Welfare News

www.welfarelaw.org ♢ www.lincproject.org VOL .9, NO. 1, ISSN 1091-4064, MAY 2004

Editor's Note: *In this issue we highlight two recent developments in ongoing advocacy by legal advocates and low-income community groups related to New York City's work programs for public assistance recipients.*

The first article reports on a major court victory won by the Welfare Law Center and Legal Momentum that upholds the right of New York City workfare workers (those who work in exchange for their grant) to sue the city if they have been subject to racial or sex discrimination in their workfare placement. The court's decision protecting workfare workers is particularly significant in light of current federal TANF reauthorization proposals that, if adopted, would significantly increase work requirements for individuals and create pressure on states to adopt workfare.

The second article summarizes a study by Community Voices Heard, a low-income community organization, that examines the Parks Opportunity Program (POP), a transitional jobs program for New York City welfare recipients. POP represents a shift away from the city's much-criticized workfare program. CVH has been a leader is promoting transitional jobs as an alternative to workfare. The study looks at the positive aspects of the program and makes recommendations for strengthening it.

Visit our website, www.welfarelaw.org, for the July 2003 Welfare News article on the settlement in our Davila case which secures greater access to education and training for New York City welfare recipients, as an alternative to workfare.

Federal Appellate Court Rules That New York City Workfare Workers May Sue for Sexual Harassment and Racial Discrimination

Introduction

In a case of first impression, the Second Circuit Court of Appeals, on February 13, 2004, determined that individuals who perform workfare (Work Experience Program or "WEP") activities in exchange for their TANF cash assistance and/or food stamps are employees within the definition of Title VII of the federal Civil Rights Act of 1964. Title VII generally protects individuals from employment-related discrimination based on race, color, religion, national origin, or gender. In *United States v. City of New York*, 359 F.3d 83 (2nd Cir. 2004), a case brought on behalf of seven women who alleged sexual harassment and sexual and racial discrimination in their workfare assignments, the

Inside. . .

Circuit Court reversed a District Court decision dismissing their complaint and held:

> "We hold that the allegations of plaintiffs' complaints sufficiently pleaded the individual plaintiffs' status as employees entitled to Title VII's protection and that PRWORA does not preempt Title VII with respect to WEP participants. Because the district court dismissed state and local claims solely for lack of supplemental jurisdiction, these dismissals also must be vacated."

This holding means that persons who work for their welfare grants are entitled to the protections of federal and possibly state labor law protections and can seek redress if they are subject to unfair treatment. Plaintiffs' next steps are to prepare for trial.

History of the Case

In 1998 the Welfare Law Center and the NOW Legal Defense and Education Fund (recently renamed "Legal Momentum") filed a complaint with the Equal Employment Opportunity Commission (EEOC) on behalf of six women whose workfare supervisors had repeatedly sexually harassed and/or discriminated against them based on race and/or gender. Each of the women could not obtain relief from the welfare agency. In September 1999, the EEOC announced that it found reasonable cause to commence enforcement proceedings in the cases, and the federal court action followed.

Complaints were filed in federal court by the United States Department of Justice as well as many of the women individually. The several actions were consolidated for purposes of addressing the City's motion to dismiss the case.

In support of its motion, the City argued that (1) the individual plaintiffs were not employees within the meaning of Title VII and that, even assuming they would otherwise be considered employees, provisions of the federal TANF statute, 42 U.S.C. §§ 608(d) and 617, reveal an intent that Title VII not apply to WEP participants. The trial court granted the City's motion to dismiss.

Second Circuit's Conclusion that Workfare Workers are "Employees" for Title VII Purposes

The Second Circuit applied a real world test to determine whether the women ought be considered employees for Title VII purposes. The Court concluded first that the women were "hired" to do the work because they received compensation - TANF, food stamps, transportation reimbursement, and child care payments - if they worked and lost that compensation if they refused, without good cause, to continue working. Second, the Circuit observed that the women were entitled to worker's compensation and other protection normally accorded only to workers. Finally, the employer, in this case the governmental agency defendants, had the exclusive control over the manner and means by which the worker completes his or her assigned tasks. The Circuit rejected an argument that Congress, in enacting the TANF block grant, intended to pre-empt federal labor protections and found no support in the plain language or the legislative history of the block grant.

Significance of the Second Circuit Opinion

The Second Circuit's decision is the first federal court decision to address whether protections normally accorded workers under federal law are available to TANF recipients who engage in WEP and community service as a condition of receiving their assistance. The TANF block grant greatly increased the numbers of welfare recipients whom the states are required to have in work-related activities. For a number of states, most significantly, New York, California, Pennsylvania, Ohio, and Florida, WEP and/or community service have been the work activities to which many recipients are routinely assigned.

However, once the state or county imposes these work requirements on a welfare recipient, whether the recipient acquires many of the protections enjoyed by unsubsidized or subsidized workers has remained an open question. Where the recipient has acquired a "regular" job, there is, of course, little question that the recipient acquires all the rights of any employee.

Two important policy statements from the federal government provide significant guidance by seeking to extend common work place protections to public assistance recipients engaged in workfare or community service. In May 1997, the U.S. Department of Labor ("DOL") issued a guide to the states setting forth the rights of workfare workers to protections under federal employment laws including: the Fair Labor Standards Act ("FLSA"), which governs minimum wage and overtime rights; the Occupational Safety and Health Act ("OSHA"), which governs workplace health and safety; unemployment and anti-discrimination laws. The DOL Guide advises states to consider the applicability of these laws as they design and implement work programs. However, as the document states, it is a "starting point" and it "cannot provide the answers to the wide variety of inquiries that could be raised regarding specific work programs." U.S. Dep't of Labor Guidance: How Workplace Laws Apply to Welfare Recipients, Daily Lab. Rep. (BNA), No. 103 at E-3 (May 29, 1997) available on the web at http://www.dol.gov/asp/w2w/welfare.htm.

In December 1997, the Equal Employment Opportunities Commission issued a notice (Number 915.002) to provide "guidance regarding the application of anti-discrimination statutes to temporary" workers. The Notice clarifies that temporary workers are protected by anti-discrimination laws and that, under many circumstances, workfare workers are considered covered workers. *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, EEO Notice, No. 915.002 (Dec. 3, 1997) available on the web at http://www.eeoc.gov/policy/docs/conting.html.

At the state level, a number of states have extended certain worker protections to TANF recipients performing WEP and/or community service. For example, many states have incorporated workers' compensation protections directly into their workfare statutes. In addition, several important court decisions have held that workfare workers are covered by workers' compensation protections.[1]

Similarly, some states' laws provide that workfare workers are entitled to the exact same protections as regular workers. For example, New York State provides that

workfare workers must be provided the exact same coverage under the New York Public Employee Health and Safety Act as regular public employees. In other situations, protections may be secured under the federal Occupational Health and Safety Act ("OSHA"). However, one should be aware OSHA protections do not extend to persons working for public employers such as state, county, or local agencies.

However, on the federal court level, the only pre-TANF decision to address whether federal worker protections apply to WEP workers was an unfortunate decision from the 10th Circuit. *Johns v. Stewart*, 57 F.3d 1545 (10th Cir. 1995). The *Johns* court determined that workfare workers are not employees under FLSA because the unique relationship between the government and the recipient under the welfare program precluded recipients from being employees when they work off their cash grant. This decision is, of course, not consistent with the United States Department of Labor's recent guidance which indicates that workfare workers are, in most instances, employees within the FLSA definition.[2]

The Second Circuit was not persuaded by the *Johns* holding. It concluded that (1) *Johns* was decided before the enactment of the TANF block grant with its emphasis on defining recipient participation as work; (2) the decision pre-dated the DOL guidance; and (3) the Tenth Circuit failed to engage in a reasoned analysis of whether the WEP worker was an employee within the very broad definition of the federal Fair Labor Standards Act.

In contrast, the Second Circuit, untroubled by the fact that the plaintiffs received TANF benefits rather than wages, noted that WEP workers can be both recipients - for some purposes - and employees - for other purposes. In this case, the Second Circuit found that the cash payment, the related benefits (such as worker's compensation and workplace protections), and the requirement that the plaintiffs' work be useful all contribute to a finding that WEP workers are employees for Title VII.

The impact of the Second Circuit's holding is already being felt. In *Stone v. McGowan*, 99-CV-1941, 2004 U.S. Dist. LEXIS 3254 (N.D.N.Y. 2004), the Northern District of New York determined that WEP workers are also entitled to the protections of the Fair Labor Standards Act and refused to dismiss a claim that the recipient was compelled to work in violation of minimum wage protections.

Conclusion

While the *City of New York* decision represents only one Circuit, the reasoning is solid and the decision is in accord with the federal agency guidance. However, surviving the motion to dismiss on the law is only the first step. Any attorney seeking to litigate these cases will still need to establish as a matter of fact that the TANF recipient is entitled to federal labor protections, that the recipient's rights were violated, and the recipient is entitled to relief.

The Welfare Law Center stands ready to assist counsel throughout the country in litigating these law and fact issues. Contact Marc Cohan, Director of Litigation at the Welfare Law Center, cohan@welfarelaw.org.

Marc Cohan

Notes

[1] *State ex rel. Patterson v. Industrial Comm. Of Ohio*, 672 N.E. 2d 1008 (1996) (workfare workers entitled to same coverage as regular workers); *Arntz v. Southwestern Wilbert Corp.*, 156 Mich. App. 309 (1986)(Both state and municipal entity were the employer for determining coverage of workers' compensation); *County of Los Angeles v. Workers' Compensation Appeals Board*, 637 P. 2d 681 (1981) (work relief is employment for workers' compensation purposes).

[2] The author is aware of only two post-TANF block grant cases challenging the calculation of workfare hours based on less than the minimum wage. In *Cordos v. Turner*, which was brought by the Welfare Law Center along with the National Employment Law Project and which has been settled, the plaintiff worked for less than the minimum wage in New York City's workfare program cleaning sanitation garages. In another New York case, *Wrobel v. Johannes*, brought by the Greater Upstate Law Project and NELP, plaintiff challenged the agency's retention of retroactive SSI benefits to reimburse itself for welfare assistance plaintiff had received during a period when she had worked in a WEP program in exchange for the welfare grant. The case was settled. In another case in Ohio, plaintiffs persuaded the local county to calculate the hours of work based on the minimum wage by threatening to file litigation.

Wages Work! An Examination of New York City's Parks Opportunity Program (POP) and Its Participants

by Sondra Youdelman with Paul Getsos

Editor's Note: The following is the Executive Summary of a longer report, published in March 2004. Sondra Youdelman is the Public Policy and Research Director of Community Voices Heard (CVH). Paul Getsos is Executive Director. The article is reproduced with the author's permission. Sondra Youdelman can be reached at CVH, 170 E. 116th St., Suite 1E, New York, NY 10029, tel. 212-860-6001, sondra@cvhaction.org. The full report is available on the CVH website: www.cvhaction.org.

The Parks Opportunity Program (POP) is the largest public sector paid transitional jobs program in the country. When initiated in March of 2001, nearly 3,500 New York City welfare recipients, who were approaching or had passed their five-year federal time limit on public assistance, were offered 11 ½ month paid positions in New York City's Department of Parks and Recreation.

The POP Program, along with other Transitional Jobs Programs in New York City, represented a significant shift away from forcing welfare recipients to perform unpaid workfare assignments (known as WEP) toward paying people a wage for

working in city agencies on a transitional basis.

This report looks deeper into the experiences of the POP workers. Community Voices Heard (CVH) initiated a survey of 200 former POP participants, examining their experiences both in POP and WEP. Their responses, in addition to findings from other transitional jobs research, welfare to work studies, and documents generated by the New York City Department of Parks and Recreation and Human Resources Administration, tell an important story about the value of transitional jobs and the policy and programmatic challenges yet to be addressed.

POP participants, unlike WEP workers, earned a wage between $9.38 and $12.50 an hour for 40 hours a week. Four days a week they worked in City parks. One day a week they attended a Job Assistance Center (JAC) or participated in the Parks Career Training (PACT) program. JAC and PACT were to offer them a variety of job readiness, job search activities and/or education and training opportunities.

Unlike WEP workers, they had City job titles and were District Council 37 union members. They accrued vacation and sick leave, like other salaried City workers. They also paid into Social Security, paid taxes and were eligible for the state and federal Earned Income Tax Credits (EITC).

The POP participants replaced unpaid Work Experience Program (WEP) participants in the Parks, and performed jobs critical to keeping New York City Parks clean and maintained. They contributed immensely to the functioning of the City, and saved Parks Department funding as well.

Earning a paycheck transformed the way participants felt about work and their desire to gain long-term employment. It also increased their monthly income, improved their quality of life and built their sense of self-esteem. They learned the respect, demands, and challenges that come with real jobs. In these regards, POP was a marked improvement over WEP.

However, limitations of the program are also apparent. Poor employment outcomes suggest that the POP program might better incorporate lessons learned from other traditional transitional jobs programs such as support services to address barriers to employment, and intensive job placement and job retention services coupled with education and training.

This report uncovers lessons learned from this large-scale experiment and sets forth recommendations for improving POP in the future.

Major Research Findings

Finding 1: Wages are an Important Component in Motivating Welfare Recipients to Move Off of Welfare

A. Wages Matter. Survey respondents specifically pointed to the benefit of certain program aspects that changed the way they felt about work and their desire to gain long-term employment. Of those surveyed, 97.6% said that earning a paycheck made a difference. Participants felt much better about themselves earning a wage in POP (87.9% feeling above average) than they did doing unpaid workfare in WEP (22.4% felt above average).

B. The POP Program Motivated Participants to Want to Leave Welfare. Of those that completed the program, 98% said they would have liked to keep working in a full-time job. Nearly all (96%) of respondents said they felt better than they had while receiving public assistance. A similar number (92.9%) of POP participants responding felt their quality of life had improved while in POP due to the money they were earning and improved self-esteem. Of those surveyed, 79.1% were actively looking for work after program completion. Those that were not had childcare issues (40%), were in school or a training program (26.7%), or had health limitations (13.3%).

Finding 2: Parks Opportunity Program Workers Did Real Work Needed for the City

A. POP Workers Did Work Critical for the City. POP Workers held City titles such as City Seasonal Aides (CSAs), City Park Workers (CPWs), Park Enforcement Patrols (PEPs), and Playground Assistants (PAs). They maintained the City's 1,700 parks, playgrounds and recreational facilities by cleaning and landscaping the parks, repairing facilities, staffing recreation centers, assisting with office administration, providing security at facilities and events, and more.

B. POP Workers Were Often Asked to Work Overtime. The importance of the role that POP workers played for the New York City Parks Department is reflected in the fact that 61.2% (60) of the workers surveyed were asked to work overtime during their course of employment. Of these workers, close to 70% were asked to work overtime between 3 and 10 times.

Finding 3: The Parks Opportunity Program Improved the Lives of Most Welfare Recipients Participating in the Program

A. POP Workers Had More Monthly Income than Welfare Recipients. At a wage of $9.38/hour, a POP worker earned $19,510/year ($23,506 with Food Stamps and the EITC) as opposed to less than $9,000/year for a family on welfare (with Food Stamps). 89.9% of those surveyed had more monthly income (even after taxes and deductions) during POP than they had while solely receiving public assistance. Moving beyond their state of previous crisis, 36.4% of them were even able to save money. Participants were eager to maintain the stability and well-being associated with earning wages at this level.

B. POP Workers Saw Their Quality of Life Improve. Of those surveyed, 92.9% felt that their quality of life had improved in POP. Responses pointed to people's increased economic security and the positive family spillover effects. Participants were able to pay the bills and often have a few dollars left over at the end of the month. They could buy things for, and do things with, their family that they were unable to do prior to participation in POP.

C. POP Workers Gained Greater Self-Esteem. Of POP respondents, 87.9% said they felt above average (good or terrific) about themselves while participating in POP. Only 22.4% of them felt so positive while in WEP. They commented on their new feelings of independence and their rising self-esteem. Many mentioned that their children felt proud of them, and they felt proud of themselves, for being able to provide for their families.

Finding 4: The Parks Opportunity Program Prepared People for Better than Unpaid Workfare/WEP

A. POP Workers Gained Skills On the Job. Of POP workers surveyed, 70.7% responded that they had learned new skills on the job. The percentage was higher still

for City Park Worker titles (77%). Training was generally done on the job. Of those surveyed, 94.1% said that they had been trained on the job while working and 61.2% learned new skills from their supervisors. The vast majority of respondents (76.9%) said that the training was similar across all POP workers. In contrast, only 39.2% said they had gained skills while participating in the Work Experience Program (WEP).

B. A Variety of New Skills Were Learned. The bulk of new skills learned or practiced were based in the following areas of the work: equipment usage (71.4%), maintenance/cleaning (48.6%), painting (44.3%), and landscaping/horticulture (31.4%). A smaller group cited other newly learned skills, including security (11.4%), clerical/administration (7.1%), customer service (5.7%), recreational coordination/planning (5.7%), and driving (2.9%).

Finding 5: POP Program Model Fails to Incorporate Critical Elements Typical of the Most Effective Transitional Jobs Programs

A. Work Supports Were Neither Fully Accessible Nor Sufficient. Of those surveyed, 92.9% had their cash public assistance cases closed within a month of when they started their jobs, requiring access to work supports to supplement the wage of $9.38 an hour. Inconsistent access to these supports meant that, while almost all survey respondents' cases were closed, only 68.7% received other types of benefits to help make ends meet while in the program. Participants felt that the following additional supports would have been helpful: increased Food Stamps (55.7%), expanded Medicaid access (34%), better rental assistance (13.4%), more childcare funds (12.4%) and supplemental cash assistance (6.2%). Based on the Self-Sufficiency Standard and Calculator of NYC, a family of 4 living on the POP wage would likely have a monthly shortfall of $1,942 (difference between their income and their expenses) without work supports.

B. Job Search and Employment Services Were of Poor Quality and Education and Training Was Limited. Overall, only 50% of POP participants found themselves better equipped or skilled to get a job due to their JAC and PACT job services participation. The bulk of services offered to participants focused on job readiness and job search instead of education and training. Participants considered the services offered only slightly above average in quality. 91% felt that the job readiness/job search assistance could have been improved. 84.4% felt that additional training would have further helped them to get jobs post-POP.

C. POP Program Failed to Address Individual Barriers to Employment. Among participants currently unemployed, a variety of individual barriers to employment were mentioned: lack of GED (45.8%), lack of education/certification (34.9%), lack of job experience (31.3%), lack of childcare (30.1%), and more. Many of these barriers hit Latinas harder than African-Americans: 43% of Latinas surveyed cited lack of English proficiency as a serious barrier, 54% a lack of GED, 43% a lack of education/ certification, and 46% a lack of job experience. Additionally, those lacking high school diplomas or equivalencies found these education-related barriers to be their most prominent.

D. Program Length is Insufficient to Achieve All Stated Goals. All POP workers felt they could have benefited from a longer transitional jobs program. 49% said that an ideal length would be 2 years, 21% said a year and a half, and 30% said one year. This was regarded as important to help people stabilize their financial circumstances and also advance their skill sets through on the job experience and additional training.

Finding 6: POP Failed to Connect Most Participants to Paying Jobs, Thereby Forcing Many to Return to Welfare

A. Program Design May Have Resulted in Limited Post-Program Placement. Only 15.5% of respondents were employed at the time of the survey. A slightly higher percentage (22%) had held at least one job since POP. This may be attributed to the difference between the skills they obtained on the job and the jobs available in the market. Additionally, critical program elements that are often present in other transitional jobs programs with higher post-program placement rates were missing or of a low quality in POP (such as case management, on-the-job mentoring, placement services, etc.). This is likely responsible for some of the poor employment outcomes of POP.

B. High Unemployment Rates Put Hard-to-Employ Population at Further Disadvantage. Individuals lacking post-program employment cited the lack of jobs available in community (80.7%), pay not being enough to support a family (42.2%), and lack of jobs available in a particular occupation (34.9%) as community-wide barriers to employment. Participants completed the program during a time when NYC and the rest of the country were amidst a recession with a high unemployment rate and weak economy. The unemployment rate for NYC residents was at an average of 8.2% in 2002 as compared to 5.7% in 2000. It was higher yet for individuals with less than a high school education (9.7%), for Non-Hispanic Blacks (11.0%) and for Latinos (9.6%). For single mothers in NYC with less than a high school education, characteristics common to most POP workers, unemployment was at an astounding 19.3% in 2003 and the percent employed a low 39.4%.

C. When in Need, Unemployed Program Leavers Frequently Returned to Public Income Support Programs. Most POP participants wanted to stay off of welfare permanently, and stressed this in every conversation. This, however, was not possible for many. After completing POP, those that still did not have employment turned to the unemployment benefit system for their survival. 85% of respondents accessed unemployment benefits at some point. The great majority (79.1%) were actively looking for work throughout, but the intersection of the economy and their low education and skill levels meant that jobs were hard to secure, particularly without needed assistance and supports. Over half (57.8%) had already returned to cash assistance when surveyed.

Transitional Jobs Program Recommendations

1. A Variety of Positions Should be Offered in Multiple City Agencies and Not-for-Profits. While Parks positions provide certain opportunities, individuals are limited in the skills learned on the job. Additional opportunities in a variety of fields could match the diverse interests and backgrounds of participants. Ideally, skills learned and practiced in the transitional job should reflect changes and growth in the labor market.

2. Links to Long-term Employment Must be Provided. The employment outcomes of POP suggest that more needs to be done to ensure the effective outcomes appar-

ent in other transitional jobs programs. Enhancing job search, as well as job placement and retention services, could directly address this issue.

3. Training and Education Opportunities Need to be Available. In order to boost people's competitiveness in the job market, transitional jobs programs should be structured to allow participants to enhance their qualifications through multiple education and training options. This is critically important when the potential workforce lacks a high school degree or the equivalent.

4. Program Length Should be Extended. An ideal program should support transitional employment for up to a two-year period; this time and flexibility are important for reasons of stabilizing participants' economic circumstances, for enhancing participants' skill and education level, and for meeting the particular needs of the varied individuals in programs.

5. Diverse Backgrounds of Participants Must be Considered. Any program that will truly be able to boast success must meet each participant where he or she is and assist each individual in getting to where they want to be. A "one size fits all" approach will fail. There must be enough options and flexibility in program design to meet the varied backgrounds, needs, and interests of each participant.

6. Access to and Scope of Work Supports Need to be Expanded. Programs should facilitate low-wage workers' access to additional supports, and policies should expand their scope. Transitional job programs should assist participants in obtaining all the supports for which they are eligible in order to reinforce the move off of welfare and support job retention; they should also provide people with information of the different supports they are eligible for upon program completion.

Federal Judge Enters New Hampshire Consent Decree To Reform Medicaid Dental Program For Children

by Kay Drought, New Hampshire Legal Assistance

Introduction

Childhood dental disease is preventable, yet causes pain and suffering for New Hampshire's poorest schoolchildren and anguish for their parents. Under the Medicaid Early and Periodic Screening, Diagnosis and Treatment (EPSDT) program for individuals under twenty-one, children have the right to dental checkups every six months as well as to follow-up treatment. Yet New Hampshire parents trying to protect their children's dental health were repeatedly told by dental offices that the office was closed to new Medicaid patients. Parents also faced waiting lists and long travel times as they attempted to find dental care through the Medicaid program. Children's dental health deteriorated while their parents worked frantically to try to get dental care for them.

This article reports on the successful settlement of a federal lawsuit to improve access to dental care for more than 60,000 low-income New Hampshire children.

Hawkins v. Commissioner

In April of 1999, a single family filed *Hawkins v. Commissioner*, a civil rights case challenging the State's lack of provision of dental care to Medicaid-eligible children. The case later expanded to nine families throughout the State, each of whom had experienced similar frustrations trying to take care of their children's dental needs. The Plaintiffs asserted eight claims under federal Medicaid law. They alleged that 1) they were not effectively informed about their rights to EPSDT services; 2) they requested but did not receive the timely screenings and diagnoses to which they are entitled every six months; 3) they did not receive necessary dental treatment; 4) they did not receive case management services to assist them with scheduling an appointment or with transportation to appointments or with other case worker support; 5) they did not receive help scheduling dental appointments nor did they receive transportation assistance to get to their appointments; 6) they experienced great difficulties obtaining dental care, difficulties which did not exist for children with private insurance; 7) they went without dental care for months while their parents have attempted to find dental providers who would accept Medicaid and 8) Medicaid dental services were not available on a statewide basis in New Hampshire.

The *Hawkins* case filing resulted in highly adversarial litigation disputes as well as intensive settlement efforts. Plaintiffs were represented by a team of lawyers at New Hampshire Legal Assistance ("NHLA"). In addition to me, NHLA attorneys Ken Barnes and Karen Rosenberg worked on the litigation, with Ken also heading up the settlement negotiation efforts. Other NHLA staff played critical roles as legal assistants, data entry workers, and secretarial support staff.

We at NHLA enjoyed a great deal of help from the Welfare Law Center and from attorneys in private practice who supplemented the work of our team. In March of 2003, the Court placed the case on an intense trial preparation track after a new governor took office and we were unable to negotiate a final settlement with the incoming administration. Soon thereafter, the Welfare Law Center agreed to begin helping with the case. Welfare Law Center staff handled class certification and summary judgment briefing, recruited expert witnesses, prepared deposition outlines, and traveled to New Hampshire to review and organize voluminous discovery materials. Attorneys in private practice assisted us with strategic planning, expert witness work, and with defending depositions.

Case Resolution: Agency Agrees to EPSDT Reforms

In August of 2003, the parties agreed to resolve the *Hawkins* claims. On January 23, 2004, the United States District Court for the District of New Hampshire approved that proposed settlement and entered a Consent Decree. On behalf of our clients, we negotiated an end to the situation faced by New Hampshire families, where parents made an unlimited number of long-distance calls throughout the State using the official Medicaid Client Services list of dentists "enrolled" as Medicaid providers, only to find

that those dentists are not accepting new Medicaid patients into their practices. Through discovery, we learned that the State Medicaid Client Services office had even provided the names of dentists who were deceased or currently living in distant states. Families who reported their lack of success to Medicaid Client Services or other branches of the Department were simply told to "keep trying."

Now, as one of many different terms of settlement, the Department is required to develop and use a replacement dental provider list containing only the names, addresses, and phone numbers of dental offices whose practices are known by the Department to be open to new dental patients within a reasonable time period prior to list use/distribution. Moreover, the Department will no longer expect families to make an unlimited number of phone calls – instead, beginning in January of 2005, families with phones will be asked to call at most twelve dental providers to try to find care for their children. At that point, the Department will no longer expect families to make additional calls. Instead, the Medicaid Client Services staff will themselves locate a dental provider with an opening for the child. In addition, beginning immediately, if the family does not have a phone or if the family head does not speak English, the Medicaid Client Services staff will make the dental appointment for the child in the first instance (instead of providing dentist names to the family for the family to contact).

The Department has also agreed to use its best efforts to make sure that children receive dental appointments within ninety days of the time that their parents initially contact Medicaid Client Services for help, and within a reasonable distance of their home or school. Shorter time limits apply in situations of urgent or emergency needs.

To make sure that parents know about their children's rights to dental care and the importance of that care, the Department will conduct a public education campaign and will make changes in how it communicates with individual families. Representatives of the Department's Child Health Assurance Program have already begun making phone calls to the families of newly-enrolled children to encourage them to seek dental care for their children. When families are notified every six months that it is time for their child's next dental checkup, they are also notified of NHLA's role in this case and given our toll-free numbers to contact.

To increase the number of available dental openings for Medicaid patients, the Department has raised Medicaid dental reimbursement rates three times in recent months and will fund new public health dentists.

The Department has agreed to comply with the Medicaid laws and regulations, an agreement which is not limited by any other Decree provisions. On behalf of our clients, we are free to return to federal court to ask the Court to order even more improvements if the new procedures mandated by the Decree do not provide children with the access to dental care to which they are entitled under federal Medicaid law.

The Consent Decree also involves significant monitoring provisions, including NHLA's receipt of Medicaid dental claims data and a variety of data reports to allow us to assess the State's progress in complying with the Decree. To our knowledge, no other Medicaid class action settlement has involved such extensive data reporting. NHLA, working with its consultant, will be able to conduct its own analyses of various aspects of the Medicaid program (e.g., by age group, geographical location, type of dental service). We will meet with the Department on a regular basis to discuss its progress. The case will remain in federal court until at least 2010 for possible enforcement. We will receive reasonable attorneys' fees for our work on all aspects of the litigation and settlement negotiations as well as attorneys' fees for our future monitoring efforts.

A Final Observation on Evidence Retention

Although a description of the myriad litigation battles we fought is beyond both the scope of this article and the endurance of the reader, we highly recommend sending a state agency an evidence retention letter at the beginning of (or even before filing) a lawsuit. At the suggestion of one of the private attorneys working with us, we sent such a letter shortly after filing the case, and we referred to that letter repeatedly during the course of the litigation. The New Hampshire Department of Health and Human Services did retain extensive e-mail communications which would ordinarily have been purged from its servers.

At one point, the Department filed a motion for a protective order seeking court permission to purge its servers, arguing that Legal Assistance demands were threatening to crash the State's computer systems. We ended up negotiating an e-mail retention agreement which required the State to create back-up tapes prior to removing e-mail from its main servers, and also required the State to recreate the e-mail server environment for the purpose of facilitating e-mail retrieval in the discovery process. We retained a computer consultant whose assistance allowed us to negotiate a resolution to the computer crash threat. Therefore we learned that evidence retention letters are just as important to Medicaid beneficiaries as those letters have become to plaintiffs suing corporate defendants.

Editor's note: *Kay Drought can be reached at New Hampshire Legal Assistance, tel.: 603-431-7411, ext. 3012; kdrought@nhla.org.*

In Memoriam

The Welfare Law Center staff notes with sadness the passing of two colleagues.

Herbert Semmel was a treasured, accomplished public interest attorney who devoted his 50-year legal career to social justice issues. He worked on wide range of issues, including civil rights, public benefits, health law, elder law, and labor law. Most recently, he was the founder and Director of the National Senior Citizens Law Center's Federal Rights Project. Prior to going to NSCLC, he was Litigation Director at New York Lawyers for the Public Interest, where he brought several successful disability rights impact cases. Herb's long and distinguished career also included serving for a period as Director of the Center for Law and Social Policy and law school teaching.

Larry Harless was a private attorney in West Virginia who was a vigorous and passionate advocate for low-income people. The Welfare Law Center became acquainted with Larry in 2002 when he brought the first constitutional challenge to TANF time limits, arguing that the state constitution imposed an obligation to aid the poor and that terminating a family's benefits after 60 months violated that obligation. The West Virginia Supreme Court ultimately concluded that terminating cash assistance was not unconstitutional because other forms of support are available to families. However, the court did require that the process for requesting extensions to the time limit be modified to satisfy procedural due process requirements.

Welfare Advocacy in the Privatized Era: A Case Study of Advocacy to Shape the Welfare Disability Assessment Process in New York City

Introduction

The privatization of welfare programs creates many challenges for advocates. Some of the tools advocates use in policy advocacy, such as using Freedom of Information laws and participation in public rulemaking, may not be available for privatized services. Decision-making takes place out of the public eye, and opportunities to learn what the agency is doing before it occurs may be limited. Nevertheless, advocates can play a role in the development and shape of privatized services. This article discusses recent efforts by the Welfare Law Center to engage in policy advocacy concerning privatized welfare services in New York City.

For many years, New York City's welfare agency, the Human Resources Administration (HRA), has contracted out the welfare disability evaluation process to a single private company. Clients and advocates have had many complaints over the years about the contractor, which often found individuals with severe disabilities to be employable despite strong evidence to the contrary. Their disability assessments were brief, their doctors often refuse to consider documentation from clients' own many doctors, and the contractor had only three offices throughout New York City, resulting in long commutes for clients, many of whom have physical and mental disabilities that severely limit their ability to leave home, walk, and use public transportation. In addition, the contractor had unreasonably rigid appointment policies, and individuals who missed or arrived late for an appointment had their applications denied and benefits cases closed, even when there was a disability-related reason for missing the appointment or arriving late.

In August 2003, HRA revealed its intention to phase out the old contractor by issuing a Request for Proposals (RAP) for a vendor to provide disability assessments, as well as several other services needed by individuals with disabilities, including intensive case management, vocational rehabilitation services, and a program for monitoring clients' compliance with medical and mental health treatment. While we are not sorry to see the current contractor go, we wanted to make sure that the new contracts did not repeat the problems of the past. Accordingly, we decided to invest our efforts in playing a role in the contracting process. This required familiarizing ourselves with local contract procurement rules and other related issues.

HRA did not inform advocates about the RAP, but we learned about it anyway, and requested a copy of the RAP. The RAP indicated that HRA intended to enter a three-year contract to serve approximately 45,600 applicants and recipients of cash assistance benefits, and, unlike HRA's prior contracts for disability assessments, subcontracting would be permitted. This raised concerns because HRA has done a poor job of ensuring that contractors comply with the Americans with Disabilities Act (ADA), and it seemed even less likely that HRA would ensure compliance by subcontractors. We had a number of other concerns about the RAP.

Under New York City contract procurement rules, City agencies intending to enter into particular types of new contracts of over a $100,000 must publish notice of the contract in the *City Record* when the agency has made a preliminary decision to award the contract to a bidder, and then hold a public hearing within ten days. The Welfare Law Center called the contracting officer listed on the RFP to find out about the timetable for making the contract award, and sent a law student to the municipal public records office a few times each week for several weeks to review every issue of the *City Record* for notice of the contract hearing. These trips were necessary because relevant portions of *City Record* are not on line. When the contract award was announced, we checked to make sure HRA provided at least ten days between the notice date and the hearing.

The Contract Award and Problems with the Draft Contracts

The contracts were awarded to two primary contractors. We conducted research on the contractors but turned up very little information about either contractor. The chief problems were with the content of the draft contracts. One overarching concern is their lack of specificity. The primary contractors were identified, but the identify of the subcontractors was nowhere to be found in the

drafts. Nor do the contracts make clear which services will be provided by the primary contractors and which will be provided by the subcontractors. Without this information, it was impossible for us to determine whether the contractors and subcontractors were qualified to provide the services contracted for. In addition, much of the information deemed important by HRA when reviewing contract bids was not contained in the contracts. For example, although the RFP asked bidders to specify what client caseloads would be, the contract contains no caseload restrictions.

Compliance with civil rights laws was another problem area. The contracts contain boilerplate language requiring the contractors to comply with the ADA and other civil rights laws, but contain no detail on what this entails. Nor do they require the contractor to have a written reasonable modification policy or staff training. Experience with the current contract has proven that boilerplate contract language is not sufficient to ensure that contractors comply with civil rights laws. The contract also contains misleading language about the nature of the contractors' obligations to provide meaningful access to individuals with limited English proficiency.

Another area of concern related to the plans that are to be drafted for individuals once they have been assessed. The contracts were drafted as if none of the 45,600 individuals to be served had their own doctors or therapists. This omission creates the possibility that clients will lose benefits by failing to follow a treatment plan created by the contractor that is inconsistent with that of the client's treating doctor or therapist. The contracts do not require the plans drafted after these evaluations to contain the reasonable modifications clients need to perform the activities described in their plans. We had several additional concerns.

Welfare Law Center Advocacy in Response to the Draft Contracts

The Welfare Law Center drafted extensive comments on the draft contracts, circulated the draft contracts and comments to other local advocates inviting them to sign onto our comments, and submitted this written testimony at the hearing, at which we also testified. We were the only organization that testified at the hearing. One value of testifying at the hearing was that it put the contractors, who attended the hearing, on notice that advocates will be closely watching contract implementation. Testifying also gave us an opportunity to say, in front of the contractors, that we have filed administrative civil rights complaints concerning the services provided by the current contractor.

Before and after the hearing, we also spoke with the Mayor's Office of Contracts and the New York City Comptroller's office, both of which play a formal role in reviewing City contracts before they are finalized. We shared our concerns and our testimony with both offices. We also spoke with the New York City Council's General Welfare Committee, which can raise concerns informally with HRA and hold oversight hearings.

One of the issues raised in our written and oral testimony was that one of the services contracted for will have little value to clients. One of the services to be provided under the contracts is giving clients who should apply for SSI a list of steps they must take to do so. What many clients with severe disabilities need is someone to assist them in taking these steps, not a list of tasks. Even if a list was needed, HRA could easily give this to clients itself. We decided it was important to include this issue in our comments because of its potential appeal to agencies with a role in the contract approval process that are concerned with curbing wasteful expenditures of public funds.

Contract Modifications Made in Response to WLC Testimony

A few weeks after we testified at the hearing, we learned that HRA had made a number of changes to the draft contracts. The contracts were revised to require the contractors to contain a general statement requiring the contractors to provide reasonable modifications to individuals with disabilities, and to require the contractors to provide specific reasonable modifications, such as reducing the number of assessment appointments clients have to attend, when possible; conducting outreach to clients who miss assessment appointments; and assisting clients with complying with the assessment process. HRA revised the contracts to require the contractors to assist individuals in the SSI application process and help gather the documents necessary to support these applications, instead of giving clients a list of tasks to complete on their own. The contracts were also revised to contain AM professional qualifications for those performing some of the activities in the contract. The language access provision was modified, and a number of additional improvements were made. While HRA did not make all of the modifications we requested and is still too vague on some issues, our advocacy clearly paid off. In addition, the contracts have not yet been finalized. We will continue to raise press for additional contract modifications issues with HRA and other City agencies involved in the contracting process.

How this Advocacy Relates to Broader WLC Efforts to Improve How HRA Serves Those with Disabilities

This advocacy is part of a larger effort by the Welfare Law Center to improve the way in which HRA serves clients with disabilities. We have been engaging in multi-pronged advocacy which includes: filing a comprehensive civil rights complaint with the Office for Civil Rights at the U.S. Department of Health and Human Services (see April 2002 ***Welfare News***), submitting a detailed proposal to HRA on the changes needed to comply with the ADA, coalition-building, commenting on HRA's ADA policy, engaging on advocacy with the State welfare agency to get the agency to play a greater role in supervising HRA's ADA compliance, commenting on HRA's ADA policy, conducting a survey (the subject of an upcoming WLC report) to determine whether HRA is providing a particular reasonable modification – home visits -- to people with disabilities, training local welfare advocates and service providers on the ADA, and other activities.

Cary LaCheen

Editor's note: The Welfare Law Center welcomes information from advocates about how they have shaped their advocacy to deal with privatized welfare systems and is interested in reporting on relevant developments across the country. Send information to Cary LaCheen (lacheen@welfarelaw.org) or Gina Mannix (mannix@welfarelaw.org). For resources on privatization see the January-February 2002 issue of Clearinghouse Review, published by the Sargent Shriver National Center on Poverty Law, www.povertylaw.org. Welfare Law Center articles from that issue are also available on the WLC website, www.welfarelaw.org.

New Welfare Law Center Report
Home Alone: The Urgent Need for Home Visits for People with Disabilities in New York City's Welfare System

Over the last few years, the Welfare Law Center has engaged in a multi-pronged advocacy strategy to obtain improvements in the way that the New York City Human Resource Administration (HRA), New York City's welfare agency, serves individuals with disabilities. In 2002, we filed an extensive complaint against the agency with the Office For Civil Rights (OCR) of the U.S. Department of Health and Human Services (HHS), charging that HRA's administration of cash assistance programs violates the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504) by failing to provide an equal and meaningful opportunity for people with serious mental health problems to obtain and maintain benefits. We have met with members of the City Council, conducted workshops for advocates, and testified at agency hearings on new contracts to provide disability assessments, case management and other services to welfare recipients with disabilities *(see article in this issue of Welfare News)*. We have recently added another dimension to our advocacy by conducting a survey of New York City welfare offices to determine whether the agency is complying with its own ADA policy. Survey results and recommendations are discussed in our forthcoming report *Home Alone: The Urgent Need for Home Visits for People with Disabilities in New York City's Welfare System* by Cary LaCheen. The report will be available in early June of the Welfare Law Center's web site, www.welfarelaw.org.

To conduct the survey, we visited every welfare office in New York City to determine whether HRA is making home visits available to individuals with disabilities who cannot go to a welfare office for appoint-ments. Home visits are a reasonable modification required by the ADA and Section 504, and HRA's own ADA policy requires the agency to provide home visits to people with disabilities who need them. At each office, we presented a scenario involving an individual with a severe psychiatric disability who was unable to come to the welfare office but needed to apply for benefits. We asked if there was any way she could apply for benefits although she could not go to the welfare office. If agency staff provided a telephone number to call to arrange a home visit, we called the number. We also checked waiting rooms to see if the agency's ADA poster was posted in English and Spanish where they were easy to see.

The results were sobering. At 13 percent of the offices, staff provided no information about home visits and appeared unaware of them. At 7 percent of the offices, staff provided incorrect information. Staff readily provided information and provided a telephone number to call to arrange a home visit in only 53 percent of the welfare offices. We were able to reach someone by phone to arrange for a home visit in only half of the welfare offices for which we were given phone numbers, despite several attempts. Welfare offices had inconsistent eligibility and documentation requirements for home visits, and some of these requirements were unreasonable. As bad as things are for people with physical disabilities, they are even worse for individuals with mental disabilities. A number of offices indicated that people with mental health problems may not be eligible for home visits, regardless of the severity of their condition. We also found that less than one-third of the waiting rooms had the agency's current ADA poster in both English and Spanish where it was easy to see.

Our findings indicate that despite the issuance of a new ADA policy and posters, HRA has a long way to go to make home visits a reality for people with disabilities.

Our report recommends that HRA and New York City make home visits a priority, and:

(1) Set uniform standards for home visits

(2) Train all staff on all aspects of home visits

(3) Ensure adequate staffing at all welfare offices

(4) Let the public know about the right to home visits

(5) Monitor all welfare offices

(6) Work more closely with the advocacy community

We intend to share the report widely with HRA, the New York State welfare agency, OCR, and local government officials.

Although our report focuses on ADA compliance in New York City and compliance with HRA's ADA policy, it may be useful to advocates in other states where clients with disabilities face similar lack of compliance with federal disability rights laws. Advocates may want to consider undertaking similar research in the communities they serve, as part of a larger advocacy strategy.

Welfare Law Center Honors Kennedy, Lardent, Wilson

Speaking to an enthusiastic crowd of over 400 people at the Welfare Law Center's Award Dinner in March, Senator Edward M. Kennedy spoke eloquently of his outrage at the growing divide between rich and poor in this country and the inadequacy of our nation's response to poverty.

The Senator also accepted the Center's James C. Corman Award honoring individuals in public service who have devoted their lives to the cause of economic justice. The Senator's Award read: "For a life devoted to public service, the Welfare Law Center salutes your extraordinary, unwavering and passionate leadership in the cause of economic and social justice."

The Award is named in memory of Congressman Corman, who was an outstanding leader in Congress in the struggle for economic justice from 1961 - 1981. Mr. Corman served on the Center's Board of Directors from 1988 - 1999. Dr. Wendell Primus, Senator Charles Schumer, and Peter Edelman are prior recipients of this Award.

Esther Lardent, President and Chief Executive Officer of the Pro Bono Institute at Georgetown University Law Center, was given an Economic Justice Award for her visionary leadership and innovation promoting the involvement of major law firms in pro bono work. She placed the Welfare Law Center's work in the context of her childhood on public assistance and food stamps. After Esther's parents, Holocaust survivors, met in a displaced persons' camp, they brought her to the United States to make a better life for themselves. At the outset they knew no English, and survived on public assistance, living in public housing. They learned English, were able to obtain employment, and eventually bought a house – but it was welfare, Esther said, that made it possible to reach that stage.

Esther also deplored the 1996 Congressional cuts in programs for low-income people and for their advocates. She hailed the Welfare Law Center for "rising from the ashes" after losing all funding at that time by pursuing an aggressive program of class action litigation and involving pro bono law firms in that work.

Donna Wilson of Washington Mutual received an Economic Justice Award in recognition of leadership in the bank's programs of corporate giving, community development, affordable multi-family lending and investment, and employee volunteerism.

Henry Freedman, Executive Director, celebrated the Center's work on behalf of its clients. The audience responded enthusiastically to news about the Second Circuit decision the week before in the workfare sexual harassment case described elsewhere in this issue, and to the cheers of the representatives of grassroots groups who were present.

Dinner Co-Chairs Richard I. Beattie (Simpson, Thacher & Bartlett), Ben Heineman (General Electric), and Sara Moss (Estee Lauder), all persons with past ties to the Center, presented the Awards. Paul M. Dodyk and Stephen L. Kass were Dinner Chairs. All helped make the dinner the most financially successful special event the Center has ever run.

Videos of the presentations of each of the awards, and the acceptance speeches of the honorees, may be found on the Center's website. A copy of Senator Kennedy's prepared remarks can be obtained from the Center.

NOTE: Photos removed from web version.

About The Welfare Law Center

The Welfare Law Center is a national legal and policy organization that works with and on behalf of poor people to ensure that adequate income support is available when necessary to meet basic needs and foster healthy individual and family development. The Center achieves its goals through legal and policy analysis, legal representation, public education, training, and aid and support to advocates. Contributions to the Center are tax deductible.

LEGAL & POLICY STAFF

Henry A. Freedman,
Executive Director
freedman@welfarelaw.org
Marc Cohan
Director of Litigation
cohan@welfarelaw.org
Cary LaCheen
Senior Attorney
lacheen@welfarelaw.org
Mary R. Mannix
Program Director
mannix@welfarelaw.org
Rebecca L. Scharf
Senior Attorney
scharf@welfarelaw.org

LINC PROJECT

Dirk Slater, *Senior Circuit Rider*
dirk@welfarelaw.org
Amanda Hickman, *Circuit Rider*
amanda@welfarelaw.org
Askia Foreman, *Circuit Rider*
askia@welfarelaw.org

DIRECTOR OF DEVELOPMENT

Nancy M. Yanofsky
yanofsky@welfarelaw.org

SUPPORT STAFF

Susanne Evarts
evarts@welfarelaw.org
Peter Kendall
kendall@welfarelaw.org
Kay Khan
khan@welfarelaw.org
Michelle Peeples
peeples@welfarelaw.org

How To Contribute to the Welfare Law Center

With the loss of federal funding, the Center relies upon contributions and publications sales to support its work. Tax-deductible contributions may be made by check or credit card (MasterCard, Visa, American Express - information can be faxed to the Center). Monthly or quarterly contributions can be scheduled. Bequests have been left to the Center in wills, and we would be pleased to discuss possible arrangements. For information about any of these options, contact Kay Khan at the Center.

About Welfare News and Welfare Bulletin

Welfare News is a periodic publication of the Welfare Law Center, 275 Seventh Avenue, Suite 1205, New York, NY 10001-6708, tel. 212-633-6967; fax: 212-633-6371; e-mail: wlc@welfarelaw.org; web pages: **www.welfarelaw.org** and **www.lincproject.org**. **Welfare Bulletin**, issued with **Welfare News**, reports on recent court decisions and noteworthy publications on income support programs.

Welfare Law Center
275 Seventh Avenue, Suite 1205
New York, NY 10001-6708

Non-Profit Org.
U.S. Postage
PAID
New York, N.Y.
Permit No. 8263