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What the Changes in the Welfare Law Mean for People with Disabilities

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New Provisions of the Temporary Assistance for Needy Families Program: Implications for Clients with Disabilities and Advocacy Opportunities

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The Deficit Reduction Act that President Bush signed in February 2006 reauthorized the Temporary Assistance for Needy Families (TANF) program and made some changes in the law governing the program.¹ The interim final regulations that the U.S. Department of Health and Human Services (HHS) issued on June 29, 2006, implement these changes.² Given the nature of the TANF changes and the high prevalence of disabilities among parents receiving TANF benefits, the new statute and regulations have implications for TANF families in which either a parent or child has a disability.³

In this article I highlight major Deficit Reduction Act provisions likely to affect clients with disabilities, review key provisions of federal disability rights laws that continue to apply to people with disabilities in TANF programs, discuss the applicability of those laws to the new TANF requirements, and identify opportunities for policy

¹Deficit Reduction Act of 2005, § 7102 (Feb. 8, 2005); Pub. L. No. 104-163, 110 Stat. 2105, codified at 42 U.S.C. §§ 601 *et seq.*

²71 Fed. Reg. 37454 (June 29, 2006), codified at 45 C.F.R. pts. 261–65. As permitted by the Deficit Reduction Act, the U.S. Department of Health and Human Services (HHS) promulgated interim final regulations that went into effect immediately and had a subsequent public sixty-day comment period. Deficit Reduction Act § 7102(c)(ii).

³For research and reports on the prevalence of people with disabilities in Temporary Assistance for Needy Families (TANF) programs, see GOVERNMENT ACCOUNTABILITY OFFICE, GAO-02-884, WELFARE REFORM: OUTCOMES FOR TANF RECIPIENTS WITH IMPAIRMENTS (2002), available at www.gao.gov; EILEEN P. SWEENEY, CENTER ON BUDGET AND POLICY PRIORITIES, RECENT STUDIES INDICATE THAT MANY PARENTS WHO ARE CURRENT OR FORMER WELFARE RECIPIENTS HAVE DISABILITIES OR OTHER MEDICAL CONDITIONS (2000), available at www.cbpp.org.

advocacy and advocacy on behalf of individual clients so that they can obtain and maintain TANF benefits.

Beyond the specific questions raised by the passage and implementation of the Deficit Reduction Act and its effect on clients with disabilities lies the broader issue of TANF program compliance with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act. In the years since the Personal Responsibility and Work Opportunity Reconciliation Act, TANF's umbrella statute, several states have revised their TANF policies or developed new ones to incorporate the requirements of the ADA and Section 504.⁴ Advocates played a key role in convincing states to take these actions. While a discussion of advocates' efforts is beyond the scope of the article, I welcome inquiries on Deficit Reduction Act-related ADA issues and on the broader topic of bringing welfare agencies into compliance with the ADA and Section 504.

I. TANF Provisions of the Deficit Reduction Act

Below is a brief summary of the Deficit Reduction Act changes and new TANF regulations likely to affect cash assistance recipients with disabilities. The Personal Responsibility and Work Opportunity Reconciliation Act and the Deficit Reduction Act are highly technical and complex, and in this article I do not discuss all of these technicalities in detail.⁵ Since the regulations are relatively new and are unclear or ambiguous on some issues, the regulatory provisions or their interpretation by HHS may change.

A. States Must Meet Strict Work Participation Rates Without the Benefit of Large Caseload Reduction Credits

Under TANF, states are free to specify which families must participate in work activities and the amount of participation required. Nevertheless, because the states must demonstrate that a certain percentage of all families and two-parent families are participating in activities that count toward the federal work participation rates, this requirement affects states' willingness to exempt families from work activities or permit parents to engage in activities that will not help the state show compliance.

The Deficit Reduction Act is likely to increase the pressure on states to require TANF recipients, including those with disabilities, to engage in work activities. The Act did not change the actual work participation rates that states must meet: 50 percent of all families and 90 percent of two-parent families receiving TANF must be engaged in countable work activities for mandated numbers of hours, and HHS may impose sizable financial penalties on states that fail to meet these rates.⁶ But the Act changed the *actual* work participation rates that states must meet in that states may no longer claim credit for caseload declines over the last decade. The Personal Responsibility and Work Opportunity Reconciliation Act and the Deficit Reduction Act provide a "caseload reduction credit" under which a state's required participation rate is reduced by past caseload reduction achieved. Before the Deficit Reduction Act, the caseload decline was measured since 1995.⁷ The

⁴See, e.g., Division of Family Development, New Jersey Department of Human Services, Providing Services to Individuals with Disabilities: Program Instruction (June 1, 2005) (in my files); DEPARTMENT OF SOCIAL SERVICES, COMMONWEALTH OF VIRGINIA, TANF TRANSMITTAL 27, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) PROGRAM(2004) (summarizing changes in TANF program revisions based on the Americans with Disabilities Act (ADA)), www.dss.virginia.gov/files/division/bp/tanf/policy/transmittals/27.pdf; Department of Transitional Assistance, Commonwealth of Massachusetts, Filed Operations Memo 2003-19, Department Obligations Under the Americans with Disabilities Act (Aug. 15, 2003) (in my files).

⁵For a fuller discussion of the requirements of the Personal Responsibility and Work Opportunity Reconciliation Act and the Deficit Reduction Act, see CENTER ON BUDGET AND POLICY PRIORITIES & CENTER FOR LAW AND SOCIAL POLICY, IMPLEMENTING THE TANF CHANGES IN THE DEFICIT REDUCTION ACT: "WIN-WIN" SOLUTIONS FOR FAMILIES AND STATES (2006) (hereinafter WIN-WIN SOLUTIONS), available at www.cbpp.org; CENTER FOR LAW AND SOCIAL POLICY, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE TO NEEDY FAMILIES BLOCK GRANT OF H.R.3734 (1996), available at www.clasp.org.

⁶42 U.S.C. §§ 607(a)(1)–(2), (c)(1)(A)–(B), 609(a)(3). Under the Personal Responsibility and Work Opportunity Reconciliation Act and the Deficit Reduction Act, two-parent families in which one parent has a disability are included in the all-families participation rate but not the two-parent rate. 42 U.S.C. § 607(b)(2)(C).

⁷*Id.* § 607(b)(3); 45 C.F.R. § 261.40.

credit is now limited to a reduction from the state's average monthly caseload since 2005.⁸ Given the major reductions in welfare caseloads during the first several years after the Personal Responsibility and Work Opportunity Reconciliation Act passed in 1996, many states thus far have been required to meet participation rates far below 50 percent.⁹ Unless states make further substantial reductions in welfare caseloads, they will now be required to meet participation rates of close to 50 percent and 90 percent.

B. State Flexibility with "Maintenance of Effort" Funds Is Being Limited

To receive federal funding under TANF, states must maintain a share of their historic spending; this amount is known as "maintenance of effort" funds.¹⁰ States originally had greater flexibility in using such funds than they do now under the Deficit Reduction Act. Notably, families receiving benefits through a separate state program paid for solely with state "maintenance of effort" funds were not included in the state's work participation rates.¹¹ Some states took advantage of this flexibility and created separate state programs for groups who were unlikely to meet the required work rates. For example, Virginia placed families whom state policy exempted from work activities in such a separate state program;

such families included families with a parent or child with a disability.¹²

Under the Deficit Reduction Act, states must now count toward the work participation rates families receiving assistance through these "maintenance of effort"—funded separate state programs.¹³

C. Many Families that Include People with Disabilities Will Still Be Counted in Work Participation Rates

The Personal Responsibility and Work Opportunity Reconciliation Act does not exclude families with a parent or child with a disability from the work participation rate calculations.¹⁴ The interim final rule that HHS issued in response to the Deficit Reduction Act, however, is a small improvement in this respect.¹⁵ Under the regulations, a parent caring for a family member who has a disability, resides in the household, and does not attend school on a full-time basis is excluded from the denominator of the state's work participation rate.¹⁶ This exception, however, is limited to parent caretakers. Nonparent caretakers of family members with disabilities are included in the work rates, as are parents caring for family members who live outside of the household. Moreover, parents who have disabilities themselves are generally included in the work rates.¹⁷

⁸Deficit Reduction Act § 7102(a)(B); 45 C.F.R. § 261.40(a)(1).

⁹States' required participation rates for 2004, the most recent data, after adjusting for the caseload reduction credit are available at www.acf.hhs.gov/programs/ofa/particip/2004/table01a.htm.

¹⁰42 U.S.C. § 609(a)(7).

¹¹*Id.* §§ 607(b)(1)(B), (b)(2)(B).

¹²See www.acf.hhs.gov/programs/ofa/MOE-05/virginia.htm for a description of Virginia's program.

¹³Deficit Reduction Act § 7102(b).

¹⁴42 U.S.C. §§ 607(b)(1)–(2).

¹⁵This regulation resulted from Deficit Reduction Act language directing HHS to issue rules defining the circumstances under which a parent residing with a child receiving assistance should be included in the work participation rates. 42 U.S.C. § 607(c)(1)(i).

¹⁶45 C.F.R. §§ 261.2(n)(2)(i), .22.

¹⁷*Id.* § 261.2(n)(1)(iii). Parents who receive Supplemental Security Income (SSI) are also excluded from the work participation rate calculation; however, on a case-by-case basis, states may choose to include SSI recipients who are engaging in federally countable work activities. *Id.*, 71 Fed. Reg. 37462 (June 29, 2006). Under the Personal Responsibility and Work Opportunity Reconciliation Act and the Deficit Reduction Act, two-parent families in which one parent has a disability are counted only in the all-families rate and not in the higher two-parent rate. 42 U.S.C. § 607(b)(2)(C).

D. Countable Work Activities Are Narrowly Defined

The new rules place greater restrictions on the types of activities that states may count toward the federal work rates; in particular, the new rules limit the extent to which participation in activities that remove barriers to employment for people with disabilities counts toward those rates. To count toward the federal rate, an individual's participation must fall within a list of twelve activities in the original TANF law.¹⁸ The Personal Responsibility and Work Opportunity Reconciliation Act and the implementing 1999 regulations, however, did not define these categories, and, before the Deficit Reduction Act, states had the flexibility to define each in a manner that best served the needs of the TANF recipients and the state. Several states used this flexibility to define some categories, such as "community service," broadly to include barrier-removal activities such as receiving counseling, medical treatment, and rehabilitation.¹⁹

The Deficit Reduction Act constrains this flexibility by requiring HHS to define the activities that qualify under each category.²⁰ The Act's regulations define the categories of work activities narrowly, limiting "community service," for example, to "structured programs and embedded activities in which TANF

recipients perform work for the benefit of the community under the auspices of public or non-profit organizations."²¹ The regulations take a rigid "mutually exclusive" approach; activities that meet the definition of one of the twelve activities may not count toward any of the other eleven.²²

Further, although the Deficit Reduction Act regulations allow states to count individuals receiving substance abuse treatment, mental health treatment, and rehabilitation services toward the federal work rates, only limited amounts of these activities are federally "countable." These activities come under "job search and job readiness," which the Personal Responsibility and Work Opportunity Reconciliation Act makes federally "countable" for only four consecutive weeks and six weeks per year, or twelve weeks if the state qualifies as a "needy state" based on its unemployment rate or increases in its food stamp caseload.²³

Under the Deficit Reduction Act regulations, one hour of rehabilitation activities counts as one hour of work.²⁴ Many individuals with disabilities are unable for at least some period to engage in any work activities other than treatment or rehabilitation, but they receive far fewer than thirty hours of treatment per week. States are likely to require some of them to engage in a concurrent work activity in

¹⁸"Work activities" are subsidized and unsubsidized employment; work experience; on-the-job training; job search and job readiness assistance; education related directly to employment; community service programs; vocational educational training (not to exceed twelve months); job skills training directly related to employment; satisfactory attendance at secondary school, or in a course of study leading to a certificate of general equivalence, if an individual has not received a high school diploma or certificate of general equivalence; and providing child care services to an individual who is participating in community service. 42 U.S.C. § 607(d). To count toward the "all-families" rate, a family must participate for at least thirty hours per week; to count toward the two-family rate, the family must participate for thirty-five or fifty-five hours per week, depending on whether the family receives federally funded child care. 42 U.S.C. §§ 607(c)(1)(A)-(B). Activities are defined as "core" or "noncore"; to count toward the federal work rates, participants must spend twenty hours each week engaged in a "core" activity to count toward the all-families rate and more to count toward the two-families rate. 42 U.S.C. §§ 607(c)(1)(A)-(B).

¹⁹GOVERNMENT ACCOUNTABILITY OFFICE, GAO-05-821, WELFARE REFORM: HHS SHOULD EXERCISE OVERSIGHT TO ENSURE THAT WORK PARTICIPATION IS MEASURED CONSISTENTLY ACROSS STATES (2005), available at www.gao.gov.

²⁰Deficit Reduction Act § 7102(c)(i)(1)(A).

²¹45 C.F.R. § 261.2(h).

²²*Id.* § 261.2; 71 Fed. Reg. 37457 (June 29, 2006).

²³42 U.S.C. §§ 607(c)(2)(A)(i) (limits on countable "job search and job readiness"), 603(b)(5) (qualifying as a "needy state"); 45 C.F.R. § 261.2(g) (defining "job search and job readiness" activities to include treatment and rehabilitation). Thirty-two states were "needy" for at least one month in the 2006 and 2007 fiscal years. A list of those states is available at www.acf.hhs.gov/programs/ofa/pi-ofa/june2006.pdf.

²⁴45 C.F.R. § 261.60(a).

addition to rehabilitation or treatment. Those unable to comply will be at risk of losing benefits.

The rules permit states to count individuals as engaged in work activities during holidays and to give participants up to ten excused absences in a twelve-month period (with a limit of two per month).²⁵ However, these protections do not go far enough. Many common illnesses result in missed work for more than two consecutive days, and the ten-month limit in a twenty-one-month period is not sufficient, given the legitimate reasons parents may have for being unable to attend work activities.

E. States Must Meet Onerous Counting and Verification Requirements

Prior to the Deficit Reduction Act regulations, states set their own policies for how to count and verify hours of participation. The regulations limit state flexibility. Now states must report “the actual hours that an individual participates in an activity” and must “support each individual’s hours of participation in the case file.”²⁶ States must submit to HHS work verification plans describing how they determine countable hours of participation, monitor participation to ensure that actual hours of participation are reported, and accurately input data.²⁷

States are likely to pass some of the responsibility for verifying participation onto TANF recipients and to sanction or close the cases of those who do not comply. Individuals with disabilities may have particular difficulty in meeting these documentation requirements.

II. The Americans with Disabilities Act and Section 504 of the Rehabilitation Act

Title II of the Americans with Disabilities Act applies to the programs and services of “public entities,” defined as states and local governments and their agencies and departments.²⁸ Title II states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits, services, programs, or activities of a public entity or be subject to discrimination by any such entity.”²⁹

Under the implementing regulations, public entities may not deny persons with disabilities an equal opportunity to participate in and benefit from the entities’ programs, services, and activities; may not administer programs in ways that impair program objectives for people with disabilities or otherwise have a discriminatory effect; and may not use eligibility criteria that tend to screen out people with disabilities.³⁰ Public entities must also make reasonable modifications of policies and practices when necessary to avoid discrimination against people with disabilities.³¹ Individuals are protected under the ADA if they have a physical or mental disability that substantially limits at least one major life activity.³² They must also be “qualified individuals with disabilities,” that is, they must meet the essential eligibility requirements for the program, service, or activity with or without reasonable modifications.³³

²⁵*Id.* § 261.60(b).

²⁶*Id.* §§ 261.60(a), .61(a).

²⁷*Id.* § 261.62.

²⁸42 U.S.C. §§ 12131–12132.

²⁹*Id.* § 12132.

³⁰28 C.F.R. §§ 35.130(b)(1)(i)–(ii), (b)(3)(i)–(ii), (b)(8).

³¹*Id.* § 35.130(b)(7).

³²42 U.S.C. § 12102(2).

³³*Id.* § 12131(2).

Title II regulations require programs, services, and activities to be provided in the most integrated setting appropriate to the needs of qualified individuals with disabilities.³⁴ States may operate separate programs for people with disabilities in limited circumstances, but individuals with disabilities may not be denied the opportunity to participate in programs that are *not* separate and different.³⁵ Public agencies must give applicants, recipients, beneficiaries, and interested persons notice of rights under the ADA and Section 504 as they apply to the particular program.³⁶ Public entities do not have to do anything that would be a “fundamental alteration” or “undue administrative or financial burden.”³⁷

Section 504 of the Rehabilitation Act prohibits discrimination against people with disabilities in programs and services receiving federal financial assistance.³⁸ Section 504 regulations are substantially similar to ADA Title II regulations, and I discuss them together.³⁹

III. Applying the ADA and Section 504 to TANF Programs After the Deficit Reduction Act

The ADA and Section 504 still apply to TANF programs, a point that HHS noted explicitly in the preamble to the Deficit

Reduction Act regulations.⁴⁰ In a section that the Deficit Reduction Act did not amend, the Personal Responsibility and Work Opportunity Reconciliation Act refers specifically to the ADA and Section 504 and states that these laws “shall apply to any program or activity which receives funds provided under this part.”⁴¹ In 2001 the HHS Office for Civil Rights issued policy guidance on the application of the ADA and Section 504 to TANF programs; the guidance discusses legal requirements and “promising practices.”⁴² The guidance makes clear that TANF programs must make, for TANF recipients, a wide range of reasonable modifications from simplifying the application process, to permitting recipients with disabilities to engage in activities that are not countable toward federal work participation rates, to providing support services that enable recipients with disabilities to benefit from work activities.⁴³ The guidance is explicit that a state’s failure to implement a “promising practice” does not necessarily mean that the TANF program violates the ADA or Section 504.⁴⁴ As a practical matter, however, failure to implement the guidance’s promising practices or a comparable substitute means that an agency is very likely to be in violation of the ADA and Section 504. HHS has issued a number of letters of finding, making clear

³⁴28 C.F.R. § 35.130(d).

³⁵*Id.* §§ 35.130(b)(1)(iv), .130(c); *id.* pt. 35 app. § 35.130.

³⁶20 C.F.R. § 35.106; see also 45 C.F.R. § 84.8. For more information on the Americans with Disabilities Act and its application to TANF programs, see CARY LACHEEN, WELFARE LAW CENTER (now the National Center for Law and Economic Justice), USING THE AMERICANS WITH DISABILITIES ACT TO PROTECT THE RIGHTS OF INDIVIDUALS WITH DISABILITIES IN TANF PROGRAMS: A MANUAL FOR NON-LITIGATION ADVOCACY (2004), available at www.nclej.org; Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 7 GEORGETOWN JOURNAL OF LAW AND POLICY 1 (Winter 2001), available at www.nclej.org; Herbert Semmel & Cary LaCheen, *Temporary Assistance for Needy Families and the Americans with Disabilities Act*, 31 CLEARINGHOUSE REVIEW 475 (Jan.–Feb. 1998).

³⁷28 C.F.R. §§ 35.130(b)(7), .150(a).

³⁸29 U.S.C. § 794(a).

³⁹45 C.F.R. pt. 84.

⁴⁰71 Fed. Reg. 37456 (June 29, 2006).

⁴¹42 U.S.C. § 608(d).

⁴²Office for Civil Rights, U.S. Department of Health and Human Services, Policy Guidance: Prohibition Against Discrimination on the Basis of Disability in the Administration of TANF (Temporary Assistance for Needy Families) (2001), www.hhs.gov/ocr/prohibition.html.

⁴³*Id.* §§ B.a, D.1, D.2.

⁴⁴*Id.* § A.4.

that TANF programs must comply with the ADA and Section 504.⁴⁵ There has been little litigation on the application of these laws to TANF programs.⁴⁶

A. May TANF Programs Allow Recipients to Engage Only in Federally Countable Work Activities?

In response to the Deficit Reduction Act, states are likely to attempt to narrow the types and duration of activities in which they permit TANF recipients to engage, so that the activities closely mirror those that are federally countable (e.g., by permitting individuals to engage in mental health or substance abuse treatment for only six or twelve weeks per year). States are also less likely than in the past to make exceptions to work requirements as a reasonable modification for recipients who have disabilities and cannot engage in federally countable full-time, or any, work activities.

If states are unwilling to make exceptions, these strategies violate the rights of TANF recipients with disabilities. The ADA and Section 504 continue to require states to make a broad range of reasonable modifications for people with disabilities even if, as a result, an individual cannot be counted toward the state's required participation rates. States may argue that they can neither permit recipients with disabilities to engage in activities that are not federally countable nor exempt those with disabilities from work activities because of the more onerous work participation rates and the risk of penalties for failure to meet these rates.

However, states have little ground for such arguments.

1. The Deficit Reduction Act Does Not Conflict with States' ADA Obligations

The Deficit Reduction Act and implementing regulations do not obligate states to require recipients with disabilities to engage in federally countable work activities. Nor do the statute and regulations prohibit states from exempting recipients with disabilities from work requirements and allow them to engage in work activities that are not federally countable or allow them to engage in fewer hours of activities than are federally countable. In fact, HHS assumed in the preamble to the interim final regulations that states would permit recipients to engage in noncountable activities and explained, “[T]hat is why the participation rate is only 50 percent.”⁴⁷

The tension between states' obligations under the Deficit Reduction Act and under the federal disability rights laws does not absolve states from the legal obligation to provide reasonable modifications of work activities to recipients with disabilities.

The distinction between welfare laws that directly conflict with ADA and Section 504 requirements and those that do not is significant, as illustrated by contrasting two cases that address states' definition of “dependent child” under the Aid to Families with Dependent Children (AFDC) and TANF programs. The AFDC statute defined “dependent child” as a child under 18 or “at option of the state,

⁴⁵Voluntary Compliance Agreement Between HHS Office for Civil Rights and Oregon Department of Human Services (Aug. 6, 2004); Letter from Peter Chan, Acting Regional Manager, Region I, HHS Office for Civil Rights, to John Wagner, Commissioner, Massachusetts Department of Transitional Assistance, (Jan. 24, 2004), available at www.masslegalservices.org/docs/shelterlof.pdf; Letter from Paul Cushing, Regional Manager, HHS Office for Civil Rights, to Maurice Jones, Commissioner, Virginia Department of Social Services (Sept. 24, 2003); Voluntary Compliance Agreement between Office for Civil Rights, HHS, and Alabama Department of Human Resources (Dec. 17, 2002); Letter from Paul Cushing, Regional Manager, Region III, HHS Office for Civil Rights, to Yvonne Gilchrist, Director, Baltimore City Department of Social Services (Sept. 26, 2002); Voluntary Compliance Agreement Between Office for Civil Rights, HHS, and Georgia Department of Human Resources, Division of Children and Family Services (Feb. 28, 2001); Letter from Margaret Chang, Acting Regional Manager, Region I, HHS Office for Civil Rights, to Claire McIntire, Commissioner, Massachusetts Department of Transitional Assistance (Ramos OCR Letter of Findings) (Jan. 19, 2001), available at www.masslegalservices.org/docs/5428_OCR-to-McIntire.pdf. Letters of finding and compliance reviews are in my files.

⁴⁶See, e.g., *Lovely H. v. Eggeston*, 235 F.R.D. 248 (S.D.N.Y. 2006); *Chatmon v. North Carolina Department of Health and Human Services*, No. COA 05-112 (N.C. Ct. App. Oct. 11, 2005); *Raymond v. Roland*, No. 3:03 CV 0118(MRK), 1004 WL 551241 (D. Conn. Mar. 12, 2004); *Fry v. Saenz*, 120 Cal. Rptr. 2d 30 (Cal. Ct. App. 2002) (Clearinghouse No. 53,705).

⁴⁷71 Fed. Reg. 37466–67 (June 29, 2006).

under the age of nineteen and a full-time student ... if, before he attains the age of nineteen, he may be reasonably expected to complete the program of such secondary school (or such training).”⁴⁸ Washington State opted to include 18-year old high school students in the state’s AFDC program. In *Aughe v. Shalala* an 18-year-old high school student who had a disability and was not expected to graduate by age 19 as a result of his disability challenged the state’s rule under the ADA and Section 504.⁴⁹ The federal district court held that, because the definition of dependent child was in the federal AFDC statute, neither the state nor HHS could waive it; thus the requirement was essential to the AFDC program and did not have to be modified for 18-year-olds with disabilities.⁵⁰

After the Personal Responsibility and Work Opportunity Reconciliation Act eliminated the AFDC program, states were no longer required to define “dependent child” in a particular way in their TANF programs. California, among other states, retained the AFDC requirement in its TANF program anyway. In *Fry v. Saenz* 18-year-olds with disabilities brought an ADA and Section 504 challenge to the rule. Distinguishing *Aughe v. Shalala*, the California Court of Appeal reversed a judgment for the defendants. The court held that the rule was not essential to the state’s TANF program because the purposes of the program could be achieved without the rule. The rationale of the *Aughe* court, that the rule was required by federal law and thus could not be waived, no longer applied.⁵¹ The court remanded for development of the factual record on whether the

rule would fundamentally alter the program by requiring additional large-scale expenditures.⁵²

Like the graduation requirement in *Fry*, the Personal Responsibility and Work Opportunity Reconciliation Act and the Deficit Reduction Act do not require states to define work activities in a particular way or prohibit them from providing TANF benefits to individuals who have disabilities and are not engaged in work activities. Thus, for states, modifying their work requirements for recipients who have disabilities and cannot meet those work requirements as a result of their disabilities would be reasonable.

2. Reasonable Modifications for TANF Recipients with Disabilities Are Consistent with TANF’s Purposes

In *Fry* the court reasoned that the “expected to graduate by age 19” rule was inconsistent with the statement of purpose in the state TANF statute, which was to enhance the family’s “right and responsibility to provide sufficient support for its children” and “right and responsibility to provide its own economic security.” The court noted that 18-year-olds who had disabilities and had not completed high school or training were ill-prepared to work, and having to care for these children might impede their parents’ ability to work.⁵³

Advocates have a strong argument that providing reasonable modifications of work activities to TANF recipients with disabilities is consistent with TANF purposes, and failing to provide them is inconsistent with those purposes. Many state TANF statutes and state

⁴⁸Former 42 U.S.C. § 606(a).

⁴⁹*Aughe v. Shalala*, 885 F. Supp. 1428 (W.D. Wash. 1995).

⁵⁰*Id.* at 1432–33. But see *Howard v. Department of Social Welfare*, 655 A.2d 1102 (Vt. 1994) (holding that the ADA and Section 504 required Vermont to modify the graduation rule for an 18-year-old with a disability because federal law did not prohibit use of state-only funds to serve such an individual and the modification was consistent with the purpose of the program).

⁵¹*Fry v. Saenz*, 120 Cal Rptr. 2d at 35, 38.

⁵²*Id.* at 43. On remand, the trial court held that an additional expenditure of \$9 million to \$16 million per year, given the amount of unallocated and unspent TANF funds and unallocated general reserve, would not be a fundamental alteration. *Fry v. Saenz*, No. 00CS01350, slip op. (Cal. Super. Ct. Sacramento County May 24, 2004) (in my files).

⁵³*Id.* at 36–37.

plans describe serving needy families and increasing self-sufficiency as goals. These goals are consistent with providing benefits to needy families with a parent or a child with a disability, even if they cannot engage in federally countable work activities. The goals are also consistent with permitting recipients with disabilities to engage in activities that are not federally countable but will assist them in becoming employable.

3. Welfare Agencies Must Prove that an Accommodation Is a Fundamental Alteration or Undue Burden

Under the ADA and Section 504, after an individual makes a threshold showing that a modification is reasonable, the burden of proving that a program modification is a fundamental alteration or undue burden lies with the public entity.⁵⁴ While courts may consider cost as a factor, cost to the state is not, by itself, evidence that a modification would be a fundamental alteration.⁵⁵

States do not know for certain that they will be unable to meet participation rates if they provide modifications to recipients with disabilities. Moreover, how states could show that providing reasonable modifications—as opposed to the myriad other choices in the state’s program design and operation—will prevent meeting work participation rates is unclear. Before any penalties are imposed on states, the regulations set out a protracted process—notice, opportunity to demonstrate reasonable cause or develop corrective compliance plans, and opportunity to come into compliance.⁵⁶ Thus HHS is unlikely to impose penalties for noncompliance with work participation rates before fiscal year 2011. Courts hold that general, speculative assertions by state and local governments that compliance with the ADA and Section 504 will

be too costly are insufficient for a “fundamental alteration” defense.⁵⁷ A state’s vague assertion that it will risk future federal penalties for failing to meet the participation rate is too speculative and remote to constitute a fundamental alteration or undue burden.

4. TANF Programs Are Not Merely Work Programs

States are likely to argue that their TANF programs are work programs, that work is an essential eligibility requirement for receiving benefits, and that to provide benefits to individuals not engaged in work activities would fundamentally alter the program. But TANF programs are not *only* work programs; they also assist needy families. Whether by law, policy, or practice, many state TANF programs exclude some individuals from work requirements, thereby casting further doubt on the strength of this argument.

B. TANF Agencies May Not Create Hurdles that Have a Discriminatory Effect

In response to the Deficit Reduction Act, some states are likely to adopt policies and practices—diversionary tactics and adding appointments or other requirements—that make it more difficult to obtain and maintain benefits. These policies and practices are likely to violate the ADA and Section 504 because they have a discriminatory effect on people who have disabilities and are unable, as a result of their disabilities, to attend appointments or jump through additional hoops. Such policies and practices are program administration methods that have a discriminatory effect; they impose eligibility requirements that screen out or tend to screen out people with disabilities. If not modified for people who cannot comply as a result of their disabilities, the policies and practices deny

⁵⁴*Olmstead v. L.C. by Zimring*, 527 U.S. 581, 604 (1999); *Frederick L. v. Department of Public Welfare*, 364 F.3d 487, 492 n.4 (3d Cir. 2004); *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

⁵⁵*Olmstead v. L.C. by Zimring*, 527 U.S. at 606 n.16, 607; *Fisher v. Oklahoma Health Care Authority*, 335 F.3d 1175, 1183 (10th Cir. 2003); *Fry v. Saenz*, 98 Cal Rptr. 2d at 41; *Makin ex rel. Russell v. Hawaii*, 114 F. Supp. 2d 1017, 1034–35 (D. Haw. 1999).

⁵⁶45 C.F.R. § 262.4.

⁵⁷*Townsend v. Quasim*, 328 F.3d 511, 520 (9th Cir. 2003); *Oconomowoc Residential Programs v. City of Milwaukee*, 300 F.3d 775, 785–86 (7th Cir. 2002); *Makin*, 117 F. Supp. 2d at 1034–56.

equal and meaningful access to TANF programs.⁵⁸

IV. Policy Advocacy

States have several policy options to increase their ability to meet federal participation rates and accommodate individuals with disabilities. Some are geared specifically toward clients with disabilities. Others are not, but they enhance a state's ability—without fear of failing—to meet the participation rates and thereby make it easier to provide reasonable modifications for individuals with disabilities.

A. Screening TANF Applicants and Recipients to Identify Disabilities

HHS Office for Civil Rights Policy Guidance makes clear that states must offer an initial screening to welfare applicants and recipients to identify individuals likely to have disabilities. States must also offer individuals the opportunity to obtain a more in-depth assessment if screening or client disclosure indicates that a recipient is likely to have a disability.⁵⁹ The Office for Civil Rights finds that the failure to screen TANF recipients for learning disabilities and to offer them an assessment violates the ADA and Section 504.⁶⁰ Nevertheless, some TANF programs do not screen for disabilities. Some screen only long-term recipients or those approaching time limits, and some give counties and even workers the discretion to screen or when to screen.

Advocates should urge states to engage in disability screening and assessment and to do so as early as possible. Identifying recipients' disabilities is in states' interest: to help them identify recipients who should apply for Supplemental Security Income (SSI) or social security disability benefits and learn who can engage in federally countable work activities with reasonable modification or support service.

Disability identification is also central to one of the core purposes of TANF—to help families become self-sufficient.⁶¹ If a state does not know what disabilities a recipient has and what reasonable modifications and services the recipient needs, the state is unlikely to be helping the recipient achieve self-sufficiency.

B. Improving Work and Education and Training Programs

Because work activities and programs commonly fail to provide reasonable modifications and support services to TANF recipients with disabilities, advocates often seek work exemptions and deferrals for recipients with disabilities. Post-Deficit Reduction Act, states may resist this approach more strenuously. Advocates may now need to devote more effort to making work activities and education and training programs meet the needs of clients with disabilities. Policy advocacy will be necessary to increase the range of work and education and training options available to recipients with disabilities, increase the involvement of disability professionals in TANF work activity program design and implementation, and build into programs the availability of support services, such as job coaches and tutors with expertise in working with adults with disabilities.

C. Maximizing Work Rates Through Work Participation Plan Choices

Under the Deficit Reduction Act, states must file, with HHS, work verification plans, explaining how the states will count and verify work activities. Policy choices that states make in these plans can improve the work participation rate that the state achieves. Although the deadline for submission of the plans was September 30, 2006, it is not too late for advocates to raise these issues with states.⁶² Final approved work verification plans are not due until October 1, 2007,

⁵⁸28 C.F.R. §§ 35.130(b)(1)(ii), (b)(3), (b)(8); 45 C.F.R. §§ 84.4(b)(1)(ii), (b)(i)(vii), (b)(4); *Alexander v. Choate*, 469 U.S. 287, 301 (1985).

⁵⁹Office for Civil Rights, *supra* note 42, § D.1.

⁶⁰See Ramos OCR Letter of Findings, *supra*, note 45

⁶¹42 U.S.C. § 601(a)(2).

⁶²45 C.F.R. §§ 261.62–.63(a).

and the regulations appear to anticipate revisions before then.⁶³

Advocates should review the work verification plan that their state filed and suggest improvements where needed. States can help their work rate in these areas:

- Having “blended” work activities that include some rehabilitative services, job search time, or training under the rubric of another (core) work activity, such as subsidized employment. “Subsidized” is apparently the primary category in which HHS will accept blended activities, at least until final rules are issued. States can design subsidized employment programs to include paid hours spent on rehabilitation, job search, or training together with employment hours.
- Defining excused absences from work activities and “holidays” comprehensively enough to include valid reasons for missing hours of work and to include days in which service providers are closed. States may need to include comprehensive listings of holidays and excuse reasons rather than just broad descriptive phrases.
- Broadly defining terms relevant to the work rate exclusion for parents caring for family members with disabilities by (1) defining “disability” to include children who do not receive SSI, (2) adopting reasonable requirements for documenting a disability, and (3) defining “attending school on a full-time basis” to make clear that some children with disabilities *enrolled* in school full-time do not *attend* full-time if they are frequently absent.
- Including SSI recipients who are engaged in thirty hours of countable activities in the work participation rates

(although this is unlikely to improve work participation rates).

D. Creating Programs with Separate State Funds

State programs funded entirely outside the federal TANF “maintenance of effort” structure are not subject to the TANF work participation rates. States may serve families with parents with disabilities in separate state-funded programs and offer them appropriate activities, services, and modifications without fear that doing so will make it more difficult for states to meet required work rates. Such programs may also be appropriate for other groups of TANF recipients, such as two-parent families. Separate programs for other groups may have the added benefit of making it easier for a state to accommodate people with disabilities in the TANF program by removing, from the work rate calculation, groups that are unlikely to help the state meet its federal work rate requirement.⁶⁴

Some states may take the position that the ADA and Section 504 prohibit them from creating separate programs for people with disabilities. While some separate programs may pose potential problems, separate state-funded programs compliant with these laws are possible.

E. Preventing Sanctions and Assisting Sanctioned Families

A high percentage of parents sanctioned for nonparticipation in work activities have one or more barriers—including disabilities—to employment.⁶⁵ Several states have programs that successfully reach out to sanctioned families to reengage them in work activities. These programs use home visits and other outreach ways to determine the reason for noncompliance, to assist in attending appointments, and to deal with barriers to com-

⁶³*d.* §§ 261.62–.63(b)–(c).

⁶⁴For further information, see WIN-WIN SOLUTIONS, *supra* note 5, at 47–60.

⁶⁵For a summary of the research on this issue, see MARCIA MEYERS ET AL., REVIEW OF RESEARCH ON TANF SANCTIONS: REPORT TO WASHINGTON STATE WORKFIRST SUBCABINET 6, 20–22, (2006), available at www.workfirst.wa.gov/about/sanction_literature_final.pdf.

pliance.⁶⁶ To determine and thus attend to the cause of noncompliance, other state programs conduct preventive outreach before imposing sanctions.⁶⁷ These programs are consistent with TANF program goals and can help states increase work participation rates.⁶⁸

F. Helping TANF Recipients with Disabilities Obtain SSI

Some TANF recipients with disabilities qualify for, but do not receive, SSI benefits. Some who qualify have not even applied for them. Getting TANF recipients onto SSI helps recipients and states because SSI benefit amounts are higher than TANF benefits, and SSI is funded solely with federal dollars. Receiving SSI benefits also removes from the work participation rate TANF recipients who are unlikely to be able to engage in thirty hours per week of federally countable work activities. Some states use welfare agency staff to help individuals through the SSI application process; others contract with legal aid offices to advocate on behalf of welfare recipients applying for SSI benefits.⁶⁹ States can create or expand these programs.

V. Advocacy Strategies on Behalf of Individual Clients

Advocates can use a variety of strategies on behalf of clients with disabilities in state and local TANF programs.

A. Informal Advocacy on Behalf of Clients

Advocates can request reasonable modifications, including modifications of work activities, for clients and document client disabilities and reasonable modification requests. If a welfare agency has

an ADA policy, advocates can use it to seek modifications for clients.

One modification that many TANF applicants and recipients are likely to need post-Deficit Reduction Act is assistance on increased documentation and work verification requirements. The ADA and Section 504 require, as a reasonable modification, TANF programs to help applicants and recipients with disabilities meet documentation requirements by phoning employers to request documentation or assisting recipients in completing paperwork. Advocacy on behalf of individual clients may be necessary to ensure the provision of these reasonable modifications.

B. ADA and Section 504 Grievance Procedures

If a welfare agency has fifty or more employees, Title II of the ADA requires it to have an ADA coordinator and a grievance procedure for the “prompt and equitable” resolution of complaints; Section 504 regulations require the same of social service agencies receiving federal financial assistance from HHS if they have more than fifteen employees.⁷⁰ Advocates can use (or advocate the creation of) these grievance procedures.

C. State Fair Hearings

Many state welfare regulations contain “good cause” exceptions to program requirements; these exceptions may be used to appeal adverse actions against individuals who cannot comply with program requirements as the result of a disability. Some state welfare regulations and policies explicitly incorporate ADA requirements and thus enable the enforcement of those

⁶⁶HEIDI GOLDBERG & LIZ SCHOTT, CENTER ON BUDGET AND POLICY PRIORITIES, A COMPLIANCE-ORIENTED APPROACH TO SANCTIONS IN STATE AND COUNTY TANF PROGRAMS (2000), available at www.cbpp.org; N.J. ADMIN. CODE § 10:90-4.12(b) (2006); DIVISION OF FAMILY DEVELOPMENT, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, *supra* note 4; DEPARTMENT OF SOCIAL SERVICES, COMMONWEALTH OF VIRGINIA, *supra* note 4.

⁶⁷See *supra* note 66.

⁶⁸See discussion of possible approaches in WIN-WIN SOLUTIONS, *supra* note 5, at 76–82.

⁶⁹For information on these programs, see *id.* at 83–85; Empire Justice Center, Investing in the Disability Program Will Help Meet Increased Work Participation Rates and Will Pay for Itself (updated March 13, 2006), <http://empirejustice.org/OurWrk/Legislation/DAP/State/Memorandums/2006/DAPmemo31306.pdf>.

⁷⁰28 C.F.R. § 35.107 (ADA); 45 C.F.R. § 84.7 (Section 504).

requirements in fair hearings.⁷¹ Many fair hearing decisions, however, correct past welfare agency errors for individual clients without requiring the agency to provide reasonable modifications to the clients. Fair hearing decisions rarely treat the systemic agency practices that led to the failure to provide reasonable modifications, and using fair hearings to challenge agency practices (such as bureaucratic obstacles serving to deter application) that do not result in adverse determinations may be difficult.

D. Complaints with the Office for Civil Rights at HHS

Advocates may file ADA and Section 504 complaints with a regional office of the HHS Office for Civil Rights or ask the office to review a welfare agency's compliance with the ADA and Section 504. Both can lead to a "letter of findings" that the agency has violated the ADA and Section 504 or a voluntary compliance agreement between the Office for Civil Rights and a welfare agency.⁷² Regional offices of the Office for Civil Rights are understaffed and have backlogs of cases; they may take a few years or longer to issue a "letter of findings" or to enter into a voluntary compliance agreement with a welfare agency. Many clients will have left the TANF program by the time a complaint is resolved. The Office for Civil Rights often lacks the resources for aggressive enforcement of these voluntary compliance agreements and let-

ters of findings, and complainants and their clients cannot enforce these agreements.⁷³ In some situations, however, there may be strategic reasons for filing a complaint with the Office for Civil Rights even if a prompt resolution is unlikely.

E. Litigation

Advocates may file lawsuits in federal or state court to enforce the ADA and Section 504 on behalf of TANF applicants and recipients with disabilities. A discussion of litigation issues is beyond the scope of this article. For further information on this topic, contact me.



The implementation of the Deficit Reduction Act by the states will undoubtedly create additional hurdles for TANF applicants and recipients with disabilities. The ADA and Section 504 continue to be important legal tools that advocates can use in varied ways for accessing TANF benefits. I invite inquiries from all of you who are working on these problems.

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⁷¹See, e.g., N.J. ADMIN. CODE § 10:90-1.7; DIVISION OF FAMILY DEVELOPMENT, NEW JERSEY DEPARTMENT OF HUMAN SERVICES, *supra* note 4; DEPARTMENT OF SOCIAL SERVICES, COMMONWEALTH OF VIRGINIA, *supra* note 4; New York State Office of Temporary and Disability Assistance, 06-ADM-05, Providing Access to Temporary Assistance Programs for Persons with Disabilities and/or Limited English Proficiency (LEP), www.otda.state.ny.us/directives/2006/ADM/06-ADM-05.pdf; Commonwealth of Massachusetts, Department of Transitional Assistance, Filed Operations Memo 2003-19, Department Obligations Under the Americans with Disabilities Act (Aug. 15, 2003) (in my files).

⁷²See, e.g., documents cited in footnote 45. For information on advocates' experience with this process, see Randal S. Jeffrey et al., *Drafting an Administrative Complaint to Be Filed with the U.S. Department of Health and Human Services' Office for Civil Rights*, 35 CLEARINGHOUSE REVIEW 276 (Sept.–Oct. 2001).

⁷³For more information on the advantages and disadvantages of using the HHS Office for Civil Rights complaint process, see my USING THE AMERICANS WITH DISABILITIES ACT, *supra* note 35.

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