Empire Justice Center
Making the law work for all New Yorkers

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The First Department Hands Elderly and Disabled Refugees a Welcome Victory

By Barbara Weiner

A better birthday surprise can hardly be imagined for an elderly refugee who fled anti-Semitism in Russia in the late 1990's and recently celebrated his 101st birthday than a ruling from the First Department that he and all other elderly and disabled, lawfully residing immigrants who are ineligible for Supplemental Security Income (SSI) solely because of their immigration status must be provided with public assistance by New York State at the SSI related standard of need set out in Social Services Law §209.2, rather than assistance at the significantly lower welfare standard. That is exactly the surprise Mr. Khrapunskiy and the members of plaintiff class recently received. *Khrahpunskiy v. Doar*, 2008 NY Slip Op 351; 2008 N.Y. App.Div. LEXIS 316 (January 17, 2008).

On January 17, 2008 the Appellate Division, First Department, in a split decision of three to two, held that New York residents who are lawfully residing in the United States and who are elderly, blind or disabled, "...are entitled to receive public assistance in the amounts defined in Social Services Law § 209(2) as 'the standard of monthly need' or minimum levels deemed necessary by the Legislature for their adequate support." This is the plaintiffs' second victory, the first having been Judge Jane Solomon's decision in August of 2005 in the court below. *See Khranpuskiy v. Doar*, 9 Misc.3d 1109, 806 N.Y.S.2d 445 (Sup.Ct., 2005). Both rulings confirm that New York cannot justify its use of a lower standard of need to determine the amount of assistance it will provide to elderly, blind and disabled immigrants than the standard it applies to elderly, blind and disabled citizens whose citizenship status makes them eligible for SSI. Although SSI is a federal program, the standard of need is set by New York, which, like many other states, supplements the federal SSI benefit.

Some of the members of the *Khrapunskiy* plaintiff class are refugees and asylees who have lost their SSI benefits because they reached the 7 year federal time limit for receiving such benefits. Others are lawfully residing immigrants who, because of the restrictions enacted in the 1996 federal welfare reform legislation, were never eligible for SSI because of their immigration status. Plaintiffs are all elderly, blind or disabled. Under the provisions of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (PROWRA), no immigrant who enters the U.S. on or after August 22, 1996 is eligible for SSI benefits unless (s)he naturalizes, is a lawful permanent resident who can be credited with 40 qualifying quarters in the Social Security system or is an active duty service members or honorably discharged veterans or their immediate dependents. The only exceptions to this exclusion from the SSI program are refugees and asylees and other humanitarian

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Khrapunskiy—continued

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based immigrants. However, their eligibility for SSI is limited to the first seven years after their entry into the U.S. in a humanitarian based classification. *See* 8 U.S.C. §§1612(a)(2)(A)-(H). If they have not become citizens by the end of those seven years, they lose their benefits.

Beginning in 2003, thousands of elderly and disabled refugees and asylees who had been unable to complete the lengthy citizenship process began losing their SSI benefits. (*See* the related article in this issue of the LSJ, "USCIS to Expedite the Naturalization and Adjustment Applications of SSI Recipients" on page 3.)

Advocates have searched, and continue to search, for a variety of solutions to this exclusion of elderly, blind and disabled immigrants from the main federal assistance program otherwise designed to support this particularly vulnerable segment of the low income population. In some states, state replacement programs have been enacted. Over the past several years, Federal legislative proposals for the extension of the SSI eligibility of humanitarian based immigrants from seven to nine years have regularly been introduced. However, to date, these proposals, in spite of substantial bi-partisan support, have been continuously held hostage to a few rabidly anti-immigrant Congress members. In New York, in addition to supporting legislative solutions, advocates brought the *Khrapunskiy* lawsuit.

New York's lawfully residing elderly, blind and disabled immigrants, though excluded from the federal SSI program, are eligible for public assistance. However, the welfare benefit standards (SSL § 131-a) are substantially below what an SSI recipient would receive through the federal benefit grant and the State supplement. New York's supplementation of the SSI grant is designed to achieve a benefit level minimally adequate for the support of the elderly, blind or disabled. The New York Legislature adjusts the monthly standard of need for SSI recipients on an annual basis, usually to pass on the federal SSI cost of living adjustment to SSI recipients but sometimes to increase its own contribution by increasing the State supplement itself. Relying on this separate standard of need for aged, blind and disabled persons in SSL §209.2, the *Khrapusnskiy* lawsuit argues that the State must provide assistance at that standard to lawful aged, blind and disabled immigrants who are receiving Safety Net assistance and not SSI solely because of their immigration status. Plaintiffs argue that this is required both by New York State's obligation under Article XVII, Section 1 of the state's constitution to provide "aid and care to the needy", and by the state and federal Equal Protection guarantee which prohibits New York from making distinctions in the level of benefits it considers adequate for the support of elderly, blind and disabled people based solely on immigration status.

The New York State Office of Temporary and Disability Assistance has until March 3rd to file a notice of appeal. It is more than likely that it will do so, although at the time of publication, plaintiffs' counsel had not yet received notice. Under CPLR §5519(a)(1), the State is entitled to an automatic stay of the First Department's decision pending a determination by the New York State Court of Appeals. Counsel for plaintiffs were successful in the First Department in obtaining a partial exemption from the stay for elderly, blind and disabled immigrants facing eviction or a cut-off in utility benefits as a result of their loss of SSI benefits, if such loss was due solely because of their immigration status. Should New York file an appeal and thereby stay the decision under which the public assistance grants of the *Khrapunskiy* class would have to be supplemented, plaintiffs' counsel also plan to move for a lifting of the stay in the Court of Appeals.

Advocates with clients who have lost or about to lose their SSI benefits because of their immigration status and who are thus facing eviction or a utility cut-off should contact plaintiffs' counsel.

In New York City, advocates can contact either Jennifer Baum of the Legal Aid Society at (212) 577-3266 or jbaum@legal-aid.org or Jane Stevens of the New York Legal Assistance Group at (212) 613-5031 or jstevens@nylag.org. Outside of New York City, advocates should contact Barbara Weiner of the Empire Justice Center by phone at (518) 462-6831, ex. 14, or by e-mail at bweiner@empirejustice.org. The Khrapunkskiy decisions, briefs and pleadings can be found in Benefits Law Database by logging onto the Online Resource Center at http://onlineresources.wnylc.net/welcome.asp?index=Welcome.

USCIS to Expedite the Naturalization and Adjustment Applications of SSI Recipients

By Barbara Weiner

A settlement has been reached in the case of *Schmul Kaplan, et al., v. Michael Chertoff*, filed in the Eastern District of Pennsylvania, which requires the United States Citizenship and Immigration Service (USCIS) to expedite the applications of refugees, asylees, and other humanitarian based immigrants for permanent residence or naturalization if the applicants are facing the cut-off of their Supplemental Security Income (SSI) benefits because they have come to the end of their period of SSI eligibility. *Kaplan v. Chertoff*, Civ. No. 06-5304 (Eastern District, Pennsylvania). The plaintiffs are represented by Community Legal Services of Philadelphia.

The *Kaplan* case was filed in December of 2006 to challenge the long delays in the adjustment and naturalization processes that put thousands of elderly and disabled immigrants at risk of losing their federal benefits. Their dilemma was the consequence of the 1996 federal welfare reform legislation, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) that denied access to SSI benefits to most lawful residents and provided only limited access to those entering the U.S. as refugees or asylees or in certain other humanitarian based categories (Amerasians, Cuban/Haitian entrants, and victims of trafficking.) Though refugees and asylees who enter the United States after August 22, 1996 are eligible to receive SSI benefits, their eligibility is limited to their first seven years in status. If they should fail to naturalize during that period of time, PRWORA requires that their benefits be terminated.

Before an immigrant is eligible to naturalize, he or she must first adjust status to lawful permanent resident. Although the naturalization process for refugees and asylees could, theoretically, be completed in 5 or 6 years, in reality it generally requires much longer. This a consequence not only of the language barriers and disabilities that make jumping citizenship hurdles particularly difficult for elderly and disabled refugees but also because of the tremendous backlog in the processing of applications by USCIS, exacerbated by the even lengthier delays in the required FBI security related clearances all such applications require. It is this latter issue that the settlement addresses, by providing for expedited processing for refugees and asylees who are, or were, recipients of SSI and who must naturalize in order to continue receiving benefits.

The major provisions of the settlement are:

Any non-citizen who is or has been receiving SSI whose benefits have been terminated or are at risk of being terminated prior to a final decision on their current or future citizenship application are class members and so covered under the terms of the settlement.

Class members may request expedited processing from USCIS for pending applications for citizenship or adjustment of status at any time. USCIS must institute such processing if six months have elapsed since the filing of their applications without a decision.

For those requesting expedited processing, USCIS will request that the FBI give priority processing to any pending security checks.

Applicants requiring appointments must be given the earliest available appointment and, for those waiting to take the Oath of Allegiance, the USCIS will administer or schedule the Oath at the next available opportunity.

The agreement also requires USCIS, through information provided by the Social Security Administration (SSA), to identify individuals whose SSI benefits have been terminated or will be terminated in the near future who have pending adjustment or citizenship applications. Individuals so identified will have their pending applications expedited. It is expected that the automatic expedite will take place close to the end of the first year of the settlement agreement.

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Facts about the 2008 Stimulus Payments

Instructions for Low-Income Workers and Recipients of Social Security and Certain Veterans' Benefits

- Most taxpayers do not need to take any extra steps to receive the stimulus payment.
- **Persons who might not otherwise file a 2007 return, but have at least $3,000 in qualifying income, will need to file a return this year to receive the stimulus package.**
- Qualifying income includes earned income (e.g., wages, net self-employment income), Social Security benefits, certain Railroad Retirement benefits, and Veterans' disability compensation, pension or survivors' benefits received from the Dept. of Veterans Affairs in 2007. (Note: Supplemental Security Income [SSI] **does not** count as qualifying income.)
- To be eligible for the Stimulus Payment, tax filers **must have a valid Social Security Number**. If a joint return, **both persons** must have a valid Social Security Number.
- Persons who have **already filed a 2007 return** showing less than $3,000 in qualifying income and did not list their Social Security, Railroad Retirement or Veteran's benefits, **should file an amended return** (Form 1040x) to list these non-taxable benefits and qualify for the stimulus payment.
- Social Security, Railroad Retirement and Veteran's Benefits should all be entered on line 20A of Form 1040 to establish eligibility for the stimulus payment.
- The stimulus payments **will not** count toward or negatively impact any other income-based government benefits such as Social Security benefits, food stamps and other programs.

Expedite Naturalization—continued

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The settlement also provides for the sending of notices to immigrants identified by SSI as having had their benefits terminated to encourage all who have not yet done so to file applications for adjustment or naturalization. The notices will inform class members of the availability of fee waivers for adjustment and naturalization applications and for the availability of expedited processing. Beginning in July of 2008, similar notices will be sent out to those immigrants who face the potential suspension or termination of benefits. The settlement only requires the notices to go out in English, though they must be accompanied by a paragraph in ten additional languages that advise the person that the letter is important and they should take the letter to someone who can translate it for them.

Once the settlement is approved by the Court, class members with pending applications who are currently receiving or who have received SSI benefits can call the USCIS "1-800 number" (1-800-375-5283) and request expedited processing.

Individuals can also make a request in writing or go to their local USCIS office. If there is no response from USCIS within 45 days of the request for expedited processing having been made, or an unsatisfactory response, class members can contact class counsel, Community Legal Services, Inc., of Philadelphia, (CLS) for assistance.

A fairness hearing is scheduled for February 29, 2008. It is expected that the Court will agree to the settlement and enter an Order of Judgment. The duration of the terms of the settlement agreement will be two years and eleven months from that date it is approved by the Court. Advocates who currently have clients with pending naturalization or adjustment applications who have lost or are about to lose their SSI benefits can call the USCIS 1-800 number to request expedited processing under *Kaplan*, starting now. Contact Jonathan Stein of CLS if you have questions or encounter difficulties with USCIS in making the request. He can be reached at jstein@clsphila.org.

State Funding for Civil Legal Services

By Anne Erickson

Ensuring that poor and low income individuals and families have access to justice and that the state of New York has a strong and well-funded system for delivering civil legal services is core to our mission. Toward that end, we have led the annual effort to secure, maintain and increase state funding for civil legal services programs across the state. As part of these efforts, each year we review, analyze and report on the state budget and its treatment of legal services.

As readers of the LSJ and others involved in state funding efforts know, last year's budget was historic in the level of state funding allocated for civil legal services. Since 1993, when the state first provided general support for the delivery of legal services, this funding had always been a "super member item" carried by the Assembly Majority. In the 2006-07 budget these funds totaled $4.6 million. The Assembly Majority also led the effort to secure approximately $2 million from the Legal Services Assistance Fund (LSAF) for legal services in that year's budget.

For the first time, last year's budget saw the Unified Courts/Office of Court Administration (OCA) allocating a new $5 million appropriation for legal services and for the first time, $3 million was included in Governor Eliot Spitzer's first Executive Budget. By the time the budget process was over last year, the state's general support for civil legal services totaled $15.85 million, more than doubled the prior year's level.

This was clearly a powerful new partnership and a powerful new commitment to revitalizing the delivery of legal assistance for low income New Yorkers.

Changes to IOLA Income

Governor Spitzer also moved quickly in his first year in office to enact changes in the Interest on Lawyer Account (IOLA) regulations that now require banks to pay interest rates on IOLA accounts that are "comparable" to the rates the banks pay on similarly sized accounts. This change has had an extremely positive impact on IOLA earnings, allowing the Fund to award $25 million in grants for the 2008 calendar year cycle, up from $13 million in 2007.

As a result, the 2008-09 Executive Budget assumes IOLA income will grow to $72 million in the coming fiscal year. The Budget gives IOLA appropriate authority that will allow IOLA to spend up to $72 million if in fact the fund earns that much in the coming year. This is the "authority" to spend, not an actual appropriation of funding.

Changes in the Executive Budget

Based on this anticipated increase in IOLA funding, the Executive Budget eliminates the following state fund appropriations:

- $4.6 million in general operating support through the Department of State budget – funding that has supported the delivery of legal services since 1993;
- $2 million from the Legal Services Assistance Fund distributed by the Division of Criminal Justice Services for core services – again – the Assembly Majority has been responsible for ensuring that this funding has been available since 2005;
- $8 million in new funding secured in last year's budget- $5 million initially proposed by OCA and $3 million proposed in the Executive Budget;
- $1.25 million for the provision of domestic violence related legal services – $1 million allocated by the Senate Majority and $250,000 by the Assembly.

The Governor's proposed budget would provide a single undefined appropriation of $1 million for civil legal services.

In meetings with the Executive and Legislative

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Funding Civil Legal Services—continued

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Leaders and in our recent testimony to the Senate Finance and Assembly Ways and Means Committees, we have noted a number of deep concerns with this approach:

- As a state, we are still failing to meet some 80% of the civil legal needs of those in our communities;
- This is a delivery system that relative to other human services has been severely underfunded for years;
- This should be a period of growth and stability, not one in which we see IOLA gains off set by state funding losses;
- State funding has become critical to the core operating funds of programs across the state;
- The state of New York should maintain its own general fund commitment to the delivery of civil legal services;
- Not all programs funded by the state are funded by IOLA;
- State funding and IOLA funding do not provide the same level of support to all programs; if state funding is lost some programs will have no IOLA funding to help support their services, other programs will suffer disproportionate losses;
- State funding will end effective April 1, 2008 while IOLA grants for 2008 have already been awarded, potentially leading to a disruptive seven-month gap in funding; and
- There is no guarantee that IOLA funds will be available for distribution in time to cover any state losses.

IOLA has already committed $25 million in grants for the 2008 calendar year and must pay those grants first with their 2008 earnings.

In addition, we have noted that there are a number of troubling trends on the horizon that could substantially blunt IOLA's earnings:

- the Federal Reserve's recent and future anticipated cuts in interest rates may drive down the new rates being paid on IOLA accounts;
- given the current state of the economy, the principal balances being held in IOLA accounts could drop; and
- given that much of the IOLA activity in New York state is driven by the real estate market, the continued depression in that sector will adversely impact the funds being held in IOLA accounts.

Indeed, New Jersey, which adopted IOLA comparability in February 2006 and saw its income climb to $52 million, is already feeling the impact of these troubling economic trends. IOLA revenue in New Jersey was down 6% in October, 9% in November and a dramatic 20% in December 2007. In Texas the IOLTA fund was expecting to earn $25 million to $28 million in revenue this year; in just the last week, the fund cut its projection in half to $14 million after the Fed slashed interest rates. It is expected that that figure may slip further depending on the Fed's future actions.

While the level of New York's IOLA funding for 2009 grants remains uncertain, the state funding that has for 15 years provided stable core operating support has been reduced to a single undefined appropriation of $1 million. Because not all state funded programs receive IOLA funding and there is no guarantee that those that are funded by IOLA will be funded at a level comparable to the amount of support provided through the state budget, many programs providing critical services will be adversely impacted by these proposed changes.

More Global Issues

We also continue to remind our state's policymakers that providing access to legal assistance is critical to the core fabric of any state's human services delivery system. As noted by the New York State Bar Association in its seminal report of the legal needs of the poor:

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Funding Civil Legal Services—continued

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> *"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… yes, the poor are confronted by such problems repeatedly and are often defeated due to the lack of counsel…"*

The issues confronting the poor and those living on low incomes are, if anything, even more complex today. Whether it's the ever-changing landscape governing access to public assistance or health care or the newly emerging legal needs of consumers and financially strapped homeowners, the legal needs of our state's most vulnerable populations remain critical and all too often unmet.

The reality is that most legal services programs today are providing only legal triage. They are helping those with a 72 hour eviction notice, but are unable to intervene earlier to negotiate payment of back rent that could avoid the eviction. They are helping victims of domestic violence untangle themselves from violent homes, but all too often only if the violence is active. They are helping the disabled secure federal benefits, but only after a denial has been issued and the case is moving deeper into the legal arena.

Not only is it more traumatic to provide such crisis-driven assistance, it is also more expensive and less cost-effective. The earlier a case is handled by legal services the more likely an agreement can be reached, benefits can be secured, or assistance can be given to help avoid longer-term problems.

How We Fund Legal Services Today

In order to meet the legal needs of poor and low income populations, legal aid programs across the country rely on three core funding streams: federal funding, Interest on Lawyer Account (IOLA) funds, and state funding. In New York, those funding streams include:

- Federal Legal Services Corporation (LSC) – federal funding received by seven (7) LSC grantees in New York State. Launched in the 1960s, the federal Legal Services Corporation (LSC) is the national construct for funding civil legal services. These funds are distributed on a per-poor-person basis and support the general delivery of legal services based on local needs assessments.

- Interest on Lawyers Account (IOLA) – received by many legal services organizations, but not all. Modeled after programs in Canada and Australia, IOLA is now a model of funding used throughout the country to tap into what had been non-interest bearing accounts held in escrow by attorneys and law firms. Seventy-five percent (75%) of the annual funding must be designated for the direct delivery of services to individuals, while 25% are designated for efforts to advance the Administration of Justice.

- State Funding - the 2007- 08 State budget provided funding for legal services through the Office of Court Administration (OCA), the Department of State (DOS), and the Division of Criminal Justice Services (DCJS) as part of the Legal Services Assistance Fund (LSAF) – again, not all programs receive funding from all of the state funding streams.

Clearly individual legal aid programs also rely on various grants and contracts and provide fund raising, but the three core funding streams support a full range of services needed to ensure a vibrant civil legal services delivery system.

Restoration of State Funding Stability Urged

In order to maintain the state's commitment to the delivery of legal services and to ensure continuity of services, it is essential that the Legislature restore the core state funding that civil legal services programs rely on to provide essential services to clients.

We have and will continue to urge the Governor and the Legislature to join together to restore all state funding for civil legal services to the 2008-09 budget.

New Advocates Guide Now Available

Newly posted on the Empire Justice Center website is a revised and updated edition of "An Advocate's Guide to the Welfare Work Rules," by Don Friedman, of our Long Island office. The guide can be found at http://tinyurl.com/2mmdgc.

As a condition of receiving public assistance in New York, applicants and recipients must comply with work requirements. The system tends to be rigidly administered, and people who are found to have in any way failed to comply are subject to sanctions, in which their benefits are reduced or terminated. But the law does provide an array of rights for those subject to these mandates. It is therefore our hope that the Guide will assist advocates in protecting clients against sanctions and in enforcing those rights.

The Guide seeks to accomplish a few related objectives:

- Set forth the basic work rules, distilled from Federal and State law, regulations and policy directives, the so-called "black-letter law." Topics covered include the evaluation of employability, the assessment process, the potential range of assignments, including discussions of workfare and access to education and training, supportive services (like child care) and the sanction process.

- Offer analysis about the meaning or intent of the legal and regulatory provisions.

- Include detailed citations of law, regulation and policy, as well as relevant judicial and hearing decisions that shed light on the meaning of the laws and rules. Nearly all of the fair hearing decisions are hyperlinked to the Empire Justice Center's Online Resource Center. Check the website introduction to the Guide for instructions.
- Provide "advocacy tips," that is, suggestions about possible strategies for effectively representing or advising clients.

- Much of the work on the Guide was done while the author was working in New York City, where about two-thirds of welfare recipients reside. The Guide therefore includes occasional "New York City Practice Notes," highlighting the particular ways in which the work rules are implemented in NYC. We anticipate that future editions of the Guide will incorporate policy and practice from around the State.

The basic law concerning the work mandates changed dramatically in 1996 when Federal welfare reform was enacted, after which New York State laws were adopted to implement the new rules. The first version of the Guide, written in 1998, took these Federal and State changes into account. Since then the only significant modification in the work rules law came about with the Federal Deficit Reduction Act of 2005 (DRA). The DRA gave wide latitude to the Department of Health and Human Services to adopt regulations implementing the new law. Those regulations were not finalized until a few days before the Guide was posted on our website. Once we know how New York State will respond to the new regulations with their own rules changes, we will update the Guide. In the meantime, a companion article in this edition of the Legal Service Journal summarizes the Federal rules changes, and a more detailed discussion is posted on our website.

Lastly, a request for your input: We would appreciate any feedback you might care to share. Among the types of information that would be particularly helpful, please tell us about any statements in the Guide that need to be corrected or updated, about noteworthy local practices, and about topics that are not included but that you feel should be covered. Please send your feedback to dfriedman@empirejustice.org. If you think the Guide should include a decision in a court case or fair hearing that might be useful for others, please submit them to Susan Antos at santos@empirejustice.org.

TANF Final Rules as Required by the Deficit Reduction Act of 2005

By Don Friedman

Introduction

The regulations summarized below represent the culmination, at least for now, of a process that began with the dramatic welfare reform legislation of 1996 – the Personal Responsibility and Work Opportunity Act (PRWORA) – which was later modified by the Deficit Reduction Act of 2005 (DRA). Following enactment of the DRA, the federal Department of Health and Human Services (HHS) drafted "Interim Final Rules." In the Federal Register of February 5, 2008, HHS's Administration for Children and Families (ACF) made some modifications to the interim rules and published its "Final Rule." It is these final rules (regulations) that are summarized here.

There are many detailed explanations of the work rules, including the New York-focused Advocate's Guide to the Welfare Work Rules, now available at www.empirejustice.org. The Advocate's Guide is the subject of a companion article in this issue of the Legal Services Journal; see also summaries on the website of the Center for Budget and Policy Priorities. What follows here are only the highlights of the final regulations. Please also note that a more thorough analysis of these final regulations are posted on the Empire Justice website

A summary of the significant changes in the final rule

Listed here are the most significant changes from the interim rule to the final rule. Each is discussed in greater detail in the complete text on the Empire Justice Center website:

- Pursuit of a bachelor's degree can count as a vocational educational activity, but remember that vocational education is only a countable activity for a total of 12 months. Despite the one-year limitation, this is a remarkable and welcome change in Federal policy.

- Additional time in education may be countable even after the 12 months of vocational education have been "used up." For example, certain educational activities, after being counted for 12 months as vocational education, may be countable as job skills directly related to employment, on-the-job training or even work experience.

- For virtually all work activities, there must be daily supervision. The final rule clarifies that daily supervision does not necessarily have to be in person, meaning it can be, for example, by phone or electronically.

- Despite the daily supervision rule, people who are engaged in education as a work activity can also be credited with one hour of unsupervised homework for each hour of class time. This one unsupervised hour can be counted in addition to supervised homework time, as long as the total does not exceed the amount of homework or study expected for that educational program. This is another significant Federal change, and may help make it more feasible for public assistance recipients to engage in educational activities.

- The countable 6 weeks of job search/job readiness is converted to an hourly figure.

- The definition of work-eligible can exclude, at state option, a non-PA parent who is receiving SSDI. Previously, only if the parent received SSI could s/he be excluded. This is important because the number of households with a work-eligible individual is central to the calculation of participation rates.

- The obligation to show "good or satisfactory progress" for certain educational activities has been eliminated.

Background information

The DRA funds the TANF program through FY 2010.

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New Consumer Website Helps New Yorkers Find Least Expensive Prescription Drugs

Announced on February 13, 2008, a new state website now allows consumers to easily compare prescription drug prices for the 150 most commonly prescribed drugs at pharmacies in their neighborhoods in order to purchase needed drugs at the best possible price.

The site, www.rx.nyhealth.gov, searches drug prices by zip code, city, or county; provides brand-name and generic drug prices; lists pharmacies' addresses and phone numbers; and provides driving directions. The site was developed and will be maintained by the Department of Health.

Features of the new site include prices for the 150 most frequently prescribed drugs from data provided by the Medicaid system, all pharmacies that participate in Medicaid, prices for drugs at their most common quantity, strength and dosage. A Frequently Asked Questions page; a "Contact Us" page; and a consumer information section with links to websites that provide information on prescriptions and programs that can help consumers obtain their medications. The website will be updated on a weekly bases and will help consumer make smart choices. Anyone without Internet access can access the website at their local libraries.

TANF Final Rules—continued

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These regulations take effect on October 10, 2008 (though certain components are already in effect)

Various bonuses that were offered to states in the past have been replaced by $150 million for research and pilots to strengthen families to be distributed based on proposals submitted by states.

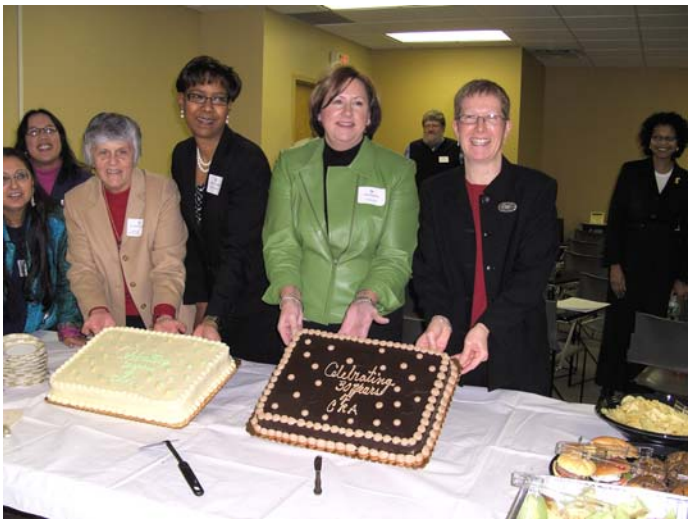
TANF and people with disabilities

There is a noteworthy discussion by ACF about public assistance recipients with disabilities. This seems to have been included because so many commenters raised concerns about the insensitivity of the interim regulations to the particular needs and concerns of this population. Among the points ACF makes:

- They will work with states to implement the DRA and regs, especially with regard to TANF adults with disabilities.
- They urge states to focus on capabilities, not limitations *(that's their way of saying we want to push participation, not exemption)*. They will expand technical assistance to help states develop effective models.
- They frequently emphasize that the low 50% participation rate essentially provides states with all the flexibility that they need, that is that states should have no problem in meeting participation rates while still providing exemptions and accommodations where needed. Many states and advocates do not agree with that assessment.
- They reiterate the states' obligation to comply with the Americans with Disabilities Act and Section §504 of the Rehabilitation Act. They also refer readers to their web page on civil rights protections, http://www.hhs.gov/ocr/tanf.
- For those working in this arena, a potentially valuable statement of Federal policy: "In ensuring equal access, it is critical that TANF agencies have comprehensive and effective screening and assessment tools in place."

The Community Reinvestment Act Continues to Meet the Credit Needs of Our Communities

By Barb van Kerkhove



In January, Empire Justice Center and the Greater Rochester Community Reinvestment Coalition hosted an all day forum celebrating 30 years of the federal Community Reinvestment Act (CRA). The forum, entitled "Happy Birthday CRA: Celebrating the Past, Planning for the Future," featured panel presentations, discussions and a lunchtime keynote address by Diane E. Thompson, an attorney with 14 years experience representing low income homeowners.

"CRA taught banks that money could be made on loans to red-lined census tracts. Unfortunately, what we have seen in the last ten years is a replacement of good, performing CRA loans with toxic subprime products, destined to fail. We need more than ever a commitment by mainstream lenders to make performing loans to all communities and not to consign certain segments of our community--the elderly, the poor, and African Americans and Latinos--to overpriced, risky products," noted Ms. Thompson.

In addition to celebrating its achievements, the panels focused on how to modernize CRA as well as how CRA might address the current mortgage meltdown. Following is a summary of panelist and audience suggestions, as well as other ideas from community advocates, for improving CRA to better meet the credit needs of today's communities.

Increase the Breadth of Community Reinvestment Obligations

How might CRA be expanded so that more financial institutions are required to meet the needs of the communities in which they do business? Panelists at this forum discussed several options. Many of these ideas come from how Massachusetts has expanded CRA, as described by Tom Callahan, the executive director of the Massachusetts Affordable Housing Alliance (MAHA).

Expand CRA to cover credit unions. Credit unions today are a billion dollar business. However, except for state-chartered credit unions in Massachusetts and Connecticut, no credit unions have community reinvestment obligations1. Applying CRA obligations to credit unions is certainly important to Rochester, where ESL Federal Credit Union is consistently one of the top mortgage lenders in the area. While some advocates would like all credit unions to be subject to CRA obligations and others opt for covering only larger credit unions, with assets over a certain threshold, this part of our financial services industry should be brought in the fold of CRA.

Expand CRA to cover all mortgage lenders. The majority of mortgage lending today is done by mortgage lenders other than CRA-regulated institutions in their assessment areas. This means that a majority of loans were made with no CRA obligations in mind. Massachusetts passed legislation in November requiring all mortgage lenders making 50 or more mortgage loans in Massachusetts each year to be subjected to full state examinations and to be rated on how well each company is meeting the mortgage credit needs of the Commonwealth2.

Require insurance companies to reinvestment in our communities. Many communities find it difficult to access affordable, quality property insurance.

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However, the property and casualty insurance industry is a multi-billion dollar business with no obligations to reinvest in the communities from which they take insurance premiums. In 1996, Massachusetts passed a law requiring Home Mortgage Disclosure Act (HMDA) disclosures on where property insurers do business and creating CRA-like financial incentives for insurers to write more policies in underserved neighborhoods3.

Strengthen Bank Community Reinvestment Obligations

In addition to expanding CRA to financial institutions other than bank depositories, panelists, particularly Hubert VanTol of Rural Opportunities, Inc. and Diane Thompson, discussed how the community reinvestment obligations of banks could be strengthened. These changes are not necessarily limited to banks. They could be applied to other financial institutions as well.

Require that affiliates be part of CRA. Currently banks can choose whether or not affiliates are included in their CRA exams. This means that if affiliates would negatively impact a bank's CRA exam rating, a bank could choose not to have affiliates included for that exam. Optional affiliate inclusion also encourages less responsible lending and services to be shifted to affiliates, while CRA-related lending and services remain with the regulated institution. To address this the federal CRA Modernization Act of 2007 proposes requiring all nonbank affiliates of bank holding companies that engage in lending or offer banking products or services be subject to CRA in the same manner as regulated financial institutions.

Change assessment areas to reflect where banks actually do business. Today banks do significant amounts business in communities where they have no branches. So, while they may capture a significant portion of such an area's lending market, they have virtually no obligations to serve the credit and investment needs of that community. As noted by Hubert VanTol, this negatively affects the lending and services available to rural communities, many of which are lower income areas. The CRA Modernization Act proposes that, in addition to CRA obligations in metropolitan areas and states where they have branches, banks also would have CRA obligations in any community where they have 0.5 percent or more of the lending market.

Expand CRA obligations to include communities of color. In her panel presentation, Diane Thompson noted that the 1977 Community Reinvestment Act was a response to the redlining of minority communities. The final legislation, however, only obliged banks to address the credit needs of low- and moderate-income communities. While low-moderate income communities often overlap minority communities, there is ample evidence to suggest that the credit needs of minority communities today are not being addressed by responsible, risk-based loan products. The CRA Modernization Act adds "neighborhoods of different racial characteristics" in addition to low- and moderate-income neighborhoods as areas in which financial institutions would have community reinvestment obligations.

Use CRA to Address the Current Mortgage Meltdown

Many of the above improvements to the Community Reinvestment Act would be likely to reduce aggressive lending practices that have led to the current mortgage meltdown, particularly bringing all mortgage lenders under the purview of CRA, requiring the inclusion of affiliates in CRA exams and expanding CRA to minority communities. Below are some additional ways to strengthen CRA to encourage regulated institutions to make only responsible loans and to help homeowners at risk of foreclosure.

Give CRA credit to institutions that work with at-risk borrowers and reduce foreclosures. As reviewed by Diane Thompson in her presentations, the response to the foreclosure crisis by financial institutions and policymakers has been inadequate. Due to the "toxicity" of many of the subprime loans made over that past few years, borrowers are in default or foreclosure earlier than ever or before their adjustable rate mortgages (ARMs) reset to the higher rate. These borrowers will not be helped by the current bailout proposals. Therefore, regulators need to use banks' community reinvestment

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obligations to encourage them to work with these at-risk borrowers. Banks should be examined for, and given CRA credit when, they work with their borrowers in default and foreclosure—including doing loan modifications and work-outs and when they reduce foreclosure rates, particularly in low-moderate income and minority communities. In addition, banks should be given CRA credit when they do not allow foreclosed properties to languish in "legal limbo," for example, when banks sell, at a deep discount, bank-owned foreclosed properties to not-for-profit developers for rehabilitation.

Reduce CRA ratings for abusive lending practices. Currently, predatory or abusive lending practices have little negative impact on a bank's CRA rating, while such practices certainly do not meet the credit needs of the community. The CRA Modernization Act would require that regulators reduce CRA exam ratings for any institution or affiliate found engaging in predatory, abusive or discriminatory lending.

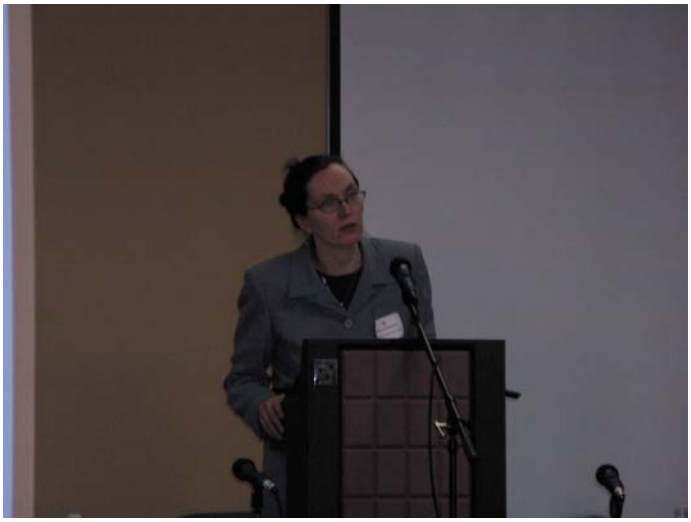
Expand disclosure requirements. Regulators and the public need to more information on the type of lending that occurs in different communities. CRA's related data disclosure legislation, the Home Mortgage Disclosure Act (HMDA), while expanded in 2004, includes little information neither on borrowers' ability to pay nor about the nontraditional mortgage products that have come into existence over the past few years. This lack of information is why the response to the foreclosure crisis has been so slow and inadequate to date. HMDA needs to be amended to require information on the specific type of loan product, loan pricing, origination fees, financing of lump sum insurance premium payments, balloon payments, prepayment penalties, loan-to-value ratios, debt-to-income ratios, housing payment-to-income ratios, and credit score information. Much of this is included in the CRA Modernization Act.

These ideas for modernizing CRA, and its supporting laws, will help ensure that needed financial services, loans and investments flow to all traditionally underserved communities.

The day's panels and presentations were videotaped by the Western New York Law Center for future viewing. To view the forum, go to their online resource center at: http://onlineresources.wnylc.net/online_training.asp.

Footnotes

1. National Community Reinvestment Coalition. 2005. "Credit Unions: True to Their Mission?" As found at: http://www.ncrc.org/policy/states/CU_Report_Final.pdf.
2. Information on this law can be found at: http://www.mahahome.org/discover/pressrelease.cfm?rid=60.
3. Information on this law can be found at: http://www.mahahome.org/issues/insuring_neighborhoods.html.



Pictured: Keynote Speaker Diane Thompson

What's New in Child Support

By Susan Antos

As a result of a number of developments at the federal level, there will be some significant changes forthcoming in the laws governing child support in New York State, particularly as applied to low income individuals who are or were receiving public assistance. For the most part, this is because 2008 is the year many of the child support provisions in the Deficit Reduction Act of 2005 become effective. This article will review those provisions and whether and how New York is implementing them. Additionally, this article will highlight two pieces of federal legislation and an international treaty of interest to those representing persons in child support proceedings. Finally, this article will highlight a national initiative which proposes alternatives to incarceration for "dead broke" dads who are in violation of child support orders - Problem Solving Courts.

Child Support Provisions in The Deficit Reduction Act of 2005

The Deficit Reduction Act of 2005, P.L. 109-171 (hereinafter the DRA), which made many changes to the Temporary Assistance to Needy Families (TANF) work rules, also made a number of changes to the child support system funded by Title IV-D of the Social Security Act. Many of these changes are likely to have a significant impact on low income families.

$25 annual fee for many users of IV-D Child Support Services

The DRA requires states to charge an annual fee of $25 to users of the IV-D child support system in cases where collections exceed $500 per year and the person has never been a recipient of benefits funded by TANF or the old Aid to Families with Dependent Children Program. 42. U.S.C. 654(6)(b). States have the option to pay the fee themselves or to charge the fee to the non-custodial parent. The Governor's Article VII bill (S. 6807/A.9807, part Z) would amend Social Services Law 111-g to authorize the Office of Temporary and Disability Assistance to promulgate regulations which would charge this fee to the custodial parent by deducting it from child support collected. The custodial parent would be charged a separate fee for each child support case. Thus, where there is more than one non-custodial parent, there will be an additional charge to the custodial parent. This provision will not become effective until the deduction of the fee from child support disbursements can be done in an automated manner.

Nationally, eighteen states have made the decision to absorb the fee rather than charge either parent.[1] This makes sense for a number of reasons. If a state charges the custodial parent, they will have to advise the parent of her right to opt out of the child support system - an administrative cost that will probably equal or exceed the cost of the fee. Additionally, there will be the administrative cost of tracking cases to determine whether annual collections equal or exceed $500 and whether the family has ever been a recipient of assistance. In Connecticut, the state initially required the payment of the fee from the custodial parent, but Governor Jodi Rell reversed the policy and had the state pay the fee after implementation proved more complicated and controversial than expected.[2]

Child support pass through

The DRA provides an incentive to states to provide a pass through and disregard of child support to families on TANF funded public assistance. A percentage of child support collections, based on the federal Medicaid matching rate, must be returned to the federal government whenever the state collects child support on behalf of a person in receipt of TANF funded assistance. Prior to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), the federal government waived its claim to this share if child support collected was passed through to families in amounts up to $50 per month. The PRWORA abolished this incentive, and as a result, many states gave up the $50 pass through. As of June 1, 2007, New York was one of only 16 states that continued a child support pass through without the federal incentive.[3]

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The DRA restores this incentive effective October 1, 2008, up to $100 where there is one child and up to $200 where there are two or more children, with no effect on the public assistance grant. 42. U.S.C. 657(a). Although this increase in income will reduce food stamps, the overall net effect on the family should be an increase in income. In New York the Governor's Article VII bill would amend Social Services Law 131-a(8) to increase the child support disregard and pass through to $100 per month, regardless of the number of children in the household, effective October 1, 2008. Additionally, the bill extends the pass through to families who have reached the five year time limit and who are now recipients of Safety Net Assistance. New York gets no federal financial incentive for providing the pass through to these families.

Child Support Distribution Rules

Child support distribution rules for persons who are or who have been on public assistance are complicated[4]. The DRA adopts a number of "family first" distribution requirements and state options, which are described more fully below:

Assignment of arrears

Effective October 1, 2009, a family that goes onto TANF funded public assistance will only assign their right to child support to the state for the period that they are on public assistance. Currently, when a family goes on public assistance they also assign their right to any child support arrears which accrued before they went on public assistance. This conditional assignment reverts back to the family when the household leaves assistance. However, if the arrears are collected while the family is on public assistance, they go to the state and not the family.

States have the option of eliminating the assignment of pre-TANF arrears a year before the DRA requires it - as of October 1, 2008. In New York, the Governor's Article VII bill would amend Social Services Law 348(2) and (3) and Social Services Law 158(5),(6) to limit assignments only to periods that families actually received Family Assistance or Safety Net Assistance. However, the effective date of this provision is October 1, 2009.

Federal Income Tax Offset

Until this year, when child support arrears were collected by federal income tax offset, they always went to pay the state if any assigned child support arrears were owed to the state. The DRA allows states the opportunity to pay families first when there is a federal income tax offset effective October 1, 2007. So far, New York has not opted to take this "family first" option.

DRA final medical support regulations will be coming out shortly - stay tuned...

The Deficit Reduction Act of 2005 made a number of important changes regarding medical support and child support orders. See 42 U.S.C. §652(f) and 666(a)(19); 29 U.S.C. 1169. The DRA requires all orders enforced by the state child support enforcement agency to contain a provision for medical support against either the custodial or non custodial parent. On September 20, 2006, the Administration for Children and Families issued proposed regulations, 71 Fed. Reg. 54965-54973, which when finalized will provide much needed guidance in this area. For example, the proposed regulations would limit the parental contribution to health care costs to 5% of income. States would be permitted the option to develop reasonable alternatives to the percentage if they are income based numeric standards. While the regulations have not been finalized yet, a number of states have developed standards that are worth considering. For example, Wisconsin does not require a parent with income under 150% of the poverty level to carry health insurance unless it is available free or at nominal cost.

The final medical support regulations are expected to be finalized later this year.

Reduction in federal funding

States receive a 66% federal match under Title IV-D of the Social Security Act to provide child support services. States also receive incentive money from the federal government when they meet or exceed their collection goals. In the past, when

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states received extra incentive payments for exceeding certain child support collection targets, states could spend that money on child support activities and draw down federal matching money. The DRA eliminates federal matching funds on reimbursable activities funded with incentive payments. In New York State, this will mean an annual loss of approximately $17 million that would have been spent on child support activities. A bipartisan bill pending in both the House and the Senate, *The Child Support Protection Act* (S. 803/ H.R. 1386) would restore the federal match to the incentive payments. This bill has 30 sponsors in the Senate and 80 sponsors in the House of Representatives.[5]

Other Federal Legislation of interest

The Responsible Fatherhood and Healthy Families Act of 2007 (S. 1626 and H.R. 3395)

A bill introduced by Senators Bayh and Obama, and Representative Davis in the House, The Responsible Fatherhood and Healthy Families Act of 2007, would repeal the $25 collection fee on IV-D cases and make a number of other changes in the law that would assist low income parents:

- Require states to deduct 20% of child support collected when calculating eligibility for food stamp benefits. This would negate or minimize the effect of the pass through increase on food stamp eligibility;
- Require states to apply a disregard to child support received that is at least equal to the earned income disregard when calculating eligibility and degree of need for TANF funded benefits;
- Ban the recovery of birthing costs through the child support program;
- Prohibit treating incarceration as "voluntary unemployment." New York has adopted this policy through case law[6] which makes it nearly impossible for incarcerated individuals to modify their support orders downward.
- Ensure that child support collected on behalf of a child in foster care is used in the best interests of the child, as opposed to cost recovery, authorizing the creation of child support trust accounts for children in foster care.

Hague Convention on the International Recovery of Child Support

The United States is the first signatory to an international agreement that will provide a structure for obtaining and enforcing child support orders on a global basis. The system is set up so that child support enforcement services are provided at no cost. Although there are fees for establishment of child support orders, they will be means tested, and based upon the means of the child, so they are likely to be minimal.

The Convention will go into effect as soon as two countries have ratified it. In the United States, steps are being taken toward ratification. The United States Department of Health and Human Services and the United States Department of State are preparing a transmittal package for review by the Office of Management and Budget before presentation to the White House this spring. The President will then submit the agreement to the Senate for advise and consent and ratification. Implementing federal and state legislation will be necessary. The entire process is estimated to take three years. The Convention goes into effect as soon as two countries have ratified it.

Every country will have a "Central Authority" that will be responsible for oversight and operational protocols. A country will have jurisdiction over a case if it is the habitual residence of the debtor or the habitual residence of the child and the debtor lived there with the child at one time and provided support to the child. All countries have committed to have the appropriate forms available in many languages. In the United States, support orders of nations who are signatories to the Hague convention will be recognized and enforced under UIFSA. The Convention will be reviewed every four years by a special commission. More information is available at www.hcch.net.

Problem Solving Courts

Building on the success of drug courts, some states are beginning to experiment with the idea of "problem solving courts," in dealing with non-custodial parents who are unable to pay child sup-

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port. The National Council of Juvenile and Family Court Judges has prepared a technical assistance paper highlighting the benefits of approaching non-compliance with child support orders in a holistic way. The courts consider alternatives to incarceration for parents who have been found in "willful contempt" which may take the form of substance abuse or mental health treatment, education or training.

In North Carolina for example, instead of incarceration, the respondent wears an electronic ankle bracelet and reports for periodic assessment while in treatment or training. In the pilot county, the program has avoided over 9500 days of incarceration in fiscal year 2006-07, saving the state over $2,000,000. Nearly $200,000 in child support payments were made by individuals who had not paid child support for months or years prior to enrollment in the program. See www.ncjfcj.org for more information.

Endnotes

[1] Vicki Turetsky, Center for Law and Social Policy, *Chart of application fees assessed by state,* on file at the Empire Justice Center. Alaska, Arkansas, California, Florida, Illinois, Maine, Massachusetts, Montana, New Jersey, New Mexico, Ohio, Oklahoma, Rhode Island, South Dakota, Texas, West Virginia and the Distric of Columbia have also opted to pay the fee rather than impose it on the family. In Minnesota, the state made the fee 1% of collections so that the cost for a family receiving only $500 annually in child support would be $5. A family with $5,000 in collections would pay a $50 annual fee.

[2.] *State Hits Custodial Parents with Fee; $25 Subtracted from Support Payments,* Ann Marie Somma, Hartford Courant. Hartford, Conn.: Sep 24, 2007. pg. A.1; *Rell Cancels Fee; Custodial Parents Were To Be Charged $25 Annualy,* Ann Marie Somma, Hartford Courant. Hartford, Conn.: Sep 25, 2007. pg B.1.

[3.] New York Social Services Law §131-a(8)(a)(v.; J. Justice, *State Policy Regarding Pass-Through and Disregard of Current Month's Child Support Collected for Families Receiving TANF-Funded Cash Assistance* (6/1/07, available at**:** http://www.clasp.org/publications/pass_through_2007june01.pdf;)

[4.] S. Antos, *Just Whose Money is it Anyway? A Guide to the Distribution of Child Support Arrears to Former Public Assistance Recipients)* http://www.empirejustice.org/library/JustWhoseMoney.pdf

[5.] For more information on the bill see: http://www.clasp.org/publications/basicfactsaboutchildsupportwebpg.htm

[6.] See *Knights v. Knights*, 71 N.Y.2d 865 (1988).

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 December 26, 2007 to February 20, 2008. 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
02/06/08	3/22/08	421.24	**Payment of Adoption Subsidies:** This proposed regulation would authorize the payment of adoption subsidies for certain special needs adoption placements prior to the finalization of the adoption. Currently, OCFS regulations require that adoption subsidies be paid upon finalization of an adoption.
1/9/08	2/23/08	351.21(b), (c), (f)(5) 351.22 (a), (b), (c), (d), (i), (f)	**Recertification of Public Assistance Recipients:** This proposed regulation would permit local social services districts to request waivers of certain face to face interviews for public assistance recipients. OTDA has previously granted a few local districts the authority to waive one of the two annual face to face recertification interviews for public assistance. This regulation would permit any district to apply for such a waiver.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
2/5/08	2/20/08	352.8 352.23(d) 352.29(h) 387.17(d)	**Changes Regulatory References from "Temporary Assistance" to "Public Assistance":** This regulation replaces reference to "temporary assistance" with "public assistance" to conform to the Social Services Law.
1/29/08	2/13/08	415.9(j)	**Market Rates for Subsidized Child Care:** This rule, which was previously promulgated as an emergency rule on October 24, 2007 and December 31, 2007, provides updated rates for the payment of child care services received by low income families. These rates vary by geographic area, age of the child and type of care.
1/29/08	2/13/08	415.2	**Child Care Subsidies for Employed Public Assistance Recipients:** This rule establishes the eligibility requirements for "Child Care in Lieu of Public Assistance," the child care guarantee for persons who are eligible for public assistance but who only wish to receive child care benefits. The regulations are a result of a statutory amendment made to Social Services Law §410-w(4)(a).
1/7/08	1/23/08	347.10(a)(8), (9), (b), (c)	**Child Support Standards Chart:** The Office of Temporary and Disability Assistance has revised the child support standards chart to reflect the revised poverty income guidelines as reported by the federal Department of Health and Human Services. For calendar year 2007, the self support reserve is $13,738. As a general rule, child support respondents with incomes below the self-support, or $25 if below the poverty level.

Special Education Victory in Greece, NY

By Jonathan Feldman

The Greece Central School District, a suburban district outside of Rochester, NY, is the eighth largest district in the state, with enrollment of approximately 13,000 students, of whom 1,300 are classified as students with disabilities pursuant to federal law. *See* Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 et seq. (2004). In 2003 and 2004, our office began receiving complaints that the District was imposing unacceptable limitations upon special education services. As the Wall Street Journal has explained, "Upset at what they describe as the district's increasing refusal to provide services, a group of [Greece] parents began meeting and comparing notes. They suspected that the district was . . . simply capping the number of students eligible for services. Some children who were classified as special-education students were declassified and placed in regular classrooms with little or no additional help." John Hechinger, *Schools Accused of Pushing Mainstreaming to Cut Costs*, Wall Street Journal (Dec. 14, 2007, at A1).

Our office saw a pattern of systemic violations, and we began to develop a class action lawsuit. Before we could proceed, however, we had to await the outcome in *J.S. v. Attica Central Schools,* 386 F.3d 107 (2d Cir. 2004), a case in which we participated as *amicus*. There, a school district faced with a class action lawsuit had asserted that individual class members were required to exhaust administrative remedies before the class action could proceed. Fortunately, the Second Circuit rejected this theory, and held that special education plaintiffs who asserted systemic violations within a school district could bypass administrative hearings and file directly in federal court.

With the green light to go forward, we began interviewing parents, and ultimately eight families came forward to represent the class. We filed the class action complaint in *K.B. v. Greece Central School District* in May of 2005, and asserted that the District had denied a free appropriate public education to the plaintiff class by imposing illegal caps on the number of students classified and by curtailing the services and supports made available to classified students.

Shortly after we filed, a new Board of Education was elected in Greece, and a new superintendent came on board, as well. The new administration expressed a strong interest in attempting to settle the case, and toward that end the parties employed a novel settlement mechanism: we agreed to use a joint expert, who would report to both sides, and who was charged with investigating the allegations of systemic violations and issuing recommendations to cure any illegal practices. The parties drafted an agreement governing the joint expert's role, and both sides agreed to negotiate in good faith to try to reach a settlement after the joint expert had issued her report.

The parties selected Professor Margaret (Maggie) McLaughlin of the University of Maryland to play this role. She came to Greece to conduct interviews and data analysis during the spring and summer of 2006, and she issued her report in August of that year. Although we had agreed to keep her findings confidential, we were able to rely upon her report in attempting to negotiate a comprehensive settlement with the District. For one year following the promulgation of her report, we met regularly with the District and were able to move closer and closer to settlement.

Finally, in August of 2007, the parties reached agreement on all issues and presented the proposed consent decree to Judge Larimer, U.S. Dis-

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Special Education Victory—continued

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trict Judge, W.D.N.Y., for his approval. Although the consent decree stipulated that a class should be certified, the parties jointly moved the judge to waive the notice and hearing usually required for class action settlements. We relied on precedent which allowed for such a waiver when the terms of the settlement provide near complete relief to the plaintiffs, and there is no evidence of collusion between the parties. *Doe v. Perales*, 782 F.Supp. 201, 206-7 (W.D.N.Y. 1991). On August 27, 2007, after oral argument, Judge Larimer granted this motion and "so-ordered" the proposed consent decree with no modifications.

The consent decree is a victory for the students, for the District has pledged to provide all existing special education students, as well as students who should be found eligible, the supports and services to which they are entitled, based upon each student's individual needs. (The full consent decree, as well as the initial complaint, can be found on our website, www.empirejustice.org). The consent decree will remain in effect for a minimum of two years, and a maximum of four, depending on the District's progress in achieving full compliance. It provides for our ongoing monitoring during this period, as counsel for the plaintiff class. The class is represented by Trilby de Jung and myself, and contributions have also been made by Jane Gabriele, Beth Trittipo, and Bryan Hetherington.

The Greece case raised some interesting legal issues (exhaustion of administrative remedies, use of a joint expert, and waiver of notice and hearing in class action settlements), and showed what can be accomplished for children and their parents when both sides are interested in achieving a comprehensive settlement.

New York State Implements Two Major Initiatives in January 2008 to Improve Access to Food Stamps

By Cathy Roberts and Dawn Secor, Food Stamp Specialist

January 2008 ushered in two big changes to the Food Stamp Program in New York State – changes which improve access to food stamp benefits and simplify program administration. The first change, which expands categorical eligibility, eliminates the resource test for almost all food stamp households. The second, the Working Families Initiative, is designed to make it easier for low-income working families to access the Food Stamp Program. Both components were announced last year by Governor Spitzer as part of his initiative to improve food stamp access for working families.

Expanded Categorical Eligibility: Removing the Resource Test

In December 2007, the Office of Temporary and Disability Assistance (OTDA) released 07-ADM-09 to advise districts about the expansion of categorical eligibility for the Food Stamp Program (FSP). OTDA subsequently issued a Q&A informational letter, 08-INF-03, providing more nuts-and-bolts information on the details of expanded categorical eligibility.

1. Background

- The theory behind categorical eligibility is that certain individuals who have already been found to be "needy" by other means-tested benefit programs should not have to re-verify their need for purposes of the Food Stamp Program.

- SSI and cash assistance (TANF and Safety Net) recipients are categorically eligible for food stamps.

- Categorically eligible individuals are not subject to:
  - The resource limit
  - The gross income test OR
  - The net income test.

- States have the option of extending categorical eligibility status to other individuals who are receiving a benefit or service funded with TANF dollars.

- States that adopt "expanded categorical eligibility" must

  1) Choose which category(ies) of TANF-funded benefits/services to include; and
  2) Set an income test at or below 200% FPL for the expanded categorical eligibility program.

2. When did expanded categorical eligibility begin in New York State?

New York State has adopted expanded categorical eligibility as of January 1, 2008.

3. What TANF-funded benefit/service is being used to grant expanded categorical eligibility status?

- The TANF-funded service being used to expand categorical eligibility is a new brochure designed by OTDA entitled "Helping Hands." This brochure, paid for with TANF funds, contains information on a range of programs available to assist households in need. (You can view the Helping Hands brochure in attachment A of 07 ADM-09.)

- Every household applying for food stamps will get the Helping Hands brochure.

4. What is the income test for expanded categorical eligibility?

- There are actually two different income tests – one for households *without* an elderly or disabled member and another for households *with* an elderly or disabled member.

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- Households who receive the Helping Hands brochure must meet one of the following income tests in order to be granted expanded categorical eligibility status:

  - ❖ **Households without an elderly/ disabled household member = 130% FPL.** (Monthly gross income at or below 130% of the federal poverty level - the regular food stamp gross income test)

  - ❖ **Households with an elderly/ disabled household member = 200% FPL.** (Monthly gross income at or below 200% of the federal poverty level)

5. Which households cannot be granted expanded categorical eligibility status?

- Households which include a member disqualified from the Food Stamp Program due to an intentional program violation (IPV) or a sanction; and

- Households that include a senior or disabled member, but do not meet the 200% gross income test.

These households are not categorically eligible for the Food Stamp Program. Households who are not categorically eligible can still qualify for food stamps, but they must be evaluated under regular food stamp rules (meaning that their resources will have to be considered).

6. How does expanded categorical eligibility affect income-eligible households?

- Households that are categorically eligible for the Food Stamp Program no longer have to meet a resource limit or the net income test. **Resources no longer "count" when determining eligibility for ongoing food stamp benefits for categorically eligible households.**

- Expanded categorical eligibility does not change the *expedited* food stamp eligibility criteria; when conducting an expedited screening, districts will still need to consider a household' s available resources.

- Caseworkers will no longer need to verify resource information for almost all income-eligible households.

- Households containing ineligible immigrants can still be categorically eligible for food stamps, but the ineligible immigrant cannot be included in the food stamp household. (In other words, expanded categorical eligibility doesn't change the immigrant eligibility requirements or budgeting rules.) The same principle is true for households with ineligible college students.

- Although the net income test doesn't apply to categorically eligible households, not all categorically eligible households will be able to receive food stamps:

  For households with 3 or more members – if the FS budget as calculated by the food stamp office (before any recoupment) yields a zero or negative monthly allotment, the household will NOT be eligible for food stamps.

  For households with 1 or 2 members – the household will be eligible for the minimum FS benefit *even if the FS budget yields a zero or negative allotment.*

(Note: this is the same budgeting methodology as used for SSI and cash assistance recipients.)

- LDSS eligibility workers are now required to include the Helping Hands brochure in each FS application packet.

- In December 2007 all food stamp recipients received a copy of the Helping Hands brochure in the mail so that they could be conferred categorical eligibility status.

The Nutrition Consortium of NYS has developed a

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handy food stamp expanded categorical eligibility desk guide which you can access at their website at www.hungernys.org.

Expanded categorical eligibility should help not only working households, and the recently unemployed living off their savings, but also many elderly individuals and couples whose had previously been shut out of the Food Stamp Program because their resources were slightly higher than $3,000.

Working Families Food Stamp Initiative (WFFSI)

The Working Families Food Stamp Initiative (WFFSI) was implemented through administrative directive 07-ADM-10, released in December 2007. It is being rolled out in phases. The first stage began on January 1, 2008.

The major components of WFFSI are:

1. Removal of the finger imaging requirement outside of New York City;
2. Waiver of face-to-face interview at application and recertification;
3. Electronic facilitated food stamp application process (e-app); and
4. More flexible overpayment (claims) collection policy.

Who can participate in WFFSI?

Any NTA (non-temporary assistance) food stamp household is eligible for WFFSI if contains at least:

- one adult member working *30 hours or more per week* or *earning an average of $175.50 or more per week* ($175.50 = 30 hours of work at the federal minimum wage level, currently $5.85 per hour)

or

- two adults *each* working *20 hours or more per week* or *earning an average of at least $117 per week* (20 hours of work at the federal minimum wage)

WFFSI screening requirement

- In order to qualify for WFFSI, all applicants **must be screened** with a WFFSI Screening Sheet or an approved local process that is equivalent.

- The earned income and work hour information listed on the household's completed FS application form is used to assess the household's eligibility for WFFSI. No additional verification is required to qualify a household for WFFSI.

- The WFFSI Screening Sheet may be included in the FS application packet and the household may submit it with their application. However, households cannot be *required* to complete the screening sheet.

- If the completed screening sheet indicates that a household meets the WFFSI criteria, that household is considered to be "presumptively eligible" for WFFSI. (Presumptive WFFSI eligibility means that the household can take advantage of the simplified WFFSI application procedures – it does not mean that the household is automatically eligible for food stamps.)

- If the household completes the screening sheet, and there is a discrepancy between the information on the screening sheet and the information on the signed FS application, the FS application "trumps" – the LDSS will rely on the FS application to determine participation in WFFSI.

- Households determined eligible for WFFSI may retain their WFFSI status during their entire certification period, even if their income status changes (ie, work hours are reduced or terminated). Districts should re-evaluate the household's eligibility for WFFSI at the next recertification.

WFFSI simplification components

1) Removal of finger imaging requirement outside of NYC

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- As of January 1, 2008 all members of WFFSI households living in upstate counties and on Long Island are exempt from finger imaging requirements. *(Remember that many adults in non-WFFSI households may be eligible for a waiver of the finger imaging requirements in accordance with their local district's finger imaging plan.)*

- In New York City, WFFSI households will still be subject to finger imaging. However, the Human Resources Administration (HRA) is increasing the number of locations and available hours of finger imaging sites in order to make it easier for WFFSI households to comply with the finger imaging requirement. OTDA and HRA are expected to reassess the finger imaging component of WFFSI during the summer of 2008.

2. Waiver of face-to-face interview

- Eventually, all WFFSI households across the state will have their certification interviews conducted by telephone at application and recertification. (They will still have the right to request a face-to-face interview.)

- Because the telephone recertification pilot project has not yet been rolled out statewide, and many districts haven't been trained on the telephone interview process, OTDA is currently NOT REQUIRING districts to institute a blanket policy of providing telephone interviews for all WFFSI households.

- However, districts can *choose* to waive face-to-face interviews for all WFFSI households – this option became available on January 1, 2008.

- At this point, the counties listed below have agreed to waive the face-to-face interview for all WFFSI households:

  - Cayuga
  - Erie
  - Greene
  - Jefferson
  - Madison
  - Nassau
  - Onondaga
  - Schenectady
  - Suffolk
  - Washington.

WFFSI households in these counties will be granted phone interviews, unless they request a face-to-face appointment. LDSS staff no longer need to assess or document individual hardship in order to waive the face-to-face interview for WFFSI households.

- Once the telephone recertification pilot is fully implemented statewide, all counties will be required to waive the face-to-face interview for WFFSI households (expected date: end of 2008 or later).

  *** For more information on the Telephone Recertification Pilot see the article posted on the Nutrition Consortium's website (www.hungernys.org) under "What's New."

- *Reminder*: districts are still required to waive the face-to-face interview requirement on an individual basis for non-WFFSI households facing hardship. Households in which all adults are elderly or disabled are entitled to a waiver upon request, without a showing of hardship.

3. Facilitated electronic application process (E-App):

➢ OTDA is developing an electronic food stamp application ("e-app") and multi-program benefit screening tool. The current target date for e-app rollout is May 2008.

➢ *Any household applying for food stamps* (not just WFFSI households) will be able to use the e-app process.

➢ **Outside of NYC:** During the the

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first implementation phase, 12 local districts have agreed to partner with local community based organizations (CBOs) to pilot the e-app. The CBOs will work with applicant households to complete and file the application and all necessary documentation through this new e-app process.

➢ **NYC:** HRA implemented a facilitated e-app based on HRA's Paperless Office System (POS) in conjunction with FoodChange and the New York City Coalition Against Hunger (NYCCAH). A plan to expand this process with other local community partners is being developed.

4. More flexible overpayment (claims) collection policy

➢ There are two changes to the overpayment collection procedures for active WFFSI households, effective January 1, 2008:

1. Terminated claims cannot be re-established, unless the overpayment was the result of fraud or an intentional program violation (IPV), as long as the household has WFFSI status.
2. Districts may be able to compromise (reduce) the amount of a claim being repaid through recoupment. For non-fraud overpayments, the entire amount of any existing claims that will not be collected within a three year period at the current rate of recoupment may be vacated (eliminated) for currently active WFFSI households.

We will keep you posted as we learn more details about WFFSI implementation, especially the e-app rollout process. In the meantime, if you have any questions about expanded categorical eligibility or the Working Families Food Stamp Initiative, contact Barbara Weiner (bweiner@empirejustice.org) or Cathy Roberts (croberts@empirejustice.org) here at the Empire Justice Center or Dawn Secor (hungerfoodstamps@aol.com) at the Nutrition Consortium of NYS.

GAO Criticizes SSA's Response to Backlogs

By Kate Callery & Louise Tarantino

The huge backlog of cases at the Social Security Administration (SSA), particularly at the hearing level, is all too familiar to advocates and our clients. As chronicled in almost all of the recent editions of this newsletter, it has grabbed the attention of the media and is at the forefront of the Commissioner's agenda. The Commissioner's newly proposed regulations on changes to the hearing process, described in the November 2007 edition of the *Disability Law News,* are part of SSA's response to the crisis. [The Empire Justice Center's comments to the proposed regulations, along with those by NOSSCR, are available at www.empirejustice.org.]

Now the Government Accountability Office has weighed in, determining that "better planning, management and evaluation could help address backlogs." The report acknowledges the daunting task faced by SSA: the number of backlogged claims between 1997 and 2007 has doubled. It also recognizes that insufficient funding has exacerbated the problem. It notes, however, "that several initiatives introduced by SSA in the last 10 years to improve processing times and eliminate backlogged claims have, because of their complexity and poor execution, actually added to the problem."

The GAO's review reads like a graveyard for SSA's past failed initiatives: "Hearings Process Improvement (HPI)," Disability Service Improvement (DSI)," "Process Unification," "The Prototype," the "Disability Claims Manager," the "Adjudication Officer." Even SSA officials acknowledged to the investigators that one project - HPI, which included reorganization of hearing offices into small groups - was responsible for dramatic increases in delays and processing times.

The report criticizes SSA for only partially implementing some of these programs, for underestimating their cost and complexity, or for failing to conduct end-to-end testing or do proper evaluations. In particular, the GAO criticizes SSA for its rushed implementation of DSI, as well as poor communication and inadequate financial planning. As noted in the November edition of the *Disability Law News,* the Commissioner has delayed implementation of this initiative nation-wide. The GAO notes, however, that there has been limited assessment of its effectiveness in the Boston region. Even the components of DSI involving time-frames for submission of evidence, which have been incorporated into the recently proposed regulations, have not been sufficiently tested. The GAO similarly criticized the Electronic Disability Process for inadequate advance testing.

The report gives mixed reviews to the Commissioner's most recent initiatives, including the use the Quick Disability Determination (QDD), service area reassignments, improvement of electronic processing and the use of FIT (Findings Integrated Template). The GAO recommended that SSA conduct a thorough evaluation of DSI before deciding what elements should be implemented nationwide. It also encouraged SSA to take steps to increase the likelihood that new initiatives will succeed by better anticipating the challenges of implementation, including appropriate staff in the design and implementation stages, by establishing feedback mechanisms to track progress and problems and by performing periodic evaluations.

SSA agreed in part with the GAO's recommendations, but did not fully agree with some if its conclusions. In particular, SSA argued that the GAO did not sufficiently emphasize its funding needs. SSA, to no avail, also pushed the GAO to recommend that the agency explore ways to improve ALJ performance. Of interest is the Commissioner's emphasis on increasing ALJ productivity, with a goal of 500-700 decisions per ALJ per year. The Commissioner reported the proactive steps the agency had taken in Fiscal Year 2007 in dealing with ALJ misconduct, including two reprimands and two suspensions, with several more pending before the Merit System Protection Board.

GAO-08-40, published in December 2007, is available at http://www.gao.gov/new.items/d0840.pdf.

Social Security Cases Now Available on PACER

By Kate Callery & Louise Tarantino

In order to protect the privacy of Social Security claimants, documents pertaining to their claims in federal court - other than docket sheets - were not available to the public on PACER (Public Access to Court Electronic Records). All that changed on December 1, 2007. In September 2006, the Judicial Conference adopted a proposed Federal Rule of Civil Procedure that specifically changes access in Social Security cases, allowing public Internet access to "an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or administrative record." Fed. R. Civ. P. 5.2(c)(2)(B). That rule, which has since also been approved by the Supreme Court, went into effect December 1, 2007.

According to a memorandum issued by James C. Duff, Director of the Administrative Office of United States Courts:

> As a result of these changes, judges and court staff should be aware that any order, opinion, or judgment docketed in a Social Security case on or after December 1, 2007, will, at some point, become available to the public through PACER. Judges and court staff should be very careful about including personal identifiers and other personal information in these documents, doing so only when absolutely necessary.

Of course, some decisions - often containing very personal information - end up being published and thus available to the public. This change, however, makes many more decisions readily available on-line. Rule 5.2(c)(2) provides that any person may have electronic access to the full record in a Social Security or immigration appeal at the courthouse. Remote access by anyone other than the parties and their attorneys, however, is subject to the limitations described above.

Advocates should be aware that Rule 5.2 also contains provisions concerning redaction of social security numbers and the names of minors. It also provides for filings made under seal, or, for good cause, protective orders to limit or prohibit a non-party's remote electronic access to a document filed with the court. These provisions may be relevant in cases where claimants have serious concerns about any information concerning their status being made public. For example, the claimant may want to proceed anonymously in order to preserve his or her privacy regarding an HIV diagnosis, or a psychiatric impairment.

Check your local court rules for treatment of the administrative record in Social Security appeals on Pacer. In the Western District, for example, '[t]ranscripts of court proceedings will be conventionally filed and served since scanning that set of documents and filing or retrieving them electronically is impractical at this time." See Administrative Procedures Guide for the Western District, available at http://www.nywd.uscourts.gov/cmecf/tutorial_admin.php. The Guide also sets forth rules allowing documents to be filed under seal without the approval of the Court.

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