Empire Justice Center
Making the law work for all New Yorkers

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$325 Million Settlement with Ameriquest Mortgage Company: What It Means for New York Homeowners

By Kirsten E. Keefe and Gabriel Malseptic

Subprime mortgage lending, or lending to borrowers with damaged credit, has faced increased regulatory scrutiny in the last three to five years as the government has tried to prevent lenders from preying on borrowers. This sector of the lending industry, which mushroomed in the early 1990s with investment money from Wall Street, has allowed many borrowers to get loans that would not have been possible twenty years ago. However, it has also created opportunities for abusive lending practices.

Overview of Settlement

On January 23, 2006, after a two-year long investigation, Attorney General Eliot Spitzer announced a $325 million nationwide settlement with ACC Holdings Corporation and its subsidiary companies Ameriquest Mortgage Company, Town & Country Credit Corporation, and AMC Mortgage Services d/b/a Bedford Home Loans. Of the award money, $295 million will be distributed to class members and $30 million will be paid to states involved in the investigation. The agreement resolves allegations of widespread fraud by the company during the period between January 1999 and December 2005, as part of a high-pressure scheme to sell mortgages, which trapped consumers into debt and put them at risk of losing their homes.

The States (forty-eight in total) investigated complaints that Ameriquest was using a variety of unlawful lending practices, such as: giving borrowers inaccurate information about interest rates; discount points and other mortgage loan terms; inflating property appraisals; fabricating income; failing to follow-up promises to mail terms of the agreement; misleading customers in interviews (for example, applicants were misled about the true costs of refinancing or were counseled to refinance even when refinancing didn't offer any real benefit). Borrowers also complained that Ameriquest pressured them to close loans on terms that were different from those originally proposed, and failed to complete funding of loans on time.

The enormity of this settlement, ranked as the second largest state or federal consumer protection settlement in history, serves as a signifier of the gross injustices that Ameriquest committed. At least 240,000 of Ameriquest's approximately 750,000 customers from 1999 to 2005 will receive restitution. However, it should be noted that this seemingly exorbitant

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Ameriquest Settlement—continued

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amount ($325M) of money is only about 2.54 percent of the $106 billion in loans made nationally during the period in question.

Similar to the settlement achieved by the States' Attorney Generals in 2003 against Household Finance Corporation, the Ameriquest settlement, though consequential in its national focus and its size (the large award and the injunctive relief obtained to reform Ameriquest's worst practices) is less significant in relieving individual homeowners. The unfortunate reality is that without any mechanism to restructure or rescind the current loans, the settlement offers little relief to those trying to save their homes.

Restitution for New York Ameriquest Borrowers

New York's Attorney General Eliot Spitzer and Assistant Attorneys General Mark Fleischer and Amy Schallop of the Consumer Frauds and Protection Bureau were integrally involved in negotiating the settlement along with attorneys general from Iowa, Illinois, California and Washington. New Yorkers will receive approximately $22 million in restitution. Over 26,000 New York State residents may be eligible to participate in the restitution fund.

The restitution money will be distributed through two separate funds. "Fund A" includes a total of $175 million that will be distributed nationally to Ameriquest borrowers who obtained mortgages between January 1, 1999 and April 1, 2003. There are approximately 14,000 New Yorkers entitled to benefits from this fund. The amount of the restitution for each consumer will be based on a formula developed by the settling states. (The total amount that New York will receive out of Fund A depends on the number of people who opt-in to the settlement.) The minimum individual recovery from this fund is estimated to be about $600 and the average award amount will be between $900 and $1,000, although as stated above, this will depend on the participation level.

In addition to the predatory practices addressed in the settlement, the majority of Ameriquest loans have onerous adjustable interest rate terms that allow the "teaser rate" to increase significantly two to three years into the loan term. For example, an Ameriquest borrower in Albany started with a fixed rate for two years of 10.95%. Thereafter, the rate increased 6.5 points over the "current index", recalculated every six months. The first trigger caused the interest rate to increase to 13.65% which meant a change in the monthly principal and interest payment from $739.87 to $902.64. As the current index increases, the monthly payment will increase, with a cap of 16.95%. An inflated appraisal on the property along with a declining housing market make it unlikely that the borrower will be able to refinance out of these egregious terms. Even though the homeowner is a class member of the settlement entitled to compensation, she still cannot afford the underlying loan.

A second fund of $295 million ("Fund B") will be distributed to a second class of Ameriquest borrowers. New York's portion of this fund is $8.7 million, based on the percentage of total dollar volume of Ameriquest loans held by consumers in New York. The State has discretion to determine how this money will be distribted to victimized Ameriquest customers. There are potentially 26,000 New York borrowers who may be entitled to benefits from this fund, however, this class may be narrowed to ensure more substantive relief to homeowners with the worst loans. [1]

Notices are scheduled to be sent to Ameriquest borrowers in early 2007. Class members will have between thirty and sixty days to respond and will be required to send in a claims form to opt-in to the settlement to obtain relief. If a borrower fails to send in a claims form, they will not be bound by the release. Class members who opt-in to the settlement will be bound by the release from bringing additional affirmative action against Ameriquest. Class members will still be able to allege all claims as affirmative defenses if

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New York Law Allows New York Consumers to "Freeze" Their Credit Reports

By Kirsten Keefe

On November 1, 2006, the Credit Report Security Freeze Legislation (A.7349-D/S.6805-B) went into effect in New York State. The law allows New Yorkers to put a security freeze on their credit reports, disallowing unknown third parties from accessing their information. Intended to help consumers who are either victims of identity theft, or who are concerned that they might be at risk of having their identities stolen, the law's provisions may prove to be too cumbersome for many to take advantage of its benefits. The law amends New York's General Business Law §380-a by adding four subdivisions, and §380-t, relettering it as §380-u and adding a new §380-t.

How does it work?

Consumers can place a "security freeze" on their credit reports to prevent their information from being pulled by unauthorized third parties. In order to place a freeze, consumers must send a written request via certified or overnight mail to the credit reporting agency ("CRA"), along with proper identification and a fee.[1] The consumer must send a separate request to each of the three main CRA's (Equifax, Experian and TransUnion).[2] The CRA's are to designate a specific address to which the request must be sent.

The CRA must place the security freeze on the account within five business days of their receipt of the request.[3] The CRA must send written confirmation to the consumer that a freeze has been placed on their report within ten business days thereafter, along with a unique personal identification number or password.[4] A security freeze means that the CRA may not release the consumer's report or credit score to unauthorized third parties.[5] A CRA may advise a third party that a security freeze is in effect.[6]

The freeze remains on the report indefinitely and may only be removed if requested for by the consumer, or if the CRA discovers the freeze was placed based on a material misrepresentation by the consumer.[7]

Can a consumer allow a designated creditor to access their credit report?

Yes. A consumer who wishes to have their credit report information released once a freeze is in place must contact each CRA to request that the freeze be temporarily lifted to allow a specific party to receive their credit information for a designated period of time. The consumer must send a written request (or may do so by phone or internet if allowed by the CRA[8]), and must provide their identification number or password, information regarding the third party to which the report should be made available or the time period for which the report should be available.[9] A fee up to $5.00 may be charged by the CRA.[10] The CRA must comply with the request within three days of receipt of the request.[11]

Can anyone else access a credit report once a "freeze" is in place?

Yes. In addition to those to whom authorization is specifically granted, several entities will still be allowed to access a consumer's report even after a freeze is in place, including: (1) entities to whom a financial obligation is already owed who deem reviewing the account necessary for account maintenance, monitoring, credit line increases, and account upgrades and enhancements; (2) subsidiaries, affiliates, agents, assignees or prospective assignees of a creditor to

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Credit Reports—continued

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whom authorized permission has been granted; (3) any entity acting pursuant to a court order, warrant or subpoena including state or local agencies, law enforcement, courts or private collection agencies; (4) a child support agency acting pursuant to Title IV-D of Social Security Act (42 U.S.C. *et seq.*); (5) the state or an entity acting on behalf of the state when investigating fraud, the collection of delinquent taxes or unpaid court orders, or other statutory responsibilities pursuant to 15 U.S.C. § 1681B; (6) an agency to prescreen as provided for under the FCRA; (7) a company conducting a file monitoring subscription if such is subscribed to by the consumer; and (8) the consumer who requests their credit report or score.[12]

How can a "freeze" be removed from a credit report for good?

There is no time expiration for a security freeze. The freeze will remain in place until the consumer requests that it be removed, and provides their personal identification number or password along with a fee if the CRA requires one. The freeze must be removed within three days of receipt of the request.[13]

What are the fees?

There is no fee to place the freeze if the consumer has been a victim of identify theft and submits a copy of a signed Federal Trade Commission ID theft victim's affidavit,[14] or a valid police report.[15]

In addition, all consumers are allowed to place one freeze free of charge on their credit reports. If the freeze is removed and the consumer wishes to place a subsequent freeze on their account, the CRA may charge up to $5.00. Each CRA may also charge a fee up to $5.00 for a temporary lift or for the permanent removal of the freeze. An additional $5.00 fee may be charged for a replacement identification number or password if the consumer loses the original.[16]

Notice to consumers

The federal Fair Credit Report Act (15 U.S.C. §1681 *et seq.*) requires CRA's to provide a summary of rights to consumers when they request information in writing about their credit report, and/or if they request information as the result of being a victim of identity theft. When such information is required to be sent, residents of New York must also be sent a notice informing the consumer of their right to obtain a security freeze.[17] Specific language to be included in the notice is set forth in the law.[18] The notice must also be sent to any consumer who requests information about a security freeze.[19]

What happens if the CRA releases information even though there is a "freeze"?

If information is erroneously released to a third party, the CRA must notify the consumer in writing within five business days following discovery of the error regarding the information released, and the identity and contact information for the entity to whom the report was released.[20] There is no private right of action, however, the attorney general may seek an injunction against the CRA, as well as seek a maximum civil penalty from the court in the amount of $5,000 for each violation.[21]

Conclusion

Identity theft has been identified by Attorney General Eliot Spitzer as the fastest growing financial crime, affecting half a million Americans each year. Research shows that low-income consumers are not any more immune from identify theft. Major security breaches such as the ChoicePoint debacle in February 2005 in which personal information was obtained from computer files over the internet, an increase in news reports of stolen business laptops out of the back seat of cars, as well as an increase in police reports about identify theft are strong evidence that we all must be more vigilant about protecting our information.

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Credit Reports—continued

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Though this new law may provide some protection, requiring requests be sent via certified or overnight mail, as well as the fees that could become costly for consumers at $5.00 for each request to have the freeze lifted, limits the likelihood that many New Yorkers will take advantage of its benefits. Since September 2005, New Yorkers have been entitled to obtain a free copy of their credit report from each of the agencies. Frequent monitoring, in addition to common sense practices, may continue to prove to be the most practicable means for consumers to protect their information.

To obtain a free copy of your credit report, go to *http://tinyurl.com/ye5nm3* or call toll free at 1-877-322-8228. Hearing-impaired consumers can access via TDD service at 1-877-730-4104. More information about New York's Security Freeze Law, credit reports, and identity theft can be found on the NYS Consumer Protection Board's website at *http://tinyurl.com/ydrpjf.*

Footnotes

[1] NY General Business Law, § 380-t(a) and (b). "Proper identification" is broadly defined as "information generally deemed sufficient to identify a person." Id. at § 380-a(n).

[2] "Consumer credit reporting agency" is defined as an agency that "regularly engages in the practice of assembling or evaluating and maintaining, for the purpose of furnishing consumer credit reports to third parties bearing on a consumer's credit worthiness, credit standing, or credit capacity, public record information and credit account information from persons who furnish that information regularly and in the ordinary course of business." Id. at 380-a(k). The law exempts certain CRA's, however, including CRA's that act as resellers of information but do not maintain permanent data bases, check service or fraud prevention services companies, and deposit account information services. Id. at § 380-t(p).

[3] Id. at § 380-t(b). Requests received after January 1, 2008 must be processed within four business days; requests received after January 1, 2009, must be processed within three business days. Id.

[4] Id. at § 380-t(c).

[5] *See* Id. at § 380-a(m).

[6]. Id. at § 380-t(b).

[7] *See* §§ 380-t(h) and (k). If a freeze is to be involuntarily removed, the CRA must notify the consumer in writing prior to the removal.

[8] *See* Id. at § 380-t(f).

[9] Id. at § 380-t(d).

[10] Id. at § 380-t(n).

[11] Id. at § 380-t(e).

[12] Id. at § 380-t(m).

[13]. Id. at § 380-t(k).

[14] Affidavit, can be found at <http://www.ftc.gov/opa/2002/02/idtheft.htm>.

[15] NY General Business Law, § 380-t(n)(1).

[16] Id at §380-t(n)(2).

[17] Id. at § 380-t(q(1).

[18] See Id.

[19] Id. at § 380-t(Q)(2).

[20] Id. at § 380-t(R).

[21] Id. at § 380-t(S).

Settlement of *Conrad v. Perales*

By Peter Dellinger

In trickery, evasion, procrastination, spoliation, botheration, under false pretences of all sorts, there are influences that can never come to good. Charles Dickens, *Bleak House*, Ch 1, 1852.

The Scheme

While, the *Conrad* case mirrors the length and literary plot of a Dickensian novel, its origins lie in the 1980s when the New York State Department of Social Services (DSS) and the nursing home industry developed a joint funding plan called "MOP II", the Medicare Optimization Program. Under this scheme, nursing homes were allowed to bill both Medicaid and Medicare on behalf of nursing home patients, keep the proceeds from which ever program paid higher benefits (usually Medicaid), and send the remaining benefits (usually Medicare) to DSS. This program was audaciously illegal: if a patient is eligible for Medicare, federal law required the nursing homes "to accept Medicare reimbursement in full satisfaction of a patient's covered services". *Conrad v. Perales*, 92 F.Supp.2d 175, 178 (W.D.N.Y. 2000).

MOP II not only defrauded the federal government, but also thousands of nursing home patients who were eligible for both Medicare and Medicaid (dual eligibles), by unlawfully requiring them to pay for their Medicare covered care under the Medicaid Program. "Unlike Medicare, Medicaid requires these patients to contribute most of their monthly income towards the cost of their care". *Conrad v. Perales,* 818 F.Supp. 559, 561 (W.D.N.Y.). This patient co-payment, called a "NAMI" (Net Available Monthly Income), was collected by the nursing homes, and under MOP II nursing home residents paid over $10 million in NAMIs for Medicare covered-care.

The Trickery

MOP II reached its height in 1989, when the Medicare Catastrophic Coverage Act expanded Medicare eligibility for those needing skilled nursing care. During this year, some 14,000 nursing home residents, who were dually eligible for both Medicare and Medicaid, had their Medicaid NAMIs unlawfully collected by their nursing homes under the auspices of DSS. Usually the nursing homes kept their patients' NAMIs because the Medicaid reimbursement rate was usually higher, but "NAMIs were retained even when the ultimate reimbursement came from Medicare and the Medicaid payment was reimbursed to DSS." *Conrad v. Perales*, 818 F.Supp. at 562. DSS officially ended MOP II on January 1, 1990.

Evasion

Soon after, advocates for the elderly became aware of the illegal and defunct program, and DSS promised to issue NAMI refunds to affected clients. In late December 1991, when these promised refunds were not forthcoming, Anthony Szczygiel, a SUNY at Buffalo Law School professor and attorney with Legal Services for the Elderly, filed a class action lawsuit challenging the MOP II program and demanding NAMI refunds for all affected New York State nursing home residents *Conrad v. Perales*, No. 91-846C (W.D.N.Y.).

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Procrastination

DSS quickly consented to class certification and by March 1992 DSS promised in open court to repay the NAMI refunds to "disadvantaged" class members. Through a highly successful series of stalling tactics and delays over the next six years, DSS, and its successor, the Department of Health, never identified the affected class members or issued the promised NAMI reimbursements. In 1989 the *Conrad* plaintiffs were already frail and elderly, and plaintiffs believe that these delays were actually induced by the defendants in order to reduce the size of the class and curtail liability for the amount of paid refunds.

False Pretences of All Sorts

Frustrated by the slow settlement process, the court ordered the plaintiffs to file "any motion...they believe will advance this litigation" in December 1998. In response, the parties filed cross motions for summary judgment, and despite its prior promises and commitments to repay all the NAMI refunds, DOH claimed 11th Amendment immunity, and refused to pay NAMI refunds to anyone.

Spoliation and Botheration

In October 2000, the court directed that discovery be completed in 6 months, but the defendants repeatedly failed to comply with the discovery deadlines, destroyed or withheld critical documents from production, and filed false interrogatory responses. Plaintiffs uncovered evidence demonstrating that the defendants had filed false and misleading affidavits in support of their prior summary judgment motion. Professor Geoffrey Hazard, director emeritus of the American Law Institute, stated that "[c]onduct like that of defendants and their counsel threatens the integrity of the entire litigation process" and he had "never encountered such a an egregious failure and refusal to comply with elementary discovery obligations as involved here."

Great Expectations

After almost two years of court-ordered negotiations and fifteen years of litigation, the defendants have finally agreed to settle the case by paying up to $11 million in refunds to each surviving plaintiff class member, or more likely, their surviving heirs. Working for the plaintiffs, Larry

Glatz of the Center for Medicare Advocacy, has successfully identified the names of 14,000 class members using available computer data and discovery information, and determined the amount of their individual illegally collected NAMIs, which range from $100 to $5000.

Notices regarding the proposed settlement are now being published in newspapers throughout the state, and the court has scheduled a class action settlement fairness hearing on December 28, 2006 in Buffalo. If the settlement is approved by the court, defendants have agreed to help provide death certificates for each of the deceased plaintiffs. With this information, the *Conrad* Settlement Administrator, Complete Claim Solutions, will attempt to locate heirs of the these class members, and mail them a NAMI refund claim form. This form may also be found at*: http://tinyurl.com/u4j69*.

The amount of any individual class member's NAMI refund will be determined by the number of heirs identified and participating the settlement, the costs of administering the settlement, and the interest rate to be applied to the NAMI refund. More information about the proposed settlement may be found at: *http://tinyurl.com/yxxd24.*

Peter Dellinger is an attorney with the Rochester office of Empire Justice Center. Along with Anthony Szczygiel and Henry Killeen, III, he represents the plaintiffs in *Conrad v. Perales*.

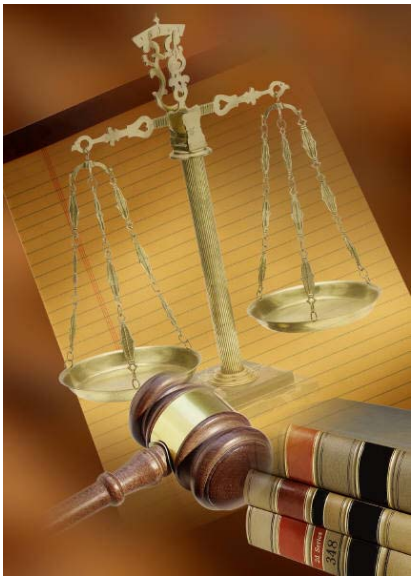
Son of *Pronti* Born

By Kate Callery & Louise Tarantino

Litigation recently filed in the Western District of New York will build on the legacy created by the *Pronti* litigation, which charged now retired Administrative Law Judge (ALJ) Franklin T. Russell with generalized bias against disability claimants. *See Pronti v. Barnhart,* 339 F.Supp.2d 480 (W.D.N.Y. 2004) (*Pronti I*). The claims of the individual plaintiffs in *Pronti* are being resolved, and the litigation itself concluded after the defendant agreed to remand all cases pending in the U.S. District Court and at the Appeals Council that involved ALJ Russell. *Pronti v. Barnhart,* 441 F.Supp.2d 466 (W.D.N.Y. 2006) (*Pronti II*). The September 2006 edition of the *Disability Law News*, available at www.empirejustice.org, includes a more detailed description of the conclusion of the *Pronti* litigation, which was brought by Attorney David Ralph of the Elmira office of LAWNY, along with private attorneys Andrew Rothstein of Elmira and Bill McDonald of Geneva.

In an effort to extent the scope of relief beyond the limited number of claims covered by *Pronti*, the Empire Justice Center has filed *Hogan et al. v. Barnhart,* seeking rehearings for Mr. Hogan and the three other named plaintiffs, as well as the class they purport to represent. Mr. Hogan and the other plaintiffs were all denied benefits by ALJ Russell, primarily on the same grounds and under the same circumstances for which SSA criticized ALJ Russell in the Findings that it submitted to the court in *Pronti I*. Plaintiffs have moved for class certification before Judge Larimer, who was the judge in *Pronti.* The class consists of all claimants, with cases pending since April 1997 (the date the Commissioner was first on notice of allegations of bias on the part of ALJ Russell), for Social Security and/or Supplemental Security Income disability benefits who received an adverse decision (wholly or in part) from ALJ Russell, and whose claims were on appeal or were within the time period to file an appeal, or whose claims were eligible to be reopened, as of April 1997.

Plaintiffs are represented by Kate Callery, Louise Tarantino, and Bryan Hetherington of the Empire Justice Center, and former DAP attorney Ed Lopez.



SSA Announces 2007 Cost of Living Increases

By Kate Callery & Louise Tarantino

The Social Security Administration (SSA) has announced that the cost-of-living increase for Social Security benefits and for the SSI Federal Benefit Rate (FBR) for 2007 will be 3.3%. This will raise the SSI FBR from $603 to $623 per month for an individual and from $904 to $934 for an eligible couple.

For retirees, $5 of the increase in monthly benefits will go to pay the increase in the Medicare Part B premium, which will be $93.50 per month for those individuals earning no more than $80,000 per year. For the first time, however, there will be a means test for determining the amount of the Part B premium, with the result that some high income retirees could see their whole Social Security benefit increase go to pay the increase in Medicare Part B premiums. See related article on page 5.

Other changes for 2007 include an increase in the earnings required for a quarter of coverage to $1,000 per month, and an increase in the substantial gainful activity (SGA) level to $900 per month for disabled persons and $1,500 for blind disabled persons.

SSA has a good fact sheet comparing 2006 with 2007 numbers at its website: *http://tinyurl.com/y5ldtv*. Additionally, an updated SSI Benefit chart for New York is available at Empire Justice Center's website, www.empirejustice.org.

Public Warned About E-Mail Scam

By Kate Callery & Louise Tarantino

On November 7, 2006, Joanne Barnhart, Commissioner of Social Security, and Patrick O'Carroll, Jr., Inspector General of Social Security, issued the following warning about a new email scam that has surfaced recently:

The Agency has received several reports of an email message being circulated with the subject "Cost-of-Living for 2007 update" and purporting to be from the Social Security Administration. The message provides information about the 3.3 percent benefit increase for 2007 and contains the following "NOTE: We now need you to update your personal information. If this is not completed by November 11, 2006, we will be forced to suspend your account indefinitely." The reader is then directed to a website designed to look like Social Security's Internet website.

"I am outraged that someone would target an unsuspecting public in this manner," said Commissioner Barnhart. "I have asked the Inspector General to use all the resources at his command to find and prosecute whoever is perpetrating this fraud." Once directed to the phony website, the individual is asked to register for a password and to confirm their identity by providing personal information such as the individual's Social Security number, bank account information and credit card information.

Inspector General O'Carroll recommends people always take precautions when giving out personal information. "You should never provide your Social Security number or other personal information over the Internet or by telephone unless you are extremely confident of the source to whom you are providing the information," O'Carroll said.

To report receipt of this email message or other suspicious activity to Social Security's Office of Inspector General, please call the OIG Hotline at 1-800-269-0271. (If you are deaf or hard of hearing, call the OIG TTY number at 1-866-501-2101). A Public Fraud Reporting form is also available online at OIG's website www.socialsecurity.gov/oig.

President Bush Names SSA Commissioner

By Kate Callery & Louise Tarantino

President Bush announced on September 14, 2006, that he intends to nominate Michael J. Astrue, of Massachusetts, to be the next Commissioner of Social Security, for a six year term beginning January 20, 2007. Mr. Astrue previously served as Chief Executive Officer of Transkaryotic Therapies. Earlier in his career, he served as General Counsel at the U.S. Department of Health and Human Services (HHS). Previously, he served as Counselor to the Commissioner of Social Security at the U.S. Department of Health and Human Services. He also served as Acting Deputy Assistant Secretary for Legislation at the Department of Health and Human Services. Mr. Astrue received his bachelor's degree from Yale University and his law degree from Harvard University.

When Mr. Astrue served at HHS, SSA was still a part of the agency. From 1986 to 1988, Astrue was Counselor to then SSA Commissioner Dorcas Hardy. He also served as Associate Counsel to both Presidents Reagan and George H.W. Bush. After leaving HHS in 1992, he was briefly in private practice. In 1993, he began a career in the pharmaceutical industry, where he held various high-level positions, including CEO.

According to the NSCLC Washington Weekly, President Bush nominated Astrue to head the Food and Drug Administration in 2001 but the nomination was blocked by Senator Edward Kennedy, who felt that Astrue was too closely tied to the pharmaceutical industry. His nomination as Commissioner of SSA will similarly require confirmation by the U.S. Senate. It has been referred to the Senate Finance Committee, but confirmation hearings have not yet been scheduled

Current Commissioner Joanne Barnhart's term was due to expire in January 2007; she obviously was not renominated. Per rumors flying at the recent NOSSCR conference in Phoenix, she was anxious to see some of her proposals, especially the Disability Service Improvement changes, carried to fruition. She has allegedly been assured they will not be derailed. Only time will tell how quickly the train will steam ahead, however.

So why wasn't Barnhart reappointed? According to an article in the September 2006 edition of the NOSSCR *Social Security Forum,* the nomination of Astrue might be viewed in light of several other Bush appointments. Several days after Astrue's nomination, President Bush designated Sylvester J. Schieber to replace outgoing Chairman of the Social Security Advisory Board (SSAB) Hal Daub. He also intends to nominate Mark J. Warshawsky and Dana K. Bilyeu to the SSAB.

Schieber has been on the SSAB since 1998, and was a proponent of a plan to address the long-range financing of the Social Security trust funds known as the "Personal Security Account" (PSA). The PSA is a two-tiered account, half of which would pay a basic benefit, or flat amount of about 47% paid to the average worker in 1996. The second tier would be a personal account. Warshawsky was Assistant Secretary for Economic Policy in the U.S. Treasury Department from 2004 to 2006. His speeches from his Treasury Department days make clear that he supported privatization. Couple that with the President's remarks that he plans to put Social Security reform on his 2007 agenda.

Of course, all that was before November 7th….

Regulatory Roundup

By Susan C. Antos

Regulatory Round Up reports on administrative rule making of interest to public benefits specialists. The rulemaking described below appeared in the New York State Register from September 27, 2006 to December 13, 2006 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). Any comments submitted by Empire Justice Center on proposed regulations, are available at www.empirejustice.org. From the "Issue Areas" bar, click on the "Public Benefits" section, go to "Cash Assistance" and then "Comments on Regulations."

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
11/15/06	12/30/06	432.2	**Child Protective Investigations:** This proposed regulation sets forth the procedures that child protective staff must take when they are denied access to a child or the home where the child resides. The regulations require an assessment done with a supervisor of whether a court order is necessary or whether any other emergency action must be taken. This assessment must be done within 24 hours after access has been refused or failed. Additionally, these regulations expand the list of collateral contacts that an agency can make as part of its child protective investigation.
11/08/06	12/23/06	441.21 443.4	**Caseworker Contacts with Foster Children, Their Relatives and Caregivers:** This proposed rule requires that local district case workers have at least monthly contact with children in foster care. The Regulatory Impact Statement notes that New York is only one of seven states that does not require monthly contacts and notes that there is a correlation between the number of case work contacts and positive outcomes for foster children. OCFS estimates that to meet this requirement New York State will need 7 caseworkers statewide at an estimated cost of $378,000.

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
11/1/06	12/16/06	11 NYCRR 362-2.5 362-2.7 362-3.2 362-4.1 362-4.2 362-4.3 362-5.1 362-5.2 362-5.3 362-5.5	**Healthy New York:** These proposed regulations have been repeatedly filed on an emergency basis for over a year, and make a number of changes to the Healthy New York program, including deleting co-payments for well child visits, allowing a lower cost plan option which does not include prescription drugs, defining *de minimus* contributions for purposes of determining whether small employers qualify to participate, exempting child support received as income, and deleting the requirement upon recertification.
10/18/06	12/02/06	358-2.2(a)(14)	**Home Energy Assistance Program (HEAP):** This consensus rulemaking requires that a notice regarding a HEAP payment is deemed to be adequate only if it has a copy of the budget or basis for the computation included as part of the notice. This regulation is a result of the decision in *Kapps v. Wing,* 404 F.3d 105 (2nd Cir. 2005).
10/11/06	11/25/06	347.10(a)(9)(b), (c)	**Child Support Standards Chart:** This regulation updates the child support standards chart which is used to calculate child support obligations for calendar year 2006. The self-support reserve for 2006 is $13,230.

Emergency Rule Making

Date of Filing	Rules Expires On	Regulations Affected	Summary
11/13/06	02/10/07	441.21 443.4	**Caseworker Contacts with Foster Children, Their Relatives and Caregivers:** This emergency rule, which was filed as a proposed rule on November 8, requires that local district case workers have at least monthly contact with children in foster care. The Regulatory Impact Statement notes that New York is only one of seven states that does not require monthly contacts and notes that there is a correlation between the number of casework contacts and positive outcomes for foster children. OCFS estimates that to meet this requirement New York State will need 7 caseworkers statewide at an estimated cost of $378,000.
10/1/06	12/27/06	357 421 428 430 441,443	**Home Studies for Adoptive and Foster Placement:** This emergency rule has not yet been promulgated as a proposed rule. It permits foster children who are being released into their own care to get their medical and education records at no charge. It requires child protective services information inquiries to other state when a person applying to be an adoptive or foster parent has resided out of state within 5 years of the application. It establishes time frames for the completion of home studies.
9/25/06	12/23/06	426.10 421.4 421.6 421.17 423.2	**Permancy, Safety, and Well Being of Children in Foster Care:** These regulations, which were proposed on September 3, 2006, the full text of which is posted on *www.ocfs.state.ny.us*, implement Chapter 3 of the Laws of 2005, which dramatically changes the proceedings governing children in foster care, particularly procedures under Article 10 of the Family Court Act, the termination of parental rights and adoption.
9/11/06	12/09/06	11 NYCRR 362-2.5 362-2.7 362-3.2 362-4.1 362-4.2 362-4.3 362-5.1 362-5.2 362-5.3 362-5.5	**Healthy New York:** These regulations have been repeatedly filed on an emergency basis for over a year, and make a number of changes to the Healthy New York program, including deleting co-payments for well child visits, allowing a lower cost plan option which does not include prescription drugs, defining *de minimus* contributions for purposes of determining whether small employers qualify to participate, exempting child support received as income, and deleting the requirement that supporting documents be required upon recertification.

Expanding the Patchwork

Inequity in Child Care Subsidy Eligibility and Administration is Greater Now Than in 2002

By Saima Ahktar and Susan Antos

In New York State, parents with incomes under 200% of poverty are eligible to receive assistance paying for child care while they work.[1] In a few locations (parts of Manhattan, the Bronx, Yonkers, Albany and Monroe counties), facilitated enrollment projects have been established under special state budget authority, which have eligibility levels up to 275% of poverty. New York funds most of this child care assistance with hundreds of thousands of dollars in federal block grant funds. These federal dollars make up approximately 85% of all money spent in New York on child care subsidies, the rest being equally divided between state and local funding. However, eligibility for this federal benefit varies depending upon where the parent lives: the happenstance of geography determines whether a family receives an affordable child care subsidy, and also determines the conditions of eligibility.

Four years ago, Empire Justice Center released a report, *Child Care in New York State: A Patchwork of Policies: A county-by county review of subsidy administration*, which reviewed the differences in child care policies among New York's 58 social services districts.[2] The report reviewed the different options allowed within the regulatory structure of the New York State Child Care Block Grant, and concluded that there was a wide disparity of cost to parents and the treatment of child care providers depending on their county residence. *A Patchwork of Policies* concluded that New York State should create a system that makes quality paramount and should establish consistent policy to assure that the early learning experiences of New York's low income children are not determined solely by their county of residence.

This article revisits the administration of child care subsidy programs in New York four years after the issuance of *a Patchwork of Policies*, to determine if access to child care benefits has become more equitable. The Empire Justice Center has reviewed the Annual Plan Updates that each of New York's 58 social services districts has submitted to the Office of Children and Family Services.[3] These plans set forth in detail the eligibility policies of each local district. This article will focus on ten key differences in child care policy among the 58 social services districts, and will illustrate that the variation among counties has actually increased. These county by county variations are set forth in the chart accompanying this article.

Parental Co-Payments

For families that are not on public assistance, the size of a child care subsidy is calculated by taking the amount of the household's annual income, subtracting the poverty level, and applying a multiplier of 10% - 35% against the resulting amount.[4] The resulting number is then divided by 12 to determine the amount of the monthly "family share," or co-payment. This amount is the same regardless of the number of children in care or the type of care utilized by the family. The choice of a co-payment multiplier, is chosen by the county, and is based upon no standard-

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ized criteria. This county option, by far, creates, the greatest inequity among districts.

The co-payment disparities among counties are as troubling now as they were four years ago. In Livingston and three other counties, a family of three with earnings of $33,200 (200% of the poverty level), pays a family share of $1,660 dollars per year for child care.[5] However, if the same family moves across the county line into Genesee County, they will be asked to pay a family share of $5,810 per year for their child care. This is a difference of $4,150, and constitutes 17.5% of the household's total annual income. Eighteen other counties charge co-payments at rates between the amounts charged by Livingston and Genesee.[6] New York City, which uses a 25.5% multiplier, applies a 10% overall cap, so that if the multiplier results in a parent co-payment which exceeds 10% of the household income, the co-payment will not exceed the cap. New York City also makes a downward adjustment if the children in the household only receive part-time care.

Pay Differential for Accreditation

The rate of payment to a child care provider who receives a subsidy from the state, is limited to the "market rate," which equals 75% of the median cost of care in a geographic area. This rate is established biennially by the Office of Children and Family Services, and is broken down by type of care, age of the child and geographic area.[7]

For regulated child care providers who meet additional accreditation standards of a national child care organization, districts may opt to pay a higher rate for care so long as the actual cost of care exceeds market rate. The accreditation means that the child care provider is meeting not only the State's health and safety requirements, but also a number of additional standards related to things like teaching, assessment of children in the program, or the management of the child care program. In both 2002 and 2006, nine districts provide accredited child care programs with a higher payment rate than programs without the accreditation.[8] Albany and Steuben Counties pay accredited child care providers at a rate that is 10% higher than market rate. In Chautauqua, Madison, Monroe, Putnam, Tompkins and Washington Counties and New York City, an accredited provider is eligible for payment at a 15% higher rate.

Child Care during Non-Traditional Work Times

State regulations permit local Social Services districts the option of paying a rate which is higher than market rate for child care provided during non-traditional work hours such as late night, over night or weekends, when the actual

cost of this care exceed the market rate. In 2002, only nine counties provided this differential; currently, twelve districts opt to provide some additional payment for child care during non-traditional hours. The rate differential for care during non-traditional hours is supplemental to the accreditation rate differential at the discretion of the county.[9] In Steuben County, a provider receives a 5% differential for providing care during non-traditional hours; an accredited program that provides weekend care would be eligible for a 15% differential. In Albany County, a provider may receive a 10% higher payment rate for either care during non-traditional hours or running an accredited program. However, an accredited provider offering weekend care is only eligible for a 15% payment differential, rather than the 20% which might be expected based on the type and time of care.

Daytime Care for a Child Whose Parent Works Nights

Districts have the option to pay for daytime child care for a parent who works nights, creating a safe and nurturing setting for the child while the parent gets some much needed sleep.[10] In 2002, only 27 social services districts reported that they offered a child care subsidy for daytime

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child care while a parent who worked at night was sleeping. Now, forty-nine districts provide subsidized daytime child care for parents who need to sleep because of their work hours. However, the sleep coverage provided is variable from district to district. Steuben County offers only five hours, while all the surrounding counties all offer eight hours of sleep time. Hamilton County provides no sleep care, while immediately adjacent Fulton and Warren counties provide six and eight hours of sleep care respectively. Again, the benefit to the family is dependant only on geography.

Child Care Beyond 24-hours

State regulations permit districts the option of paying for child care for periods longer than 24 hours.[11] Only 14 of the 58 districts provide for child care over 24 hours.

In addition to emergency situations, child care beyond 24 hours benefits parents who travel for work or have jobs subject to compulsory overtime. Allegany County will pay for care over 24 hours up to seven times per year in cases of emergency or where the parent's activities require it. Franklin County will pay for care over 24 hours in emergencies with justification, but prior approval is preferred. In Schoharie County, paid child care extending beyond 24 hours must be pre-approved for a specific time-limited period of up to three months.

Counting Older Children in the Child Care Services Unit

Recent amendments to the child care regulations provide local social services districts with the option of including the presence and income of 18, 19 and 20 year olds in the child care assistance unit when calculating the household eligibility for a subsidy.[12] This option relies on the unrealistic assumption that a young adult who works will turn his or her income over to a parent in order to contribute to the household finances, and may penalize families who have working older teenagers who live at home.

Twenty-nine districts count an 18, 19, or 20 year old child as part of the household receiving child care assistance, and count income earned by the grown child in the calculation of household eligibility for child care assistance. In these counties, a young adult in the household who works 20 hours per week for 50 weeks earning minimum wage ($7.15 per hour starting in 2007), is considered to contribute $7,150 to the household. In such a scenario, a mother with wages of $13,200 (the poverty level for a household of two) with two children - one age 18 and one age 4, would have a $1 per week co-payment[13] if the teenager is not included in the assistance unit. Including the teen's income makes the family a household of three, but pushes their income to $20,350, almost 125% of poverty, increasing

their co-payment to $26 per week in a county with a 35% co-pay multiplier. By deeming the income of older children toward the total household income, families with older children who work pay amounts in excess of other families of the same size. Interestingly, the income of teens is not counted in determining public assistance eligibility or degree of need,[14] so deeming income for child care eligibility is inconsistent with the rules applied in the family assistance program.

Interestingly, there are some situations when the choice of this option actually benefits the family. For example, when the older child has little or no income, including the 18, 19 or 20 year old increases the household size used to determine eligibility against the same or only slightly larger income that would be applied if the older child was excluded. Thus in a household of three, a mother with wages of $16,600 (the poverty level for a household of three) with two children - one age 18 and one age 8, would have a $23 per week co-payment in a county with a 35% multiplier if the teenager with no income is not included in the assistance unit. If the unemployed teen is included in the assistance unit, the co-payment would be $1.00. In response to this quandary, some districts, like Rockland and

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Nassau, have opted to count the older child in the child care services unit only when it is a benefit to the household.

Child Care During a Break in the Parent's Activity

Local districts may, but are not required to pay for child care which is utilized when a parent has a break in employment or education for up to a one month period.[15] Paying for child care during breaks in parental activity means that a parent is not required to lose a valued child care provider when the parent is between jobs, or on a short educational break. Almost half of the districts (23) pay for some child care during such periods. Lewis County provides two weeks of child care while a parent has a break in approved activities. A parent in Madison County is allowed up to a four week break in activities while receiving child care assistance. Nassau County provides two weeks of assistance for parents with breaks in scheduled activities, teen parents on a break from school, or individuals switching jobs with a definite starting date and job offer. In Warren County, a parent may receive two weeks of child care for a break in activity, while waiting to begin a scheduled activity, or when scheduled to begin employment.

Transportation

Districts also have the option to pay for transportation that brings children to and from the child care provider.[16] Only ten of the 58 districts provide this vital service in any manner. Ulster County limits its transportation coverage to children attending summer camps. The cost is capped at $100 per summer. In comparison, Chautauqua County pays for all children attending before - or after - school programs offered by the YWCA, and to move children between licensed child care providers and schools, on a case by case basis.

Inconsistent Absence Policies Affect Providers

Some of the disparities in the administration of child care benefits especially affect child care providers. State regulations permit, but do not require, local districts to make payments for children who are temporarily absent from child care.[17] When a child is absent from child care on a regularly scheduled care day, 53 of 58 districts have elected to pay for child care. However, there is wide variation among the districts as to which absences will be paid for and how many are covered. Oneida County will pay for four missed days of scheduled child care per month and 24 days in six months without any specific reason for the absences. New York City allows 12 missed days in one month and 40 days in six months, but specifies that the absence must be caused by one of eight reasons. Furthermore, New York City reserves the right to monitor and not pay for overused absences.

Program Closures

Another policy which disproportionately affects child care providers is whether the social services district will pay the child care provider if the program is closed for a holiday, severe whether or other emergency.[18] If a child care program must be closed on a regularly scheduled day, 13 districts will pay for the closed programs. Even among this minority of counties, the criteria for payment vary dramatically. Columbia County will pay specified holiday closures for non-exempt providers where there is an existing letter of intent with the county. In Monroe County, only day care centers are eligible for four paid closures or less. Washington County pays for 5 days of program closure for day care, group family day care, and school aged child care but not family day care. In Schuyler County, day care, group family day care, and family day care providers are eligible for 5 days of program closure with a letter of intent from the district.

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Conclusion

Four years after Empire Justice Center released *A Patchwork of Policies*, the child care system remains as fragmented as ever. Under the new gubernatorial administration, New York State should create a system that makes quality paramount and establishes consistent policy to assure that the early learning experiences of New York's low income children are not determined solely by their county of residence. Empire Justice Center is part of a coalition of over 60 advocacy organizations called Winning Beginning New York, which have called for the creation of an Early Learning Commission. This Commission would be charged with creating a unified early care and education system in New York State. The creation of this Commission would be an important first step in establishing an equitable system for the administration of child care subsidies in New York State. For more information visit the Winning Beginning website at: *www.http://tinyurl.com/y2nurh.*

Footnotes

[1] Social Services Law §410-w.
[2] The full report, Child Care in New York State: A Patchwork of Policies, is available at http://tinyurl.com/v8w3q.
[3] Data is taken from the 2004-2006 Annual Plan updates filed with the New York State Office of Children and Family Services pursuant to 05 OCFS-LCM-08. In cases where the most recent annual plan was not available, the 2002-2003 Annual Plan update was used. Most district plans are posted on the Empire Justice website at http://www.tinyurl.com/y5jy55.
[4] 18 NYCRR §415.3(f).
[5] Those counties are Cattaraugus, Otsego and Schoharie.
[6] For a detailed comparison of family share burdens based on income level and household size, please see http://www.tinyurl.com/y6rw9p.
[7] Social Services Law §410-x(4); 05 OCFS LCM-17.
[8] 18 NYCRR §415.9(h).
[9] 18 NYCRR §415.9(h).
[10] 18 NYCRR §415.4(c)(3).
[11] 18 NYCRR §415.1(a).
[12] 18 NYCRR §415.1(1).
[13] 18 NYCRR §413.3(f)(4).
[14] Social Services Law 131-a(8), 131-a(10).
[15] 18 NYCRR §415.2(c)(2).
[16] 18 NYCRR §415.7(a)(3).
[17] 18 NYCRR §415.6(b).
[18] 18 NYCRR §415.6(c).

County by County Disparities in Child Care Assistance

County by County Disparities in Child Care Assistance

	Family Share	Payment for Absent Child	Payment for Program Closure	Payment for child care transportation	Higher payment rate for accredited child care	Higher rate for care during non-traditional hours	Payment for care while a parent who works 2nd or 3rd shift sleeps	Payment for child care beyond 24 hours	Include 18,19,20 y.o. in child care services unit	Payment for breaks in activity
Albany	25%	yes	yes	no	10%	10%	8 hours	yes	yes	4 weeks
Allegany	20%	yes	no	no	no	no	8 hours	yes	yes	no
Broome	35%	yes	no	no	no	no	6 hours	no	no	no
Cattaraugus	10%	yes	no	no	no	no	8 hours	no	yes	no
Cayuga	35%	yes	no	no	no	no	6 hours	yes	yes	no
Chautauqua	25%	yes	no	yes	15%	no	6 hours	no	no	4 weeks
Chemung	35%	yes	no	no	no	no	8 hours	no	yes	no
Chenango	35%	yes	no	yes	no	no	no	yes	no	no
Clinton	20%	yes	no	no	no	15%	8 hours	yes	yes	2 weeks
Columbia	20%	yes	yes	no	no	no	6 hours	yes	yes	2 weeks
Cortland	35%	yes	yes	no	no	15%	8 hours	no	yes	no
Delaware	17.50%	yes	no	no	no	no	8 hours	no	no	no
Dutchess	30%	yes	no	no	no	no	6 hours	no	no	no
Erie	35%	yes	no	no	no	no	no	no	no	no
Essex	20%	yes	no	no	no	no	8 hours	no	no	no
Franklin	30%	yes	no	yes	no	no	6 hours	yes	yes	2 weeks
Fulton	20%	yes	no	no	no	no	6 hours	no	no	no
Genesee	35%	yes	no	no	no	no	no	no	no	2 weeks
Greene	35%	yes	no	no	no	no	no	no	no	no
Hamilton	25%	no	no	no	no	no	no	no	no	no
Herkimer	25%	no	no	no	no	no	8 hours	no	no	no
Jefferson	25%	yes	yes	no	no	no	6 hours	yes	no	4 weeks
Lewis	25%	yes	no	no	no	15%	8 hours	yes	yes	2 weeks
Livingston	10%	yes	no	no	no	no	8 hours	no	yes	no
Madison	25%	yes	no	no	15%	no	8 hours	no	no	4 weeks
Monroe	25%	yes	yes	no	15%	no	6 hours	no	yes	2 weeks
Montgomery	35%	yes	no	no	no	no	6 hours	no	no	no
Nassau	17.50%	yes	no	yes	no	no	no	no	yes	2 weeks
New York City	25.50%	yes	yes	no	15%	15%	8 hours	no	yes	4 weeks
Niagara	35%	yes	no	yes	no	no	no	no	no	no
Oneida	35%	yes	no	yes	no	no	8 hours	yes	yes	no
Onondaga	35%	yes	yes	yes	no	no	8 hours	no	no	no
Ontario	20%	yes	no	no	no	no	8 hours	no	yes	2 weeks
Orange	35%	yes	no	yes	no	no	8 hours	no	yes	2 weeks
Orleans	35%	yes	no	no	no	no	no	no	no	no
Oswego	35%	yes	no	no	no	no	8 hours	no	yes	no
Otsego	10%	yes	no	no	no	no	8 hours	no	no	no
Putnam	20%	yes	yes	yes	15%	15%	8 hours	yes	no	2 weeks
Rensselaer	25%	yes	no	no	no	15%	no	no	yes	2 weeks
Rockland	35%	yes	no	no	no	no	8 hours	no	yes	4 weeks
Saratoga	20%	no	no	no	no	no	no	no	no	no
Schenectady	20%	yes	no	no	no	no	8 hours	no	yes	2 weeks
Schoharie	10%	yes	no	no	no	no	8 hours	yes	yes	4 weeks
Schuyler	25%	yes	yes	no	no	15%	8 hours	no	yes	2 weeks
Seneca	35%	yes	no	no	no	5%	8 hours	no	yes	no
St. Lawrence	25%	yes	no	no	no	no	8 hours	no	yes	no
Steuben	30%	yes	no	no	10%	5%	5 hours	no	no	**
Suffolk*	25%	yes	**	no	no	no	6 hours	**	**	**
Sullivan	35%	no	no	no	no	no	6 hours	no	no	no
Tioga	25%	yes	no	no	no	no	6 hours	no	no	no
Tompkins	20%	yes	yes	no	15%	no	6 hours	no	yes	no
Ulster	25%	yes	yes	yes	no	no	6 hours	no	yes	2 weeks
Warren	25%	yes	no	no	no	no	8 hours	no	no	2 weeks
Washington	20%	yes	yes	no	15%	15%	8 hours	yes	yes	2 weeks
Wayne	25%	yes	no	no	no	no	8 hours	no	no	no
Westchester	20%	yes	yes	no	no	no	7 hours	yes	yes	no
Wyoming	30%	no	no	no	no	yes	no	no	no	no
Yates	35%	yes	no	no	no	no	7 hours	no	no	no

Data is taken from the 2004-2006 Annual Plan updates filed with the Office of Children and Family Services pursuant to 05 OCFS-LCM-08, unless
* Information taken from the 2002-2003 Annual Plan
** Data incomplete

President's Corner: Policy Matters

By Anne Erickson

"Policy matters," Jim Tallon, President of the Untied Hospital Fund (UHF) declared as he opened a recent UHF conference on health care financing and delivery in New York State. "And," he said, "policy is back."

That captures the most powerful and positive buzz humming through state government right now. Policy discussions are back and dialogue is opening up. We know we may not – in fact probably won't – agree with the new administration on every decision and each detail of redesigning programs and services in New York – but what an amazing breath of fresh air to actually be discussing policy options again.

Indeed, to help the transition get underway, Governor-elect Eliot Spitzer created over a dozen committees to delve into everything from agriculture to homeland security. These committees are reporting back as we go to print and will offer the new Governor a snapshot of key issues in each of these broad policy arenas.

We've been working on the number of fronts. On the desperate need for increased investment in civil legal services, we have met with members of Governor-elect's Human Services, Government Reform and Criminal Justice Transition Teams. And as we note to them, the very fact that as an issue civil legal services doesn't even have a clear "table" to be responsible for it is testimony to the years of neglect we've had in this state. They are making no promises, but they are asking questions, engaging the issue, thinking things through with us.

On health care policy, the discussions are swirling around system designs, access, and coverage -- and putting the needs of the patient/consumer (the very patient consumer) at the center of the discussion. In human services, the talk is of structures and systems that will deliver, not deny services. The language of economic security is now used again when taking about children and families.

Heady days these. Its early, its new, it is policy and not yet governance. But there's a new wind blowing through state government: Policy matters; policy is back.

Here's to a wonderful holiday season to all – and to hitting the ground running Day One.

Expanding Access to Justice: New York's Next Challenge

By Anne Erickson

The New York Equal Justice Commission is pressing the incoming administration to take a fundamental policy approach to investing in civil legal services in New York. Here is our basic framing of the issue and the request.

> *"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and, sometimes, no skill in the science of law."*
> Powell v. Alabama, 287 U.S. 45 (1932)
>
> *"Poor people in New York State encounter literally millions of problems each year without the assistance of a lawyer. The problems are not trivial. Most often, they involve one of the basic necessities of life…"*
> Report to the Chief Judge, Legal Services Project (NY 1998)

A Crisis in Civil Justice

New York State is home to one of the most comprehensive and vibrant legal systems in the country. We pride ourselves on honoring the rule of law and striving for justice. New York is also home to 2.8 million people – 14.9% of our state's population -- living in poverty.[1] The child poverty rate in our state tops 19%. Thousands more live just above poverty, where the loss of a day's pay can pit the need to pay the rent against the cost of putting food on the table.

For the poor and near poor, access to justice is critical. Their lives intersect with the law and legal systems in the most fundamental areas of life, including housing, income supports, unemployment, health, social security and debt collection. As the New York State Bar Association noted in its seminal report on the legal needs of the poor:

> *"American society today is complex and the judicial system mirrors that complexity…. few middle class Americans would represent themselves in court if their access to shelter, income, food or clothing were at issue... Yet, the poor are confronted by such problems repeatedly and are often defeated due to the lack of counsel."*[2]

Despite the importance of legal aid in meeting the fundamental legal needs of the poor and near poor, the federal Legal Services Corporation in 2005 reported on the *Justice Gap in America*.[3] Not surprising to anyone involved in the struggle to expand access to justice, the report found that ***"at least 80 percent of the civil legal needs of low income Americans are not being met."*** These findings confirm earlier studies in New York that found less than 15% of the legal needs of low income New Yorkers were being met.

The New York Challenge

While other states have led the way in creating funding structures for legal services over the past few years, New York has lagged behind. New York is now one of only seven states that does not provide general operating support for the delivery of legal aid to the poor.[4] Indeed, in New York general funding for civil legal services is only provided as an add-on by the Assembly Majority.

We urge the new administration to bring New York back into the leadership position it once held. Specifically, we call on the new administration to work with the Legislature and the Judiciary to:

- Invest in Justice by creating a permanent Access to Justice Fund at a level of $50 million in the 2007 budget;[5]

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- Identify a state level agency or branch of government to assume responsibility for administration and oversight of such Fund; and

- Work with the legal community and the Equal Justice Commission to ensure that access to justice in New York receives the support, attention and priority it so desperately needs and so richly deserves.

The Equal Justice Commission believes the provision of civil legal services is a societal obligation and should be considered in the same light that we view other core social benefits, such as health, education and public assistance.

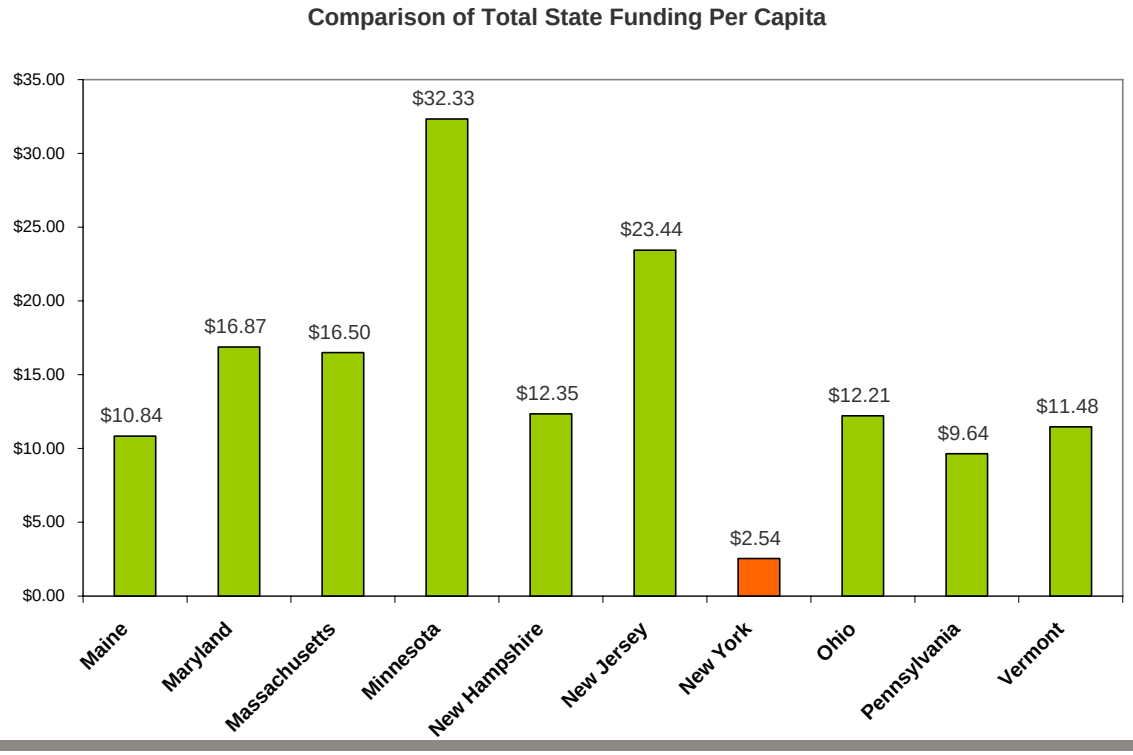
Anne Erickson

Chair, Equal Justice Commission

Footnotes

[1] US Census Bureau, 2003 American Community Survey, New York State, data table 3.
[2] *The New York Legal Needs Study*, New York State Bar Association Committee on Legal Aid, June 1990, revised and reprinted December 1993.
[3] *Documenting the Justice Gap in America*, A report of the Legal Services Corporation, September 2005, hereinafter The Justice Gap; www.lsc.gov or link through www.empirejustice.org.
[4] The others are Alabama, Alaska, Idaho, New York, South Dakota, Wisconsin and Wyoming
[5] In its 1998 report, The Legal Services Project appointed by Chief Judge Judith S. Kaye called on the state to create a $40 million Access to Justice Fund noting that "$40 million annually would do no more than restore legal services funding lost since 1992 (after adjusting for inflation)."

The picture that paints a thousand words. While other states made significant investment in civil legal services in recent years, New York did not. This shows a comparison of -- on a per poor-person basis -- general state appropriations and/or court and other fees dedicated to civil legal services for 2005-2006 based on information gathered by the American Bar Association. Investing $50 million in civil legal services would put New York in the mid-range of states, taking our per poor person investment to $18.57.



New Loan Repayment Assistance Program (LRAP) at Empire Justice Center

By Michael Mule'

Next year, attorneys at Empire Justice Center will take part in a new loan repayment assistance program (LRAP) recently approved by our Board of Directors. The program will provide attorneys and those with job-related graduate school debt at Empire Justice with a forgivable loan each year to partially offset the monthly expense of repaying that debt.

In 2007, recipients of LRAP will be responsible for the tax consequences of the assistance they receive. However, in recent conversations the Monroe County Bar Foundation has shown an interest in exploring sponsoring the Empire Justice LRAP beginning in 2008. If the Monroe County Bar Foundation does sponsor the program, LRAP recipients could exempt the forgiveness of the loans from counting as taxable income under 26 U.S.C §108(f).

This pilot program is the result of efforts by an ad hoc committee of attorneys at Empire Justice in cooperation with the management team to develop a sustainable loan assistance program for current and new staff with law school debt. The ad hoc group began the process with individual assessments to determine the loan debt of current staff. Staff members that wanted to participate in the process understood they would have to disclose their current law school debt and monthly payment amounts to participants in the group. The group contacted 17 different LRAP programs at public interest offices across the country to assess the features of each of the various programs.

From these programs, the group decided on four model programs and applied the LRAP formulas of those programs to the loan debt of participants in the ad hoc group. After we applied our debt numbers to these formulas, we assessed the pros and cons of each of the four formula's and decided on which LRAP program formula would work best for our goals and described these results in a memo to the management team. Based on the models, the organization's goals and the budget, Empire Justice decided that we could afford a program design that capped net monthly loan payments at 6% of gross monthly salary. With 8 attorneys eligible the cost will be about $10,000 per year. The Board has indicated that it will review the program design for continued affordability as the new staff with eligible loans are hired.

The staff committee's memo described the financial burdens faced by legal services attorneys with significant law school debt as follows:

The economy has significantly changed since legal services programs began in the 1960's. Most notably, the costs of education and a law school degree have increased significantly. Anecdotal evidence from lawyers who graduated in the 1960's, '70's and into the '80's indicates that they graduated with relatively little undergraduate and graduate school debt. Today, it is not

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uncommon for lawyers to finish their educations with upward to $120,000 in educational debt. Increased debt loads are coupled with an economy that places greater demands on our budgets for basics such as housing, taxes, utilities, health care and child care. Studies indicate that we are required to spend a higher percentage of our income today on the non-frivolous consumer goods listed above, than we did in the 1970's.

While legal services salaries have increased over the years, non-profit programs have suffered similar budgetary strains and have not always been able to keep salary levels commensurate with yearly cost of living increases. Educational debt has become a significant monthly expense to lawyers; a monthly payment often comprises the largest single debt payment for recent graduates, sometimes totaling more than housing payments. While lawyers who graduated twenty years ago had to make hard choices about how to spend their money and sacrificed personal comfort to work in legal services, today's graduates often can't even make those choices because they cannot pay their student loans and work in public interest law.

Recent graduates who are able to find a way to make it, often do so by consolidating their loans over longer time periods. Today, unlike even ten years ago, graduates are extending repayments terms to 20 or even 30 years. (Ten years ago, the typical time period was 10 to 15 years.) These extended repayment terms, while they make a monthly payment affordable, mean that not only are legal services lawyers paying more in interest for their loans, but that their loans will be a strain on their incomes for a much longer period of time. Many people end up relying on the support of partners and family members as the only way to be able to afford their jobs.

The negative impact of the increased costs of education has on legal services programs has never been calculated but it exists. The pool of graduates who are financially able to accept legal services jobs is dwindling and has the potential of eliminating those who do not come from privileged backgrounds or have other financial resources. In addition, there is serious jeopardy to the retention of lawyers in legal services. While in the past, newer legal services lawyers could scrimp and save for 10 years while they paid off their loans, the extension of loan terms to upwards of 30 years means that many will be incurring more significant but necessary debt – such as mortgage payments, child care and financing the education of their children – while they are still making payments on their own loans!

Access to Legal Services for Limited English Proficiency (LEP) Individuals

By Michael Mule'

New York has one of the largest populations of Limited English Proficient (LEP) individuals in the United States,[1] and in response some legal services offices have begun developing language access polices and procedures to assure LEP clients are provided equal access to legal assistance. There also has been a growing understanding of language access as a civil rights issue requiring legal services programs to reexamine how they provide services to LEP individuals and develop effective policies and procedures.

Currently, many offices have inadequate procedures or lack written policies to address the needs of LEP individuals.[2] Indicators of basic language access deficiencies include: encouraging and relying on relatives or friends to interpret for clients, intake databases that lack a mandatory data field for the client's primary language, lack of formal arrangements in place to obtain professional interpreters, having neither bilingual nor monolingual staff that have been trained on interpreting techniques, lack of an articulated policy on delivering services to LEP clients, and having case handlers that send untranslated letters (or no letters at all) to clients who don't read English (or Spanish).[3] Many of these deficiencies can be overcome with proper planning and design of LEP procedures.

Before discussing the components of an effective language access policy, it is important to define who is considered LEP and why language access has been considered a civil right. The United States Department of Health and Human Services, defines LEP persons as "individuals who do not speak English as their primary language and who have a limited ability to read, write, speak, or understand English," the same definition is used in the Department of Justice (DOJ) LEP Guidance.[4]

Executive Order 13166 (Order), "Improving Access to Services by Persons with Limited English Proficiency," described how denying individuals access to federally funded programs or services due to their spoken language is national origin discrimination in violation of Title VI of the Civil Rights Act of 1964 and required each federal agency to develop an LEP Guidance.[5] The Order described the obligation of all federal agencies and programs that are recipients of federal funding to provide meaningful access to LEP individuals in their services or programs.[6] Each federal agency was to "prepare a plan to improve access to its federally conducted programs and activities by eligible LEP persons."[7] The Department of Justice (DOJ) was directed to provide federal agencies guidance on this obligation.[8]

Based on these federal obligations, Legal Services Corporation (LSC), in 2004, issued the "Guidance to LSC Programs for Serving Client Eligible Individuals with Limited English Proficiency."[9] The LSC Guidance (Guidance) describes how "LSC programs have an obligation to provide services to clients with limited English proficiency (LEP) that are equal to the services they provide to clients who speak English without difficulty."[10] The LSC Guidance describes a process to assist legal services offices in developing effective LEP procedures.

Programs are to assess the need for LEP procedures in each service area and examine LEP concerns in three contexts: 1) Assessing eligible individual needs and program resources in their service area; 2) Creating programs or policies that reflect these needs and resources and provide for training of program staff and the implementation of the program's policy; and 3) Approaching LEP strategy and implementation in the context of a statewide effort.[11]

The LSC Guidance recommends offices consider several factors when determining the need for LEP services, policies, and procedures in each program area:

1. The number or proportion of LEP persons

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eligible to be served or likely to be encountered by the program, (using U.S. Census and other reliable data sources about the LEP community);
2. The frequency with which LEP individuals come in contact with the program (which languages have been most frequently encountered by the program in the past);
3. The nature and importance of the program's services to people's lives (realizing that legal representation by LSC programs is important to all they serve) ; and
The resources available to the program and the cost of obtaining them (taking account of the size of the LEP population and the resources necessary to effectively serve them).[12]

Once a legal services program has assessed the LEP needs using these four factors, it should create a written Language Access Policy (LAP) that describes the obligations of the program to provide services to LEP individuals. Programs should assure that "administration, litigation and advocacy, support staff and intake, and pro bono activities, as well as community leaders, potential beneficiaries and the program board of directors have all contributed to its development."[13]

An effective LAP will have several key features. It must describe a process staff can use when interacting with an LEP individual that includes 1) a method for identifying the language spoken by the individual, and 2) a list of staff with sufficient competency in particular languages alongside a list of outside language service providers for languages staff cannot accommodate which includes the contact information and availability of each.

The policy must also include how current and new staff will receive training on LEP procedures. Such a policy should describe the responsibilities and use of available bilingual staff to provide language assistance. Language standards must be included to assess the competency of interpreter, spoken language assistance, and translator, written assistance, services for LEP individuals. There should also be an outreach component, so LEP individuals will be aware of language services available. Lastly, the policy should include a method to update LEP procedures periodically to address changes in the LEP population.[14]

The LSC Guidance was developed to assist programs in developing effective LEP policy and procedures. Once such procedures are in place, they will assure legal services are provided to all individuals, regardless of their spoken language.

Included below are links to legal service programs with LEP procedures and polices and other resources to assist legal services programs. Note: These resources and many others will be included in the Legal Services section of Language Access Resource Center (LARC) found in Advocate Resources section of the new Empire Justice Center website that will launched later this month. If you have resources that you would like to add, contact Michael Mule' at mmule@empirejustice.org.

LEP Procedures and Polices of New York legal services programs:

- Legal Aid Society of Northeastern New York, http://tinyurl.com/y3859e
- Legal Aid Society of Mid-New York, http://tinyurl.com/yyg4qo Other Resources
- Legal Services Corporation (LSC), Resources for Serving Clients with Limited English Proficiency (LEP), Available at: http://tinyurl.com/yxquc3
- Paul M. Uyehara, *Making Legal Services Accessible to LEP Clients*, Language Access Project, Community Legal Services, Inc, 2003, Available at: http://tinyurl.com/yfr8ot

We at Empire Justice Center will be assessing our own LEP policies in the coming months.

Footnotes

1. 2005 U.S. Census American Community Survey, People 5 Years and Over Who Speak a Language Other Than English at Home: 2005, Available at: http://tinyurl.com/kmd8g .
2. See Paul M. Uyehara, *Making Legal Services Accessible to LEP Clients*, Language Access Project, Community Legal Services, Inc, 2003, Available at http://tinyurl.com/yfr8ot.

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Ameriquest Settlement—continued

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they are sued in foreclosure or raise them in a recoupment action through a bankruptcy proceeding.

New York State received an additional $2.5 million for costs for their involvement in reaching the settlement. The NYS Banking Department and the Attorney General's office each received $1.25 million. The Attorney General's portion went into the State treasury.

Injunctive Relief

One of the strongest parts of the settlement is the injunctive relief achieved. According to Attorney General Spitzer's website, as of March 15, 2006, the date the settlement took effect, Ameriquest must:

- Provide the same interest rates and discount points for similarly situated consumers;
- Provide full written and oral disclosures regarding interest rates, discount points and prepayment penalties, and provide important information regarding consumers' pricing options;
- Overhaul its appraisal practices by prohibiting sales personnel from selecting, contacting, or attempting to influence appraisers;
- Provide accurate good faith estimates;
- Refrain from soliciting borrowers for refinancing within two years of the original loan, except under limited circumstances;
- Use independent loan closers; and
- Adopt policies to protect whistle-blowers and facilitate reporting of improper conduct.[2]

An independent monitor will oversee Ameriquest's on-going compliance with the settlement. The monitor will be able to access Ameriquest's records and will have broad authority to examine Ameriquest's lending practices.

Conclusion

More information about the settlement can be obtained from the class action administrator's website at *http://tinyurl.com/scgrh*. Empire Justice will continue to track the settlement and will attempt to provide information on its website as more details become known. If you have questions or would like more information or updates regarding the settlement, contact Kirsten Keefe at kkeefe@empirejustice.org or at (518) 462-6831.

Footnotes

1. Some New York Ameriquest borrowers may be entitled to recovery from both funds.
2. Office of New York State Attorney General Eliot Spitzer, "Ameriquest to Pay $325 Million and Reform Lending Practices," (January 23, 2006) at <http://www.oag.state.ny.us/press/2006/jan/jan23a_06.html>.

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3. Id.
4. See The Department of Health and Human Services Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 68 Fed. Reg. 47,311, 47,313 (Aug. 8, 2003), Available at: http://tinyurl.com/y9teul; See also, Department of Justice Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, [hereinafter DOJ Guidance] 67 Fed. Reg. 41,455, 41, 458, Available at http://tinyurl.com/gx3a2.
5. Executive Order 13166, 65 Fed. Reg. 159 (August 16, 2000), Available at http://tinyurl.com/ym32hr
6. Id.
7. Executive Order 13166, 65 Fed. Reg. 159 (August 16, 2000), Available at http://tinyurl.com/ym32hr
8. See DOJ Guidance, 67 Fed. Reg. 41,455, Available at http://tinyurl.com/gx3a2.
9. See Legal Services Corporation LEP Guidance, Available at http://tinyurl.com/ycnyv4.
10. Pg.1, Legal Services Corporation LEP Guidance.
11. See Pg.3, Legal Services Corporation LEP Guidance.
12. See Pg.4, Legal Services Corporation LEP Guidance.
13. See Pg.6 , Legal Services Corporation LEP Guidance.
14. See Pg.6-13, Legal Services Corporation LEP Guidance.

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