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DISABILITY LAW NEWS

SSA Obligated to Provide Language Assistance

Advocates have undoubtedly had the experience of appearing at a hearing with a client who is unable to speak English, only to discover that no interpreter is available, or to have the Administrative Law Judge (ALJ) question the claimant's need for an interpreter. Claimants also relate the challenges they face when appearing at the district offices (DOs) without their own interpreters. Advocates may be unaware of the extent to which the Social Security Administration (SSA) is obligated to provide language assistance services to limited English proficient (LEP) claimants and beneficiaries.

Michael Mulé of the Empire Justice Center has compiled a compendium of the case law and requirements of Title VI of the Civil Rights Act of 1964 (Title VI) that led SSA to develop a systematic language assistance plan. SSA's plan has been in effect to some extent for the past thirty years. SSA Program Policy Documents also require local district offices and hearing office staff to provide interpreters for oral communication and translated versions of written forms and notices for LEP claimants and beneficiaries. These language assistance services should be requested by advocates whenever they are necessary to ensure an LEP claimant or beneficiary can effectively communicate with SSA.

LEP Cases

SSA was first required to provide language assistance services for LEP individuals in *Cruz v. Califano*, 78 F.R.D. 314, (D.C.Pa. 1978). In *Cruz*, the plaintiffs were applicants for Supplemental Security Income (SSI) challenging the failure by the Secretary of Health, Education and Welfare to provide Spanish translated versions of notices and appeal forms to applicants for SSA benefits. The plaintiffs claimed that using English-only notices violated the Constitution, Title VI, and the Social Security Act, and requested the Court order SSA to print and provide translated notices for LEP applicants and claimants. Soon after, SSA entered into a consent decree where it agreed to provide Spanish-language cover notices and interpreters.

In *Soberal-Perez v. Heckler*, 717 F.2d.36 (2d Cir.1983), the Court addressed SSA's obligation to provide notices and oral instructions to LEP individuals. The Spanish-speaking plaintiffs in *Soberal-Perez* contended that their claims for Social Security and/or SSI benefits were denied because of SSA's failure to provide notices and oral instructions in Spanish. The Second Circuit determined Title VI did not apply to SSA; it had a rational basis for providing the notices

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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.

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only in English; and that Due Process was not denied when notices were provided only in English. The *Soberal-Perez* Court, however, stated that SSA remained bound by the *Cruz* agreement. In both cases the obligation was based on Title VI, which would serve as the foundation for the SSA LEP Plan.

SSA LEP Plan

SSA began developing a language access policy in the early 1990's. On August 11, 2000, President Clinton signed Executive Order 13166 (EO 13166), which directed federal agencies to apply the obligations imposed by Title VI. In September 2004, responding to the requirements of EO 13166, SSA created an LEP plan to provide fair service regardless of an individual's LEP status. SSA's Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency (LEP), available at http://www.ssa.gov/multilanguage/LEPPlan2.htm#otherlang. SSA also developed procedures describing language services district offices and hearing offices must provide when interacting with LEP individuals.

The SSA Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency (LEP), describes how meaningful access is required for all LEP individuals in all SSA programs. Factors SSA considers when determining what constitutes reasonable steps to ensure meaningful access to LEP individuals include the: (1) number or proportion of LEP persons in the eligible service population; (2) frequency with which LEP individuals come into contact with the program; (3) importance of the service provided by the program; (4) and resources available to the recipient.

The SSA policy is to ensure that "individuals have access to our programs and services regardless of their ability to communicate with us in English." Pursuant to this policy "Social Security will provide an interpreter free of charge, to any individual requesting language assistance or, when it is evident that such assistance is necessary to ensure that the individual is not disadvantaged," and will not require individuals needing language assistance to provide their own interpreters. In 2006, SSA created a video-on-demand (VOD) training session on how to provide language services to LEP individuals for staff, which is available on the SSA intranet.

SSA Program Policy Documents

SSA language services obligations are described in the Program Policy Documents, the Program Operations Manual System (POMS), which is followed by the SSA district office staff when processing claims for benefits; and the Hearings, Appeals and Litigation Law Manual (HALLEX), which is followed by the Hearing Office (now ODAR staff) and ALJs.

The POMS describe the obligation of SSA district office staff to provide language services to LEP individuals. *See* POMS GN 00203.011 - Special Interviewing Situations: Limited English Proficiency (LEP) or Language Assistance Required, 06/03/2003, available at: https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0200203011. District office staff must provide appropriate language services to all LEP individuals free of charge. For each interaction (on the phone, written communication, in-person), staff must be alert to the language needs of any individual having difficulty in understanding or speaking English and determine whether the individual wants to conduct the interview in English or another language that s/he prefers.

Staff must offer to obtain the services of an in-office interpreter prior to an interview or obtain an interpreter through the telephone interpreter services (TIS) if the future appointment is a telephone interview, or when immediate service is needed even if an interpreter is not requested by the LEP individual. District office staff must also provide LEP individuals with appropriate written materials (pamphlets, fact sheets, etc.) in the language the individual prefers. POMS sections also require the translation of notices, applications, and forms into Spanish. *See* GN 99001.000 (notices); NL 00601.600 (notices); and GN 99002.000 (applications and forms). While Spanish is the only identified language in these sections, public information materials are available in many other languages. *See* NL 00603.600; s*ee* also SSA Multilingual Gateway, http://www.ssa.gov/multilanguage/.

ODAR staff must provide an LEP individual with a qualified office interpreter, private interpreter, or an

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Banking Alternatives for Dedicated Savings Accounts

As DAP advocates know, retroactive benefits for children's SSI cases must be put into a Dedicated Savings Account (DSA) and used for extraordinary items related to the child's disability. Since SSA will not pay any retroactive benefits until the DSA is established, what can representative payees do if they have a bad bank history and cannot find a financial institution that will accept their account?

This question showed up on the DAP list serve recently, and the responses provided a tremendous source of information. Read on!

As we reported in the March 2008 *Disability Law News*, SSA started a pilot project in four Southern states that offers the option of claimants receiving their Social Security or SSI benefits in the form of a prepaid debit card instead of a paper check. The targeted audience for the debit card use is beneficiaries who do not have or cannot open bank accounts. https://secure.ssa.gov/apps10/poms.nsf/lnx/0202402006. Claimants can call 1-(877)-212-9991 or go to www.USDirectExpress.com for more information. The Consumers Union has also put together a FAQ sheet, available at http://www.comsumersunion.org/pub/core_financial_services/005733.html. Although this program is not yet available in New York, SSA expects nationwide rollout later in 2008.

Another option is to open an Electronic Transfer Account ("ETA") at an ETA Provider bank. An ETA is a low-cost bank account where a recipient can receive Federal payments each month by direct deposit. The claimant's credit worthiness is not an issue. To find an ETA Provider bank in a claimant's area, call 1-(888)-382-3311 or go to www.eta-find.gov for more information.

It was recommended that a claimant should open two accounts as above: (a) one as a dedicated savings account used exclusively for the retroactive award in and (b) one for the ongoing monthly payments.

Lastly, Credit Union accounts can also be used for setting up a DSA.

Now we are all a lot wiser about advising our clients on the options available to them in setting up a DSA.

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interpreter available through the Telephone Interpreter Service (TIS). The ODAR staff determines if a claimant needs an interpreter by reviewing records and reports of previous contact with the claimant. POMS GN 00203.011. At all hearings, the ALJ must ensure that an interpreter fluent in both English and the language in which the claimant is most proficient is present throughout the hearing. *See* Hearings, Appeals and Litigation Law Manual (HALLEX) I-2-6-10, Hearing Procedures - Foreign Language Interpreters 09/02/05; and HALLEX 1-2-1-70, Foreign Language Interpreters 09/28/05, available at www.ssa.gov.

When the hearing begins, the ALJ must verify the interpreter's identity and have him/her certify "under penalty of perjury" that s/he is a qualified interpreter. HALLEX 1-2-6-10. The ALJ must direct the interpreter to interpret without changing the meaning of questions and answers, correct the interpreter if questions are changed to the third person, and must not use idiomatic or slang expressions when questioning hearing participants. If the claimant or a witness is having difficulty understanding the interpretation, an ALJ may have to adjourn or postpone the hearing until an acceptable qualified interpreter is available. HALLEX 1-2-6-10.

Michael also reminds advocates that SSA's Unfair Treatment Complaint Form, SSA Publication No. 05-10071, February 2004, is available at: http://www.ssa.gov/pubs/10071.html in both Spanish and English.

Michael has made much of the information contained in this article, as well as the LEP obligations of other public benefit programs, available on the Empire Justice Center's on-line resource center: http://onlineresources.wnylc.net/language_access.asp. The new Language Access Resource Center (LARC) also contains several language access trainings, as well as other guides and helpful materials.

Many thanks to Michael Mulé for his invaluable work in this area.

REGULATIONS

Hearing Listings Changes Proposed

The Social Security Administration (SSA) proposes changes to the Special Senses Listing, particularly, the hearing impairments portion, in a Notice of Proposed Rulemaking issued August 13, 2008. 73 Fed. Reg. 47103. Comments are due by October 14, 2008.

SSA proposes "to reorganize and expand the second through fifth paragraphs of current 2.00B1, 'Hearing impairment,' to provide additional guidance." It wants to "remove the guidance in the first paragraph of current 2.00B1, which states that hearing ability should be evaluated in terms of the person's ability to hear and distinguish speech. Because our current and proposed listings provide for using tones to evaluate hearing loss, this language may be misleading."

NOTE: Changes to the children's Listing provisions generally track those for adults; this note will cite only to the proposed adult Listing revisions.

Speech discrimination, now known as word recognition, guidelines are, however, added for the new language addressing cochlear implants. SSA proposes to set forth separate procedures for evaluating claimants with the implants (see below).

SSA also proposes "to remove the guidance in the last paragraph of current 2.00B1, which provides that cases of alleged 'deaf mutism' should be documented by a hearing evaluation. This guidance refers only to the evaluation of deaf mutism as a hearing impairment; however, we can also evaluate cases of alleged mutism under listing 2.09, for loss of speech. In that case, we would not need a hearing test. We are not proposing special requirements for evaluating hearing loss if you have deaf mutism; we would require the same documentation as for other hearing disorders."

Moving on to the next subsection of the Listing, SSA proposes also "to redesignate current 2.00B2, 'Vertigo associated with disturbances of labyrinthine-vestibular function, including Meniere's disease,' as proposed 2.00C, and to redesignate current 2.00B3, 'Loss of speech,' as proposed 2.00D… to recognize that they are not always associated with hearing loss." SSA promises that these changes will contain no substantive revisions, merely "minor editorial changes so that the format of these sections will be consistent with other sections of the introductory text." In addition, "we also propose to redesignate current 2.00C, 'How do we evaluate impairments that do not meet one of the special senses and speech listings?' as proposed 2.00E."

The proposal would "remove the requirement for an otolaryngologic examination and instead require a complete otologic examination preceding audiometric testing (current 2.00B1)." And it will suffice if the otologic exam substantiating the existence of a medically determinable cause for hearing loss exists somewhere in the medical records; it need not be performed in conjunction with the audiometric testing (which serves to measure the severity of the medically caused hearing loss), but it must be associated in time: within two months. SSA reasons that "Having the otologic examination precede the audiometric testing can help identify conditions that could interfere with the audiometric testing. However, having the otologic examination follow the audiometric testing will allow the physician to consider the results of that testing in reaching his or her conclusions about the individual's hearing loss. We believe that either sequence is acceptable for determining whether the individual has a medically determinable impairment that has resulted in hearing loss." SSA expressly requests "specific comments on this change, replacing an otolaryngologic examination with an otologic examination."

The proposal includes significant revamping of the guidelines for how audiometric testing is to be conducted; see subsection B2, for claimants who do not have a cochlear implant, and subsection B3, for those who do. Some childhood-specific testing also is given recognition.

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Technical Corrections for "Child in Care" Regs Announced

SSA announced technical corrections to regulations affecting entitlement to mother's and father's benefits, to include alternatives to the nine month duration of marriage requirement. 73 Fed. Reg. 40965 (July 17, 2008). SSA is also deleting an out-of-date cross-reference to the definition of "substantially all," restoring in its place the regulatory definition for "substantially all" that had been inadvertently deleted to show if a grandchild or step grandchild is dependent based on SSA's support requirements. The amendments are characterized as technical corrections issued as a "direct final rule" with an effective date of September 15, 2008.

Cross-Program Recovery Clarified

SSA proposes to "amend our title II regulations to explicitly provide that we apply an underpayment due an individual to reduce an overpayment to that individual in certain cases. Our title XVI regulations already state this policy. Additionally, these proposed rules reflect our procedures for collecting overpayments when a payment of more than the correct amount is made to a representative payee on behalf of a beneficiary after the beneficiary's death. These proposed rules would clarify that we would collect overpayments in this situation from only the representative payee or his estate but would not collect these overpayments from the representative payee's spouse or from the spouse's estate." 73 Fed. Reg. 40997 (July 17, 2008). Comments are due by September 15, 2008.

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Word recognition testing will apply to those with cochlear implants, who will be deemed "disabled" for the first 12 months (or to age 5, if later) following the implant procedure, and must be tested at the end of that time using the "Hearing in Noise Test [for Children] (HINT [/ HINT-C])." For claimants not fluent in English, revisions of the word list will be necessary. SSA addresses this need in proposed new subsection B4: "if we cannot measure your word recognition ability because you are not fluent in English, your hearing loss cannot meet listing 2.10B or 2.11B. In this situation, we would consider the facts of your case to determine whether you have difficulty understanding words in the language in which you are most fluent, and if so, whether that degree of difficulty medically equals listing 2.10B or 2.11B. For example, we will consider how you interact with family members, interpreters, and other individuals who speak the language in which you are most fluent." Again, SSA expressly seeks comment on this approach.

Testing no longer will have to be done with hearing aids in place: "Although we propose to no longer require aided testing, we are not proposing to change the level of hearing loss needed to demonstrate a listing-level impairment. Based on our adjudicative experience and the comments we received in response to our ANPRM and at our policy conference, we have determined that individuals with this level of hearing loss do not usually obtain significant improvement in their ability to hear and communicate from hearing aids. Therefore, we believe that without a cochlear implant, a hearing loss at the level specified in the current listing is indicative of listing-level severity even if the individual were to use hearing aids."

Advocates with experience in representing hearing impaired claimants should read the proposed changes carefully and submit comments by the October 14, 2008 deadline.

Representation Rules Revised

The Social Security Administration (SSA) issued proposed regulations revising its rules on representation of parties on September 8, 2008. 73 Fed. Reg. 51963. Comment deadline is November 7, 2008.

SSA defines five major concept changes:

(1) "These proposed rules would recognize entities as representatives, define the concept of a principal representative,"

(2) "and authorize principal representatives to sign and file a claim for benefits on behalf of a claimant."

(3) "These proposed rules would also mandate the use of Form SSA-1696 to . . . revoke, or withdraw an appointment of a representative, and to waive a fee or direct payment of the fee."

(4) "We propose to define the concept of a professional representative and require professional representatives to use our electronic services as they become available, including requiring professional representatives to submit certain requests for reconsideration or a hearing before an administrative law judge (ALJ) electronically."

(5) "Finally, we propose to require representatives to keep paper copies of certain documents that we may require."

Some advocates will welcome some of these revisions, as SSA is "proposing these revisions to reflect changes in representatives' business practices and to improve our efficiency by enhancing use of the Internet." For "professional representatives," however, there is a significant concern.

In order to make these revisions enforceable, SSA will authorize itself to reject a particular representative in a particular claim. The decision will not be subject to administrative appeal.

Paper Copies

That paper copies requirement? "These representatives must keep, and provide to us upon request, paper copies of the Form SSA-1696 with the original signature of the claimant, the electronic signature of the representative, and the respective dates of the signing. Further, we will require entities to maintain, and provide to us on request, a signed statement from each attorney, eligible non-attorney, and employee . . . that they are performing all representational services on behalf of the entity, that any fees should be paid directly to the entity, and that they will receive compensation directly from the entity."

Principal Representative

The short version of representation-by-entity and the concept of principal representative is to "explain" SSA's "current policy that a claimant may appoint multiple representatives to represent him or her at the same time. A claimant may appoint one or more individuals or entities to work on his or her claim at the same time. A principal representative is responsible for disseminating information and requests from us to a claimant and the claimant's other representatives, if any. It is our current practice to require a claimant to appoint a principal representative only if the claimant appoints more than one representative. We now propose to require that a claimant choose and appoint a principal representative. If a claimant appoints only one representative, that individual or entity is the principal representative."

The concept can work well when a firm takes on a claimant's case and assigns it to one or a series of advocates. What happens, though, if an individual appoints a law firm or other advocacy entity, and appoints a service agency where his/her case manager is employed? Will coordination of effort present new difficulties in setting the strategy for the advocacy? Read the proposed language, think about it, and comment!

Filing Applications

SSA summarizes the application-filing change: "We also propose to allow principal representatives to sign and file applications on behalf of claimants, provided the claimant has opportunity to review and verify the accuracy of the completed application. . . . However,

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a claimant will have to expressly acknowledge on the Form SSA-1696 that he or she is responsible for the information provided to the principal representative for the application. We believe that this type of acknowledgement is necessary to ensure that the claimant remains responsible for the content of the application."

Professional representative

So, what's a "professional representative," you ask?

"We propose to introduce the concept of a professional representative and to distinguish it from a principal representative. A professional representative includes any attorney, any individual other than an attorney, or any entity that holds itself out to the public as providing representational services before us (see 20 C.F.R. §§404.1735 and 416.1535), regardless of whether the representative charges or collects a fee for providing the representational services. . . . we intend to require a professional representative to use electronic media that we prescribe, such as the Internet, to register with us . . ."

"We propose to require professional representatives and their employees to complete an initial access registration with us through the use of electronic media that we prescribe. Representatives who are not classified as professional representatives and their employees . . . will be permitted to do so either electronically or by other means. Access registration requires representatives and their employees to supply us with certain personal, professional, and business affiliation information that we will use to authenticate and authorize representatives and their employees to do business with us. This initial registration will also require professional representatives and their employees to provide us with specific attestations to ensure that they know, understand, and will comply with our rules and regulations. Access registration is a one-time process, and it will allow us to process each claim more efficiently. However, representatives and their employees must update the access registration if their personal, professional, or business affiliation information changes. The authorization and authentication process will also assist us in safeguarding the personally identifiable information provided to us."

SSA expressly requests "public comment on our definition of 'professional representative.' While we believe that the proposed definition covers the vast majority of representatives who do business with us, we are interested in receiving public comment on whether our proposed definition adequately includes all relevant organizations."

Professional representative liabilities

Now for the sensitive part. Will the requirement that professional representatives attest that they know, understand and will comply with SSA's rules add new, chilling liabilities to the work done by representatives?

It appears so: "Violation of these affirmative duties may subject the representative to sanctions under 20 C.F.R. §§404.1745 and 416.1545. We may ask representatives to provide us with forms, documents, copies of signed statements, and other information to confirm that representatives are complying with our rules. We expect that these changes will create safeguards against fraudulent activity."

Also, of perhaps less chilling quality, SSA proposes "to revise our list of prohibited actions to include three additional items: refusing to comply with any of our regulations, violating any section of the Act for which a criminal or civil monetary penalty is prescribed, and assisting another individual whom we have suspended or disqualified. Violation of these prohibited actions may subject the representative, or an attorney or a non-attorney whom a claimant has not appointed as his representative but who works for or on behalf of the claimant's appointed representative and helps represent the claimant in his claim before us, to sanctions under 20 C.F.R §§404.1745 and 416.1545."

COURT DECISIONS

Second Circuit Allows Anonymous Pleading

In a case that may have relevance to Social Security practice, the Court of Appeals for the Second Circuit held last month that a plaintiff's application to proceed under a pseudonym should be granted in certain circumstances. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185 (2d Cir. 2008).

In a case involving New York's Rape Shield law, the court considered Rule 10(a) of the Federal Rules of Civil Procedure, which requires that the title of a complaint must name all of the parties. In a case of first impression, it held that the vital purpose of facilitating public scrutiny of judicial proceedings embodied in that rule must be balanced against the plaintiff's need for anonymity. It referred to the decisions of other circuit courts that have carved out a limited number of exceptions to the general requirement of disclosure. It endorsed the rule that the plaintiff's interest in anonymity must be balanced against both the public interest in disclosure and any prejudice to the defendant.

The plaintiff in this case was *pro se*. The Court of Appeals also took the district court to task on its failure construe the pleadings of a *pro se* party liberally. It found that the court should have afforded the plaintiff wider latitude in pressing her claims an issue that comes up frequently in the Social Security realm. See, for example, the *Tavera* case described in this newsletter, where Social Security acknowledged that it had not met its obligation to help the *pro se* plaintiff develop the record.

Obviously, there may be instances where a plaintiff in a Social Security appeal would be concerned about privacy issues. For example, a plaintiff may wish to keep his/her HIV confidential. Advocates should be aware that there are special provisions for maintaining privacy in Social Security cases, including the option of sealing the record. *See* Fed. R. Civ. P. 5.2 (c)(2)(B), discussed in more detail in the January edition of the *Disability Law News.*

SSA Program Circulars Now Available

As mentioned elsewhere in this newsletter, invaluable resources sometimes get lost in the inner sanctums of our file cabinets. We here at the Empire Justice Center are trying to make many of those gems available to you on the on-line resource center. Among the latest acquisitions are two New York Regional Program Circulars dealing with supported employment and subsidies.

SSA Program Circular 90-3 (Job Coach Services in Supported Employment) and SSA Program Circular 91-1 (Supported Employment – Subsidy Considerations) are available as DAP #501. These Circulars are cited in the 2007 version of the *Benefits Manual for Working People with Disabilities* manual, which is available for purchase from the Empire Justice Center. To view the table of contents and sample chapters and to download the brochure and order form, *see* http://www.nls.org/benefits_management_manual.htm.

Thanks to Jim Sheldon and Susan Sternberg for helping us resurrect these golden oldies.

Judge Questions Acute Onset of Mental Retardation

Program Operations Manual System (POMS) DI 25501.025 precludes the establishment of an alleged onset date in a subsequent application prior to the date of the previous ALJ or AC decision: "Onset cannot be set until after an ALJ or AC decision." This requirement can lead to some anomalies when a subsequent application is approved while the original case is still on appeal. [For more on the vagaries of subsequent applications, see the March 2008 edition of the Disability Law News.]

Judge Michael Telesca of the Western District of New York confronted one of those anomalies in a recent appeal of a case that had been handled by Ellen Rita Heidrick of the Southern Tier Legal Services office of LAWNY. While his appeal was pending in U.S. District Court, the claimant, represented on appeal by Kate Callery of the Empire Justice Center, was approved on a subsequent application in which he had alleged an onset dated the day after the previously ALJ denial. After some digging, Kate learned that the new application had been approved under Listing 12.05C for mental retardation, which had not been part of the prior claim. Kate moved for remand of the original claim for consideration of the new and material evidence of retardation associated with the new claim.

In remanding the claim, Judge Telesca noted:

> [T]he Court observes that the plaintiff, who was found disabled as of May 13, 2005, because of mental retardation, likely did not become mentally disabled during the night of May 12, 2005 – the date on which the ALJ found he was not disabled in his first application for benefits.

The Court went on to note that essentially the same medical evidence supporting the Commissioner's favorable decision existed prior to the new alleged "onset" date. Ellen is looking forward to quoting this language to the ALJ at the remand hearing! Judge Telesca's decision in *Erway v. Barnhart* is available as DAP #502..

Which WISC?

The various tests used for measuring intelligence are periodically updated and renormed - or made harder - in part to compensate for the so-called "Flynn effect." Named after James R. Flynn, the effect assumes an average rise in intelligence over generations. *See* http://www.apa.org/releases/flynneffect2.html.

Hence, we have the WISC-R (1974), WISC-III (1991) and now WISC-IV (2003). (WISC, by the way, stands for "Wechsler Intelligence Scale for Children," first developed in 1949.) Results from the various tests can differ - sometimes significantly. For more on the differences among the WISC tests, see the July 2005 edition of the *Disability Law News.*

Social Security has apparently not taken a position on which WISC is valid. On March 23, 2000, SSA issued a memorandum reminding adjudicators in the New York region that until the WISC-R is declared obsolete by an appropriate authority (either the publisher or the American Psychological Association), results will considered valid. When SSA orders tests, however, the WISC-III is preferred. It is unclear whether SSA has updated that position since the advent of the WISC-IV. In any event, SSA's 2000 memorandum is now available as DAP #503.

Note that there is a Spanish version of the WISC. EIWN-R PR (Escala de Inteligencia de Wechsler para Niños – Revisada de Puerto Rico) was published in 1993 and is the Spanish adaptation of the WISC-R (Wechsler Intelligence Scale for Children - Revised), meaning it retains the basic structure and content of the English version. It is designed for children between six and sixteen, and is based on a normative sample of 2,200 Puerto Rican children.

Please keep us informed if you have any updated information on SSA's acceptance of these various WISC scales.

Eight Years, Another Remand

A recent posting on the Western New York Law Center's website entitled "*Federal Court Statistics, or: How Numbers Can Drive You Mad"* links to an enormous report on numerous details of the federal judiciary, including age of pending cases (http://www.law.com/jsp/article.jsp?id=1202424181868). What the report tells us is that cases at the Federal Court level are taking too long to be decided. What the report does not tell is the human story of a 12 year old child waiting eight years for the Social Security Administration and the court to make a decision. And this is actually a story with the potential for a happy, though protracted, ending!

In a July 2008 decision in *Burden o/b/o AA v. Commissioner* (5:05-CV-846**)**, Senior Judge Frederick Scullin of the Northern District of New York reversed and remanded the Commissioner's decision denying benefits to a 12 year old child for further consideration of whether her impairments met or equaled the requirements of Listings 112.05(D) and/or 112.05(E).

Plaintiff filed an application for disability on behalf of her daughter (AA) in 2000. The application was denied initially and then again by an ALJ. Upon remand from the Appeals Council, the ALJ again found AA was not disabled.

AA was diagnosed with developmental delays from an early age. When she reached school age, she was classified as a speech-impaired student and was placed in special education. She repeated kindergarten, was given early intervention services and diagnosed with a learning disorder (NOS) and mild mental retardation.

AA took two IQ tests, one when she was four years old and one when she was seven years old. As of the date of the ALJ's decision, the first IQ scores were invalid because more than one year had elapsed since the time of testing. IQ scores obtained before age seven are current for one year if the IQ score is 40 or above. *See* Subpart P, Appendix 1, §112.00(D)(10). The IQ test scores AA took when she was seven years old, however, were current and valid as of the date of the ALJ's decision. IQ scores obtained between ages seven and sixteen are valid for two years from the date of testing when the IQ score is 40 or above. *Id*.

According to Judge Scullin, "the ALJ considered both IQ scores but failed to proceed to a proper analysis of whether the May 2003 IQ scores would combine with other impairments to result in AA meeting or equaling a listed impairment. Instead, he stated that the 'discrepancy' between the August 2000 and May 2003 scores indicated that 'neither . . . can be accepted as indicative of academic success' and prematurely proceeded to a discussion of functional equivalency. The ALJ's analysis of AA's IQ test scores failed to take into account their validity under the regulations and ignored the May 2003 scores' implications for whether AA met or equaled a listed impairment."

In May 2003, AA scored a verbal IQ of 71, a performance IQ of 68, and a full scale IQ of 67, which put her performance and full scale IQ scores within the range encompassed by two listed impairments under 112.05(D) and 112.05(E). Judge Scullin remanded for "the ALJ to consider AA's valid May 2003 IQ scores properly and to collect such additional evidence as necessary to determine whether AA met the additional requirements of Sections 112.05(D) or (E)."

Judge Scullin also remanded for a proper evaluation of credibility pursuant to 20 C.F.R. §416.929.

This is a very good decision by Judge Scullin. We hope the remand will conclude quickly and result in payment of benefits to this patient and deserving child. The decision in *Burden o/b/o AA v. Commissioner* is available as DAP #504.

Whose House Is It?

Considering the hours of training, studying and practicing that most Social Security advocates undergo to present cases administratively before the agency and then at a higher level in federal court, it is always a little awe inspiring when a *pro se* claimant is able to take it to the Commissioner!

Take, for example, the case of *Tavera v. Commissioner* (07 Civ. 3660) recently decided by District Judge Denise Cote in the Southern District of New York. The plaintiff, Juan Tavera, had earlier filed for SSI benefits, appealed an unfavorable decision to the District Court and won a remand. At the remand hearing, he prevailed on his disability claim, but was denied SSI because he owned a house in the Dominican Republic valued at 125,000 pesos, a little more than $4,300. The resource level for SSI recipients is $2,000.

Mr. Tavera attempted to explain to SSA that the property belonged to his mother, not him, but that he could not produce ownership papers because none existed. Mr. Tavera explained his case to an ALJ, who decided against him. Once again he proceeded to federal court *pro se*. After two extensions of time to file his brief, the Commissioner of SSA finally asked the District Court to remand Mr. Tavera's case back to the agency to determine who actually owned the house.

The Commissioner also conceded to the Court that, particularly with a *pro se* claimant, the ALJ should have offered to assist Mr. Tavera in developing his record and should have advised him of seeking help from other family members. According to Judge Cote, the ALJ had a duty to probe into, inquire of, and explore the relevant facts of Tavera's case but failed to do so, citing the 1990 Second Circuit decision in *Cruz v. Sullivan*, 912 F.2d 8 (2d Cir 1990).

The Court granted the Commissioner's motion for remand for the agency to assist him in developing the record as to the true ownership of the property in question. As the Court noted, if Mr. Tavera is again dissatisfied with SSA's decision, he knows his way to the courthouse!

A copy of the decision in *Tavera v. Commissioner* is available as DAP #505.

ADMINISTRATIVE DECISIONS

Appeals Council Finds Functional Equivalency

Sometimes the Appeals Council does the right thing! Katie Courtney, of the Rochester office of the Empire Justice Center, argued forcefully to the Appeals Council that the ALJ had erred in failing to find that her minor client had marked impairments in two domains, and thus functionally equaled a listing - and the Appeal Council agreed!

Although the ALJ had found that Katie's client had a marked impairment in the domain of acquiring and using information, he had ignored substantial evidence of a similar impairment in the domain of interacting and relating to others. As Katie pointed out to the Appeals Council, the ALJ had implied that the domain of interacting and relating with others is limited to behavior problems; he focused heavily on evidence that the child was well-behaved and quiet, and had loving family relationships.

The regulations at 20 CFR §416.926a(i)(2), however, state that this domain involves much more than behavior problems. It also includes difficulty communicating with others and speaking intelligibly or with adequate fluency. See 20 CFR §416.926a(i)(3); see also 20 CFR §416.926a(i)(2)(iii) (a preschooler should be able to initiate and participate in conversations, speaking clearly enough that both familiar and unfamiliar listeners can understand what he says most of the time).

Katie cited evidence revealing that her client had marked limitations in communication skills, including evidence from his teacher that 75-85% of his speech was unintelligible. A formal assessment of his intelligibility judged it to be at 60% in a known context. [Although not as helpful in this case, note that SSR 98-1p provides guidance for rating degrees of intelligibility as marked or extreme.]

Katie's arguments obviously caught the attention of the Appeals Council. The claim was referred to a medical consultant who agreed that the severity of the claimant's speech and language delay functionally equals the childhood disability criteria. The Appeals Council accepted review and issued a fully favorable decision, finding the child disabled as of the date of his application in 2005. Way to go, Katie!

Excuse Me, I have the Hiccups...

But am I disabled? Maybe, according to a recent victory secured by Greg Phillips of Segar & Sciortino in Rochester. Greg convinced the ALJ that his 59 year old client was disabled due to the difficulties he had with frequent hiccups, belching, and air swallowing, which were thought to be secondary to gastroesophageal reflux.

The claimant's treating physician had opined that the claimant's hiccups were totally incapacitating. He completed a residual functional capacity (RFC) evaluation indicating that the claimant was limited to less than sedentary work. He emphasized that the claimant was unable to perform any activities for a long time, and that it would be unsafe for him to work.

In fact, the ALJ found that the claimant's ability to perform sedentary or light work was severely compromised by his hiccups. He observed that the claimant was frail and had difficulty breathing. The claimant also reported experiencing extreme fatigue, since the hiccups interrupted his sleep. The ALJ agreed that the claimant could not return to his past work as a crane and fork lift operator. He found that the claimant was unable to perform the full range of work at any exertional level, in addition to finding him disabled under the Medical-Vocational Guidelines.

Congratulations to Greg for wining what is probably a one of a kind case!

Advocate Overcomes Client's Jail Record

Doris Cortes, Senior Paralegal with the Rochester office of the Empire Justice Center, represented a claimant with a long history of bipolar and schizoaffective disorders, as well as borderline intelligence. In fact, he had been found disabled and eligible for SSI back in 1993, but his benefits had been suspended in November 2003 and ultimately ceased in November 2004 due to his incarceration. [See 20 C.F.R. §416.1335, which provides for suspension of benefits following 12 consecutive months of suspension; and 20 C.F.R. §416.1325, which provides for suspension of benefits due to status as a resident of a "public institution" - a euphemism for jail!]

The client, who had reapplied for SSI in 2004, had been in and out of jail at least three times since 2003. Despite ample evidence of severe mental impairments, the ALJ indicated to Doris that the fact that the claimant had been sent to jail weighed against his having serious mental illness! Doris wasted no time in following up with the ALJ on this point, citing data from the Bazelon Center on the number of individuals with mental illness in the criminal justice system who had extensive experience in both the criminal justice and mental health systems, and suffer from severe mental disorders and poor functioning. See http://www.bazelon.org/issues/criminalization/factsheets/criminal3.html.

The ALJ obviously saw the light, as he ultimately agreed that the claimant was disabled. In fact, not only did he find the claimant disabled for SSI purposes as of the date of his application in 2004. He also applied collateral estoppel to find the claimant eligible for Title II benefits! The ALJ acknowledged that the case had been identified as a Special Disability Workload (SDW) case, meaning that the claimant had been awarded SSI benefits and later became eligible for Title II benefits, but continued to be paid only under Title XVI (SSI). It had been flagged and reviewed (or "mapped") by the "SDW cadre."

The SDW cadre had discovered that the claimant had had minimal work activity in 1996 and 1997, which was not considered substantial gainful activity (SGA) for entitlement purposes, but was sufficient to give him insured status for Title II purposes. The ALJ thus found that the claimant was entitled to Title II benefits from April 1996 and continuing. While, as discussed above, his SSI benefits had been suspended and then terminated when he was incarcerated, Title II benefits are subject to suspension during a period of incarceration, but are not terminated. 20 C.F.R. §404.468.

Doris's client will now be eligible for monthly SSI and SSD benefits. He will also receive SSI retroactive to 2004, as well as Title II benefits retroactive to 1996, taking into the account the nonpayment provisions for those months during which he was incarcerated.

Kudos to Doris for a job more than well done!

ALJ Discovers Cure for Mental Retardation?

Sometimes truth is stranger than fiction. In that department, Doris Cortes of the Empire Justice Center shares with us a quote from an otherwise favorable ALJ decision:

> Moreover, the undersigned recommends that this claim be reviewed in 24 months due to the possibility of medical improvement related to the ability to work since his depressive disorder with some anxiety causes his mental retardation and the same could abate with consistent treatment, use of medication and care.

Has anyone come across this new medication in the *Physicians' Desk Reference* yet?

Old Evidence File Saves the Day

The past is prologue, as they say. And all too often, the past histories of our clients' claims are difficult to access. Bruce Caulfield of Neighborhood Legal Services in Buffalo reminds of us, however, of how invaluable they can be.

Bruce's client had been approved for benefits following an ALJ hearing in 1998. She had even survived a CDR (Continuing Disability Review) in 2002. She ultimately lost her benefits when she married: her husband's income made her financially ineligible for SSI. She sought Bruce's able assistance when she reapplied after separating from her husband. Despite no improvement in her condition since the time of her original approval, her claim had been denied on medical grounds.

While Bruce had contemporaneous evidence of his client's current condition, he wisely recognized the value of reminding the ALJ that the client had previously been approved for the same condition. Easier said than done, however. ODAR and OTDA repeatedly maintained that the 1998 and 2003 files had been destroyed. Bruce persisted, however. With the intervention of the Regional Office in NYC, the files were located at the suburban Buffalo District Offices.

Bruce went on to persuade a Senior Attorney at ODAR to issue a fully favorable decision on the record. Bruce is certain that this outcome would not have been as likely without the records from the prior files.

As an interesting aside, the Senior Attorney, in his decision, found the residual functional capacity (RFC) assessment rendered by an SSA consultative examiner (CE) to be "so vague as to render it useless." The decision writer quoted *Curry v. Apfel*, 209 F.3d 117 (2d Cir. 2000): "Consulting physician's residual functional capacity evaluation, using terms such as 'moderate' lifting and carrying limitation as well as 'mild' standing and walking limitation, was 'so vague as to render it useless' in evaluating whether a claimant could perform work at any given evectional level."

Yet another example of Buffalo Bruce's tenacious advocacy skills!

ALJ Agrees that DA&A Not Material

Proving that DA&A (drug abuse and alcoholism) is not material to a claim for disability is often a daunting task even when the claimant is currently sober. Add to the equation the fact that the claimant has been unable to maintain any significant periods of sobriety, and the task can become more than daunting. But that didn't stop Ellen Rita Heidrick of the Bath office of Southern Tier Legal Services of LAWNY.

Ellen managed to persuade the ALJ that even though her client was actively abusing alcohol, he was nonetheless disabled by virtue of his mental limitations. She secured a statement from his treating psychiatrist acknowledging that he could not separate the claimant's mental limitations from his alcohol abuse. Ellen then cited SSA's Emergency Teletype (EM 96-94), Question #29, dated August 30, 1996, which reminds adjudicators that where it is impossible to project what limitations would remain if the individual stopped using alcohol or drugs, a finding of disabled should be made.

SSA's Teletype, now known as EM-962000, is available as DAP #428. It has been cited in several District Court decisions. *See, e.g., Ostrowski v. Barnhart*, 2003 WL 22439584 (D.Conn. 2003); *William v. Apfel*, 2000 WL 1466099 (W.D. Wash. 2000). The "official" version can be found at https://s044a90.ssa.gov/apps10/. For more on DA&A materiality, see the January 2008 edition of the *Disability Law News.*

The ALJ was obviously convinced, since he issued a six page favorable decision finding the claimant disabled as of the date of his application. He concurred that the claimant's alcohol dependence was not material to the finding of disability "as his depression exists despite sobriety." Well done, Ellen, for - once again - pushing that envelope

Appointment of Representative Form Updated

Representing claimants can be hard work - and not just the part about going to the hearings with them. As advocates well know, lots of time and energy is often expended simply trying to secure the evidence file before even undertaking representation.

SSA's Form 1696 - or the Appointment of Representation - is usually the key to getting any information out of SSA. Many advocates, however, prefer to review the Exhibit File before actually committing to representation, and are thus hesitant to submit a 1696 early in the process. That is where the Form 3288 (Consent for Release of Information) comes in, allowing to review the file without committing to represent. (Both forms are available at http://www.ssa.gov/online/forms.html.)

Form 3288 (5-2007) is SSA's preferred method for general consent for disclosure. It does, however, expire 90 days from date of signature. POMS GN 03305.001 B.5.a. Most of the time, the 3288s are used for one-time disclosures. Apparently, in April 2007, Region II made it mandatory that a 3288, or its equivalent under POMS GN 03305.001 B.2, be on file to allow the staff or associates of claimant representatives to communicate with any SSA employees. At the same time, advocates were encountering problems with some DO and ODAR personnel, who were insisting that an individual representative, rather than an office or program, be listed on the 1696 form. They were refusing to honor the form when someone else from the advocate's office or program contacted them on behalf of the claimant, on either matters of substance or simply to copy the file.

SSA has now issued a new 1696 that solves this problem. The revised 1696 (Form SSA-1696-U4 (05-2008)) permits the claimant to authorize the representative's firm or associates to deal with SSA as well as the named/appointed representative. The new 1696, however, does not alleviate the need to use the 3288 in those cases where the advocate has not yet decided to represent the claimant but simply needs to review/copy the file, or get some basic information from SSA.

Speaking of forms, SSA is encouraging advocates and claimants to file appeals on line. Some advocates, however, have had trouble filling in forms such as the Request for Reconsideration (SSA-561-U2 (9-2007)). The ever industrious Gene Doyle has created a fill-in version using the fully functional Adobe Acrobat program [rather than the free Adobe Reader problem]. Gene's version is available as DAP #506.

For More on SSA's proposed regulations on recognizing others as representatives and electronic filing, see the Regulations section *supra*.

SSI Benefit Levels Published

Thanks to Jim Murphy of the Cortland office of Legal Services of Central New York, you now have a hand guide to all the SSI benefit levels since 1976! Jim has compiled all those old payment level charts that have been floating around various file cabinets and put them together in one accessible place. Jim's compendium is available as DAP #507.

WEB NEWS

Backup Files Online for Free

For people who are relying on laptops as their primary computer, the issue of backing up files has become more problematic. One way to resolve this issue is a program called "Mozy," which uses an internet connection to automatically back up files. Mozy works equally well on both Windows PCs and Apple Macs. The program is free for up to 2 gigabytes or less. More storage is also available for a monthly fee.
http://mozy.com

Courtroom Technology Debuts

The United Sates District Court for the Northern District of New York is offering eight electronic courtrooms to present evidence in the most efficient way. These enhancements of the litigation process have enabled the District to meet both the needs of the bar as well as the public while preserving the integrity and dignity of the court proceedings. Albany and Syracuse each have three electronic courtrooms and Binghamton and Utica each have one electronic courtroom.
http://www.nynd.uscourts.gov/Courtroom_Technology.htm

Child Health Plus Guidelines Increase

A chart of the new Child Health Plus income guidelines that become effective September 1st – (income ceiling will be 400% FPL rather than 250% FPL) is available at:
http://www.health.state.ny.us/nysdoh/chplus/who_is_eligible.htm

Foreclosure Counseling Listing

Not-for-profit organizations that have received some type of public funding to provide foreclosure prevention services are listed by county at the Department of Housing and Community Renewal (DHCR) website. New York homeowners at risk of foreclosure can contact an organization in their area to seek assistance. DHCR is working to add new agencies to the list - so if you don't see one in your areas so please check back soon.
http://www.dhcr.state.ny.us/Programs/ForeclosurePrevention/CounselListing.htm

NYSBA Funds Student Loan Assistance

The New York State Bar Association (NYSBA) recognizes that new lawyers may be discouraged from pursuing careers in public service due to student loan debt. To encourage lawyers to pursue careers in public service, the Association's Student Loan Assistance for the Public Interest program will provide two new grants of up to $4,000 to help repay law school debt for public service attorneys.
www.nysba.org/slapi

CLASS ACTIONS

Martinez v. Secretary, No. 82-4816, (E.D.N.Y.)
("the Title II delay case")

Description - Certified class challenged delays in the hearing process in claims for Title II disability benefits.

Relief - SSA is required to send notice to Title II claimants with the acknowledgment of the request for hearing stating that claimants have a right to a decision in a reasonable time. Claimants are entitled to bring separate federal mandamus actions where delay is unreasonable.

Citation - Unpublished order dated April 24, 1986.

Information - Toby Golick, Bet Tzedek Legal Services, Cardozo School of Law (212-790-0240).

Sharpe v. Sullivan, No. 79-1977 (E.D.N.Y.)
("the SSI delay case")

Description - Certified plaintiff class challenged delays in holding administrative hearings, issuance of hearing decisions, and issuance of payments, on SSI claims. In 1980 Judge Haight entered order placing time limits on each step, and requiring SSA to pay interim benefits when time limits were exceeded. In 1985 Judge Haight vacated these time limits in light of *Heckler v. Day*, U.S. 104 (1984), and in 1990 entered a new order, below.

Relief - 1990 orders require (1) SSI disability cases: (a) OHA must issue notices explaining delay and right to sue after 120 days from hearing request, and (b) SSA must pay interim benefits if regular benefits have not been paid within 60 days of favorable hearing decision (with certain exceptions, e.g. non-cooperation); (2) SSI nondisability cases: SSA must pay interim benefits within 60 days of favorable hearing decision, or within 60 days of favorable hearing decision, or within 90 days from hearing request.

Citations - *Sharpe v. Secretary*, No. 79-19777 (S.D.N.Y. July 10, 1980) (unpublished order), aff'd 621 F.2d 530 (2d Cir. 1980), vacated No. 79-1977 (S.D.N.Y. 1985) (unpublished), revised, No. 79-1977 (S.D.N.Y. March 6, 1990) (unpublished).

Information - Johnson Tyler, South Brooklyn Legal Services (718-237-5500).

Greenawalt v. Apfel, 99-CV-2481 (E.D.N.Y. 1999)
("personal conference in SSI waiver case")

Description - Plaintiffs challenged SSA's practice of denying requests for waivers of overpayments in SSI cases without giving a claimant an opportunity for a personal conference.

Relief - The settlement in *Greenawalt* extended the personal conference procedure applied to SSI claimants residing in Pennsylvania [*see, Page v. Schweiker*, 571 F. Supp. 872 (E.D. Pa. 1983)] to all SSI claimants nationwide. As a result of the settlement in the case, SSA agreed to stop denying SSI overpayment waiver requests until claimants are given a personal conference.

Citations - None

Information - Peter Vollmer, Vollmer & Tanck, (516) 228-3381; Pvollmer96@aol.com.

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.

Medicaid Can Continue When SSI is Terminated

The state/local duty to determine continued Medicaid eligibility when a change of circumstances occurs, such as termination of SSI benefits, is found in the federal Medicaid regulations at 42 C.F.R. §435.930 (b) ["The agency must . . . (b) Continue to furnish Medicaid regularly to all eligible individuals until they are found to be ineligible"].

There are an excellent pair of class actions that protect New Yorkers' continued Medicaid coverage when cash assistance is terminated:

1. *Stenson v Blum*, 476 F.Supp. 1331 (S.D.N.Y. 1979), *affd.* 628 F.2d 1345 (2d Cir. 1980), *cert denied sub nom. Blum v Stenson*, 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980) requires an *ex parte* redetermination of continued Medicaid eligibility when SSI benefits are terminated [or suspended]. *See* 80 ADM-19 and 80 ADM-84, available at http://onlineresources.wnylc.net/pb/showfaq.asp?fldAuto=44.

2. *Rosenberg v The City of New York*, 80 Civ. 6198, Partial Final Judgment and Stipulation of Consent to Partial Final Judgment (S.D.N.Y. December 10, 1981) requires a separate determination of initial or continued Medicaid eligibility when Public Assistance is denied or discontinued. *See* 82 ADM-5 available at: http://www.wnylc.net/pb/docs/82ADM5.pdf.

Both of these cases have been incorporated into state Medicaid regulations. *See* 18 NYCRR §360-2.6(b) ["If a recipient's ADC, HR, SSI, or Title IV-E case is discontinued, MA will be continued until the social services district determines the recipient to be ineligible for MA. The district must determine the recipient's continuing eligibility no later than the end of the calendar month following the month in which the recipient was determined ineligible for ADC, HR, SSI, or Title IV-E"]. *See also* 18 NYCRR §360-2.2(a)(2) ["Persons determined to be ineligible for ADC or HR will have their MA eligibility determined separately, unless they have stated in writing that they do not want their MA eligibility determined."]

The federal Medicaid agency, the Centers for Medicare & Medicaid Services (CMS) [previously known as Health Care Financing Administration (HCFA)] of the U.S. Department of Health and Human Services (HHS) has issued a very strong, comprehensive policy statement in a guide called *Continuing the Progress: Enrolling and Retaining Low-Income Families and Children in Health Care Coverage*, available at: http://onlineresources.wnylc.net/healthcare/docs/Continuing_the_Progress.pdf, which provides, in pertinent part:

Exhaust All Possible Avenues of Coverage. Similar to the rules relating to initial eligibility determinations, States may not terminate Medicaid eligibility unless they have affirmatively explored and exhausted all possible avenues to Medicaid eligibility. States may not determine eligibility for some categories and require families to reapply in order to determine eligibility for other categories.

States must have processes in place that explore and exhaust all possible avenues of eligibility. These processes must first consider whether the family or individual continues to be eligible under the current category of eligibility and, if not, explore eligibility under other possible categories.

The extent to which and the manner in which a State must explore other possible categories will depend on the circumstances of the case and the information available to the State. For example, if the State has information in its Medicaid files (or other available program files) suggesting an individual is no longer eligible under the poverty-level category but potentially may be eligible on some other basis (e.g., on the basis of disability or pregnancy), the State must consider eligibility under that category on an *ex parte* basis without requiring the family to reapply.

If the *ex parte* review (i.e., a review based on information available to the State) does not establish eligibility under any category, the State must provide the family or individual a reasonable opportunity to provide information to establish the potential bases for ongoing Medicaid eligibility, including disability or pregnancy. A State does not have to maintain coverage unless the individual has provided some reasonable indication that he or she may be eligible under

(Continued on page 21)

(Continued from page 20)
some other basis. *Id* at pp. 18-19.

For those who are interested, there is a similar statement of policy with respect to the denial of a Medicaid application:

Exhaustion of All Avenues of Eligibility. States may not deny a completed Medicaid application (or terminate coverage) unless it has affirmatively explored and exhausted all possible eligibility categories. Therefore, States must have effective processes in place to consider all possible avenues of coverage. The extent to which and the manner in which a State must explore other possible categories will depend on the circumstances of the case, the information contained in the application, and the availability of other supporting documentation.

For example, if the application is for a family and the State determines the family does not qualify under the family coverage category (Section 1931), it must consider coverage for the children in the family under the poverty-level group or other children's eligibility groups. If the children and the parents do not meet coverage requirements for categorically needy family and children's groups, and the State has a medically needy program, the agency would need to consider medically needy coverage for the child and the parents. If the application or any other available information indicates a member of the family is disabled, Medicaid eligibility under the disability category must be considered. However, if there is no indication of a disability (and the applicant has been advised that he or she might qualify for Medicaid on the basis of disability), no further exploration of eligibility under the disability category need be done. *Id.*, at p. 10.

DAP advocates should note that State Medicaid regulations at 18 NYCRR §360-2.2(b)(2) require that "Persons determined to be ineligible for SSI must make a separate application if they wish to have MA eligibility determined, assuming they have not already done so." This seems to violate federal Medicaid policy but has yet to be the subject of litigation in New York State.

SSI applications state that "I am/We are applying for Supplemental Security Income and any federally administered State supplementation under title XVI of the Social Security Act, for benefits under the other programs administered by the Social Security Administration, and *where applicable, for medical assistance under title XIX of the Social Security Act*" (emphasis supplied). Since New York is a so-called "1634" State [*see* 42 U.S.C. §1383c], an SSI application is also regarded as a Medicaid application. If an SSI application is denied, there is a compelling argument to be made that New York State [or its local social services districts] must make a separate determination of the SSI applicant's Medicaid eligibility [without the need of filing a new, separate Medicaid application].

Thank you to Gene Doyle, admirable and amazing advocate from POOR, for this analysis of a question recently posted to the DAP list serve.

SSAB Recommends Changes to the SSI Program

The Social Security Advisory Board (SSAB), a seven -member bipartisan Board created by Congress to advise the President, the Congress, and the Commissioner on matters relating to the Social Security and Supplemental Security Income (SSI) programs, has recommended that Congress re-examine the SSI program - now more than 35 years old. The SSBA has begun its own review of several aspects of the program. In May, it released Issue Brief #4, in which it considers three aspects of the program that need "a fresh look as part of a comprehensive legislative review":

- Benefit levels in household with one than one SSI beneficiary
- Benefit levels for disabled beneficiaries; and
- Asset limits and excluded amounts of income

The Board concluded that while it agrees with Congress's initial premise that two can live more economically than one, SSI's "couple's rate" gives beneficiaries an incentive not to marry and gives married couples an incentive to dissolve their marriages. It recommends "equivalence scales" - to be applied to households of all sizes and compositions.

The SSAB also raised the issue of the additional household costs associated with the disability of a beneficiary. Recognizing that setting rates that vary based on disability would make a complicated program more complicated, it suggests that further research is needed to set appropriate benefits rates.

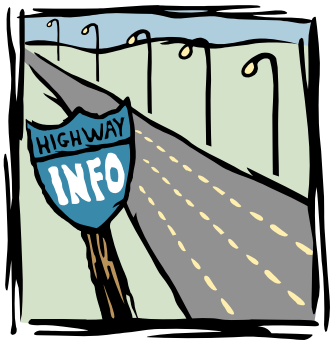
Finally, the SSAB addressed the question of "frozen income and resource limits." The Board questioned whether Congress's original goal of ensuring minimum income for eligible beneficiaries is still being met in light of the fact that the $20 general and $65 earned income exclusions have not been increased in 35 years. If they had been indexed to reflect increases in wages using the Average Wage Index, they would now be about $105 and $342, respectively. Similarly, the asset limit of $2,000 for an individual and $3,000 for a couple has not been increased since 1989. Adjusted for inflation, those figures would now be $3,500 for an individual and $5,250 for a couple.

The SSAB's Issue Brief #4 is available at http://www.ssab.gov/documents/SSI.pdf.

Partnership Conference Task Force Meeting Agenda

We hope that many of you will be joining us at the Statewide DAP Task Force meeting, which will kick off the Partnership Conference in Albany from September 22-24, 2008. The meeting will focus on technology issues advocates are facing in SSA's new electronic era. The agenda, which is attached at the end of the newsletter, will include:

- New Electronic Initiatives at ODAR
- Using eDib Files with Adobe
- Using FIT (Findings Integrated Template) to "Write" ALJ Decisions
- Empire Justice Center's New Brief Bank
- What Hardware and Software Do We Need in Our Offices?



See you at Partnership Conference!

END NOTE

Blame it on Dear Old Dad?

A recent study by Swedish researchers suggests that there is a genetic link between the age of a father and bipolar and other disorders among children. According to the study, which was published in the September issue of *Archives of General Psychiatry,* the older the father, the greater his child's risk for bipolar disorder. Previous studies have apparently linked paternal age to increased risk of schizophrenia and autism.

Emma M. Frans, of the Karolinska Institute in Stockholm, and colleagues concluded that "[a]fter controlling for parity (number of children), maternal age, socioeconomic status and family history of psychotic disorders, the offspring of men 55 years and older are 1.37 times more likely to be diagnosed as having bipolar disorder than the offspring of men aged 20 to 24 years." The risks started increasing around age 40 but were strongest among those 55 and older. Children born to these dads were 37 percent more likely to develop bipolar disorder than those born to men in their 20s.

While the personality of older fathers had previously been suggested as an explanation for the association between mental disorders and advancing paternal age, the study indicates that genetic influences are considerable: "As men age, successive germ cell replications occur, and de novo (new, not passed from parent to offspring) mutations accumulate monotonously as a result of DNA copy errors." Similar copy errors do not increase with maternal age. Although children of older mothers also had increased risk, the risk is less pronounced than that with older fathers. In fact, the mother's age had no effect in cases of early onset bipolar disorder (diagnosed before age 20). The chances of a child with early onset bipolar disorder with an older father, however, more than doubled.

Researchers analyzed Swedish national registry data from more than 80,000 people, including 13,428 with bipolar disorder who were born between 1932 and 1991.

Australian psychiatrist Gordon Parker of the Black Dog Institute speculates that this finding might help explain the rise in the number of bipolar case. He reminds readers, however, that the risk of such a diagnosis is still slight, and that the study shouldn't necessarily deter older men from considering fatherhood.

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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@lsny.org

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

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STATE-WIDE DAP TASK FORCE MEETING

Sponsored by the Empire Justice Center

Monday, September 22, 2008 1:30. – 4:00 p.m.
Partnership Conference
Albany Marriott
Albany, NY

AGENDA

1:30 p.m. to 1:45 p.m. - Welcome and Introductions

1:45 p.m. to 2:45 p.m. – New Electronic Initiatives at ODAR; Q&As on eDib
Presented by: Kathy Nadoraski, Hearing Office Director, ODAR, Albany
Moderated by: Kate Callery, Louise Tarantino & Ann Biddle

2:45 p.m. to 3:15 p.m. – Using eDib Files With Adobe
Presented by: Jim Murphy, Legal Services of Central NY

3:15 p.m. to 3:30 p.m. – Using FIT (Findings Integrated Template) to "Write" ALJ Decisions
Presented by: Katie Courtney, Empire Justice Center, Rochester

3:30 p.m. - 3:45 p.m. – Empire Justice Center's New Brief Bank
Presented by: Nancy Krupski, Louse Tarantino & Kate Callery

3:45 p.m. – 4:00 p.m. – What Hardware and Software Do We Need in Our Offices?
Presented by: Nancy Krupski & Tom Karkau
Moderated by: Louise Tarantino & Kate Callery