Empire Justice Center

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SSI/PA Budgeting Regulations Declared Illegal

By Susan Antos

In a one two punch, two New York Courts struck down two different regulations which attempted to destroy the concept of SSI invisibility in public assistance households with children.

***Doe v. Doar*, Monroe County Supreme Court**

The most far reaching decision is *Doe v. Doar*, which was certified as a statewide class action by Justice David D. Egan of the Monroe County Supreme Court on July 14, 2005. In a ruling on plaintiffs' motion for summary judgment, Justice Egan struck down 18 NYCRR §352.2(b), the regulation which reduced the public assistance grants of households with children that also contain SSI recipients, holding that 18 NYCRR §352.32(b) violated Social Services Law 131-c, as well as the standards of need set forth in Social Services Law §§131-a and 209.

The Office of Temporary and Disability Assistance (OTDA) had adopted the rule that was struck down in *Doe* on July 7, 2004. In his decision, Justice Egan noted the strong public comment opposing the regulation, specifically referencing that 57 out of 61 comments were in opposition to the regulation.

Noting that 26,700 house holds with children receiving public assistance in the state of New York were affected by this budgeting change, the Court certified a class consisting of all families with children residing in the same filing unit consisting of at least one individual who receives or will receive Supplemental Security Income and at least one individual who receives, has applied for, or will apply for benefits under the Family Assistance and/or Safety Net Assistance Programs in the State of New York.

The Office of Temporary and Disability Assistance was ordered to develop a remedial plan with plaintiffs' stipulated consent, restoring benefits to all class members at the pre-July, 2004 levels, and compensating all eligible class members retroactively for the loss of benefits sustained from 2004 to the present.

OTDA has appealed Justice Egan's decision. Plaintiffs' counsel will shortly be filing a motion arguing that no automatic stay should apply in this case. Please watch the public assistance list serve (hosted by wnylc.com) for updates.

Should the Fourth Department hold that a stay is not appropriate in this case, the remedial plan will go into effect. Plaintiffs' counsel has requested that the remedial plan include an expedited process for relief to class members identified by

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Rent Increase Exemption Program Includes Disabled

The Fair Housing Coalition for People with Disabilities led by Coalition for the Homeless, Tenants & Neighbors, and the Center for Independence of the Disabled, New York (CIDNY) has fought for years to win the inclusion of people living with disabilities in the Senior Citizens' Rent Increase Exemption program (SCRIE). After months of negotiations with New York City officials, an amended version of the legislation won final and unanimous passage by the NYS Legislature. The law, when signed by Governor George Pataki, and implemented by Mayor Michael Bloomberg, will enable up to 20,000 households headed by people with disabilities living in regulated housing to claim an exemption from rent increases when their rents rise above 30 percent of income. Landlords will receive tax abatements in the amount of the foregone rent. Fourteen other localities in New York State may, at their option, grant this benefit to disabled tenants as well.

The groups newly eligible for the program include households receiving SSI, SSD, veterans' pensions or compensation, or enrolled in the Medicaid Buy-In Program so that a disabled individual who leaves SSI for employment won't lose the rent increase exemption. While pleased that a 25-year fight to win this benefit has been won, the Coalition fought hard to ensure that people with disabilities won the SAME benefits as are granted senior citizens, and is disappointed that the City of New York did not agree to an income cap equal to that which is authorized under current law for senior citizens. It has vowed to return to Albany next year to win equal benefits for people with disabilities. The New State legislation sets an income ceiling for people with disabilities that is as much as $7,000 lower than it is for senior citizens.

Doe v. Doar—continued

(Continued from page 1)

plaintiffs counsel. This is because OTDA estimates that it will take at least six months for them to identify and process some class members. In order for us to obtain this relief, we are requesting that the names, addresses, public assistance case numbers and Fair Hearing numbers (if there is one) of all affected class members be forwarded to Susan Antos at santos@empirejustice.org.

Counsel for the plaintiff class include Bryan Hetherington and Susan Antos of the Empire Justice Center, the Welfare Law Center, the New York Legal Assistance Group and the Legal Aid Society (NYC).

***Melendez** v. **Wing**,*
Appellate Division, First Department

Just one month before *Doe* was decided, the Appellate Division, First Department struck down 18 NYCRR §397.11, which had required the inclusion of SSI benefits in the calculation of eligibility and degree of need for families applying for and receiving emergency shelter allowances because of AIDS/HIV related illnesses. In a decision which guided the Court in *Doe*, the First Department's unanimous decision in *Melendez* v. *Wing*___A.D.2d___ 797 N.Y.S. 2d 54 (First Dep't 2005), held that the emergency shelter allowance was a form of public assistance and that Social Services Law §131-c unambiguously states that SSI benefits "should not be included as available income for purposes of calculating the amount of public assistance".

OTDA has made a motion requesting permission to appeal The *Melendez* decision to the Court of Appeals. The plaintiff in *Melendez* is represented by Jennifer Sinton and Armen Merjian of Housing Works.

The decisions and pleadings in *Doe v. Doar* and *Melendez v. Wing* are available on the Online Resource Center: http://www.wnylc.net/onlineresources/welcome.asp?index=welcome.

City and District Court Need to Expand Code Enforcement Powers

By Mike Hanley

Legislation expanding equity powers for city courts and district courts outside of New York City was signed into law on July 26 by Governor Pataki (Chapter 337 of the Laws of 2005). The new powers go into effect on January 1, 2006. The legislation had been introduced as S.3343 / A.7293. The expanded equity powers are limited to landlord/tenant and code enforcement actions or proceedings that are related to state or local laws regarding housing matters "including, but not limited to, the multiple dwelling law, the multiple residence law, and any applicable local housing maintenance codes, building codes and health codes."

As a sample of the considerable flexibility extended to the City Courts and District Courts by the new legislation, consider the following language added to Section 203 of the Uniform City Court Act: "Regardless of the relief originally sought by a party the court may recommend or employ any remedy, program, procedure or sanction authorized by law for the enforcement of housing standards, if it believes said remedy, program, procedure or sanction will be more effective to accomplish compliance or to protect and promote the public interest."

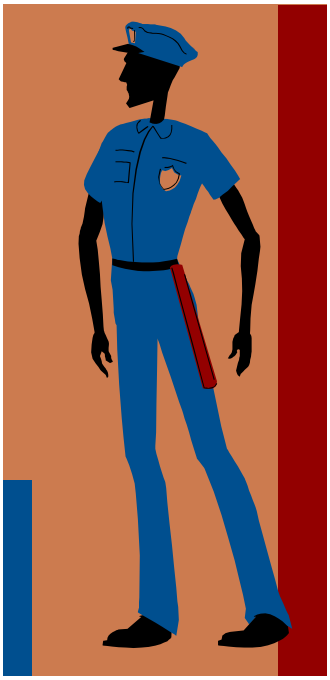
Specifically, the new law will give the City and District Courts equity powers and jurisdiction to:

- Impose and collect civil penalties regarding housing matters;
- Recover expenses incurred by a city in enforcing housing codes or with respect to removal of a nuisance or demolition of a building;
- Entertain actions or proceedings for injunctions or retraining orders to remove a hazard or nuisance;
- Entertain a "special proceeding" to obtain title to an abandoned building;

Entertain proceedings or requests for stays of eviction or rent abatement by a tenant in cases in which a defense is founded upon the existence of conditions dangerous to health or safety under Section 755 of the Real Property Law (or in certain jurisdictions, Article 7-A proceedings)

The new law is not likely to change the code enforcement landscape simply by its passage. Still, in communities where neighborhood associations or tenant rights groups are mobilized to work for change, it opens tremendous possibilities. If local officials and judges can be motivated to seriously address code enforcement issues, this legislation provides the tools. It may be possible for example to urgent cases, such as housing with lead-paint hazards, from routine processing to make sure that judges can order that repairs be made promptly and safely, and connect property owners to financial assistance programs that can make that happen.

This is not a law to let sit on the shelf.



The Executive Director's Corner

June 2005. We paused one last moment before announcing our new identity as Empire Justice Center. Two amazing organizations would see their names fade, morph and become something new. The mission of those organizations was re-affirmed, re-embraced. We pledged, Board and staff, to remain true to the visions set out for us by the incredible work and 30-year history of the Greater Upstate Law Project and, the more recent and no less powerful work of the Public Interest Law Office of Rochester.

As our chief counsel, Bryan Hetherington noted to staff that week, "We are saying farewell today to two names whose reputations have been built by the work of an extraordinary group of attorneys and other advocates. Some remain with us still and others have retired or moved on to new jobs - but all of whom shaped GULP or PILOR and were, in turn, shaped by us. It now falls to us to pour the meaning into our new name."

It was an exiting week, rolling out the new name, re-introducing ourselves to friends and colleagues after two years of intense planning and execution. It was also scary and bittersweet. I reached out to former GULP leaders, talking with Steve Brown, Ed Lopez, Ellen Yacknin - each a friend and mentor. We'd been keeping them posted along the way, but now the week had come, I needed their final blessing and thankfully was cheered along by each in their own way. We had worked through issues with staff at GULP and PILOR – and I knew we were OK when Mike Hanley gave his thumbs up, a sign that we were heading in the right direction.

We did not enter this lightly; we knew it was the right thing to do, but we wanted to make sure we did it the right way. We did extensive outreach; undertaking surveys and interviews with both random and targeted legal services directors and staff and with other advocacy groups at the national, state and local levels. We spoke with funders, reporters and state lawmakers. From those responses we tried to capture the "essence" of who we are and what we do. The input gave us an amazing matrix:

Top adjectives used to describe GULP/PILOR staff

Knowledgeable	Forceful	Dynamic
Credible	Broad-based	Accessible/ available
Passionate	Accurate	Multidimensional
Committed	Dependable	Responsive
Expert	Informative	Proactive
Statewide	Determined	Integrity
Aggressive	Resource-ful/helpful	Effective
Skilled	Supportive	Dedicated

We also came away with a re-enforced understanding of our place in the community:

- GULPILOR is a multi-issue, multi-strategy law office/legal organization
- Systems change is a key focus; it sets us apart
- We provide critical support/training to legal services and other groups that they can't get elsewhere
- We are all Mission driven and our focus is on broad issues of social and economic justice
- Our breadth of issues and expertise is what makes us unique

Capturing this and stating it simply and effectively in a new name would be a challenge.

We bit the bullet and decided to work with a professional marketing and communications agency, Roberts Sapher in Rochester. During that final six-month stretch we went over potential names – discarding some immediately and working to tweak others. We went back and forth, getting staff reactions and input. We settled on the name and Roberts Sapher went to work on a logo. Finally we were ready.

Letters went out to hundreds of supporters, our grant makers, contractors, state agencies and hundreds of other interested parties. We alerted friends and colleagues across the state and the nation. Blast e-

Executive Director—continued

mails alerted the many sublaw listservs we all participate in. With coverage in the daily papers and on the radio in Albany and Rochester and a half-hour show on WAMC's Capital Connection with Alan Chartock, we publicly unveiled the Empire Justice Center.

The universal response was amazingly positive.

"Of all the names changes I've seen in nonprofits, Empire Justice is the best," wrote one statewide advocate. From a state agency executive, came: "congratulations on the completion of your merger and the official formation of the Empire Justice Center. It sounds like a solid match and a lot of work." From a colleague in New York City: "Congratulations on this great merger of two powerhouse programs."

We felt embraced by our community as you recognized what an undertaking the merger has been - and that it is still a work in progress: "Congratulations…. I know that it was a lot of hard work for you, and I know that the work isn't over yet." And you wished us luck in the most important areas – the ability to keep it all going. As one community leader wrote, "I hope this marks a new era of increased funding opportunities for state support and unrestricted work!"

And of course, we all had some fun with it. Wrote one long-time colleague and advocate: "Now, perhaps, the empire can strike back...Good luck!"

And so, as we pause again, with this first issue of the LSJ under our new banner, we thank you all for your congratulations and well wishes. Know that we will do all we can to continue earning your respect, trust and support.

Empire Justice Center

Making the law work for all New Yorkers

Keeping Your Head During the Medicare Part D Rollout: Where We Are Now & What to Watch Out For

By Trilby de Jung

The Medicare Part D Prescription Drug Program, due to begin in just over four months, means a huge change in drug coverage for the approximately 560,000 New Yorkers who receive both Medicare and Medicaid benefits (dual eligibles). After January 1, 2006, Medicaid will no longer pay for most prescription drug costs, although Medicaid will continue to pay for other services. Dual eligibles will instead receive coverage for prescription drugs through Medicare, Part D. Dual elegibles that do not choose a prescription drug plan for themselves will be automatically enrolled in a plan effective January 1, 2006.

The Low Income Subsidy

Dual eligibles will also be automatically enrolled in the Low-Income Subsidy (LIS), also called "extra help" by the government. The LIS provides help in paying Part D's very high out of pocket costs, which include monthly premiums; the annual $250 deductible; co-payments, and; the famed doughnut hole (complete lack of coverage for prescription costs between $2,250 and $5,100 each year).

Another group of low-income Medicare beneficiaries who will automatically be enrolled in the LIS are those who do not receive full Medicaid, but instead participate in one of the Medicare Savings Programs (QMB, SLMB and QI-1). These programs provide help paying for Medicare Part B premiums, some deductibles and co-pays.

Other low-income Medicare recipients will have to apply for the LIS, or be subject to Part D's full out of pocket costs. Those with income up to 135% of the Federal Poverty Level (FPL) and resources below $6,000 for an individual ($9,000 for a couple) are eligible. Partial subsidies are available up to 150% of FPL. For a full description of the benefits of full and partial Low Income Subsidy programs, visit www.gulpny.org/LSJ/2005/April.pdf, "*Rollout Begins for New Medicare Drug Benefit: Test Run of Low Income Subsidy Application."*

By now, many low-income Medicare beneficiaries have already received notice of the changes to come. The private plans that will deliver the new drug benefit have applied to participate in the program, and the average monthly premium has been calculated ($32.20). In sum, rollout of the new Medicare drug benefit is well underway. This article will give you a brief timeline of recent and upcoming significant events, and information on the key issues to watch out for.

The Timeline for Enrollment

May 2005: Dual eligibles should have received a mailing from the Center for Medicare and Medicaid Services (CMS) informing them that they will be getting their prescription coverage through Part D starting in January 2006. Recipients were told that they are "deemed" eligible for the LIS and do not have to apply for the subsidy.

June 2005: Participants n the Medicare Savings Programs (QMB, SLMB and QI-1) should have received a mailing explaining the Part D benefit and telling them that they too, are automatically eligible for, and enrolled in, the LIS.

May-August 2005: Low-income Medicare recipients who are not automatically enrolled in the LIS, but who may be eligible for this help, should have received a LIS application in the mail from the Social Security Administration (SSA). SSA began processing LIS applications in July. SSA will inform applicants of their decision on the application through the mail. The LIS application is also available on the Internet, though it is better to use an original application than a downloaded one because it is scannable and will be processed more quickly.

September 2005: CMS awards bids to plans and begins automatically and randomly assigning dual eligibles to a Medicare prescription drug plan.

October 2005: CMS mails the "*Medicare & You 2006 Handbook:"* to all Medicare Households. By mid-October, comparative information about the plans should be available at www.medicare.gov or 1-800-MEDICARE.

Medicare Part D rollout—continued

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In late October, CMS will notify dual eligibles by mail of the plan into which they will be auto-enrolled if they do not choose their own plan. This automatic assignment will be random, and may not be the best plan to cover an individual's medications or local pharmacies. Dual eligibles will be able to enroll in a different plan between November 15 and December 31, 2005, during the regular enrollment period for all Medicare recipients. Enrollment in a different plan will cancel the automatic random assignment. Dual eligibles will also have the ability to change plans every month.

November 15, 2005: This is the date on which regular enrollment in the Medicare prescription drug plans begins. May 15, 2006 is the last day to enroll in a Medicare prescription drug plan without the possibility of increased premiums due to late penalties.

Spring 2006: At some point (specific date is yet to be announced), all those enrolled in the LIS who are not dual eligibles (i.e. those not on full Medicaid) will receive "facilitated enrollment" into a Part D prescription drug plan. This group of LIS enrollees includes Medicare Savings Program participants and anyone else determined eligible for the LIS either be SSA or New York State,

"Facilitated enrollment" in this context really amounts to delayed auto-enrollment. This group of LIS enrollees will have more time to participate in regular plan enrollment than dual eligibles will have. However, at some point in the spring of 2006 (date yet to be determined), CMS will notify these beneficiaries that a plan has been selected for them, and that they will be enrolled in that plan unless they make their own choice. The CMS selection will be random. Beneficiaries will then be "facilitated enrolled" into the randomly assigned plan effective June 1, 2006.

This group of beneficiaries will only have one chance to change plans during a "special enrollment period" some time after June 1, 2006 (date not yet specified). This group will not have the ability to change plans every month. After the "special enrollment period" they must wait until the next annual enrollment period to change their plan.

Back-Door Eligibility for the LIS

Since the income and asset limits for the LIS are so low, there are two important "back-doors" to LIS eligibility that you may be able to help low-income clients utilize.

The QI-1 Medicare Savings Program: The LIS asset test is expected to disqualify a significant number of low-income Medicare recipients. The QI-1 program has the same income limit as the LIS—135% of the FPL. However, the QI-1 program has no asset test. Despite this significant eligibility difference, participants in QI-1 will automatically be eligible for the LIS. Hence, QI-1 serves as a noteworthy "back-door" to the LIS.

To further complicate matters, the rules for counting income and resources are different for Medicare Savings Programs, regular Medicaid and the LIS. LIS rules are more generous in that the LIS household size rules will include a relative that the applicant supports, even if that relative is not a spouse or minor child. However, unlike Medicaid, LIS will count income such as in kind help with rent. Also unlike Medicaid, LIS will count assets such as IRAs and other retirement accounts even if they are owned by a spouse or are in payment status. Only time will tell how these budgeting difference play out.

Medicaid with a Spend Down or Pooled Trust: People who establish Medicaid eligibility through a spend down during any month from July to December of 2005 will be enrolled in the LIS for all of 2006, even if they get cut off Medicaid later on in 2005 or 2006. Clients might also eliminate the spend down and still qualify for Medicaid (and thus the LIS) by joining a pooled trust such as NYSARC. For more information on pooled trusts and spend down, visit www.wnylc.net/onlineresources/health_care.asp

Plenty of Uncertainty Remains: Key Issues

State LIS Eligibility Determinations: As of the date of this writing, New York State Department of Health (NYSDOH) has not developed a mechanism for making determinations of eligibility for the low-income subsidy (LIS), even though they are required by federal law to accept LIS applications and help people file them. NYSDOH has instructed local Medicaid of-

Medicare Part D rollout—continued

(Continued from page 7)

fices to accept applications for the Medicare Savings Programs, but to refer those interested in the LIS to their local SSA office to apply.

A referral to SSA might well be in the best interest of most low-income Medicare recipients interested in the LIS because of the delay in processing applications for the Medicare Savings Programs. Applicants for these programs are likely to wait at least several months as opposed to the two-week processing period estimated by SSA for the LIS applications.

However, those seeking to utilize a "back-door" to LIS eligibility (either a Medicare Savings Program of Medicaid with a spend down or pooled trust) will need to apply through their local Medicaid office. Anyone who is eligible for both a "back-door" and even a partial LIS should likely file both applications simultaneously in order to take advantage of the earliest effective date possible.

The Medicaid Wrap: NYSDOH will provide a "wrap-around" drug benefit for dual eligibles through the state Medicaid program. In other words, New York's state funded Medicaid will cover some medically necessary drugs for a dual eligible. There are two reasons why Medicaid may pay for a drug. First, Medicaid will cover certain drugs that are not part of the Medicare drug program's basic benefit. These include benzodiazepines, such as Valium, Ativan, Halcion, Librium, and Xanax, and barbiturates, such as Seconal , and Amytal. There will still be a federal match for these rugs. Second, Medicaid may pay for drugs that have been denied by a Part D prescription drug plan because the drug is not on the plan's formulary. The federal government will not provide any matching dollars for these expenditures.

Significant questions remain about how the state Medicaid wrap will operate. For example, NYSDOH has said the state Medicaid program will not cover the cost of a drug every time a pharmacist refuses to fill a prescription for a Medicare Part D participant because it is not on the prescription drug plan's formulary. Enrollees will have to first ask their private prescription drug plans for a "coverage determination," or formal statement by the plan as to whether it will cover a drug, and if not, why not. NYSDOH may also require recipients or their physicians to request an "exception" and wait 24-72 hours for a response from the plan before state Medicaid covers the drug.

Monitoring and/or advocacy will likely be necessary to a) help beneficiaries who are denied a drug by their plan to access state coverage through the Medicaid wrap, and b) prevent the private prescription drug plans from minimizing their coverage for dual eligibles and forcing expenditures onto the state program offered through the Medicaid wrap.

In conclusion, low-income Medicare recipients are likely to have questions and may need your help navigating the new, extraordinarily complicated Part D drug benefit. The LIS program will provide significant benefits for low-income Medicare recipients. Some clients will be able to gain access to the LIS program through a Medicaid "back-door," utilizing enrollment in either the Medicare Savings Programs or Medicaid with a spend down or with a pooled trust.

Information is still incomplete on when and how all enrollments will be accomplished. Check upcoming issues if the *Legal Services Journal* and postings on the Health Care page of the Online Resources Page for up to date information, including notices of trainings for advocates coming up this fall. Agencies that are likely to be offering trainings for advocates include Empire Justice Center, Legal Services for the Elderly in Buffalo, Legal Services for the Elderly in New York City, Legal Services for New York City, Nassau/Suffolk Legal Services, Brookdale Center on Aging at CUNY/Hunter College, and Selfhelp Community Services, Inc. in New York City. Check the calendar at www.probono.net/ny for a calendar of training activities.

Helpful Websites

For more information and some helpful websites, turn to page the Did You Know section of this newsletter on page 18.

What Happened to My Tax Refund?

Clients counting on an income tax refund are sometimes surprised to learn that what Uncle Sam giveth, Uncle Sam can also taketh away. A recent DAP Listserv inquiry related the tale of a claimant who was notified of an overpayment about two years ago based on work activity. The claimant filed for a waiver, which resulted in a finding that she was completely without fault, but waiver was nonetheless denied. A hearing was requested. In the meantime, while her request for a waiver was pending, the Social Security Administration (SSA) tried to set up a payment plan with monthly payments toward the overpayment. She declined, and SSA reported to the credit bureaus that she had a delinquent account in the amount of the overpayment. As a result, she was denied a loan. To add insult to injury, her tax refund was confiscated.

Recovery of Title II overpayments is authorized by referral of the overpayment to the Secretary of the Treasury, under 31 U.S.C. §3720A, who can seize the individual's tax refund. 20 C.F.R. §404.520-526 (1991). These sums must be "certain in amount, past due and legally enforceable, and eligible for refund offset under [separate] regulations issued by the Secretary of the Treasury." These provisions are inapplicable to individuals who are current recipients of Title II (presumably because SSA is free to seek recoupment from current benefits). There is also a 10-year statute of limitations that runs from date the overpayment accrues. If a tax refund for a given taxable year is insufficient to recover the debt completely, the case remains with Treasury for collection of the remainder in succeeding years.

The beneficiary, however, must be notified that she has 60 days to appeal and/or to request waiver; and she is entitled to hearing on the waiver request, unless a hearing was already held on a prior waiver request and a finding of fault already made.

Effective September 22, 1997, SSA also is permitted to recover SSI overpayments from former SSI recipients by withholding federal income tax refunds, 20 C.F.R. §416.580 [62 Fed. Reg. 48437 (Sept. 22, 1997)]; POMS §SI 02220.012. The same basic procedural rules apply as with Title II above.

Similarly, SSA may refer delinquent debts of more than $25 to credit reporting agencies, and may contract with private debt collection agencies, pursuant to 42 U.S.C. §404. A delinquent account exists when three criteria are satisfied (i) the overpayment occurred after the recipient turned 18; (ii) the recipient is no longer receiving Title II or SSI benefits; and (iii) the overpayment is otherwise unrecoverable. 20 C.F.R. §404.527. An overpayment is unrecoverable when (i) SSA has sent all notices [initial notice, reminder notice, and past-due notice] or collection activity is suspended or terminated; (ii) there is no installment payment arrangement or the overpaid person failed to make any such payment for two consecutive months; (iii) the overpaid person did not request waiver or waiver request has been denied; (iv) the overpaid person did not request reconsideration of the initial overpayment determination or the reconsideration was denied; and (v) the overpayment cannot be recovered by adjustment of benefits payable to any other individual (that is, payments to others based on the overpaid individual's record) because the other individual was living in a separate household at the time of the overpayment and did not receive the overpayment.

SSA's determination to refer information about a debt to a consumer collection agency and its determination to refer the overpayment to the Department of Treasury for administrative offset is considered an administrative action not subject to the appeals process. 20 C.F.R. §404.903. Before SSA can make these referrals, however, it must first contact the overpaid person in writing, describing the amount and nature of the debt; the action SSA proposes to take; and the debtor's rights to an explanation of the debt, to request review of the debt, to dispute the accuracy of the information about the debt, and to inspect and copy SSA records about the debt. SSA must also give the debtor at least 60 days to present evidence that all or part of the debt is not past-due or not legally enforceable, or to enter into a written agreement to repay the debt. 20 C.F.R. §§422.305, 315 & 317.

While SSA does have the right to intercept tax refunds and to refer overpayment debts to collection agencies, it can only do so within the confines of these regulations. SSA is not supposed to start collection until the client has received a final decision on the waiver appeal. Advocates have been successful in recovering tax refunds that have been seized inappropriately by contacting Sandy Harrison at SSA (410-965-3458).

Regulatory Roundup

By Susan C. Antos

This article reports rulemaking of interest to public benefits specialists, which appeared in the New York State Register from April 20, 2005 to August 10, 2005. Three new rules have been proposed, two new rules have been adopted and one proposed rule was adopted. All references are to 18 NYCRR, unless otherwise indicated. If you are interested in reading the text of a proposed rule or the summaries of public comment and the response regarding an adopted rule, please contact Connie Wiggins (cwiggins@empirejustice.org) at Empire Justice Center..

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
6/29/05	8/13/05	352.7(g)(3)(vii) 370.3(b)(2) 372.2(a)(2)	**Federal Poverty Line:** Every year the Federal poverty level is updated in the Federal Register by The United States Department of Health and Human Services (HHS). However, 18 NYCRR incorrectly refers to poverty guidelines promulgated by the Federal Office of Management and Budget. This proposed regulation would correct that misstatement. The regulation further proposes that the revised poverty levels will be effective from April 1 - March 31 of each State fiscal year for purposes of determining eligibility for emergency assistance.
6/22/05	7/13/05	352.8(b)(5)(6) 352.8©(1)(ii)	**Technical Amendments:** This regulation, which was proposed on April 20, 2005, makes a number of technical amendments including correcting the names of public assistance programs (i.e., changing home relief to safety net assistance) and conforming the regulation that sets the standard of need for safety net individuals who reside in public shelters for the homeless other than those in Part 900 shelter, room and board regulation to reflect the fact that the shelter allowances no longer include heat. Previously, the standard of need for such household utilized the "shelter allowance with heat" included, which no longer exists.

Notice of Proposed Rule Making — continued

Date of Filing	Last Day to Comment	Regulations Affected	Summary
4/26/05	5/11/05	443.1 443.7	**Approval or Certification of Foster Home on an Emergency Basis:** This regulation expands the conditions under which a foster home can be certified on an emergency basis. Previously, such a certification could be made only when the child was being removed as the result of abuse or neglect. The new regulation will allow such emergency certification when there is a compelling reason to do so.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
8/01/05	8/17/05	352.3(d)(2)(i) 352.3(d)(2)(ii) 352.5(b) 352.5(f)(2) 352.2(f)(5)(i)	**Section 8 Housing:** This regulation, which was filed on an emergency basis on February 28, 2005 and May 31, 2005 and as a proposed rule on May 25, 2005 requires that the rent for public assistance recipients whose rent is subsidized by Section 8 housing vouchers, shall receive a rental allowance in the amount actually paid, not to exceed 30% of the total of the basic needs allowance, Supplemental Home Energy Allowance and the local shelter allowance for households with children. This regulation was adopted because the federal Department of Housing and Urban Development (HUD) has directed housing authorities to recalculate rents by January 1, 2005, to comply with HUD regulations that require that rent be the higher of 10% of household income, 30% of the family's gross income (adjusted by HUD deductions) or the maximum allowable shelter allowance. The HUD regulation is not new but many housing authorities in New York were out of compliance with the HUD regulation, charging 30% of household income with HUD adjustments instead of the higher public assistance shelter allowances. Compliance with the HUD directive would have resulted in increased costs for many social services districts, and an increase in public assistance benefits to those households, with no increased cash to the family because their rent would go up. Additionally, these families would have faced a reduction in food stamps. To avoid this impact, OTDA changed the regulation but allowed districts that were computing the regulation correctly to continue to do so to avoid a negative impact on those housing authorities.

Notice of Adoption — continued

Date of Filing	Effective Date	Regulations Affected	Summary
7/13/05	8/03/05	404.1(d)(2) 432.2(b)(3) 441.7 465.1 466.4 Part 428	**Uniform Case Record in Child Welfare Cases:** This regulation changes the recertification period for foster care maintenance payments from 6 to 12 months and would adopt standards for the retention of foster care records. In response to public comment, OCFS clarified that the Uniform Case Record is only required to have documentation of the child's immigration status. A number of other clarifying changes were also made in the final regulation.

Notice of Continuation

Healthy and Safety Standards for Legally Exempt Informal Child Care Providers

The June 29, 2005 New York State Register contains a notice continuing a regulation proposed on January 5, 2005 which would have imposed new health and safety standards on legally-exempt informal child care providers including inspections and a reduction in their payment rate unless they completed 10 hours per year of training. The Office of Children and Family Services now has until January 5, 2006 to adopt this regulation

Empire Justice Center Legislative Activities A Mixed Bag

By Kristin Brown

Empire Justice staff was involved in a variety of legislative initiatives throughout the 2005 session. In addition to work done on our pro-active agenda, which was developed throughout the fall of 2004, staff worked re-actively on a number issues as they arose. The following is a comprehensive review and status report on our work. Stared items were also among our 2004 Legislative Priorities.

For more information on any of these issues, visit our website at www.empirejustice.org or contact the staff person associated with the issue.

Budget Related Advocacy

Always, it seems, some aspect of New York's state budget process is unique – and 2005 was a particularly singular year. The year's budget process highlights included – working within an unfamiliar sped up time table, which allowed the Legislature to meet the April 1st deadline for the first time since 1984; use of the Budget Conference Committee Process, which kept the public up to date on compromises that had been negotiated behind the scenes in each substantive area; and the question lurking behind every strategy discussion - how does the Court of Appeals decision in *Pataki v. Silver* affect the Legislature's role in the budget process? With the budget completed before April began, the rest of the legislative session focused on passing substantive bills. While Empire Justice staff continued to focus on a number of fronts throughout session, the majority of our "wins" were associated with the budget.

***Restoration of the Civil Legal Services (CLS) state appropriation RESTORED**

Primary Staff: Kristin Brown

As anticipated, the Governor did not include funding for the CLS state appropriation in the Executive Budget. With the leadership of Assembly Judiciary Chair, Helene Weinstein and other members of the Assembly Majority, Empire Justice joined with colleagues in New York City and civil legal services programs across the state to ensure the restoration of this critical funding. Toward this end, Empire Justice acted as an information conduit for upstate and Long Island CLS programs, developed advocacy materials, coordinated five regional lobby days in Albany and sent out updates and action alerts to those CLS providers that receive state funding. Ultimately, the Assembly majority restored CLS funding at the 2004 level of $4.6 million in the final budget that passed on March 31st 2005.

Advocacy on Proposals included in the Department of Family Assistance Budget - MIXED SUCCESS

Primary Staff: Kristin Brown, Susan Antos

The 2005 Executive Budget included a number of proposals in the Department of Family Assistance budget (which includes both the Office of Temporary and Disability Assistance (OTDA) and the Office of Child and Family Services (OCFS). Empire Justice supported some of the proposals and opposed others. In addition to submitting testimony to the Human Services Joint Fiscal Committee on the Executive Budget, we worked closely with our anti-poverty colleagues throughout the late winter and early spring to share our concerns with the Legislature and Governor Pataki. Some of the issues we worked on included:

- Opposing the proposal to block grant $1 billion in surplus Temporary Assistance to Needy Families (TANF) funding to local Departments of Social Services. Ultimately, this proposal was amended to block grant $600 million to local districts and to allocate the remainder TANF funds to specific programs, including restoration of $1 million for the Dis-

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Legislative Activities—continued

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ability Advocacy Program (DAP) and $4 million for the Supplemental Homelessness Intervention Program (SHIP).

- Supporting the transfer of the Welfare to Work Division from the Department of Labor to the Office of Temporary and Disability Assistance - **ENACTED**

- Opposing the proposal to implement full family sanctions - **DEFEATED**

- Opposing the proposal to cap the earned income disregard at 50% - DEFEATED

Advocacy on proposals included in the Department of Health Budget
MIXED SUCCESS

Primary Staff: Trilby deJung

The 2005 Executive Budget also included a series of cuts and changes to public health programs including Medicaid and Family Health Plus (FHPlus). Empire Justice, an active member of Medicaid Matters, worked with colleagues across the state to impact the final budget. Below is a summary of the issues we focused on.

- Opposition to Cuts in Family Health Plus (FHPlus) Program: While the deeper cuts proposed by the governor were rejected, the legislature did enact new restrictions, which include:

  ►*New eligibility exclusions* - federal, state & local government employees (to extent covered by employer insurance); individuals with employment-based insurance in previous nine months excluded, but exclusion suspended until a specified level of crowd-out is reached.

  ►*Higher co-pays* - FHPlus enrollees to pay $3 for generic and $6 for brand name drugs, $5 per visit for clinic and physician services and $5 per visit for dentists.

  ►*Fewer benefits* - new limits on preventive and routine vision care (one eye exam, one pair of glasses or contacts where medically necessary and medically necessary occupational eyeglasses per 24 month period).

- **Support for State Assumption of FHPlus.** The state will pick up these costs in counties

  outside of NYC were accelerated, to commence in October 2005. The state will pay 75% of costs in 2005 and 100% in 2006 in New York City.

- **Support for State Take Over of Local Medicaid Costs –** Local Medicaid costs were capped at the 2005-2006 levels plus trend factor. Local governments get to choose (beginning in 2008) whether to pay an amount under cap or provide a share of sales tax. Local demonstration projects on cost effectiveness were authorized, with approval from the Department of Health.

- **Opposition to Proposed Increase in Medicaid Pharmacy Co-Pays** – Result - Medicaid enrollees (both fee for service and managed care) will now pay $1 for generic drugs and $3 for brand names. The $100 cap on annual co-pays was increased to $200.

Other Issues:

- **Preferred Drug Program (PDP) & Clinical Drug Review Program (CDRP)** – A PDP was established for Medicaid and EPIC and the CDRP was expanded. CDRP is limited to drugs that require monitoring and drugs that are subject to abuse. A newly established Pharmacy and Therapeutics Committee (PTC), which will include three consumer representatives, will advise the Department of Health on the lists for both programs. The PTC is also charged with oversight and will monitor impact of the new programs. Empire Justice advocated for consumer safeguards in the development of these programs and was pleased to see some of them included in end result.

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Legislative Activities—continued

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- **Mandatory Medicaid Managed Care Expansion** – The budget includes a $50 million target for savings to be generated by expanding mandatory enrollment in Medicaid managed care. We are now working closely with other advocacy organizations to positively impact the implementation of this change at the administrative level.
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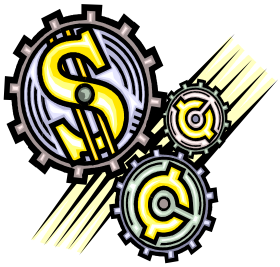
***Securing new state funds for civil legal services PENDING**

Primary Staff: Kristin Brown



Securing new funds for the provision of civil legal services is always a priority for Empire Justice. For the past several years, since the creation of the Legal Services Assistance Fund, Empire Justice has advocated for both the Senate and the Assembly to earmark funds for civil legal services programs. This year, we advanced a proposal for the Senate to provide funding for legal assistance for victims of domestic violence, which garnered the support of Senate Judiciary Chair, John DeFrancisco, and Senators Robach and Winner. While our efforts on this front have not yet yielded new funding, we are hopeful that next year we'll be able to increase support in the Senate.

We also alerted the upstate CLS community to the opportunity to secure funding from Assembly's portion of the Legal Services Assistance Fund by submitting requests to Assemblymember Weinstein. It remains unclear what the Assembly will do with these funds.

Legislative Advocacy:
The Budget and Beyond

Ensure Prompt Contracting with Agencies
A.3454 (Bing) / S.1893 (Robach) VETOED

Primary Staff: Kristin Brown

Empire Justice actively supported this bill which would have strengthened existing Prompt Contracting law and closed loopholes that hurt many not for profit agencies who receive state contracts, undertake the provision of services in good faith, and then struggle to make ends meet while they wait for their contracts to be executed. We were very disappointed to see the Governor veto the bill this July. Governor Pataki cited State Agency concerns that they would be unable to meet the requirements of the bill and the potential for "unplanned and unbudgeted costs to the operating budgets of state agencies" as well as increased administrative costs as his reason for the veto. However, in the veto message, he directed the Division of Budget and state agencies to work with the bill sponsors and interested parties to "identify any impediments to compliance with the prompt contracting law and to recommend appropriate changes to protect not for profit organizations contracting with the State"

Expand District and City Court Jurisdiction
A.7296 (Destito) / S.3343 (DeFrancisco)
SIGNED CHAPTER 337

Primary Staff: Mike Hanley

This bill, which will go into effect January 1, 2006, will provide District and upstate City Courts limited equity jurisdiction in housing matters. This will help streamline access to housing court and will ideally increase compliance with Upstate District and City Court rulings. We have actively supported this bill for several years and are very pleased that the Governor has signed it into law.

"Home Equity Theft Prevention Act"
A.7667-A (Nolan)/S.4744 (Farley)
PASSED THE ASSEMBLY

Primary Staff: Kirsten Keefe

This bill would protect New York homeowners from the unscrupulous practices of "foreclosure rescue" scams. The bill amends the banking law, the real property law and the real property actions and proceedings law to regulate real estate speculators who take deeds from vulnerable homeowners under the guise of "foreclosure rescue assistance." Empire Justice worked closely with New Yorkers for Responsible Lending (NYRL) to push for passage of this bill. We provided technical assistance to the Legislature, tes-

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Legislative Activities—continued

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tified at a hearing held by Assembly Banking Committee Chair, Catherine Nolan and assisted a local homeowner in the development of her own testimony for the hearing and helped her prepare to speak with local media.

***Reauthorize the Food Assistance Program A.7486 (Glick) /S.4349 (Meier) PASSED THE ASSEMBLY**

***Expand the Food Assistance Program A.7639 (Glick) PASSED THE ASSEMLBY**

Primary Staff: Barbara Weiner, Kristin Brown

The FAP program, while available to just two groups of immigrants, the elderly and victims of domestic violence, provides the opportunity for New York to provide a lifeline for those ineligible for the Federal Food Stamp Program. Without the reauthorization of FAP, Empire Justice Center estimates that over 100 particularly vulnerable immigrants will no longer be eligible for nutritional assistance. Unfortunately, the Senate did not pass the bill before they left Albany for the summer. With the program set to expire September 30th, it is likely that this program will die. In an effort to save the program, Empire Justice met with Senate, Assembly and Gubernatorial staff throughout the Legislative Session. We developed a series of memos on the importance of the program, which included estimates of how many people currently utilize FAP, how much it might cost to expand the program and how many people we would expect to enroll if the program was expanded. We also developed an ad hoc coalition of concerned organizations and coordinated a Lobby Day focused on Senate Majority members.

Utilize Funds Generated by Conversion of Non Profit Health Insurance Companies to Serve the Uninsured A.4024 (Grannis) PASSED ASSEMBLY

Primary Staff: Trilby deJung

We supported the Grannis legislation, which would have established standards and a frame work for reviewing the merits of conversion applications with an opportunity for public input and would require that 100% of the charitable asset of a converting entity be directed to a charitable foundation dedicated to enhancing health care coverage. Unfortunately, without a Senate bill, there was no hope of changing the law. Furthermore, the Court of Appeals has upheld the Empire conversion statute. Without passage of legislation that would direct more of the funds from such company conversions toward addressing lack of access to health care, the State is likely to use conversion funds as they see fit, rather than targeting a substantial proportion to addressing the health care crisis in our state.

***An "Act to End Childhood Lead Poisoning in New York State" – A4201B (Gantt) S.2513 (Robach) - AMENDED**

Primary Staff: Mike Hanley

This bill, originally drafted by the Paint and Coatings Association and introduced by Assemblymember Gantt and Senator Robach was amended at the end of session to reflect the Coalition to End Lead Poisoning in NYS model bill. The amended bill focuses on establishing a primary prevention strategy for the elimination of lead poisoning – essentially creating incentives for property owners to address lead hazards BEFORE children are poisoned. For more specifics on the bill, see "LEAD PAINT ADOVCATES SHIFT FOCUS" article in this issue (August, 2005) of the *Legal Services Journal*.

Refund Anticipation Loan Bill A.1971 (Nolan) – DID NOT PASS THE ASSEMBLY

Primary Staff: Kirsten Keefe

Tax refund loans carry annual percentage rates between 70% and 700%, but most people who get one don't even realize they're receiving a loan and not their own refund. This bill would improve disclosures required for consumers, require tax preparers that offer tax refund anticipation loans to register with the NYS Department of Banking and act in the best interests of their taxpayer customers. Empire Justice worked with NYRL to raise awareness about this

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Legislative Activities—continued

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issue and reached out to legal services programs in target districts and set up meetings with legislators to discuss their concerns. We also developed and presented testimony at a hearing on Refund Anticipation Loans held by Assembly Banking Committee Chair, Catherine Nolan.

Legislation Affecting Victims of Domestic Violence

Primary Staff: Amy Schwartz

Confidentiality of Voter Registration Records for DV victims - A.1221 (Tokasz) / S.2914 (Flanagan) PASSED ASSEMBLY

Assess and Develop Support for Creating Dedicated Stream of Funding for Domestic Violence Services for Gay, Lesbian, Bi-sexual and Transgender (GLBT) Victims of Domestic Violence **IN PROGRESS**

We worked with Rochester/Monroe County Domestic Violence Consortium - developed memos of support and met with members of the Rochester Delegation on the following legislation**:**

*Expanded Definition of Family and Household Member - A.5052 (Weinstein)/S.4303 (Spano) – **PASSED ASSEMBLY**

Renewal of Mandatory Arrest and Primary Aggressor Law - **RENEWED IN EXECUTIVE BUDGET –** new sunset date - September 1, 2007

Mandatory Inquiry into Ownership and Possession of Firearms - A.2404 (O'Donnell) / S.1929 (Balboni) **PASSED ASSEMBLY**

Renewal of Judicial Hearing Officer Pilot Project in 7th and 8th Judicial District - A.1438 (John) / S.1706-a (Nozzolio) **SIGNED CHAPTER 247**

RESOLUTIONS

*Assemblymember **Gantt Introduces Resolution on Homeowner's Insurance Data Disclosure**

Primary Staff: Barb VanKerkhove, Ruhi Maker, Kristin Brown

The resolution commemorated the release of PILOR's report, "The Homeowner's Insurance Gap" and called for a legislative solution to the problem of insurance redlining. We have received additional funding to develop model legislation that would require insurance companies to report data on the issuance and pricing of homeowners insurance policies in low income and minority communities and will maintain this issue as a priority in the 2006 Legislative Session

Assembly and Senate Judiciary Chairs, Rochester Legislators and co-sponsors across the state introduce a Joint Resolution Commemorating GULP and PILOR's new name - PASSED

Primary Staff: Kristin Brown

At the end of the 2005 Legislative Session, the legislature passed a joint resolution commemorating the creation of the Empire Justice Center, stating "it is the sense of this Assembled Body that when organizations of such noble aims are brought to our attention, they should be celebrated and recognized by all the citizens of the great State of New York" Empire Justice is pleased and honored to be able to mark such a momentous occasion with a resolution passed by both houses.

DID YOU KNOW?

State Judges Listed on Web Directory

A directory of more than 1,200 state judges who preside over trial and appellate courts is now available on the Unified Court System's Web site. The alphabetic list contains the name of every judge, along with an address and phone number. Included are links to expanded information about the judges, experience on the bench, prior professional experience, bar admission, education and civic and professional activities. The listing is an effort to increase information about and make the court system more accessible to the public.
*http://www.courts.state.ny.us/judges/directory.shtm*l

Internet Resource Raises Awareness of Domestic Violence

A new website, created by Columbia students for the Legal Aid Society, contains important information about domestic violence. It offers visitors basic legal advice, critical safety tips, and links to other useful resources, including the website for the Domestic Violence Program at Barrier Free Living, which focuses on helping persons with disabilities.
http://www2.law.columbia.edu/lda/DV.index.html

Get Your Credit Report Free

A one stop secure website now allows you to free access to your credit report once every 12 months. The three credit reporting agencies, Eqifax, Experian and TransUnion sponsor the site. After providing your name, address, date of birth and social security number, you are then asked a three questions that only you would have answers to regarding either current or past loan information. The site is extremely user friendly and in a matter of minutes, you are able to read and print your reports from each of the credit reporting agencies. If you want to know your credit score (FICO), there is a small fee that ranges from $5.95 to $7.00. You can also request your credit report by phone or by mail. Click on the links for phone number and address information.
www.annualcreditreport.com

Helpful Websites for Medicare Part D Information

CMS: *www.cms.hhs.gov.medicareform/*

SSA: *www.socialsecurity.gob/prescription*

Empire Justice Center & Western New York Center Online Resources Health Care Page:
www.wnylc.net/onlineresources/health_care.asp

Medicare Rights Center: *www.medicarerights.org/newlawframeset.html*
Center for Medicare Advocacy: *www.medicareadvocacy.org/FAQ_PrescDrugs.htm*
Kaiser Foundation: *www.kff.org/medicare/rxdrugdebate.cfm*
Families USA: *www.familiesua.org*

New Medicaid co pays in effect as of August 1, 2005.

As of August 1, 2005, all Medicaid beneficiaries, including those in Medicaid Managed Care, and those who receive SSI, will be subject to pharmacy co pays of $3.00 for brand name drugs and $1.00 for generics. There will be no co pays for psychotropics, TB drugs or birth control. The pharmacy cannot refuse to provide drugs because of inability to pay co pays, and the following people are exempt:

►Those younger than 21
►Pregnant women for up to two months following end of pregnancy
►Adult Care Facility residents
►Nursing home residents
►Intermediate Care Facility for the Developmentally Disabled residents
►Those living in OMH or OMRDD Community Residences
►Those enrolled in Comprehensive Medicaid Case Management or Service Coordination Programs
►Those enrolled in Home & Community Based Services Waiver Programs (either OMH or OMRDD)
►Those enrolled in the Traumatic Brain Injury Waiver Program

The letter that Medicaid beneficiaries received regarding the co-pay increase is Attachment 2A to GIS 05 MA 06, which is available on the DOH website at http://www.health.state.ny.us/health_care/medicaid/publications/pub2005gis.htm

Family Health Plus Benefits & Eligibility Restrictions in Effect

Four major changes are taking effect in the Family Health Plus program: 1) significant new co payments for drugs and certain other services; 2) limits on the vision benefit; 3) a new resource test for eligibility, and 4) elimination of coverage for certain government workers.

►*Co Pays*. Starting **September 1, 2005**, pharmacy co pays will be $6 for brand name drugs and $3.00 for generics. Covered medical supplies will have a $1.00 co pay and over the counter drugs will require a $0.50 co pay. There will be a $5.00 co pay for visits to clinics, physicians and dentists and a $25.00 co pay for each in patient hospital stay. Non-urgent ER visits will cost $3.00, and radiology services will carry a $1.00 co pay. Providers cannot deny services because of inability to pay co payments, however the providers can ask for payment later and/or send bills. The following people are exempt: Those under age 21, pregnant women, permanent residents of nursing homes, residents of OMH or OMRDD residential facilities and residents of Adult Care Facilities

►*Vision Benefit*. Also effective **September 1, 2005**, the Family Health Plus vision benefit will be limited to include the following in a 24 month period: 1) one eye exam; 2) either one pair of prescription eyeglass lenses and a frame, or prescription contact lenses where medically necessary; and 3) one pair of medically necessary occupational eyeglasses. Replacements are not covered.

►*Resource Test*. Effective **August 1, 2005**, Family Health Plus applicants and members undergoing recertification will be subject to a resource test. The level of allowable resources is set at three times the level of income allowed for regular Medicaid recipients in a comparable household. *See* SSL § 369-ee(1)(i).

►*No Coverage for Government Workers*. As of **September 1, 2005**, anyone eligible for health benefits through employment with the Federal State or County governments, or a municipality or a school district, will no longer be eligible for Family Health Plus.

GIS messages on these changes (05 MA 027 & 05 MA 031) are available on the DOH website at: http://www.health.state.ny.us/health_care/medicaid/publications/pub2005gis.htm

Lead Paint Poisoning Prevention Advocates Focus on Legislative Strategies

By Michael Hanley and Kristin Brown

According the New York State Department of Health's lead poisoning prevention plan, "Eliminating Childhood Lead Poisoning in New York State by 2010," approximately 5,000 children in New York State outside of New York City, have blood lead-levels of more than 10 micrograms per deciliter. Both the state and the National Center for Disease Control agree that a child poisoned at that level will suffer permanent injury. To make matters worse, recent studies show that children suffer significant injuries at even *lower* levels. That means that lead hazards in housing may be exposing many more thousands of children to the lifelong consequences of being poisoned by lead.

Faced with these challenges, advocacy groups dedicated to making sure that New York State meets the national health policy goal to *eliminate* lead poisoning by 2010 are looking at more aggressive initiatives. Over the last thirty years, the greatest advances in reducing the numbers of poisoned children have always followed the adoption of tougher laws or regulations. Armed with this lesson, advocates in New York are once again focusing on making state and local lead poisoning prevention laws more effective.

You've heard it before: lead poisoning causes *irreparable* damage to the brain and nervous system of the lead-poisoned child. That damage shows up as serious behavioral problems including attention deficits, hyperactivity, and increased aggression. Lead poisoning also causes permanently lowered IQs. The public may believe (or perhaps just hope) that the problem is being overstated, but it sure doesn't look that way when you open your eyes to the connections that say otherwise. Consider, for example how lead poisoning is affecting the lives of the low-income families that you see as your clients. Ask the DAP advocates in your program to take a look at the medical records in the files of the kids they are representing on SSI appeals. How many of them have elevated blood lead level? Or, if you have a client whose son or daughter has special educational needs, don't be surprised if you find out that that child has a history of lead poisoning.

The injuries to lead-poisoned children are not being overstated. In fact, in many respects, we are finally starting to fully appreciate how severe a problem lead poisoning is -- not only to the individuals, but also to entire communities. In the last few years documentation has been prepared that shows that children injured by lead poisoning have measurably reduced chances for finishing school, that they have a greater likelihood of being brought into the criminal justice system, and that they will suffer greatly reduced earning potential. Consider the effect upon an entire school when, as one school principal found, 75% of the first graders in the school who were being held back from promotion to second grade had elevated blood lead levels. In short, the quality of life for a lead-poisoned child is seriously and inalterably diminished and society, not just the child, is paying the price.

Didn't we already solve the lead problem?

Don't be lulled into believing that the lead-paint problem has already been brought under control. Although removing lead from gasoline in 1974 and banning lead from paint by 1978 made important contributions to reducing lead poisoning, for many segments of the population lead poisoning has barely dropped. Even though the overall prevalence rate for children with elevated blood lead levels is now down to around 3%, in many counties (Erie, Fulton, Monroe, Montgomery, Oneida, Onondaga, Washington) the countywide prevalence rate is around 7%. And in some specific urban neighborhoods the lead poisoning rate exceeds thirty, or even forty percent. Imagine the social and economic burden imposed upon a neighborhood community when lead poisoning rates are that high. Moreover, high lead-poisoning rates affect not just neighborhoods, but schools as well. In urban school districts where a substantial percentage of the students come from households living in high poverty areas with older housing, the impact from

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high lead-poisoning rates has been devastating. Rest assured that if the lead-poisoning rates of these neighborhoods or schools were found in the more affluent suburban communities, a health care emergency would already have been declared.

"Primary Prevention" and the Problem With Current State Laws.

Increasing awareness of the consequences of lead poisoning and a better understanding of what you need to do to keep a child from being poisoned in the first place have caused a renewed focus on "primary prevention" strategies. Primary prevention means finding lead in housing *before* children get poisoned instead of waiting for a child to be poisoned and *then* looking for the hazard in the child's home. Surprisingly, though, apart from the requirements imposed by federal law for federally assisted housing, we don't have any meaningful primary prevention strategies in place in New York State. Until now the nearly exclusive enforcement vehicle for preventing lead paint poisoning has been the state Public Health Law. Unfortunately that law relies on exactly the kind of "canary in the coal mine" approach that is inimical to the concept of "primary prevention." County health officials don't inspect for lead hazards until a child has already been poisoned, and local municipal building inspectors don't inspect for lead paint hazards at all.

Other than the general provisions of the state Public Health Law (and local protections enacted in New York City), there aren't *any* laws or regulations requiring the removal of lead-paint hazards in New York State. New York *does* have a statewide "Property Maintenance Code" (PMC), but that code barely refers to deteriorated paint and does not address *lead-based* paint hazards at all. In fact, the Property Maintenance Code itself is only a small portion of the several volumes of regulations adopted by the Department of State to implement the state Uniform Fire Building and Fire Prevention Code (Article 18 of the Executive Law, §§ 370-83). Lets face it, the Department of State, the agency responsible for the enforcement of the PMC, is geared up to inspect for electrical outlets and fire exits -- not health hazards hidden in the paint peeling off of old buildings. Certainly the Department of State is not geared up to make sure that persons doing inspections under the PMC are trained to identify the hazards from the invisible dust that come from paint containing lead. Nor have the Department of Health or the Division of Housing and Community taken any steps to assure systematic lead inspections in privately owned housing. Although the Public Health Law created a Governor's advisory committee to assure coordination of these agencies, there has been little progress in doing so.

In fact, neither that Uniform Fire Prevention and Building Code nor the Department of State's regulations implementing it require inspections for lead paint hazards. Even if they did, there are currently no provisions in the Code to require their removal. The closest provisions in the PMC that in any way deal with paint hazards are two brief paragraphs requiring the repair of "deteriorated" paint. But those sections actually threaten to do more harm than good, because the PMC does not require "lead-safe work practices" when paint containing lead is disturbed. There's not even a requirement for property owners or contractors find out whether the deteriorated paint contains lead before they disturb it.

The lack of lead-safe work practice requirements, even when paint is being disturbed in *occupied* units, makes no sense. Information is readily available about the established and accepted protocols that need to be followed to prevent occupants from being poisoned. The failure to have any state protections requiring lead safe work practices in dealing with deteriorated paint in older buildings is simply unconscionable. Children exposed to lead chips and dust from the removal or repair of lead-based paint are at extreme risk. Case after case shows that lead poisoning levels for children skyrocket when repairs are not done safely. Unless they are told otherwise, how many landlords when faced with a citation for "deteriorated paint" under the PMC won't just bring out a paint scraper or belt sander, or remove the paint with a propane torch? And that's about the most dangerous thing they can do.

To make matters worse, under Executive Law § 379 the state Property Maintenance Code *preempts* all local building maintenance codes outside of New York City. That means municipalities even use their own local building codes to address their lead

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poisoning problems.

So, it looks like if lead poisoning is to be eliminated by the year 2010 we're going to have to change some laws.

First, we have to take the simple step of making sure that lead-paint hazards are illegal. Second, we need to make sure that procedures are in place that will assure that lead hazards will be found – that means there should be both systematic inspection in high risk areas and mechanisms for tenants to obtain an inspection by a certified lead inspector any time they suspect a hazard. Third, since we need to make sure that we don't make the problem worse, lead-safe work practices must be required.

To address the problem responsibly, however, much more is needed. As with most complex and multi-layered problems, the devil is in the details. Experienced lead poisoning prevention advocates from across the state have been working for many months to put together draft legislation -- at both the state and local levels. When adopted, that legislation will finally establish an effective "primary prevention" structure for all of New York State, and then we can really begin to eliminate the poisoning pockets that haven't been reached by current prevention efforts. In the rest of this article, we'll take a look at the state legislation that has been proposed, and next month, in Part 2, we'll look at a model municipal ordinance.

The State Legislation

Draft legislation doesn't have much value if you can't get it passed. Accordingly the Coalition to Eliminate Lead Poisoning in New York State (CELPNY) has taken the unusual step of working with a paint industry trade organization, the National Paint and Coatings Association, to assist Assemblyman David Gantt and Senator Joseph Robach in preparing the comprehensive legislation needed to address the state's lead paint crisis.

The Empire Justice Center is proud to be an active member of CELPNY, a remarkable coalition that includes the Northern Manhattan Improvement Corporation (who were instrumental in passing the NYC local lead law), the New York Public Interest Research Group, the League of Women Voters, and a wide range of other organizational and individual members.

The bill that has gotten the ball rolling, Assembly 4201B/ Senate 2513B, was first introduced in 2004. With more input from the CELPNY, the bill was significantly strengthened at the end of the 2005 legislative session. In its current form, the bill will establish a meaningful primary prevention strategy. In many respects, this legislation will be one of the most innovative in the country.

Although the bill was held up in the Assembly's Housing Committee in 2005, it will come up again for consideration automatically in the 2006 Legislative Session and under Assembly rules this time it will have to be put on the Housing Committee agenda for a vote. Advocates are hopeful that A.4201B/S.2513B will have the support of both houses of the legislature next year.

One of the innovative provisions of the legislative proposal is that it will require the state Department of Health to identify the areas of the state that pose the greatest risk of lead hazards and prepare specific primary prevention plans for those areas. These mechanisms take advantage of the fact that we know that, to a large extent, lead poisoning occurs in geographically identifiable areas. You don't need to inspect every apartment in the state to solve the problem. The at-risk households can be accurately predicted using readily available housing and population demographics. Not surprisingly, low-income, minority households, living in older housing are clearly at greatest risk. Within that pool, the goal will be to reach the "persons at risk," namely children under age 7 and pregnant women.

Outside of New York City, 41% of the poisoned children reside in only 2% of the State's zip codes (36 out of 1700). And, even within those areas, the specific neighborhoods at the highest risk can be identified. In the City of Rochester, for example, over 90% of the more than 4,000 children poisoned between 1993 and 2005 lived in only 40% of the city's census block groups. Limited resources mean that not all housing can be inspected right away. Inspections must, of necessity, be highly targeted. The good

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news is that enough information is available to know *which* housing should be the highest priority for inspections. The state legislative proposal takes advantage of that knowledge and will require that it be used to target inspections.

The proposed legislation requires the state to compile and make public the top 30 of the state's 1009 municipalities with the highest incidents of lead poisoning, identifying them as "Communities of Concern." That's only 3% of the municipalities (cities or towns) in the state, but they are expected to account for over 90% of the incidents of lead poisoning. For each of these communities, the state will be required to work with local county health and municipal building officials to prepare and implement a "Primary Prevention Plan." The prevention plans will use further geographic targeting and demographics to identify the specific neighborhoods likely to contain lead paint hazards and assure targeted inspections. In addition to identifying the Communities of Concern, the legislation will require the state to identify any census tract or census block group in which more than 25 cases of lead poisoning have occurred in the previous year and again work with local officials to prepare a more specific primary prevention plan for these "areas of high risk." This provision will work as a safeguard to assure the identification of any hot spot whether or not it is located in one of the 30 "Communities of Concern." Identifying the Areas of High Risk will assure that no child, if you will forgive the expression, is left behind. And this time, that's for real.

For units not targeted immediately for inspection there are other important primary prevention measures. For example, there is a requirement that within two years all pre-1970 rental units be certified to be either "lead free," "lead contained" or "lead stabilized" as defined in the statute, and owners will have a due diligence responsibility to inspect their properties. Multiple dwellings in New York City are already covered by a local lead paint ordinance, but advocates are hopeful that the final legislation will provide economic incentives for property owners in New York City to assist them in making their apartments safer.

The proposed state legislation also adopts other protections included in New York City's local law to establish that lead-paint hazards must be identified and removed using lead safe work practices. It will provide "on demand" inspections for upstate tenants to assure that they can obtain a professional inspection when there is reasonable cause to be concerned that a lead hazard is present. Addressing the liability criteria established by the Court of Appeals in the companion Chapman and Silber rulings, owners will be required to inspect their own properties. Establishing owner-awareness of the probable existence of a lead hazard will also help plug the loop-hole in the current federal "disclosure" law that requires landlords to warn prospective tenants of *known* lead hazards but does not require the landlord to do even the most basic inspection of the apartment to determine if any hazards may be present.

The bill adopts a "carrot and stick approach" providing incentives to the property owner in the form of tax credits for hazard abatement costs and creates a loan fund financed by issuance of state bonds. To attain "lead-contained" or "lead stabilized" status required to access the incentives, inspections by certified inspectors would be required at least every three years, or upon renting the apartment. Inspections would be required more frequently if there was a reasonable basis to believe that a condition existed that was conducive to creating a lead hazard. (For example, if a leak caused damage that compromised the painted surface making it susceptible to produce chipping, peeling or otherwise create lead dust.)

There are just over four years remaining for New York to meet the State and CDC goals of eliminating childhood lead poisoning by the year 2010. Experience tells us that moving to the next plateau requires that we adopt tougher laws and more effective enforcement. This legislation is crafted to the job. Legal Services advocates can play an important role in the passage and implementation of these measures. Please consider joining us in our efforts. For more information or to Join the Coalition to End Lead Poisoning in NYS, contact: Mike Hanley at our Rochester office (mhanley@empirejustice.org), or Kristin Brown in Albany (kbrown@empirejustice.org).

Which WISC Was It?

The listings for mental retardation, particularly 12.05C and 112.05D, continue to be fertile ground for disability findings. Advocates increasingly, however, see ALJs rejecting what would otherwise be "listing level" test scores as invalid because of other test results with higher IQ scores. If this happens to you, make sure you pay attention to which test was administered and when.

The most commonly reported IQ tests are from the Wechsler series: the WAIS (Wechsler Adult Intelligence Scale) or WISC (Wechsler Intelligence Scale for Children). The listings themselves do not specify which version of the test should be used, referring only to the "series." 20 C.F.R.§§12.00D.6.c & 112.00D.9. Both tests have undergone a number of revisions over the years.

The most current version of the WAIS is the WAIS-III, available since 1997, which replaced the WAIS-R, published in 1981. Research has demonstrated that the WAIS-R can produce scores up to 2.9 points higher than the WAIS-III, presumably because the WAIS-R was normed against the 1981 population, and is thus outdated. SSA has yet to declare the WAIS-R obsolete, preferring to leave that to the professional psychological community. POMS DI 24515.055, published in 2003, for example, refers to both tests, as well as to the WISC-R and the WISC-III. DI 33535.035, published in 1990, refers only to the WAIS-R and WISC-R (described as an improved test because of its then current normative data).

Advocates should note that the WISC was most recently "re-normed" in 2003. The most current version is the WISC-IV. The WISC-IV updated the WISC-III (published in 1991), which was preceded by the WISC-R (1974), revising the original WISC of 1949. None of SSA's publications appear to mention this newest version yet, but it should start showing up in more and more records.

Social Security Ruling (SSR) 96-2p may provide some support for arguing that WAIS-III or WISC-IV should be preferred – especially if they produce lower results! SSR 96-2p defines "medically acceptable" diagnostic techniques as those used in accordance with medical standards generally accepted within the medical community as the appropriate techniques to establish the existence and severity of an impairment. POMS DI 28010.150B compares scores from different IQ tests and refers to how SSA evaluates new and improved diagnostic and evaluative techniques in CDRs (Continuing Disability Review claims). *See also* DI 28020.250.

Differing version of the tests may not be the only reason for discrepancies among results. Another often cited reason for disparate scores is the practice effect, where later scores are inflated as a result of familiarity with the test or test format. SSA has provided some guidance in this area. See POMS DI 24515.055C. See also *Childhood Disability Evaluation Issues, Social* Security Administration Office of Disability, SSA Pub. No. 64-076 (March 1998), available at www.clsphila.org/abc_march98_training.htm#Listings112. It contains a plethora of helpful information about mental retardation issues.

In the May 2005 edition of the *Disability Law News*, we reported that this publication had been superceded by a new compendium of Q&As promulgated by SSA in 2001, which refers back to SSA Pub #64-074 for guidance on evaluating mental retardation. Note that the document we referred to as the "Headless Child Instruction" is in fact the same as the March 1998 Childhood Training Manual "Pink Cover." See Section II 1, available at www.clsphila.org/abc for advocates files/training material Q and A.pdf. Please keep us informed about your successes in countering conflicting IQ scores.

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