

February 18, 2002

Office for Civil Rights
U.S. Dept. of Health & Human Services
233 N Michigan Ave
Ste. 240
Chicago IL 60601

ATTN: Patricia Lucas

Dear Ms. Lucas:

The American Civil Liberties Union of Wisconsin Foundation (ACLU-WIF) works in courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. The ACLU-WIF works to extend rights to those segments of our population that traditionally have been denied their rights, including women; children; people of color; people with disabilities; and the poor. If the rights of society's most vulnerable members are denied, everybody's rights are imperiled. To help protect these rights, in 1989 the ACLU-WIF established its Poverty, Race & Civil Liberties Project.

The primary focus of the National Association for the Advancement of Colored People (NAACP) is the protection and enhancement of the civil rights of African Americans and other minorities. In addition to its legislative and community initiatives, the goals of the NAACP are carried out through the Legal Department, which operates with a mission of focusing on class actions and other cases of broad significance and impact. The mission of the Legal Department is fulfilled in part by supporting and advising local branch litigation efforts.

The ACLU-WIF and the Milwaukee Branch of the NAACP are submitting the following complaint regarding Wisconsin Works (W-2), this state's Temporary Assistance to Needy Families (TANF) program. We have serious concerns regarding the Wisconsin Department of Workforce Development's (DWD's) failure to properly comply with civil rights requirements and the Americans with Disabilities Act of 1990 (ADA).

Although W-2 is often described as a work program, the reality is that it is a program intended to *prepare* individuals to work by providing necessary and appropriate services. There is no question that the ADA imposes specific, and affirmative, obligations upon an agency administering a TANF program, to identify and appropriately serve disabled individuals and households with disabled members. For the reasons discussed in detail below, DWD has as yet been unable or unwilling to comply with that obligation. Our specific concerns include the following:

First, W-2's intake, screening and assessment procedures are grossly insufficient to ensure proper identification and evaluation of the needs of disabled W-2 applicants and participants and those with disabled family members;

Second, there is a widespread failure to ensure that the W-2 program is accessible to and accommodates disabled persons and households with disabled members, by, *inter alia*, DWD's failure to conduct a proper diagnostic review of the W-2 program; use of inadequate notices; imposition of excessive verification requirements; failure to ensure appropriate assignments; and implementation of inappropriate policies and practices on sanctions, case closures and time limits extensions;

Third, certain aspects of W-2 *per se* discriminate against persons with disabilities; and

Fourth, separate from the disability discrimination, data obtained in the course of preparing this complaint

shows a serious racial disparity in the frequency with which agencies extend time limits for W-2 participants. (It is unclear whether, or to what extent, this racial disparity permeates other aspects of W-2.)

These problems stem largely from DWD's failure to ensure that the local agencies with which it contracts appropriately handle the cases of disabled persons and those with disabled family members. Further, DWD has engaged in other actions, including issuing certain policies and implementing certain provisions of W-2 agency contracts, which have the clear effect of discouraging the provision of adequate and appropriate services to disabled persons.

DWD's actions and omissions are of particular concern because there is no question that a substantial proportion of persons remaining on W-2, as well as many of those whose W-2 benefits have been terminated, suffer from disabling impairments. For example, a recent U.S. G.A.O. report found that as many as 44% of TANF recipients reported having physical or mental impairments.¹ DWD concedes that "the remaining [W-2] caseload is comprised mainly of individuals with more severe barriers to employment."² W-2 agencies themselves assert that as many as one-third of W-2 participants have disabilities, AODA problems, mental health issues, or other substantial barriers to employment.³ Further, in 2000 31.6% of W-2 participants were enrolled in "Adult Basic Education" (ABE), for persons with less than eighth-grade reading and math levels.⁴ Yet despite the prevalence of disabilities among the W-2 population, in 2000 only 7.9% of recipients received disability assessments, 6% mental health counseling, and 2.6% AODA counseling.⁵

Structure of W-2.

Under Wisconsin law, an individual found eligible for the W-2 program is placed in one of the following W-2 "employment positions:"

- a. Transitional placements (W-2 T), defined as placements for individuals who the W-2 agency determines, on the basis of an assessment by the division of vocational rehabilitation or similar agency or business, have been, or will be incapacitated for at least 60 days; are needed in the home because of the illness or incapacity of another member of the W-2 group; or are incapable of performing a trial job or community service job;⁶
- b. Community service jobs (CSJ), defined as jobs for individuals who are not otherwise able to obtain employment, designed to improve their employability by providing work experience and training and to assist them to move into

¹*Welfare Reform: More Coordinated Federal Effort Could Help States and Localities Move TANF Recipients with Impairments Toward Employment* (U.S. General Accounting Office, 10/01). The 44% figure may understate the extent of the problem, since most counties relied on recipients' self-disclosure "which may not ensure the identification of some impairments that could interfere with employment." *Id.* at 4. Due to the volume of material referenced herein, hard copies of these and other cited documents are not attached to this complaint, but will be provided by the ACLU-WIF should OCR require them.

²*Wisconsin State [TANF] Plan, FFY 2002-FFY 2003 (Draft)* (Wisc. Dept. of Workforce Development, 11/01), p. 1.

³*An Evaluation: Wisconsin Works Program, Audit 01-7* (Wisc. Legislative Audit Bureau, 4/01), (hereafter, "LAB 01-7"), p. 79.

⁴LAB 01-7, p. 22. Undiagnosed learning disabilities and cognitive barriers are common among the TANF population. See, e.g., *Temporary Assistance for Needy Families (TANF) Program - Second Annual Report to Congress* (U.S. Dept. of Health & Human Services, 8/99), p. 140; *Recent Studies Indicate that Many Parents Who Are Current or Former Welfare Recipients Have Disabilities or Other Medical Conditions*, Sweeney, E. (Center on Budget & Policy Priorities, 2/29/00), p. 3. It therefore is likely that many W-2 participants - especially those placed in ABE classes - have learning disabilities or cognitive impairments, although these have not necessarily been diagnosed. See also, *Matching Applicants with Services: Initial Assessments in the Milwaukee County W-2 Program* (Manpower Demonstration Research Corp., 11/01), p. 90.

⁵LAB 01-7, p. 78.

⁶§49.147(5), Wis. Stats.

unsubsidized employment or a trial job;⁷

c. Trial jobs, defined as part or full-time jobs to improve the employability of individuals by providing work experience and training for which the W-2 agency pays a wage subsidy to the employer to employ them;⁸ and

d. Unsubsidized employment, defined as employment for which the W-2 agency provides no wage subsidy. Individuals assigned to the unsubsidized employment category – even individuals with no other source of income - receive no cash assistance from the W-2 program.⁹

I. Assessment Deficits.

In 2001, the U.S. Dept. of Health & Human Services Office for Civil Rights issued its “*Policy Guidance: Prohibition on Discrimination on the Basis of Disability in the Administration of TANF.*” As this Policy Guidance makes clear:

It is critical that TANF beneficiaries with disabilities receive an assessment that allows them equal opportunity to benefit from TANF programs and the assessment process. This assessment should incorporate an individualized analysis of each person's ability to meet the program requirements, rather than on stereotypes or assumptions about the effect of a type of a disability. ***TANF agencies should tell applicants and beneficiaries that, although disclosure of disability is not required, individuals can alert the agency to a disability.***

Agencies should also inform applicants and beneficiaries that any disclosure is voluntary. ***At a minimum, intake workers should be able to recognize potential disabilities, and to conduct an initial screening to identify possible disability for those individuals who agree to undergo screening. Such screening should be conducted only by trained staff, using screening tools that have been properly validated. If there is an initial indication that an individual has a disability that may impact his/her ability to successfully complete or benefit from a current or proposed program assignment based on applicant or beneficiary disclosure, an initial screening or other information, the TANF agency should give the individual an opportunity for a more comprehensive evaluation or assessment.***¹⁰

The actual W-2 screening and assessment process is deeply flawed in design and practice. The reality is that agencies frequently fail to make any meaningful assessment of a parent's abilities or those of a disabled family member at all, or defer assessments until after a participant has been on W-2 for years and her time is running out.

That the state deliberately sought to have disability assessment play a secondary role in W-2 program administration is made clear by explicit statements in its initial W-2 proposal. As that plan bluntly stated, “[d]ecades of experience with formal assessments have shown that there is no tool which can substitute in each instance for the actual attempt by an individual to seek, obtain or hold employment as a gauge to personal capabilities.”¹¹ In other words, individuals would be - and, as W-2 implementation showed, in fact were - expected to work (and fail) before receiving any disability screening. Many of those who failed - having already been led to believe they were ineligible for W-2 - never returned.¹²

⁷§49.147(4), Wis. Stats.

⁸§49.147(3), Wis. Stats. In practice, trial jobs are rarely used, and thus are not further discussed herein.

⁹§49.147(1)(c), Wis. Stats. DWD subdivides this into three categories: unemployed individuals capable of obtaining employment (commonly known as “job ready”), individuals who are working, and employed individuals previously assigned to a trial job, community service job or transitional placement. *Wisconsin Works Manual* 5.2.0-5.2.3. The implications of, in particular, the “job ready” category for disabled persons is discussed below.

¹⁰*Id.* (emphases added).

¹¹*Wisconsin Works 1999 Plan* (4/1/95 draft), p. 12.

¹²*Converting to Wisconsin Works: Where did families go when AFDC ended in Milwaukee?* (Hudson Institute &

A. Official policies encourage diversion of applicants prior to any disability screening.

DWD's official "light touch" policy directs W-2 agencies to "provide only as much service as an eligible person asks for or needs."¹³ An individual who does not know of the need to request particular services or how to make such a request, can be – and frequently is -- turned away prior to the initial screening mandated by the OCR Policy Guidance.

In fact, under DWD's policy even a receptionist "may direct appropriate persons to self-service resources outside the W-2 program . . ."¹⁴ without having conducted any screening to determine whether that person has a disability or requires any accommodation.

An individual who makes it past the receptionist meets with a Resource Specialist for "W-2 Intake and Diversion."¹⁵ The Resource Specialist is required to conduct an "initial screening of persons to begin the process of determining job readiness and family resources," which *may* (but is not required to) include gathering information about recent job search, employment skills, history, education, and household composition.¹⁶ In contrast to the OCR Policy Guidance, there is no express mandate that the Resource Specialist screen for a participant's or family member's disability, no uniform tool used for such screening, and no follow up to ensure that appropriate services are provided to individuals with disabilities. Neither is there any requirement that the Resource Specialist have any training in identifying disabilities. Again, these omissions run directly counter to the mandates of the OCR Policy Guidance.

B. Even for persons not diverted, agencies do not adequately screen or assess applicants or participants.

Applicants who make it past the diversion process often do not receive appropriate screening or assessment. Outside Milwaukee, it is unclear what, if any, discussion of potential disabilities occurs. A recent study showed that Milwaukee W-2 agencies (which serve about 75% of the state's W-2 participants) at most ask about medical issues which might hinder participation an average of 65% of the time.¹⁷ It is completely unclear how or why the agencies failed to even mention medical issues with the remaining 35% of participants. Children's medical issues were discussed in only 17% of intakes and (apparently) generally only if the conversation was initiated by the participant.¹⁸ There was no indication that issues which could indicate potential disabilities in children, such as behavioral or school problems, were discussed at all. In addition, although most agencies inquired as to an individual's education, the questions focused on grade level completed, not actual literacy¹⁹ - even though, as discussed above, many TANF participants have undiagnosed learning disabilities and perform at levels far lower than the academic grade completed would predict. Domestic violence, which is often correlated with mental health concerns, was discussed in only 4% of interviews, and even then case managers often failed to meaningfully address the issue.²⁰

The use of formal assessment tools was even more variable.²¹ Although the study does not indicate how

Mathematica Policy Research, 1999). For example, 23% of those surveyed who reported a disability were not working and not receiving cash assistance from any government program (including W-2). *Id.* at 38.

¹³*Wisconsin Works Manual 1.1.0.7.*

¹⁴*Id.*, 1.6.3.2.

¹⁵*Id.*, 1.6.3.3.

¹⁶*Id.*

¹⁷*Matching Applicants with Services: Initial Assessments in the Milwaukee County W-2 Program* (Manpower Demonstration Research Corp., 11/01), p. 85. Significantly, among the applicants with whom such issues were discussed, 40% reported a chronic medical condition and 22% more reported a short-term medical condition. *Id.*

¹⁸*Id.* at 86.

¹⁹*Id.* at 79-81.

²⁰*Id.* at 88.

²¹Milwaukee has been more heavily studied than other counties because most W-2 recipients live in Milwaukee. However, the same problems almost certainly exist in most counties in the state, since virtually all the DWD policies and contract provisions discussed herein apply statewide.

often such tools were actually used or whether they were used in each instance in which they were discussed, they were mentioned only 5% of the time at one agency, 20-30% of the time at three agencies, and 86% of the time at another agency.²²

Screening and assessment deficits appear to be caused in large part by the following problems:

1. Workers often lack the training or skills needed to assess disabled persons. As the OCR Policy Guidance makes clear:

TANF agencies may need to fulfill their obligation to ensure that the agency's policies and practices do not subject individuals to disability-based discrimination by TANF agencies by training staff to provide equal access to TANF programs for individuals with disabilities. Effective training is one means of ensuring that there is not a gap between a TANF agency's written policies and procedures, and the actual practice of employees in the front line interacting with persons with disabilities. Effective training ensures that employees are knowledgeable and aware of policies and procedures relating to persons with disabilities and are trained to work effectively with persons with disabilities. . .

Yet as discussed above - and in contrast to the mandates of the OCR Policy Guidance - there is no requirement that receptionists or Resource Specialists have any training whatsoever in evaluating disability, even though they are permitted to "divert" applicants away from the W-2 program. W-2 case managers (known as financial employment planners or FEPs), need receive only minimal training, which has been simply inadequate to ensure appropriate identification of disabilities. There is no requirement that a FEP have any experience in vocational rehabilitation, social work, counseling, or any other special area of concern to disabled W-2 participants, and often such experience is lacking. Instead, many, if not most, FEPs enter the system with a belief that their role is to enforce compliance with assigned activities and formal rules and to sanction non-participation, not to focus on assessment and accommodation. As a result, both in initial intake and ongoing case management, disabilities often remain ignored or unidentified, or labeled as "attitude problems." Even workers who do believe disabilities exist often have little training or understanding of available resources or methods for serving disabled clients or households with disabled family members.

2. DWD does not require formal or uniform screening. As discussed above, the Policy Guidance requires the use of trained intake workers and validated screening tools to conduct disability screenings at intake. Yet DWD instructs agencies to make only an "*informal*" assessment of the "applicant's recent job search efforts, work history, education, skills, interests and abilities."²³ The lack of an explicit mandate that agencies screen for disabilities, the lack of any reference to disabilities or barriers of other household members, and DWD's refusal to require a formal screening process, frequently result in inadequate or non-existent screening. Neither is there any uniform screening tool - much less one validated for ADA compliance - available to the agencies.²⁴

3. Caseworkers rarely advise applicants that their responses remain confidential or that their answers

²²*Matching Applicants with Services*, pp. 90-91; see also p. 93. Further, the "Customer Testing/Assessment Checklist" of the agency which most frequently uses formal assessments is unlikely to identify certain barriers. For example, if an individual "displays a negative attitude," the FEP is only told to test the individual's "Career Attitude" and "Strategy Aptitude," not to screen for mental health issues - even though DWD's own policy manual makes it clear that such attitudes can be a sign of mental health problems or certain physical problems. See, e.g., *Wisconsin Works Manual, App. V*, pp. 102, 114.

²³*Wisconsin Works Manual 5.1.0*.

²⁴DWD may now be developing screening tools to be used with persons newly assigned to CSJ and W-2 T positions. These tools are not yet in use. Further, it does not appear that DWD intends to require disability screening prior to diversion; to require it for persons the agency claims are "job ready;" to require agencies - which have failed to conduct assessments for years - to go back and reevaluate the circumstances of the existing caseload; or to offer screening to persons terminated from the W-2 program.

may lead to the provision of additional services. In many cases, individuals are understandably reluctant to reveal information about personal problems, particularly regarding such stigmatized issues as mental illness or substance abuse. The OCR Policy Guidance recognizes the needs for agencies to alert individuals to the importance of voluntarily disclosing a disability. DWD, however, does not require that agencies provide this information to applicants or participants. That agencies do not routinely advise individuals of the confidentiality of their responses, or inform individuals that providing such information can lead to the provision of special services to address those barriers, hinders self-disclosures about such problems.

4. Participants perform self-assessments. When assessment tools are utilized, many case workers require participants to complete the assessment tool without assistance and without inquiring whether accommodations are necessary. Further, as discussed below, case workers often fail to read the responses to specific questions completed by the participant, even though those responses often indicate a potential disability.

5. DWD has no protocols for the screening or assessment of learning disabilities. As the OCR Policy Guidance recognizes, as many as 40% of the TANF caseload may suffer from learning disabilities. Yet in the sections of its policy manual on “Education and Training,” “W-2 Transitions,” and “Personal Barriers to Employment,” DWD does not even mention learning disabilities as a barrier to be addressed or provide screening or assessment tools for agencies to identify this barrier.

6. Agencies frequently classify individuals as “job ready” without having conducted meaningful assessments. The “job ready” classification denies the family all W-2 cash assistance - even if no one in the household is employed - as long as the agency thinks household members should be able to work.²⁵ Again in contrast to the OCR Policy Guidance requirement for disability screening at intake, seldom is such screening employed in making the “job ready” determination. For example, of households entering the W-2 program when AFDC ended, 30% were classified as “job ready.” Yet while 32% of these purportedly “job ready” parents had only a grade school education,²⁶ the agencies never conducted formal screening for or assessment of potential learning disabilities. Neither did agencies routinely screen for other disabilities. The result of the W-2 enrollment process was that within a year after W-2 began, the cash assistance case load dropped by 40%.²⁷ Many of these households never returned to W-2, even if they never secured employment or other means of support.

7. Even when a disability is disclosed, a comprehensive assessment does not necessarily follow. As the OCR Policy Guidance makes clear, once there is an indication that an individual may have a disability - even if the nature or extent of the disability is unclear - the agency must provide the opportunity for a more comprehensive assessment. Under W-2, however, “assessment” for disabled participants or persons with disabled household members frequently consists of little more than providing the individual with a DWD form - including forms medical providers have criticized as poorly written - to take to a physician.²⁸ For individuals whose disability has not been formally diagnosed (such as persons who say that they cannot read well or that they feel sad, but have not been evaluated); who do not have a treating physician; or whose physician is, for whatever reason, unable or unwilling to complete DWD’s form, there is no guarantee that an assessment will be completed. Instead, some case workers decline to offer assessments, often relying on language in the W-2 policy manual which appears to make such assessments discretionary. In addition, some agencies balk at authorizing funding, particularly since the assessment costs come out of their fixed budgets.

²⁵As discussed below, W-2 contracts make use of the “job ready” classification financially appealing to W-2 agencies.

²⁶See, e.g., *Transition to W-2: The First Six Months of Welfare Replacement* (Institute for Wisconsin's Future, 6/98).

²⁷*Informational Paper 45* (Wisc. Legislative Fiscal Bureau, 1/01), p. 53. Further, more than half the remaining TANF recipients received cash assistance through programs for parents on SSI (Caretaker Supplement) or for relatives other than parents (Kinship Care), not through W-2.

²⁸See, e.g., *Matching Applicants with Services*, p. 85 (“For example, if an applicant has asthma but does not have an incapacitation form [from her own doctor] stating work limitations, her health is not considered to be a primary employment barrier.”)

8. W-2 contracts provided disincentives to properly assess participants. There is no question that it is more costly to serve participants with disabilities. The OCR Policy Guidance makes it clear that an agency may not use methods of administration or contracting procedures which may subject individuals to disability discrimination. In fact, OCR encourages administering agencies to “*reimburse[] providers in such a way as to facilitate, rather than impede, equal opportunity for individuals with disabilities to benefit from the TANF program. . .*”

Yet DWD’s contracts with W-2 agencies have been structured in ways that inevitably discourage assessment. Under the contracts in effect from 1997-99, DWD let agencies (including the private agencies which serve the vast majority of W-2 participants) keep a percentage of any surplus.²⁹ For example, if a contract was for \$20 million and the agency spent \$10 million, it could keep a substantial portion of the contract amount as profit.³⁰ The more the agency underspent its contract, the greater its profit. This structure created clear incentives to reduce services by, for example, classifying large groups of recipients as “job ready” so as to avoid paying benefits, or by failing to conduct the formal assessments which agencies had to pay for out of their own budgets. From 2000-01, while DWD judged agencies on whether they had, for example, assigned individuals to a sufficient number of hours of activities, DWD did not set standards to measure whether or not a formal assessment had been completed in appropriate cases, much less evaluate the quality of such assessments. At the same time, the W-2 agencies continued to bear the cost of conducting assessments. The 2002-03 contracts only require formal assessments in W-2 T cases and therefore do not address the problems regarding individuals placed in CSJ or job-ready categories without disability screening or assessment, nor does the reimbursement structure adequately address the additional costs of serving disabled participants.

9. When screening and assessment occur, it is often not until participants approach their time limits. DWD issued policy memos indicating that agencies should assess participants as time limits approach, indicating that the department was aware of the inadequate assessments for existing W-2 participants. Yet even in such cases, DWD has said only that agencies “can” conduct assessments or reassessments (not that the agencies “must” do so), and that they can continue to utilize informal assessments.³¹ Further, delaying assessments for years - until time limits are nearly up - deprives many W-2 participants of the ability to obtain adequate and necessary services prior to the expiration of their time (while not guaranteeing that an extension of time will be granted). In addition, as discussed below, while DWD closely monitors the precise nature of any barrier affecting a person for whom the agency does request a time limit extension, it does not do so for cases in which no extension is requested.

II. Accommodation and Accessibility.

As the OCR Policy Guidance makes clear:

TANF agencies must afford qualified individuals with disabilities an opportunity to participate in or benefit from TANF programs that is equal to the opportunity the agency offers to individuals without disabilities.

In order to comply with this legal requirement, TANF agencies must provide TANF beneficiaries with disabilities with services that are appropriate, and that give these beneficiaries an equal opportunity to benefit from the agency's job placement, education, skills training, employment and other TANF activities. . .

Program providers are required to make reasonable modifications to policies, practices, and procedures that deny equal access to individuals with disabilities unless a fundamental alteration

²⁹ LAB 01-7, p. 32.

³⁰ *Id.*

³¹ *Operations Memo 99-48* (DWD Bureau of Work Support Programs, 6/29/99), p. 5.

in the program would result. . .

In addition, the Policy Guidance emphasizes that TANF agencies must adopt non-discriminatory methods of administration.

The phrase "methods of administration" refers to the "official written policies" of the TANF agency and to the "actual practices" of the agency. . .

TANF agencies may need to fulfill their obligation to ensure that the agency's policies and practices do not subject individuals to disability_based discrimination by developing and implementing a comprehensive written policy that incorporates modifications made to policies, practices and programs. Clear written policies that describe in detail how to respond when a TANF participant has a disability should be provided to all TANF agency and provider staff who have contact with beneficiaries with disabilities. . .

Finally, TANF agencies may need to fulfill their obligation to ensure that the agency's policies and practices do not subject individuals to disability_based discrimination by conducting regular oversight of TANF programs and services to ensure that people with disabilities are being served. Agencies and service providers should also monitor their policies and procedures in all programs they administer regarding persons with disabilities and their implementation. . .

It is clear that agencies often fail to provide necessary services or any type of accommodation to facilitate the participation of disabled individuals in the W-2 program.

A. DWD has failed to conduct an appropriate diagnostic review or require local agencies to do so. As the OCR Policy Guidance states:

the TANF agency should undertake a comprehensive examination of its own policies, practices and procedures to determine changes necessary to ensure that TANF participants with disabilities have an equal opportunity to benefit, or otherwise ensure that necessary modifications to policies, practices and procedures are made.

There is no question that DWD has failed to conduct the necessary evaluation.

1. DWD has not evaluated the type and prevalence of disabilities experienced by the population it serves. According to the OCR Policy Guidance, an agency's self-evaluation needs to include a "thorough assessment of the prevalence of various populations of people with disabilities who participate in its TANF programs." Clearly this has not occurred, since DWD did not require data collection to document the "type and severity of barriers to employment faced by individual participants"³² or their family members. It therefore "is not possible to determine either the extent to which the current W-2 population is affected by substantial barriers to employment or the extent to which those who require specialized services . . . are actually receiving them."³³

2. DWD has not adequately evaluated W-2 to determine what modifications of policies and practices are necessary. The OCR Policy Guidance states that once the agency identifies the nature and prevalence of disabilities, "[b]ased on this information, *the entity analyzes each step of the TANF program to determine what changes are necessary* to ensure people with disabilities have an equal opportunity to access and benefit from TANF programs and related activities." (emphasis added). DWD itself has never conducted such an evaluation of the W-2 program, nor has it required local agencies to conduct any diagnostic review specific to W-2.³⁴

³²LAB 01-7, p. 80.

³³Id. at 79.

³⁴The last diagnostic review by the state agency was conducted by DWD's predecessor agency, the Dept. of Industry, Labor & Human Relations, in 1993. Since TANF was not adopted until 1996 and W-2 was not implemented until 1997, W-2 clearly was not addressed in the 1993 review. In 1998, DWD had its "Job Centers," which administer a number of programs in addition to W-2, conduct reviews using standard forms prepared by

3. DWD has not conducted regular oversight of W-2 programs, to ensure that policies and practices do not subject individuals to discrimination on the basis of disability, as also required by the OCR Policy Guidance.

B. Agency notices are inadequate. The OCR Policy Guidance makes clear that TANF agencies must ensure that proper notice of agency actions is provided to disabled participants.

1. Notices are unintelligible. For years, hearing officers have found DWD notices - especially sanction notices - insufficient to properly advise *any* participants of negative actions. Obviously, if even an average participant cannot understand the notices, the problem is more severe for those individuals with learning or cognitive barriers. Nevertheless, DWD has yet to rewrite its notices in such a way as to assure the language and format are comprehensible to persons of limited literacy or cognitive skills.

2. DWD does not require agencies to provide any contact to learning disabled or illiterate recipients, or others the agencies know will be unable to comprehend the notice. The OCR Policy Guidance makes it clear that agencies must ensure that recipients understand notices they receive. The Guidance further suggests that “[w]here a TANF agency’s notice is sent to a person the agency knows will be unable to comprehend the notice due to a mental impairment or learning disability, the TANF agency modifies its procedures to ensure other modes of communication are attempted, such as oral communication, phone calls, and home visits, before taking a negative action based upon the notice.” DWD does not require its agencies to take such actions.

3. Notices do not contain adequate information regarding the rights of disabled persons. For example, the Wisconsin Works Participation Agreement contains no ADA-related information whatsoever.³⁵ In addition, while some notices state that persons with special needs can contact the agency, this information is often buried amidst extensive unrelated data or printed in smaller type at the bottom of the page. Further, the notices do not include any explanation of ways in which the agency can assist a disabled individual or any indication that the agency can modify program requirements, as discussed in the OCR Policy Guidance.

C. Verification requirements are unduly burdensome. In general, W-2 policy and W-2 agencies improperly place the burden on the individual to verify the existence, nature and extent of a disability before any accommodation is considered. If an individual claims to have a disability, often the agency simply hands the individual a form and insists that the individual take the form to be completed by her physician. Seldom does a worker offer to assist the individual in obtaining verification, or even inquire if such an accommodation is necessary.³⁶ Further, it is common for the agency or DWD to insist on multiple or repeated verifications of a given impairment, leading some medical professionals to become reluctant to complete W-2 forms.³⁷

D. Assignments fail to appropriately accommodate disabled participants and those with disabled family members. The OCR Policy Guidance makes it clear that agencies must tailor assignments and participation requirements to individual disabilities. The Policy Guidance also makes it clear that “TANF agencies may exempt individuals with disabilities from work requirements . . . when, due to their disabilities, these individuals are unable, with or without reasonable accommodation, to participate in work or other TANF program requirements.” Yet, as discussed below, both DWD policy and agency practice routinely lead to inappropriate assignments. As a result, disabled participants

DWD. However, the reviews did not specifically mention W-2 or discuss the matters raised in the OCR Policy Guidance, including the W-2 application process and procedures relating to notifying beneficiaries of their rights; the nature and requirements of the W-2 program; and policies and practices to aid individuals in sustaining W-2 program participation.

³⁵*Matching Applicants with Services*, pp. 25-6.

³⁶*Id.* To the contrary, the Participation Agreement states: “If I have a medical reason that keeps me from working, *I* will get a written statement from an approved medical provider.”(emphasis added). Nowhere does it indicate that the agency can or will assist a disabled participant in obtaining this information.

³⁷*Exceptions to the Rule: The Implementation of 24-Month Time-Limit Extensions in W-2* (Manpower Demonstration Research Corp. 12/01), p. 17.

use up valuable months from their lifetime limits without receiving necessary services.

1. The failure to properly assess disabilities leads to inappropriate assignments. If an agency does not fully understand the existence, nature or extent of a recipient's barriers or those of her family members, it cannot appropriately serve the individual. As discussed above, the process of screening and assessment for disabilities is haphazard at best, and training of caseworkers is minimal. Consequently, individuals with unrecognized or undiagnosed disabilities, or whose children or other family members may have such disabilities, are often sent to "regular" W-2 assignments with which they are unable to comply, only to end up being sanctioned for "non-cooperation."³⁸

2. Agencies often fail to tailor assignments to known impairments. Even when assessments or other documentation of impairments exists, agencies often fail to make any change in assigned activities, or to even inquire what accommodations the participant requires for herself or a disabled family member. This may occur for various reasons, including case managers who fail to review the details of an assessment completed by the individual;³⁹ case manager emphasis on W-2 as a "work" program; staff ignorance of appropriate methods of serving disabled adults and children; lack of referral resources;⁴⁰ and the lack of intensive services for specific populations, such as learning disabled persons.⁴¹ One report found that agencies wrongly told disabled recipients or families with disabled children that they were not allowed to participate in the W-2 program if they could not work full time or assigned activities in excess of medical restrictions.⁴² Case workers in some agencies believe they lack discretion to use anything other than "standard" assignments and that "supervisors questioned activities assignments that varied from a particular format."⁴³ For all these reasons, agencies often fail to provide individualized services to disabled participants and those with disabled family members.

3. Agencies routinely require 40 hours per week of participation. Although state law allows the agency to assign "up to" 40 hours a week of activities, DWD reduces this discretion by stating that individuals in CSJ "are generally expected to participate 40 hours per week" and that W-2 T participants are to be assigned to "full time activity whenever possible."⁴⁴ DWD compounded the problem by using contract performance standards to reward "full engagement," *i.e.*, the assignment to 40 hours per week of activities, without including standards to reward - or even consider - whether such assignments were appropriate. Thus, the decision for agencies was clear: if they showed DWD that individuals were assigned to full-time activities, they were more likely to get a contract bonus. If they failed to show individuals were assigned to appropriate activities, the likelihood was that no one would even notice. Consequently, agencies have often pressured families to perform full-time activities, insisting that this is a W-2 requirement, even if that extent of participation is in excess of what physical or mental health conditions allow.⁴⁵

4. W-2 contracts provided disincentives to properly serve disabled participants and those with disabled

³⁸As discussed below, the sanction rate for W-2 participants is extremely high.

³⁹For example, case managers often review only the scores of formal assessment tools, rather than reading the individual's substantive responses to specific questions. Yet it is the responses to particular questions, not just the total scores, which often would alert the agency to the existence of a potential disability.

⁴⁰For example, during much of the year 2000 the state Division of Vocational Rehabilitation ran out of funds to serve disabled persons, and W-2 agencies frequently did not have - or did not use- alternative referral resources. Notably, DVR recently stated that it again expects to have more clients than it is capable of serving, due to the implementation of rules permitting more SSI recipients to work.

⁴¹*Temporary Assistance for Needy Families (TANF) Program: Third Annual Report to Congress* (U.S. Dept. of Health & Human Services, 8/00), p. 241.

⁴²*Final Report of W-2 Disabilities Hotline* (Wisc. Council on Children & Families, 9/10/98), and *5/23/00 Follow Up Memorandum*.

⁴³*Matching Applicants with Services*, pp. 93-94.

⁴⁴*Wisconsin Works Manual 7.3.1.2, 7.3.2.2*.

⁴⁵*Final Report of W-2 Disabilities Hotline*.

family members. There is no question that it is more costly to provide the intensive services often required by disabled persons and those with disabled family members. Yet, as discussed in the assessment section above, DWD entered into contracts which lacked adequate incentives - and in some case provided disincentives - for agencies to provide necessary services.

5. It is unclear whether work sites are accessible to persons with mobility impairments. Although the W-2 offices themselves apparently are physically accessible, the accessibility status of work and training sites in Milwaukee and elsewhere is uncertain.

D. Sanction policies unduly penalize disabled participants and participants with disabled family members. Under the W-2 program, agencies are instructed to reduce an individual's monthly benefit by \$5.15 per hour for each hour she fails to participate without "good cause."⁴⁶ As the Policy Guidance makes clear, "**rather than sanctioning TANF beneficiaries who, due to their disabilities, do not comply with work or other program requirements, TANF agencies may make reasonable modifications that facilitate compliance, or grant extensions or temporary exemptions to TANF requirements.**" (emphasis added). Yet neither DWD's rules nor practices adequately protect disabled recipients from improper sanctioning. Although the state's own policy manual makes it clear that "non-cooperation" is often a sign of a disability,⁴⁷ DWD has been far more focused on ensuring that agencies sanction non-participation than it has on ensuring that agencies have properly evaluated the reasons for non-cooperation. In fact, as recently as 2/15/02, DWD publicly raised concerns that some agencies were not sanctioning recipients often enough - without even mentioning the need for agencies to conduct assessments and make appropriate assignments before sanctioning.

1. There is no evidence that monetary sanctions lead to compliance by disabled recipients. In a televised program, the state's former W-2 administrator, J. Jean Rogers, proclaimed that women on welfare are like "big kids."⁴⁸ And like children, she said, the W-2 program must punish them - by cutting their benefits - if they don't follow their caseworkers' rules. Despite Ms. Rogers' arguments, there is simply no validated research showing that the imposition of monetary sanctions leads to compliance by disabled participants. To the contrary, sanctions are often applied to persons "whose physical and mental disabilities reduce either their ability to appreciate what is required of them [by the TANF program] or their ability to secure and retain a job, or both."⁴⁹

2. DWD gave Milwaukee agencies financial incentives to impose sanctions. As discussed above, the TANF agency may not use contractual methods which have the effect of subjecting individuals to disability discrimination. Yet under contracts in effect from 1997-2001, DWD let the private agencies which operate W-2 in Milwaukee (and only in Milwaukee) keep all monies withheld from participants' checks as sanctions, creating clear financial incentives for these agencies to impose large sanctions upon W-2 participants.⁵⁰ The impact of these provisions is highlighted by the fact that on average the Milwaukee agencies sanctioned participants more often, for greater amounts of money, than did agencies in the rest of the state.⁵¹ At the same time, DWD failed to impose or enforce contract criteria which might have provided agencies with financial incentives to ensure that sanctions were appropriate or that participants had been appropriately assessed and accommodated prior to the imposition of sanctions.⁵²

⁴⁶ §§49.148(1)(b),(c), Wis. Stats.

⁴⁷ DWD's own manual states that non-compliance with program requirements may be a sign of mental illness, cognitive impairments, or substance abuse. *Wisconsin Works Manual App. V*, pp. 60,85-6,102. Yet DWD has done little to ensure that W-2 agencies put these principles into practice.

⁴⁸ *What Welfare Reform Did for Me* (Wisconsin Public Television, 1999-2000).

⁴⁹ . . . *Many Parents Who Are Current or Former Welfare Recipients Have Disabilities*, p. 17.

⁵⁰ See, e.g., *LAB 01-7*, App. 1, p. 1-30, at *.

⁵¹ *Id.*, pp. 54-56. Sanction rates in Milwaukee County averaged 10 percentage points higher than in the rest of the state.

⁵² Although the contracts permitted DWD to impose financial penalties for agencies which "failed to serve" W-2 participants, DWD has not treated failing to assess or excessive sanctioning as failures to serve. To the contrary, DWD has yet to impose a single financial penalty on any W-2 agency for failure to serve participants for any reason.

3. Sanctions are often imposed upon disabled recipients. As discussed below, most recipients who have been identified as disabled or who have disabled family members are assigned to W-2 T. In December 2000, 15.2% of the W-2 T caseload was sanctioned. From March - December 2000, the amount of sanctions imposed on W-2 T participants averaged \$278 per month in Milwaukee and \$201 per month in the rest of the state.⁵³ That agencies routinely impose large sanctions on a significant percentage of the W-2 T caseload means that these agencies inevitably, and frequently, sanction persons they know to be disabled.

4. Sanctions are often imposed upon recipients who have not received appropriate assessments or accommodations. As discussed above, many W-2 participants have not been adequately screened, assessed or accommodated. As also discussed above, non-compliance is frequently an indicator of a disability. Nevertheless, agencies routinely frame non-participation as an “attitude problem,” not a disability issue, and proceed to impose sanctions automatically. For example, in addition to the W-2 T sanctions discussed above, in December 2000, 32% CSJ participants were sanctioned. From March - December 2000, the amount of sanctions imposed on CSJ participants averaged \$383 per month in Milwaukee, and \$262 per month in the rest of the state.⁵⁴

5. DWD fails to require any pre-sanction review, investigation or conciliation. Despite the frequency of sanctions of participants in both W-2 T and CSJ placements, DWD has not required agencies to undertake any investigation whatsoever to determine whether the alleged non-compliance was caused by or related to the disability of the participant or family member prior to imposing a sanction, or to determine whether some accommodation would facilitate participation.⁵⁵ Instead, most case managers simply review data showing whether or not an individual attended an activity and, if someone is not listed as having attended the activity, enter a sanction into the computer.

6. Case managers are not required to give good cause for disability-related non-participation. Under state rules, an individual must be granted good cause for non-participation only if she has a required court appearance or lacks child care. All other good cause determinations are left to the discretion of the case manager.⁵⁶ Thus, agencies can and do sanction persons whose non-participation is due to her own illness or disability or that of a family member.

7. Agencies require excessive verification of disability-related good cause. Agencies often only give good cause for non-participation due to illness or disability if the person has a doctor’s note specific to that particular date - yet in many cases of chronic disability, an individual does not see a physician for every incidence of illness. In addition, agencies seldom offer to assist an individual in obtaining verification of good cause.

E. Case closure policies also penalize disabled participants and those with disabled family members. As in the sanction context, DWD’s rules and practices fail to adequately protect disabled persons.

1. Many disabled individuals and persons with disabled family members have had their cases closed. There is clear evidence that many persons who have left the program are disabled. For example, DWD’s own study of persons who left W-2 in 1998 showed that 28.1% of unemployed respondents were experiencing illness, injury or disability of themselves or a family member.⁵⁷ Another study found that former AFDC recipients who did not initially have their cases converted to W-2 “were almost twice as

⁵³LAB 01-7, pp. 55-56.

⁵⁴*Id.*

⁵⁵DWD now suggests that it may address “issues” related to individuals who are being sanctioned for non-participation related to a disability. However, although this suggestion has been in existence for months, and although DWD is aware that this is a “potential ADA issue,” there still have been no procedures developed to implement it, nor is there a clear deadline by which agencies will be required to actually evaluate cases to determine whether non-participation is disability-related. In addition, any potential changes apparently will only affect participants sanctioned in the future, not those already subjected to erroneous sanctions.

⁵⁶Wisc. Adm. Code DWD 12.20.

⁵⁷*Wisconsin Works (W-2) Leavers Survey: Final Report* (Wisc. Dept. of Workforce Development, 11/01), p. 30.

likely to have reported a personal disability that limits their ability to work - 35 percent compared to 19 percent [who did convert to W-2].” Those who did not convert to W-2 were three times more likely to report having a disabled family member, 16% to 5%.⁵⁸ DWD made no effort to re-enroll such participants, or even to inform them that they might be eligible for W-2 despite their medical problems or those of their family members.

2. Many individuals have left W-2 for reasons which are “red flags” for disabilities. Another DWD study indicated that a substantial number of W-2 participants had cases closed because they “chose not to participate in program requirements”⁵⁹ - yet DWD’s own policy manual lists non-cooperation as a “red flag” requiring further assessment and evaluation.⁶⁰ Similarly, a substantial number of cases were closed for persons who “chose” not to attend appointments or enroll in W-2⁶¹ - yet DWD’s manual acknowledges that missing activities also can be a symptom of substance abuse, cognitive impairments, and mental health problems.⁶²

3. DWD fails to require any pre-termination review, investigation or conciliation. Despite the frequency of case closures of participants with medical problems, or of participants whose cases suggest such problems may exist, DWD does not conduct, or require agencies to conduct, pre-termination reviews of any case - even “red flag” cases - to ensure that barriers have been identified, appropriate assessments have been conducted, necessary services have been offered, and appropriate accommodations made.

F. Time limit and extension policies penalize disabled participants. Under Wisconsin law, an individual can participate in a particular W-2 employment position (*e.g.*, CSJ, W-2 T) for up to 24 months of her life, except under unusual circumstances⁶³ - a limit more restrictive than what is required by federal law. Her overall participation in W-2 cannot exceed 60 months, except under specified circumstances.⁶⁴

However, as the OCR Policy Guidance also makes clear, TANF agencies may need to modify policies and practices concerning extensions in order to properly serve disabled participants and those with disabled family members. In fact, under the Policy Guidance “TANF agencies may exempt individuals with disabilities from . . . time limits when, due to their disabilities, these individuals are unable, with or without reasonable accommodation, to participate in work or other TANF program requirements.”

Under W-2, time limits *can* be extended if specific barriers exist, including the need to remain at home to care for a member of the W-2 group with a severe incapacity; personal disability or incapacity; or “low achievement ability, learning disability, or emotional problems of such severity that they prevent the individual from obtaining or retaining unsubsidized employment . . .” For CSJ participants, the agency may also grant extensions if the adult group member has made all “appropriate” efforts to find employment and local labor market conditions preclude a reasonable job opportunity.⁶⁵ But *in practice* agencies often deny extensions to disabled W-2 participants and persons with disabled family members. Notably, of the 1345 persons who reached 21 months of W-2 participation⁶⁶ from 1/99 - 6/00 and who did not receive extensions, only 371 (27%) were because the participant obtained employment. In other words, **people who were not working** made up almost 3 out of 4 extension denials.

⁵⁸Where did families go...?, pp 15-16.

⁵⁹This includes 7.9% of those who had been on AFDC in 1997 but were not on W-2 in 10/99. *A Study of all AFDC and W2 Closures (September 1997 Through September 1999)* (Wisc. Dept. of Workforce Development, 3/00). Because the W-2 caseload is a fraction of the AFDC caseload, the percentage understates the magnitude of the problem: 7.9% of those on AFDC in 1997 equals 2298 people - about 20% of the total cash assistance caseload in 12/01.

⁶⁰Wisconsin Works Manual App. V, p. 17.

⁶¹This includes 9.4% of those who had been on AFDC in 1997 but were not on W-2 in 10/99 (2724 persons - about 30% of the 12/01 caseload). *A Study of all AFDC and W2 Closures*.

⁶²Wisconsin Works Manual App. V, pp. 60, 85, 102.

⁶³See, §§49.147(3)(c),(4)(b)2,(5)(b)2, Wis. Stats.

⁶⁴§49.145(2)(n), Wis. Stats.

⁶⁵Operations Memo 01-30 (DWD Bureau of Work Support Programs, 6/4/01).

⁶⁶An extension of the 24 month limit is generally requested at the 21st month of participation.

1. DWD does not allow agencies to toll time limits for any participants. The OCR Policy Guidance makes it clear that an agency may toll time limits while, for example, a participant is undergoing a disability assessment or obtaining the skills necessary to address her disability.⁶⁷ DWD, however, does not allow tolling of any disabled person's time limit for any reason.

2. Many disabled individuals did not receive extensions. There is clear evidence that agencies failed to request extensions of W-2 time limits for many disabled participants. Of the 1345 persons who reached 21 months of W-2 participation from 1/99 - 6/00 and who did not receive extensions, 222 (16.5%) had households which included a disabled member.⁶⁸ In addition, of those who did not get extensions, 28% were assigned to ABE classes (for persons with less than 8th grade skills) and 2% to literacy skills training, and 90 participants (6.7 %) had an 8th grade education or less⁶⁹ - factors which clearly raise the likelihood of learning disabilities or cognitive impairments. Further, 8% of those who did not receive extensions were assigned to physical rehabilitation, 9% to mental health counseling, 5% to disability assessment, and 3% to AODA counseling.⁷⁰

3. Many individuals did not receive extensions for reasons which are "red flags" for disabilities. Agencies listed 197 of the 1282 for whom no extension was requested (15%) as "did not participate in finding employment or in assigned activities"⁷¹ - even though, as discussed above, non-participation frequently indicates the existence of a disability.

4. Even extension denials for "neutral" reasons may be suspect. As a recent report makes clear, it is simply impossible to ascertain whether agencies are engaging in proper evaluation of extension cases.

Although W-2 policy requires that FEPs notify participants about the availability of an extension, this is monitored only by reviewing CARES [computer screens] or hard copies of the file. . . "There is too much emphasis on CARES, without a valid way to really determine whether the information entered in CARES is actually valid. Did the FEP discuss this with the participant? Did the participant understand? . . ."⁷²

For example, agencies claim that 152 persons - about 12% of those for whom no extension was requested - "voluntarily" declined W-2 extensions or services, but in the absence of information regarding what agencies told participants it cannot be determined whether these decisions were truly voluntary or informed. Ninety-seven persons were denied extensions because the agencies claimed - without making a vocational assessment specific to that individual - that the labor market had sufficient jobs. In addition, 257 people were moved from one W-2 category to another (e.g., from W-2 T to CSJ), but DWD did not require agencies to conduct meaningful assessments before making placement changes.⁷³ In fact, there has been some concern that, particularly in Milwaukee, "agencies may be moving participants from one subsidized position category to another or determining that they are [job ready] . . . based on the time limit rather than on their progress in developing skills necessary to become self-sufficient through employment."⁷⁴

⁶⁷One suggestion included in the OCR Policy Guidance is that "a TANF agency allows TANF beneficiaries who score below the ninth grade level on a standardized adult basic education test to enroll in adult basic education classes. **The TANF program's time limits and work requirements do not apply to these beneficiaries until beneficiaries either reach the ninth grade level or complete adult basic education courses.**" (emphasis added).

⁶⁸*Meeting the Needs of Harder to Serve Participants*, p. 26.

⁶⁹*Id.*, pp. 25, 27.

⁷⁰*Id.*, p. 27. Due to the lack of assessments and appropriate assignments, this is likely a substantial undercount of the participants with such barriers. *See also id.*, p. 8 ("These data cannot tell us how closely the barriers clients are facing relate to their W-2 assigned work activities [A] client with an unidentified mental health problem may not be receiving mental health counseling.")

⁷¹*Id.*, p. 24.

⁷²*Exceptions to the Rule*, p. 17.

⁷³*Meeting the Needs of Harder to Serve Participants*, p. 24.

⁷⁴*LAB 01-7*, pp. 84-5.

5. Many individuals are not adequately assessed or accommodated by agencies making the extension decisions. The decision to grant an extension “depend[s] heavily on the cooperation of the medical community, and this varies.”⁷⁵ Yet DWD does not require that agencies formally screen and assess W-2 participants prior to declining to request an extension, even if the agency is unable to obtain cooperation from the medical provider.

6. DWD does not require a detailed evaluation of non-extension cases.

[I]t is clear that W-2 cases that are granted a time-limit extension have received multiple and intensive reviews. However, the process does not operate in reverse: Comparable effort is not invested to determine whether all cases that should receive an extension are brought forward . . . There is no uniform programmatic compensation for W-2 participants who receive poor or inappropriate case management services; nor is there monitoring of the implications for time-limit extension applications that are never officially denied but are also never officially completed.⁷⁶

DWD’s lack of monitoring occurs even though agencies clearly have incentives not to request extensions in cases in which the agencies themselves have failed to provide appropriate assessments and services, as well as incentives not to request extensions due to the financial burden agencies assume if numerous extensions are granted and their caseloads increase.

III. Disparate Treatment

A. State law provides lower levels of benefits for disabled than non-disabled W-2 participants.

As discussed above, most W-2 participants who receive cash assistance are assigned to the W-2 T or CSJ categories. Although some non-disabled persons are placed in W-2 T, and although some disabled persons may participate in CSJs, it appears that the vast majority of W-2 T participants are disabled, and that most disabled participants are placed in W-2 T.

An individual receives \$628 per month for participation in W-2 T.⁷⁷ She receives \$673 per month for full-time participation in a CSJ.⁷⁸ Because W-2 T participants receive lower monthly benefits, this has the obvious effect of subjecting households whose activities are assigned based on their own disability, or a disability of a family member, to disparate treatment – a lower monthly benefit level – than other households.

B. SSI and SSDI recipients are ineligible for W-2.

According to the OCR Policy Guidance, “[t]he Federal TANF statute is founded on the public policy that individuals formerly on welfare will be better off if provided with job and/or training opportunities rather than continued public assistance. This same policy should be applied, where appropriate, to those formerly eligible for public assistance who have disabilities, but who can work if provided with modified training or accommodated job opportunities.” However, under state law, disabled persons who receive Supplemental Security Income (SSI) are completely ineligible to participate in, or receive the benefits of, any W-2 services.⁷⁹ State rules extend this requirement to preclude W-2 eligibility for recipients of Social Security Disability Income (SSDI) benefits.⁸⁰ Thus, SSI or SSDI recipients are not able to receive W-2 assistance – even if they want such assistance to attempt to return to work.

⁷⁵*Exceptions to the Rule*, p. 20.

⁷⁶*Id.*

⁷⁷§49.148(1)(c), Wis. Stats.

⁷⁸§49.148(b)1, Wis. Stats.

⁷⁹§49.145(2)(i), Wis. Stats.

⁸⁰Wisc. Adm. Code DWD 12.09(2)(j).

In addition, although the state uses TANF funds to provide a monthly stipend for the minor children of single parents who receive SSI⁸¹ (or in a two-parent household, for children if both parents receive SSI), state law does not provide this “Caretaker Supplement” to the children of equally disabled parents who receive SSDI. This is true even if the SSDI parent’s income is the same as, or lower than, an SSI recipient’s income. Thus, there is no TANF-based financial support available to disabled SSDI parents.

IV. Racial Disparities.

In addition to disability-related discrimination, the data regarding extensions of W-2 time limits raise indications of disparate treatment of racial minorities in the W-2 program. For recipients who reached the 21st month of participation from 1/99 - 6/00, 78 out of 212 Caucasian participants, or 1 in 2.7, received extensions. For Latino participants, 33 out of 105, or 1 in 3.2, received extensions. Most disturbing, for African American participants, only 96 out of 1050, or 1 in 10.9, received extensions.⁸²

The data raise serious concerns not only regarding the racial disparities in the extension process, but also regarding the extent to which such disparities may permeate the entire program. Thus, for example, one must question whether African-American participants are diverted at higher rates than other participants, or more frequently labeled as “non-cooperative.” One also must question whether African-Americans receive appropriate case management services or are assigned to appropriate activities.

Recommendations for Remedial Steps

I. Screening and Assessment

A. Require agencies to offer disability screening to all applicants, before diversion. Agencies should be required to inquire about barriers of the applicant and other household members, to ensure proper identification of disabilities. To encourage disclosure, agencies should be required to inform individuals that screening may be used to help determine appropriate activities, and that responses will be kept confidential. A screening tool must be created and validated to identify the disabilities experienced by many participants, including physical health problems, mental illness, learning disabilities, alcoholism, the emotional effects of domestic violence, children’s behavioral and school problems, and other impairments that might limit employment opportunities.

B. Provide meaningful assessments. If an individual discloses a disability or a potential disability is identified by the screening process, agencies should be required to offer individuals a comprehensive assessment by a qualified individual with knowledge of the particular disability. While individuals should be permitted to obtain assessments from their own treating medical providers in lieu of an agency provider, this decision should be made by the participant. In addition, completion of a form from their own doctor should not be a prerequisite for enrollment in W-2 or assignment to particular activities.

C. Require mandatory reassessments. This is needed both *retrospectively* for those who were denied a meaningful initial assessment; and *prospectively*, once a suitable assessment tool is devised. For the program to work for customers, an appropriate assessment must take place in every W-2 case. Given the deficits of the assessment process for the years of W-2, all participants should be reassessed once a suitable tool is developed. The agencies also should be required to comprehensively reassess customers three to six months after application, as a check on erroneous initial assessments and as a gauge of the appropriateness of services provided.

D. Reset disabled participants’ time limits. In order to ensure that OCR Policy Guidance is followed, any participant with a disabling condition (or who cares for a family member with a disabling condition), which was not identified at intake and/or properly assessed, should have her time limit reset. This includes past and current participants who never received adequate assessments, as well as future participants. The failure to reassess should result in a good cause exemption from work requirements and from time limits, until such an assessment is provided.

⁸¹§49.477, Wis. Stats.

⁸²*Meeting the Needs of Harder to Serve Participants*, p. 25.

II. Accommodation and Accessibility

A. Require DWD and local agencies to conduct diagnostic reviews of their own programs, as discussed in the OCR Policy Guidance. These would include thorough evaluations of the barriers experienced by the W-2-eligible population, and address what modifications are necessary throughout the W-2 process in order to appropriately serve these participants.

B. Require DWD to revise its notices and notice procedures. Notices should be rewritten at a grade-school reading level, to help ensure that they are intelligible by persons of limited literacy. DWD should also include in participation agreements, employability plans, notices, and agency posters, specific and prominent language advising individuals of the ability to request assistance and agencies' ability to accommodate disabilities or modify practices. For individuals who are illiterate, DWD should require agencies to offer alternative methods of communicating the content of notices (*e.g.*, offering phone contact).

C. Require DWD to change its verification procedures. Once an agency is aware that a disability exists or may exist, the agency should be required to offer assistance to the individual in obtaining any verification (medical or other) necessary for participation. Verification requirements also should be simplified so that disabled persons are not required to submit multiple verifications of the same impairment.

D. Ensure that assignments comply with assessments. DWD also must ensure that agencies take an individual's impairments into account in developing assignments. This would cover both the specific nature of the assignment and the hours of participation. For example, if an individual is only able to participate for 20 hours per week, agencies must not be permitted to mandate 40 hours per week of participation. DWD also should revise its policy and contract criteria to ensure that agencies emphasize appropriate accommodation over "full engagement."

E. Ensure that individuals are not sanctioned for disability-related reasons. DWD should require agencies to engage in a pre-sanction investigation. During the process, DWD should require agencies to inquire whether the non-participation is related to any physical or mental health issue or disability of the individual or a family member and, if a disability is identified, the agency should be required to conduct any necessary assessments and review possible accommodations to the assignment. DWD also should require agencies to grant good cause for non-participation related to an individual's illness or disability or that of a family member. If verification of the reason for non-participation is required, the agency should be obligated to offer assistance in obtaining such verification.

F. Ensure that individuals do not have cases closed due to disability-related reasons. As in the sanction context, DWD should require agencies to engage in a pre-closure investigation, to inquire whether the missed appointment (or other action triggering the closure) is related to any physical or mental health issue or disability and, if a disability is identified, the agency should be required to conduct necessary assessments and review possible accommodations.

G. Ensure that individuals are not denied extensions for disability-related reasons. DWD should require agencies to engage in a thorough investigation, including conducting formal screening and, if necessary, comprehensive assessments, to determine whether an individual has a physical, mental, cognitive, literacy, or similar barrier to employment. If the agency intends to deny an extension on the basis that jobs in the labor market are available, DWD should require the agency to identify the specific jobs within a reasonable distance of the individual's home, taking into account the barriers faced by the individual; the agency should not be permitted to use broad, raw data (such as city wide unemployment statistics) as a basis for making this decision. DWD should review agency decisions not to grant extensions as closely as it reviews the decisions to grant extensions.

H. Reset disabled participants' time limits. In order to assure that OCR Policy Guidance is followed, any participant with a disabling condition or who cares for a family member with a disabling condition, which was not accommodated (whether or not an assessment occurred) should have her time limit reset. This includes past and current participants who never received adequate assignments, as well as future participants. The failure to assign appropriate activities should result in a good cause exemption from work requirements and from time limits, until an

appropriate assignment is made.

III. Disparate Treatment.

A. Require the state to raise W-2 T payments to the CSJ level, so as not to penalize W-2 T participants by providing them with a lower benefit amount.

B. Permit disabled SSI and SSDI recipients to participate in W-2 activities if they wish to obtain additional skills in order to facilitate employment. In addition, SSDI recipients should be granted the same access to C-Supp benefits as is provided to SSI recipients.

IV. Racial Disparities.

A. Ensure that race does not play a role in determining eligibility for extensions. DWD should conduct a thorough and supervised review of the cases of all racial minorities, particularly African-Americans, who were not granted extensions. This review must include a detailed evaluation to ensure that agencies provided appropriate and necessary case management services to any (disabled or non-disabled) W-2 participant, as well as a review to ensure that barriers were appropriately identified and addressed by the W-2 agency. DWD should be required to offer an extension to any household affected by inappropriate case management services.

B. Require an evaluation of racial disparities in all aspects of the W-2 program. The review should be conducted by a neutral outside source, and should cover such issues as the nature and quality of services provided to persons of different races. This evaluation should be supervised by OCR. Once the evaluation is completed, further remedial steps should be discussed.

V. General program issues.

A. Require DWD to conduct a public outreach campaign. There is no question that many disabled persons and persons with disabled family members have left W-2. In addition, the failure to properly assess and accommodate disabled individuals and family members and explicit statements that persons who could not work would not be able to participate in W-2, inevitably discouraged many disabled persons and those with disabled family members from even applying for W-2. Consequently, DWD should be required to mount a statewide outreach campaign, approved by OCR, to reach W-2-eligible households with disabled members who have been discouraged and excluded by inadequate assessment and program policies and practices.

B. Require DWD to propose and issue revised regulations. OCR should direct DWD to promulgate regulations that incorporate the OCR policy guidance, and which adopt the screening, assessment and accommodation steps discussed herein.

C. Require DWD to revise contract criteria and performance standards, to ensure and encourage the provision of adequate and appropriate services to disabled participants and those with disabled family members.

D. OCR should provide continuing oversight, with technical assistance. Since 1997, advocates and W-2 participants have seen too often a gap between legal requirements and policy and practices that are actually implemented. It is critically important that the state and local program designers and managers have the degree, kind and quality of technical assistance they require in order, for example, to design and appropriately validate assessment tools that can help to identify the disabling conditions with which W-2 applicants are dealing, develop appropriate methods to modify program requirements, and ensure proper training of staff. DWD has thus far been unable or unwilling to accomplish compliance on its own. Thus we urge OCR to provide, compel or otherwise to facilitate DWD and local agencies to obtain the technical assistance needed to serve all citizens.

In conclusion, a compliance review is highly important because DWD has not, thus far, provided the

services necessary for disabled persons to achieve independence, in violation of the ADA and the goals of the Personal Responsibility and Work Opportunity Reconciliation Act.

Please feel free to contact us with any further questions or requests for information.

Sincerely,

KARYN L. ROTKER
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