Empire Justice Center
Making the law work for all New Yorkers

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IOLA "Comparability" Regulations Proposed

By Anne Erickson

Proposed changes to the IOLA regulations could result in a $45 million infusion into legal services in New York State, restoring the system to its early 1990s capacity.

In announcing the proposed changes, Governor Eliot Spitzer said the increase in revenue "will provide New Yorkers with greater access to civil legal services. With IOLA, New York has attempted to make up for the lack of federal funds for necessary civil legal services, and yet programs have remained under-funded."

The proposed regulations come on the heels of the Governor's first state budget in which he worked with Legislative leaders to increase state funding for civil legal services. Cut significantly after 9/11 and pretty much frozen since then, New York's state funding for legal services was among the lowest in the country on a per poor person basis.

As noted by Assembly Judiciary Committee Chair Helene Weinstein, "for more than a decade the Assembly has stood alone in the struggle to ensure access to critical legal services for low income New Yorkers…. It is a refreshing change to have a partner like Gov. Spitzer who believes that the words 'liberty and justice for all' should have meaning for all New Yorkers."

Commending the Governor for his leadership in these efforts, IOLA Executive Director Lorna Blake noted that payments to IOLA for civil legal assistance should increase several times over.

Leadership in the New York State Bar Association, long a staunch supporter of civil legal services and one of the driving forces behind the creation of IOLA in New York also applauded the governor. "Access to justice for all, not just those who can afford it, has been and will continue to be a key Association priority," said Kathryn Grant Madigan, President Elect of the Bar.

Following months of review, analysis and investigation into other states' practices, the IOLA Board recently voted to amend its regulations as they relate to the interest rates paid on IOLA accounts. IOLA – Interest on Lawyer Account – is the process through which lawyers and law firms place client funds that are in small amounts or will be held for short periods of time into pooled accounts. The interest from these IOLA accounts is combined into a special fiduciary or trust fund and is used to support the delivery of civil legal services.

The IOLA concept was created in the early 1980's and is now part of the core funding for civil legal services in every state across the country. Since its inception, IOLA directors and trustees, state bar associations and state policy makers have worked with the banking industry to ensure that IOLA accounts generated the best possible returns in order to provide the greatest public good.

In recent years, the national legal services and bar communities have been frustrated by the increasingly low interest rates paid on IOLA accounts relative to other accounts. Pegged to checking or NOW account rates, the interest paid on

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IOLA accounts, has lagged considerably behind the rates paid on other similar accounts. Over the past several years, states have begun to work with banks to ensure "comparable" rates – or "interest rate comparability."

As noted by Jane E. Curran, a member of the American Bar Association's Commission on IOLTA [1] and long time director the Florida Bar Foundation, "Interest rate comparability for IOLTA accounts may seem a jumble of vague concepts, but the result is clear. First embraced in Alabama, Florida and Ohio in the early 2000s, comparability is yielding significant increases in IOLTA revenue." [2]

As of late 2006, Alabama, Connecticut, Florida, Massachusetts, Michigan, Mississippi, New Jersey and Ohio have all incorporated "interest rate comparability" into their IOLA rules, statutes or regulatory guidelines.

The New York effort, jumped-started by Governor Eliot Spitzer who has taken an strong leadership role in expanding access to justice in his first year in office, is focused on amending the IOLA regulations. The proposed amendments, announced in the May 30th State Register, are currently in the 45 day public comment period which ends July 16.

Prior to the publication of the regulatory changes, the Governor, his key policy staff and key IOLA staff met with a number of the leading banks in New York State to urge their early and voluntary compliance with the new standards. To its credit, Chase Bank – the largest IOLA participating bank - led the way, pledging to adopt the new standards voluntarily prior to their effective date.

The Changes

While the long-standing IOLA regulations required banking institutions to pay "not less than the rate paid by the banking institution on similar accounts," as a practical matter banks would point to low interest checking accounts or passbook savings accounts as "similar" accounts. This may have made sense when IOLA was established in New York in 1983, but clearly the banking industry and its products have changed dramatically in the ensuing 27 years.

The variations in products and interest rates are significant. Current rates offered on IOLA accounts in New York range from a high of 3.6% to a low of 0.2%. [3] According to the impact statements accompanying the proposed regulations, the weighted average interest paid on IOLA accounts currently stands 0.57%. In contrast, some of the same banking institutions paying less than 1% on IOLA accounts are aggressively offering rates of 4% and 5% to their other banking customers.

While IOLA cannot regulate banks or dictate the interest offered on any product, it can determine which banks are eligible to hold IOLA accounts. The new regulations would deem a bank "eligible" to hold IOLA accounts if it complies with the regulations and is approved by the IOLA Board of Trustees. To be considered eligible, the banking institution must agree to pay "the highest yield available… to its best customers… on similarly-sized accounts maintained at that institution." The regulations then define the various types of accounts that might be offered by the banking institution.

Given that an estimated $3.1 billion are currently held in IOLA accounts in New York State, the banking industry will presumably have every incentive to remain eligible to hold these accounts.

The Impact

According to estimates from IOLA and the Governor's office, this regulatory change and the resulting adjustment to "comparable" rates paid on IOLA accounts could generate between $45 million and $55 million in new funding for civil legal services.

This would put New York well on its way to restoring the capacity of the delivery system to its early 1990s level and allow it to meet more of the growing legal needs of the poor.

Indeed, it was ten years ago that the Legal Services Project created by Chief Judge Judith Kaye estimated that $40 million in a permanent and dedicated funding stream was needed annually to meet the basic civil legal needs of eligible New Yorkers. According to the report issued by the Project, "[a]gainst the need and the principles at stake, $40 million is a small down payment toward access to justice, and obtaining a substantial measure of justice is a bargain at this price."

Adjusting that $40 million target for inflation and recognizing the growth in poverty and the increasing legal needs of the poor, advocates have urged the state to secure an additional $50 million in funding for legal services. And, they have noted, this infusion would simply restore the community to the capacity it had in the early 1990s before interest rates in general took a nose dive and the federal government cut back dramatically on its investment in legal services.

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This restoration has been true in the other states that took the lead on "interest rate comparability." Florida, for example, saw an increase in its IOTA funds from $22.7 million in 2004-05 to $67.3 million in 2005-06 according to the American Bar Association. The first use of the new funds was to restore cuts of more than 30% the Florida legal services programs had suffered since the late 1990s.

"A combination of too many years of static funding levels, increased numbers of people living in poverty and gnawing inflation mean, in effect, that the sudden influx of cash brings little more than parity with the highest level of IOL/TA funding back in the early 1990's," notes Ms. Curran. [4]

The Need

In New York as in the rest of the country, IOLA funding supports the delivery of civil legal services to those in need. Despite the best efforts of the community to increase funding and expand access to justice, every indication is that New York is meeting – at best – 20% of the legal needs of the poor. [5]

Compounding this problem is the growth in the number of people living in poverty, along with the increasing complexity in the laws, rules and regulations that govern the services these individuals so desperately need.

Indeed, access to justice touches on the most basic of needs and the most fundamental rights:

- The elderly may have a "right" to appeal a denial of their prescription drugs under the massively confusing Medicare Part D program but no one to help them do so;
- A young mother struggling to hold onto her new job may have a "right" to challenge denial of her child care assistance but she has neither the means nor ability to do so;
- The victim of domestic violence desperately seeking to free herself from an abuser may have special protections afforded under law but these protections are meaningless if she cannot afford an attorney to help secure them;
- The disabled adult, confused and panicked over the termination of his health benefits, has a "right" to appeal his denial but without access to legal assistance may have no way to exercise that right.

As Chief Judge Kaye wrote in creating the Legal Services Project in 1997:

"A justice system that allows disparities in justice based on the ability to pay is inconsistent with a fundamental principle of our free democratic society – equal justice for all."

With these simple but powerful changes to the IOLA regulations, New York will significantly strengthen the legal services delivery system and further ensure that the inability to pay is not a barrier to justice.

Footnotes

[1] Most states use the term Interest on Lawyer Trust Accounts, hence IOLTA. New York's program is Interest on Lawyer Account or IOLA.

[2] *A New Frontier for IOLTA: Interest Rate Comparability,* Dialogue/Summer 2006.

[3] See: www.iola.org rates are noted by banking institution as of March 1, 2007.

[4] *Expressing Their Interest,* ABA Journal, June 2007.

[5] *Documenting the Justice Gap,* Legal Services Corporation, September 2005, http://tinyurl.com/2a76oh.

Child Support Desk Reviews: New State Procedures Frustrate Those Seeking Relief

By Susan Antos

An Administrative Directive promulgated by the Office of Temporary and Disability Assistance (OTDA) last year was intended to assist low income individuals on public assistance and those recently on public assistance when they believe they had not received all the child support to which they are entitled. Instead, the Administrative Directive outlines a two-tiered review process which directs requests to the Child Support Helpline, a broad based phone system which includes long waits on hold.

Because this process is the outcome of the *Broniszewski* consent decree which has not yet expired, the Empire Justice Center, counsel for the plaintiffs, would like feedback from advocates and individuals regarding their experience in both using the Child Support Helpline (the access point for desk reviews) and the desk review process itself.

Background

Recipients of Family Assistance (FA) and Safety Net Assistance (SNA) are required to assign their rights to any child support that they are entitled to receive to their Local Department of Social Services (LDSS). [1] This means that Local Departments of Social Services keep all but $50 of the support collected to reimburse themselves, the State of New York and the federal government for public assistance paid to the recipient. [2] This $50 of support is called the "pass-through" or "bonus" payment and is received by the recipient in addition to the public assistance grant. The pass through does not count as income when determining the amount of public assistance to which the recipient is entitled. [3]

The Pass Through

A FA or SNA recipient is only entitled to a pass through when the support paid is "current," which means that the absent parent paid his or her child support (not spousal support) in the month when it was due. [4] When a parent is in arrears, any support paid will first be credited to the current month, allowing the family a pass through payment. [5] The maximum pass through payment is $50, regardless of the number of children for whom child support is received. [6] If less than $50 in current child support is collected, the family will get a pass through, but only for the lesser amount.

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

Excess Support

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

The most likely scenario in which a LDSS is likely to overlook the accrual of excess support is in the case of a working recipient receiving a partial grant, especially one who has wages subject to variation. In the *Broniszewski* class action, [9] a case challenging the failure of Erie County to promptly distribute excess support and the failure of the state to provide a review process for persons who believed they were owed excess support, nearly all of the named plaintiffs were working public assistance recipients whose small public assistance grants were less than the amount of child support collected on their behalf (plus $50). Advocates representing working public assistance recipients should make a habit of reviewing their client's statements of support collected along with their income maintenance (WMS) budgets to make sure that they are receiving all of the support to which they are entitled.

Desk Reviews

As a result of *Broniszewski* and other litigation,[10] current and former public assistance recipients are entitled to an administrative review if they believe that they were

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wrongly denied a pass through or excess support or if they believe that the pass through that they received was not adequate. This litigation required that Office of Temporary and Disability Assistance (OTDA) to promulgate regulations creating a due process review procedure called the desk review. These regulations were filed on December 5, 2002 and were effective December 24, 2002. [11] Although the desk review does not provide all the procedural protections of a fair hearing, it does require an opportunity for a face to face conference, and a written determination by the local support collection unit and the state within clearly proscribed time periods. On December 13, 2007, the Office of Temporary and Disability Assistance promulgated 06 ADM-16, which sets forth the desk review procedures with greater specificity than the regulations. The process developed in the ADM is cumbersome and appears to have been developed to impede rather than encourage access to a desk review.

Local Level Review: Roadblocks Abound

The desk review is a two tiered procedure which is initiated by written request on a standard form. The form is not readily available and persons must navigate labyrinthian procedures to obtain it. The primary method for obtaining the form is to call the Child Support Helpline (888-208-4485), the general information line which receives hundreds of calls every day regarding any question having to do with child support collections. The line is only open Monday through Friday from 8:30 - 5:00, providing only limited access to working individuals. The recorded message does not ever mention that a desk review can be requested. Callers must divine that by slogging through the menu that eventually gets them to a human. Callers report delays of 20 minutes or more getting through to a person. This is particularly problematic for low income individuals who only have access to cell phones and who have limited minutes. When the caller finally reaches a person, the desk review request is not taken by the person answering the call. Instead, the caller is mailed a desk review form which they are advised to complete and mail. Attorneys have reported that they have been unable to request desk reviews on behalf of their clients. OTDA has indicated that it is directing its contacts to correct this problem.

The desk review request form is not available on line other than as an attachment to 06 ADM-16. However, the ADM does not contain the address to which the form must be mailed. OTDA says that it does not include the form in the ADM because the forms are not returned to one central address, but rather to the local district support collection units. The address to which the form is mailed depends upon where the caller resides. There is no statewide tracking of first level desk review requests. The Empire Justice Center has obtained a list of the Support Collection Unit addresses and we have posted the request form and these addresses to the Online Resource Center, which is accessible through the websites of the Empire Justice Center http://www.empirejustice.org/ or the Western New York Law Center at: http://onlineresources.wnylc.net/welcome.asp?index=Welcome. However, this posting is no substitute for adequate procedures which are easily accessible to unrepresented individuals and those who do not find their way to our web site.

The Office of Temporary and Disability Assistance has promised to make the forms available at local support collection units. However, none of the information received by recipients indicates that forms are available locally, so this option will be of little value to persons other than those reading this article.

The desk review request form contains spaces for the requester to indicate the months for which a review is requested and whether the review is requested for pass through payments, excess current support or excess arrears support. [13] The form contains a notice that the recipient should provide any supporting documentation, and a check off box to request a conference with SCU staff during the desk review. [14] There is no place on the form for the name and contact information of the Appellant's representative, so it is unclear how attorneys should convey this information.

The period of review is limited to the calendar year in which the desk review is requested and the previous year. [15] In response to concerns raised by *Broniszewski* counsel, OTDA has sent instructions to districts advising them that all forms received in January which request review for the previous two years will be deemed to be timely. [16] The Empire Justice Center has requested that this timeline be promulgated in a regulation or policy document.

The regulations provide that SCU staff must make reasonable efforts to ascertain information if it is not provided by the recipient. [17] All efforts made by the SCU must be documented in the file including:

- contact with employers and other income payors to determine dates of withholding;
- contact with other states' IV-D agencies to ascertain dates of collection (in such case the 45 day time period is tolled for 30 days to allow sufficient time for a response);

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- contact with income maintenance staff to ascertain public assistance payment information and amounts of unreimbursed public assistance. [18]

The local social services district must issue a determination in writing no later than 45 days from the date of receipt of completed desk review form. [19] This determination must be sent by first class mail and include a copy of any worksheet used as part of the review process and documentation considered in the desk review. [20] A copy must be sent to the income maintenance unit. [21]

State Level Review

A recipient unhappy with the local determination may request a state level review within 20 days of the local Support Collection Unit determination. [22] This request must also be in writing, must specify the facts in dispute and must include a copy of the SCU desk review determination and any additional but previously unavailable documentation. [23] A written response must be made by the New York State Department of Child Support Enforcement within 30 days of the date of the receipt of the recipient's request and must include any revised and or additional worksheets and any new documentation considered in the desk review. [24] This determination will be mailed to the recipient, the SCU and the local income maintenance unit. [25]

The determination will advise the recipient that further review may be obtained pursuant to Article 78 of the Civil Practice Law and Rules. The determination will include the telephone number of a local legal services office. [26]

The federal court's jurisdiction over the consent decree in the *Broniszewski* case expires June 13, 2008. Persons experiencing problems with the implementation of the desk review process, please advise plaintiff's counsel immediately: Susan Antos, Empire Justice Center, 119 Washington Avenue, Albany New York 12210. Phone: 518-462-6831, x 15; fax: 518-462-6687, santos@empirejustice.org. We encourage you to send us the attached Child Support Helpline/Desk Review Access report form whenever you encounter difficulties with the desk review process.

Footnotes

[1] 42 USC 608(a)(3); Social Services Law (SSL) §§158(5); 349-b(1)(a).

[2] SSL §111-e(1).

[3] SSL §§111-c(2)(d); 131-a(8)(a)(v). Effective October 1, 2008, the federal Deficit Reduction Act of 2005 will permit states to pass through up to $100 per month in child support to families with one child and up tp $200 per month in child support to families that include 2 or more children.

[4] SSL §111-c(2)(d);131-a(8)(a)(v);

[5] 18 NYCRR §347.13(a).

[6] 18 NYCRR §347.13(b)(1).

[7] 18 NYCRR 352.12(b)

[8] 97 ADM-7, p. 7-8.

[9] *Broniszewski v. Perales* (W.D.N.Y.), CV) The complaint, consent decrees and related documents in *Broniszewski* are available in the Benefits Law Database at the On Line Resource Center (ORC), which is accessible through the websites of the Empire Justice Center http://www.empirejustice.org/ or the Western New York Law Center at: http://onlineresources.wnylc.net/welcome.asp?index=Welcome . http://www.wnylc.net

[10.] *Schwartz v. Dolan*, 854 F. Supp. 932 (N.D.N.Y 1994); *Broniszewski v. Perales* (W.D.N.Y.), *Collazo v. Bane*, 92 Civ. 5468 (E.D.N.Y). Pleadings in these cases are available in the Benefits Law Database at the On Line Resource Center.

[11.] New York State Register, December 24, 2002, p.12.

[12] The Administrative Directive is available in the Agency Directives section of the On Line Resource Center.

[13] 18 NYCRR 347.25(d)(2).

[14] 18 NYCRR 347.25(d)(3).

[15] 18 NYCRR 347.25(b).

[16] The training materials state that "...in instances where the SCU receives a desk review request form during the month of January and that request seeks review of the two calendar years prior to that January, calendar years 2005 and 2006 should be considered for the desk review." Letter from OTDA counsel Suzanne Dolin to Susan Antos of the Empire Justice Center dated May 26, 2007.

[17] 18 NYCRR 347.25(e)(3).

[18] 18 NYCRR 347.25(e)(3).

[19] 18 NYCRR 347.25(e)(1),(f)(1).

[20] 18 NYCRR 347.25(f)(1).

[21] 18 NYCRR 347.25(f)(2).

[22] 18 NYCRR 347.25(g)(1).

[23] 18 NYCRR 347.25(g)(2).

[24] 18 NYCRR 347.25(g)(4).

[25] 18 NYCRR 347.25(g)(5).

[26] 18 NYCRR 347.25(g)(6).

Child Support Helpline / Desk Review Report Form

Child Support Helpline / Desk Review Report Form

Please let the Empire Justice Center Know about your experiences calling the Child Support Helpline

1. Date of call to Helpline:_____

2. Time of call to Helpline:_____

3. Minutes on hold:_____

   ☐ It took this amount of time to reach a real person

   ☐ I hung up after this amount of time on hold.

4. Purpose of call:

   ☐ To find out general information about child support.

   ☐ To request a desk review

5a. If the purpose of the call was to request a desk review and you were able to reach a real person, were you mailed a desk review request form?

   ☐ Yes

   ☐ No

5b. Were you able to successfully complete the desk review request Process?

   ☐ Yes

   ☐ No

   ☐ If no, explain what happened: _____

   _____

   _____

5c. If you were able to successfully complete the desk review process, did you receive a decision on your request for review?

   ☐ Yes, within 45 days of my request.

   ☐ Yes, more than 45 days after my request. Number of days after request: _____

   ☐ Never received a decision.

   Date of request: _____

Child Support Helpline / Desk Review Report Form

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6. Please describe any other concerns you have about the Child Support Helpline / desk review process:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

Your name: _____

Address: _____

_____

Phone: (_____)_____
Area code

e-mail: _____

Please fax to : Jessica Ansert, Empire Justice Center (518) 462-6687 or mail to:

Jessica Ansert
Empire Justice Center
119 Washington Ave., 2nd Fl.
Albany, NY 122210

Governor's Goal: Food on the Table of Low Income Working Families

By Barbara Weiner

The food stamp program is a good program. It provides low income people with a monthly financial boost designed specifically to help families meet their nutritional needs, although, with an average benefit level of about $1 per person per meal, food stamp benefits are not really quite enough to provide an adequate diet. That is why legislation has been introduced this year in both the House and the Senate to bring the food stamp benefit level much closer to the amount necessary to meet the real cost of a healthy and truly nutritious diet. However, even though currently food stamp benefits often run out before the end of the month, they are still a critical supplement to the monthly income otherwise available to low income households to meet their bills.

Nevertheless, Government statistics show that in New York State, up to 40 percent of eligible households are not receiving this vital assistance. The proportion of working households that are eligible but do not participate is even higher - well over half. So why don't all eligible households apply to participate in the program?

Study after study has shown that low income working families do not participate in the Food Stamp Program because of the overly bureaucratic and time consuming application process. Applying for benefits usually requires several visits to the local social services district, with each visit often including long waits to be seen. One national study of a few years ago observed that it's much easier and quicker to get a gun license than it is to apply for food stamp benefits.

For most low wage working people, one consequence of taking time off from work to apply for food stamp benefits is a loss of income. Low wage jobs don't usually provide paid "personal leave" to enable an employee to take care of personal business. For some workers the consequence of taking time off from work can be even more severe - loss of the job altogether. It is these working families who stand to benefit enormously from the program changes announced by Governor Spitzer on June 5, in conjunction with National Hunger Awareness Day.

The Governor's plan, titled the Working Families Food Stamp Initiative, eliminates these bureaucratic barriers to working family participation in the federal Food Stamp Program by waiving those aspects of the application procedures that require people to come into the social services district in person. Eligible applicants will bypass the face to face interview at the social services office and will not be subject to finger-imaging. They will be able to submit all the documents needed to verify their eligibility by mail.

It is estimated that the Governor's Initiative will bring as many as 100,000 additional New York households into the federal Food Stamp Program. The plan will do so not only by eliminating the requirement that working households appear in person at the local social services district office to apply for benefits but also by eliminating the strict food stamp resource limits that exclude many households with modest retirement or other savings from qualifying for benefits. This improvement applies to all food stamp households and implements a federal option long available to the states but which New York is only now taking advantage of, under this new Administration. As a result, families whose income is below the federal poverty level and who are otherwise eligible for food stamps will be able to get such assistance without first liquidating their retirement savings or depleting savings meant to send a child to college or to buy a first home.

Increasing the number of households in New York getting federally funded food stamps not only helps the families themselves, it is a boon to the low income communities in which the food stamp households live. Government estimates are that every $5 in new food stamp benefits generates about $9 in total community spending. Governor Spitzer is to be congratulated not only for helping low income families to gain easier access to the nutritional assistance to which they are entitled but also for bringing a much needed economic stimulus to New York's poorer communities.

The Social Security Administration and LEP Individuals

By Michael Mulé

The Social Security Administration (SSA) is the Federal agency that issues Social Security numbers, pays retirement, disability (SSD) and survivor's benefits to workers and their families and administers the Supplemental Security Income (SSI) program. Many of these services are provided at the local district office. When an individual wants to appeal an SSA decision about their benefits they have a right to a hearing at the SSA hearing office.

SSA began developing its language access policy in the 1990's. [1] In September 2004, responding to the requirements of Executive Order 13166, SSA created an LEP plan to provide fair service regardless of an individuals limited English proficiency (LEP) status. [2] SSA also developed procedures describing language services district offices and hearing offices must provide when interacting with LEP individuals.

The SSA LEP Plan

The SSA Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency (LEP), describes how meaningful access is required for all LEP individuals in all SSA programs. Factors SSA considers when determining what constitutes reasonable steps to ensure meaningful access to LEP individuals include the:

- number or proportion of LEP persons in the eligible service population;
- frequency with which LEP individuals come into contact with the program;
- importance of the service provided by the program; and
- resources available to the recipient. [3]

The SSA policy is to ensure that "individuals have access to our programs and services regardless of their ability to communicate with us in English." Pursuant to this policy "Social Security will provide an interpreter free of charge, to any individual requesting language assistance or, when it is evident that such assistance is necessary to ensure that the individual is not disadvantaged," and will not require individuals needing language assistance to provide their own interpreters. [4]

SSA District Office LEP Policies

The Program Operations Manual System (POMS) describes the obligation of SSA district office staff to provide language services to LEP individuals. [5] District office staff must provide appropriate language services to all LEP individuals free of charge. For each interaction (on the phone, written communication, in-person) staff must be alert to the language needs of any individual having difficulty in understanding or speaking English and determine whether the individual wants to conduct the interview in English or another language that they prefer. [6]

Staff must offer to obtain the services of an in-office interpreter prior to an interview or obtain an interpreter through the telephone interpreter services (TIS) if the future appointment is a telephone interview, or when immediate service is needed even if an interpreter is not requested by the LEP individual. District office staff must also provide LEP individuals with appropriate written materials (pamphlets, fact sheets, etc.) in the language the individual prefers. [7]

SSA Hearing Office LEP Policies

The Hearing Office (HO) staff must provide an LEP individual with either qualified office interpreters, private interpreters, or interpreters available through the telephone interpreter services (TIS). The HO staff determines if a claimant needs an interpreter by reviewing their records and reports of previous contact with the claimant. [8] At all hearings, the administrative law judge (ALJ) must ensure that an interpreter, fluent in both English and the language in which the claimant is most proficient, is present throughout the hearing. [9]
When the hearing begins, the ALJ must verify the interpreter's identity and have them certify "under penalty of perjury" they are a qualified interpreter. [10] The ALJ must direct the interpreter to interpret without changing the meaning of questions and answers, correct the interpreter if questions are changed to the third person, and must not use idiomatic or slang expressions when questioning hearing participants. If the claimant or a witness is having difficulty understanding the interpretation, an ALJ may have to adjourn or postpone the hearing until an acceptable qualified interpreter is available. [11]

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SSA LEP Policies—continued

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The Empire Justice Center recently worked with the Rochester SSA district office to implement many of these features. If you have any questions about the SSA LEP requirements, or would like additional information or resources on the subject, please contact Michael Mulé at the Empire Justice Center mmule@empirejustice.org.

Footnotes

[1] *See* H.R. REP. 102-1093 (December 31, 1992) at *23, Activities of the House Select Committee on Aging in the 102nd Congress (establishing a 1993 task force to address the problems of bilingual staffing, bilingual interpreters, assessment of bilingual service needs, and Spanish language notices).

[2] *See* Social Security Administration's Plan for Providing Access to Benefits and Services for Persons with Limited English Proficiency (LEP), Available at http://www.ssa.gov/multilanguage/LEPPlan2.htm#otherlang.

[3] *Id.*

[4] *Id. See* the SSA "If you need an interpreter" poster, Available at: http://www.ssa.gov/multilanguage/langlist1.htm

[5] *See* POMS GN 00203.011 - Special Interviewing Situations: Limited English Proficiency (LEP) or Language Assistance Required, 06/03/2003, Available at: https://s044a90.ssa.gov/apps10/poms.nsf/lnx/0200203011, or http://tinyurl.com/24t2uv.

[6] *Id.*

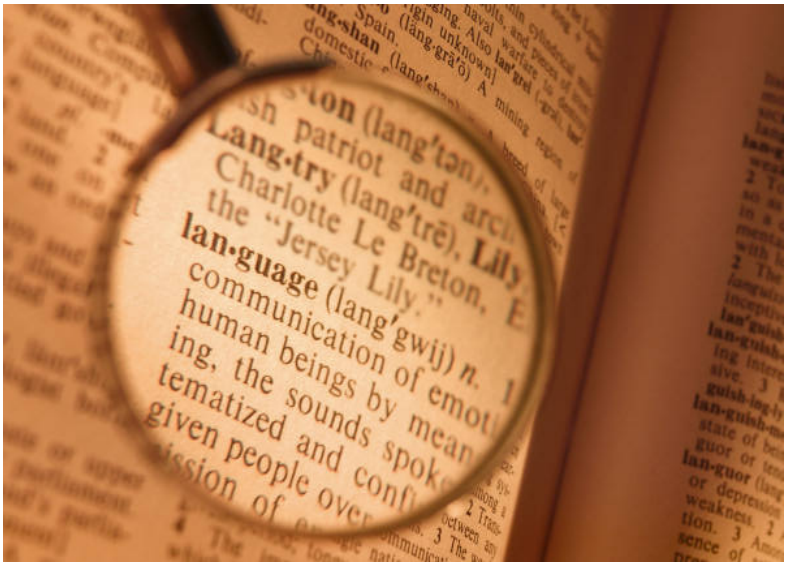
[7] *Id.,* Translated materials are available at the Social Security Multilingual Gateway, Available at: http://www.ssa.gov/multilanguage/.

[8] *Id.*

[9] *See* Hearings, Appeals and Litigation Law Manual (HALLEX) I-2-6-10, Hearing Procedures — Foreign Language Interpreters 09/02/05, Available at: http://www.ssa.gov/OP_Home/hallex/I-02/I-2-6-10.html or http://tinyurl.com/2zd2n8; See also HALLEX 1-2-1-70, Foreign Language Interpreters 09/28/05, Available at: http://www.ssa.gov/OP_Home/hallex/I-02/I-2-1-70.html, or http://tinyurl.com/2zfqw5.

[10] *See* HALLEX 1-2-6-10.

[11] *Id.*



Injunction Denied in Fleeing Felon Case

By Kate Callery & Louise Tarantino

A district court in New York has denied a request for a preliminary injunction in litigation challenging SSA's practice of suspending benefits of any recipient who has an outstanding warrant alleging a violation of probation or parole without a finding that the person is actually violating probation or parole. *Clark v. Astrue*, a nationwide class action lawsuit against the Social Security Administration (SSA) was filed in December in the United States District Court for the Southern District of New York by the Urban Justice Center, along with the National Senior Citizens Law Center and the law firm Proskauer Rose LLP.

The named plaintiffs in *Clark* come from various parts of New York State, Oregon, and Florida. All had been receiving either SSI or SSDI benefits due to their various disabilities. Their benefits were abruptly terminated by SSA based merely on allegations that they had violated conditions of their respective probations. There were no findings in any of the cases that the plaintiffs had actually violated probation. Each plaintiff presents a very compelling story of the severity of his or her impairments and the harm suffered by losing benefits. Several of them have contemplated suicide as a result.

The Complaint, which is posted on the Urban Justice Center's website (www.urbanjustice.org) in the Mental Health Project's litigation section, alleged that SSA's policy of suspending or denying SSDI or SSI benefits solely on the basis of an outstanding warrant alleging a violation of the conditions of probation or parole without regard to whether or not there has been a finding that such individual has in fact committed such a violation is unlawful. Rather, there must first be a determination of an actual violation before benefits can be suspended or denied.

In denying plaintiffs' motion for a preliminary injunction, the court refused the relief requested under the "likelihood of success on the merits" preliminary injunction standard. See *Clark v. Astrue*, 2007 WL 737489 (S.D.N.Y. March 8, 2007). The court found the plaintiffs' proposed statutory construction argument unpersuasive "in light of express statutory language reflecting that Congress contemplated and intended for the SSA to suspend benefits based on the warrant alone." 2007 WL 737489 *5.

The district court distinguished the Second Circuit's decision in *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005), in which the United States Court of Appeals for the Second Circuit struck down the SSA's practice of assuming that anyone with an outstanding warrant is fleeing prosecution and held that the SSA must first determine whether the person intended to flee prosecution before suspending benefits. It found that "to the contrary, the SSA has shown that it suspends benefits pursuant to 42 U.S.C. §§1382(e)(4)(A)(ii) based only on warrants that specifically address violations of probation or parole, as opposed to general arrest warrants." 2007 WL 737489 *6.

The court did find a basis to waive the exhaustion requirement for the plaintiffs, finding it would be futile for the plaintiffs to challenge SSA's policy in the administrative process. Plaintiffs are forging ahead with the case, and are currently engaged in discovery.

Bank Freeze Problems Attract Attention

By Kate Callery & Louise Tarantino

Despite the protections afforded to recipients of Social Security and Supplemental Security Income (SSI) benefits by 42 U.S.C. §407 exempting benefits from creditors, advocates hear countless stories from clients whose bank accounts have been seized or frozen. The plight of these clients and the dubious actions taken by their creditors and banks are finally receiving some well-deserved scrutiny.

Recent reports in both the *Christian Science Monitor* and the *Wall Street Journal* have highlighted the problems that arise when creditors seek to enforce judgments against Social Security and SSI recipients. The March 21, 2007 article in the *Christian Science Monitor* - entitled "Direct deposit of Social Security checks: safe, fast - and disastrous" and available at http://tinyurl.com/ytosax - relates the story of a client of Johnson Tyler from South Brooklyn Legal Services. At the encouragement of Social Security, she arranged for her disability checks to be directly deposited into her account, only to have her account frozen. The story chronicles the nightmare the client faced as a result.

The article also summarizes attempts by the advocacy community to address this problem. Johnson Tyler's litigation challenging the New York law upon which banks rely to freeze accounts is cited, as is litigation in North Carolina. [See the September 2005 *Disability Law News* for a summary of *Mayer, et al v. New York Community Bankcorp, et al.*] Virginia attempted to alleviate the problems caused by seizures of exempt funds by amending restraining notices to prohibit banks from freezing accounts that contained only exempt funds. The Virginia Bankers Association (VBA) met with court officials to argue that the change violated Virginia law. Virginia, however, has since reinstated the old forms.

As the *Christian Science Monitor* points out, the banks argue that they should not be put in the position of determining which funds should not be frozen. But advocates note that the banks have a financial interest in restraining accounts, as the fees charged by the banking institutions are significant. Some banks, however, such as New York Community Bank (NYCB) have implemented systems to protect Social Security funds from improper garnishment. NYCB checks to be sure an account does not contain exempt funds before freezing it. According to John Fennell, NYCB vice president, the policy "has been effective in protecting depositors" and has not been a burden to the bank.

[*Note: other banks have also agreed not to seize accounts containing only exempt funds. Johnson Tyler informs us that Banco Popular will not restrain a bank account containing only direct deposit Social Security/ SSI provided there has been no other deposit activity in the account during the last 90 days. Additionally, Chase and Astoria Federal will not honor restraining notices when the account contains only direct deposit SSI/ SSD.*]

The front page article in the *Wall Street Journal* on April 28, 2007, entitled "The Debt Collector vs. The Widow," similarly highlights the problems faced by several disabled social security beneficiaries whose supposedly exempt accounts were frozen. The article points out that Pennsylvania's Supreme Court recently issued a rule that barred banks from freezing accounts that contain only direct deposits of Social Security. [To read the new rules, see www.aopc.org/OpPosting/Supreme/out/471civ.5attach.pdf.]

The good news on the local front is that New York is considering new legislation modeled on a Connecticut statute that offers more protection to debtors with exempt funds. Thanks to the hard work of members of New Yorkers for Responsible Lending (NYRL) and others, a new bill will be introduced by Assemblywoman Helene Weinstein. We'll keep readers posted on the progress of the legislation.

The good news on the local front is that a bill was recently introduced in the New York State Assembly and Senate by Assemblywoman Helene Weinstein, Senator Volker and others that is modeled on a Connecticut statute. It offers more protection to debtors with exempt funds. Thanks to the hard work of members of New Yorkers for Responsible Lending (NYRL) and others, the bill (A08527 /S.6203) has already made it through both the Assembly Judiciary and Codes committees without any negative vote or any comment. The language of the bill and a bill summary are available at http://assembly.state.ny.us/leg/?bn=A08527&sh=t and http://assembly.state.ny.us/leg/?bn=A08527

Editors Note: This bill passed the Assembly on June 21, 2007 just prior to their adjournment. It was delivered to the Senate where it awaits action.

Path to Citizenship Scattered with Landmines

By Dishpaul Dhuga

On May 17, 2007, Senators working on the arduous task of putting together a comprehensive immigration reform deal announced an agreement on a possible immigration package. The agreement itself is significant considering the importance of the issue in our country and how many people this could affect. However significant the new proposal might be, some of the provisions need great improvement.

In a nutshell, the deal dubbed as "the grand bargain", would provide a path to citizenship for the estimated 12 million workers in the United States illegally. This path to citizenship is scattered with landmines. And the path to citizenship is hardly a path; it's more like a maze with provisions such as the $5000 fine and a "touchback" requirement for immigrants to go back to their home countries before any hope of becoming a citizen. The deal would also decrease the number of green cards available to family members while increasing the number for workers with needed skills. The bill would create a temporary-worker program, but would not include a path to citizenship for guest workers.

The bill also includes reinforcing the borders, getting tougher on employers who hire illegal immigrants, eliminating the backlog of visa applications for legal immigrants, an AgJOBS provision which would assist in the legalization of undocumented farm workers, and the DREAM Act which would address the tragedy of young people who grew up in the U.S. and have graduated from U.S. high schools, but whose future is constrained by current immigration laws due to not having legal residency.

There have been numerous criticisms of the deal already, some crossing party lines. For example, some on the right have called this measure "amnesty" while those on the left say the "grand bargain" is a sellout. Groups who support and advocate for family-based immigration are not happy with the decrease in green cards for family members. Considering that family reunification has been the cornerstone of the immigration system since 1965, this decrease in family-based visas is an extremely negative reversal of current policy.

The proposal to move to a merit system, in which points would be assigned for work skills and education, would increase professionals coming into the country while decreasing lower-skilled workers who are vital to our economy. Democratic Senators and immigrant advocates have criticized the temporary-worker plan arguing it would further jeopardize and exploit the lives of the underclass of low-skilled workers. They have also argued that the guest-worker program will drive down wages and working conditions for all American workers.

Since May 17, there have been numerous proposed amendments and debate on the immigration reform deal. However, the turning point occurred on the eve of June 7, 2007 when the reform deal was withdrawn from the Senate Floor. A second motion to invoke cloture on S. 1348 was defeated, and Majority Leader Reid withdrew the bill from floor consideration. There was a dispute between Reid and Republicans over how many amendments senators would be permitted to debate. The good news is that Senate leaders expressed the need and desire to bring the issue back for further debate in the near future. The bill's proponents, including the president, have insisted that the measure is not dead. It's in the country's best interest that immigration reform measures do not lie dormant again.

The proposed immigration reform package needs some major improvements. The maze to citizenship and the undermining of family-based immigration should not be tolerated. However, allowing debate and discussion on these vital issues will help bring the topic of immigration out into the open more, and hopefully give the American people and our representatives a chance to make amendments to some of the harshest measures in the new proposal.

For more information please see: www.immigrationforum.org, www.aila.org, www.ncic-metro.org, www.thenyic.org

Regulatory Roundup

By Susan C. Antos

The Regulatory Round Up reports on administrative rule making of interest to public benefits specialists. The Regulatory Round Up will not appear in this issue because there was no regulatory activity in the New York State Register from April 25 to June 6, 2007 that involved matters of interest to public benefits specialists.

Public Phone Directory
New York State Government Listings

The New York State Office of Technology (OFT) is a state government agency that primarily provides information services to other state government entities. They are located in Albany, New York and operate a centralized data center, provides a state-wide network infrastructure providing data and voice services and other information technology related. Now, available to the public, OFT has compiled a state phone directory that is easy to search offering several search options. Available searches include by individual name, organization, toll free numbers, NYS Congress Member offices, NYS Senate and Assembly offices and by functional description and keyword. To access this state phone directory, go to https://www6.oft.state.ny us/telecom/phones/indsearch.jsp.

STAFF

Albany Office

119 Washington Ave., Albany, NY 12210 ◆ (518) 462-6831 ◆ Fax: (518) 462-6687
Email: Nkrupski@empirejustice.org

Anne Erickson, President & CEO

Susan C. Antos, Attorney
Public Benefits

Kristin Brown
Director of Legislative Advocacy

Dishpaul Dhuga, J.D.
Immigration & Domestic Violence

Kirsten Keefe, Attorney
Consumer

Nancy C. Krupski
Manager of Information Technology

Sarah Spain, Law Intern
Fair Hearing Bank Database

Hillary Brown
Administrative Secretary

Louise M. Tarantino, Attorney
Disability

Barbara Weiner, Attorney
Food Stamps, Immigration Benefits

Connie Wiggins, Administrative Assistant

Saima Akhtar, Law Intern
Benefits Law Database

Rochester Office

1 West Main Street, Suite 200, Rochester, NY 14614 ◆ (585) 454-4060 ◆ (585) 454-4019
Email: mpeterson@empirejustice.org

Bryan D. Hetherington, Chief Counsel

Catherine M. Callery, Attorney
Disability

Katherine Courtney, Attorney
Disability

Rebecca Case Grammatico, Attorney
Consumer

Gladys Castro
Administrative Assistant

Doris Cortes, Paralegal
Disability

Trilby de Jung, Attorney
Health

Peter Dellinger, Attorney
Consumer Law, Civil Rights

Jonathan Feldman, Attorney
Education, Civil Rights

LJ Fisher, Attorney
Disability

Sarah Gilmour, Attorney
Disability & Civil Rights, Health Care, Housing

Angela Hale, Paralegal

Michael Hanley, Attorney
Housing

Kristi Hughes, Director
Development & Administration

Ruhi Maker, Attorney
Community Reinvestment, Consumer

Michael Mule, Attorney
Hanna Cohn Fellow

Tania Santiago
Administrative Secretary

Becky Schroeder
Director of Finance & Human Resources

Amy Schwartz, Attorney
Domestic Violence

Barbara van Kerkhove, PhD
Community Reinvestment

Michelle Peterson
Training & Publications Coordinator

Sara Valencia, Attorney
Disability

White Plains Office

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

Linda Bennett-Rodriguez, Attorney
Immigration

Robert Cisneros, Attorney
Immigration