temporarily absent from the home, but is expected to return within 180 days. It adds a requirement, however, that has no statutory authority, and could be very harmful to parents: it creates a new period of ineligibility for a specified relative who fails to report within 5 days of the time it becomes "clear" that the child's absence will extend beyond 180 days. Such a penalty is not authorized by statute and is unduly subjective as written.

This 30-day disqualification has no authority in state or federal law. Neither Congress nor the Pennsylvania General Assembly has imposed such a disqualification on families. Without such a

requirement in federal or state law, this disqualification has no legal basis.

Even were this disqualification authorized, it should only occur when it is *"clear to the parent or relative"* that the child's absence will extend beyond 180 days, and that fact is not reported. There may be times when a child welfare agency believes that the child will be out of the home for more than 180 days, while the parent/relative is confident that the child will return sooner. A parent/relative should not be required to report what she does not know. It should be enough that benefits be terminated when a child will be gone more than 180 days; it is quite another to punish the family for underestimating the duration of absence.

Remedy: Delete the thirty day disqualification and modify the regulation to read "...by the end of the five day period that begins with the date that it becomes clear to the parent (or relative) that the minor child will [continue to] be absent...."

6. The Regulations Continue Vestiges of the Old AFDC-U Program.

153.44 Procedures

One artifact of the old AFDC program was the requirement that, in order to qualify, a family not only be poor and have minor children, but also that the children be deprived of support because of the death, absence or incapacity of a parent; two parent families could, at state option, be eligible only if the principal wage earning parent had met strict requirements defining recent work, was unemployed (i.e., working less than 100 hours per month) and was not receiving Unemployment Compensation. Critics of all political leanings correctly pointed out that the old AFDC program discriminated against two parent families.

Given that TANF gave states extremely broad discretion to eliminate such artificial rules and encourage two parent families, it is distressing that Pennsylvania has chosen to keep this basic anti-family concept and only is tinkering with the definition of principal wage earner.

Remedy: Eliminate this and all such rules that discriminate against two parent families (as Pennsylvania has done for Medical Assistance) and evaluate eligibility for two parent families based on the same criteria for other families -- income and willingness to work.

COMMENTS ON RESET REGULATIONS

In addition to substantially revising the eligibility regulations that impose a time limit on benefits and make other, related changes, the proposed regulations attempt to implement new work requirement regulations that establish a new "RESET" program. While we do not object to the RESET program, DPWs implementing regulations go beyond the authority bestowed upon the agency by the statute and make the program one-sided and unfair and undermine the mutual endeavor envisioned by the General Assembly to help people become self-sufficient.

7. The Regulations Do Not Treat Those Working 20 Hours Per Week Properly.

165.1(a) General

This proposed regulation states "A recipient who is not exempt shall be enrolled in the ... RESET program." This provision requires all nonexempt participants to comply with the requirements of RESET and to participate in RESET as directed, as well as to seek and accept employment. But this blanket requirement does not address the status of those who are already employed 20 hours or more per week. Under Act 35, such employed individuals are excused from further mandatory work activity, 62 P.S. § 405.1(a.2)(2). Thus, the regulation should clarify this point, so that people who are satisfying the statutory mandate of 20 hours per week of employment are not required to do more mandatory work activities, which may interfere with other, familial responsibilities or educational activities that will move the family toward self-sufficiency. This is not a minor point -- working recipients often find it difficult to pursue additional training and education because of DPW imposed demands and caseworker hostility to such pursuits.

Not to revise the regulations on behalf of working recipients would be contrary to the express dictate of the Legislature, which determined that 20 hours of work per week was an acceptable minimum. This is not to say that low wage families should not be encouraged to increase their hours of employment, nor to participate in other programs voluntarily, but they should not be forced to do so. Certainly the incentive to earn enough money to escape poverty should be incentive enough and all that the Legislature expected.

Remedy: Add the following sentence to the end of the subsection: "However, persons who are employed at least 20 hours per week are not required to participate in another work-related activity."

The Requirement to Maximize Employment.

§ 165.1(a) and other sections as noted below

Throughout, the proposed regulations impose an obligation to "maximize employment" that has no statutory authority. Any recipient who is working 20 hours/week is not subject to any additional work activity requirements. 62 P.S. § 405.1(a.2)(2). Act 35 requires only that recipients "seek employment, accept any offer of employment and maintain employment," *id.* § 405.1(a.2)(1), and expressly dictates that the Department's work requirements recipients be designed to enable recipients to secure "part-time employment which can establish a work history." *Id.* § 405.1(a.1). Rather than paralleling Act 35's language, however, this regulation (and its equivalents as listed below) goes beyond it by requiring recipients to "seek, accept, *maximize* and maintain employment." Besides being illegal, this regulation is not good policy: in choosing not to impose a work obligation greater than 20 hours/week, the General Assembly recognized that many single parents are unable to work more hours because they have competing obligations. In particular, many parents have disabled or troubled children who need more attention than a full-time worker can provide. Requiring such parents to work full-time may have severe repercussions for their children's future.

Remedy: All reference to "maximizing" employment should be deleted in this section and in the following:

§ 125.1(f)(2)(vi)
§ 133.23(a)(1)(vi)(B)(V)
§ 141.41(e)
§ 141.61(a)(1)(xv)
§ 165.31(c)(2)

8. The Proposed Regulations Do Not Deal Fairly with Exemptions.

165.21(c)Enrollment --*Deleted Exemptions*

The new regulation deletes numerous long-standing work exemptions that are no longer mandated by the welfare code but are still worthy of consideration since the conditions are common sense reasons that a recipient may not be available for work, including: persons 60 years of age or older, persons incapacitated by drug or alcohol problems and in treatment, persons needed in the home because of the illness or incapacity of another member of the household, and pregnant women. The Department, in preamble to §165.21 (c)(2)(4) states that such persons will have the opportunity to establish good cause under §165.52. However, they are not specifically listed as bases for "good cause" in that

regulation, which is primarily written in terms of "good cause" for not accepting a job. The good cause regulation should be amended to explicitly allow these exemptions where appropriate.

Remedy: Add the following to Section 165.52 as possible bases of good cause: the person is 60 years of age or older; the person is incapacitated by drug or alcohol and is enrolled in treatment, the person is needed in the home because of the illness or incapacity of another member of the household, or the person's pregnancy interferes with compliance.

165.21(c)(2) *Exemption for Lack of Child Care*

The text of the proposed regulation is inconsistent with the federal TANF law, which provides that a person may not be sanctioned because of "unavailability of *appropriate* child care *within a reasonable distance from the individual's home or work site.*" 42 U.S.C. § 607(e)(2)(A)(emphasis added). The proposed regulation's failure to follow the italicized TANF language could subject the state to federal penalties and, more importantly, endangers children. Leaving out the requirement that the child care be "appropriate," let alone failing to define it in contravention of federal regulation, 45 C.F.R. § 261.56, has the potential to force parents to accept inappropriate child care, especially in rural areas or in situations where night-time care is needed but options are few.

Remedy: The last phrase should read, "for whom alternate *appropriate* child care arrangements are unavailable *within a reasonable distance from the individual's home or work site.*" Furthermore, consistent with federal regulation, DPW should develop standards for determining "appropriateness" and "reasonable distance."

165.22 Verification of Exemption

In deleting existing Section 165.11 on verification of exemptions and folding that section's text in this one, DPW has omitted a longstanding provision from the former regulation that has been in effect since 1992.

The proposed regulation provides that failure to verify an exemption will lead to enrollment in RESET "unless the person has cooperated and verification is unavailable." §165.22(b)(2). However, it deletes additional language from existing §165.11(b): "or unless it is clear that the person is exempt." This change suggests that even when it is clear that a person is exempt but has

not verified the exemption, he or she will be enrolled. For example, a person who is clearly mentally ill might be enrolled, even when it is apparent to the case worker that the person will not be able to either understand the requirements or comply. Such an action can be anticipated to lead to a sanction of a very vulnerable person.

This deletion from the existing Section 165.11 is not required by Act 35 and will not interfere with the aim of the Act to encourage self sufficiency. On the other hand, it will have a deleterious effect on persons with disabilities and hamper them from obtaining exemptions. Such insistence on verification in all cases regardless of personal limitations will put the state at risk of violating the Americans with Disabilities Act, 42 U.S.C. §12101-213. The deleted text should be restored.

Remedy: The following phrase should be added to the end of subsection (b)(2): "or unless it is clear that a person is exempt."

165.25 Enrollment after an Exemption Ends - *General*

The proposed regulation states, "A person who was formerly exempt is required to participate in a work or work-related activity in accordance with the following...." The subsequent list includes various dates on which an exemption ends, such as the date a child without child care becomes age 6, the date an infant reaches age 1, etc.

The regulation more accurately would state that the exemption ends on such date, but not that participation in a work activity necessarily begins that very day. For instance, a person who had not received prior notification of the exemption's end may not have child care arranged immediately or have found an appropriate work activity.

Remedy: The language quoted above should be put into a subsection (a), which would read, "A person's exemption ends in accordance with the following...." A new subsection (b) should state: "A person whose exemption is ending will be given notice of its ending by the Department and an adequate opportunity to locate and prepare to begin in work or a work-related activity."

165.25(2) Enrollment after an Exemption Ends - Alternative Child Care

The proposed regulation provides that a person excused for lack of child care "is required to participate as soon as alternate child care arrangements are available...." The word "appropriate" should

be added to described the alternative child care. There has been much controversy on the subject of child care in Pennsylvania — particularly on child safety — and the regulations should not be written so that participants are required to put their children into any possible arrangement, despite questions about its safety, reliability, quality of care, etc. Moreover, as noted in the discussion of the regulation describing the exemption itself, § 165.21(c)(2), failure to consider appropriateness would violate federal TANF law.

Remedy: Add the word "appropriate" before "alternate child care arrangements."

9. DPW's RESET Requirements Are Inconsistent with the Statute and Are Over-reaching.

165.31 RESET participation requirements

The proposed regulation at §165.31 (b)(2) requires individuals to "maximize and maintain" employment. This phrase is not found in the RESET statute and represents overreaching by the Department. DPW erroneously maintains that individuals who are working the requisite 20 hours can still be required to participate in DPW selected employment and work activities, even when those recipients are pursuing a path that is more likely to achieve self sufficiency through work and education, rather than simply adding additional hours of low wage, entry level employment. DPW's continued resistance to education is the reason why Pennsylvania does so poorly in measures of job retention and advancement, as compared to other states. <<http://www.acf.dhhs.gov/programs/opre/hpb/table2.htm.>>

Second, the Department again inserts the requirement that the recipient "participate in ... work related activity, including those ~~specified on the~~ AMR." §165.31(c). Nothing in the statute affords the Department such sweeping and arbitrary powers. The entire rationale of the AMR is to forge a *mutual agreement* between the recipient and the Department that lays out what the recipient is expected to do and what supportive services she can expect. The statute says, "the CAO ... shall assess the additional measures that may be necessary ... including the type of work related activities .... These measures shall be incorporated into ... the AMR." 62 P.S. §405.1 (a.2)(4). DPW's approach undermines this legislatively mandated concept and opens the door to confusion and uncertainty.

Third, the approach taken throughout fails to give proper weight to the legislative expectation that recipients would begin their time on TANF with a short (eight week) job search, followed by an

assessment of where those recipients who did not find work need further help in order to become self sufficient. DPW has both in policy and in practice circumvented this approach. It has done so, first by often requiring a job search of eight weeks *plus* an additional 90 days (many of the Department's "quick attachment" contractors run programs of such duration) and second by never doing real assessments. The proposed regulations should, if followed, make it clear that the job search is limited to eight weeks, assuming that the other language discussed above is modified so that DPW does not have unlimited power to dictate further, unspecified activities. As to the lack of assessments, the regulations must be revised to include that requirement, as mandated by the General Assembly and the federal statute, 45 C.F.R. §261.11 and the ADA, see below. Failure to require assessments results in many people drifting through their first two years on welfare and never finding services they need to become self sufficient.

Remedy: Delete the phrase "including, but not limited to, those specified on the AMR." Add language requiring assessment for those unable to find work.

165.31(c)(3) *12 month limit on education and training as a work activity*

The regulation limits those who have not found employment during their first 24 months of TANF to no more than 12 months of vocational activity, general education, English-as-a-Second Language and jobs skills training combined. While it is true that such activity *alone* may constitute work activity for 12 months, it is certainly a permissible activity, when combined with other activity, even after 12 months. Moreover, an extension beyond 12 months may in certain cases be an appropriate remedy under both the Americans with Disabilities Act regarding people with disabilities, who may require more than 12 months to ready themselves for work, and Title VI of the Civil Rights Act, which precludes discrimination on the basis of natural origin, and which has been applied to those who do not speak English as their primary language. See ADA section below. DPW has already been the subject of a Civil Rights complaints regarding discrimination against those who do not speak English; this regulation would only add to that dispute. Similar objections can be raised regarding the application of this law to people with disabilities, who may require more than a year to overcome their barriers to employment. A blanket policy that does not allow for "reasonable accommodation" would violate of the ADA and is also unwise, since it would effectively preclude employment for parents who might otherwise become self sufficient.

Remedy: clarify that the one year limitation only pertains to activity undertaken by itself. Add language allowing the 12 month maximum to be exceeded in order to comply with the ADA or Title VI.

165.31(c)(4) *High School/GED as a Work Activity*

DPW's subregulatory policies explicitly permit a person under age 22 to be found to have good cause to be excused from the 20 hour work requirement, even after 24 months of high school while a TANF parent, if he or she is: (1) continuing with high school; or (2) attending at GED program at least 20 hours per week. See Operations Memorandum 99-9-3, Summary on RESET policy on Access to Education, at p. 4 (September 14, 1999)(attached, Exhibit 3).

So that a reader is not confused into thinking that a person necessarily must leave a high school or GED program after 24 months, explicit reference should be made to the "good cause" basis for continuation of education.

Remedy: The phrase "a maximum of" should be deleted, and the following language should be added to the end of proposed § 165.31(d)(4):

> "... although if under age 22, he or she may have good cause after 24 months to complete his or her high school program or to attend an equivalency program for at least 20 hours per week."

165.31(d) *Post-24-Month Work Activities*

Contrary to state law, the proposed regulations attempt to make working 20 hours per week "a condition of eligibility" and state that failure to work that number of hours, without good cause, will result in the imposition of a sanction. This is in conflict with the wording of the statute, which says that the inability to find 20 hours of work per week is grounds for a review of eligibility and development of a plan to find and begin participation in 20 hours of work activity. 62 P.S.§405.1(a.2)(6).

When the post 24 month provision of the statute first became effective on March 3, 1999, DPW adopted this statutorily based approach, using the statutorily mandated "review of eligibility" to explain to recipients that they had to find work or they would be assigned work, work experience placement or workfare. This was in keeping with Community Legal Services' analysis of state law, which was instrumental in the development of the March 1999 policy.

(attached, Exhibit 4). Under state law, only those who *willfully* refuse to cooperate are to be sanctioned.

Despite this workable procedure, the new regulations seem to embark on a new policy. While it might be that this is unintentional, the rule, as written, installs a much harsher policy that is inconsistent with both state law and current operations. We urge DPW to rewrite the regulations to reflect its current practice instead of the new policies set forth in the proposed rulemaking.

Selection of work activities

The proposed regulation states that the recipient must participate in work activities "as approved by the Department...." This is an example of DPW attempting to control a participant's choice of work activities, even though nothing in the statute bestows this authority. See 62 P.S. § 405.1(a.2)(6). Again, the appropriate work activities are the one's agreed upon in the Agreement of Mutual Responsibility. The AMR process is designed to be a consultative process. It is not simply a question of the Department approving a particular activity.

Remedy: Delete the phrase "as approved by the Department."

Status of Work Study

In subregulatory materials DPW has construed "work" as including "work study." See Operations Memorandum 99-9-3 at p. 3. This activity should be included on the list of permissible activities, particularly as it is one that is likely to make continuing and completing an educational program possible.

Remedy: Add a new 165.31(d)(1)(vii) that explicitly includes work study.

165.31(e) Agreement of Mutual Responsibility

This provision is not consistent with Act 35's statutory provisions on the AMR.

Notably, the regulation provides, "Final approval of the work and work-related activities listed in the AMR rests with the Department." However, the statute requires an applicant/recipient to "enter into a mutual agreement...." 62 P.S. § 405.3(a). Nothing in the regulation suggests that this is to be a mutual agreement — instead it merely gives the Department "final approval." But, as noted above, the statute does not give DPW authority to dictate which of the list of allowable work activities

a participant must perform, to the exclusion of all others. 62 P.S. § 405.1(a.2)(5) and (6).

Too often we have found that recipients are assigned to activities not on the basis of an assessment of their individual needs but rather based solely on what the caseworker perceives to be the needs of the Department -- to fill slots in programs.

Remedy: Delete the sentence that states, "Final approval of the work and work-related activities listed in the AMR rests with the Department." Replace it with a sentence, taking text directly from the statute, that provides:

> "The recipient and the Department will enter into a mutual agreement that will set forth the responsibilities and obligations to be undertaken by the recipient to achieve self-sufficiency, the time frames within which each obligation is to be completed, the penalties for failure to comply and the actions to be taken by the department to support the efforts of the applicant or recipient."

165.31(f) Self-Initiated Education and Training

By failing to revise parts of the regulations in effect before Act 35 was passed, the proposed regulation continues policies concerning education and training that are not supported by the new statute.

Limitations on employment and training

First, the conditions from the prior version of the regulation are retained: that the person attend at least half-time; that the person must demonstrate that they are making satisfactory progress; and that the activity is not secondary education or an equivalent level of vocational or technical training, unless the individual is either a pregnant female or custodial parent. §165.31(f)(1)-(3). Again, nothing in Act 35 that makes education and training an allowable work activity during the first 24 months contains these limitations. See 62 P.S. §405.1(a.2)(5).

Remedy: The following language should be deleted: "if in addition to the criteria in subsection (f), the following conditions are met: ...." Also, subsections (1) through (3) should be deleted, and subsections (4) and (5) should be renumbered (1) and (2), and amended as recommended below.

Special allowances

DPW is to be commended for the practice of supporting education and training by offering special allowances when a person engages in education and training, even if it is not a mandated work activity. This policy, which has been effect for some time, see Operations Memorandum 99-9-3 at pp. 1 and 2, should be codified in this regulation to insure uniformity and reliability.

Remedy: A new §165.31(f)(3) should be added:

> "Special allowances should be approved for education and training activities on a person's AMR, even if these activities are voluntary, such as if a person is in education and training in addition to another work activity."

165.31(f)(4) *Education and Training During First 24 Months*

There are several problems with this proposed section. Some provisions are inconsistent with the statute. Another problem is the failure to explain the option to continue education or training after 12 months if combined with work or work activity, which is consistent with current DPW policy.

First, the proposed regulation states that training must be "approved." As we have pointed out repeatedly, nothing in Act 35 gives DPW authority to veto a person's chosen work activity if it is among the permissible activities, and education and training is permissible during the first 24 months. In any event the appropriate discussion is whether it should be included in the Agreement of Mutual Responsibility. See 62 P.S. §405.1(a.2)(5).

Remedy: Delete the word "approved."

Second, the section needs to make it clear that after pursuing education or training for a year, such activity may still be part of an AMR, although it will not in and of itself satisfy the work related activity requirement. DPW data has shown that there have been disappointing results in getting people work ready during their first two years of TANF receipt. Indeed the Department has begun a Community Connections initiative to do community based outreach at least in part to address this problem. In addition, the early engager "Time Out" is aimed at getting people to begin education or training during their first two years. At the very least, it makes sense to adopt a policy that encourages recipients to pursue needed education and training, even if it takes longer

than 12 months. DPW has publicly stated that this is the Department's policy. The regulation should reflect that position.

One place where DPW has publicly represented that this is its policy was during the Senate debate over House Bill 1266; based on DPW's representations that this was their policy, the Senate decided not to pass H.B. 1266 and instead leave DPW with the flexibility that they contended they needed. To now allow regulations to be published that fail to articulate this policy is inconsistent with the representations made to the Senate.

Remedy: Add language that makes it clear that any valid education or training that will lead to self sufficiency may be supported in the AMR. Also add language that makes it clear that recipients may pursue education or training beyond one year if they combine it with another work activity.

165.31(f)(5) *Education and Training After 24 Months*

As drafted, this provision states that a person must fulfill the post-24-month 20 hour work requirement even if he or she is already participating in education and training. This is not consistent with DPW's policies on completing education and training programs after 24 months, as negotiated after the implementation of the work requirements in March, 1999 and especially after the House had passed House Bill 1266. DPW made a number of promises to legislative leaders and the public to obviate the need for legislation that authorized a greater emphasis on education and training.

Operations Memorandum 99-9-3 (Exhibit 3) recognizes limited good cause exceptions for not meeting the 20-hour work requirement for persons in internships, practicums or student teaching. A later Operations Memorandum, Good Cause for Education Post-24-Months 00-9-4 (Sept. 18, 2000)(attached, Exhibit 5), recognizes good cause for not meeting the 20 hour work requirement for certain persons who are completing education and training programs after 24 months. The proposed regulations do not appear to allow such exceptions.

Remedy: The Operations Memoranda addressing good cause exceptions to the 20 hour work requirement for persons in education or training should be incorporated into this provision. Section 165.52 concerning good cause should be specifically modified to permit this outcome.

165.31(g) Exempt Voluntary Participation

This section has been appropriately revised to include DPW's policy that work-exempt individuals with a documented disability who nonetheless volunteer for a training program are not required to participate in 8-week job search as an initial activity. However, the regulation should also state that special allowances (e.g., transportation and childcare) are available to exempt volunteers, Operations Memorandum 99-9-3 at p. 2 (Exhibit 3), since this has been a problem in the past. This is particularly important for DPW's new "Exempt Volunteer" Time Out policy, which further incentivizes employment and training activities among persons who have RESET exemptions. See 31 Pa.Bull.1639 (March 24, 2001) and Operations Memo, Maximizing Participation Project (MPP) CAO Procedures (attached, Exhibit 6).

Remedy: Add the following sentences to the end of the provision:

> "An exempt volunteer should be given special allowances to participate in appropriate activities."

10. The Attempt to Eviscerate the Sanction/Conciliation Process is Unwise and Unlawful.

165.51 Conciliation (to be renamed "Compliance Review")

Even the name change for this section suggests that DPW is attempting to make changes that will adversely affect recipients, by shifting its focus away from helping recipients comply with work requirements and toward a more punitive stance. This section deals with the process that is to be followed when a recipient is suspected of refusing to comply with work requirements. The law is clear that if a recipient is wilfully noncompliant, the family is subjected to severe and escalating sanctions.[6] Thus, it is very important to assure that the process of invoking sanctions is fair and reasonable. The current regulation requiring conciliation has been in effect for more than 20 years. 22 Pa. Bull. 4875 (October 2, 1992)(effective retroactively October 1, 1989).

DPW has proposed rewriting the Conciliation regulation, despite having absolutely no statutory mandate for change. These changes

---

[6] The sanction for the first instance of "willful noncompliance" is a disqualification for at least 30 days and possibly thereafter, until a person is willing to comply. A second offense is punishable by at least 60 days and a third by permanent disqualification. Transgressions during the first 24 months result in the offending adult being removed from the grant; after 24 months, all sanctions affect the entire family. See generally, 62 P.S. §432.3(a).

deal with the key question of insuring that recipient families are given the opportunity to resolve any differences that they may have with the agency concerning their work requirements.

Don't we owe it to all Pennsylvania families to make absolutely sure that any shortcomings are willful and without excuse? Isn't compliance and self sufficiency a more important goal than punishment? From a legal point of view, doesn't the truncation of the conciliation process and the resultant loss of flexibility raise serious concerns about compliance with the Americans with Disabilities Act?

DPW has somewhat modified its original position but still proposes elimination of the directive that DPW workers "exhaust efforts toward conciliatory resolution of disputes ... before the issuance of a notice of adverse action" and, incredibly, that all conciliatory efforts be documented in the case record. Finally, DPW proposes eliminating the requirement to have these conciliation sessions at an agreed upon time, instead stating that the caseworker will merely consider the recipient's schedule.

The existing standards for conciliation provide important safeguards for recipients and prevent inadvertent mistakes. Certainly the Department has been able to sanction thousands of families under the existing regulations. Current DPW data shows that at least 4,000 recipients families are being sanctioned in any given month. DPW, Number of TANF Adults Disqualified Due to Sanctions (September 10, 2001), (attached, Exhibit 7). Even with the existing safeguards and the Conciliation regulation, when DPW did a pilot project where families about to be sanctioned were visited by a community organization, approximately 80% were found to be avoidable with proper treatment and counseling. Other states lacking such protections up front have found that many unnecessary sanctions are imposed. Both Connecticut and Tennessee have found that when they review sanctions that have been imposed or are about to be imposed that many are wrong or at least avoidable. Neighboring Delaware, as well as Utah, have found that many of those sanctioned are families with ongoing social problems and high degrees of disorganization, suggesting that the sanctioned behavior is not so much due to deliberate choice, but rather due to dysfunction and previously undiagnosed mental health and mental retardation problems.

Given these experiences, we ask, is it too much to ask that a caseworker exhaust all reasonable efforts to bring people into compliance and to write down what efforts they made, so that they can be reviewed later for adequacy? Is it too much to ask that caseworkers arrive at a mutually agreeable time for a conversation,

whether it be in person or by phone, before depriving a family of what may very well be their entire livelihood?

Experience prior to these regulations showed that many of the sanctions being imposed were for trivial things, like a mother who could not get to a training class at 9:00 am because she had to walk her kindergartner to school through a dangerous, drug infested neighborhood. Her caseworker's initial response was that she should teach the child to walk to school by herself, or get another child to escort her. With a conciliation program, the problem was resolved by switching her to another class that started slightly later in the day. This is exactly the kind of flexible solution that the current regulations offer and, indeed, require. The protections in the current regulations should not be diluted so that DPW can sanction more families with fewer procedural protections. The purpose of Pennsylvania's welfare code is to establish self-sufficiency, not to punish errant families at the first opportunity. Ultimately, cooperation must be secured, even after a sanction takes place.

What can possibly be the objection to directives found in subsection (b) "to explore ways to facilitate a mutually advantageous relationship that will make the recipient more employable and help the recipient reduce dependency?" Or to help the recipient reach a "reasonable resolution?" Even the directive to reschedule appointments unless the recipient shows a clear pattern of missing appointments (language that DPW also proposes to delete) is meant to insure that earlier abuses are not repeated and that recipients are afforded a reasonable chance to comply. Instead of this flexible but firm approach, DPW has proposed language that states, "at the compliance review, the recipient has an opportunity to present information concerning the recipient's compliance...." This is clearly a change in attitude and tone that is deliberate and meant to make it easier for caseworkers to sanction individuals that they deem to be at fault.

In the period before the adoption of these regulations, sanctions often resulted from scheduling CAO appointments when recipients had doctor's appointments, or school functions or even job interviews. Even with the current regulations, we see cases where people are being sanctioned for unwitting mistakes rather than deliberate defiance of work requirements. Under the current regulations such problems are quickly resolved rather than result in sanctions. If the proposed regulations are adopted, we anticipate a return to the day when recipients were routinely sanctioned when they missed even one appointment, scheduled at a time and place over which they had no control. Prior to the adoption of this regulation, CLS and other community organizations also regularly saw people who were sanctioned for failing to keep a single appointment for which they

got less than 24 hours notice. It was these kind of abuses that made the regulation as it is currently written necessary. All that would remain under the proposed regulation would be vague standard that recipients who are noncompliant would be sanctioned unless they can show "good cause." Nothing exists to explain what good cause would be, other than to trust to the subjective feelings of impatient caseworkers.

Remedy: Keep the existing conciliation protections in the regulations.

165.61(a) Sanctions

Subsection (a) of the proposed regulation is a laundry list of purported bases for sanctions. Compared to the statute, which lists three transgressions that can result in sanction, the regulatory list covers several pages and 12 different sanctionable transgressions, several with multiple subparts. Moreover, the list is much broader than the comparable provision in the statute. See 62 P.S. §432.3(a). Included are transgressions that have no statutory basis, such as "(6) fails to maximize employment" as well as requirements that leave out statutory protections, such as only permitting a sanction for failure to work only when the recipient "is able to engage" in the assigned work. 62 P. S. §432.3(a)(iii). In addition, the proposed regulation, at subsection (9), calls for sanction when an individual "fails to participate in one of the following work activities during the first 24 months" without any requirement that the person be referred to such a program. Read literally, the regulation requires sanction of an individual who does not speak English for failing to find and enroll in an English-as- a-second-language program, even if they did not know of its existence and no one had directed them to go to the particular program. The statute, however, makes it clear that any such training and educational programs shall be developed only after consultation and an assessment of needs and the incorporation of such recommended programs into an individual's Agreement of Mutual Responsibility. 62 P. S. §405.1(a.2)(4)&(5). DPW attempts to short circuit this consultative process and put all of the potential responsibility on the individual, in flagrant defiance of the statutory language. Similarly, subsection (12) authorizes sanction if an individual "fails to apply for work at the time and in the manner the Department may prescribe." Nothing in the Act gives the Department powers so broad and so subject to arbitrariness and abuse.

Remedy: The regulation should follow the text of the statute for grounds for sanctioning.

165.61(c)(3) *Sanction for Reduction of Hours*

This proposed regulation implements the statutory penalty of reducing the TANF grant based upon a reduction of earnings but authorizes this alternate penalty only in the first 24 months. However, the statute makes clear that it can also be an alternative penalty after 24 months. 62 P.S. § 432.3(b). This is a critical difference, because all post-24 month sanctions otherwise are full family sanction of at least 30 days duration. Especially where the sanctionable activity is a slight reduction in hours worked, the punishment should not be as severe as a full family sanction, and indeed the state statute does not authorize such a limitation.

Remedy: Delete the phrase "during the first 24 months."

165.71(b) Notification

The current regulations provides notice that the sanction period is over and the recipient may again be eligible for full benefits. DPW has commendably retreated from its earlier proposal to eliminate this reminder. This is of considerable importance, since Departmental data suggests that many sanctions go far beyond the statutorily prescribed periods.

The proposed regulation, however, needs to prescribe when the notice should be sent. In order to insure fairness and effectuate prompt compliance, the notices should be timed to arrive shortly before the 30 and 60 day time periods expire, so that recipients have the opportunity to keep sanction periods to the statutory minimum.

Remedy: Require that the notice be sent 5 days before the expiration of the statutory minimum period.

OTHER PROVISIONS

11. The Gross Income Test Should Be Repealed.

183.71 Gross Income Test

Under the former AFDC program, 42 U.S.C. §602(a)(18), there was a gross income test set at 185% of the state's standard of need. Any family who exceeded this level was ineligible, regardless of other disregard policies that might reduce their income to an otherwise eligible level. Pennsylvania announced that it was abolishing this test when it implemented the TANF program, in part because it would have undermined the 50% disregard of earned income that it also adopted. Now, however, when it is finally revising the regulation,

DPW seeks to hold on to this test, at least for non-recipients. This is patently unfair and will actually discourage working families from going off TANF to preserve months of eligibility. Even a one month break in eligibility will disqualify the family, if its income exceeds 185% of the standard of need. For example, an *applicant* family of three would be ineligible if their gross income exceeded $587, even though a *recipient* family earning $588 would receive $109 in monthly TANF payment. Such a policy only adds to the animus towards the TANF program and discriminates against the working poor.

Remedy: DPW should eliminate this outdated and pointless rule.

COMMENTS ON SUPPORT REGULATIONS

12. The proposed regulations Do Not Protect Victims of Domestic Violence

We understand that extensive comments on the support regulations, particularly with respect to domestic violence waivers, will be addressed by the Women's Law Project and the Community Justice Project, both of whom have representatives on DPW's Domestic Violence Task Force. CLS and the clients it represents in this rulemaking endorse their comments. Here, however, we address several themes regarding the deficiencies of the support regulations where waivers are required in cases involving domestic violence. Also, we address a few support issues not related to domestic violence waivers.

Context of domestic violence and support actions

The failure of the support regulations is not that domestic violence waivers are entirely absent from the support cooperation requirements. Rather, this is an instance where "the devil is in the details." The support regulations on the domestic violence waivers contain: (1) inadequate notice requirements; (2) excessive verification requirements; and (3) arbitrary expirations of the waivers. These failures are not small, marginally important details. To the contrary, they could expose women to extraordinary harm.

Support cooperation is a not a mere inconvenience for domestic violence victims, but a highly risky undertaking. In and of itself, the filing of a support petition against an abuser is extremely likely to enrage him, and his anger may cause him to repeat his prior violent behavior against his former partner. Moreover, if not handled appropriately, the petition could alert the batterer to his former partner's whereabouts. Even if he does

not learn where she is living, the abuser may see his partner in court at the support hearing, putting her in close proximity to him at a time he is particularly angry.

For these reasons, the details of the domestic violence waivers from the cooperation requirements are crucial. Given that the possible consequences include physical and mental harm, and even death, the stakes are much too high to tolerate anything less than exacting implementation of the waivers.

Concern for the safety of domestic violence victims and the need for precision in the details were at the core of policy and procedure recommendations submitted by the Domestic Violence/TANF Task Force and approved by DPW. The deficiencies outlined below are all inconsistent with the policies and procedures to which DPW agreed during the Task Force implementation process.

Inadequate notification to the applicant or recipient

187.25 Notification to the Applicant or Recipient

Proposed §187.25(a) provides that the CAO will provide oral and written notification to an applicant or recipient of the right to claim a good cause exemption from the cooperation requirements. However, it provides that only the written notice must state the details required by subsection (a), which includes circumstances constituting good cause, proof of good cause, and the procedure for the good cause determination.

The reason for requiring oral notification of the right to claim good cause is manifest: The danger of domestic violence is too significant to trust to paper notification. If notification is only written, women may miss reading it in the raft of paper that accompanies the welfare process, or limited reading comprehension may prevent them from understanding the written notice.

Oral as well as written explanation of good cause was recommended by the Domestic Violence Task Force, agreed to by DPW, and published in DPW's Operations Memorandum, 00-06-10, The Family Violence Option: Revised Child/Spousal Support-Good Cause Requirements/Procedures (June 30, 2000)attached, Exhibit 8). It must also be required in the regulation.

Remedy: Add the words "oral and" before the word "written" in § §187.25(a).

Burdensome documentary requirements

187.27(b) Waiver of Cooperation for Good Cause — *Proving the Good Cause Claim*

First, §187.27(b), which governs proof of good cause, repeatedly uses the words "corroboration" and "corroborative evidence." These word suggests that evidence in addition to the woman's self-affirmation of her abuse is needed, when in fact DPW agreed in its Operations Memorandum that self-affirmation can in some cases be sufficient.

Remedy: The words "corroboration" and "corroborative evidence" should be replaced by the word "verification."

187.27(b)(1)(iv) *Evidence of good cause*

Second, §187.27(b)(1)(iv) includes specific details regarding medical verification that are burdensome and inconsistent with the verification procedures set forth in subsection (vii)and the Verification form described therein which were developed by DPW to establish verification for domestic violence waivers.

Remedy: Subsection (iv) should be deleted and the remaining subsections renumbered.

187.27(b)(1)(v) *Evidence of good cause*

Third, §187.27(b)(1)(v) does not set forth the full scope of good cause circumstances, as set forth in §187.27(a)(4).

Remedy: Delete the phrase "indicate that the putative father, noncustodial parent or absent spouse might inflict harm on the individual or family member as specified under subsection (a)(4)"; replace it with "verify domestic violence as defined at subsection (a)(4)."

187.27(b)(1)(vi) *Prohibition on contacting abuser*

Fourth, the last sentence of §187.27(b)(1)(vi) is a critical statement that is misplaced. That sentence is, "The CAO may not contact the putative father or noncustodial parent to verify good cause in a domestic violence situation." Rather than being included in this list of possible verification, the sentence should be included in § 187.27(b)(2), which describes the CAO's role in assisting with verification.

Remedy: Move the last sentence of §187.27(b)(1)(vi) to the end of §187.27(b)(2),

187.27(b)(1)(vii) *Person completing waiver application*

Fifth, §187.27(b)(1)(vii) provides that "the person with domestic violence training" (i.e., domestic violence prevention agencies) and the recipient will complete the good cause form. This is a burden that should not be placed on such providers; moreover, by involving a third party, the requirement may delay or prevent processing of the request. The Task Force and DPW had agreed that the form would be completed by the CAO, working with the recipient.

Remedy: Replace the words "the person with domestic violence training" in §187.27(b)(1)(vii) with "the County Assistance Office."

Inappropriate end of waivers

187.27(c)(3) and 187.23(d)(4) *Expiration of waivers*

Section 187.27(c)(3) provides that the CAO, court of common pleas, or DRS approving a waiver will establish the expiration of the waiver. Section 187.23(d)(4) also makes references to "expiration" of the waiver. However, the notion of expirations at an arbitrary date conflicts with the Family Violence Option incorporated in TANF and adopted by DPW, which provides for waivers "so long as necessary." 42 U.S.C. §602(7)(A)(iii). Also, expiration of waivers was not even discussed by the Domestic Violence Task Force, which recommended — and DPW agreed — that waivers should last as long as needed, subject to review every six months. The Operations Memorandum provides for six month reviews, but does not include the establishment of an expiration date.

Setting expiration dates for these waivers is extraordinarily problematic. There is no reason to think that domestic violence is susceptible to being resolved by a date certain. If a waiver were to expire and a support action begun by DPW before a woman could seek to re-establish it (which could happen for a multitude of reasons, such as she was not aware of its expiration or she is too busy dealing with her problems to attend to it), the woman could be in as much danger as she was at the time that the waiver was granted. The provision for six-month review better protects these vulnerable families while satisfying DPW's interest that waivers not be permanent where not required by the circumstances of a particular case.

Remedy: In §187.23(d)(4), change the phrase "until the good cause waiver expires" to "as long as the good cause exists." In § §187.27(c)(3), eliminate the phrase, ""the DRS will establish the expiration of the waiver and...."

187.27(c)(4) *Period for review of good cause*

Moreover, §187.27(c)(4) provides that a review of good cause may be earlier than six months. Reviews in less than six months was never discussed with the Task Force, much less agreed upon.

Remedy: Delete the last sentence of §187.27(c)(4).

Other support provisions

187.22 Definitions -- *budget group*

We object to the requirement that all siblings be included in the budget group, including children for whom support is being paid. The federal requirement that these children be included in the budget group was repealed when AFDC was replaced by TANF in 1996. DPW can and should permit parents to leave children receiving support out of the budget group if they so choose, promoting self-sufficiency and encouraging non-custodial parents to support the children.

Remedy: Modify the regulation to permit the removal of children from th welfare grant when the custodial parent elects to do so.

187.23(b)(6) and 187.23(c)(6) *Paying support to DPW after assignment*

These provisions require that a parent who receives support payments directly from an absent parent after an assignment of support is made to pay these funds over to DPW. We note that in the initial month of application for TANF any support received or anticipated to be received by the TANF parent is counted in determining the family's TANF payment, subject to a $50 disregard.

Remedy: These provisions should be modified to reflect the fact that support received directly from the absent parent is not always required to be paid over to DPW.

13. DPW Has Failed to Consider the Mandates of the ADA in its Proposed Regulations

Throughout our comments, we make reference to various proposed regulations which in our view violate the Americans with Disabilities Act ("the ADA"). The ADA shortcoming tend to fall into two categories: either DPW fails to provide assistance necessary to allow persons with disabilities to successfully participate in the TANF program, or it fails to modify rules that will allow persons with disabilities to fully benefit. The purpose of this section is to provide the legal background on this issue and to pull together the ADA violations that are pointed out throughout this document.

Title II of the ADA provides, "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. In a recent policy guidance, the Office for Civil Rights ("OCR") of the U.S. Department of Health and Human Services ("HHS") discussed the application of this rule to administration of the TANF program. Office for Civil Rights, U.S. Department of Health and Human Services, Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance for Needy Families) (January, 2001) ("the OCR ADA guidance")(attached, Exhibit 9). It can also be found at http://www.hhs.gov/ocr/prohibition.html.

The OCR ADA guidance identified two central concepts of the ADA applicable in the administration of TANF programs: individualized treatment, and effective and meaningful opportunity to participate. Id. at Part B. It also set forth three core legal requirements. First, equal access to the TANF program must be ensured through the provision of appropriate services.[7] Id. at Part D.1. Second, policies, practices and procedures must be modified to provide equal access to the TANF program and services by people with disabilities.[8] Id. at Part D.2. Third, the TANF program must adopt

---

[7] The ADA and Rehabilitation Act regulations provide that a public entity may not provide a qualified individual with a disability with a service or benefit that is not as effective in affording equal opportunity to obtain the same result, gain the same benefit, or reach the same level of achievement as others. 28 C.F.R. §35.130(b)(1)(iii); 45 C.F.R. §84.4(b)(2).

[8] According to the ADA regulations, where necessary to avoid disability discrimination, a public entity is required to make reasonable modifications in policies, practices, or procedures, unless these changes

non-discriminatory methods of administration. Id. at Part D.3. See also, 28 C.F.R. § 35.130-(b)(3)(ii). The OCR guidance leaves no doubt that so-called neutral criteria in state TANF programs which hinder the effective participation of qualified individuals with disabilities are prohibited and must be modified. See also, 28 C.F.R. § 35.130(b)(8) (prohibiting the application of eligibility criteria which tend to screen out qualified persons with disabilities from fully and equally enjoying any service or program, unless necessary for the provision of the program).

In the comments that follow, we identify numerous ways in which the proposed regulations violate the ADA. Notably, each violation is specifically addressed in the OCR guidance.

1. *Failure to provide assessments (§§141.41(e), 165.31):* Our comments note that the regulations, like actual program implementation by DPW, have failed to include the assessment required by Act 35. This failure violates not only state and federal welfare law, however, but also the ADA. Without knowing whether a recipient has a disability that requires reasonable accommodations, DPW cannot properly provide assistance and modifications. The OCR ADA guidance notes that the assessment is "critical" and lays out a variety of promising practices for the assessment process. OCR ADA guidance, Part D.1.

2. *Enrolling persons in RESET who fail to cooperate with verification of work exemptions but clearly are exempt (§165.22):* As noted, language which DPW proposed to remove from an existing regulation would have the effect that a person who did not cooperate with the verification process would be enrolled in the work program, even though he or she is clearly exempt. For example, take the case of a mentally disabled adult who is not able to follow the usual perfunctory instructions to obtain verification and is perceived to be uncooperative. The OCR guidance states that the ADA requires that assistance should be provided to persons with disabilities who need help to complete the application process. OCR ADA guidance, Part D.2.

3. *Twelve month limitation on education and training as a work activity (§165.31(c)(3)):* This is an example of a rule that must be modified in cases where persons with disabilities cannot obtain the full value of such opportunities in the period typically provided. The OCR guidance specifically notes that such modifications in educational programs are promising practices for ADA compliance. OCR ADA guidance, Part D.2.

---

would fundamentally alter the nature of the program. 28 C.F.R. §35.130(b)(7).

4. *Evisceration of conciliation protection against sanctions (§165.51):* As we noted in our extensive comments on this section, the conciliation provision would be greatly weakened by the proposed regulation. DPW seeks to take this step despite the growing recognition that sanctions are often the result of noncompliance caused by disabilities. OCR has indicated that a best practice for TANF programs is a procedural safeguard in which a TANF agency "systematically and routinely investigates and assesses which beneficiaries are being sanctioned and why to determine whether or not beneficiaries who are sanctioned have a disability and whether the disability substantially contributes to the beneficiaries' noncompliance." OCR ADA guidance, Part D.3. The weakening of the conciliation process is not consistent with the agency's ADA obligation, as demonstrated by the OCR guidance. Additionally, OCR suggests that a TANF agency should follow up on missed appointments as a method of avoiding disability discrimination, OCR ADA guidance, Part D.2., another part of the existing conciliation regulation that DPW would eliminate.

5. *Modifications to the TANF time limit (§141.41(f)):* Although we do not focus our comments on the ADA issue in our already lengthy discussion of the TANF time limit, exceptions are required by the ADA for persons with disabilities. The OCR guidance provides as an example of modifications in policies and practices concerning exemptions from work requirements, extensions of time limits and sanctions:

> A TANF agency exempts individuals with disabilities from State-imposed time limits, or provides an extension to the 60-month limit imposed by federal law.

OCR ADA guidance, at Part D.2. CLS has written a lengthy paper submitted to DPW in which we explain the ADA's role in requiring exceptions to the time limit (attached, Exhibit 10). Unfortunately, DPW has done little to insure that its proposed regulations are ADA compliant. When DPW eventually promulgates its complete Time Limit policy, it must factor in accommodations it is required to make under the ADA.

LIST OF EXHIBITS

Exhibit 1 - Operations Memorandum 01-06-09, Implementation Instructions for the Time-Out Initiative

Exhibit 2 - Cash Assistance Handbook 105.251

Exhibit 3 - Operations Memorandum 99-9-3, Summary on RESET policy on Access to Education, (September 14, 1999))

Exhibit 4 - Community Legal Services' Opinion Letter, March 1999 policy

Exhibit 5 - Operations Memorandum, Good Cause for Education Post-24-Months 00-9-4 (Sept. 18, 2000)

Exhibit 6 - Operations Memo, Maximizing Participation Project (MPP) CAO Procedures

Exhibit 7 - DPW, Number of TANF Adults Disqualified Due to Sanctions (September 10, 2001)

Exhibit 8 - Operations Memorandum, 00-06-10, The Family Violence Option: Revised Child/Spousal Support - Good Cause Requirements/Procedures (June 30, 2000)

Exhibit 9 - Office for Civil Rights, U.S. Department of Health and Human Services, Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance for Needy Families) (January, 2001)

Exhibit 10 - CLS Opinion Letter, Application of the ADA and Title VI to Persons Facing the TANF Time Limit in Pennsylvania

EXHIBIT 8

MEMORANDUM

TO: Child Care, Welfare, and Disability Advocates

FROM: Peter Zurflieh and Larry Norton, Community Justice Project

RE: CCIS Child Care Program 25 Hour Per Week Work Requirement: A New "Temporary Exceptions" Policy Has Been Established

DATE: December 1, 2000

One of several problems with DPW's new 25 hour per week work requirement in the Child Care Information Services (CCIS) Child Care Program (a.k.a. "subsidized child care") is that the requirement allowed no exceptions for good cause. Parents who have missed work due to circumstances beyond their control, and who dropped below 25 hours in a week as a result, had their child care assistance terminated.

Last September, the Community Justice Project wrote to DPW on behalf of a parent who had a job for exactly 25 hours per week, but who missed a few hours of work in several weeks of her first months of employment in order to take her severely disabled to child to appointments with various specialists at the Hershey Medical Center. Applying the "exceptionless" 25 hour per week rule, the CCIS agency denied this parent's application for subsidized child care. We argued that DPW has a duty under the American's with Disabilities Act (ADA) to modify any program rules which have the effect of excluding otherwise eligible families from the subsidized child care program based solely on the disability of the parent or, as in this case, the disability of a family member for whom the parent is responsible. We threatened to sue on behalf of this parent and a class of similarly situated parents, unless DPW immediately provided child care assistance to the family and agreed to modify the 25 hour per week work rule by establishing an exceptions policy.

Months of negotiations followed, but we finally have an exceptions policy. We were able to convince the Department that exceptions should be created, not only for parents who miss work due to a disability, but also for other circumstances beyond the control of the parent, such as medical appointments, illness or injury, unavailability of work due to employer closings for holidays and other reasons, and domestic violence. DPW still refuses, however, to include transportation problems or personal emergencies (furnace malfunction, broken water pipes, etc.) on the list of circumstances beyond the control of the parent warranting an exception to the hours per week work requirement.

Considerable time was spent in the negotiations persuading DPW that CCIS agencies should assist parents, as needed, in verifying the information needed to establish an exception and that the Department should allow for a range of acceptable forms and methods of verification. The results here were pretty positive, we think.

Attached is the text of a letter sent by DPW to all CCIS agencies statewide on November 29, 2000. The letter details the new policy and verification procedure and provides helpful

examples. This administrative implementation of the "temporary exceptions" policy will be followed by publication of proposed regulations. This is important, because the regulatory review process will allow us an opportunity to argue that DPW:

(i) should expand the list of exceptions to include transportation problems and personal emergencies;

(ii) extend the verification policy changes, so that they apply to verification of **any** factor of eligibility for subsidized child care, not just the 25 hour per week work requirement.

This may also be an opportunity for us to argue, once again, that DPW should set the hours per week work requirement back to 20 hours, making it consistent with the TANF work requirement.

It would be extremely helpful for further work on these issues if advocates could let us know of any cases in which a parent has lost or been denied subsidized child care:

- because the parent missed work due to a transportation problem or personal emergency;

- based on the parent's failure for any reason to meet the 25 hour per week work requirement (We are looking particularly for parents who work between 20 and 25 hours and who cannot get any additional hours from their employer or parents who go to school full-time and cannot work a full 25 hours per week); or

- based upon the parent's failure/inability to provide requested verification (e.g., the CCIS insists on a document, which the parent cannot produce, when perhaps a phone call from a third party would suffice, or the parent has a disability, which prevents her from understanding and carrying out a rigid or difficult verification requirement, such as getting support print-outs or proof of support cooperation from the DRS).

Please also let us know whether and how well you think this new policy is being followed in your area. You can reach us at:

Community Justice Project
118 Locust Street
Harrisburg, PA 17101

(717) 236-9486 or (800) 322-7572
Fax (717) 233-4088

peterzurflieh@paonline.com
larrynorton@paonline.com