Empire Justice Center

July 2007
Issue 4, 2007

DISABILITY LAW NEWS

DAP Coordinator Retires

Fish gotta swim, birds gotta fly…and Barbara Samuels has got to be the Social Security expert that everyone goes to with questions large and small. A statewide DAP coordinator in New York City since 1987, Barbara has represented clients too numerous to count, provided substantive trainings galore, answered frequent disability inquiries from across the State, and still found time to write a three volume tome on Social Security practice and procedure. This epitome of an effective legal services attorney recently bid farewell to the mean streets of Manhattan for greener acres in Arkansas.

Barbara's fans both in New York City and upstate New York will miss her wealth of knowledge and her dry sense of humor. Luckily, many of her fantastic training outlines are still in circulation and we hope to be able to convince her to keep them up-to-date! Barbara will continue to share her vast expertise with us by participating on the DAP list serve, so all is not lost.

We wish Barbara many relaxing and fruitful years of retirement, once she stops fighting with the Social Security Administration about her retirement checks. They at the agency don't know what they are in for. Good luck Barbara - you will be sorely missed in our DAP world.

Barbara Samuels and Victor Torres, DAP Advocates

INSIDE THIS ISSUE:

Disability Law News© is published six times per year by:

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

The newsletter is written and edited by Louise M. Tarantino, Esq., Catherine M. Callery, Esq., Ann Biddle, Esq., and Paul M. Ryther, Esq.

Available online at:

www.empirejustice.org

SSA Commissioner Testifies on Backlog

The backlog of disability appeals pending within the Social Security Administration continues to be a topic of interest to Congress. (*See* the March 2007 edition of the *Disability Law News*). In May, Commissioner Michael Astrue testified before the Senate Finance Committee on his plans to reduce the backlog.

Acknowledging what he characterizes as an "unacceptable" situation, Astrue identified four areas that he believes hold the most promise for eliminating the hearings backlog: compassionate allowances, improving hearing procedures, increasing adjudicatory capacity, and increasing efficiency with automation and business processes.

Compassionate Allowances

Astrue proposes expanding the Quick Disability Determination (QDD) model that has been piloted in New England as part of the DSI. [In fact, regulations have already been proposed to expand QDD nationwide. See the Regulations section of this newsletter for details.] In the Boston region, 97% of the cases selected for QDD have been decided in the mandated 21 day time frame, and 85% have been allowed. Astrue hopes to increase the percentage of cases in QDD, which currently constitutes only 2.6% of the cases.

Astrue also suggested that adjudicators are at a disadvantage because they are forced to work with outdated medical listings and poorly defined categories of disabilities. A taskforce in conjunction with the Department of Health and Human Services will work on updating the rules. He also reported that adjudicators have been hampered by two of the new electronic systems developed for DSI, which were not ready for "real-world use." SSA has pulled these systems and will focus its efforts on refining its two primary systems.

Improve Hearing Procedures and Increase Adjudicatory Capacity

SSA will "attack" the most aged cases, starting with those that are or will be 1,000 days old as of September 30, 2007. It will reallocate resources to do so, including re-evaluating the 1995-2000 experiment that authorized Senior Attorney Advisors to issue fully favorable decisions. Astrue also promises to increase adjudicatory capacity by hiring additional ALJs. SSA will hire Senior ALJs on as needed basis. Improving ALJ productivity is an additional Astrue goal, a sensitive topic to say the least, as it can conflict with the notion of ALJ independence.

In the meantime, SSA will "streamline" the folder assembly portion of case preparation, presumably doing away with the List of Exhibits and using sequential numbering. According to Astrue, many ALJs report that they do not use the exhibit list. Some ALJs have volunteered to hold hearings with files that have not been reassembled, but rather remain in the format used by the DDSs (the state Disability Determination Services). SSA will seek volunteers from field office to help with assembly.

Astrue also announced that he will mandate the use of Findings Integrated Templates (FIT) for decision writing. (*See* the May 2007 edition of the *Disability Law News* for more on FIT). Video hearings will also be emphasized, including the establishment of a National Hearing Center (NHC) to handle electronic files and conduct only video hearings.

Additionally, using "profiles" developed by the Office of Quality Performance, cases will be screened and triaged to see if a determination can be made without a hearing. In some cases, as advocates in New York have already begun to see, claims will be remanded to the DDS to see if an allowance can be issued. [*See DAP# 460 for an example of the notice sent to New York claimants when their claims are remanded to DDD; note that they are informed that if a favorable decision cannot be issued, their claims will be returned to ODAR, presumably without losing their places in the hearing queue.*]

Increasing Efficiency with Automation and Improved Business Process

Astrue hopes to develop a new case management and processing system for the Appeals Council – another sign that the Appeals Council is here to stay. Currently, the Appeals Council systems do not interface

(Continued on page 3)

SSI Immigrant Bill Passes House

On July11, 2007, H.R. 2608 was passed in the House of Representatives by a voice vote. Introduced by Congressmen McDermott and Walker, this bill would extend the period of SSI eligibility from seven to nine years for elderly and disabled refugees. For those elderly and disabled refugees and asylees whose seven year period of eligibility for the federal program has expired or is about to expire, the legislation provides an additional two years in which to pursue naturalization and remain eligible for SSI. (*See* the January and May 2007 issues of the *Disability Law News* for details on the dilemmas posed by these time limitations and the ongoing litigation to address this issue.)

Advocates are hopeful that this much needed legislation will pass the Senate as well. Under the House bill, SSI recipients whose benefits are reinstated will be paid prospectively. Additionally, if they can demonstrate that an application for naturalization is pending before the Department of Homeland Security, benefits can be extended an additional year. Advocates hope to have this provision included in the Senate version as well. Stay tuned for further developments.

SSA Commissioner Testifies—continued

(Continued from page 2)

with the electronic folder (eDib). He also wants to implement electronic signatures for decisions, and plans to install video equipment in all hearing rooms.

The Commissioner also announced the implementation, through a pilot program next spring, of "ePulling." In another effort to streamline file assembly, ePulling will identify potential duplicate documents, classify documents by type of evidence and date, sequentially number pages, and create exhibit lists – all leaving staff more time for analysis and development. Escheduling is also in the works.

Astrue reported that all states, with the exception of New York, are now certified to use the electronic folder. He touts the transition to eDib as another means of alleviating the backlog. He hopes to provide better shared access to electronic folders, to avoid the need to copy files to send to other offices. He also hopes to expand internet support for representatives, to avoid burning CDs for representatives, as well as the other support work now needed, such as issuing bar codes for submission of evidence, etc. Finally, he proposes standardizing the electronic folder in hearing offices.

Other initiatives mentioned in Astrue's testimony include having the Appeals Council issue final decisions when possible to reduce the number of remands; encouraging greater cooperation between field office and hearing offices; improving management training; implementing quality assurance programs for hearing offices; increasing decision writer productivity; and continuing interregional case transfers. In terms of transfers, Astrue suggests that instead of simply transferring cases, service areas will be temporarily realigned by assigning hearing offices without a backlog to become part of service areas that have backlogs. Among other things, according to Astrue, a video-equipped hearing room in the assisted office will be assigned to the assisting office. This will somehow reduce the boxing and unboxing of files, and will also allow remand of cases from the Appeal Council back to same office that issued the decision, thus preventing the assisted office from transferring only its hardest cases.

Finally, of interest to advocates, Astrue suggests that SSA should become more proactive in investigating ALJ misconduct complaints. He acknowledges that it has now been fifteen years since the Commissioner issued its interim procedures in 1992. (*See* the January 2003 edition of the *Disability Law News.*) The Administration is allegedly working on developing a permanent process that will result in consistent, timely action.

A copy of Astrue's testimony is available as DAP# 461.

NOSSCR Director Addresses DAP Conference

DAP advocates attending the state-wide conference in Albany last month once again had the pleasure of hearing from Nancy Shor, Executive Director of NOSSCR (National Organization of Social Security Claimants' Representatives). Nancy, with her usual wit and aplomb, shared her knowledge and insights into the latest developments within SSA.

According to Nancy, DSI - or the Disability Service Improvement - proposed by former Commissioner Joanne Barnhart as the panacea for many of the problems in the disability determination process is likely on its way out under new Commissioner Michael Astrue. (*See* the May 2006 edition of the *Disability Law News* for more on the DSI regulations.) New regulations would be necessary to pull the plug on DSI as a whole, which is being piloted in the Boston Region. Nancy speculates that instead it will probably not be rolled out nationwide.

Some aspects of DSI may survive, such as the Quick Disability Determinations. Although highly touted by the new Commissioner, Nancy facetiously suggests that cases are selected for QDD by a word search for "cancer' or "terminal"; it may be expanded to include "comatose." [Regulations have been proposed to expand QDD nationwide. See the Regulations section of this newsletter for details.] On the other hand, the Federal Reviewing Officers initiative, with all the FROs located in Falls Church, has turned out to be reconsideration on steroids with a reversal rate of only 20-25%, and will probably not survive. Nor will the idea of a central bank of medical and vocational experts.

Nancy also predicts that - unlike the DSI proposal - the Appeals Council may still be there to kick around, but perhaps with beefed up own motion review powers and a new name (Decision Review Board?). Nancy wonders whether in the context of a new, improved Appeals Council, the question of issue preclusion could arise. In other words, will the Appeals Council require, as hinted at in *Sims v. Apfel*, 120 S.Ct 2080 (2000), that any appealable issues must be "preserved?" On a related note, Nancy does not think that the new Commissioner will push for a Social Security court. He does not appear to be shocked by the numbers of appeals pending in the federal courts.

In terms of hearing procedures, the DSI regulations that require ALJ to give 75 days notice of hearings will likely survive. ALJs will probably become, however, even stricter regarding request for adjournments, in the face of a 30% rescheduling rate. On the other hand, we will probably see regulations rather than guidelines on deadlines for submission of evidence. Nancy also reviewed the four prong plan, which is outlined on page 2 of this newsletter, that Commissioner Astrue presented in May to Senate Finance Committee to reduce the backlog of disability claims.

Other odds and ends that Nancy sees in her crystal ball:

- The proposed two year bump up in Grid rules (see the January 2006 edition of the *Disability Law News*) is "on hold" in the face of push back from the Black Congressional Caucus and others who have raised concerns about the disparate effect the changes would have on African Americans and other minority communities, given their lower life expectancies
- Video teleconferencing may become mandatory, as it is in Medicare claims. Nancy suggests that advocates agree to some VTC hearings, so that SSA can justify its equipment and maybe, be persuaded not to require them.

Nancy also reported on changes in how the Department of Justice (DOJ) is processing EAJA (Equal Access to Justice Act) attorney fees. According to DOJ, under the language of EAJA, the fees belong to the plaintiffs and not to the attorneys. Thus, fees can be seized by the Treasury Department if the claimant owes a federal debt. Although the processes for how EAJA checks are issued have varied regionally, it seems that all EAJA checks will now be issued in the name of the claimant.

As always, Nancy's presentation was fast paced and fact-filled. We appreciate her generosity in sharing her knowledge and expertise with us at our DAP conferences.

REGULATIONS

SSPA Provisions Effectuated

SSA announced implementation of the centralized computer file described in section 202 of the Social Security Protection Act of 2004 ("SSPA"), a system for tracking monthly wages paid to employees. The legislative amendments provide "for the imposition of administrative sanctions based on the failure to disclose information to us." 72 Fed. Reg. 27425 (May 16, 2007).

Now that the data crunching system is in place, SSA published these notices to announce the applicability date of the revisions to 20 C.F.R. §§404.459, 416.1340 and 498.102. Those revisions previously were published as final rules and impose "civil monetary penalties and/or assessments for withholding of information from, or failure to disclose information to, SSA." (*See* July 2006 *Disability Law News*).

Although the announcements were released May 8, 2007, the computer system has been up and running since November 27, 2006, for tracking SSI recipients, and since 2005 for Title II beneficiaries. As a result, the amendment to 20 C.F.R. §§498.102(a)(3) published May 17, 2006 (71 Fed. Reg. 28574), which is the OIG regulation, as it relates to the withholding of information from, or failure to disclose information to, SSA, and the amendments to 20 C.F.R. §§404.459 and 416.1450 published October 18, 2006 (71 Fed. Reg. 61403) all became applicable November 27, 2006.

The October revisions "expand the situations where administrative sanctions may be imposed. . . . A person is subject to a sanction for failing to disclose information that is material to determining title II/title XVI benefit eligibility or amounts if:

"The person knows or should know the information is material to benefit eligibility or amount; and

"The person knows or should know the withholding of the information is misleading; and

"The failure to disclose occurred after November 27, 2006."

SSA Proposes to Extend QDD

SSA proposes "to amend our regulations to extend the quick disability determination process (QDD), which is operating now in the Boston region, to all of the State disability determination services. We also propose to remove from the QDD process the existing requirements that each State disability determination service maintain a separate QDD unit and that each case referred under QDD be adjudicated within 20 days. These proposed actions stem from our continuing effort to improve our disability adjudication process." 72 Fed. Reg. 37496 (July 10, 2007). Comments deadline is August 9, 2007.

Numerous Body Systems Listings Extended

SSA issued a final rule, effective on publication, which "extends until July 1, 2008, the date on which the listings for eight body systems will no longer be effective. Other than extending the effective date of the listings, we have made no revisions to the listings; they remain the same as they now appear in the Code of Federal Regulations. This extension will ensure that we continue to have the medical evaluation criteria in the listings to adjudicate disability claims involving these body systems at the third step of the sequential evaluation process." 72 Fed. Reg. 33662 (June 19, 2007).

SSA explains, "As a result of medical advances in disability evaluation and treatment, and our program experience, we periodically review and update the listings. We intend to publish proposed and final rules to update the listings as expeditiously as possible. However, we will not be able to publish final rules revising the listings for these body systems by July 2, 2007, the current expiration date. Therefore, we are extending the current expiration date for the listings as indicated above. . . ."

The body parts affected are:

Growth Impairment (100.00).
Respiratory System (3.00 and 103.00).
Digestive System (5.00 and 105.00).
Hematological Disorders (7.00 and 107.00.
Endocrine System (9.00 and 109.00).
Neurological (11.00 and 111.00).
Mental Disorders (12.00 and 112.00).
Immune System (14.00 and 114.00).

Form 1696 Revised

SSA has submitted for OMB approval a revised 1696, Appointment of Representative Form. For the proposed revised form, "The information collected by SSA on form SSA-1696-U4 is used to verify the applicant's appointment of a representative. It allows SSA to inform the representative of items which affect the applicant's claim, and it also allows the claimant to give permission to their appointed representative to designate a person to copy claims files." 72 Fed. Reg. 35293 (June 27, 2007).

New Medicaid Citizenship Proof Requirements

A final rule was published in the July 13, 2007 Federal Register (72 Fed. Reg. 38661), that amends Medicaid regulations to implement the provision of the Deficit Reduction Act that requires States to obtain satisfactory documentary evidence of an applicant's or recipient's citizenship and identity in order to receive Federal financial participation. This regulation provides States with guidance on the types of documentary evidence that may be accepted, including alternative forms of documentary evidence in addition to those described in the statute, and the conditions under which this documentary evidence can be accepted to establish the applicant's citizenship. The effective date was July 13, 2007.

Code of Conduct Proposed for Immigration Judges

The Executive Office for Immigration Review (EOIR) of the Department of Justice (DOJ) is proposing newly formulated Codes of Conduct for the immigration judges of the Office of the Chief Immigration Judge and for the Board members of the Board of Immigration Appeals. The proposal was announced in the Federal Register on June 28, 2007 (72 Fed. Reg. 35510-35513). Comments may be submitted not later than July 30, 2007.

Among the proposed rules:

"Canon IX. An immigration judge shall be patient, dignified and courteous to litigants, witnesses, lawyers and others with whom the judge deals in his or her official capacity and shall not, in the performance of official duties, by words or conduct, manifest bias or prejudice.

"Canon X. An immigration judge shall act in a professional manner toward the parties and their representatives before the court, and toward others with whom the immigration judge deals in an official capacity.

"Canon XI. An immigration judge shall refrain from any conduct, including but not limited to financial and business dealings, that tends to reflect adversely on impartiality, demeans the judicial office, interferes with the proper performance of judicial duties, or exploits the immigration judge's official position. . . .

"Canon XIII. An immigration judge shall not publicly disclose or use for any purpose unrelated to adjudicatory duties nonpublic information acquired in a judicial capacity. . . ."

While these rules apply to immigration judges, perhaps they bode well for some real reform at SSA. These rules are undoubtedly connected to the scathing criticism that immigration judges have received in the federal courts. *See, e.g., Benslimane v. Gonzales*, 430 F.3d 828 (7th Cir. 2005), in which Judge Posner, citing the staggering number of times in which the Court of Appeals had reversed the Board of Immigration Appeals in the preceding year, found that the adjudication of immigration cases had "fallen below the minimum standards of legal justice." 430 F.3d at 830. His conclusions were based not just on a finding that ALJs made errors of law, but also on the repeated cases in which the immigration judges were rude, hostile or biased. Following this and other similar decisions, the Justice Department apparently undertook its own investigation of the immigration judge corps.

As noted above in the outline of Commissioner Astrue's remarks to the Senate Finance Committee, SSA is supposedly revising its own complaint procedures. Let's hope SSA takes a lesson from the EOIR about how administrative law judges should behave.

SSNs Now Randomly Assigned

In the July 3, 2007 Federal Register (72 Fed. Reg. 36540), SSA announced a proposed change in the way Social Security numbers (SSNs) are assigned.

"SSA is proposing to change the way that we assign SSNs. We intend to eliminate the geographical significance of the first three digits of the SSN (the "area number"') by no longer allocating entire area numbers for assignment to individuals in specific States. Instead, the SSN will be randomly assigned from the remaining pool of available SSNs, and the first three digits of the SSN will no longer have any geographical significance. We believe that by changing the way we assign the SSN we will ensure that there will be a reliable supply of SSNs for years to come. Additionally, we believe that this will also help reduce opportunities for identity theft and SSN fraud and misuse." Comments can be submitted until August 2, 2007.

COURT DECISIONS

Supreme Court Allows Parents to Prosecute Case

In a case that could have implications in the DAP world, the Supreme Court recently ruled that parents, either on their own behalf or as representatives of the child, may proceed in court unrepresented by counsel even though they are not trained or licensed as attorneys. In *Winkelman ex rel. Winkelman v. Parma City School Dist*.,127 S.Ct. 1994 (U.S. 2007), the Court held that the language of IDEA (Individuals with Disabilities Education Act) accords parents as well as children independent, enforceable rights. It ruled that parents have enforceable rights at the administrative stage, and it would be inconsistent with the statutory scheme to bar them from continuing to assert those rights in federal court at the adjudication stage.

The Court thus overturned the ruling of the Sixth Circuit Court of Appeals that had dismissed the Winkelmans' case, finding that because parents enjoy rights under IDEA, they are entitled to prosecute IDEA claims on their own behalf. In light of this holding, the Court did not reach petitioners' argument concerning whether IDEA entitles parents to litigate their child's claims *pro se.*

The decision of the Supreme Court effectively overrules an earlier decision by the Second Circuit. In *Wenger v. Canastota Central School District,* 146 F.3d 123 (2d Cir. 1998) (per curiam), *cert. denied,* 526 U.S. 1025, 119 S.Ct. 1267, 143 L.Ed. 2d 363 (1999), where a parent sued under the Individuals with Disabilities Education Act ("IDEA"), the Rehabilitation Act of 1973, and the Due Process Clause of the Fourteenth Amendment, the Second Circuit applied the rule established in *Cheung v. Youth Orchestra Foundation of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990). Under *Cheung*, parents were not allowed to represent their children without the assistance of counsel.

Several years ago, the U.S. Attorney's office raised *Wenger* and *Cheung* as an impediment in children's SSI cases, arguing that since the child, not the parent was the claimant, the parents were technically not proceeding *pro* se, but rather were representing the child and should not be allowed to so. This argument was refuted by at least one court in the Second Circuit. *See Maldonado ex rel. Maldonado v. Apfel*, 55 F.Supp.2d 296 (S.D.N.Y.1999). It presumably has been laid to rest once and for all by *Winkelman.*

Contact Us!

Advocates can contact the DAP Support attorneys at:

Louise Tarantino: (800) 635-0355, (518) 462-6831, ltarantino@empirejustice.org
Kate Callery: (800) 724-0490, (585) 454-4060, ext. 5727, (585) 295-5727, kcallery@empirejustice.org
Ann Biddle: (646) 442-3302, abiddle@lsenyc.org
Paul Ryther: (585) 657-6040, pryther@frontiernet.net

Court Reverses in *Pro Se* Appeal

Most advocates at one point or another have had a client who despite obvious psychiatric problems has insisted that his disability is based on his physical impairments. When such a claimant has limited contact with the mental health system, and less than compelling physical impairments, winning the claim can be an uphill battle.

A recent decision from Judge Telesca of the Western District illustrates - and resolves - some of the problems with this type of case. In *Johnson v. Astrue*, --- F.Supp.2d ---, 2007 WL 1830796 (W.D.N.Y. 2007), the testimony of the *pro se* claimant at the ALJ hearing focused on the claimant's physical problems. The Court acknowledged that the claimant denied his mental problems at the hearing and gave seemingly coherent testimony. It found, however, that "the severity of the plaintiff's schizophrenia was masked at the time of the hearing." It quoted a psychology textbook for the proposition that clinical manifestations of schizophrenia can be subtle and easily missed by the casual observer. 2007 WL 1830796 *7.

The Court concluded that the ALJ was misled by the claimant's testimony, and erred in discounting his schizophrenia based on the clear weight of evidence of record. Interestingly, it appears from the decision that, perhaps due to the claimant's inconsistent treatment history, the diagnosis of schizophrenia was not entirely clear cut. The Court nonetheless determined that the claimant's condition met Listing 12.03.

Judge Telesca also found that the ALJ's determination that the plaintiff was not entirely credible was supported by the record. It went on, however, to determine that because the substantial medical evidence indicates that the claimant is schizophrenic, his credibility should not have been an issue: "truth is an illusive term for the schizophrenic." 2007 WL 1830796 *6.

The case was remanded for the calculation of benefits!

Send Us Your Decisions!

Have you had a recent ALJ or court decision that you would like to see reported in an upcoming issue of the *Disability Law News?* We would love to hear from you! Contact Kate Callery, kcallery@empirejustice.org or Louise Tarantino, ltarantino@empirejustice.org with your decisions.

ADMINISTRATIVE DECISIONS

Appeals Council Amends Onset Date

Buffalo Bruce Caulfield strikes again! Bruce, a paralegal at Neighborhood Legal Services in Buffalo, recently appealed a very mean-spirited decision, in which the ALJ found that his client could perform light work. The Appeals Council found that his client was disabled as of her fiftieth birthday and remanded the claim for the consideration of the time period before that date.

The ALJ had begrudgingly acknowledged that the claimant, age 47 at the time of her application, had numerous severe impairments, including herniated and degenerative disc disease of the lumbar spine, osteoarthritis of the hips, osteoarthritis and bursitis of the right shoulder, status post arthroscopic surgery for supraspinatus tendon tear of the right shoulder, left carpal tunnel syndrome, irritable bowel syndrome, gastritis, asthma, depression, post traumatic stress syndrome, anxiety disorder, migraine headaches, and sinusitis.

Despite this litany, the ALJ appeared skeptical of the diagnoses, and refuted the restrictions given by the treating physician based on these diagnoses. In fact, he went on to criticize the treating physician for providing "little actual treatment beyond prescribing large amounts medications [sic], 24 simultaneously, at last count…; i.e. almost $26,000 worth of medications paid by Medicaid over the past 3 ½ years." The ALJ even claimed that the treating physician did not provide a residual functional capacity assessment, although he had unequivocally opined that his patient was "totally disabled secondary to L5-S1 disc herniation and L4-L5 degenerative disc disease with a limited range of motion with pain on all extremities. She functions at less than a sedentary level and needs rest breaks for fatigue. She has not been medically stable or symptom free for any extended period of time despite compliance with treatment and multiple medications."

The ALJ also rejected the limitations imposed by the claimant's treating psychiatrist as well, who had recommended, at best, part-time or sheltered employment due to chronic symptoms of depression and anxiety. The ALJ dismissed these limitations as based on the claimant's subjective complaints. He also dismissed the claimant's allegations of hallucinations as "culturally common to Puerto Ricans, as noted in DSM-IV and were alleviated with medications." He found the claimant not credible, because, among other things, "it would appear altogether incredible that even after 5 years [in the U.S.] a person could not respond to" a basic question as to whether she could speak English or not.

Bruce pointed out these egregious statements on the part of the ALJ to the Appeals Council. He argued that even if the treating physician's statement, along with the employability reports provided to DSS, were not enough, the ALJ had a duty to close any perceived gap in the evidence, citing *Rosa v, Callahan*, 168 F.3.d 72 (2d Cir. 1999). He also posited that the ALJ's unfounded medical conclusion regarding the claimant's hallucinations raised serious questions of possible racial bias.

Although the Appeals Council did not believe that the record supported a conclusion of racial bias, it found that the ALJ's conclusion was not supported. It noted that the "medical records cited do not document a culture-bound syndrome diagnosis and the DSM-IV at pages 844-849 (Glossary of Culture-Bound Syndromes) does not clarify this point; thus the Administrative Law Judge's conclusion is not supported." The Appeals Council also criticized the ALJ for failing to recontact the treating source, reiterating Bruce's citation to the *Rosa* case.

Since the ALJ had found the claimant limited to light work, the Appeals Council found that she was under a disability as of her fiftieth birthday, relying on Medi-

(Continued on page 11)

ALJ Grants Waiver

Should an SSI beneficiary who is on benefits due to mental retardation and lives in an ARC group home be held responsible for an overpayment ostensibly caused by his representative payee? No, says paralegal Sue Lane-Kreutz of the Oak Orchard Legal Services Office of LAWNY in Batavia. And she convinced the ALJ hearing the appeal to agree with her.

Sue's client, whose IQ is somewhere between 46 and 64 depending on which test is used, was charged with overpayments totaling $3,310.11. The overpayments allegedly arose because for a number of months that the beneficiary was receiving SSI, he had two burial funds, which in total exceeded the resource limits. In addition to a $1500 burial fund, he also had an irrevocable burial trust. (*See* 20 CFR §416.1231, which provides that a beneficiary can have a burial fund of $1500 and an irrevocable burial contract for any amount, but the $1500 exclusion will be reduced by the value of the irrevocable trust.).

Apparently the trust was established when Sue's client was residing in a DDSO facility. Sue argued that his case manager at the DDSO was a new staff person who did not understand the SSI rules. Because of his intellectual limitations, the DDSO was also the representative payee for Sue's client. As noted by the ALJ, he "had no part in causing the overpayment and his inability to make decisions and appropriately spend his money is documented by both his limited intellectual functioning, adult residential supervised living, sheltered work employment, and need for a case manager and a representative payee."

The client's current case manager at the ARC facility to which he transferred did understand the problem and helped him with his waiver request, which was denied by Social Security. Sue represented him at the hearing, and convinced the ALJ that he met both parts of the two prong standard for wavier: he was not fault in causing the overpayment, and could not afford to pay it back. As the ALJ noted, the claimant's sheltered workshop earnings were low enough that he continued to qualify for SSI. If any of his remaining funds were withheld to repay SSI, the amount of room and board that the ARC could collect would be affected, resulting in a hardship for both the client and agency. Since the ARC was not representative payee when the incorrect trust was established, the ALJ found that it should not be penalized as a result of the actions taken by the former representative payee.

Sue argued that the fault lay with the DDSO, who should be responsible for the overpayment. The ALJ, while absolving the claimant of responsibility, did not make a finding as to the liability of the agency. Representative payees, however, can be held responsible for recovery of overpayments, either jointly with the beneficiary or individually. See POMS §SI 02201.020 (Who Is Responsible for Repayments?). But see §B.3 (Recovery Liability), reminding adjudicators that recovery can be attempted against the representative payee alone only when the overpaid funds were not used for the overpaid individual's support and maintenance.

Sue noted that she put a lot of work into this case, and it paid off. Well-said!

Onset Date —continued

(Continued from page 10)

cal-Vocational Rule 202.09. In so doing, it made a finding, despite the ALJ's references, that she is unable to communicate in English. It mandated that under the vocational rules, the educational category of "illiterate or unable to communicate in English" had to be applied, despite the claimant's actual years of education. It remanded the claim for further consideration of the three years prior to onset, based on the ALJ's failure to evaluate completely the treating source opinions. It also concluded that, as argued by Bruce, vocational testimony was necessary.

Although a return appearance before this particular ALJ may not be Bruce's idea of fun, we have no doubt that he will continue to provide his client with outstanding representation. We look forward to hearing the results of Round Two!

ALJs Reluctant to Grant Adjournments

Advocates are frequently confronted with the situation where a client contacts the legal services office shortly before the hearing and there is simply not enough time to prepare. Some ALJs are reluctant to grant adjournments in these situations, instead urging - or even ordering - the advocate to appear and submit additional evidence or argument after the hearing. All can agree that this is not the best way to practice law. But advocates can probably expect to run into more frequently, as part of SSA's response to the hearing backlog is to pressure ALJs to move case along. [As noted in the summary on page 2 of this newsletter detailing Commissioner's Astrue's testimony to Congress regarding the backlog, 30% of scheduled hearings have to be rescheduled (although most of these involve *pro se* claimants). Undoubtedly, this adds to delays at the hearing offices.]

How to get an adjournment in these circumstances? This is indeed a conundrum, but Andrew Alter of Mid-Hudson Legal Services recently shared an approach that has worked for him in most situations. First, decide whether you wish to represent the client, or need time to evaluate the case. If the former, *see* 20 C.F.R. §§404.936(f)(2) & 416.1436(f)(2) and HALLEX §I-2-3-10.E, which provides grounds for an adjournment if the client has retained you less than 30 days before the hearing, and you need time to prepare. *See also* the instructions issued pursuant to the *Miller* case, described in the Class Action section of this newsletter.

What if you have not decided whether you will represent the client, but want to time to evaluate the case without formally submitting an Appointment of Representative (Form 1696)? Andrew tries to strike the appropriate balance between protecting the client's interest, safeguarding his own professional prerogatives, and extending professional courtesy to the Administrative Law Judge. He often advises the client to request the adjournment, providing the client with a letter that he/she can present to the ALJ. A sample of his letter is available as DAP# 462.

Andrew cautions that such a letter might not satisfy an ALJ with a strong predisposition against adjournments in general, but he has found it to be a demonstration of good faith that most ALJs have appreciated.

Thanks to Andrew for his wise counsel.

Obtaining Medical Records

Every advocate has undoubtedly experienced the frustration of trying and trying to no avail to obtain crucial medical record from recalcitrant sources. What if the advocate actually convinces the ALJ to issue a subpoena for the records, which the provider also ignores? Alan Block of Neighborhood Legal Services in Buffalo reminds us that when all else fails, and the records really are "outcome-critical" to proof of the claim, the advocate may have remind the ALJ of the ODAR procedure in HALLEX directing the U.S. Attorney to prosecute the provider for civil contempt on behalf of ODAR. *See* HALLEX §I-2-5-82.

The process may be burdensome enough that the ALJ either (1) allows the claim or (2) decides the evidence is no longer critical and denies the claim without enforcement of the subpoena. According to Alan, in order to minimize the possibility of option (2) and maximize the possibility of option (1), advocates need to be prepared to argue that (2) is not a permissible option, citing the moldy Second Circuit authority of *Treadwell v. Schweiker*, 698 F.2d 137, n.9,10 (2d Cir. 1983) for the enforcement procedure. Alan reports that he has seen an ALJ resort to option (2). There is also at least one reported district court decision (*Massanari v. Northwest Community*, 2001 WL 1518137 (W.D.N.Y. 2001)) where the U.S. Attorney actually prosecuted a mental health provider for contempt.

Thanks to Alan for reminding us that we sometimes have to push the envelope to get what our clients need.

Informal Remands May Help Speed Cases Along

Commissioner Astrue's plans to help alleviate the long delays in the appeal process are outlined on pages 2-3 of this newsletter. Included in his proposal - and already in place in New York - is a plan to remand claims from ODAR to the state Disability Determination Services (or the Division of Disability Determinations - DDD - in New York) in the hopes of getter quicker decisions. Rumor has it that some 4,000 cases in New York have been selected for such reviews, and some have even been approved!

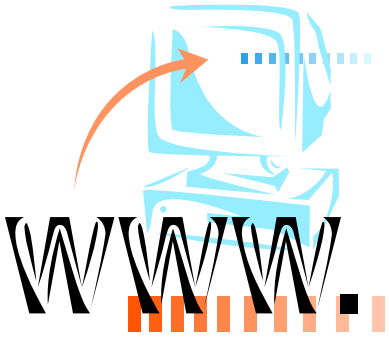
What if your client's case has not been identified for remand, but you just obtained some dynamite new evidence that will turn the case around? You can ask for Informal Remand, or Prehearing Case Review. You can ask the Field (District or Branch) Office to pull the case back for sending to DDD, or you can ask ODAR to do it. The trigger is whether your new evidence shows "a dramatic worsening of the claimant's condition and/or a significant new impairment of which the adjudicating component was not aware." The new evidence need only be "significant," and a hearing will not be scheduled for at least 60 days. POMS §DI 27520.001; HALLEX §I-2-5-10; DDD procedures are described at POMS §DI 27520.005.

What if your client just got an initial denial? You've looked at the record file and found some new dynamite evidence? Don't want to wait for ODAR to plod through to your case? You can also try asking the Field Office to make an Informal Remand! POMS § DI 12010.015 describes the basic procedures for the FO to follow for sending the case record back to the DDD along with the new evidence to consider. Time requirements are short for the DDD's action and for any quality review.

If you happen to try out these options, let us know what your experience is.

Update Your Favorite Website

Remember to update your favorites list to the current Empire Justice Center website at www.empirejustice.org. Our old GULP website is no longer available.



WEB NEWS

Find NYS Telephone Number Listings

Who you gonna call when you need to reach someone in New York State government? A directory put out by the NYS Office of Technology lists state employees by name, or agency name, or telephone number. This is a great resource for tracking down useful contacts in NYS government.
https://www6.oft.state.ny.us/telecom/phones/indsearch.jsp

New Glossaries Available for Interpreters

The Vera Institute of Justice has developed criminal and juvenile justice glossaries in Spanish and traditional Chinese for interpreters, translators, and bilingual staff for justice and public safety agencies, courts, and nonprofit organizations. The glossaries include 640 legal and criminal justice words and phrases that are commonly used in New York courts, justice agencies, and nonprofit organizations.
www.vera.org/transglossary.

NYS Accessible Housing Registry is Now Online

If you are a person with a disability looking for housing that is accessible, affordable and in your area of New York State, or if you are helping someone look for accessible housing, CIDNY's (Center for Independence of the Disabled in New York) improved housing Registry can help. The easy-to-use Registry supplies extensive information concerning affordable and market-rate housing throughout New York State, including information on accessibility features. The Registry allows you to search for housing by: * location including by town, zip code and major cities *income, age or disability requirements.
www.nysaccessiblehousing.org

Citizenship Requirements for Medicaid Listed

The Centers for Medicare and Medicaid Services, part of the Department of Health and Human Services, has put out a fact sheet detailing the newly enacted proof of citizenship requirements for the Medicaid program.
http://www.cms.hhs.gov/MedicaidEligibility/05_ProofofCitizenship.asp

NYSARC Pooled SNT Info

If you are looking for information on setting up a Supplemental Needs trust for your client, check out the NYSARC website or call 800-735-8924 or in Albany, 518-439-8323.

http://www.nysarc.org/family/nysarc-family-trust-services.asp

CLASS ACTIONS

Yvonne Robinson v. HHS and Treasury, 92 Civ. 7976 (Griesa, J.) ("the missing benefits case")

Description - Class of Social Security and SSI beneficiaries sued SSA and Treasury over defects in procedures for replacing lost, stolen, or otherwise missing benefits payments. Plaintiffs allege that replacement requests languish for years and that the government fails to provide adequate hearing or notice of any appeals rights.

Relief - If an individual requests replacement of a benefits check, the Government will replace the payment by issuing a "settlement check" before investigating whether the original check was cashed. If the Government later determines that the individual was not entitled to the replacement payment, it will issue an overpayment notice requesting that the individual repay the money to the Government.

If the individual did not receive and "electronic fund payment" (EFT), the Government must determine whether it has accurate direct deposit data. If the bank routing number is accurate, the Government must follow up with the bank to ensure transmittal of the original EFT payment. If the bank routing number is inaccurate, SSA will promptly instruct the DOT to issue a replacement payment. If the bank routing number is accurate, but the individual's number is inaccurate, SSA will first try to correct the problem but will replace the payment within 30 days.

Citations - The District court for S.D.N.Y. approved a final settlement in *Robinson v. Chater and Rubin*, 92 CV-7976 (S.D.N.Y.) (TPG), in June 1997.

Information - Ann Biddle, Legal Services for the Elderly (646-442-3302). abiddle@lsenyc.org

Miller v. Secretary, No. 87-1393T (W.D.N.Y.) (Telesca, J.) ("the file access case")

Description - Plaintiffs challenged SSA's refusal to permit representatives to review hearing files sufficiently in advance of scheduled hearing dates. Settlement in 1988 requires SSA to send notice to all ALJs nationwide setting forth duty to provide access to the claimants' files, and when not possible, to evaluate whether there is good cause to postpone the hearing.

Relief - Nationwide instruction directs ALJs to provide adequate access to hearing files, and to consider adjourning hearings for good cause where such access is not provided. The instruction remains useful and can be found at *http://www.empirejustice.org/content.asp?ContentId=1223.*

Citations - Unpublished order (1988) requires national instruction to all ALJs of policy, and duties described above.

Information - Catherine M. Callery, Empire Justice Center (800-724-0490, 585-454-4060)

BULLETIN BOARD

This "Bulletin Board" contains information about recent disability decisions from the United States Supreme Court and the United States Court of Appeals for the Second Circuit.

We will continue to write more detailed articles about significant decisions as they are issued by these and other Courts, but we hope that this list will help advocates gain an overview of the body of recent judicial decisions that are important in our judicial circuit.

SUPREME COURT DECISIONS

Barnhart v. Thomas, 124 S. Ct. 376 (2003)

The Supreme Court upheld SSA's determination that it can find a claimant not disabled at Step Four of the sequential evaluation without investigation whether her past relevant work actually exists in significant numbers in the national economy. A unanimous Court deferred to the Commissioner's interpretation that an ability to return to past relevant work can be the basis for a denial, even if the job is now obsolete and the claimant could otherwise prevail at Step Five (the "grids"). Adopted by SSA as AR 05-1c.

Barnhart v. Walton, 122 S. Ct. 1265 (2002)

The Supreme Court affirmed SSA's policy of denying SSD and SSI benefits to claimants who return to work and engage in substantial gainful activity (SGA) prior to adjudication of disability within 12 months of onset of disability. The unanimous decision held that the 12-month durational requirement applies to the inability to engage in SGA as well as the underlying impairment itself.

Sims v. Apfel, 120 S. Ct. 2080 (2000)

The Supreme Court held that a Social Security or SSI claimant need not raise an issue before the Appeals Council in order to assert the issue in District Court. The Supreme Court explicitly limited its holding to failure to "exhaust" an issue with the Appeals Council and left open the possiblity that one might be precluded from raising an issue.

Forney v. Apfel, 118 S. Ct. 1984 (1998)

The Supreme Court finally held that individual disability claimants, like the government, can appeal from District Court remand orders. In *Sullivan v. Finkelstein*, the Supreme Court held that remand orders under 42 U.S.C. 405(g) can constitute final judgments which are appealable to circuit courts. In that case the government was appealing the remand order.

Lawrence v. Chater, 116 S. Ct. 604 (1996)

The Court remanded a case after SSA changed its litigation position on appeal. SSA had actually prevailed in the Fourth Circuit having persuaded that court that the constitutionality of state intestacy law need not be determined before SSA applies such law to decide "paternity" and survivor's benefits claims. Based on SSA's new interpretation of the Social Security Act with respect to the establishment of paternity under state law, the Supreme Court granted certiorari, vacatur and remand.

Shalala v. Schaefer, 113 S. Ct. 2625 (1993)

The Court unanimously held that a final judgment for purposes of an EAJA petition in a Social Security case involving a remand is a judgment "entered by a Court of law and does not encompass decisions rendered by an administrative agency." The Court, however, further complicated the issue by distinguishing between 42 USC §405(g) sentence four remands and sentence six remands.

SECOND CIRCUIT DECISIONS

Torres* v. *Barnhart, 417 F.3d 276 (2d Cir. 2005)

In a decision clarifying the grounds for equitable tolling, the Second Circuit found that the District Court's failure to hold an evidentiary hearing on whether a plaintiff's situation constituted "extraordinary circumstances" warranting equitable tolling was an abuse of discretion. The Court found that the plaintiff, a *pro se* litigant, was indeed diligent in pursuing his appeal but mistakenly believed that counsel who would file the appropriate federal court papers represented him. This decision continues the Second Circuit's fairly liberal approach to equitable tolling.

Pollard v. Halter, 377 F.3d 183 (2d Cir. 2004)

In a children's SSI case, the Court held that a final decision of the Commissioner is rendered when the Appeals Council issues a decision, not when the ALJ issues a decision. In this case, since the Appeals Council decision was after the effective date of the "final" childhood disability regulation, the final rules should have governed the case. The Court also held that new and material evidence submitted to the district court should be considered even though it was generated after the ALJ decision. The Court reasoned that the evidence was material because it directly supported many of the earlier contentions regarding the child's impairments.

Green-Younger v. Barnhart, 335 F.3d 99 (2d Cir. 2003)

In a fibromyalgia case, the Second Circuit ruled that "objective" findings are not required in order to make a finding of disability and that the ALJ erred as a matter of law by requiring the plaintiff to produce objective medical evidence to support her claim. Furthermore, the Court found that the treating physician's opinion should have been accorded controlling weight and that the fact that the opinion relied on the plaintiff's subjective complaints did not undermine the value of the doctor's opinion.

Encarnacion v. Barnhart, 331 F.3d 79 (2d Cir. 2003)

In a class action, plaintiffs challenged the policy of the Commissioner of Social Security of assigning no weight, in children's disability cases, to impairments which impose "less than marked" functional limitations. The district court had upheld the policy, ruling that it did not violate the requirement of 42 U.S.C. §1382c(a)(3)(G) that the Commissioner consider the combined effects of all of an individual's impairments, no matter how minor, "throughout the disability determination process." Although the Second Circuit upheld SSA's interpretation, affirming the decision of the district court, it did so on grounds that contradicted the lower court's reasoning and indicated that the policy may, in fact, violate the statute.

Byam v. Barnhart, 324 F.3d 110 (2d Cir. 2003)

The Court ruled that federal courts might review the Commissioner's decision not to reopen a disability application in two circumstances: where the Commissioner has constructively reopened the case and where the claimant has been denied due process. Although the Court found no constructive reopening in this case, it did establish that "de facto" reopening is available in an appropriate case. The Court did, however, find that the plaintiff was denied due process because her mental impairment prevented her form understanding and acting on her right to appeal the denials in her earlier applications. The Circuit discussed SSR 91-5p and its *Stieberger* decision as support for its finding that mental illness prevented the plaintiff from receiving meaningful notice of her appeal rights.

Veino v. Barnhart, 312 F.3d 578 (2d Cir. 2002)

In a continuing disability review (CDR) case, the Second Circuit ruled that the medical evidence from the original finding of disability, the comparison point, must be included in the record. In the absence of the early medical records, the record lacks the foundation for a reasoned assessment of whether there is substantial evidence to support a finding of medical improvement. The Court held that a summary of the medical evidence contained in the disability hearing officer's (DHO) decision was not evidence.

Draegert v. Barnhart, 311 F.3d 468 (2d Cir. 2002)

The Second Circuit addressed the issue of what constitutes "aptitudes" as opposed to "skills" in determining whether a claimant has transferable skills under the Grid rules. The Court found that there was an inherent difference between vocational skills and general traits, aptitudes and abilities. Using ordinary dictionary meanings, the Court found that aptitudes are innate abilities and skills are learned abilities. The Circuit noted that for the agency to sustain its burden at step 5 of the sequential evaluation that a worker had transferable skills, the agency would have to identify specific learned qualities and link them to the particular tasks involved in specific jobs that the agency says the claimant can still perform.

GAO Issues Reports on SSN Use

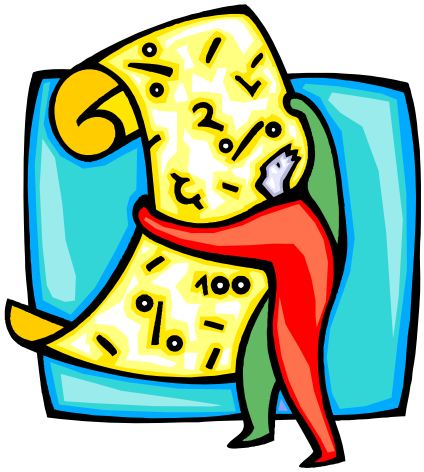
The Government Accountability Office (GAO) has issued two new reports on the vulnerability of individual social security numbers to fraud and abuse, following up on several previous studies. (*See, e.g.*, the September 2005 issue of the *Disability law News*). In a report issued on June 15, 2007 (GAO-07-752), the GAO recommended that federal agencies could take further actions to prevent the availability of social security numbers (SSNs) in public records.

The GAO determined that only two federal agencies - the IRS (Internal Revenue Service) and Department of Justice (DOJ) - commonly provide records containing SSNs to state and local public record keepers; in recent years, both have taken steps to truncate or remove SSNs in those records. These agencies provide property lien records to public record keepers, on which they traditionally included full SSNs for identity verification purposes. The truncation system currently used by the IRS, however, displays the last four digits of the SSN. The DOJ policy is not uniform, and some districts display none of the numbers while some show all. Although some local public agencies remove the SSNs, that policy is not uniform either, and the process can be time-consuming and costly.

To further exacerbate the problem, the GAO notes that information resellers - companies that specialize in amassing personal information - sometimes provide truncated SSNs to customers that show the first five digits. Consequently, it is possible to reconstruct an individual's full nine-digit SSN by combining a truncated SSN from a federally generated lien record with a truncated SSN from an information reseller. The GAO suggested that Congress consider enacting truncation standards or assigning an agency to do so.

GAO-07-1023T, published on June 21, 2007, also deals with the truncation problems, and reviews the extent to which vulnerabilities persist in federal laws addressing SSN collection and use by private sector entities. Federal laws and regulations require agencies at all levels of government to frequently collect and use SSNs for various purposes. In the private sector, certain entities, such as information resellers, collect SSNs from public sources, private sources, and their customers, and use this information for identity verification purposes. In addition, banks, securities firms, telecommunication firms, and tax preparers engage in third party contracting, and consequently sometimes share SSNs with their contractors for limited purposes. The laws governing these various usages are not uniform or consistent.

The GAO concluded that while lack of SSN truncation standards leaves SSNs vulnerable to potential misuse by identity thieves and others, SSN truncation standards have yet to be addressed at the federal level.



END NOTE

How Quickly Can You Read This?

Feeling overwhelmed by the hundreds of e-mails that accumulated while you enjoyed your well-deserved summer vacation? Daunted by the pile of back issues of the *Disability Law News* on your desk? Or tempted by a stack of novels set aside for your summer reading? Maybe speed-reading is the answer for you.

According to a July 25, 2006 article in the *Wall Street Journal*, speed reading courses are making a comeback. Popular in the 1960s and '70s, with courses such as those first designed in the 1950s by Evelyn Woods, new companies have been springing up across the country. Today's courses, rather than promising to help readers whip through all those classics they never read in school, are geared more toward helping professionals synthesize work-related material.

Proponents claim speed-readers can learn to assimilate text on a page - or on a computer screen - by absorbing groups of words in a single glance. With training and practice, they say that speed-readers can process 500 to 1,000 words per minute, as compared with the average reader, who takes in around 250 to 350 words, or about one page of text, in a minute - and all this without sacrificing comprehension. Although the average reader regresses - or rereads - about twenty times per page, speed-reading experts claim to retrain your brain to look at words in a different way. In some ways, says Hal Bernard Wechsler, a former executive at Evelyn Woods and now the head of SpeedLearning, it is like learning a new language.

Some educators are skeptical of claims made by speed reading companies. According to Anne Cunningham, professor of cognition and development at the University of California, Berkley, generally people can read no more than 300 words per minute without losing comprehension. She criticizes speed reading courses as teaching skimming. While that might be a reasonable strategy for some purposes, it is incomplete.

Some tips from the experts?

- Use a pen, pencil or finger to track words as you read. Since this may be more difficult with the fluid movement of scrolling computer screens, some experts recommend printing documents when possible.
- Use peripheral vision to read at least two words at a time, a technique known as "chunking."
- Ask yourself questions about the material as you read: Who, what, why and how?
- Practice silent reading, avoiding hearing individual words in your head as you read.

Even proponents, however, may concede that speed reading is not the best way to read for pleasure. So zip through those e-mails, but take those novels to the beach and relax.

Empire Justice Center
Making the law work for all New Yorkers

Contact Us!

Advocates can contact the DAP Support attorneys at:

Louise Tarantino
(800) 635-0355
(518) 462-6831
ltarantino@empirejustice.org

Kate Callery
(800) 724-0490 ext. 5727
(585) 295-5727
kcallery@empirejustice.org

Ann Biddle
(646) 442-3302
abiddle@lsenyc.org

Paul Ryther
(585) 657-6040
pryther@frontiernet.net

SUBSCRIPTION INFORMATION

Disability Law News© is published six times per year by Empire Justice Center, a statewide, multi-issue, multi-strategy non-profit law firm focused on changing the "systems" within which poor and low income families live.

A one-year subscription to the Disability Law News is $75.00.

To order, please complete the information below and mail, together with your check, to:

Disability Law News
c/o Empire Justice Center
1 West Main Street, Suite 200
Rochester, New York 14614

Please reserve my one-year subscription to the Disability Law News for $75.00.

_____
Name Organization

_____
Street Address

_____
City State Zip

_____
Phone Number Fax Number

_____
Email Address