

Language Matters: Designing State and County Contracts for Services Under Temporary Assistance for Needy Families

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When Congress reformed welfare in 1996, eliminating the Aid to Families with Dependent Children program and creating the Temporary Assistance for Needy Families (TANF) block grant, the design of welfare programs nationwide changed dramatically.¹ States receive federal dollars based upon a formula that incorporates the amount of funds they received in 1994 under Aid to Families with Dependent Children; this primarily reflects their cash assistance caseloads at that time. Due to the significant declines in caseloads since then, states have accumulated financial resources that enable them to design their programs differently.² States are using some of these funds to provide job readiness, job search, and job placement services. Many have reinvested these savings to address the work barriers many parents face and to give low-income working families access to strong work supports, such as child care, transportation

resources, education and training, and state earned income tax credits.³

In differing degrees and with varying levels of success, states and counties are turning to private organizations—both nonprofit and for-profit—to provide some of the services and supports that families need; these include assessments of job readiness and barriers to employment, skills training, job placement, intensive case management, assistance in securing Supplemental Security Income, and help in addressing barriers to work. In some cases states have entered into contracts or memoranda of understanding with other state agencies to provide some of these services and supports.

While the picture is mixed, often states and counties have not used sufficient care in precisely spelling out what they intend to purchase and the types of outcomes they expect. As a result, funds often are not well utilized, and opportunities to assist

This article is a cooperative effort among its five authors. Each is identified in a footnote at the beginning of her section and is responsible only for the information in the section she wrote. For the note on the authors, see page 529.

¹ Eileen Sweeney coordinated this article and wrote the introduction and conclusion.

² ED LAZERE, CTR. ON BUDGET & POLICY PRIORITIES, UNSPENT TANF FUNDS AT THE END OF FEDERAL FISCAL YEAR 2000 (2001), available at www.cbpp.org/1-22-01sfp00surplus.htm; ZOE NEUBERGER & ED LAZERE, CTR. ON BUDGET & POLICY PRIORITIES, ANALYSIS OF TANF SPENDING THROUGH THE MIDDLE OF FEDERAL FISCAL YEAR 2001 (2001), available at www.cbpp.org/9-28-01wel.pdf.

³ EILEEN SWEENEY ET AL., CTR. ON BUDGET & POLICY PRIORITIES, WINDOWS OF OPPORTUNITY: STRATEGIES TO SUPPORT LOW-INCOME FAMILIES IN THE NEXT STAGE OF WELFARE REFORM (2000), available at www.cbpp.org/1-12-00wel.htm; ED LAZERE ET AL., CTR. ON BUDGET & POLICY PRIORITIES, STATES AND COUNTIES ARE TAKING STEPS TO HELP LOW-INCOME WORKING FAMILIES MAKE ENDS MEET AND MOVE UP THE ECONOMIC LADDER (2001), available at www.cbpp.org/5-18-01wel.pdf.

families are squandered. In some cases, contract provisions may actually be a disincentive to serving families who face barriers to work; in many cases, contracts do not seem designed to encourage providers to address fully the needs of parents who have disabilities themselves or whose children have disabilities.

Contracts between state or county agencies and other agencies or private organizations are likely to become permanent features of state TANF programs. State officials and advocates must closely scrutinize the language included in these contracts to make sure that they are designed to achieve the results the state seeks. State lawmakers may want to consider legislation that spells out what must be included in these contracts and agreements, as well as monitoring and enforcement mechanisms. Lawmakers should also ensure that contract terms comply with federal and state civil rights laws. Statutory provisions that guarantee public access to both the contracting process and the information contract work generates could dramatically improve the effectiveness of contract provisions and, as a result, the quality of services contractors provide.

In this article, four professionals share their knowledge and expertise. Each has looked at these issues from a different perspective, with an eye toward strengthening contract provisions that can help low-income families receive the services they need to move toward independence or to retain work and advance to better paying jobs. Together the four perspectives offer an important road map of insights and lessons learned for legal services advocates, state legislators, and state officials as they consider the steps needed in their states and counties to secure services for needy families.

In the first section, Barbara Bezdek, an associate professor at the University of Maryland School of Law, discusses her work evaluating the requests for proposals Baltimore, Maryland, issued, the proposals vendors submitted, and the contracts into which the city and vendors entered in order to implement TANF and Maryland's corresponding state program. She shares her findings regarding some

of the flaws in the city's process; she also enumerates the elements that a community audit of the contracting process should include in order to design better requests for proposals that will lead to stronger contracts and better services for low-income families.

In the second section, Sharon Parrott, a Center on Budget and Policy Priorities senior policy analyst who recently returned from two years as a senior policy analyst for the District of Columbia's Department of Human Services, shares insights gained from her experience at that agency. She discusses what drafters of contracts should consider in seeking to maximize the documents' effectiveness, as well as the importance of technical assistance to vendors in securing better services for low-income families.

In the third section, Carol Medaris, an attorney at the Wisconsin Council on Children and Families and formerly a staff attorney at Legal Action of Wisconsin, describes the circumstances that led the Wisconsin legislature to strengthen statutory requirements governing contracts with counties and private agencies administering the state's TANF program. She suggests contract terms and incentives to avoid, as well as contractual provisions that may ensure better quality services for low-income families. Advocates have been playing a very important role in improving these contract requirements.

In the fourth section, Cary LaCheen, a senior attorney at the Welfare Law Center and expert on the Americans with Disabilities Act, addresses an often overlooked aspect of contracts for TANF services: the requirement that they be so drafted as to facilitate compliance with civil rights laws. She discusses the applicability of the requirements in the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973 for TANF-funded programs and contracts entered into using TANF funds.

Staff at the Center on Budget and Policy Priorities and the Welfare Law Center have been assisting advocates and others across the country on many of these issues. Please contact either organization for further information or help; contact information is at the end of the article.

I. A Citizens' Audit of TANF Work Services Contracts in Baltimore

Much of the criticism of TANF as anti-poverty policy has focused on its failure to lead to self-sufficiency for families.⁴ Many advocates and scholars have also critiqued welfare reform's constriction of recipients' due process rights. This section proceeds from a view that may appeal to a wider coalition of state and local stakeholders: that the millions of tax dollars spent on welfare reform—a policy on which policymakers claim a consensus exists—must be effective in achieving its stated goal of helping welfare-reliant families make the transition to work.

Baltimore offers a good illustration of the urgency of mounting an effective welfare-to-work policy. Poverty has worsened in the center city, where 60 percent of Maryland's poor now live, as jobs and economic opportunity have moved to the suburbs. To implement TANF and Maryland's parallel state legislation, Baltimore issued a series of requests for proposals to provide employment-related services to help welfare recipients meet welfare reform's work requirements. To date the city has let twenty-nine contracts to twenty vendors and committed itself to pay some \$64 million for the vendors' services.

Although Baltimore knew it needed to serve 10,000 TANF families, this array of contracts projected just 2,058 jobs and has delivered fewer still.⁵

A citizens' audit in Baltimore analyzed the city's requests for proposals to provide employment services to TANF recipients and compared them to the actual scope and quality of services and to program outcomes promised in the resulting contracts. The audit revealed disturbing failures on the part of Baltimore to deliver on the state's side of the reformed welfare contract. We can hardly avoid the conclusion that the contracts unfairly usurp poor parents' sixty-month lifetime cap by directing them into activities that do not lead to sustainable employment and the escape from welfare poverty.

A. Requests for Proposals

Requests for proposals are the most common method by which government entities purchase professional services.⁶ Baltimore's requests for proposals to provide welfare-to-work services appeared at first blush to contain important accountability tools; they proposed to assess direct job placement vendors on important measures, including the hourly wage for job placements obtained, the number of jobs

⁴ Barbara L. Bezdek wrote this section.

⁵ The complete study is reported in Barbara L. Bezdek, *Contractual Welfare: Non-Accountability and Diminished Democracy in Local Government Contracts for Welfare-to-Work Services*, 28 *FORDHAM URBAN L.J.* 1559 (2001). Of the contracts let by the Baltimore City Department of Social Services for 1998–99, seventeen were let to thirteen vendors: one private for-profit corporation (America Works of Maryland), five nonprofit entities (Baltimore Urban League, Goodwill of Baltimore, Maryland New Directions, Chimes, and Park Height Community Center), three public colleges, and four city agencies. The largest contract went to the Office of Economic Development, the traditional administrator of the Job Opportunities and Basic Skills/Job Training Partnership Act welfare-to-work component of the 1988 Family Support Act, which preceded the 1996 welfare reform legislation. Ironically, under its contract with the welfare agency, the Office of Economic Development is producing twice as many "work experience" slots as job placements for Baltimore's Temporary Assistance for Needy Families (TANF) population. More than twice as many people (4,855) were to receive services counting as "work experience" as were to be placed in jobs. The seventeen contracts together proposed a total of 2,058 jobs for Baltimore's TANF customers. An additional 1,267 were to receive services "related to" employment, such as job search, job readiness, literacy instruction, or community service. The entire package was to serve 8,180 TANF recipients—about 1,800 fewer than the number the city estimated would reach the twenty-four-month mark that triggered the federal mandate to comply with TANF work requirements.

⁶ For a fuller discussion, see *id.* Requests for proposals often include a comprehensive specification of services that must be provided; this approach is not universal, however, as government agencies often encourage prospective contractors to develop their own methodology. See KEVIN LAVERY, *SMART CONTRACTING FOR LOCAL GOVERNMENT SERVICES* 63, 66 (1999).

with and without benefits, and the number of persons placed in full-time unsubsidized employment or enrolled in other work activities (by type).⁷ The requests for proposals included the customary provision that failure to deliver could result in termination of multiyear contracts.

However, in key respects, the requests for proposals offered prospective vendors little guidance about the city's needs or requirements. For example, they required scant attention to the labor market accessible to Baltimore residents.⁸ A critical failing of this form of request for proposals is that the city waited to hear from its bidders to learn the parameters of its program, including such key factors as the number of individuals to be served, the number who would be aided by job placements or by some intermediate spot on the continuum from welfare to paycheck, and even the cost of the vendor-dependent program to taxpayers.

Baltimore's approach thus delegated significant aspects of program design to the vendors. One result is that vendors' programs vary enormously in the character and quality of every aspect of the services they offer TANF customers. Another result is that, given the absence of both effective program prescription and contract management, the local government is not in the driver's seat for its policy or service delivery. It is acting in derogation of the responsibilities devolved to it by the state.

B. The Contracts

Not surprisingly, the contracts let pursuant to deficient requests for proposals magnify the deficiencies. The contracts provide for services to too few TANF recipients and aim for quite limited employment outcomes; the few contracts that

are expressly connected to real job openings engage in "creaming" of the recipients who are most job-ready. Most vendors that are paid for "direct job placements" in fact do not promise job placements for most welfare recipients. Thus Baltimore has been expending most of its funds for welfare-to-work services apparently without any expectation that most welfare recipients will thereby achieve employment success and independence from welfare.

1. Value-Added? Low Expectations for Employment Outcomes

The vagueness of critical terms in the vendors' program proposals reflects the failure of the requests for proposals to structure tightly, and to render enforceable, the policy goal of helping parents secure and retain employment. Ten vendor programs variously aim for customers to

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be "placed in jobs," "placed with employers," or "to be employed." Six vendors' contracts call only for programs whose attenuated relation to employment includes the number to "be enrolled," to "complete a career plan," or to "be served." The absence of definitions and government-selected performance benchmarks renders the count, and the contractors' obligations, nearly meaningless. For example, one vendor projected that 600 individuals would "receive employment" and then forecast

⁷ Balt. Dep't of Soc. Servs., Request for Proposals for Direct Job Placement Program Services, BCDSS/IMA-97/015-S para. 3.7 (1997).

⁸ The quality of the service specification is a critical ingredient of effective contracting. Local government can clarify what it wants from vendors by specifying the resource inputs needed for the task (e.g., the number and qualifications of personnel needed for the job and the number of clients to be assisted); processes and tasks; and outputs and performance expected to meet contract standards. LIVERY, *supra* note 6, at 66. The requests for proposals asked vendors to identify the occupations TANF recipients were "most likely" to obtain after the vendor's program and to offer some evidence that the Baltimore metropolitan labor market would support the services the vendor proposed.

that 450 of these would “retain employment for at least 7 days.”⁹

Value-adding vendors—those whose services increase the likelihood that a TANF recipient will find and retain gainful employment—are most clearly vendors that either contract for training with employers who will hire those who complete the training successfully, offer training that leads to a credential in an occupation likely to have recurring vacancies in the locale, or both. Several vendors received funding to provide job training for specific service-sector occupations that were widely thought to offer the greatest employment opportunity for low-skilled, minimally educated women. However, these vendors made no promises that successful trainees would receive job offers. For example, Baltimore Goodwill entered into a contract to train seventy people for positions as “house person, room attendant, utility steward, salad pantry.” Without making any commitment, it stated a bare expectation that the hotel site of its training “will hire our customers if a position is available during the initial pilot phase of this project.”¹⁰

Three vendors claimed that they would conduct training that would lead to a state license or credential. A local community college said that it would offer a selection of training programs that might include emergency medical technician and geriatric nursing assistant. Workers in these fields are certified upon passing a state-administered test. The vendor explained that its selection of training programs “will depend on the actual employment demands in the Baltimore area,” but

it did not explain how, when, or on what basis it would make that decision.¹¹ Similarly Catholic Charities pledged to help recipients conduct “meaningful career planning and job search,” including certification opportunities “in a field that could provide employment.”¹² The city apparently assumed that these vague assertions complied with the requirement of the request for proposals that vendors demonstrate that employment to which their services would lead was available in the Baltimore metropolitan labor market.

The Chimes program illustrates both an advantage and a disadvantage of the city’s reliance on vendors to design its employment readiness program. The disadvantage is creaming. Perhaps understandably, a vendor selects trainees whom it believes have the greatest likelihood of completing the program successfully. On the other hand, Chimes offered valuable credential and job prospects and specified an extensive list of prerequisites to enrollment, including possession of a high school diploma or its equivalent; at least eighth-grade proficiency in writing and mathematics; good health; ability to lift fifty pounds; passing a medical examination, drug screening test, and criminal background check; and possession of a current driver’s license.¹³

Other vendors practiced creaming that was less comprehensive but still significant. Baltimore Goodwill’s hotel services program included drug and criminal background screening “to assure that we do not train a customer who could not be hired” by the partner hotels.¹⁴ Some vendors specified literacy prerequisites,

⁹ See Balt. Dep’t of Soc. Servs., Family Investment Program Plan 42 (1999) (summarizing Welfare to Work Academy of Morgan State University).

¹⁰ Balt. Dep’t of Soc. Servs., Grant Agreement Between Baltimore City Department of Social Services and Baltimore Goodwill Industries for Hospitality Training and Placement Services app. A (1997). If no such position was available, the vendor planned to “ask Omni to help us locate a similar position” elsewhere downtown.

¹¹ Balt. Dep’t of Soc. Servs., Grant Agreement Between Baltimore City Department of Social Services and Baltimore City Community College (1997).

¹² Balt. Dep’t of Soc. Servs., Grant Agreement Between Baltimore City Department of Social Services and Catholic Charities Head Start 5 (1997). The vendor suggested a ninety-hour certification in Early Childhood Education and a Health Care certificate. *Id.*

¹³ Balt. Dep’t of Soc. Servs., Grant Agreement Between Baltimore City Department of Social Services and the Chimes for Job Training and Placement Services app. A (1997).

¹⁴ Balt. Dep’t of Soc. Servs., Grant Agreement Between Baltimore City Department of Social Services and Baltimore Goodwill Industries for Hospitality Training and Placement Services app. A at 2 (1997).

while others offered assistance in securing a high school equivalency diploma; America Works of Maryland required the ability to complete its application form. Nearly all vendors excluded “current substance abusers,” and most excluded persons with a “substance abuse history.”

2. Missing in Action: Contract Management

Despite the modest promise of the requests for proposals, the contracts subsequently let revealed no meaningful benchmarks or outcome measures, and none contained any control provisions. Only two vendors proposed that outcomes serve as a measure of performance, and only one proposed payment only for performance.¹⁵ At least one recent study found that Baltimore was not at all unusual in this approach. Formal contract management is largely absent in local government procurement, and few of those responsible for contract oversight are procurement professionals or have any formal training in contract management.¹⁶

C. Components of a Citizens’ Audit

Undertaken from a citizen-stakeholder’s perspective, an audit of a governmental system of contracts for TANF services might examine the following factors:

1. Policy Goals of the Contracting Program

A threshold question is, of course, whether contracting out TANF services serves appropriate goals. If so, to what

extent are these articulated in the request for proposals and specified in the contracts? Defining “appropriate goals” requires thoughtful input beyond that available from the agency that lets the contracts. The low-income communities most affected by the work activity requirement, program clients, and the larger community to be served, as essential stakeholders in this significant reformulation of the ways in which government provides assistance and supports to its citizenry, all ought to have a consultative role at this stage.¹⁷

Goals that are in tune with community needs will likely include “cross-program” goals that are not specifically the subject of the services sought by the contract in question but involve policies of the same governmental unit, such as a specified percentage reduction in poverty in an area, or goals for community involvement or local capacity building. Minnesota, for example, designed its program expressly to increase employment *and* to reduce poverty, and independent analysts confirm that state’s significant success.¹⁸

2. Performance-Goal Setting

Contracts that emphasize high numbers of job placements can pressure vendors to focus on the easier-to-serve. If payment is made only as numerical goals are achieved, are smaller community-based organizations precluded from successful competition because they are less able to muster the cash flow necessary to sustain a contract whose payout is tightly pegged to performance benchmarks?

¹⁵ America Works of Maryland proposed to be paid \$5,490 per person still employed six months after placement in a full-time job with benefits and \$4,320 per person employed for at least six months in a job without benefits.

¹⁶ LAVERY, *supra* note 6, at 71–72.

¹⁷ E.g., THERESA J. FEELEY & SHERI A. BRADY, NAT’L ASS’N OF CHILD ADVOCATES, BEYOND DECLINING CASELOADS: ADVOCATES’ TOOLS FOR MONITORING WELFARE REFORM (1999). Federal and state administrative procedure acts expressly exempt requests for proposals, and so the familiar processes of notice and comment rule making, limited as they often are in ensuring meaningful public participation, are absent here. Thus advocates must find other means to convey their perspectives.

¹⁸ VIRGINIA KNOX ET AL., MANPOWER DEMONSTRATION RESEARCH CORP., REFORMING WELFARE AND REWARDING WORK, A SUMMARY OF THE FINAL REPORT ON THE MINNESOTA FAMILY INVESTMENT PROGRAM 2–4 (2000), www.mdrc.org. Notably Minnesota was found to have reduced poverty and increased employment for the group considered key by many policymakers: single-parent long-term recipients, who comprise the majority of the welfare caseload and who are least likely to enter employment on their own. *Id.* at 2.

On the other hand, citizens should be able to learn whether established vendors are held responsible for achieving the outcomes they promised.

Does the welfare agency set realistic contract goals? Do numerical goals undermine softer goals, such as ensuring equity in services, avoiding racially disparate employment patterns in placements, offering services that match clients' needs, or

tations that clients will move toward work with the actual availability of services that will enable clients to overcome barriers to employment? One prong of a useful audit could be scrutiny of the use of "personal responsibility contracts." Advocates in Baltimore discovered in 1998 that TANF recipients were required to sign blank personal responsibility contracts, despite the requirement of state law that the plans specify both the work activities required of the recipient and the supportive services to be provided by the agency.²⁰

Contracts that emphasize high numbers of job placements can pressure vendors to focus on the easier-to-serve.

building the capacity of local contractors?¹⁹ To the extent that contracts reflect "partnership" approaches, in which the state offers significant technical assistance and information during the term of the contract to increase the likelihood of success, as distinguished from old-fashioned compliance monitoring, does this model produce effective services or undermine the government's ability to enforce performance standards?

3. Implementation of TANF Work Requirements

Is the state doing its part by providing the services that will enable clients to leave welfare for work? In light of time limits, are TANF recipients receiving adequate assessments that frame their options and lead to the support they need to move successfully into the work force and to stay there? Do service providers match clients appropriately to jobs or to employment-related services? Are employment-related services in place? How well do they serve job seekers and employers? Are local agencies able to align their expect-

4. Assessment of the Employment That Contractors Secure for Clients

A valuable assessment requires examination of both quantitative and qualitative factors. Maryland is one of many states that have adopted a "work first" policy in order to move the most job-ready welfare recipients rapidly into work. Its caseload has dropped precipitously, though not as much as in some other states. Maryland officials are proud that at least half of the people who have left welfare are employed three months later. They say little about the other 50 percent, except to suggest that they left cash aid voluntarily. Officials downplay the circumstances of this group, but evidently a huge number have disappeared without securing work.

5. Contract Management, Renewal, and Rebid Decisions

We must know who reviews performance and evaluative data, according to what standards, and how reporting requirements are implemented. Some situations may appropriately call for less stringent review. For example, agencies may decide to apply to contracts granted to pilot projects or to smaller community-

¹⁹ The evaluation criteria for the U.S. Department of Labor's Welfare-to-Work bonus program, authorized by the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251, include (1) entry into unsubsidized employment, (2) six-month retention in unsubsidized employment, (3) six months of earnings in unsubsidized employment, and (4) attainment of educational or occupational credential by participants who entered unsubsidized employment.

²⁰ See FAMILY INV. PROGRAM LEGAL CLINIC, TIME OUT!: A STATUS REPORT ON WELFARE REFORM IN BALTIMORE CITY AT THE THREE YEAR MARK, AS EXPERIENCED BY THOSE IT WAS INTENDED TO HELP AND THEIR LEGAL ADVOCATES 10 (1999), www.law.umaryland.edu/faculty/czapanskiy.asp.

based organizations, where capacity building is a goal, renewal terms that are more forgiving than those applied to larger contracts. Consider local experience with this approach.²¹

In this era of heightened reliance on contracting out to provide services, what roles do agency staff retain for achieving the new welfare objectives within the framework that the private vendor contracts create? In particular, what training do they receive in managing these contracts?

The underlying policy of the 1996 welfare law requires that jobs to which the new services lead be assessed for their ability to promote clients' self-sufficiency through work. Self-sufficiency is a concept amenable to serious debate, but, in the work-force development field, job access, retention, earnings, and benefits are common measures of progress toward self-sufficiency. In Maryland, as in much of the nation, data on welfare leavers who are working suggest that many still live below the poverty level and that their jobs are likely contingent and lack benefits.²²

6. Evaluation of Contract Performance

Government review of service vendors' performance also requires close scrutiny. How is the private contractor held accountable for compliance, performance, and outcomes? To what extent is the local agency serving the citizens by contracting carefully, measuring vendors'

performance properly, and making renewal and rebid decisions in line with suitable measures? Performance measures and incentives, including pay-for-performance, are potentially important tools in the privatization kit.²³

D. What Should Government Do?

In implementing welfare reform, government at every level should seek to increase employment and decrease poverty, while it seeks to reduce dependence on welfare. To that end, government agencies must design contracts with work-service vendors to secure employment in a value-added sense: employment that leads to existing jobs that TANF recipients retain for significant periods and that pay wages above the poverty level.

Advocates in Baltimore have been pressing the Department of Human Resources to improve the operation of the contracted work-service vendors by remedying deficiencies in how customers are assigned to specific vendors and in the assessments of job readiness and barriers to employment on which the assignments are intended by statute to be based. Advocates argue that Maryland should "refund" at least the first three years of TANF recipients' five-year lifetime limit to the thousands who complied with work activities under Baltimore's "family investment" program, while the welfare agency failed to conceptualize or implement its side of the bargain adequately.

²¹ A useful primer is JESSICA YATES, *MANAGING THE CONTRACTING PROCESS FOR RESULTS IN WELFARE REFORM*, WELFARE INFORMATION NETWORK (1997), www.welfareinfo.org/contractissue.htm.

²² See, e.g., CATHY BORN, UNIV. OF MD. SCH. OF SOC. WORK, *LIFE AFTER WELFARE: AN INTERIM REPORT 26* (1997) (58 percent of leavers earned wages reported in state administrative systems, and average earnings for 1996 were \$4,818; half earned less than \$3,041); *id.*, *LIFE AFTER WELFARE: THIRD INTERIM REPORT 41-45* (1999) (reporting the top twenty employment categories of Maryland's welfare leavers and questioning whether these jobs will pay enough to enable them to support their families and avoid a return to the welfare rolls); SHARON PARROTT, CTR. ON BUDGET & POLICY PRIORITIES, *WELFARE RECIPIENTS WHO FIND JOBS: WHAT DO WE KNOW ABOUT THEIR EMPLOYMENT AND EARNINGS?* (1998), www.cbpp.org/11-16-98wel.htm.

²³ Responsible benchmarks and contract management practices do exist as models for state and local TANF job services. Congress relied upon performance-based management principles in aspects of the TANF statute; it reinforced the work participation requirements with a system to award bonuses to "high-performing States," defined as those most successful in achieving the purposes of the TANF program. The Department of Labor's Welfare-to-Work bonus program and the Workforce Investment Act are two major initiatives designed to include meaningful benchmarks and outcome evaluation, thereby suggesting a serious concern for their effectiveness as work-force development programs. See Bezdek, *supra* note 5, at 1588-91.

II. Considerations in Designing Contracts That Work: District of Columbia

A new request for proposals for a second round of TANF employment service contracts from the District of Columbia's Department of Human Services would select vendors to help TANF recipients prepare for, find, and retain jobs.²⁴ The first set of these contracts had been awarded in 1998, and both the agency and the vendors agreed that the contract structure had to be changed substantially. Policymakers had decided that the new contracts should be "performance-based" (the first round contracts were also performance-based) and that the primary outcome measure should be achievement of unsubsidized employment.

Each vendor selected would serve a random group of TANF recipients. Many of the district's TANF recipients had substantial barriers to employment. A significant number were long-term recipients of cash assistance. Roughly two-thirds of all recipients, in the agency's estimate, read below the sixth-grade level. Thus the contract structure and payment mechanisms had to take into account the difficulty of the contractors' task of helping low-skilled and barrier-challenged recipients find and retain employment.

Several welfare-to-work experts, as well as state and local agencies around the country, confirmed that no generally accepted standards or identified best practices governed the design of such contracts. Little systematic research was available on the best way to structure the contracts, the best "payment points," or the appropriate levels of payment. In fact other states and cities were also struggling either to develop similar contract language or to determine whether their current contracts were yielding the desired results and whether different contract terms would affect the results.

A. Contract Goals

Without much of a guidebook, we began to develop new contract terms. The following were some of the key goals we identified for the new contracts:

1. Increase Incentives for Vendors to Serve Clients Unlikely to Find Employment Immediately

We wanted the terms of the contract to discourage "creaming" of the caseload and to provide explicit incentives for vendors to seek out clients who did not respond to initial letters informing them of the requirement to participate in work activities. Like many jurisdictions, we had found in the first round of vendor contracts that many recipients did not "get in the front door" of programs—they did not respond to letters telling them of their program assignment, and vendors did not do enough to seek out these recipients and encourage participation.

2. Ensure That Payments Are Adequate to Sustain Vendors Who Perform Adequately

Setting performance-based payment levels is difficult. On the one hand, the contracting agency wants to reward good performance. On the other hand, the reality of welfare-to-work programs is that some recipients will not find or retain unsubsidized employment, and many will be unable to do so in the short term. Thus, within a performance-based structure, payments must be large enough to allow vendors who perform adequately to operate their programs, that is, the payments when a recipient succeeds must be large enough to offset reasonable costs of services to those who do not find jobs quickly (or at all). Payments under the district's first contract were inadequate, and even high-performing vendors lost money and found it difficult to maintain their programs.

²⁴ Sharon Parrott, who wrote this section, worked at the District of Columbia's Department of Human Services for two years beginning in the spring of 1999 as a senior policy analyst in the areas of TANF, food stamps, and Medicaid. One of her first tasks was to design a new request for proposals for a second round of TANF employment service contracts.

3. Emphasize Unsubsidized Employment While Recognizing “Intermediate Successes”

District policymakers were clear that the goal of the work program was to help recipients find unsubsidized employment, not to engage in long-term education and training efforts. This emphasis was due, in part, to concerns about meeting the work participation rates. Policymakers also were concerned, however, that tying too large a portion of potential payments to vendors to job placement and retention would give vendors strong incentives to “cream” the caseload. Thus we also identified as a goal offering financial payments for recipients’ “intermediate successes,” such as completing orientation and being assessed by the vendor, with payments made weekly if recipients were participating in activities.

4. Improve Vendors’ Capacity to Provide Quality Services

The agency was very concerned that, even with an improved contract structure, some of the entities likely to apply for a contract lacked extensive experience or expertise in operating programs to help welfare recipients find jobs. The agency recognized the difficult task we were asking outside entities to perform and wanted to find ways to help the vendors improve their performance and upgrade their own skills.

How we structured the contract terms to try to meet these goals is the subject of the rest of section II.

B. Crafting Contract Terms to Meet the Agency’s Goals

After looking at TANF employment service contracts from several jurisdictions, we developed a set of payment points as well as a new mechanism for referring recipients to service providers. Taken together, these were the means by which we hoped to achieve the contract goals.

1. Changing the Referral Structure

While defining the payment points and levels is a key component of designing a performance-based contract, developing a performance-based contract, developers of TANF employment services contracts often seem to overlook the referral mechanism. As noted above, one of our key concerns was that, in the district and throughout the country, many recipients assigned to a work program never attended or participated. To address this problem, the new contract radically changed the mechanism for referring TANF recipients to employment service vendors.

In the first round, each contract stated the total number of recipients a vendor could serve over the course of the year. This, coupled with a payment structure that rewarded quick job placement and little else, meant that each vendor had a strong incentive to request large numbers of referrals in a single batch, send letters to those recipients asking them to attend the vendor’s program, and then serve only those customers who “showed up.” To address this problem, we developed a referral concept we called the “point-in-time” caseload.

Under the new structure, each vendor’s contract specified the number of recipients it was able to serve (its “point-in-time” caseload), and at any given time the vendor could not have a higher number of TANF recipients assigned to its program. When the contract began, TANF recipients were assigned to vendors in numbers equal to the vendors’ contractual point-in-time caseloads.²⁵ A recipient remained a part of that vendor’s point-in-time caseload until the recipient retained a job for three months, was found to meet an exemption criterion (such as having a child under a year old), or had failed to participate and had been sanctioned for three months. A vendor could not recommend imposition of a sanction without showing that it had taken certain steps to encourage the recipient to participate.

²⁵ This is a simplification since some of the vendors had been providing services under the first round of TANF employment service contracts. These vendors kept their currently active cases and were assigned new cases in numbers that brought their total caseload up to their point-in-time caseload.

This structure precluded vendors from requesting referrals of more recipients than they could serve and then ignoring those who failed to respond to modest recruitment efforts. Instead recipients not found exempt would remain part of the vendor's point-in-time caseload for at least four months (a vendor could not likely recommend a sanction that could be imposed on a recipient in less than one month). In response, many vendors began to conduct home visits for recipients who failed to participate and to offer creative incentives for attendance at orientation sessions, such as serving meals or offering vouchers to popular stores where they could purchase items for their children.

This point-in-time caseload concept was a subject of contract negotiations. If a vendor bid for a large point-in-time caseload but submitted staffing plans that seemed inadequate to serve a caseload of that size, the vendor risked not being awarded a contract or being asked to revise its point-in-time caseload request or its staffing plan or both.

The point-in-time caseload concept was an important improvement in the contract, but implementing the new approach successfully took some time. Despite an explanation in the request for proposals and a requirement that potential vendors explicitly state their requested point-in-time caseload size, many vendors were initially confused by the concept. This was particularly true for many of the community-based vendors that had little experience providing services under a performance-based contract.

As discussed below, the contract's payment points also were designed to provide a clear signal and strong financial incentives for vendors to adopt measures that would increase participation rates among recipients referred to them. These included rewarding vendors when recipients "came in the front door" and when they were participating in activities, rather than issuing a payment only when a recipient found a job.

2. Payment Points

The district decided to set the payment points and levels in the request for proposals rather than having vendors

propose how much they should earn when they achieved certain goals. (Other jurisdictions often allow vendors to bid on payment levels, an approach that results in either paying different amounts to different vendors or using the bids to develop a uniform set of payment levels for all vendors that receive contracts.) The district set the payment rates due largely to its concern that, because a significant portion of the provider community was not used to performance-based contract models, many local vendors would be ill equipped to make informed bids. The request for proposals set payment points as shown on table 1.

These payment points, taken together, were designed to meet the goals we had identified: to encourage vendors to take steps to increase recipients' participation rates, to ensure that the payments were adequate so that reasonably performing providers did not lose money, and to maintain a strong focus on job placement while rewarding vendors for helping recipients meet "intermediate" goals. When developing a performance-based contract, we must recognize that, while vendors receive payment only when they reach certain benchmarks, the payments—including resources devoted to recipients who do not ultimately "succeed" by finding a job—must be sufficient to enable competent vendors to support their entire operations. Thus the question is not "how much should it cost to help a recipient find a job?" but rather "how much should a vendor be paid for each recipient who finds a job?"

Insufficient payments can lead vendors on a downward spiral. Facing financial pressure, they may cut staff; this leads to programs of poorer quality and even lower earnings. Thus, while performance-based contracts can give vendors strong incentives to improve performance, payments must be adequate. Agencies should be willing to reevaluate payment levels if vendors with good performance are struggling financially.

While assessing the adequacy of these payment points is difficult, district vendors seemed to be in far better financial health under this structure than under the previous one. There contract vendors

Table 1.—Payment Points in a Performance-Based Contract

Payment Point	Maximum Amount	Description	Goal
Initial payment	\$400	Earned per recipient who attended orientation and completed an assessment	Encourage vendor to adopt measures to encourage participation
Weekly fee	\$50/week	Earned per recipient participating in activities	Reward the “intermediate success” of active participation in work-related activities and encourage vendors to invest time and effort in recipients who were less job-ready
Placement bonus	\$1,500	Earned per recipient who retained a job for at least 4 weeks	Focus on helping recipients find unsubsidized employment
Retention bonus	\$1,200	Earned per recipient who retained a job for 12 weeks	Focus on job placement and retention
Higher-wage bonus	\$300	Additional bonus if a recipient for whom a retention bonus was paid earned at least \$7.50/hour	Reward vendors who help recipients find higher-paying jobs (and encourage emphasis on job quality)
Adult education bonus	\$200	Earned per recipient who participated in adult basic education	Encourage vendors to allow and promote adult basic education, particularly programs funded in a separate agency initiative

could rarely earn even \$1,500 for each recipient who found and retained a job. After the new set of contracts had been in place for almost a year and contract renewals were being considered, the payments potentially available to vendors were increased again. Modifications included a \$400 payment for initial job placement (even if the job did not last four weeks), up to \$1,200 if a recipient retained a job for six months, \$200 for a home visit that resulted in program participation by a recipient who had not previously participated, and a \$500 adult education bonus. The contracts have also been modified to include bonuses to recipients who find and retain jobs.

C. Contracts Based Purely on Performance?

The district considered only a purely performance-based contract structure, under which all of a vendor's earnings depended on recipients achieving certain goals. While jurisdictions have a strong

interest in basing payment on performance, too little is known about the benefits of contracts that are based partially on reimbursement of costs and partially on performance, compared with those that are purely one or the other.

A hybrid approach that combines cost reimbursement and performance-based components would have the advantage of guaranteeing vendors a base level of funding. Though less than operating costs, such a base level of funding would reduce the financial risk contractors assume should performance-based payments be lower than expected. Payments could be low for a variety of reasons, including poor quality of services, imperfect calibration of payment points and levels, a caseload with more barriers to employment than previously recognized, or a weakening job market (a growing concern now that the economy is in a recession). If a contract tied a large portion of a contractor's earnings to performance but also included a cost reimbursement com-

ponent, the vendor would retain a strong incentive to provide quality services and would face reduced financial risk.

Jurisdictions interested in contracting with community-based vendors must consider the level of fiscal risk implicit in various contract designs. Community-based vendors may be far less equipped than larger corporate entities to accept high levels of fiscal risks.

D. Investing in Efforts to Improve Vendor Performance

In addition to changing the referral mechanism and payment terms, the new District of Columbia contract made one other substantial change. It committed to contract with a technical assistance provider that would work with all of the district's vendors to help them improve their programs. The employment service vendors were contractually obligated to work with the technical assistance provider. The district made this decision because it recognized that even a well-designed contract structure would not change the underlying capacity of the entities that were likely to submit bids. Based on the agency's experience in the first round of contracts, we were concerned that many of the potential vendors would lack the organizational capacity to learn about and replicate emerging best practices from around the country or to engage in aggressive staff training. In short, the payment structure alone would not foster the kind of improvement in contractor performance we needed.

Thus the district contracted with a technical assistance provider—in this case, Mathematica Policy Research Inc.—to work with all its vendors of TANF services to help them identify weaknesses in their programs and develop solutions. We found that both community-based and large corporate vendors needed and could benefit from technical assistance. Mathematica worked one-on-one with vendors and arranged for many hands-on training sessions with their staffs to offer lessons from programs around the country. Some sessions were geared toward program managers and focused on pro-

gram structure; these addressed issues such as the components of a comprehensive job search program. Other sessions were for vendors' caseworkers and focused on how to help recipients prepare themselves for life changes and on strategies for engaging reluctant participants. While leaving much room for improvement, investing in technical assistance for the vendors appeared to improve the quality of services provided to recipients.

Some might argue that the district paid to train private entities so that they could earn more money from the district government. Without the technical assistance, however, the recipients would have been required to participate in lower-quality programs and would have been the real losers.

Government has increasingly looked to private entities to provide services that government believed it either was not equipped to provide or had provided poorly in the past. Government must recognize, however, that simply contracting out these services does not make the underlying task easier. Regardless of who undertakes the job, helping recipients find employment is difficult when they face a variety of barriers. Entering into a partnership with vendors to help them improve their services is a worthwhile investment.

III. Designing Contracts for TANF Services—the Wisconsin Experience

Wisconsin's TANF program, "Wisconsin Works" or W-2, authorizes the state to contract with either governmental or private agencies.²⁶ For the first contract period, from September 1, 1997, through December 31, 1999, most of the state's seventy-two counties administered their own programs, as did three tribes. Five counties operated as a consortium. However, Milwaukee County, which has the largest number of recipients, contracted with five private agencies, and thus these entities served most recipients in the state. Each of the five agencies, which include two that are for-profit, operated in a distinct

²⁶ Carol W. Medaris wrote this section.

district. Five other private agencies operated in eight other counties, with one responsible for four counties. Subsequent contract periods have seen a slight decline in administration by county agencies and tribes and an increase in counties where private agencies administer W-2.²⁷

State law authorizes the Department of Workforce Development to award contracts based on a competitive process approved by the state Department of Administration. For the first contract period, county departments of human or social services and tribes had the right of first refusal to administer the program in their jurisdictions if they met certain criteria, primarily caseload reduction.²⁸

By August 1997, the month before W-2 began, caseloads in Wisconsin were down to about 35,000 families, from about 65,000 in January, 1996. This reduction was a result of both the strong incentive posed by the right-of-first-refusal caseload reduction criterion and the implementation of two other programs that served as a phase-in to W-2: Self-Sufficiency First, which required applicants to search for work and consider any alternatives to cash assistance, and Pay for Performance, which increased the number of participants who were required to work and

instituted stricter sanctions. Even the Department of Workforce Development had not expected such “success”—it had based initial contract allocations on an estimated caseload at start-up of about 49,000 families.

The contract terms for the first period of two years and four months provided for profits based entirely on the amount of money each W-2 agency saved out of its initial allocation. Advocates pointed out at the time that this offered an overwhelming incentive to reduce caseloads still more.

The contracts provided that W-2 agencies could initially draw down, under a fairly complicated formula, 75 percent of the money due them but unspent after the first year.²⁹ Under that formula, and given the caseload reduction as well as a significant number of cases in which benefits were reduced due to sanctions, agencies realized very substantial profits.

In early October 1998 the *Milwaukee Journal Sentinel* reported that from a total allocation of \$265 million, \$107 million, or 40 percent of the amount budgeted for the first ten months of the program, was “surplus”

because far fewer people than expected are using the programs, records show.

²⁷ For the second contract period, January 1, 2000, to December 31, 2001, in addition to county agencies there were two tribal administrators and ten private agencies—one operating in five counties, one in two counties, three in one county each, and the same five continuing to operate in Milwaukee County. Beginning in January 2002, in addition to county agencies, one tribe and nine private agencies will operate programs—one in six counties, one in four counties, three in one county each, and four in Milwaukee County. Two for-profit agencies will continue to operate in Milwaukee County. (Five tribes developed a TANF plan and are working directly with the federal government.)

²⁸ Initially the goal was a 25 percent reduction in the twelve months before August 30, 1996, when selections were to be made. However, counties and tribes received an adjustment based upon reductions occurring before the twelve-month period. Monthly reports of each agency's progress were sent to all agencies. After nine months, all but Milwaukee County and three tribes had met their goals, in many cases several times over. *See, e.g.*, Wis. Dep't of Health & Soc. Servs., Div. of Econ. Support Administrator's Memo 95-56 (Dec. 27, 1995); *id.*, Bureau of Welfare Initiatives Operations Memos 96-14 (Feb. 9, 1996), 96-25 (Mar. 11, 1996), 96-38 (Apr. 1, 1996), 96-46 (May 1, 1996), 96-85 (June 17, 1996), 96-66 (July 2, 1996), 96-72 (July 23, 1996), 96-79 (Sept. 11, 1996). Milwaukee County eventually agreed to relinquish its efforts to administer its own program.

²⁹ The formula set forth a two-tier distribution mechanism for excess agency funds. Under the first tier, agencies retain an amount equal to 7 percent of the contract amount as unrestricted profit. Under the second tier, agencies keep the first 10 percent of the remaining funds for unrestricted use, with the rest split equally between the agency and the state. The agencies' portion must be reinvested in the community under terms approved by the state. *See* Memorandum from Bob Lang, director, Legislative Fiscal Bureau, on Unexpended Funding Under the Agency Contracts for the Wisconsin Works (W-2) Program and from the Child Care Program (Nov. 3, 1998).

These huge budget surpluses could translate into millions of dollars in profits for counties throughout the state and for the five W-2 agencies in Milwaukee County.

Other records obtained by the *Journal Sentinel* offer the first public scrutiny, since W-2 was fully implemented in March, of a massive number of sanctions, or pay reductions for W-2 cash assistance participants who skipped work.³⁰

The statistics for the whole first year compiled, the W-2 surplus was \$131 million out of a total contract amount of \$321 million (still approximately 40 percent), leading to \$98.5 million that was available to draw down and \$25 million in pure profits for the agencies.

Based on data through August 31, 1998, the maximum amount of unexpended funding that might be disbursed in 1998–99 was \$98.5 million. Of this amount, (1) up to \$25 million in unrestricted funds might be retained by W-2 agencies statewide (the 7 percent first-tier amount and 10 percent of the remainder); (2) up to \$36.7 million might be distributed to the agencies for community reinvestment statewide; and (3) up to \$36.7 million might be retained by the state.³¹

The Department of Workforce Development tried to frame the surplus as

proof of the program's success. However, advocates and legislators, especially Milwaukee's Gwendolyn Moore, a state senator and former welfare recipient, raised questions about the fate of those who left the program and the propriety of using state funds intended for the poor for private agencies' profits and tax relief in other counties instead.³²

Eventually even strong supporters of W-2 were persuaded of the need for contract changes. Rep. John Gard, considered one of the authors of W-2 and subsequently cochairman of the powerful legislative Joint Committee on Finance, issued a strong letter urging that performance measures be included in the second contract:

We are writing to encourage the Department to base any profit calculation under the new W-2 agency contracts on measures of agency performance. These should include criteria such as placements of W-2 applicants or participants in unsubsidized jobs, whether the jobs are full-time or part-time, job retention by former applicants or participants (and whether they return to the program), wages and benefits earned by former applicants or participants, appropriate implementation of all components of the program and customer satisfaction.

³⁰ Margo Huston, *W-2's First Year Is Under Budget by \$178 Million*, MILWAUKEE J. SENTINEL (state ed.), Oct. 4, 1998, at A1.

³¹ Lang, *supra* note 29.

³² Huston, *supra* note 30. In the article Jean Rogers, administrator of the state's Division of Economic Support, called the surplus evidence that W-2 "has been wonderfully successful." Others characterized the surpluses and sanctions as warning signs that the W-2 program "must do more to help the state's neediest families surmount barriers to self-sufficiency," including addictions, mental illness, or a lack of education, training, child care, or transportation. The *Sentinel* also noted that Rogers had chastised Milwaukee County's five W-2 agencies for failure to sanction participants enough in the first months of the program and that sanctions had increased 400 percent in the seven months since then. See also, e.g., these articles by Margo Huston, *What to Do with the \$186 Million W-2 Surplus*, MILWAUKEE J. SENTINEL (state ed.), Oct. 8, 1998, at B3; *Private W-2 Agencies to Share in Profits*, *id.*, Oct. 13, 1998, at A1; *Return of W-2 Surplus to Taxpayers Urged*, *id.*, Oct. 16, 1998, at A1; *Counties May Get \$40 Million W-2 Windfall*, *id.*, Nov. 2, 1998, at A1; *W-2 Agencies Urged to Take Money Coming*, *id.*, Nov. 13, 1998; *State's Private Agencies First in U.S. to Receive Profits*, *id.*, Nov. 18, 1998, at A1. See also Associated Press, *Private Groups Profit from W-2*, Wis. STATE J., Nov. 19, 1998, for press coverage of the discussions the surplus engendered. As the discussion progressed, some legislators and county administrators suggested that counties appropriately might use their profits for tax relief.

The new contracts should not permit agencies to receive profits based on caseload decreases or reduced agency spending that are not directly attributable to placement of W-2 applicants or participants in unsubsidized employment.³³

Representative Gard also admitted in the letter that the former contract, which allowed agencies to retain a portion of the profits without regard to their performance, “may provide an incentive for the agencies to focus more on reducing caseloads than on truly assisting families to become self-sufficient.”

A number of public meetings followed, organized by advocates and Senator Moore primarily to consider how to spend the reinvestment money but also to hear suggestions about the new contracts. (The Department of Workforce Development had been asked to hold public hearings on the contracts, but it never did so.)

On March 9, 1999, Senator Judy Robson, chairwoman of the Senate Committee on Human Services and Aging, held a hearing to discuss contract issues. During the hearing, at Senator Robson’s request, the Department of Workforce Development agreed to make sure that the contract process was open to the public. However, on April 7, when it issued a 100-page draft contract that included extensive performance standards, the department announced that any public comments had to be submitted within ten days. After a reaction of outrage by advocates and sympathetic legislators, and a contentious second hearing before the Senate committee, the department ultimately extended the deadline to the end of April.

On May 19, 1999, the Department of Workforce Development issued the final contract.³⁴ Performance standards included achievement of specific rates for

- participants entering full- or part-time employment that lasted at least thirty days;

- wage rates at job entry, based upon rates attained by agencies in 1998, with bonuses for increased rates;

- job retention rates, measured after 30 days and again after 180 days;

- “full and appropriate engagement,” measured by whether participants had employability plans and were engaged in appropriate activities for at least thirty hours per week (this also included a Food Stamp Employment and Training program rate of at least twenty-seven hours per week);

- adults who were without a high school diploma or its equivalent and were assigned to “basic educational activities,” including high school and equivalency courses, job skills training, English as a Second Language, literacy, and other basic education; and

- availability of employer-provided health insurance within 180 days of the date participants entered employment.

The contract set a base rate and two bonus-rate levels for each standard. Only agencies meeting all the base rates were eligible for the bonus funding. Meeting

Advocates and legislators raised questions about the propriety of using state funds intended for the poor for private agencies’ profits and county tax relief instead.

base rates also entitled the agency to a right of first selection for the next two-year contract period, 2002 through 2003. For those meeting the first higher bonus level, 4 percent of the contract amount was available for restricted use (programs that met TANF requirements and were approved by the Department of Workforce Development). For those meeting the second bonus level, 3 percent of the contract amount was available as unrestricted

³³ Letter from Rep. John Gard and Sen. Tim Weeden, cochairs of Joint Committee on Finance, to Secretary of Department of Workforce Development (Dec. 2, 1998).

³⁴ Wis. Dep’t of Workforce Dev., Request for Proposal to Administer Wisconsin Works (W-2) and Related Programs (May 1999) (with cover memorandum signed by J. Jean Rogers, administrator, Division of Economic Support (May 19, 1999)).

funds. (For each standard agencies met at the higher level, they received one-sixth of the award.) Two additional standards might substitute for one of the 3 percent performance bonuses: (1) entry into a valid contract with a faith-based provider or (2) completion by 50 percent of participants assigned to basic skills or job skills training. Advocates succeeded in diluting the faith-based standard somewhat compared to its original form. Moreover, concerned that agencies might turn needy families away, advocates succeeded in removing a standard that would have rewarded low recidivism rates.

By this time, the Department of Workforce Development seemed to have engendered a certain amount of distrust among some legislators. Perhaps for this reason, the legislature enacted standards for “performance bonuses” on its own as part of the 1999–2001 budget.³⁵ In addition to most of the performance measures included in the department’s scheme, the legislature required measurement of whether placements were part-time or full-time and of W-2 “customer satisfaction.” Also, the state would recover any

money W-2 agencies did not spend because of sanctions.³⁶ The legislature prohibited bonuses for caseload decreases or reduced spending that “are not directly attributable to placement or participation in unsubsidized employment.”³⁷

Whether and to what extent these performance standards have helped make the system work better for poor families is difficult to know. Caseload reductions had already begun to slow down in 1999 under the old contract. For 2000, the first year of the new contract, caseloads were fairly stable. Since December 2000, caseloads have been increasing again.³⁸ But, of course, this increase coincides with an economic downturn in Wisconsin as well as the rest of the nation.

A new secretary of the Department of Workforce Development, Jennifer Reinert, has been much more willing than her predecessor to listen to the community.³⁹ The “light touch,” which instructed agencies to provide “only as much service as an eligible person asks for or needs,” is no longer in effect, according to department spokespersons, although it is still on the books.⁴⁰ And a recent

³⁵ 1999 Wisconsin Laws Act 9 § 49.143(3g). Advocates suggested many of the additions and changes; ultimately the changes were primarily the result of agreements reached by Representative Gard and Sen. Gwendolyn Moore of the Joint Committee on Finance.

³⁶ *Id.* § 49.143(2)(ct).

³⁷ *Id.* § 49.143(3g)(b). The governor vetoed the provision that would have given counties 3 percent of the performance bonuses for reinvestment purposes (instead of the 4 percent going to W-2 agencies for this purpose), the provision that would have required that the department develop a system to track former participants and applicants, and the provision that would have established a statewide advisory group, regional forums, and special work groups to address concerns about the program and provide for public input. *Id.* § 1224d, 1224p (1999).

³⁸ From January to December 1998 the W-2 cash-assistance caseload dropped from 14,391 to 9,078. In 1999 the caseload declined to 6,763, and in 2000 it ranged from a high of 6,772 to a low of 6,496. In 2001 the caseload had risen from 6,679 in January to 8,381 by October. To get an accurate picture of the total TANF caseload, one should add the child-only cases—those in which no parent receives TANF benefits either because the parent instead receives Supplemental Security Income benefits or because the child is cared for by a relative other than a parent. (Although in some other states child-only cases are primarily those in which the parents are undocumented immigrants and only their children are eligible, Wisconsin does not provide any benefits to these families.) Since W-2 began, Wisconsin’s child-only cases have ranged between about 10,800 and 11,700 per month and have been about equally divided between those in which the parent receives Supplemental Security Income and those in which the caretaker is a nonparent.

³⁹ Among other innovations, Secretary Jennifer Reinert initiated a Milwaukee W-2 Advisory Panel that includes community and advocate representation; the panel has met frequently with department representatives and has made many suggestions for program improvement, several of which the department has agreed to implement.

⁴⁰ WIS. DEP’T OF WORKFORCE DEV., WISCONSIN WORKS MANUAL § 1.1.0 (Philosophy and Goals, No. 7). Under this provision, many applicants have been turned away without receiving information about programs and services that might help them.

audit found that people were returning to the program; as of July 2000, 26 percent of those who left in the first quarter of 1998 were receiving benefits again, and 42 percent had returned in Milwaukee County.⁴¹ The audit found that the percentage of cases in which sanctions were imposed decreased from 31.4 percent in October 1999 to 21.1 percent in December 2000. Sanction percentages in Milwaukee County, however, were generally high (and error-prone)—four of the five agencies sanctioned more than 20 percent of participants receiving cash assistance from October 1999 through December 2000, and one agency sanctioned an average of 48 percent of its caseload. The dollar amounts of the sanctions also were high in Milwaukee County, with averages ranging from 45 percent to 59 percent of benefits among the five private agencies there.

Final contracts have now been developed for 2002 and 2003, following a period for public comment.⁴² Performance standards are similar to those described above, with a number of new requirements, including increased assessments for participants, a requirement that a certain percentage of participants complete

their educational programs (an option in the previous contract), a wage *gain* standard rather than the previous contract's placement wage *rate* standard, and a minimum score on a customer satisfaction survey that the department developed.⁴³ The contract specifically requires agencies to meet the department's audit requirements and states that they must not have been subject to a corrective action for substantial noncompliance with the program. These latter requirements are a result of extremely negative financial audits of two Milwaukee agencies.⁴⁴

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

Many individuals receiving TANF benefits have health problems and disabilities.⁴⁵ The Americans with Disabilities Act and section 504 of the Rehabilitation Act are important sources of legal protection for clients in TANF programs. Both laws are incorporated into the Personal Responsibility and Work Opportunity Reconciliation Act, and both apply to programs and activities receiving federal TANF funds.⁴⁶ Both restrict the content of contracts between TANF agencies and

⁴¹ WIS. LEGISLATIVE AUDIT BUREAU, AN EVALUATION: WISCONSIN WORKS (W-2) PROGRAM (Apr. 2001), www.legis.state.wi.us/lab/Reports/01-7tear.htm.

⁴² See Wis. Dep't of Workforce Dev. Adm'r Memorandum 01-07, Instructions for Re-Contracting for Right of First Selection Agencies for the Next W-2 Contract (Apr. 23, 2001).

⁴³ The Milwaukee County W-2 agencies strongly opposed the latter standard. Memorandum from Milwaukee W-2 Agencies to Jennifer Noyes, administrator, Department of Workforce Solutions (Mar. 8, 2001) (Wisconsin Works (W-2) Contracts for the Period January 1, 2002, through December 31, 2003: An Opportunity for Public Comment).

⁴⁴ See letter and attachment on the Maximus Inc. agency from the Wisconsin Legislative Audit Bureau to the cochairs of the Joint Legislative Audit Committee (July 28, 2000) and letter and attachments focusing on Employment Solutions Inc. from the bureau to the cochairs (Feb. 16, 2001). When questioned about how these two agencies could still have earned the right of first selection for the subsequent contract period, the Department of Workforce Development responded that nothing in their 2000–2001 contract prevented them from earning that position. Employment Solutions eventually left the program.

⁴⁵ Cary LaChen wrote this section. For a survey of studies of the prevalence of disabilities among current and former welfare recipients, see EILEEN SWEENEY, CTR. ON BUDGET & POLICY PRIORITIES, RECENT STUDIES INDICATE THAT MANY PARENTS WHO ARE CURRENT OR FORMER WELFARE RECIPIENTS HAVE DISABILITIES OR OTHER MEDICAL CONDITIONS (2000), www.cbpp.org/2-29-00wel.htm.

⁴⁶ 42 U.S.C.A. § 608(d) (2001). The other statutes incorporated into the Personal Responsibility and Work Opportunity Reconciliation Act are the Age Discrimination Act, *id.* §§ 6101 *et seq.*, and Title VI of the Civil Rights Act, *id.* §§ 2000d *et seq.*

private and government organizations providing services to TANF clients.⁴⁷

The Americans with Disabilities Act applies to all state and local programs, including TANF programs, and to privately operated organizations that provide education and training, screening and assessment, mental health services, drug and alcohol screening and treatment, and other services to TANF clients.⁴⁸ Section 504 applies to programs and services that receive federal financial assistance, such as federal TANF, Welfare-to-Work, and Workforce Investment Act funds.⁴⁹ Both laws define discrimination broadly to include failure to provide an equal opportunity to participate in and benefit from programs and services and failure to make reasonable modifications in policies and practices when necessary to avoid discrimination unless such modifications would fundamentally alter the nature of the program or be an undue burden.⁵⁰ Many prohibitions of the Act and Section 504 apply to services provided directly and those provided through “contractual, licensing or other arrangements.”⁵¹

A. Application of the Americans with Disabilities Act and Section 504 to TANF-Funded Contracts

The Americans with Disabilities Act prohibits TANF programs and private programs serving TANF clients from using “criteria and methods of administration” that have a discriminatory effect or that substantially defeat or impair the accomplishment of the objectives of the public entity’s program for individuals with disabilities.⁵² Advocates can use this provi-

sion to challenge provisions in contracts between TANF agencies and other public and private agencies. The provision is also a strong basis for helping states think through the types of language needed in their requests for proposals and contracts before they are signed.

Many performance-based contract provisions, as well as contract payment schemes, are likely to have a discriminatory effect on people who have disabilities and need, or are more likely to need, a greater level of services than others. Contract provisions may violate the Americans with Disabilities Act or Section 504 because they do not pay for, or create incentives to provide, the services that people with disabilities need in order to have an equal opportunity to participate in or benefit from TANF programs or services.⁵³

If a contract between a TANF agency and a private organization offering disability screening and assessment to TANF recipients provides for a flat fee for every individual with a completed assessment, regardless of the number of examinations or tests required, the contract may violate the Americans with Disabilities Act and Section 504 by creating a disincentive for the private organization to administer all of the tests and examinations that a specific individual with a disability may need. Advocates also can argue that the Act and Section 504 affirmatively require TANF agencies to include performance-based measures in their contracts and to ensure that people with disabilities receive an equal opportunity to obtain and continue receiving TANF benefits, participate in education and training programs, and obtain TANF work exemptions.

⁴⁷ *Id.* §§ 12101 *et seq.* (Americans with Disabilities Act); 29 U.S.C.A. § 794 (section 504).

⁴⁸ 42 U.S.C.A. §§ 12131 *et seq.* (2001) (Title II); *Id.* §§ 12181 *et seq.* (Title III).

⁴⁹ 29 U.S.C.A. § 794 (2001).

⁵⁰ 28 C.F.R. §§ 35.130(b)(1)(ii), 35.130(b)(7).

⁵¹ 42 U.S.C.A. §§ 12182(b)(1)(A)(ii), (b)(1)(C), (b)(1)(D), (b)(2)(ii) (2001) (Title III); 28 C.F.R. §§ 35.130(b)(1), (b)(3) (2001) (Title II); 45 C.F.R. §§ 84.4(b)(i)–(vi) (2001) (Section 504).

⁵² 42 U.S.C.A. § 12182(b)(D) (2001); 28 C.F.R. §35.130(b)(3)(i) (2001).

⁵³ Alternatively advocates can argue that contract provisions with a discriminatory effect violate the Americans with Disabilities Act because they deny individuals with disabilities an equal opportunity to participate and benefit from the TANF agency’s programs or do not comply with the Act’s reasonable modification requirement. *See* 28 C.F.R. §§ 35.130(b)(1)(ii), 35.130(b)(7) (2001).

Policy Guidance issued by the Office for Civil Rights of the U.S. Department of Health and Human Services on the application of the Americans with Disabilities Act and Section 504 to the administration of TANF programs makes clear that both laws apply to the payment structure of TANF contracts. The guidance encourages TANF agencies to “reimburse[] providers in such a way as to facilitate, rather than impede, equal opportunity for individuals with disabilities to benefit from a TANF program.”⁵⁴ It goes on to state that when TANF programs use outcome-based reimbursement methods, “the TANF agency should take into account the additional costs of providing services to persons with disabilities so that service providers do not reject such persons, or provide them with inappropriate or inadequate services to persons with disabilities.”⁵⁵

Some TANF agencies have established relationships with other government agencies to provide disability screening and assessment, drug and alcohol screening and treatment, mental health treatment, education and training, and other services for TANF clients. The Americans with Disabilities Act and Section 504 also require TANF agencies to develop arrangements that encourage services to TANF clients. Referring clients to another public agency for services without providing the funds necessary to provide the services is a discriminatory method of program administration under the Act and Section 504. Memoranda of

understanding between TANF agencies and other government agencies must ensure that funds follow clients.

B. Case Law

No cases, as yet, appear to interpret the interplay of TANF, the Americans with Disabilities Act, and state contract reimbursement schemes.⁵⁶ However, in the health care context, advocates have used the Act to challenge the discriminatory effect of capitation rates and other reimbursement schemes in managed care programs. In one case, managed care organization members with disabilities challenged the financial arrangements between managed care organizations and physicians; plaintiffs alleged that the arrangements created an incentive to delay or deny care to people with disabilities.⁵⁷ The case was settled on a confidential basis after denial of defendants’ motion to dismiss or for summary judgment.⁵⁸ In Tennessee, on the theory that the reimbursement rate created a disincentive to serve clients with greater needs, plaintiffs sued a private home care agency for refusing to serve such clients.⁵⁹ The court, holding that Section 504 reached discrimination between those with more and less severe disabilities, issued a preliminary injunction and later denied defendants’ motion to dismiss.⁶⁰ The U.S. Department of Health and Human Services recommended to Congress that Medicaid managed care programs make higher payments for individuals with disabilities and greater health care

⁵⁴ U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE FOR CIVIL RIGHTS, PROHIBITION AGAINST DISCRIMINATION ON THE BASIS OF DISABILITY IN THE ADMINISTRATION OF TANF (TEMPORARY ASSISTANCE FOR NEEDY FAMILIES) (2001), available at www.hhs.gov/ocr/prohibition.html. For a more general discussion of the guidance, see EILEEN P. SWEENEY, CTR. ON BUDGET & POLICY PRIORITIES, HHS GUIDANCE EXPLAINS HOW FEDERAL LAWS BARRING DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES APPLY TO STATE AND COUNTY TANF PROGRAMS (2001), www.cbpp.org/2-26-01wel.htm.

⁵⁵ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 54.

⁵⁶ For a more detailed discussion of the application of Title II of the Americans with Disabilities Act to various aspects of TANF programs, see Cary LaCheen, *Using Title II of the Americans with Disabilities Act on Behalf of Clients in TANF Programs*, 7 GEO. J. ON POVERTY L. & POL’Y 1 (Winter 2001), available at www.welfarelaw.org/ada_manual/contents.htm.

⁵⁷ *Zamora-Quezada v. HealthTexas Med. Group of San Antonio*, 34 F. Supp. 2d 433, 438 (W.D. Tex. 1998).

⁵⁸ *Settlement in Texas Shows How ADA Can Be Used to Challenge HMO Care*, DISABILITY COMPLIANCE BULL., Dec. 14, 2000, at 5.

⁵⁹ See *Winkler v. Interim Servs. Inc.*, 36 F. Supp. 2d 1026 (M.D. Tenn. 1999).

⁶⁰ *Id.* at 1030.

needs or use other program design features to prevent providers from practicing adverse selection of people with greater service needs.⁶¹

C. Enforcing the Americans with Disabilities Act and Section 504

Those protected under Title II of the Americans with Disabilities Act can enforce the Act by filing a complaint with the Department of Health and Human Services within 180 days of the discriminatory conduct or by filing a lawsuit in court.⁶² Plaintiffs may bring a private action for discrimination in programs and services against public entities without exhausting administrative remedies.⁶³ A complaint filed with the Department of Health and Human Services will not bar a lawsuit even if the complaint is unresolved, but a court has discretion to stay the case pending the administrative determination.⁶⁴

The Eleventh Amendment prohibits private lawsuits against states for money damages under Title I of the Americans with Disabilities Act.⁶⁵ Some courts have extended this holding to Title II damage claims.⁶⁶ The Supreme Court stated that government officials might still be sued under the Act for injunctive relief under *Ex parte Young*, and many courts so held.⁶⁷ A few courts, however, held that even claims for injunctive relief might not be brought against states or state officials under the Act.⁶⁸ Municipalities also may be sued under the Act for all types of relief if they are not an “arm of the state.”⁶⁹ Those that are an “arm of the state” may be sued for injunctive relief except in jurisdictions that limit injunctive relief claims under the Act. Advocates also may sue states for all forms of relief under Section 504, which many courts held was enacted under Congress’ authority under

⁶¹ DONNA E. SHALALA, U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS: SAFEGUARDS FOR INDIVIDUALS WITH SPECIAL HEALTH CARE NEEDS ENROLLED IN MEDICAID MANAGED CARE 119–20 (2000), <http://hcfa.hhs.gov/medicaid/omchmpg.htm>.

⁶² 42 U.S.C.A. § 12188(a)(1) (2001); 28 C.F.R. § 35.170(b) (2001).

⁶³ See, e.g., *Schonfeld v. City of Carlsbad*, 978 F. Supp. 1329, 1334 (S.D. Cal. 1997), *aff’d mem.*, 172 F.3d 876 (9th Cir. 1999); *Tyler v. City of Manhattan*, 857 F. Supp. 800, 818 n.12 (D. Kan. 1994).

⁶⁴ Cf. *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979) (administrative complaint under Title IX of the Civil Rights Act does not bar a lawsuit).

⁶⁵ *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (Clearinghouse No. 52,744).

⁶⁶ *Thompson v. Colorado*, 258 F.3d 1241 (10th Cir. 2001) (Clearinghouse No. 54,038); *Kvorjak v. Maine*, 259 F.3d 48 (1st Cir. 2001) (Clearinghouse No. 53,972); *Frederick L. v. Dep’t of Pub. Welfare*, 157 F. Supp. 2d 509 (E.D. Pa. 2001).

⁶⁷ *Ex parte Young*, 209 U.S. 123 (1908); *Garrett*, 121 S. Ct. at 968 n.9; see also *Randolph v. Rogers*, 253 F.3d 342 (8th Cir. 2001), *reh’g denied*, 2001 U.S. App. LEXIS 16637 (July 20, 2001) (Clearinghouse No. 53,868); *John Roe No. 2 v. Ogden*, 253 F.3d 1225 (10th Cir. 2001); *Hostin v. Ariz. Sch. for the Deaf & Blind*, 2001 U.S. App. LEXIS 11401 (9th Cir. May 30, 2001) (unpublished), *reh’g denied*, 2001 U.S. App. LEXIS 15796 (July 10, 2001); *Project Life Inc. v. Glendening*, 139 F. Supp. 2d 703 (D. Md. 2001); *Frederick L.*, 157 F. Supp. 2d 509; *State Police for Automatic Ret. Ass’n v. Difava*, 138 F. Supp. 2d 142 (D. Mass. 2001). See also Herbert Semmel, *Enforcing Federal Rights Against States*, 35 CLEARINGHOUSE REV. 309 (Sept.–Oct. 2001). For further information on these issues, contact the National Senior Citizens Law Center, which has established a National Technical Assistance Center on enforcing federal rights against state officials, www.nslc.org or hsemmel@nslc.org.

⁶⁸ *Walker v. Snyder*, 213 F.3d 344 (7th Cir.), *amended by* 2001 U.S. App. Lexis 16037 (July 12, 2000), *cert. denied*, 121 S. Ct. 1188 (2001) (Clearinghouse No. 53,130) (Congress did not have the authority to enact Title II of the Americans with Disabilities Act, and state officials may not be sued under Title II for injunctive relief); *Doe v. Div. of Youth & Family Servs.*, 148 F. Supp. 2d 462 (D.N.J. June 25, 2001) (Congress did not have the authority to enact Title II of the Americans with Disabilities Act); *Frederick L.*, 157 F. Supp. 2d 509 (state may not be sued under Title II for injunctive relief).

⁶⁹ *Alden v. Maine*, 527 U.S. 706, 756 (1999).

the Spending Clause.⁷⁰ Many courts hold that states waive Eleventh Amendment immunity under Section 504 when they accept federal funds.⁷¹

V. Conclusion

The four preceding sections confirm that securing strong, workable contracts with provisions that will ensure that vendors meet the varying needs of low-income families is not an easy task. But the authors also make clear that the task can—and must—be accomplished. Under current law in some states, obtaining information about the requests for proposals and their contents, or about the terms or results of contracts, is often difficult for the public. As the discussion of the Baltimore experience and its strong community audit show, this is an area where state legislators and advocates should consider implementing changes to ensure greater transparency in the contracting process and restore greater public scrutiny over the use of these very important public funds.

State officials—in both the legislative and executive branches—and advocates should carefully scrutinize the terms to be included in the requests for proposals, contracts, or agreements that their states and counties are negotiating to provide services intended to help low-income families move from welfare to work. In some cases, such as Wisconsin, state legislative intervention may be needed. In others, such as the District of Columbia,

administrative action to design better contracts and provide technical assistance to ensure that vendors are able to comply with program rules and goals can help make a difference. Requiring evidence of customer satisfaction, as is now under way in Wisconsin, has the potential to move less responsive contractors to devote greater consideration to the needs of those they are intended to serve. The work is repetitive, cumulative, and evolving—with each set of requests for proposals and contracts, improvements can be sought and secured, as reflected in both the Wisconsin and District of Columbia examples.

In all circumstances, ensuring that states and counties design their contracts to comply with the requirements of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act—as well as other civil rights laws—is essential to protecting the rights of people with disabilities in the TANF program. These laws give advocates, legislators, and other state policymakers strong legal handles in a program where legal handles are few. The Americans with Disabilities Act and Section 504 also provide a policy framework for moving program design—including design, implementation, and monitoring of requests for proposals and contracts—in directions that can be very helpful in meeting the needs of parents with disabilities as well as all low-income families.

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⁷⁰ *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000), cert. denied sub nom. *Ark. Dep't of Educ. v. Jim C.*, 121 S. Ct. 2591 (June 29, 2001) (Clearinghouse No. 53,607); *Stanley v. Litscher*, 213 F.3d 340 (7th Cir. 2000); *Frederick L.*, 157 F. Supp. 2d at 519.

⁷¹ *Jim C.*, 235 F.3d at 1081; *Stanley*, 213 F.3d at 344; *Clark v. Cal. Dep't of Corr.*, 123 F.3d 1267 (9th Cir. 1997); *Frederick L.*, 157 F. Supp. 2d 509; *Patricia N. v. Lemahieu*, 141 F. Supp. 2d 1243, 1250 (D. Haw. 2001). At least five circuits hold that the waiver of Eleventh Amendment immunity by accepting federal funds in 42 U.S.C.A. § 2000d-7 is valid. See *Stanley*, 213 F.3d at 344 (listing cases). But see *Pugliese v. Ariz. Dep't of Health & Human Servs.*, 147 F. Supp. 2d 985 (D. Ariz. 2001) (section 504 does not operate as a basis for consent to be sued by a state accepting federal funds).