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Legal Services Journal

"Fleeing Felons" Ineligible for SSI

By Kate Callery and Louise Tarantino

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As the saying goes, if you commit the crime, you have to do the time. But for thousands of blind, aged or disabled persons nationwide, ignorance of the crime and failure to do the time has resulted in a loss of Supplemental Security Income (SSI) benefits.

Under the Social Security Act, "fugitive felons" are ineligible for SSI benefits. A "felony" generally refers to a serious crime, either violent or non-violent, that is usually punishable by imprisonment for more than one year. A "fugitive felon" is defined as someone who is fleeing to avoid prosecution for a felony, or to avoid custody or confinement after conviction for a felony. Violators of probation or parole imposed under federal or state law are also ineligible for SSI. 42 U.S.C. §1382(e)(4); 20 C.F.R. §416.1339.

This amendment to the Social Security Act was a result of welfare reform legislation enacted in 1996, the Personal Responsibility and Work Reconciliation Act (PRWORA). PRWORA also made fugitive felons ineligible for other welfare benefits including food stamps, Temporary Assistance to Needy Families (TANF), and certain federal housing assistance benefits. Proposed legislation would extend the reach of the "fleeing felon" provision to Title II benefits (disability and retirement benefits). (H.R. 4070 passed unanimously by the House of Representatives in June 2002).

Although it has taken the Social Security Administration (SSA) a little time to implement these new provisions, recently SSA has been moving forward with a vengeance. In 2000, SSA gained access to FBI computer data on outstanding warrants. In 2001, SSA signed contracts with states to compare the names of SSI recipients to lists of fugitives provided by police. In return, SSA would provide law enforcement with the addresses to which it mailed SSI benefits. The legislation allows SSA to furnish to law enforcement entities the current address, Social Security number and photograph of any identified "fleeing felon". 42 U.S.C. §1382(e)(5).

According to a recent Los Angeles Times article, nationwide, 4,721 persons have been arrested and 45,000 recipients have had their SSI benefits

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Greater Upstate Law Project Staff (www.gulpny.org)

Albany Office
119 Washington Ave., Albany, NY 12210 • (518) 462-6831 • Fax: (518) 462-6687

Anne Erickson, Executive Director
Susan Antos, Attorney, Public Benefits
Kristin Brown, Policy & Development
Nancy Krupski, Communication Coordinator
Louise Tarantino, Attorney, Disability
Barbara Weiner, Attorney, Food Stamps & Immigration Benefits
Connie Wiggins, Administrative Assistant
Bob Carlton, Upstate Lawhelp Coordinator & Administrative Secretary
Anzala Wilson, Paralegal, Immigrant DV Victims
Precious Bonaparte, Intern
Courtney Isop & Anthony Brindisi, Interns

Rochester Office
80 St. Paul Street, Suite 660, Rochester, NY 14604 • (585) 454-6500 • Fax: (585) 454-2518
Email: mvanorman@wnylc.com

Kate Callery, Attorney, Disability
Mike Hanley, Attorney, Housing
Becky Schroeder, Administrative Assistant
Amy Schwartz, Attorney, Domestic Violence
Michelle VanOrman, Administrative Secretary
Gerald Wein, Attorney, Special Projects

White Plains Office
Hudson Valley Poverty Law Center
80 North Broadway, White Plains, NY 10603 • (914) 422-4329 • Fax: (914) 422-4391
Email: Rcisneros@law.pace.edu

Rob Cisneros, Attorney, Immigration, HIV & AIDS Linda Bennett, Attorney, Immigration, HIV & AIDS

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Please send your materials to:
Editor, Legal Services Journal
Greater Upstate Law Project
80 St. Paul Street, Suite 660
Rochester, NY 14604

Addressing the State Budget Gap:

A Common-Sense Budget Invests in New York's Families

By Kristin Brown

Human services programs including civil legal services have suffered severe cuts in state funding over the past two years. This year, as the state budget gap continues to grow, a number of groups including the Fiscal Policy Institute (FPI) and SENSES have developed a common sense strategy for filling a large portion of the gap. The strategy focuses on identifying new ways to raise revenues in an effort to cut down on service cuts and to avoid shifting state fiscal problems to the local level where counties must increase local sales and property taxes. If implemented as recommended, the state could use these strategies to close the gap (currently estimated at $2 billion this fiscal year, which ends March 31st, and as high as $12 billion in the coming fiscal year, which begins April 1st) by over $5 billion.

Recognizing the devastating impact further cuts in funding would have on the civil legal services and human services communities GULP has joined approximately 200 other human service, labor, religious and environmental organizations in supporting the revenue raising approach. By taking such an approach, the state would be able to go a long way toward filling the budget gap and would have the opportunity to invest in New York's families rather than eliminating critical jobs and services that are desperately needed, particularly during the current economic downturn.

GULP strongly urges the state to consider the following recommendations:

Instead of shifting spending onto local taxpayers, Albany should:

- **Capture a portion of the federal tax windfall**. If you earn $300,000 a year, you'll be getting a tax break of around $5,000 from the federal government in 2003. A modest, temporary NY state tax increase on the portions of family incomes above $100,000 could raise up to $3 billion to help solve the state's budget crisis and avoid damaging reductions in services. Affected taxpayers would still receive a substantial reduction in their overall tax bill while doing their fair share during these tough times.

- **Close the loopholes that allow big corporations to avoid paying taxes on profits they earn in New York.** Corporate taxes account for only 4% of the state budget, down from 10% in 1977. New York law allows companies to use accounting tricks to avoid paying taxes on what they earn in New York. Closing the loopholes would raise $1.5 billion.

- **Tell the federal government to help states recover from the recession and September 11th.** The Governor and State Legislature should encourage Washington to increase federal payments for Medicaid and economic recovery. This would provide the state with $3 billion and New York City with an additional $3 billion.

If you are interested in supporting this common sense approach to addressing the budget gap, visit GULP's website at: http://www.gulpny.org and click on "legislation" FPI and SENSES are also doing a number of educational events across the state. For more information about these events, contact Trudi Renwick at Renwick@fiscalpolicy.org or 518.786.3156.

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suspended under this law. Many of those recipients caught in the "fugitive felon" snare have been violators of probation, parole or some nonviolent crime. For a large number, the "crime" occurred decades ago. Many of these violators have never fled at all, continuing to live in the jurisdiction that issued the warrant.

For DAP advocates, the question is, what do we do with these cases? Initially, take a good look at the notices your clients receive. POMS SI §00501.050(E) sets forth the information that is supposed to be included in these notices. SSA is supposed to set forth the facts that show that the recipient is fleeing to avoid trial, imprisonment or custody. At a minimum, the notice should identify the jurisdiction that issued the warrant and the date of issuance.

Keep in mind that the POMS require SSA to verify that the SSI recipient being sought is the correct individual. SSA is directed to examine the legal document that the law enforcement agency is acting on such as the court order or decision issued by a court, a copy of the arrest warrant or a copy of the decision of the court or parole board documenting that the recipient has violated a condition of probation or parole. SSA must retain a copy of this evidence in the file. POMS SI §00501.050(B).

The notice should also advise recipients that they can appeal the decision to terminate their benefits and are entitled to a continuation of benefits if the appeal is filed within 10 days. The 10 days starts to run the day after receipt of the notice. The continuation of benefits will cease when a reconsideration decision is issued.

Clearly, any appeal requires an advocate to uncover the original charge and the facts surrounding the alleged flight to avoid prosecution or imprisonment. As noted, this information should be in the notice and in the SSA file. You could attack the "fleeing felon" designation in one of two ways: 1) discrediting or overturning the original warrant, or 2) challenging flight to avoid prosecution or imprisonment.

There may well be mistakes or loopholes that can be used to a claimant's advantage to challenge the underlying warrant. For example, the warrant may have in fact been cleared up, but the paperwork was not completed. Or in instances of very old warrants, the crime may no longer be classified as a felony. In other words, it may at least be worth looking onto some of these cases. Most courts have web sites, which can be helpful in tracking down addresses and phone numbers needed to obtain some of the basic information about the warrant.

To challenge the original warrant, an advocate can contact or refer the client to the public defender's office in the originating jurisdiction. It is not enough that the charging jurisdiction refuses to extradite the "fleeing felon" for benefits to be resumed: many of these jurisdictions would happily incarcerate the individual if he presented himself on their doorstep! The underlying legal instrument that gave rise to the charges at issue has to be resolved before SSI benefits can be reinstated.

Another approach would be to argue that the SSI recipient was not fleeing to avoid prosecution, custody or conviction for a felony or parole/ probation violation. This argument is strengthened in cases where the recipient claims to have no knowledge that a warrant was issued or believes that any underlying charge had been resolved

Sarah Gilmour of PILOR has had success in pursuing some of these avenues recently. A former client for whom PILOR had obtained disability benefits contacted the office to report that his benefits were being terminated because of an outstanding Massachusetts warrant. Sarah successfully negotiated with the Assistant District Attorney (ADA) in Springfield to dismiss the charges in the interest of justice. Not only was the warrant sixteen years old, there had been no named victims. The ADA was

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Fleeing Felons, continued

also swayed by the fact the defendant's disability benefits had been terminated.

Sarah is also negotiating with a New Jersey District Attorney in another case, where she is helping the client make arrangements to pay off an outstanding fine. Many legal services advocates may not be in a position to do this kind of negotiating themselves, but could instead refer the SSI recipient to the appropriate public defender to quash or rescind the warrant.

The bad news is the report that Sarah shared with us about the manner in which her client was greeted at SSA when he tried to ask for continued benefits pending his reconsideration. The claims representative apparently informed him in no uncertain terms that the answer was "no!" Although there admittedly may not be great grounds for appeal in a number of these fleeing felon cases, our clients should nonetheless be accorded their procedural rights. Let's try to make sure that SSA does not get too carried away in its zeal to help make the streets safe again!

Dealing with these cases may involve a two-pronged approach: dealing with the underlying warrant itself, as demonstrated by Sarah's cases, and/or challenging the termination through the Social Security Administration's appeals process. Two recent Administrative Law Judge (ALJ) decisions demonstrate that at least some ALJs will listen to these claims.

In a decision from California, the ALJ found that the claimant continued to be eligible for SSI benefits because he was not a fugitive under Nebraska law, the jurisdiction issuing the warrant. At the time the claimant left Nebraska, the claimant was not aware that he owed a debt (the basis for the warrant), was not aware that a creditor converted a civil matter into a criminal one and no warrant had yet issued. He was not even aware that there was an attempt to prosecute him until years after he left the state. The ALJ held that, taking into account the nonexistence of the warrant at the time the claimant left Nebraska, and his ignorance of any matter that could result in criminal prosecution, he could not have had intent to flee to avoid prosecution. [20 C.F. R. §§416.1339, 416.202(f)(1)].

A Georgia ALJ also found that a claimant who left a state (Washington) without knowledge of any criminal charges being lodged against him could not be presumed to be fleeing prosecution and ineligible for SSI benefits. The ALJ also noted that SSA had not provided any valid and persuasive evidence to rebut the claimant's contention that he did not flee a criminal charge in the State of Washington. The criminal charge was later dismissed and the dismissal document indicated that that claimant was never arraigned or prosecuted on the criminal complaint.

The ALJ went on to say that there was no legal basis for the agency determination that the claimant was fleeing to avoid prosecution for a felony because in order to be fleeing, one has to know of, or have notice of, a charge being filed and having such notice, fail to respond to the allegations in the charge. The record in that case showed that the claimant had no knowledge or notice of a felony charge and no opportunity to respond to any such charge. Copies of both ALJ decisions are available from GULP as DAP # 373.

In the food stamps arena, the U.S. Department of Agriculture (USDA) issued Regional Letter 02-03 addressing the situation in which a person is unaware of an outstanding warrant. The gist of the memo is that, for food stamp purposes, a person cannot be considered to be fleeing until he has knowledge of an outstanding warrant and has been given an opportunity to resolve the warrant. A copy of Regional Letter 02-03 is available from GULP as DAP # 374.

Similarly, a recent New York State Office of Temporary and Disability Assistance (OTDA) fair hearing held that a public assistance recipient's bene-

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Fleeing Felons, continued

fits could not be terminated under the "fleeing felon" rule because the recipient was not aware of the outstanding arrest warrant and was therefore not fleeing to avoid prosecution. The Fair Hearing Officer held that the agency provided no evidence to rebut the recipient's testimony that, to her knowledge, she was never arrested and that she was not attempting to avoid prosecution. This decision, Fair Hearing # 3561826L dated August 28, 2001, is available at the Online Resource Center at http://www.wnylc.net/onlineresources/welcome.asp?index=welcome.

Although SSI recipients may lose their benefits due to their status as a "fleeing felon", their Medicaid benefits should continue. See NYS Social Services Law (SSL) §131(14), 97-ADM-23. The claimant would have to transition from SSI-Medicaid to non-SSI Medicaid, but the protections afforded under *Stenson* v. *Blum*, 476 F.Supp. 1331 (SDNY 1979), aff'd wo. opinion, 628 F.2d 1343 (2d Cir. 1980) and 18 NYCRR §360-2.6(b) should allow for uninterrupted Medicaid coverage for these persons.

As we know, DAP advocates undertake representation of persons whose Federal disability benefits, SSI or SSD, are denied or terminated. SSI recipients faced with termination of their benefits due to their categorization as a "fleeing felon" are desperately in need of legal assistance to retain their benefits. We anticipate that the numbers of these cases will continue to grow. We at GULP are interested in hearing from you on these issues so that we can go forward with litigation, if appropriate. Please let Louise or Kate know about your cases.

Governor Wraps HCRA into Budget Negotiations

Calls for "Rollbacks" in CHP and Family Health Plus

By Anne Erickson

The Governor's proposed budget proposes to extend the provisions of the Health Care Reform Act (HCRA) governing the financing of health care services, due to expire on June 30. He also calls for extending Child Health Plus (CHP) for another two years through June 30, 2005. In extending CHP, the Governor wants to "shift children from 100 percent to 133 percent of the Federal Poverty Level from Medicaid to CHP and eliminate CHP temporary enrollment"

That means only children in poverty will be eligible for full, comprehensive coverage under Medicaid, while children above poverty will be limited to CHP coverage, substantial, but not as comprehensive as Medicaid. The Governor says this "rollback (in) Medicaid eligibility for children" will "gradually shift 234,000 children" out of Medicaid and back into CHP.

The Governor's health budget also calls for a "roll-back eligibility for Family Health Plus from 150 percent to 133 percent of the Federal Poverty Level effective February 1, 2003. Persons enrolled in the FHP Program prior to that date will remain eligible." Based on 2000 Census data, over 300,000 New York adults between the ages of 18 and 64 live on incomes between 130% and 150% of poverty. The vast majority of the New Yorkers will no longer be eligible for coverage under Family Health Plus

Predatory Sales: Rent to Own Stores in New York State

By Peter Dellinger

The US financial system is arguably the most sophisticated and efficient in the world, but this sophisticated infrastructure differs markedly from the world of Wall Street in low income and minority neighborhoods. In these communities, the tools of finance are increasingly pawnshops, check-cashing outlets, and rent-to-own stores. For the rent-to-own industry, these neighborhoods constitute a vast and thriving predatory business opportunity. There now are some 8,000 rent to own stores in 50 states serving three million consumers, and these stores generate $2.35 billion in rental fees each year.

Rent-to-own companies (RTOs) such as Rent-A-Center, Rainbow Rentals, Rentway and others, lease new and used appliances, computers, furniture and other household items to consumers who aspire to ownership over time. RTO transactions are cleverly excluded from all federal consumer protection laws, and as a result, RTOs regulated by state law.

In New York State, RTOs are regulated by New York Personal Property Law §500, et seq. In rent-to-own transactions the "retail price" [1] is known as the "cash price", which is generally defined as the price at which anyone today could buy the item retail in the ordinary course of business. Personal Property Law §503. Thus, if a consumer simply walked into an RTO store, theoretically s/he could buy the item on the spot for the "cash price". Virtually all RTO customers, however, attempt to purchase an item over time, and under this statue, RTOs are permitted to charge double the "cash price" in establishing the total consumer cost to be paid over time. Personal Property Law §503. This is obviously a terrible economic bargain for any consumer, but particularly low income consumers: if a refrigerator is priced at $500 retail by appliance dealers, RTOs can charge $1000 (plus tax) for the same refrigerator. Thus, under this statute RTOs are lawfully permitted to set a finance charge which rivals organized crime.

Along with a 100% retail price mark-up, the RTO industry frequently use form contracts designed to generate the maximum amount of economic exploitation. These standard contracts include terms requiring weekly payments and prohibit consumers from owning the item until the final payment has been made. As a result, the RTO retains legal title to the item until the very last and complete payment is received.

Unlike almost all other consumer transactions, a rent-to-own customer may have made virtually all the required weekly payments and default near or at the end of the loan term, losing the item plus all previous cash payments. This repeatedly happens, and the vast majority of RTO consumers never achieve ownership. According to the rent-to-own industry, fewer than 25% of consumers complete a rent-to-own purchase. Meanwhile, the RTO can then re-lease the item at the same weekly or monthly rental rate to a new consumer, and the cycle begins again.

While these particular predatory consumer practices may be within the bounds of state law, RTO companies frequently use an unlawful third method to increase their profits by setting a "cash price" for merchandise far above any price found in the retail market. This industry practice is no secret. In *Colon v. Rent-A-Center, Inc*., 13 F.Supp.2d 553, 557 (S.D.N.Y. 1998) one RTO admitted "that on average, the MSRP [manufacturer's suggested retail price] is approximately 70 percent of Rent-A-Center's cash price for the same merchandise." Rent-A-Center admitted that "reducing cash prices to prevailing retail prices would result in a reduction of payments by Rent-A-Center's customers in New York by more than $5 million per year." *Id.*

The RTO practice of elevating the "cash price" far beyond the retail market price, and then doubling this sum, has existed for many years, [2] but it is frequently difficult, if not impossible to prove.

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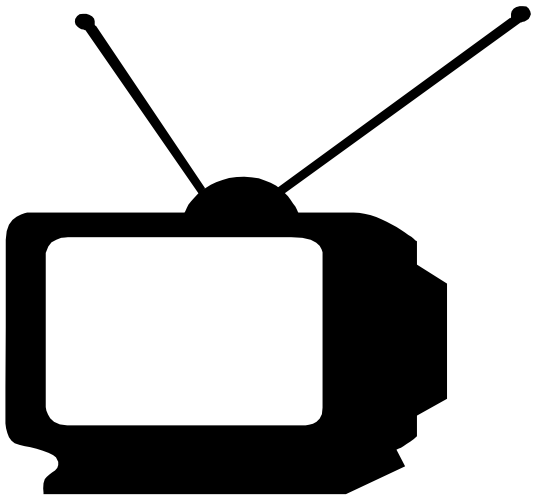
Predatory Sales, Continued

With the advent of the Internet however, we may now be able to quickly find and compare prices of identical models of appliances and electronic items, and use this information to reveal RTO illegal pricing practices.

Here are some recent examples of prices found in client RTO contracts and a comparison with the MSRP for the identical item as found on the Internet:

Item	RTO Cash Price	Total R-T-O Cost	Retail Price	Lawful RTO Price (x 2)
Philips VCR	$259.99	$468.42	$137.00	$274.00
JVC TV and Stereo System	$2039.99	$4079.80	$1129.00	$2259.80
Whirlpool washer & dryer	$1039.47	$2078.94	$668.00	$1336.00
Whirlpool Refrigerator	$1715.47	$3430.94	$972.00	$1944.00
Magnavox TV	$589.99	$1091.22	$321.22	$64244



In comparing the RTO "cash price" for used appliances and new retail prices obtained from the Internet for the identical appliances, the RTO price deviation and deception is even more stark:

Item	Used Cash Price	Total R-T-O Cost	Retail Price New	Lawful RTO Price (2x)
Whirlpool Refrigerator	$799.99	$1462.98	$499.00	$998.00
Whirlpool Dryer	$512.99	$1025.92	$191.00	$382.00
Roper Refrigerator	$683.94	$1262.82	$519.00	$1038.00

When challenged with this data, the RTO industry has been quick to settle individual consumer suits alleging violations of the New York Personal Property Law, Deceptive Practices Act, and other state consumer protection states. If you know of consumers who are now renting items or have rented from stores such as Rent-A-Center, Rent-Way, Aaron's Rentals, Rainbow Rentals, Colortyme, First Choice Rentals, or other similar companies, and believe that they have been cheated, please contact me. I would be pleased to discuss possible litigation strategies and remedies.

Footnotes-[1] This of course, virtually never happens because the "cash price" is always set so outrageously far above the value of the merchandise, that any consumer with money to buy the item outright would never purchase it from an RTO. Indeed, Rainbow Rentals admits that only 3% of its business consists of cash sales. SEC Form 10-K 1999 p. 15.

[2] See Memorandum from Lizette A. Cantres, General Counsel, State Consumer Protection Board, dated July 11, 1986 to Evan Davis, Counsel to the Governor, S. 9727-B Bill Jacket, p. 32.(1986)

Governor Proposes to Codify Existing Shelter Allowances

By Anne Erickson

In announcing his 2003-04 Executive Budget, Governor George Pataki called on the legislature to put the current shelter allowance into statute to avoid the court ordered adjustments to what are undeniably inadequate shelter grants. The budget bill he submitted in January 29 would set in statute the shelter schedule, as it existed on April 1, 2002, an action that, if adopted by the Legislature, "shall supersede any that may be issued through regulation by the office of temporary and disability assistance subsequent to January 1, 2003." (Education, Labor and Family Assistance Budget S. 1403/A.2103, page 277-78).

The Governor claims that his proposal will help the state "avoid a $71.3 million full annual cost ($59.4 million in 2003-04) from a court-ordered increase in the welfare shelter allowance ceilings."

"This bill enacts the existing regulatory schedule of public assistance shelter allowances within the Social Services Law to avoid potential increases that could result from pending litigation." (Governor's Memorandum in Support, submitted in accordance with Article VII).

The Governor's memo offers the following background and rationale:

"This bill is necessary, in the context of the pending Jiggetts litigation, to avoid potential cost increases that could result from a court-ordered increase in the welfare shelter allowance ceilings.

On September 5, 1997, the State Supreme Court declared that the State's schedule of welfare shelter allowances was inadequate for Family Assistance cases in New York city and, after appeals, on March 21, 2002, directed the State to promulgate an increased shelter allowance schedule by July 19, 2002. Accordingly, on July 19, 2002, the Office of Temporary and Disability Assistance (OTDA) filed a notice of proposed rule making that would increase the shelter allowance maxima for welfare families statewide.

Implementing new welfare shelter allowance schedules would cost a projected $59.4 million gross in SFY 2003-04 ($71.3 million on a full annual basis). This bill would moot the litigation and avoid such a cost increase by enacting the existing regulatory schedule of public assistance shelter allowances into statute. These changes not only would protect State taxpayers against a judicially-imposed increase in welfare spending, but also would verify that the shelter allowance portion of the public assistance grant is to be set by the Executive and the Legislature rather than by the courts.

There are currently approximately 14,500 families that have intervened in the Jiggetts case and receive a court-ordered monthly shelter supplement averaging $286. In addition, there are Jiggetts like cases underway in large upstate counties (Westchester, Nassau and Suffolk) which also have intervener processes in place. The bill authorizes continuation of additional shelter allowance payments, if necessary, to maintain housing for welfare households with children facing eviction. This provision will not increase State costs because the cost of these additional payments is currently included in the Financial Plan."

Please watch www.gulpny.org for additional information and analysis in the coming weeks.

Child Support Desk Reviews: Assuring That Public Assistance Recipients Get the Extra Cash to Which They Are Entitled

By Susan C. Antos

As a condition of eligibility, recipients of Family Assistance (FA) and Safety Net Assistance (SNA) are required to assign their right to any child support that they are entitled to receive, to the Local Department of Social Services. 42 USC§608(a)(3); Social Services Law (SSL) §158(5); §349-b(1)(a). Local Departments of Social Services retain all but the first $50 of the support collected to reimburse themselves, the State of New York and the federal government for public assistance paid to the recipient. SSL §111-e(1). This $50 of support is called the "pass-through or "bonus" payment and is received by the recipient in addition to the public assistance grant. The pass through does not count as income when determining the amount of public assistance to which the recipient is entitled. SSL§111-c(2)(d); §131-a(8)(a)(v).

The Pass Through

A FA or SNA recipient is only entitled to a pass through if the support paid is "current," which means that the absent parent pays his or her child support (not spousal support) in the month when it is due. SSL §111-c(2)(d); §131-a(8)(a)(v). When a parent is in arrears, any support paid will first be credited to the current month, allowing the family a pass through payment. 18 NYCRR §347.13(a). The maximum pass through payment is $50, regardless of the number of children for whom child support is received. 18 NYCRR §347.13(b)(1). If less than $50 in current child support is collected, the family will get a pass through, but only for the lesser amount. [1]

Every month that child support is paid, the household should get a "mailer" which tells the family how much has been collected in current support for the current month. The mailer will also indicate if current support was received for the previous month, but not reflected in the last statement. This could occur if an income execution imposed at the end of one month did not reach the support collection unit in time to be counted for purposes of calculating the pass through. In such a case, the payment received on time, but credited later, would still count as current support. If the full pass through was not issued in the prior month, a make up payment would be made.

Excess Support

If the support collection unit (SCU) collects more current child support than is paid out in public assistance benefits (plus the $50 pass through), any excess support should be paid to the recipient. 18 NYCRR §352.12(b). In some cases, this will be a one time occurrence. This can happen when a support order is paid weekly and the month contains five, instead of the usual four pay periods. It can also happen when a working recipient has infrequent overtime pay which results in a smaller public assistance grant for the month. In those months, even if the public assistance case stays open, the excess support should be paid to the recipient. 97 ADM-7, p. 7-8.

The most likely scenario in which a Social Services District is likely to overlook the accrual of excess support is in the case of a working recipient receiving a partial grant, especially one who has wages subject to variation. In *Broniszewski v. Perales*, a federal class action, which challenged the failure of Erie County to properly disburse excess support, nearly all of the named plaintiffs were working public assistance recipients whose small public assistance grants were less than the amount of child support collected on their behalf (plus $50). With more public assistance recipients working, advocates should make a habit of comparing their client's statements of support collected, with their income maintenance budgets.

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Child Support Desk Reviews-continued

Desk Reviews

As a result of litigation [2], current and former public assistance recipients are entitled to an administrative review if they believe that they were wrongly denied a pass through or excess support or if they believe that the pass though that they received was not adequate. [2] This litigation required that Office of Temporary and Disability Assistance (OTDA) to promulgate regulations which provide a procedure called the desk review. These regulations were filed on December 5, 2002 and were effective December 24, 2002. (New York State Register, December 24, 2002, p. 12). Although the desk review does not provide all the procedural protections of a fair hearing, it does require an opportunity for a face to face conference, and a written determination by the local support collection unit and by the state within clearly proscribed time periods.

Local Level Review

The desk review is a two tiered procedure which is initiated by written request on a standard form to be developed by OTDA. [3] The form will contain spaces for the requester to indicate the months for which a review is requested and whether the review is requested for pass through payments, excess current support or excess arrears support. 18 NYCRR §347.25(d)(2). The form will contain a notice that the recipient should provide any supporting documentation, and will contain a check off box to request a conference with SCU staff during the desk review. 18 NYCRR §347.25 (d)(3).

The first level of review occurs at the local level. The period of review is limited to the calendar year in which the desk review is requested and the previous year. 18 NYCRR §347.25(b). SCU staff must make reasonable efforts to ascertain information if it is not provided by the recipient. 18 NYCRR §347.25(e)(3). All efforts made by the SCU must be documented in the file including:

- contact with income payors to determine dates of withholding;
- contact with other states' IV-D agencies to ascertain dates of collection (in such case the 45 day time period is tolled for 30 days to allow sufficient time for a response);
- contact with income maintenance staff to ascertain public assistance payment information and amounts of un-reimbursed public assistance.

18 NYCRR §347.25(e)(3).

The local social services district must issue a determination in writing no later than 45 days from the date of receipt of completed desk review form. 18 NYCRR §347.25(e)(1), (f)(1). This determination must be sent by first class mail and include a copy of any worksheet used as part of the review process and documentation considered in the desk review. 18 NYCRR §347.25(f)(1). A copy must be sent to the income maintenance unit. 18 NYCRR §347.25(f)(2).

State Level Review

A recipient unhappy with the local determination may request a state level review within 20 days of the local Support Collection Unit determination. 18 NYCRR §347.25(g)(1). This request must also be in writing, must specify the facts in dispute and must include a copy of the SCU desk review determination and any additional but previously unavailable documentation. 18 NYCRR §347.25(g)(2). A written response must be made by the New York State Office of Child Support Enforcement within 30 days of the date of the receipt of the recipient's request and must include any revised and or additional worksheets and any new documentation considered in the desk review. 18 NYCRR §347.25(g)(4). This determination will be mailed to the recipient, the SCU and the local income maintenance unit. 18 NYCRR §347.25(g)(5).

(Continued on page 15)

USDA Issues Policy Guidance on Immigrant Food Stamp Restoration

By Barbara Weiner

Implementation of the changes in immigrant eligibility for food stamp benefits brought about by the Food Stamp Program Reauthorization Act of last year has begun. On January 2, 2003, the Food and Nutrition Service of the United States Department of Agriculture (FNS/USDA) issued an extensive policy directive to the states to guide them in bringing back into the food stamp program what is estimated to be about 400,000 previously ineligible immigrants. New York, historically home to about 18 percent of the non-citizen participants in the food stamp program nationally, should see its food stamp participation rate jump by tens of thousands of needy individuals.

The Reauthorization Act of 2003 made the following changes in immigrant eligibility for food stamps:

- Effective April 1, 2003, the Act restores eligibility to immigrants with a "qualified alien" status (a group made up primarily of lawful permanent residents or "green card holders") once they have resided in the United States for five years in such status;

- Also effective April 1, 2003, the Act eliminates the 7 year time limit on the food stamp eligibility of refugees, asylees, Amerasians, persons whose deportation has been withheld and Cuban/Haitian entrants;

- Effective October 1st of last year, the Act restored the eligibility of disabled non-citizens with a qualified status as long as they are in receipt of disability-based assistance that has eligibility standards as strict as the Supplemental Security Income program (SSI) (for disabled immigrants, there is no five year wait), and

- Effective October 1, 2003, children with qualified alien status will become eligible for food stamps without having to wait five years and without the imposition of sponsor deeming—an income budgeting methodology that counts the income and resources of immigrant sponsors who have signed an enforceable affidavit of support when evaluating the financial eligibility of the sponsored immigrant for benefits.

As before, lawful permanent residents who can be credited with 40 qualifying quarters in the Social Security system, or immigrants in a qualified alien status who are on active duty in the armed services or who have been honorably discharged, along with their dependents, are eligible for food stamps. These immigrants do not first have to wait five years. However, veterans and active duty service members are not exempt from sponsor deeming if their sponsor has signed an enforceable affidavit of support.

Applications May Be Taken as of February 1

Beginning on February 1st, food stamp agencies may begin to take applications from immigrants who have resided in the United States for five years in a qualified status, although the individual will not begin to receive food stamp benefits until the 1st of April. USDA provided state agencies with this option in order to allow them to avoid a crush of applications during the month of March. New York's Office of Temporary and Disability Assistance (OTDA) has provided notice to the local social services districts of this option, though it has not mandated that the counties begin accepting applications any time before March 1st.

In New York City, immigrants who have been in a qualified alien status for at least five years on April 1st, should automatically begin getting food stamps as of that date as long as they are members of a household receiving temporary assistance and there are at least some members of the household currently receiving food stamps. However, OTDA has said that, in districts outside of New York City, the resto-

(Continued on page 13)

Immigrant Food Stamp Restoration– continued

ration will not be automatic for such immigrants for reasons having to do with the upstate WMS system. These districts have been instructed to include the immigrant in the food stamp household at the household's next recertification, retroactive to April 1. Of course newly eligible immigrants are also free to go into upstate district offices and request to be put back into food stamp household as of April 1, without first having to wait for the household's recertification.

After the April 1st restoration, immigrants with a qualified alien status who reach their five year eligibility date in the future will not be automatically included in their household's food stamp grant in any district. However, all social services districts have been advised to note at recertification whether the food stamp household contains an excluded immigrant member who will become eligible during the next certification period. Such individuals are to be restored to the food stamp grant prospectively. If this information is somehow missed and the person is not restored, then, at the next recertification, the immigrant should be included in the food stamp household retroactive to the date he or she became eligible.

Newly eligible immigrants who must first apply in order to begin receiving food stamps, i.e., those who are not members of a temporary assistance household currently receiving food stamps, will be the target of a widespread outreach campaign by USDA and OTDA, working with community nutrition advocacy organizations, to encourage them, many of whom are understandably skittish after the 1996 welfare reform law about applying for any benefits, to apply for food stamps. Sponsor deeming and liability, issues that will become increasingly important in the future, should not be a concern to the overwhelming majority of immigrants who will become eligible for benefits as of April 1st because they do not have sponsors who have signed an enforceable affidavit of support. The enforceable affidavit of support did not go into effect until December 19, 1997. Except for a small group of family based immigrants who adjusted to lawful permanent resident status between December 19, 1997 and March 31, 1998, and may be eligible for food stamps on April 1st, none of the immigrants with enforceable affidavits of support will have been here long enough to qualify for benefits.

Restoration of Eligibility of Disabled Immigrants

As of October 1st of last year, disabled, needy immigrants with a qualified alien status became eligible for food stamps without having to wait five years. However, to be considered disabled under the food stamp law, the individual must be receiving disability-related assistance for which the eligibility criteria are at least as stringent as the criteria for determining disability in the Supplemental Security Income (SSI) program. The USDA Guidance has clarified that such assistance may include state disability-related Medicaid and disability-related general assistance.

As reported in the last issue of the LSJ, OTDA issued an administrative directive, 02-ADM-7, instructing the local districts that any immigrant with a qualified alien status who is receiving disability-related Medicaid should be considered disabled for food stamp purposes.

The problem is that the poorest of these immigrants, those receiving or eligible to receive Safety Net Assistance (SNA), are unlikely to be referred for a disability determination since they are eligible for regular Medicaid in conjunction with their receipt of SNA. Although Medicaid rules direct that local districts refer disabled applicants or recipients of Medicaid for a determination of disability if they appear to be disabled and are less than 65 years old, in practice such referrals are not often made for individuals eligible for regular Medicaid since Medicaid disability determinations are costly and time consuming. Thus another avenue must be found.

One possibility for New York is to ask USDA to consider SNA "disability-related assis-

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Immigrant Food Stamp Restoration– continued

tance" in those cases where a recipient has provided proof that his or her medical condition is sufficiently grave to meet the SSI criteria. Currently, the SNA program is very likely providing benefits to many immigrants who have disabilities severe and long lasting enough to meet the SSI standard, but who are ineligible for the federal disability benefit because of their immigration status. (Most immigrants entering the country after August 22, 1996 will not be eligible for SSI unless they naturalize or can be credited with 40 qualifying quarters). However, at most, the local districts have only evaluated the disabilities of these immigrants in conjunction with an employability assessment, a process that does not employ the SSI disability standards and so does not meet the food stamp law's requirement. Furthermore, elderly SNA recipients are not subject to work rules at all and so would not undergo even the employability evaluation.

The question for New York is whether a disability determination procedure less costly and cumbersome than the Medicaid process can be put into place to evaluate the severity of an immigrant's disability who is receiving SNA and could be receiving food stamps if such a determination were made. USDA has taken a step in the direction of making it possible for New York to do this, by stating in its guidance that the determination of disability may be based on a medical practitioner's statement. This would include the immigrant's own treating physician. Discussions with OTDA have confirmed that the state is looking into this potential avenue for rendering disabled immigrants eligible for food stamps, at least in those cases where there is little question that the individual is suffering from a serious and long lasting disability and is not receiving SSI solely because of immigration status

Deeming and Sponsor Liability

The eligibility of family based immigrants for means tested benefit programs whose status was adjusted to permanent residence after December 19, 1997, must be determined by counting the income and resources of the sponsor as available to the immigrant — a budgetary method called "sponsor deeming" . If, because of certain exemptions from deeming provided by PRWORA, the sponsored immigrant ultimately receives the benefits anyway, the sponsor liability rules come into play. As noted above, the mass restoration of food stamp benefits scheduled for April 1st for immigrants who have been in a qualified status for five years will not involve implementation of the deeming and liability provisions to any significant extent.

For the future, however, with respect to sponsor liability, it must be understood that, under the 1996 welfare reform law, there is no requirement that states pursue sponsors for repayment of benefits, beyond requesting such reimbursement from the sponsor. However, federal benefit agencies have not issued much in the way of guidance to the states to help them determine whether, and how, to pursue sponsors for repayment in particular cases. For example, although the states probably have the authority to waive the pursuit of sponsor repayment where the sponsor has been abusive, the availability of such a waiver has not been expressly articulated anywhere.

USDA has issued some rules on sponsor liability; for example, clarifying that where the sponsor is him- or herself in receipt of food stamps, the state may not pursue the sponsor for repayment of the food stamp benefits provided to the sponsored immigrant. It is also clear that states may, and should, consider cost effectiveness in deciding whether to pursue sponsors for repayment. In the case of food stamps, the taking of legal action by a district to recover the value of the benefits provided to a sponsored immigrant would probably not be considered cost effective since the states do not get to keep a share of the money recovered and there is no federal funding provided to the state for pursuing the sponsor.

It is expected that the Department of Health and Human Services (HHS) will publish guidance

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Immigrant Food Stamp Restoration– continued

shortly on sponsor deeming and liability. This would address deeming and liability in the context of Medicaid and TANF benefits. In the meantime, at least with respect to Medicaid, the sponsor deeming and liability rules in 00 OMM ADM-9 should not yet be applied by the local districts. In light of the Aliessa v. Novello case, these rules will need updating.

The whole question of sponsor deeming and liability will be addressed in an upcoming issue of the LSJ, as soon as the additional guidance that is anticipated to be issued by OTDA and HHS comes out. In the meantime, it is important to clarify to the immigrants who have an opportunity to rejoin the food stamp program on April 1st that they should not hesitate to apply for benefits because of fear that their sponsor will be pursued for repayment. It is only the very, very few immigrants who adjusted status *after* December 19, 1997 and who have been here for five years in such status to whom the deeming and reimbursement rules would apply.

Advocates with questions about the restoration of immigrants to the food stamp program, including the particular problems for bringing disabled immigrants back in, or who are encountering difficulty with the local district's implementation of these changes, are encouraged to contact me at bweiner@wnylc.com.

Child Support Desk Reviews-continued from page 11

The determination will advise the recipient that further review may be obtained pursuant to Article 78 of the Civil Practice Law and Rules. The determination will include the telephone number of a local legal services office. 18 NYCRR §347.25(g)(6).

The federal court's jurisdiction over the consent decree in the *Broniszewski* case expires July 11, 2003. If there are problems with the implementation of the desk review process, please advise plaintiff's counsel immediately: Susan Antos, Greater Upstate Law Project, Inc. 119 Washington Avenue, Albany New York 12210. Phone: 518-462-6831, fax: 518-462-6687, santos@wnylc.com.

Footnotes: [1] Since the implementation of the Personal Responsibility and Work Opportunity Reconciliation Act in 1996, states have been free to increase or eliminate the child support pass through. There has been legislation proposed in New York every year to increase the pass through to $100. See, e.g. A.1461 introduced on January 16, 2001 by multiple sponsors, including Assembly members Weinstein, Glick, Davis, Grannis, Lopez, John and Greene. Although the increase is supported by both houses and the Governor, it has been held hostage to negotiations over other child support provisions upon which the legislature has been unable to agree, and has not passed either house.

[2] *Schwartz v. Dolan, 854 F.Supp. 932 (N.D.N.Y 1994)*; *Broniszewski v. Perales* (W.D.N.Y), *Collazo v. Bane, 92 Civ. 5468 (E.D.N.Y)* Consent decrees in Broniszewski and Collazo are available in the Benefits Law Database at the On-Line Resource Center (ORC) at www.gulpny.org.

[3] 18 NYCRR 347.25(d)(1). OTDA has indicated that it is in the process of developing an Administrative Directive which will contain the form and instructions to the counties on the desk review process.

Immigrant Notes

By Barbara Weiner

Social Security Numbers for Immigrants without Employment Authorization:

At the end of November, the Office of Temporary and Disability Assistance issued an Informational Letter, 02 INF-40, telling the local districts to give immigrants applying for assistance who are not authorized to work and who don't have Social Security numbers (SSNs) a letter to take to the Social Security Administration (SSA) to get a non-work Social Security Number (SSN).

SSA has the authority to issue non-work SSNs to immigrants who produce such a letter on the letterhead of a government entity that states that a SSN is a condition of eligibility for the particular benefits and that, but for the SSN, the individual is otherwise eligible for the benefits. (See POMS RM 00203.510.). The INF instructs the local district to give this letter to the non-citizen applicant for benefits as soon as it appears that he or she is eligible for assistance.

According to the INF, the failure of a non-citizen parent or caretaker relative applying for benefits to apply for and furnish an SSN will result in the imposition of an incremental, non-durational sanction (i.e., sanctioned until compliance). Similarly in the food stamp program, a household member who refuses to apply for or furnish a SSN is excluded from the household's grant and a determination of the eligibility of the remaining household members is made.

The INF states that there is one circumstance in which the failure of a non-citizen household member to apply for or provide an SSN will result in the entire household being ineligible for assistance. That situation is where the non-citizen is a "non-applying" household member whose needs and income are considered in determining the amount of assistance granted to the household, i.e., a legally responsible relative. Asked for clarification, OTDA has stated that the term "non-applying" household member in this context refers to non-citizens whose status makes them ineligible for benefits. It was pointed out that this could be read to mean that the citizen children of an undocumented parent would be denied assistance. As an undocumented person and ineligible for benefits, the parent would be considered "non-applying". Clearly ineligible for a work authorized SSN, he or she could also not obtain, and furnish, a non-work SSN. However, OTDA said this is not the intent and that it will make it clear in a soon to be issued INF that an entire household is only rendered ineligible if the legally responsible, non-applying relative is work-authorized but refuses to furnish an SSN.

"Expired" Green Cards

On more than one occasion, a local district has refused to accept an application for benefits if the applicant's green card, evidence of lawful permanent residence status, has expired. There have been at least two fair hearing decisions clarifying that, although a green card may have an expiration date, the status does not. Recently, the Officer of Medicaid Management issued a General Information System notice (GIS) advising local districts that, for the purpose of obtaining Medicaid, a green card that contains an expired date is acceptable documentation of lawful permanent residence status. See GIS 02 MA/027.

In a similar vein, a little more than a year ago OTDA issued an INF entitled "Food Stamp Questions and Answers" where, in answer to the question:

> *Can food stamp eligibility be denied for Lawful Permanent Residents who have lost their green cards or whose green cards have expired until they get a replacement card?*

OTDA replied*:*

> *No. Districts can verify the status of an individual with INS without having a copy of the green card, or with an expired green card. (*See 01 INF-21, October 25, 2001.)

Governor Wants to Grab SSI Pass-Through

By Anne Erickson

Dismissing advocates calls to raise revenues by enacting a temporary surcharge tax on the portions of family income over $100,000, the Governor is instead proposing to intercept the modest annual cost of living increase the federal government provides to some of the state's poorest citizens, those living on Supplemental Security Income (SSI).

Advocates continue to argue that the more well-off in this state can afford to help out during this time of unprecedented fiscal crisis. The Governor would instead tax SSI recipients 100% -- intercepting their entire COLA for next year. "The elimination of the 2004 pass-through should have minimal consequences for the SSI population," the Governor notes in his budget materials, adding, "the Federal benefit increase is an annual occurrence, taking effect January 1 of each calendar year. This proposal eliminates only one such increase – the one scheduled for January 1, 2004."

According to the Governor's Budget materials, the elimination of the COLA would "save" the state $25.7 million in SFY 2003-04 by "assuming that there will not be a general pass-through of the January 1, 2004 Federal benefit increase. This savings will grow to $103 million per year starting in SFY 2004-05." It's unclear how the savings grow in the out years if this is to be a one time taking of the COLA.

The Governor says his plan would provide some limited exemptions and, he argues, it is in line with Federal law: "Each year, the Federal portion of the SSI benefit increases to reflect changes in the consumer price index. Subject to certain restrictions in Federal law, the State ***may*** pass-through this increase to SSI recipients ***or use the added funds to reduce State costs*** for the program." Emphasis added.

In his annual budget message, Governor Pataki repeatedly called on the legislature to join him in making the "right choices" and the "tough choices." Obviously, for the Governor, the "right choice" in this budget is to protect the wealthy and tax the poor. The budget choices for SSI recipients, faced with increased living expenses and no increase in benefits, may well be tougher choices than the Governor appreciates.

Regulatory Roundup

by Susan C. Antos

This article reports activity in the State Register from December 11, 2002 to February 5, 2003. During this period, two rules were adopted and the rule regarding temporary shelter supplements was re-promulgated on an emergency basis for the fourth time Additionally, the proposed shelter allowance regulations were continued. 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 Lewis or Nancy Krupski at GULP, Albany.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
12/5/02	12/24/02	347.25	**Desk Reviews of Child Support Payments:** These regulations implement the court order in Broniszewski v. Perales (W.D.N.Y) which requires a 2 tiered review to challenge the distribution of child support (i.e. , pass-through, excess child support). The first level of review is at the local level in which the Support Collection Unit (SCU) at the local social services district must offer the person requesting the review an opportunity for a face-to-face conference. The state will promulgate a form for the request of a desk review. The SCU must complete the review within 45 days of the receipt of the request. If the matter is not resolved, a second tier level of review will then take place at the state level, upon written request. The state must respond in writing, within 30 days. A person may appeal the state determination by bring an Article 78 proceeding. See related article on page 10.
12/2/02	12/1/02	357.36(d)1 421.1(g) 421.24 (c)(2)(ii) 427.2(d) 430.12(f)(1)(1) 130.12(g)(5)(v) 435.2(b), (g) 446.3(c), (d) 443, 444	**Application, Certification, Approval, and Supervision of Foster Family Boarding Homes:** These regulations repeal current foster care regulations and replace them with regulations governing both certified non-relative foster families and kinship foster families. The regulations harmonize the standards for approval and create a process that permits persons to apply as foster and adoptive parents simultaneously.

Regulatory Roundup, continued

Emergency Rulemaking

Date of Filing	Effective Date	Regulations Affected	Summary
12/2/02	3/01/03	351.24	**Temporary Shelter Supplements**: This regulation, first filed as an emergency rule in November 2001, and again in February 2002, June of 2002 and December 2002, allows families who receive Safety Net Assistance because they have reached the 30 month time limit to receive "Jiggetts" supplements. No notice of proposed rule making has been filed with this emergency rule.

Notice of Continuation

Regulations Affected	Summary
352	**Shelter Allowance:** On August 7, 2002, the OTDA proposed new shelter allowance regulations in response to a court order in the Jiggetts case. This notice on continuation give OTDA until August 7, 2003 to adopt this regulation. NYS Register (1/29/03). See "State Proposes Shelter Allowance Regulations" in the August 2002 issue of the Legal Services Journal, as well as the more in depth article, "OTDA Proposed Shelter Allowances: No Cure for Homelessness or Substandard Housing" in the October 2002 issue.

Reimbursement of Unpaid Medical Expenses Under Family Health Plus

By Douglas Ruff
Nassau Suffolk Law Services

The Office of Medicaid Management has issued a GIS message (02 MA/033) to local districts to "clarify existing policy as it relates to the Family Health Plus (FHP) program, concerning reimbursement for medical expenses paid by an applicant when agency error or delay causes the applicant to pay medical expenses before their FHPlus plan enrollment becomes effective." The GIS was issued 12/31/02.

Prior to the issuance of the GIS, the Department of Health took the position that there was no provision for reimbursement or retroactive coverage under FHP. The GIS does not address the issue of retroactive coverage for unpaid bills caused by Agency error or delay.

The GIS provides for reimbursement for reasonable out of pocket expenses paid in cases of Agency error and Agency delay, provided that the services received are those that would have been covered under FHP. There is no requirement that the provider be participating in a FHP plan or be an enrolled Medicaid provider.

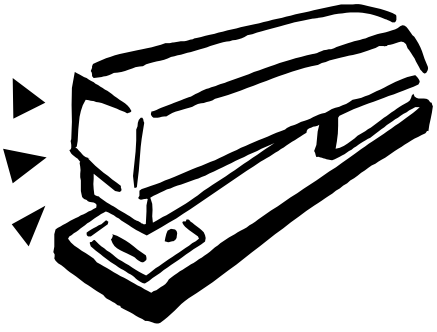
Local districts have the option of issuing reimbursement to eligible individuals themselves, or having the New York State Department of Health process the reimbursements.

The full GIS is posted by the Western New York Law Center at www.wnylc.com

Thanks to Doug Ruff for keeping us posted.

GULP's Battered Immigrant Legal Assistance Program (BILA) Receives Grant from Target Stores

GULP is pleased to report that BILA, our Capital District program that provides legal assistance to immigrant women who are abused, has received a grant from Target Stores to purchase office equipment for BILA staff attorney, Anzala Wilson. The grant will enable Ms. Wilson to continue to work closely with project partners from The Legal Project and the local domestic violence shelters to provide high quality targeted legal aid to immigrant women. Many thanks to Target Stores for providing funding to support this vital new program.



First Hanna S. Cohn Equal Justice Fellow Chosen

Following a national search, Spencer Phillips, a third year law student at the J. Reuben Clark Law School at Brigham Young University, has been selected as the first Hanna S. Cohn Equal Justice Fellow. Phillips will begin work at the Public Interest Law Office of Rochester (PILOR) in September 2003.

As part of the two-year term, Phillips will focus on the legal needs of Rochester's deaf and hearing-impaired population. His project will include outreach, community education and legal assistance in the areas of employment, housing, disability rights, education and civil rights.

"Deaf people have long been exploited in the employment field, harassed in housing arrangements, and neglected by their neighbors and the nation as a whole," noted Phillips. "They deserve, and desperately need, a legal advocate who not only speaks their language, but one who communicates equally well with the hearing world."

A native of San Francisco, Phillips received a bachelor's degree in English from BYU in April 2000. He has served as a legal intern for the National Association of the Deaf Law Center in Silver Spring, MD, as a law clerk for the Disability Law Center in Salt Lake City, UT, and is currently a law clerk with the Provo City Attorney's Office**.**

The Fellowship was established in memory of Hanna S. Cohn, who served as the Executive Director of Volunteer Legal Services Project (VLSP) for twenty years. In posthumously awarding Hanna the New York State Bar Association Root\Stimson Award for outstanding volunteer service to the community, state bar president Lorraine Power Tharp noted, "Hanna's passion for her work, her unwavering commitment to help meet the needs of poor and disenfranchised has been a source of pride for the profession, and both the state and Monroe County legal community. She was an inspiration to a generation of lawyers who either entered poverty law or responded to the needs of the disadvantaged through pro bono service as a direct result of her example." Striking a similar note in his law day address last year, U.S. District Judge Michael Telesca, characterized Hanna as a "drum major for justice . . . who devoted her life to those in need."

The Fellowship is made possible by Hanna's family, through private donations to the Hanna S. Cohn Memorial Fund, and by a contribution from the *Campaign for Justice*, an annual fund drive that Hanna established to support the work of VLSP, the Legal Aid Society and Monroe County Legal Assistance Corporation.

Jerry Wein, Hanna's husband notes, "The work of the fellow of course will not replace or replicate Hanna. We hope to recognize a part of her journey by opening a door for a new lawyer--as one was opened for her when a national fellowship in public interest law brought Hanna to Rochester. The fellowship will also provide an opportunity for a lawyer entering the profession to build on her or his values and skills within a supportive legal community, and help fashion a world where the phrase "equal justice" has real meaning. On behalf of Hanna's family, I wish to thank the *Campaign for Justice* and the many friends who contributed to the Hanna S. Cohn Memorial Fund."

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