4-1-2000

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“Welfare Reform” and Procedural Due Process Protections: The Massachusetts Example

CAROLYN GOODWIN†

INTRODUCTION

The 1996 welfare reform established a new program, Temporary Assistance for Needy Families (TANF), which significantly altered the former welfare program, Aid to Families With Dependent Children (AFDC). The Supreme Court had characterized AFDC as a statutory entitlement in the form of a property right, making constitutional procedural due process applicable to deprivation of welfare benefits. When Congress passed TANF, it stated explicitly that TANF could not be characterized as an entitlement.

By statutorily eliminating an entitlement to welfare benefits and consequently a property right in welfare benefits, Congress may have deprived welfare recipients of the constitutional guarantee of due process protections, such as fair hearing appeals, designed to limit welfare agency actions. Many recipients have their benefits

† J.D., State University of New York at Buffalo School of Law, 2000. I wish to thank Bob Mertz and my parents, Rhoda and Herbert Goodwin, for their never-ending encouragement and support as well as editing assistance. I also wish to thank Professors Susan Vivian Mangold, Jacob Hyman, and Frank Munger for their helpful comments on an earlier draft of this paper. Finally, my sincere appreciation to Mia McFarlane and Kinda Serafi for their constructive feedback and assistance.

5. See Melissa Kwaterski Scanlan, The End of Welfare and Constitutional Protections for the Poor: A Case Study of the Wisconsin Works Program and Due
terminated, not as a result of any deliberate failure to comply with requirements, but because caseworkers have inadvertently made errors. A system of procedural due process protections for welfare recipients is particularly important to empower recipients who are generally disenfranchised due to "race, class, or gender." The formal appeals process provides welfare recipients with a voice to challenge decisions made "by untrained, uninformed, or biased workers at . . . governmental agencies." Since recipients may no longer have a federal statutory entitlement to welfare benefits, the question remains of what will happen to procedural protections for welfare recipients whose benefits are unfairly terminated or who, in the wake of time limited benefits, are unfairly denied extensions of time limited welfare benefits.

In this article, I will examine some of the implications of the new welfare law on procedural protections for welfare recipients by looking at what has happened to due process in the states, particularly in Massachusetts, since Congress enacted TANF.

In Part I of this note, I explain the nature of the former

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7. Id. at 1113-14 (analyzing the importance of due process protections for women, particularly women of color, in light of recent welfare reform).

8. Id. at 1116.

9. Whether the federal and/or state courts will interpret the TANF statute as depriving recipients of constitutional due process guarantees remains unclear. Compare Michelle L. Van Wiggeren, Experimenting with Block Grants and Temporary Assistance: The Attempt to Transform Welfare By Altering Federal-State Relations and Recipients Due Process Rights, 46 EMORY L.J. 1327, 1356 (1997) (explaining that “elimination of the AFDC entitlement and denial of a federal TANF entitlement through PRAWORA do not give rise to any legitimate due process claims; these two entitlements were terminated uniformly by legislative action”), with Helen Hershkoff, Welfare Devolution and State Constitutions, 67 FORDHAM L. REV. 1403, 1404 (1999) (claiming that “federal due process should continue to protect poor people against arbitrary governmental action even if welfare is no longer a federal entitlement . . .”) and Weston v. Hammons, No. 99-CV-412, at 19 (D. Colo. Nov. 5, 1999) (Findings of Fact and Conclusions of Law) (on file with the author and with the Buffalo Law Review) (rejecting the argument that “when Congress specified that [TANF] benefits are not an entitlement, it intended to prevent the creation of a property interest and thereby prevent due process rights from attaching to the right of any person to receive benefits”).

entitlement status of welfare benefits that gave rise to procedural due process protections for welfare recipients. I also explain the framework for analyzing what level of due process is required for deprivation of protected property interests. I then describe changes in the welfare law which led to the statutory elimination of the entitlement status in the federal welfare law. I also discuss the possibility that Congress, despite the non-entitlement language in TANF, did not intend to eliminate procedural protections for welfare recipients because it required states to develop procedural safeguards.

In Parts II through IV, I examine a few state experiences to show a selection of how state administration of benefits and concurrent procedural due process protections have developed since TANF. In Part II, I provide a sampling of state welfare cases and experiences dealing with due process rights of welfare recipients since TANF. In Part III, I describe present welfare regulations and concurrent procedural protections in Massachusetts. I focus on Massachusetts because it imposes a two-year time limit on welfare benefits, three years less than the federal five-year maximum. As of December 1998, welfare recipients in Massachusetts who had been on welfare for two years either lost their benefits or applied for an extension of benefits. In addition, in Massachusetts, unlike in some states, the courts have not interpreted the state constitution as mandating the state to provide assistance to needy persons. In Part IV, I look at the procedural protections that attend extensions of time limited benefits in Massachusetts to show how due process rights have developed since TANF for a discretionary portion of the state welfare law.

Finally, in Part V, I assume, for purposes of analysis,
that there is no federal statutory entitlement, which would create a protected property interest, in welfare benefits. I do this to show that despite the elimination of the entitlement status in the federal welfare law, recipients still have avenues to secure adequate procedural protections. I use Massachusetts procedural protections for extensions to time limited benefits as a case study to explore potential strategies that recipients can use to secure due process protections, either through judicial interpretation of state welfare laws or through legislative actions.

I. WELFARE: ENTITLEMENT AND PROCEDURAL DUE PROCESS

A. Background to Welfare’s Entitlement Status

Public assistance for needy persons existed in various forms throughout the history of the United States. In the 1930s, the federal government assumed a central role in providing welfare benefits by enacting public assistance laws, including Aid to Dependent Children (ADC), as a portion of the 1935 Social Security Act. ADC was renamed Aid to Families with Dependent Children (AFDC) in 1962. In the 1960s and 1970s, the federal government expanded its involvement in welfare through a series of judicial decisions. In the 1960s, the federal courts expanded the rights of welfare recipients, including its determination in


16. See Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620 (1935); HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR: THE AUTHORITATIVE ACLU GUIDE TO POOR PEOPLE’S RIGHTS 4 (1997); GORDON, supra note 15, at 4-5 (explaining that while the Social Security Act of 1935 provided for public assistance, it did so in a stratified manner with social insurance programs (including social security and unemployment compensation) as “superior both in payments and in reputation” to the public assistance programs (generally “welfare”) which were deeply stigmatized).

17. See GORDON, supra note 15, at 1.

18. See Van Wiggeren, supra note 9, at 1332-34.

19. See id. at 1333 n.56 (explaining how the courts expanded the rights of welfare recipients in cases such as Shapiro v. Thompson, 394 U.S. 618 (1969) (declaring unconstitutional states’ imposition of one-year waiting period on new residents otherwise eligible for welfare assistance)); King v. Smith, 392 U.S. 309, 334 (1968) (invalidating an Alabama regulation that denied needy children
Goldberg v. Kelly, that individuals who met the statutorily defined eligibility criteria for welfare benefits possessed an entitlement in welfare benefits.

The Court determined that welfare benefits, as a statutory entitlement, were property rights to be protected by the Due Process Clause of the Fourteenth Amendment. The Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law." As a result of the decision in Goldberg, the federal government required states to set up a system of fair hearings as part of their plan to administer federally funded welfare programs.

When determining whether an individual's due process rights have been violated, the courts apply a two-pronged test. First, the court determines whether a property right exists. Because of the decision in Goldberg, welfare recipients had an entitlement, in the form of a property right, in their AFDC benefits. The second stage of the due process analysis asks, what are the necessary procedures to

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21. See id. at 262.
22. See id. at 262-63 n.8 ("It may be realistic today to regard welfare as more like 'property' than a 'gratuity.' Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.") The Court goes on to quote Charles A. Reich, a legal economic scholar: "It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced." Id. (quoting Charles A. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965)); see also Charles A. Reich, The New Property, 73 YALE L.J. 733 (1964).
23. U.S. CONST. amend. XIV, § 1. The due process clause is established in the Fourteenth Amendment to the Constitution as it applies to the States and the Fifth Amendment as it applies to the Federal government.
24. See Goldberg, 397 U.S. at 266-71; Zietlow, supra note 6, at 1123-26.
27. See Goldberg, 397 U.S. at 262-63.
satisfy the Due Process Clause? In other words, what process is due? The courts have developed legal standards to determine what level of due process is required for individuals deprived of "life, liberty, or property." The Supreme Court, in Mathews v. Eldridge, articulated the three factors to be balanced in determining the level of administrative procedures required by the due process clause. The court must consider:

- first, the private interest that will be affected by the official action;
- second, the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
- finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the addition or substitute procedural requirements would entail.

Although the level of procedural due process required for termination of government benefits is subject to a balancing test and is not fixed, by characterizing AFDC welfare benefits as a property right, the Court guaranteed recipients some level of procedural due process.

B. Temporary Assistance to Needy Families and the Elimination of Welfare's Entitlement Status

In 1996, the federal government eliminated AFDC by enacting Temporary Assistance to Needy Families (TANF) as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. TANF ended the

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31. Id. at 335.
32. See id. at 334; Conway, supra note 25, at 210.
federal guarantee of assistance for needy persons by changing the program from an entitlement program to a non-entitlement, block-grant program. Major provisions of TANF include a five-year lifetime limit to welfare benefits (states can enact laws with shorter time limits) and a federal work requirement. As an entitlement, AFDC guaranteed federal public assistance to needy persons. TANF abandons that guarantee and shifts the responsibility of designing and administering welfare programs to the states. For


By contrast, entitlements versus non-entitlements programs are distinguished in terms of beneficiaries' capacity to enforce their interest in the states' fulfillment of programmatic promises. Crudely put, the issue here is the degree to which statutory standards give administrators discretion to determine a beneficiary's access to cash, goods, or services and the extent to which those decisions are constrained by legal remedies. The degree of legal protection is thus a function of both the definitiveness of statutory or regulatory criteria and the level of legal protection afforded to defend the "rights" defined.

Id.

36. See 42 U.S.C. § 608(a)(7)(A) (1999) ("A State to which a grant is made . . . shall not use any part of the grant to provide assistance to a family that includes an adult who has received assistance under any State program funded under this part . . . for 60 months (whether or not consecutive) . . . ").

37. See 42 U.S.C. § 608(a)(7)(E) (1999) (stating that the law "shall not be interpreted to require any state to provide assistance to any individual for any period of time under the state program funded under this part").


The Federal Law enacted in 1935 provided the several States with a Federal guarantee that whatever amount they provide by way of support for dependent children will be matched, according to a formula, by the Federal government. This is what we mean when we speak of welfare as an entitlement. It is the entitlement of the several States to support from the Federal government. (In the 1960s children who meets the qualifications became entitled to receive whatever benefits a State prescribes . . .

Id.

40. See Sheryll D. Cashin, Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities, 99 COLUM. L. REV. 552,
example, under AFDC, the federal government "guaranteed [states] the availability of funds, allowing for flexibility in times of economic recession," by providing them with half or more of the costs to provide assistance to families eligible for the program. Under TANF, the federal government essentially provides each state with a lump-sum payment in the form of a block grant, which can be supplemented through a system of incentives and bonuses, but essentially remains at a fixed level.

When drafting TANF, Congress indicated that courts should not interpret the law to provide benefits as a statutory entitlement by stating that "[t]his part shall not be interpreted to entitle any individual or family to assistance under any State program funded under this part." Congresspersons held differing views on the potential impact of disentitling welfare. For example, legislative history reflects that "[D]emocrats supported retaining this [entitlement] status to protect welfare recipients from wrongful deprivation of benefits. In contrast, the Republicans sought to eliminate the entitlement, believing that by doing so they would rescue welfare recipients from dependence on government and reduce the costs of administering the welfare system."

By statutorily eliminating an entitlement to welfare benefits, it is unclear whether Congress intended to prohibit courts from interpreting TANF as requiring

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41. Mason, supra note 40, at 627; see also HERSHKOFF & LOFFREDO, supra note 16, at 34-35.


44. See Greenberg, supra note 42, at 30 ("[B]lock grant amounts stay constant through 2002 except for any adjustments due to bonuses or penalties. Under limited circumstances, a state experiencing an economic downturn may qualify for additional federal funding through a contingency fund.").


46. Van Wiggeren, supra note 9, at 1338-39 & nn. 89-91.
constitutionsal procedural due process protections, whether it intended to transform the welfare program from a lifetime guarantee of benefits to conditional temporary assistance, or both. Statutory and regulatory language suggest that Congress did not intend to fundamentally alter procedural fairness in administration of benefits. For example, TANF requires states to develop procedural safeguards in their administration of state welfare programs. Under the federal regulations that govern general administration of public assistance programs, states must submit fair hearing plans to the federal government for review. The regulations describe the requirements for a fair hearing and explain that "[u]nder this requirement hearings shall meet the due process standards set forth in the U.S. Supreme Court decisions in Goldberg v. Kelly, 397 U.S. 254 (1970) and the standards set forth in this section."

TANF also requires states to submit plans that "set forth objective criteria for the delivery of benefits and the determination of fair and equitable treatment, including an explanation of how the State will provide opportunities for adversely affected recipients to be heard in a State administrative or appeal process." Although this provision

47. Sylvia Law outlines three aspects of the entitlement concept: First, entitlement signifies that individual poor people have a legal right to whatever benefits Congress chooses to guarantee them. Second, it means that once an individual has demonstrated that he or she is entitled to benefits, when the state acts to terminate aid it must explain the reasons why and give the individual an opportunity to protest. Finally, the entitlement concept means that states are guaranteed federal matching funds if they provide subsistence for poor people who meet the qualifications of the federal Social Security Act. Sylvia Law, Review Essay, Ending Welfare As We Know It, 49 STAN. L. REV. 471, 483 (1997). But see Weston v. Hammons, No. 99-CV-412, at 19 (D. Colo. Nov. 5, 1999) (Findings of Fact and Conclusions of Law) (on file with the author and with the Buffalo Law Review) ("[T]o the extent congress did intend to prevent due process rights from attaching, that would be constitutionally impermissible. Congress may not create a property interest by the substantive provisions of a statute but then defeat the right to due process merely by reciting that there is no entitlement.").

48. See 42 U.S.C. § 601(a)(2) (1999) (stating, in part, that its purpose is to "end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage").


50. Id. § 205.10(a)(1)(ii).

may be vague, "it contains the classic due process requirement that states provide 'opportunities... to be heard.'"\footnote{52}

By stating that TANF is not an entitlement while requiring state plans to include provisions for appeals processes, Congress may not have eliminated due process requirements for administration of welfare benefits, but rather eliminated the federal entitlement to benefits and delegated the formation of due process requirements to the states.\footnote{53} In addition, TANF does not necessarily preclude states from creating an entitlement to welfare benefits under state law. It may only eliminate the entitlement for the federal portion of the welfare law.\footnote{54} Although TANF requires states to provide some level of due process, by eliminating its entitlement status, Congress left open the possibility that states will not create sufficient protections and recipients will be treated in an arbitrary manner.\footnote{55}

II. PROCEDURAL DUE PROCESS PROTECTIONS IN THE STATES

As TANF only requires states to provide the federal government with "objective criteria" for delivery of benefits and an opportunity to be heard,\footnote{56} states may vary significantly in their interpretation of "objective criteria" and consequently in their approach to fair administration of benefits.\footnote{57} In reviewing a selection of state experiences dealing with state administration of welfare benefits and concurrent due process protections, it appears some states

\footnotesize

\begin{itemize}
\item \footnote{52. Van Wiggeren, supra note 9, at 1359.}
\item \footnote{53. See id. at 1361.}
\item \footnote{54. See id. at 1355.}
\item The language [of the federal statute] only says "[t]his part"—meaning the federal statute which creates TANF—shall not be interpreted to create an entitlement. As a result, the statute may permit states to create an entitlement through their own welfare laws... because the potential for state-created entitlements exists, the law fails to end welfare entitlements completely. Id.
\item \footnote{55. See Conway, supra note 25, at 212.}
\item \footnote{56. See supra notes 49-52 and accompanying text.}
\item \footnote{57. See generally Janet Varon, Passing the Bucks: Procedural Protections Under Federal Block Grants, 18 HARV. C.R.-C.L. L. REV. 231, 233 (1983) (discussing the effects on the poor of block-grant social programs, in particular claiming that when government has created social programs that shift control to the states, it "has paid insufficient attention to the procedural protections which should accompany these programs").}
\end{itemize}
have developed fair processes, while others operate their programs in more arbitrary manners.  

Some states have responded to the increased flexibility in administration of welfare benefits by creating additional safeguards against erroneous sanctions. For example, in a class action lawsuit brought by welfare recipients in Colorado, the Denver Department of Human Services reached an agreement with the plaintiffs that it would not impose a reduction or termination of benefits without first providing a “Pre-Sanction Warning Letter and Notice of Sanction Agreement,” thereby strengthening procedural protections for welfare recipients.

In addition, caseworkers in Iowa are required to provide additional case management services to recipients prior to terminating their benefits for failure to comply with a program requirement. In Florida, a community member review panel offers assistance to recipients who are not complying with program rules. But in Pennsylvania, for example, adequate procedural protections have not developed alongside new welfare regulations.

State constitutions and statutes affect the manner in which states administer welfare benefits. Several state constitutions have express provisions requiring that its government care for its needy. In states in which welfare recipients have a state constitutional right to assistance, due process protections are more likely to apply. In New

58. I intend to provide a sampling of some of the issues that have developed regarding administration of benefits and due process requirements since TANF. This section does not represent an exhaustive study of state experiences since TANF.


61. See Lukens & Pokempner, supra note 59.

62. See id.

63. See id. (explaining the necessity for additional safeguards to protect recipients from unfair termination of benefits in Pennsylvania).

64. See William C. Rava, State Constitutional Protections for the Poor in Emerging Issues in State Constitutional Law, 71 TEMP. L. REV. 543, 551 (1998). (“Twenty three state constitutions recognize that someone or something in the individual states will provide for those in need.”).
York—a state with a constitutional right to assistance—welfare recipients have challenged the state’s failure to comply with fair hearing requirements. For example, in *Piron v. Wing*, six individuals obtained relief after challenging the state’s failure to promptly restore their benefits after fair hearing victories. In two other New York cases, the court found that the “City and State disregarded its rules, regulations, consent decrees, and due process essentials in sanctioning petitioners [recipients] for their alleged failure to comply with employment requirements.” When reviewing the fair hearing decisions which had upheld petitioners’ sanctions, the court determined the recipients had been treated in a biased manner.

Despite some successful litigation, welfare recipients in states with constitutional provisions requiring provision of assistance, are not necessarily guaranteed adequate procedural protections because courts may interpret the provisions in a limited manner. For example, courts in New York, Kansas, and Alabama have interpreted their state constitutional provisions that claim the state has an obligation to care for the poor as granting the legislature wide discretion in determining who constitutes the poor and in what manner the state must provide for the poor. Rather than take an active role in interpreting state welfare statutes and defining the rights of welfare recipients, many state courts defer to state legislative and executive decision-making processes.

Still, other state courts have taken an active role in interpreting state statutes, even interpreting state welfare provisions as establishing an entitlement to welfare benefits. For example, in Colorado, a state court judge

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67. See id.

68. See Rava, *supra* note 64, at 567.

69. See id. at 560-64.

70. See id. at 568.
interpreted the state welfare benefit as a protected property interest with subsequent due process protections, despite the Colorado statute’s claim that welfare is “not an entitlement.” The court held that “due process applies because under the state’s welfare program benefits must be provided to those who meet the state’s requirements . . . creat[ing] an expectation of benefits for those who meet the requirements and does not allow unfettered agency discretion in determining who gets benefits.” While the wide ranging implications of this decision are not known, the decision suggests that significant protections for welfare recipients can be achieved through state initiatives, including judicial interpretation of state statutes and constitutions.

Although certain state courts have ruled in favor of due process rights for welfare recipients, absent a federal requirement, many states have been operating their programs in an arbitrary manner. Even in states that retain fair hearing and other due process requirements, the administration of the benefits can be so poor that a “new lawlessness reigns,” in which due process procedures do not protect recipients. In particular, many state welfare administrators do not convey to welfare recipients that, while welfare is time limited, they still have a right to other government benefits, such as food stamps and Medicaid.

But like a game of telephone, as the welfare reform message has trickled down from Congress to governors to state legislators to counties, cities, welfare administrators and caseworkers, it has grown distorted. The mantra to “end welfare as we know it” has mutated into a message that it’s OK to deny all government benefits, regardless of the protective aspects of the law (few and far between as they are). “There is no question that there’s tremendous confusion among welfare administrators,” says Ron Pollack, executive director of Families

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72. Id.
75. See id.
recent news story relayed the plight of one welfare recipient frustrated by the inefficiencies of the system:

Gail Aska was a model [welfare] recipient. Two years ago, the New York City resident got a job—without health insurance—and promptly informed her caseworker .... Meanwhile her son, who had spinal surgery a year before, needed a follow-up visit with a doctor. To her dismay, Aska discovered that the transitional Medicaid benefits she was supposed to be getting had been cut off .... Somehow Aska's case had been miscoded. When she kept insisting that she had a right to transitional Medicaid, she was told she would get a date for a Fair Hearing, where the issue would be arbitrated. She waited for months and months. Finally, she gave up and applied for insurance for her son through a separate government-funded program .... "My son had some symptoms from the surgery that we needed to get checked out," she said. "You don't play around with that—you don't wait for a fair hearing."7

Procedural protections for welfare recipients remain critical in ensuring that welfare benefits and other government benefits are not unfairly denied.77

III. MASSACHUSETTS WELFARE REGULATIONS AND CONCURRENT PROCEDURAL DUE PROCESS PROTECTIONS

In the early 1990s, the Massachusetts government, like many other state governments, began discussing changes to state welfare laws.78 In 1995, the Massachusetts legislature enacted its welfare law, later named Transitional Aid to Families with Dependent Children (TAFDC).79 The state, pursuant to a federal waiver, implemented most of its provisions prior to passage of the federal welfare law.80

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7 U.S.A., which documented the tremendous drop in Medicaid enrollment and the corresponding rise in uninsured children. "And there's no question that beneficiaries are also confused about their rights."

76 Id.

77 See id.; Levin-Epstein, supra note 60 (stating that the state Department of Public Welfare in Pennsylvania reinstated Medicaid for 32,000 persons who were wrongfully deprived of Medicaid when they moved from welfare to work).


80 See The Family Economic Initiative and the Massachusetts Law Reform
After the federal welfare law passed in August 1996, Massachusetts implemented its two-year lifetime limit to welfare benefits provision.\(^8\) The state time-limited welfare provision took effect on December 1, 1996.\(^2\) The law sets forth a maximum and cumulative time limit of twenty-four months, during a continuous sixty-month period, in which persons are eligible to receive welfare benefits.\(^3\) Recipients can receive benefits beyond this time period if they fall within an exempt category,\(^4\) are eligible for a domestic violence waiver,\(^5\) or the Commissioner of the administering agency, Department of Transitional Assistance (DTA),\(^6\)

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81. See MLRI INTERIM REPORT, supra note 80.


83. "[A] family ... shall receive assistance for not more than a maximum and cumulative twenty-four months during a continuous sixty-month period, unless an extension is granted by the commissioner ...." MASS. GEN. LAWS ch. 5, § 110(f) (West 1998); see MASS. REGS. CODE tit. 106, § 203.100 (1999).

84. See MASS. REGS. CODE tit. 106, § 203.100. Recipients may be considered exempt if they are pregnant and in their last four months of pregnancy, see id. § 203.100(A)(1)(c), have a disability, see id. § 203.100(A)(1)(a), are needed to remain at home to care for a relative with a disability, see id. § 203.100(A)(1)(b), or are under age 20 and meet certain requirements, see id. § 203.100(A)(1)(b)(f).

85. See id. § 203.110; Mason, supra note 41, at 629-30 (explaining that, under TANF, states have the option to enact a hardship and a family violence exemption from the federal and state welfare time limits for women who are subject to extreme cruelty and/or who are victims of domestic violence).

86. "To reflect the legislative theme that welfare benefits were intended to be temporary, the Legislature changed the name of the administering agency from the Department of Public Welfare to the Department of Transitional Assistance, St.1995, c. 5, § 41 ... ." Minnefield v. McIntire, No. Civ. A. 99-3349, 1999 WL 823890, at *2 (Mass. Sup. Ct. Aug. 27, 1999).
grants them an extension. 87

Recipients must comply with TAFDC program requirements in order to receive benefits. 88 Program requirements are complex, including strict work requirements, 89 a child exclusion provision, 90 a learnfare provision, 91 a requirement for childhood immunizations, 92 and others. 93 Welfare benefits will be reduced or terminated for non-exempt recipients who do not comply with program requirements. 94

Despite changes to federal welfare laws and state administration of welfare benefits, since 1995, Massachusetts has not significantly altered its regulations prescribing the manner in which welfare fair hearings should be conducted, except for fair hearings regarding appeals from denial of welfare benefit extensions. 95 The Fair Hearing Rules set forth processes for recipients should they be unfairly sanctioned or denied benefits:

General Description of the Fair Hearing Process: The fair hearing process is an adjudicatory proceeding whereby dissatisfied applicants, recipients... upon written request can obtain a determination of the appropriateness of certain actions or inactions on the part of the Department.... The process is designed to secure and protect the interests of both the appellant

88. See id. § 203.000.
89. See id. § 203.400 (requiring recipients to work twenty hours a week unless they qualify for a categorical exemption).
90. See id. § 203.300 (excluding benefits for children born while the mother is on welfare or has recently been on welfare).
91. See id. § 203.900 (requiring parents to provide verification of their children's attendance in school because the state imposes sanctions if the children fail to attend school and have no good cause reason for their absence).
92. See id. § 203.800 (requiring that children be immunized).
93. See generally id. § 203.000-203.920.
94. See id. § 203.000 (listing the requirements recipients must fulfill to receive welfare benefits).
95. See id. § 343.000. Here is an abbreviated summary of the changes: (1) effective April 1, 1994, "fair hearings may be conducted face-to-face, whether in person or by video conferencing or telegraphically," id. § 343.120; (2) effective November 1, 1995, "the Department of Public Welfare was changed to the Department of Transitional Assistance," id. § 343.000; and (3) effective September 18, 1998, there are now regulations regarding the appeal process for family cap and domestic violence waivers, and an extension of benefits beyond the twenty-four month limit, and the basis for fair hearing decisions is governed by the Code of Massachusetts Regulations title 106, section 343.610, see id. § 343.610.
and appropriate Department personnel... A hearing is conducted by an impartial referee of DOH (Department of Hearings). The decision of the Referee is based only upon those matters which are presented at the hearing. The Referee examines the facts, the law, and the other circumstances of the case presented by the parties to determine the legality and appropriateness of the Department's or the Department's employee's action or decision of the Department. It is binding upon the Department and is not subject to any review within the Department...  

The Fair Hearing Rules also include an aid pending provision in which recipients continue to receive benefits after they have submitted a request for a fair hearing. Although fair hearing requirements for time limited welfare benefits in Massachusetts remain essentially intact, the due process procedures that have developed around extensions to the two-year time limit on welfare benefits do not provide the same level of protection.

IV. PROCEDURAL DUE PROCESS PROTECTIONS FOR EXTENSIONS TO THE TWO YEAR TIME LIMIT ON WELFARE BENEFITS IN MASSACHUSETTS

The Massachusetts welfare law grants the Commissioner of DTA the power to grant welfare recipients extension of benefits beyond the 24-month time period, and requires him or her to establish discretionary criteria to determine whether an extension of benefits should be granted. Importantly, the Commissioner need only consider certain factors when reviewing an extension request and is not required to base his or her decision on whether these factors have been met.

The Commissioner established several criteria as

96. Id. § 343.110.
97. See id. § 343.250; see also Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that “when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process”).
98. See discussion infra part IV.
99. See discussion infra part V.
factors to consider when determining benefit extensions which include: (1) whether the recipient has been sanctioned for failure to comply with work requirements, or other program rules; (2) whether the recipient has access to adequate child care; and (3) whether suitable employment exists locally. Recipients can apply for an unlimited number of extensions, but each extension is limited to six months and can only be renewed by the Commissioner, up to the federal lifetime limit of five years.

The legislature established procedural protections and appeal processes for persons denied extensions which are different from the procedures for other welfare benefit terminations. The appeals process for extensions to time limited benefits follows the general fair hearing rules except that:

When the subject of an appeal is an adverse action regarding a request for an extension, the hearing officer shall not substitute his or her judgment for that of the Commissioner. Such actions may only be overturned by a hearing officer if it is found that the Commissioner has abused his or her discretion when making the determination on the extension request.

Recipients who are denied extensions have much more limited appeal rights than those seeking relief from denial or termination of welfare benefits. Unlike in most welfare appeals where the hearings officer applies an independent standard of review (i.e. has the authority to overturn decisions made by other divisions or personnel of DTA), in appeals from denial of extensions, the hearing officer cannot “substitute his or her judgment for that of the

103. See id. § 203.210(B)(2)(e).
104. See id. § 203.210(B)(2)(d).
105. See id. § 203.210(B)(2)(a).
110. See Mass. Gen. Laws ch. 18, § 16 (1999) ("Said division shall be under the supervision of a director appointed by the commissioner and shall be independent of all other divisions and personnel of the department.").
The hearing officer has the ability to overturn the Commissioner's denial of an extension if the Commissioner has "abused his or her discretion." Once again, recipients have more limited appeal rights for extension denials than for regular welfare appeals. In most welfare appeal hearings, the hearing officer weighs the evidence under a preponderance of evidence standard, but for time-limit extension appeals, the hearing officer must apply an "abuse of discretion" standard. As the regulations only require the commissioner to consider certain discretionary criteria in making her decision, a hearing officer will have a difficult time proving that the commissioner "abused his or her discretion." December 1, 1998 marked the first cut-off date for welfare benefits for approximately 5,100 welfare recipients. Each month another 500 families reach their twenty-four month time limit. By August 30, 1999, close to 6,000 families had applied for extensions of benefits, of which only 382 had been granted. One thousand were still

111. MASS. REGS. CODE tit. 106, § 343.610(D).
112. Id.
114. MASS. REGS. CODE tit. 106, § 343.610(D).
115. See id. § 203.210(B)(2)(a-e).
116. Id. § 343.610(D); see Anne Paulsen, OP-ED, A Welfare Travesty, BOSTON GLOBE, Nov. 6, 1998, at A27 (explaining the difficulty recipients will have while seeking extensions to welfare benefits); Doris Sue Wong, Welfare Appeals Process Criticized, Agency Head's Power At Issue, BOSTON GLOBE ONLINE, http://www.boston.com/dailyglobe/globehtml/195/Welfareappealsprocesscriticized.htm (created July 14, 1998) (on file with the author and with the Buffalo Law Review) (claiming it will be difficult for a hearing officer to overturn the Commissioner's decision).
117. See MLRI INTERIM REPORT, supra note 83; Zachary R. Dowdy, State to Delay Welfare Benefit Cutoff: Some See Compassion; State Blames Red Tape, BOSTON GLOBE, Oct. 28, 1998, at B1 (estimating that 7,100 recipients would have their benefits terminated).
118. See Department of Transitional Assistance Website, http://www.state.ma.us/dta/dtatoday/reform/welfarereform-Chapter5.htm (collected March 6, 2000) (on file with the author and with the Buffalo Law Review).
119. See MLRI FOURTH REPORT, supra note 113, n.1
According to statistics available in March 1999, Massachusetts had “the highest rate of denial of extensions . . . ,” in comparison to the other eleven states in which welfare recipients had reached their time limits.121

A recent study analyzing the fair hearing process for extension of benefit requests, revealed that, of the 99 families appealing a denial of extension benefits, 91% lost their final appeals.122 According to the study, the primary reason families lost their appeals was for failure to participate in a voluntary job search program, a requirement not listed in the enumerated criteria.123 The following fair hearing appeal from denial of welfare benefits extensions decision illustrates the limited effectiveness of the appeals process under the present regulations.

Facts: A mother who was homeless fulfilled DTA’s dual requirements of searching for housing for four days per week and doing community service for 20 hours per week. She was also looking for a job on her own and went once to a structured job search, which conflicted with these two other obligations. After being homeless for two years, she had just received a housing subsidy and testified that she “needs benefits for a few more months so she can pay for her security deposit, rent and food.”

Decision: DTA denied the mother an extension for “fail[ing] to cooperate with the Department in work related activities.” The four DTA representatives present at the hearing stated that the mother—who was not represented—was originally denied an extension because she had not voluntarily participated in

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120. See id.

121. Massachusetts Law Reform Institute Documentation Project and the Family Economic Initiative, Second Report: A Closer Look At The Thousands of Families Losing Benefits Under the Massachusetts Time Limit, http://www.gbls.org/gbls/gblsweb.nsf (created Apr. 7, 1999) (on file with the author and with the Buffalo Law Review) [hereinafter MLRI SECOND REPORT]. Appendix A lists the other eleven states: (1) Florida; (2) Nebraska; (3) Oregon; (4) South Carolina; (5) Virginia; (6) Louisiana; (7) North Carolina; (8) Connecticut; (9) Texas; (10) Arizona; and (11) Indiana. See id. at Appendix A; see also Doris Sue Wong, 88% Fail to Receive Cash Aid Extensions, BOSTON GLOBE, Mar. 26, 1999, at B2 (quoting Elizabeth Schott, a senior policy analyst at the Center for Budget and Policy in Washington D.C. as saying, “I would definitely put Massachusetts in the pretty harsh end of the spectrum in terms of its policies and results”).

122. See MLRI FOURTH REPORT, supra note 113.

123. See id.

structured job search. The hearing officer upheld the termination of benefits to the family under the new appeal standard that prohibited him from "substituting his . . . judgment for that of the Commissioner."  

In the above scenario, the mother had fulfilled her work requirement but was still denied a benefit extension. The hearing officer could not reverse the Commissioner’s decision because the decision was made under the Commissioner’s discretionary authority. With such discretionary standards, the hearing officer could not determine that the recipient should receive an extension even though the hearing officer could correct the facts on the record. Although there are procedural protections in place to appeal denials of extensions, the high standard for reversal limits the effectiveness of the appeals process.

Given the critical nature of the welfare benefit extension to the lives of many low-income women and children, and given the discretionary nature of the extensions process (the Commissioner presently considers extension requests on a case-by-case factual basis), procedural due process remains important to ensure that recipients will not be unfairly denied extensions. In examining the changes to procedural protections in Massachusetts since the federal welfare law, it appears that, although fair hearing processes in Massachusetts remain in place for welfare benefit sanctions and terminations, fair hearing regulations that attend discretionary time limit extension requests do not provide adequate due process for welfare recipients.

125. MLRI FOURTH REPORT, supra note 113 (hearing decision dated May, 12, 1999) (emphasis added).
126. See supra notes 102-09 and accompanying text.
127. See Massachusetts Law Reform Institute, Family Economic Initiative Comments on FY2000 Budget and Administration’s Policy with Regard to TAFDC Time Limit, Letter to Secretary O’Leary, http://www.gbls.org (created Dec. 18, 1998) (on file with the author and with the Buffalo Law Review) (explaining that “[e]ven if the hearing officer were to make findings of fact correcting factual errors in DTA’s presentation of the case, in the absence of standards, there is no set of facts . . . under which a hearing officer can conclude an extension must be granted”).
128. See MLRI FOURTH REPORT, supra note 113.
V. POTENTIAL CHALLENGES TO LIMITS IN PROCEDURAL DUE PROCESS: THE MASSACHUSETTS EXAMPLE

Since welfare administration has been devolved to the states, states may offer a better avenue for asserting an entitlement in welfare benefits and subsequently challenging due process violations. Assuming TANF eliminated a federal statutory entitlement to welfare benefits, welfare recipients can still assert due process rights through state constitutional provisions, courts and state legislatures. By establishing an entitlement in state welfare programs, recipients could claim a property right to welfare benefits, which would satisfy the first prong of the due process test, and therefore enable them to effectively argue for adequate procedural protections.

Welfare recipients in states with constitutional provisions requiring the state to provide assistance to needy persons can argue that its state constitution gives rise to attendant procedural protections. Still, even in states such as Massachusetts, in which courts do not interpret the state constitution as mandating the state to provide assistance to needy residents welfare recipients may still have grounds to assert a property interest in welfare benefits and subsequent due process rights.

It has been argued that a property interest can be found in a benefit program where there are defined eligibility criteria in which a person who meets the criteria can "legitimately expect to receive benefits." Since the Massachusetts welfare program has defined eligibility

129. See Hershkoff, supra note 9, at 1405 ("In thinking through legal responses to devolution, we might take a cue from devolution itself and 'think local.' "). See generally Rava, supra note 64, at 546-47 (explaining state constitutional protections and their potential for protecting the poor).

130. See supra pp. 569-70 and accompanying notes (describing the two-part due process framework: i.e. (1) Is there a protected property interest? (2) If yes, then how much process is due?).

131. See supra p. 575 and accompanying notes. Note that a state constitutional right can be narrowly interpreted by the courts.

132. See Opinion of the Justices to the House of Representatives, 333 N.E.2d 388, 398 (Mass. 1975) (stating they were "aware of no constitutional obligation on the State to provide financial assistance to all its needy residents").

133. Nancy Morawetz, A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era, 30 CLEARINGHOUSE REV. 97, 104-05 (1996); see also supra note 26 and accompanying text.
criteria, recipients may be able to argue that they have a property interest in the two-year time limited benefits. As I have mentioned before, lawyers successfully advanced this argument in a recent Colorado case which established welfare recipients’ entitlement to benefits, despite the “no-entitlement” language in the federal and state welfare statutes.

It has similarly been argued that there is no property interest in programs with overly discretionary eligibility standards. For example, in its analysis of whether plaintiffs had a property interest in public housing benefits, the Massachusetts Supreme Judicial Court explained that, “to the extent the agency ... possesses discretion to decide whether to grant or withhold the benefit, it becomes less likely that a potential recipient will be found to have a constitutionally protected property interest.” Under that analysis, determination of whether the extended benefit period, although determined on a discretionary basis, could trigger a property interest in the extended benefit will depend on whether the extended benefit period is seen as a continuation of the less discretionary two-year welfare program, or as a separate benefit program.

134. See supra notes 88-94 and accompanying text.

While benefits may be denied to non-complying participants, that does not change the mandatory nature of the program for those who do comply. If the program is fully funded and a participant is in full compliance with all its requirements ... the participant is entitled to benefits; nothing in the 'no entitlement' language changes that fact. Id.

136. See Morawetz, supra note 133, at 104-05; see also Weston, No. 99-CV-412, at 19 (explaining that one reason the benefit program at issue created a claim of entitlement was because it did not permit discretion).
138. See supra notes 102-107 and accompanying text.

In characterizing the extension of benefits as a “separate, short-term”
If the extended benefit period is seen as an extension to the original welfare benefit, than recipients have already met the initial eligibility criteria and therefore should have a property interest in the extended benefit period.\textsuperscript{140} Once recipients establish a property interest in welfare benefits they can then argue for constitutional procedural due process protections.\textsuperscript{141} While a property interest does not guarantee recipients will receive an extension, it does guarantee that some level of procedural due process will apply to the benefit extension period.\textsuperscript{142} Conversely, if the extended period is seen as a separate program, recipients will have a difficult time establishing a property interest in the extended period, as eligibility criteria are extremely discretionary.\textsuperscript{143}

Another avenue for establishing and strengthening procedural due process protections for welfare recipients is through changing state welfare laws. In the last Massachusetts state congressional session, two welfare extension related provisions were presented to the Governor in the proposed budget.\textsuperscript{144} Unfortunately, the Governor vetoed both in the final bill.\textsuperscript{145} The first provision expanded the list of criteria that the Commissioner should consider when determining extensions and required that the Commissioner “make such determination in writing.”\textsuperscript{146}

\textsuperscript{140} See supra notes 133-37 and accompanying text.

\textsuperscript{141} See supra notes 25-33 and accompanying text.

\textsuperscript{142} See supra notes 29-33 and accompanying text.

\textsuperscript{143} See supra notes 136-39 and accompanying text.


\textsuperscript{146} 1999 Mass. Acts 4900, § 194.

Section 194.[REDRAFT S. 107] The fourth paragraph of subsection (f) of section 110 of chapter 5 of the acts of 1995 is hereby amended by striking out the second sentence and inserting in place thereof the following sentence:-[The commissioner shall make such a determination in writing based on such criteria, which shall] include,
The second provision would have required "the department of transitional assistance [to] apply the same standard of review for all administrative appeals concerning benefits or waivers under chapter 5 of the acts of 1995..." This second provision would have curtailed the commissioner's discretion in determining welfare benefit extensions by altering the appeals review standard from an abuse of discretion standard to a preponderance of evidence standard, although this is not the reason the Governor vetoed the provision.

Although Congress may have eliminated the federal entitlement to welfare benefits, welfare recipients still have good grounds to assert due process rights to welfare benefits both through judicial interpretation of state welfare statutes or through changing the state welfare laws altogether. While I have focused closely on benefit extensions in Massachusetts, similar arguments can be made in regard to welfare programs among the various states.

CONCLUSION

The 1996 welfare reform law dramatically changed welfare policy by, among other provisions, imposing a five-year lifetime limit on benefits. The law also attempts to eliminate welfare's entitlement status, which had previously taken the form of a property right that had given

but not be limited to: (1) whether the recipient has received and or rejected offers of employment, has quit a job without good cause or has been fired for cause; (2) the degree to which the recipient has cooperated and is cooperating with the agency in work-related activities; [and (3) whether the recipient needs a reasonable amount of time, as determined by the commissioner, to complete a recognized education or training program.]

Id. (bracketed material indicates proposed changes to the law).

148. See supra notes 110-11 and accompanying text.
149. "I am vetoing this section, as it would undermine the discretionary authority of the DTA Commissioner to waive certain requirements for good cause, as provided under the welfare law." 1999 Mass. Acts 4901, § 309.
150. See discussion supra Parts I(b).
151. See discussion supra Parts III & V; see also Hershkoff, supra note 9, at 1404-05 & n.9 (suggesting that federal due process challenges may still be an option for welfare recipients because it is unlikely the Supreme Court will revisit the issue and overrule Goldberg v. Kelly).
rise to constitutional procedural due process protections.\textsuperscript{153} Whether or not Congress effectively eliminated the procedural due process requirements that had previously accompanied welfare benefits is, and will continue to be, worked out through the courts and through state and federal legislatures. Should welfare benefits not be considered a federal entitlement, welfare recipients can attempt to find state entitlements to welfare benefits through state constitutions and laws.\textsuperscript{154} In the meantime, welfare recipients and advocates have been arguing effectively for adequate procedural due process protections throughout the various states.\textsuperscript{155}

In this period of diminishing federal welfare commitment, it is important that there be effective standards limiting administrative discretion in determining welfare eligibility and eligibility for extension of benefits. Although states may develop adequate procedural protections for their welfare programs, absent a federal requirement, states may develop poor processes for welfare recipients to challenge unfair benefit terminations, denials or arbitrary denials of extensions to the time limited benefits. To adequately protect welfare recipients from unfair treatment, federal and state laws must guarantee that recipients receive the constitutional procedural due process protections secured by the Supreme Court thirty years ago.

\begin{itemize}
\item \textsuperscript{153} See discussion \textit{supra} Part I(a) \& I(b).
\item \textsuperscript{154} See discussion \textit{supra} Part IV.
\item \textsuperscript{155} See discussion \textit{supra} Parts II, III \& IV.
\end{itemize}