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Legal Services Journal

New Social Security Numbers for Domestic Violence Victims

By Amy Schwartz, Kate Callery and Louise Tarantino

Victims of domestic violence and stalking are often forced to flee their own homes in order to insure the safety of themselves or their children. Sometimes safe havens, shelters, and orders of protection are insufficient safeguards against tenacious and determined abusers. After all other safety measures have been exhausted, some victims have no alternative but to relocate and, in more dangerous cases, establish a new, safe identity. Even then, abusers may persist in trying to track down their victims – often by using the victims' social security numbers to locate them through medical and welfare records, court documents, school and employment records or any of the ever-increasing ways that social security numbers are used for identification. For this reason, identity changes are often coupled with Social Security number changes as a helpful or even necessary part of a safety plan in these drastic situations.

Although the Social Security Administration (SSA) does not routinely assign new numbers, in 1997 it established special procedures for victims of domestic violence and stalking or other victims who can show that they are being harassed or abused or that their lives are in danger. SSA Publication (No. 05-10093) lays out the requirements for applying for a new number. *(See www.socialsecurity.gov/pubs/10093.html).*

In addition to documenting one's current name and Social Security number (SSN), SSA requires evidence of citizenship status. If the client has changed his or her identity, it also requires one or more documents identifying the applicant by both old and new names. For a victim on the run, obtaining some of these documents may prove difficult, or even dangerous. According to SSA, it will provide help in getting additional evidence.

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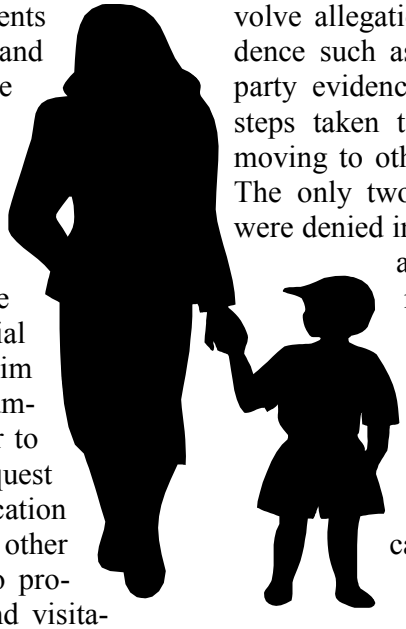
The applicant must also provide a statement explaining why a new number is needed, along with corroborative evidence documenting the harassment or abuse. Third party evidence from an unbiased or impartial source is preferred. Evidence of greater probative value may include police records and reports, photographs or other imagery, official court documents and court orders of protection. Evidence such as letters from district attorneys, social workers, domestic violence or homeless shelters, government agencies or others with knowledge of the abuse will also be accepted. Evidence of lesser probative value, such as letters or statements from the victim's family and friends may be accepted if those friends and family have some direct knowledge about the events.



Because resourceful abusers may attempt to track the family using the children's social security information, a victim may also need to change the numbers of minor children in order to protect the family. If such a request is made at the time of her application and the abuser is the children's other parent, the applicant must also provide proof of legal custody and visitation. However, if the applicant parent meets the requirements for a new SSN, the children's SSNs can be changed without submission of additional evidence. New SSNs can be assigned only in cases where the applicant parent has sole legal custody. If the child's number is ultimately changed and the other parent later requests information from the child's record, SSA is not supposed to disclose this information without formally determining whether such information can be disclosed.

Interestingly, there are very few POMS governing these situations. Although there are cross-references in the on-line POMS to RM 00205.058 & 059 and RM 00205.045, those sections are no longer available on SSA's web site. Nor are any of the POMS in the RM 00205.000 section pertaining to requests for a different social security number. They were presumably removed for the protection of those seeking new numbers.

RM 00205.045 contained a number of scenarios outlining situations where requests for new numbers were warranted. Most involve allegations of serious abuse, with evidence such as police and hospital and third party evidence, along with proof of drastic steps taken to evade the abuser, including moving to other states, changing names, etc. The only two examples where the requests were denied involved allegations of threats by a non-family member that could not be sufficiently verified, and a situation where no evidence of current harassment was provided. The scenarios are replete with examples of the extent to which SSA will provide assistance to the applicants.

On the other hand, one of the only POMS available to the public specifically dealing with these situations is NL 00703.853, which is accessible at www.ssa.gov. It is an example of the form notice that SSA issues in cases where a determination has been made that sufficient evidence of endangerment has not been submitted. It emphasizes that the claim was rejected because of insufficient proof that the applicant's Social Security number is connected to allegations of harassment/abuse or endangerment.

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GULP Director Presents Awards of Recognition At The 2004 Partnership Conference

By Anne Erickson

In clearing out some old boxes recently, I came across a light green coffee mug, emblazoned with the New York State Bar Association logo and an imprint for "The Partnership Conference, June 1994." Although the conferences are not held every year, the community met again in Albany from June 14th - 16th.

Over 350 people attended, including attorneys and paralegal staff, managers and union members, directors and volunteers. All joined for an intense two and a half days of training, networking and celebration. The buzz in the hallway was definitely high energy and the informal feedback on the workshops was extremely positive. Unfortunately, there was also an undercurrent of loss as we missed our many colleagues from the Legal Aid Society (NYC) who are facing lay offs and massive deficits.

For months, the conference planning committee worked on the details and overall structure of the conference. A smaller team from GULPILOR, the Legal Aid Society and Legal Services for New York, oversaw the development of sub law tracks in Disability, Housing, Health, Welfare, Family Law, Consumer, Employment, Community Economic Development and Immigration. Serving on both the Planning Committee and the smaller, more intense sub law coordinating team, was a tremendous, at times frustrating, but ultimately rewarding experience.

I was honored to be asked by the Bar to present two very special awards of recognition to Senator John De Francisco and Assemblywoman Helene Weinstein, chairs of the Judiciary Committees in their respective houses.

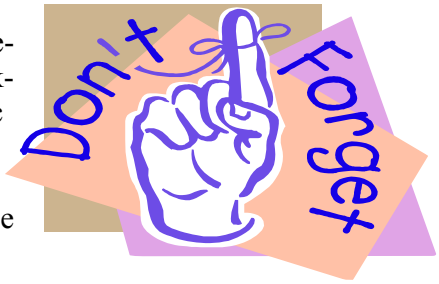
Assemblywoman Weinstein has worked tirelessly for civil legal services since becoming chair of the Judiciary Committee in 1994. She has been with us through the high points and through the extreme challenges of the veto, the year of the bare bones budget and last year's veto override. She is truly the community's champion within the New York State Assembly and more broadly within the Legislature.

Senator De Francisco only recently became chair of the Judiciary in his house and is currently finishing his second session in that seat. He has quickly risen to the challenge of providing civil legal services to those in need. As a practicing attorney, he "gets it," fully understanding the need to have both sides vigorously represented in any legal arena.

Rather than list their accomplishments and recite their biographical sketches, I took the opportunity to make a straightforward introduction. Looking out over the packed banquet room, I simply said: "Senator, Assemblywoman, meet the backbone of the legal services community." I went on to note that here in this room were the amazing advocates, the attorneys and paralegals, who provide the day-to-day representation so desperately needed in this state. When we come seeking state funding, this is the community we are representing. These are the people who are

Earned Income Disregard

Reminder: Effective June 1, 2004, the Earned Income Disregard (EID) decreased from 51 percent to 43 percent for working families on public assistance. People receiving public assistance who are currently receiving the EID should receive a notice of the change and how their case will be rebudgeted. For more details, see 04 ADM-3, which is available at http://www.odta.state.ny.us/directives/2004/default.htm.



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Clients who in fact change their identities and their SSNs should be advised that these dramatic measures may not adequately protect them from a determined abuser. Although SSA does try to protect the confidentiality of these records, they may still be inadvertently disclosed to a manipulative and resourceful abuser. Further, the old and new SSNs are cross-referenced on SSA's system.

Clients should also be forewarned that the number change process is slow, so applicants should not look to it as a quick fix. Further, it really should be done after a legal name change, so there are a number of hoops to jump through before one should even apply. Some legal services offices and domestic violence (DV) programs that have a legal program/staff attorney can assist with the name change process.

Remember, however, that this is a really drastic step. An applicant should have a great deal of counseling and safety planning beforehand, as there might be less drastic alternatives. Also, this is a relatively rare procedure, so despite the promises in the POMS that SSA will do much to help develop evidence and support the applicants in these cases, in reality SSA offices might not have much experience in this area, and may or may not have had any particular DV training. The procedures remain, however, a valuable tool in helping to protect victims of domestic violence and stalking.

Partnership Conference Awards — continued

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working in your district and in communities across the state, representing victims of domestic violence, providing assistance to the elderly, helping those denied critical benefits, securing services for children with special needs…. And it is on their behalf, that I was honored to present the New York State Bar Association's award of recognition to Senator De Francisco and Assemblywoman Weinstein for their efforts to secure state funding for legal services.

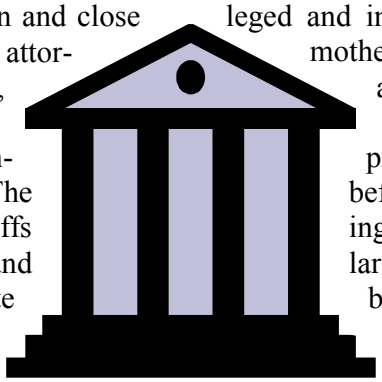
It was a great opportunity to introduce these key legislators to the backbone of the legal services community. Many thanks to the State Bar for helping pull off another amazing conference.

Court of Appeals to Rule on Child Witnessing of Domestic Violence as Neglect

By Amy Schwartz

Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) questions certified sub nom. *Nicholson v. Scoppetta,* 344 F. 3rd 154 (2nd Cir. 2003), certified questions accepted by the New York State Court of Appeals, 1 N.Y. 3rd 538 (Nov. 25, 2003) is a federal civil rights class action suit filed on behalf of battered mothers and their children challenging the constitutionality of New York City's child protection practices in cases involving domestic violence.

Commenced in 2000, *Nicholson* is the first case in the country to make such claims, and as such, this landmark litigation has received extensive media attention and close monitoring by law guardians, attorneys, child welfare advocates, domestic violence programs, courts, and lawmakers throughout the state and nationally. The lead attorneys for the plaintiffs include Carolyn Kubitschek and David Lansner from the private law firm of Lansner & Kubitschek, as well as Jill Zuccardy from Sanctuary for Families' Center for Battered Women's Legal Services.



In *Nicholson,* ten plaintiff mothers and their children sued Administration for Children's Services (ACS), NYC's child welfare agency, alleging that the practice of removing children (often *ex parte* and without court order) solely on the grounds that the mothers were targets of abuse was unconstitutional. The families claimed that pursuant to agency practice, a mother's status as a victim of domestic violence and the children's exposure to abuse was considered virtually *per se* neglect under Article 10. Filed under 42 USC §1983, the plaintiffs argued that the City's actions not only punished and harmed children and their mothers, but also infringed upon several key constitutional rights, including the right to familial integrity and the right to live free of governmental interference.

Following nearly two months of trial in 2001, United States District Judge Jack B. Weinstein issued a comprehensive and scathing decision. The Court made six specific findings regarding the City's child welfare policies and practices: (1) ACS regularly alleged and indicated neglect against battered mothers; (2) ACS rarely held abusers accountable for their violence; (3) ACS failed to offer adequate preventative services to mothers before prosecuting them or removing their children; (4) ACS regularly and unnecessarily separated battered mothers and children; (5) ACS failed to adequately train its employees regarding domestic violence; and (6) ACS's written policies provided insufficient and inappropriate guidance to its employees.

As to the constitutional questions, the Court found the practices infringed upon the Fourteenth Amendment liberty right to familial integrity without substantive and procedural due process, as well as the children's Fourth Amendment right to be free from unreasonable search and seizure. The Court also determined the actions violated the plaintiff's

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Domestic Violence as Neglect—continued

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Ninth Amendment's right to integrity of the family unity, the Thirteenth Amendment's prohibition against slavery and involuntary servitude, and the Nineteenth Amendment's prohibitions regarding sex discrimination. Judge Weinstein issued a remedial preliminary injunction against ACS and the City to enjoin these practices and, further imposed a variety of procedural, consultation, training, and reporting requirements on ACS and the City. The defendants appealed the District Court's ruling to the Second Circuit.

In September 2003, the federal Appeals Court generally upheld the lower court's decision, but was unable to issue a final ruling. While the ACS removal policies *could* be considered unconstitutional , the federal Appellate Court determined the assistance of New York State Court of Appeals was necessary to interpret key questions of child welfare law in the Family Court Act (FCA). The Second Circuit certified three questions:

1. Does the definition of "neglected child" under FCA §1012(f),(h) include instances in which the sole allegation of neglect is that the caretaker or parent allows the child to witness domestic abuse against the caretaker?
2. Can the injury or possible injury, if any, that results to a child who has witnessed domestic abuse against a parent or caretaker constitute "danger" or "risk" to the child's "life or health," as those terms are defined in FCA §§1022, 1024, 1026-1028?
3. Does the fact that the child witnessed such abuse suffice to demonstrate that "removal is necessary" in FCA §§1022, 1024, 1027 or that "removal was in the child's best interests" in §§1028, 1052(b)(i)(A) or must the child protective agency offer additional particularized evidence to justify removal?

On November 25, 2003, the New York's highest court accepted the questions. Appellate briefs addressing these questions were filed by the defendants in February 2004, by the plaintiff mothers and children in April, and, most recently, by the various *amici* in May. It is expected that the case will be argued in Albany on September 7, 2004.

Although all four appellate divisions have confronted similar questions about the intersection of neglect, child witnessing and domestic violence, case law has been inconsistent. This will be the first opportunity for the Court of Appeals to rule on these controversial issues. In light of the voluminous record associated with *Nicholson*, the wealth of information will undoubtedly assist the Court in making an informed decision on the questions presented. Doubtless, this ruling will have a profound impact on child welfare policy throughout the state, and likely, nationally.

Judge Weinstein's preliminary injunction was scheduled to terminate on January 31, 2004. However, in light of the pending state and court rulings, the injunction was extended by the District Court on December 9, 2003 and will continue through July 2004 with the caveat that the parties may apply for an earlier modification, extension, or termination. (294 F.Supp. 2d 369) It is anticipated that the Second Circuit will make its final ruling following receipt of the state court's interpretaion of the law.

Who Can Be A Representative Payee?

By Kate Callery and Louise Tarantino

The Social Security Administration (SSA) requires that a representative payee will be appointed if it determines that the interests of the beneficiary will be served by representative payment rather than direct payment of benefits. 20 C.F.R. §§404.2001 & 416.601 *et seq.* Most advocates have witnessed the difficulties that can arise when claimants are confronted with finding an appropriate representative payee. Many of us have also seen the havoc that can result from the appointment of inappropriate payees, such as abusive spouses or boyfriends, or miserly agency personnel.

SSA is supposed to ensure that appropriate payees are appointed. It ostensibly has access to a great deal of information about payee applicants, including conviction records, past payee histories, and allegations or reports of abuse. The Omnibus Reconciliation Act of 1990 mandated the creation of the Representative Payee System (RPS), an integrated, on-line system for entering and retrieving information about payees and applicants. The RPS is intended as a tool to aid investigation of payee applicants.

How Does SSA Decide Who Should Be Payee?

SSA follows an order of preference as to who should be appointed representative payee, starting with close relatives and moving down to an authorized social agency. 20 C.F.R §§404.2021 & 416.621. Note that most agencies serving as payee can charge a fee of either 10% of beneficiary's monthly payment or $25.00 per month. 20 C.F.R. §§404.2040 & 416.640a. See also POMS GN 00501.00 *et seq.* for rules governing representative payments. The Social Security Protection Act of 2003, outlined in the March 2004 edition of the *Disability Law News* available at www.gulpny.org, contains a number of new protections for beneficiaries who have representative payees.

Can A Convicted Felon Serve As Representative Payee?

Sometimes a beneficiary's – or even SSA's – first choice for a representative payee may have some skeletons in the closet. Unless the proposed payee was convicted of crimes involving false reporting, Social Security number fraud, misuse of Social Security benefits, or violations of certain sections of the Social Security Act itself, a felon may be appointed as representative payee. For guidelines, see POMS § GN 00502.133. SSA will consider appointing a convicted felon if there is no other suitable payee and the appointment will be in the best interests of the beneficiary. Among the factors that SSA considers is the nature of the crime, the applicant's relationship to the beneficiary, how recently the crime was committed, date of release and any indications of a recurrence of criminal behavior. According to SSA, however, crimes of a violent nature (murder, child abuse, etc.), those involving drugs or theft of over $500 generally indicate that the applicant may not be suitable.

Under the Social Security Protection Act of 2003, however, anyone who is "fleeing to avoid prosecution" is prohibited from serving as a representative payee. There is no exception allowing the Commissioner to certify that the appointment would appropriate as with "non-fleeing" felons. This provision will take effect April 1, 2005.

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Representative Payee—continued

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What About Non-Citizens?

There is no requirement that a representative payee be a citizen. In fact, there are special provisions in SSA's POMS for appointing representative payees outside the United States. POMS GN 00505.010 *et seq.* These and other POMS references make specific references to those situations where the payee applicant may not have a social security number. (Some of these provisions deal with SSA's inability to screen the applicant through the RPS without a social security number). The POMS also make an exception for a parent filing to be a payee for his/her minor child who cannot be issued a social security number (e.g., an undocumented alien). GN 00502.117A.1a advises appointing the parent as payee and processing the case manually. See also GN 00502.110.

Although a non-citizen parent may make it through SSA's RPS, other problems may face such a representative payee applicant. Without a valid social security number, the parent may be unable to open the dedicated savings account that is required in all SSI childhood claims. See POMS GN 00603.025 *et seq.* & SI 01130.601 *et seq.* In these situations, the parent may ask another family member or friend to serve as representative payee instead.

Parents who are undocumented may be afraid to even broach this kind of request with SSA for fear of being reported to the immigration authorities. Unless the parent is applying for benefits on his or her own behalf and presents SSA with an Order of Deportation or Removal when asked to supply verification of immigration status, SSA has no duty to report. On September 28, 2000, the Department of Justice, along with several other federal agencies, including the SSA, issued guidance to agencies required under the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996 to notify the immigration service about "aliens whom the entity knows are not lawfully present in the US." (65 Fed. Reg. 58301).

The guidance clarified that findings by a benefits agency that someone is not lawfully present, which triggers the reporting obligation, can only be made by the agency if it has evidence that the immigration service itself has already made a determination that the non-citizen is not lawfully present, such as final Order of Deportation. Furthermore, the finding of unlawful presence must be made in the context of an administrative review of the non-citizen's own application for benefits. In other words, if the non-citizen is not applying for benefits on his own behalf, the agency has no obligation to report the individual to immigration.

The various federal agencies have also issued policy statements over the years that confirm that the implementation of immigrant eligibility rules should not deter household members who are citizens or eligible immigrants from applying for, and receiving, public benefits.

What if the Payee Applicant is a Creditor of the Beneficiary?

Situations frequently arise where a representative payee applicant may be the beneficiary's landlord, or the director of the institution where the payee resides or receives services. POMS GN § 00502.135 provides that benefits will not be certified to a payee applicant who is a creditor unless the applicant:

- is a relative of the beneficiary living in the

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Representative Payee—continued

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same household, or

- is a legal guardian or legal representative, or
- is a facility that is licensed or certified as a care facility under the laws of the State or a political subdivision, or
- is administrator, owner or employee of a facility where the beneficiary lives **and** no alternative payee can be found, or
- is an organization where the creditor relationship is based solely on the SSA fee for payee services provision, or
- is an otherwise acceptable applicant who can show that he poses no harm to the beneficiary and that the financial relationship poses no substantial conflict of interest **and** no alternative payee can be found.

Despite the blanket prohibition, there is obviously a great deal of leeway for SSA to appoint creditors as payees. These appointments can be particularly problematic when the payee-creditor reimburses itself out of the beneficiary's funds. See GN 00602.030 *et seq.* governing a representative payee's role in paying creditors. Unfortunately, the Supreme Court has held that a state welfare department, serving as representative payee for children in foster care, can reimburse itself out of the beneficiaries' Social Security funds, despite the protections of the anti-assignment provisions of 42 U.S.C. §407(a). See *Washington State Dept. of Social and Health Servs. V. Guardianship Estate of Keffeler,* 537 U.S. 371, 385, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003). *But see Balzi, Brogan, et al. v. Stone & Callahan,* 85 Civ. 8706, 90 Civ. 7805 (Knapp, J.), which established a number of procedural safeguards for patients in NYS Office of Mental Health facilities.

Despite SSA's many rules and regulations governing the appointment of representative payees, in reality SSA claims representatives are often scrounging to find payees so that payments can be issued. And SSA has been the brunt of very negative publicity concerning abuses within the payee system. As part of the Social Security Protection Act of 2003, Congress has mandated once again that SSA survey how benefits are being used and managed by representative payees and report back to Congress within eighteen months. In the meantime, let us know what problems your clients encounter.

USDA Issues Proposed Food Stamp Regulations Implementing Immigrant Provisions of the 2002 Farm Bill

By Barbara Weiner

On April 16, 2004, the Food and Nutrition Service of the United States Department of Agriculture (FNS) issued proposed regulations implementing the food stamp program provisions of the Farm Security and Rural Investment Act of 2002 (FSRIA). See 69 Fed. Reg. 20724, et seq. The 2002 reauthorization of the food stamp program and amendments to its rules was only a small, and relatively inexpensive, part of FSRIA, which dealt primarily with the setting of agricultural subsidy amounts and other major agribusiness related policies.

Much of what is contained in these proposed regulations has already been implemented through administrative guidance issued by FNS over the past two years to help states comply with the food stamp provisions of FSRIA, which were effective upon enactment. The "catch up" role that the issuance of these food stamp regulations plays is not unusual. It almost always takes the FNS several years to implement statutory changes through the regulatory process, with the promulgation of regulations occurring long after the statutory provisions have already been implemented in practice. Nevertheless, one advantage of this time lag is that experimentation with various implementation alternatives during the period before regulations are issued gives FNS the benefit of practical experience when it begins to formulate implementing regulations.

These regulation implement several major revisions to the eligibility and certification provisions of the food stamp program that were enacted in FSRIA. These statutory revisions included the expansion of immigrant eligibility (the subject of this article) and several other, non-immigration related, revisions to food stamp eligibility and certification rules, including granting state the option to greatly simplify food stamp household reporting requirements; to use income and resource definitions from other benefit programs for the purpose of determining food stamp eligibility, and to provide transitional food stamp benefits to households leaving the Temporary Assistance to Needy Families (TANF) program. These provisions are the subject of a companion article in this issue on page 17. For additional background on the 2002 legislation reauthorizing the food stamp program, see "Food Stamp Program is Reauthorized - Program's Supporters Score Major Victory," *Legal Services Journal,* June 2002.

Expansion of Immigrant Eligibility

The 2002 FSRIA expanded food stamp eligibility to immigrants who had resided in the United States in a qualified status for five years or more. This brought the eligibility provisions of the food stamp program more in line with two other major federal benefit programs, TANF and Medicaid. However, going even further, FSRIA provided that children or disabled immigrants who are in a qualified status are immediately eligible for food stamps, without a five year wait in a qualified

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status. Thus, for example, a child who enters the U.S. as a permanent resident (with a green card), or who has been determined eligible to self-petition for status because she has been battered or abused by a citizen parent, is eligible for food stamps regardless of how long she has held that status.

To be considered disabled under the Food Stamp Act, an individual must be receiving a disability based benefit. The proposed regulations clarify that such benefits include a state's Medicaid program, if the criteria for eligibility are as stringent as federal SSI criteria. So, in New York, if an immigrant with a qualified status is determined eligible for disability based Medicaid, (s)he would also be eligible for the food stamp program, without regard to how long (s)he had been in the qualified status.

In these proposed regulations, FNS also addresses certain questions about immigrant eligibility under the amendments made by FSRIA that state agencies and advocates have raised over the last year or so. First, FNS clarified that an immigrant who is in a qualified status for five years is eligible for food stamps *regardless* of what the individual's status was on entry to the U.S., including if the individual initially entered the U. S. illegally.

A second issue addressed by FNS was whether the five years in a qualified status requirement means five consecutive or merely five cumulative years. The issue could arise if, for example, a lawful permanent resident left the U.S. for a period greater than 6 months without advance permission. Under these circumstances, immigration could treat the individual as having abandoned lawful resident status. If the immigrant is able to regain lawful resident status, the question was raised whether the five year period starts over. FNS answered in the negative. Any years the immigrant accrued in a qualified status before losing lawful permanent resident status should be added to the years accrued in a qualified status after regaining permanent resident status.

Deeming and Sponsor Liability

Several issues were addressed by FNS with regard to deeming of sponsor income and resources. Any family based immigrant who applies for permanent resident status after December of 1997 must have a sponsor who signs an enforceable affidavit of support. Deeming of sponsor income when determining the sponsored immigrant's eligibility for benefits is one way of enforcing sponsor liability, by attributing the sponsor's income to the immigrant regardless of whether the sponsor is actually supporting the immigrant (s)he sponsored. In 2002, the law was amended to exclude immigrant children from having income deemed to them that their sponsoring relative is not actually providing.

The question arises as to how sponsor income is deemed if the household contains both sponsored adults and sponsored children. For example, suppose a U.S. citizen petitions for his brother, his brothers wife, and their children. In order to bring his family members to the U.S. the U.S. citizen must sign an affidavit of support. How would sponsor deeming work in this case, if the immigrant family were to apply for food stamps? FNS proposes that one third of the sponsor's deemable income be applied to each of the adults and one third to the child. To determine the household's eligibility for benefits, only two thirds of the sponsor's deemable income would count against the household. The one third attributable to the child would be excluded. (Of course, for the first five years in

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their permanent resident status, only the child would be eligible for food stamps. No sponsor income would be deemed to the food stamp household consisting only of the child.)

The sponsor income deeming rules have three basic exceptions. The first is that no sponsor income is deemed against other household members if the sponsored immigrant is not actually eligible for benefits. In addition, sponsor income may not be deemed against an immigrant in the food stamp household if the immigrant has been battered or abused by her sponsoring relative. Finally, a household that is indigent is also exempt from deeming. Indigence is defined as having income at or below 130% of poverty. One troubling issue with respect to this last exemption is that the food stamp agency is required to send the name of the sponsor and the sponsored immigrant to the U.S. Attorney General. Although there is no real risk to someone's immigration status growing out of this reporting requirement, since the information is gathered by the Attorney General's statistical service primarily for the purpose of making reports to Congress, the requirement is likely to have a chilling effect on households being asked to supply this information.

Advocates had proposed that an individual to whom deeming applies be provided with the opportunity to decline to provide the sponsor information, rendering him - or herself ineligible for benefits but allowing the remaining household members to continue with their application. The proposed regulations allow the state to utilize a process under which information about the sponsored immigrant with the Attorney General is not shared without the consent of the sponsored immigrant. The state agency must advise the sponsored immigrant that failure to provide this information would render him or her ineligible.

New York's Implementation of the Immigrant Eligibility Expansion in FSRIA

As noted, many of the provisions of FSRIA expanding immigrant eligibility have already been implemented in New York. The Office of Temporary and Disability Assistance (OTDA) issued an extensive Informational Policy Letter on April 2, 2003 (03 INF-14), implementing the provisions discussed above. With respect to sponsor deeming and liability, OTDA directed local districts not to initiate court actions against sponsors for reimbursement of food stamps provided to the immigrants to avoid the food stamp program in order to protect their sponsors against potential legal action by the local districts.

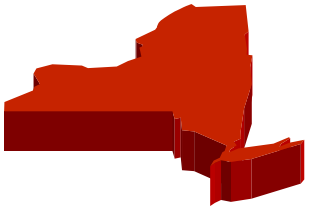
GULP and other statewide advocacy organizations have heard very little about whether deeming and liability issues are having a negative impact on the access of immigrants to food stamp benefits. It may very well be that the number of immigrants applying for food stamps who are sponsored by family members who signed enforceable affidavits of support is still extremely small. It is only the family sponsors of immigrants who apply for green cards after December of 1997 who are required to execute the new affidavit. Since most sponsored immigrants must wait five years before becoming eligible for food stamps, problems with deeming may not really emerge until sometime in the future.

We urge you to contact GULP if you become aware of problems arising out of these immigration related requirements or with any other questions you may have related to immigrant eligibility for food stamps. Contact Barbara Weiner by phone at (518) 462-6831, or by e-mail at bweiner@wnylc.com.

Legislative Update

By Kristin Brown

While the 2004 Legislative Session has not yet come to a close, the last scheduled day for the Legislature to be in town has come and gone. Here at GULP, as this issue of the *Legal Services Journal* goes to print, we continue to monitor a number of unresolved issues. From advocating for the Governor to sign bills that have passed both the Senate and the Assembly to urging the legislature to reject proposed cuts in welfare, Medicaid and Family Health Plus, to including full restoration of state funding for civil legal services programs in the finalized 2004-2005 state budget, we plan to remain vigilant to the end.



This session, as always, GULP has worked hard to see that new laws are passed that will help poor and low income adults and children. We are pleased to report that in a number of cases, our efforts may come to fruition, as several of the bills we have focused on this year have passed both the Senate and the Assembly. We are hopeful that the Governor will sign these bills into law when they reach his desk. These potential new laws include:

- A bill that will help stabilize low income working families by ensuring that for each year, no more than 10% of their Earned Income Tax Credit (EITC) will be seized to pay back welfare overpayments. GULP helped to negotiate a win-win solution – low-income families will still receive the majority of their EITC and the state will still get the overpayments back.
- A bill that will exempt individuals from welfare work requirements if the local Department of Social Services requires them to apply for Disability Benefits.
- A bill that will increase access to basic education for individuals who receive safety net benefits and do not have children.
- A number of other bills passed the Assembly and are very close to passing in the Senate. These include:
- A bill that would provide city and district courts limited equity jurisdiction, making it easier for advocates to do code enforcement work.
- A bill that would add housing discrimination against domestic violence victims to the human rights law.

More information on these bills, and the Governor's proposed human services cuts is available in the previous issue of the Legal Services Journal and on our website at: http://www.gulpny.org/Web%20Templates/Legislation/Legisl.htm.

Over the coming months, keep your eyes on the GULP website for opportunities to help us in our efforts to get these and other pieces of critical legislation signed into law and to weigh in on budget issues, including the civil legal services state appropriation.

Regulatory Roundup

By: Susan Antos

This article reports public benefits activity in the New York State Register from April 14, 2004 to June 2, 2004. Two new rules have been proposed, one new rule has been adopted, another rule was re-adopted with amendments, and one rule was promulgated on an emergency basis. Two rules were allowed to expire. 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 (clewis@wnylc.com) or Nancy Krupski (nkrupski@wnylc.com) at GULP, Albany.

Notice of Proposed Rulemaking

Date of Filing	Last Day to Comment	Regulations Affected	Summary
4/28/04	6/12/04	399.4(a) 352.3(c)	**Temporary Absences:** This proposed regulation would delete the requirement that the temporary absence provisions only apply to "federally aided" public assistance programs, and also permit temporary absences to occur within the social services district (currently the absence must be outside the social services district). Additionally this regulation deletes the 180 day cap on the payments made during temporary absences by repealing 18 NYCRR 352.3(c).
4/28/04	6/12/04	352.20	**Exemption of Earned Income:** This regulation implements Chapter 246 of the Laws of 2002, which amended 131-a(8)(i), (iii) of the Social Services Law to exempt income earned by dependent children who are students, when determining eligibility for public assistance.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
5/27/04	6/16/04	352.32(c)	**Budgets for Public Assistance Cases:** This regulation repeals the requirements that caseworkers date and sign the original budget and each successive budget revision and to indicate the effective period of the budget. OTDA says budgets automated under the Welfare Management System (WMS) and the Automated Budgeting Eligibility Logic (ABEL) include the date the budget is calculated and its effective date as well as information to identify the caseworker, so this regulation is no longer necessary.

Amended Notice of Adoption

Date of Filing	Rules Expires On	Regulations Affected	Summary
3/29/04	5/15/04	Part 415	**Subsidized Child Care Services:** These regulations were adopted February 13, 2004 and are now refilled with several non-substantive amendments. The regulations were described in detail in the June 2003 *Legal Services Journal*, p. 16. They make a number of changes to the administration of child care in New York including: • defining a child care services unit for eligibility purposes • imposing child support cooperation requirements as a condition of receiving child care services • changes in absence policies

Emergency Rulemaking

Date of Filing	Rule Expires On	Regulations Affected	Summary
3/29/04	6/26/04	415.6 415.9(j)	**Market Rates for Subsidized Child Care:** These regulations, which have been filed and refilled as emergency regulations, update the allowable rates which may be paid for child care subsidies. The rates are based on a survey conducted by the Office of Children and Family Services (OCFS). A comparison of the new rates and the old rates (promulgated in October of 2001) are on GULP's website at: www.gulpny.org/Child_Care/marketratecomparison2003.pdf. The regulations impose a new requirement on providers who only serve subsidized children. To obtain an increase up to the higher market rate these providers must document "actual cost of care" to the social services district. Providers who take both subsidized and private pay parents, must only show that they charge private pay parents at or above the new market rate, to obtain a higher rate. GULP's comments on the proposed regulations can be found at www.gulpny.org.

Notice of Expiration: These proposed regulations can not be reconsidered unless a new notice of proposed rulemaking is filed in the New York State Register.

Temporary Housing Assistance: The June 2, 2004 New York State Register contains a notice that OTDA has let a regulatory proposal expire which had appeared in the May 14, 2003 State Register. The regulation would have imposed a sanction of at least 30 days against a family that failed to pay its share of temporary housing assistance costs and would have required that sanctioned adult caretakers take their children with them when leaving temporary housing. The regulation also would have repealed the provision that required a protective or preventative services evaluation prior to discontinuing temporary housing assistance.

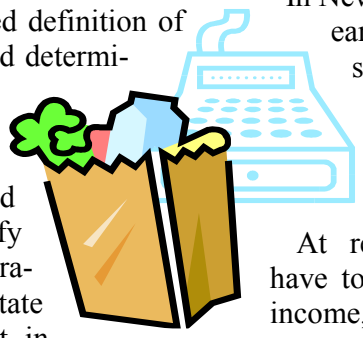
Residency Requirements: The April 21, 2004 New York State Register contains a notice that OTDA has let a regulatory proposal expire which had appeared in the October 8, 2003 State Register. The regulation would have repealed the residency requirements which were struck down as a result of the litigation in *Saenz v. Roe,* 526 U.S. 489, 110 S.Ct. 1518 (1999); *Brown v.Wing,* 170 Misc. 2d 544, aff'd 241 A.D. 956 (4th Dep't. 1997); *Aumick v. Bane,* 161 Misc. 2d 271 (1994).

Implementation of the Food Stamp Eligibility and Certification Provisions of the 2002 Farm Bill

By Barbara Weiner

A companion article in this issue of the *LSJ* discusses the publication of proposed federal regulations by the Food and Nutrition Services of the United States Department of Agriculture (FNS) that implement the provisions of the 2002 food stamp reauthorization legislation expanding the eligibility of immigrants for food stamp benefits. See this issue, page 8. The food stamp reauthorization provisions were a part of the Farm Security and Rural Investment Act of 2002 (FSRIA). The proposed regulations were published on April 16, 2004 in Volume 69 of the Federal Register, beginning at page 20724.

This article concentrates on the sections of the proposed regulations that implement non-immigration related provisions of the Farm Security and Rural Investment Act (FSRIA), including simplified household reporting requirements; simplified definition of income and resource, simplified determination of deductions, and expansion of the transitional benefit alternative. In general, FSRIA greatly expanded the ability of states to simplify food stamp program administration, including permitting state food stamp agencies to adopt income counting rules from other programs in order to bring more conformity to the state's administration of its various public benefit programs.



Many of the options provided to the states in the 2002 legislation and discussed below have already been implemented by New York under earlier guidance issued by FNS, even before the publication of these proposed regulations.

Simplified Reporting Requirements

Under the simplified reporting rules currently in effect, food stamp households with earned income are only required to report changes in household circumstances every six months except those changes that bring the household's income over 130% of the federal poverty line or reduce work hours of a household member subject to the ABAWD rules below the statutory requirement. During the six month simplified reporting period, local districts must act on changes that are reported and verified by a food stamp household that would increase the household's benefits and on changes in public assistance grants and other sources that are considered verified upon receipt by the agency.

In New York, food stamp households with earned income must recertify every six months. The proposed regulations make clear that households certified for periods of six months or less do not have to submit separate, six month periodic reports. At recertification, the household will have to provide all the information about income, household composition, shelter expenses and so on that would otherwise be required in the periodic report. (*See* 7 CFR § 273.14.)

FSRIA provided states with the option to extend simplified reporting to all food stamp households, not just those with earned income. The state may include any household in the simplified reporting system that is certified for at least four months. Households that

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are certified for periods of more than six months must submit a periodic report at least every six months. In New York, households receiving public assistance generally must recertify every 6 months. Thus, as with earned income households, food stamp households in receipt of public assistance will have their certification periods coincide with the federal simplified reporting period and so will not have to submit a periodic report. Districts have the option to use a twelve month certification period for food stamp households with unearned income other than public assistance. These households would be required to submit a periodic report in the sixth month.

Households that are statutorily exempt from food stamp periodic reporting requirements, which includes migrant workers, homeless households, and households in which all members are either elderly or disabled, can be subject to simplified reporting rules as long as their certification period coincides with the reporting period, since then there would be no need for a periodic report.

Since the simplified reporting period cannot exceed six months, this is not a good option for elderly and disabled households, who are otherwise eligible to be certified for benefits for up to 24 months. New York has been seeking approval of its variation of the simplified reporting system for these households, that only requires the elderly or disabled household to return the 6 month reporting form if there were any changes to report. OTDA was recently informed by FNS that it will not be permitted to continue to use this system. Effective May 1, 2004, elderly and disabled food stamp households have been converted back to ten-day change reporting rules. These households were notified in April that they must report changes in household circumstances within ten days of becoming aware of the change. (*See* 04 ADM-02.)

The state is provided two options for acting on changes in household circumstances that are reported outside the periodic report (other than changes in monthly gross income that exceed the household's monthly gross income limit). The first is the current procedure of only acting on changes that a household reports if the change would increase the food stamp benefits. For changes reported that would decrease benefits, the food stamp agency may only reduce the food stamp benefits if the change reported by the household or by another source is verified upon receipt or is a change in the household's public assistance grant. This is the procedure followed in New York.

The second option provided in the proposed regulations is for the state to act on all reported changes, regardless of whether they would increase or decrease the food stamp benefit. FNS states that it is providing this as an option because some state food stamp agencies have already been granted waivers prior to the publication of these regulations allowing them to do this.

If households fails to submit a required periodic report, or submits one that is incomplete, the food stamp agency must send a notice advising the household of the missing or incomplete report within 10 days of the date the report should have been submitted. If the household does not respond, the household's benefits must be terminated. However, if the household fails to provide sufficient information about a deductible expense, the household's benefits should not be terminated. Instead, the household will simply not receive the benefit of the deduction.

Finally, FNS propose to require that periodic reports be subject to the current requirements for quarterly reports, namely that they

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be written in clear, concise and simple language and meet the bilingual requirements of the food stamp law, which are described in 7 CFR § 272.4(b).

Simplified Definition of Income, Resources and Deductions

Many, if not most, of the proposed simplifications in the definition of income, resources and deductions were implemented by New York almost two years ago, shortly after the enactment of FSRIA. The districts were informed of these changes through 02 ADM-7, issued in August of 2002.

However, with the publication of the proposed regulations, several of the revisions made by New York will not survive the adoption of final regulations. On the other hand, certain clarifications made by the proposed amendments may open other opportunities for the state to disregard certain types of income or resources in calculating food stamp eligibility.

The explanatory section accompanying the proposed regulation expressly rejects the rule adopted by New York in 2002, excluding adoption subsidies and foster care payments from counting as income for the purpose of food stamp eligibility and benefit amount. These payments have not counted as income in New York since October 1, 2002. Another income exclusion adopted by New York and rejected by FNS are VISTA payments made under Title I of the Domestic Volunteer Service Act of 1973.. (*See* 69 FR 20724, at 20743 and 20744.)

FNS clarifies that child support payments made on a voluntary basis, like legally obligated child support payments, are to be counted as income, unless they qualify to be excluded under food stamp rules for the treatment of infrequent or irregular income. The proposed regulations also implement the option provided by FSRIA and long adopted by New York, of treating legally obligated child support payments as an income exclusion rather than a deduction. This has the effect of permitting a household with gross income over 130% of poverty that would otherwise be ineligible for food stamps to participate in the food stamp program if a member of the household is making child support payments large enough that, if subtracted from the household's gross income, the household's income would be brought within the allowable maximum income level. In calculating the 20% earned income deduction, states which exclude rather than deduct child support must apply the earned income deduction to the child support excluded from gross income.

The proposed regulations provide the option to the state to rely solely on the records of the child support enforcement agency in determining the amount of child support the household pays, without any additional verification or reporting required of the household. This of course would only apply if the payments are being made through the child support enforcement system. States choosing this option must require the household to sign a statement authorizing the release of the household's child support records to the state food stamp agency. FNS invites public comments on this proposal. To the extent that advocates have concerns about the accuracy of these records, FNS should be made aware of these concerns. In the explanatory material, FNS also welcomes suggestions as to other simplified methods the states could use in determining the amount of child support deduction or exclusion.

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FSRIA gave states the option, which New York took, of making the Standard Utility Allowance (SUA) mandatory, rather than permitting households to provide evidence of higher payments. The advantage of choosing this option is that the state food stamp agency can provide the highest SUA deduction, the heating/cooling SUA, to residents of public housing units with a central utility meters but who are charged for excess heating or cooling costs. In addition, states adopting the mandatory SUA are no longer required to prorate the SUA when two or more food stamp households share living quarters.

In the explanatory material to the proposed regulations, FNS reports that some question has been raised by state agencies as to whether the SUA must be prorated if eligible food stamp household members reside with ineligible members if the ineligible member pays all or a part of the expenses included in the SUA. In response to this question, FNS invites the public to vote on one of two alternatives. (*See* 69 FR 20724, at 20750.) FNS intends to incorporate the alternative that gets the most public support into the final rule! The first alternative, and the one FNS originally intended be followed, is to provide the food stamp eligible household with the benefit of the entire SUA, regardless of who pays the bills. The second alternative is to prorate the SUA if the ineligible member pays part or all of the households expenses.

Advocates should definitely weigh in on this question. If New York were required to go back to prorating the SUA, even if just for food stamp households residing with ineligible members, it would be extremely harmful. In the past, proration of the SUA was a major cause of food stamp budgeting errors in the state. The elimination of proration has not only reduced New York's error rate, it also has, perhaps more importantly, maximized the food stamp benefits for which New York households are eligible. To reinstate proration would mean the loss of food stamps to many food stamp households, including food stamp households comprised primarily of children living with adult household member who are ineligible because of their immigration status.

FSRIA gave states the option of disregarding changes in household expenses which would effect the amount of deductions for which a household is eligible until a household's next recertification, with the exception of changes in earned income or change in shelter costs arising out of a change in residence. New York adopted the option and instructed local districts not to decrease deductions in childcare, medical costs or excess shelter costs, unless the change in shelter expenses is the result of a move or the change is being budgeted in the public assistance grant. *See* 01 ADM-7. However, the State instructed local districts to process all verified increases in deductible expenses during the certification period. In the proposed regulations FNS rejects exercise of the option only in one direction, objecting that to ignore decreases in deductions and only budgeting increases would raise program costs beyond what was anticipated when the option was enacted.

The proposed regulations also provide flexibility for the states with respect to the counting of resources, allowing resources excluded under the state's TANF or Medicaid programs to be excluded under the food stamp program, within certain limits. For example, a state could use its Medicaid rule exempting Individual Retirement Account (IRAs) in the food stamp program if the ex-

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emption is conditioned on there being a penalty for early withdrawal, other than a loss of interest. (Unfortunately, New York's Medicaid and TANF rules do not provide for the exemption of retirement accounts.)

The exemption of resources could extend to any resource excluded by a state's Medicaid or TANF programs that meets FNS" definition of "not readily available." Readily available applies to "...resources in a financial institution that can be converted into cash in a single transaction, without going to court to obtain access or incurring a financial penalty other than loss of interest." (Proposed Rule 273.8, 69 FR 20724, at 20759.)

Transitional Food Stamp Benefits for Households Leaving Welfare

The last major provision of FSRIA addressed in the proposed regulations concerns the implementation of transitional food stamp benefits. New York was the first state to adopt the transitional food stamp benefit option, at a time when it was only an option provided by FNS through regulation. A year or so later, Congress enacted the authority for the states to provide transitional benefits in FSRIA, and extended the period during which such benefits could be provided from three months to five months. In addition, Congress amended the food stamp law to allow food stamp certification periods to be extended beyond the statutory 12 month period if necessary to accommodate the transitional period. Households receiving transitional food stamps are not required to report any changes in household circumstances during the transitional period.

In the explanatory material accompanying the proposed regulations, FNS notes that under FSRIA states are provided with complete discretion to decide which households will be eligible to receive transitional benefits, except for certain households that are specifically excluded by law. Therefore the proposed regulations eliminate the current requirement that, at a minimum, states opting to implement the transitional benefit program must provide such benefits to households leaving welfare due to earned income. This should have little effect in New York which has, since the beginning, provided transitional benefits to all eligible households whose TANF case closes, whether the public assistance case is closed because of increases in earned income or because of increases in unearned income or simply because the household no longer wishes to receive public assistance. See 01 ADM-16, November 7, 2001.

The regulations provide that during the transitional benefit period, the household will receive the same food stamp benefit allotment it received in the month prior to the close of the TANF case, adjusted for any reductions in income due to the loss of TANF. However, states are given the option of adjusting the household's benefit during the transitional period to take into account changes in circumstances that it learns about from another program in which the household participates. One circumstance that the state does not have the option to ignore is if a member of the transitional food stamp household leaves the household and becomes a participant in another food stamp household. The prohibition against duplicate participation requires that the transitional benefits paid to the initial household be reduced to reflect the departure of that household member.

Pursuant to FSRIA, households who experience changes in circumstances that would

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increase their benefits may report such changes to the food stamp agency but, in order to receive an increase in benefits, the household will not be able to continue in the transitional benefit program but must recertify for participation in the regular food stamp program.

FNS clarifies that households may participate in the transitional benefit program even if only some of the members were receiving TANF before the assistance case closed (mixed households). New York does include these households in the transitional program.

Though the states are given wide discretion in determining which households can participate in the transitional program, households leaving TANF due to a TANF sanction or all of whose members are ineligible to participate in the food stamp program may not participate in the transitional benefit program. Because New York does not impose household sanctions in either the food stamp or public assistance programs, it is difficult to imagine under what circumstances a household that was participating in the food stamp program would become ineligible for transitional benefits when its TANF case closed. Nevertheless, in 01 ADM-16, OTDA states that a household will be ineligible for transitional benefits if a member of the household at the time of case closing is sanctioned for having violated a food stamp work requirement, committed a food stamp or public assistance intentional program violation or failed to comply with food stamp reporting requirement.

This is in contrast to the proposed regulations, which provide that it is only if the entire household is ineligible to receive food stamps or is leaving TANF because of a sanction that the household is ineligible for transitional benefits. If the sanction or disqualification applies only to an individual household member, FNS states that the household is still eligible for transitional benefits. The ineligible member must be excluded in calculating the amount of the transitional benefits. In response to questioning on this point, OTDA staff has indicated that in practice, New York's program in fact does work that way, since it is the public assistance case closing code that determines whether a household is placed in the transitional program, not the presence of a sanctioned member in the household.

One issue that has troubled New York advocates is that when the TANF case is closed at the end of a certification period because of the household's failure to recertify, New York does not automatically extend the food stamp certification period in order to provide the household with 5 months of transitional benefits. Since the certification periods for households receiving both public assistance and food stamps ordinarily coincide, OTDA considers the failure of the household to recertify for TANF benefits as a failure by the household to meet food stamp reporting requirements. Advocates may want to monitor whether households are inadvertently losing access to transitional food stamp benefits when their TANF and food stamp benefits close at the same time for failure to recertify.

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