Empire Justice Center
Making the law work for all New Yorkers

Legal Services Journal

October 2007

Inside This Issue

Legal Services Journal
is published by:

Empire Justice Center
1 West Main Street, Suite 200
Rochester, NY 14614
Phone: (585) 454-4060

October 2007 issue.

Available online at:

www.empirejustice.org

Criminal Mischief Becomes a New Family Offense

By Amy Schwartz and Bryn Lovejoy-Grinnel, Law Intern

New York's Response to Criminal Mischief in the Domestic Violence Context

Destruction of or damage to property has long been a common domestic violence tactic utilized by abusers to threaten, retaliate, terrorize or maintain power and control. While the type of harm to property is limited only by the offender's access to the victim and his creativity, some typical examples may include: destruction of landlines or cellular phones, disabling phones by pulling cords from the walls, destroying furniture or other household items, breaking windows in a home or car, breaking doors or disabling locks, vandalizing the victim's vehicle or intentionally involving the vehicle in an accident, injuring or killing a family pet or farm animal, destroying the partner's clothing, jewelry or items of sentimental value.

Despite the prevalence of these abusive tactics in the intimate partner violence context, New York's law enumerating the domestic violence crimes called "family offenses" under both the Criminal Procedure Law[1] and the Family Court Act[2] did not specifically include conduct of this nature. As a result, domestic violence victims seeking relief from these acts of abuse faced uphill challenges when commencing a family offense proceeding against their abuser under Article 8 of the Family Court Act. Victims were forced to re-characterize the property-related attacks under an existing family offense such as disorderly conduct, harassment, menacing or stalking with the hope that the court would not dismiss the case for lack of jurisdiction. Those unable to engage the civil Family Courts often elected not to proceed while others attempted to hold their abusers accountable via criminal actions. However, even the criminal justice system was unwilling to consider abusers liable for this type of abuse in some jurisdictions. Certain New York police agencies, prosecutors, and courts in the 2nd Department have interpreted the criminal mischief laws to specifically exempt offenders who damaged or destroyed the "property of another person" that could be considered marital (or jointly-owned with the victim) because the offender arguably had an ownership interest in the items and was thereby entitled to do as he pleased with his own property.[3]

Interestingly, this interpretation of the criminal mischief law has been openly criticized in New York, in academic circles, and in other states as being wrongly decided, bad policy and bad law (especially in the domestic violence context), as well as out of step with the evolution of similar mischief and vandalism laws and case law around the country.[4] With

(Continued on page 2)

Criminal Mischief—continued

(Continued from page 1)

no recent appellate level decisions or remedial legislative action, many victims subjected to this type of abuse in New York were, essentially, abandoned without any civil or criminal recourse against their intimate partners.

The Legislature Responds

In 2007, the Legislature sought to remedy this obvious gap in the law by making the crime of criminal mischief an enumerated family offense.[5] Bills were introduced on June 1, 2007 in the Assembly by Assembly Judiciary Chair Helene Weinstein (A.8854-A) and in the Senate on April 18, 2007 by Senator Liz Kruger (S.4542-A). This was the first time bills of this nature were introduced in both houses and, surprisingly, they passed both bodies in the same session. The Governor signed the legislation on August 18, 2007 and the law will become effective on November 13, 2007. Notably, this is the first enhancement to the list of family offenses since the addition of the stalking laws in 1999.

The justification for the new law as outlined in the bill memo stated:

> Experience with the concurrent jurisdiction provisions of the Family Protection and Domestic Violence Intervention Act (Chapter 222, Laws of 1994) has revealed a significant gap in the enumerated family offenses. With regularity, courts handling family offense cases are faced with situations in which an offender is alleged to have vandalized or destroyed property that is either owned by the victim or jointly owned by both parties. Yet criminal mischief is not enumerated as a family offense that may be prosecuted in Family Court, and courts are sharply divided regarding whether it may be prosecuted as a crime if the property is jointly owned or owned in the offender's name. This bill provides that criminal mischief be added to the concurrent jurisdiction provisions in section 812 of the Family Court Act and section 530.11 of the Criminal Procedure Law.

While Article 145 of the Penal Law contains four different degrees of criminal mischief crimes[6] ranging from misdemeanors to felonies, the new law does not specify whether one or all of the crimes constitute new family offenses. However, the enumerated family offense of "reckless endangerment" also has multiple levels and has been generally interpreted to include either level of offense. Accordingly, based on the facts in one's case, attorneys could legitimately argue that any of the appropriate degrees apply.

Despite the existence of challenging New York-based legal precedents and criminal justice policies, practitioners representing domestic violence survivors in the Family Courts have the ability to cite the law, case law from New York and other states, together with the persuasive legislative intent for passing these new laws.

Other than the criminal mischief statutes themselves, there is no definitional section in the laws to assist in their interpretation. Therefore, civil practitioners in Family Court family offense cases should familiarize themselves with the existing criminal mischief case law addressing the laws' culpable mental states, what may constitute "damage" to property, as well as how "property of another person"[7] has been previously interpreted.

Despite the existence of challenging New York-based legal precedents and criminal justice policies, practitioners representing domestic violence survivors in the Family Courts have the ability to cite the law, case law (from New York and other states[8]) together with the persuasive legislative intent for passing these new laws. It can now be argued that by adding criminal mischief to the list of criminal and civil family offenses and applying it

(Continued on page 3)

Criminal Mischief—continued

(Continued from page 2)

to victims of family offenses, the Legislature specifically intended to end the debate regarding destruction or vandalization of separate or jointly-held property by their abusers. In limiting these protections to those defined as "family and household members" in family offense cases doubtless the Legislature anticipated that the majority members of this victim class would jointly own property with their abusers through marriage or cohabitation. To limit access to this family offense only to a select, smaller class of victims who do not jointly own property with their abusers would serve to only to undermine the law's stated purpose and would be inconsistent with the application of all other existing family offenses. However, given the existing legal precedent in the 2nd Department, practitioners in that jurisdiction may face increased challenges as the new legislation butts up against the case law.

It should also be noted that as a new family offense, crimes of criminal mischief will also be subject to concurrent jurisdiction under the Criminal Procedure Law[9], more comprehensive Criminal Court orders of protection[10], mandatory arrest protections and primary aggressor determinations[11], and requirements that police agencies prepare and file Domestic Violence Incident Reports[12].

Evidence Collection Strategies in Criminal Mischief Cases

Because the criminal mischief statutes require proof of damage to or destruction of property, it is important that practitioners and their clients gather the necessary evidence:

- Take photographs or video of damaged or destroyed property
- Collect the damaged or destroyed property and keep it in a safe place or with law enforcement to preserve the chain of evidence
- Identify witnesses (including law enforcement, EMTs, neighbors, other witnesses) to the property damage or to the incident itself and, where possible, take their statements or subpoena them for trial
- Secure original sales receipts to document the original price paid for the item to document value
- Obtain repair receipts or estimates for property that can be repaired
- Keep receipts as the victim replaces damaged or destroyed property in order to document replacement value
- Obtain estimates for replacement costs for the item(s)
- If clean-up is required (i.e. removal of paint, feces, water or fire damage) to fix the property, keep receipts or estimates for the work

If proving the offender is responsible for past mischief offenses has proven difficult, consider surveillance options (i.e. home security cameras)

Seeking Restitution in Criminal Mischief Family Offense Proceedings

Family Courts have the authority to grant restitution upon agreement or after a finding or an admission of a family offense. While many Family Court family offense petitioners do not routinely seek restitution, the addition of criminal mischief to the enumerated family offenses and the proof of damage necessary to prove criminal mischief elements create a new opportunity for victims to be more frequently compensated for their losses. In family offense proceedings, restitution up to $10,000 may be granted in a dispositional order.

Conclusion

As the criminal mischief laws face increased use and scrutiny under the Family Court Act it will be interesting to see how the case law evolves when applied more frequently in the domestic violence context. Stay tuned!

Footnotes

[1] Criminal Procedure Law §530.11

[2] Family Court Act §812

[3] To date, the 2nd Department is the only Appellate Division in NY to address this issue directly in the 1997 case *People v.*

(Continued on page 25)

2007 Domestic Violence Legislative Update

By Amy Schwartz

The following are summaries of the domestic violence-related laws passed in 2007 in New York:

Signed Into Law

Prohibition on Charging Fees for Service of Civil Orders of Protection: Bill Number: A.7370 (Hyer-Spencer) / S.4020 (Volker). Status: Signed by the Governor on 5/21/2007

Several Sheriff's Departments in New York routinely charge a fee for serving orders of protection, fees for mileage associated with service, and/or fees where an order cannot be served in one attempt. This practice, however, violates the STOP Formula Grant Program's requirements under the federal Violence Against Women Act that survivors of domestic violence, sexual assault and stalking who obtain civil orders of protection from their offenders should not have to bear financial expenses related to obtain such order. New York receives significant STOP grant monies and this new law is intended to remedy this inconsistency and bring the state into compliance. As there are no fees for the service of criminal court orders, this law is also intended to create equity between the criminal and civil systems. By amending subdivision (h) of CPLR §8011, the new law specifically provides that Sheriff's Departments throughout the state may not charge a fee for court-ordered service of process for a civil order of protection or for other orders or papers served simultaneously with the order of protection. Effective August 20, 2007.

Criminal Mischief as a New Family Offense

Early Lease Termination for Domestic Violence Survivors: Bill Number: A.3386 (Heastie) / S.1922 (Robach) Status: Signed by the Governor on 6/04/2007 AND Bill Number: A.9244 (Heastie) / S.6351 (Robach) Status: Signed by the Governor on 8/15/07.

Domestic violence survivors often have to flee their rental units in an attempt to avoid further violence or threats of violence, seek safety in a shelter, or to deter stalkers. Unfortunately, because many survivors have long-term leases with their landlords, these leases may pose an economic barrier to safety where the lease contains clauses that make early termination fiscally prohibitive. She may also get a poor reference from her landlord as a result of having to break her lease. Responding to this concern, amendments to Real Property Law § 227-c newly authorizes the court that issued the survivor order of protection [amendments to Criminal Procedure Law §530.12 & 13, Domestic Relations Law §240, and Family Court Act §§446, 656, 842 and 1056(5)] to also terminate her residential lease before the natural end of its term. This early termination will release her from any further liability for the rental agreement and enable her to vacate the premises without financial penalty. Only survivors with orders of protection may qualify for this relief.

Prior to commencing a court action for lease termination, the survivor must have attempted to negotiate a termination with the landlord to no avail. In filing her petition for relief, the tenant must provide notice of the proceeding to the landlord, as well as to any joint tenants, even if that joint tenant is the abuser. She must also demonstrate that despite the existence of the order of protection a continuing, substantial risk of physical or emotional harm exists to her or her child, that relocation will substantially reduce the risk, that attempts for a voluntary release from the lessor were denied, and she is acting in good faith. If a lease termination order is granted, the survivor must insure that all sums due are timely paid and she must return the property free of occupants. If there are joint tenants, the survivor is not responsible for removing the co-tenant from the premises after an order is issued. This law empowers the court to sever the joint tenancy rather than terminate tenancy in its entirety unless all tenants agree to a complete termination. The law also outlines procedures for adjustments in rent and for the setting the termination date. This law will be effective October 1, 2007.

DV Legislative Updates—continued

(Continued from page 4)

Criminalization of Sex and Labor Trafficking Bill Number: A.8679 (Dinowitz) / S.5902 (Padavan) Status: Signed by the Governor on 6/06/2007

A reported 18,000 to 20,000 people are trafficked into the United States each year for forced labor or sexual exploitation. Until recently, only the federal government and selected states had specific laws prohibiting such conduct. By passing this comprehensive, landmark legislation, there are many new provisions and protections:

1. New crimes: Both sex and labor trafficking are now criminalized under new Penal Law §§230.34 and 135.35. Penal Law §§230.36 and 135.36 provides that victims of sex and labor trafficking will not be held accountable as accomplices to their traffickers. Sex trafficking and labor trafficking are now included under Penal Law §460.10 and Criminal Procedure Law §700.05 as criminal acts that may be the basis of an enterprise corruption charge and prosecutors are authorized to employ wiretaps on trafficker's telephones. Finally, Executive Law §621(5) is amended to reflect the criminalization of labor and sex trafficking.

2. Targeting the Industry: Penal Law §230.03 is repealed, and Penal Law §230.04 elevates the crime of patronizing a prostitute from a B misdemeanor to an A misdemeanor. A person who knowingly sells travel-related services for prostitution tourism in another jurisdiction is guilty of a felony under Penal Law §230.25(1).

3. Sex Offender Registry: Defendants convicted of sex trafficking must also register as a sex offender pursuant to Correction Law §168-d(1)(b).

4. Victim Assistance: The Social Services Law was also amended to add a new Article 10-D, which outlines the definition of human trafficking victims and provides for services available to human trafficking victims as soon as practicable, including those that are pre-certified, non-citizens.

5. Creation of an Inter-Agency Task Force: The law further establishes an interagency task force charged with measuring and evaluating the state's progress in preventing human trafficking, prosecuting traffickers and providing services victims of human trafficking.

This law will be effective on November 1, 2007. The provisions relating to the Inter-Agency Task Force are effective immediately and will sunset on September 1, 2011.

Amendment to Criminal Firearms License Restrictions Where Willful Violation of Orders of Protection Caused Physical Injury: Bill Number: A.0618 (Paulin) / S.4066 (Robach) Status: Signed by the Governor on 7/03/2007

Criminal Procedure Law §§530.14(1)(a)(ii)(A) and 530.14(3)(a)(i) were amended to require a court to order the revocation of or defendant's ineligibility for firearms licenses and/or to order the immediate surrender of all firearms owned or possessed by the defendant upon determination that the defendant willfully violated a temporary or permanent order of protection by inflicting physical injury upon another person. This law lowers the degree of injury necessary to trigger these protections from "serious physical injury" to "physical injury". Effective August 2, 2007.

Issuance of a Criminal Temporary Order of Protection with a Securing Order: Bill Number: A.8193 (Weinstein) /S. 4538 (Kruger) Status: Signed by the Governor on 7/3/07

The Criminal Procedure Law currently authorizes orders of protection to be issued in criminal family offense case or non-family offense cases as a condition of any order of release on own recognizance (ROR), adjournment on contemplation of dismissal (ACD), pre-trial release (non-family offenses only) or bail. However, neither CPL §§530.12 or 530.13 expressly permit the issuance of a temporary order of protection where the defendant was committed to the custody of the sheriff, rather than released. Although a defendant may not be released s/he may continue to pose a threat to the victim or have contact with her from the confines of jail. By amending CPL §§530.12(1) and 530.13(1), this new remedial law provides the courts with express permission to issue a temporary order of protection "in conjunction with any securing order committing

(Continued on page 6)

DV Legislative Update—continued

(Continued from page 5)
the defendant to the custody of the sheriff." Effective July 3, 2007.

Representative of the State Office for the Aging Added to New York State Office for the Prevention of Domestic Violence Advisory Council: Bill Number: A.8762 (Young) / S.3717 (Golden) Status: Signed by the Governor on 7/03/2007

Executive Law §575(4)(b) was amended to increase the number of ex-officio members of the New York State Office for the Prevention of Domestic Violence's Advisory Council to allow for the addition of a representative of the State Office for the Aging. This addition institutionalizes the recognition of older adults who may experience domestic violence. Effective July 3, 2007.

Establishment of a Probation Detainer Warrant Pilot Project: Bill Number: A.8592B (Aubry) / S.6352 (Lanza) Status: Signed by the Governor on 7/18/2007

By amending the Criminal Procedure Law and adding a new section (§410.92), the Division of Probation was authorized to establish pilot projects in four New York State counties outside of NYC. Additionally, the law also amends Correction Law §500-a(1)(c) to allow for the temporary detention of persons in violation of their probation for family offense, sex offense or youthful offender convictions.

Under the new law, a person on probation may be taken into custody for a violation of a condition of a sentence of probation when the Director or Deputy Director of the local Probation Department determines that the probationer is a public safety risk and the probationer may be detained for up to 48 hours to permit the sentencing court to determine whether the (s)he violated a condition of his or her sentence. If the sentencing court finds reasonable cause that a condition of the sentence was violated, the court may commit the probationer into the sheriff's custody, set bail or release the person on their own recognizance. If there is no probable cause, the probationer will be released. Further, the law requires the Office of court Administration to ensure that judges in pilot program communities are available to review the status of persons in custody pursuant to the detainer. Finally, the law also mandates reporting procedures be established to track the use and impact of detainer warrants. Effective July 18, 2007.

Experimental Program for Electronic Transmission of Orders of Protection: Bill Number: A.7554C (Rosenthal) / S.4704C (Volker) Status: Signed by the Governor on 7/18/2007

Under this new law, the Office of Court Administration was authorized to create rules for selected Family Courts (in Erie, Onondaga, Monroe, Nassau, New York, Westchester, Richmond, Kings, and Albany counties) to institute experimental programs that will allow temporary or permanent orders of protection to be transmitted by fax or electronic means for service to Sheriff's offices or police departments. Participation in this pilot program is voluntary and the authorizing legislation sunsets July 1, 2010. The law also directs the Chief Administrator of the Courts to submit a report by April 2009 evaluating the pilots and making recommendations for further legislation. Effective July 18, 2007.

Court Rules Prescribing Workload Standards for Attorneys for Children: Bill Number: A.6847B (Weinstein) / S.4025-A (DeFrancisco) Status: Signed 8/28/07

Recognizing the complexity of cases and heavy workloads carried by many law guardians who represent children, Section 249-b was added to the Family Court Act requiring the Office of Court Administration (OCA) to establish workload standards for law guardians, including maximum numbers of children who can be represented by any given law guardian at one time. In Section 1 of the law, the Legislature made specific findings outlining the intent and purpose of this new amendment.

To allow for proper budgeting, a preliminary report by the Chief Administrator is due by November 15, 2007 to the Administrative Board of the Courts, the Governor, and the Legislature. By April 1, 2008, the Chief Administrator of the Courts is to disseminate these new court rules imposing workload standards pursuant to this legislation. In determining these rules, OCA must consider the wide variety of cases law guardians cover (child welfare & termination of parental rights proceedings, juvenile delinquency, and persons in need of supervision

(Continued on page 25)

C.A.S.H Team Preps for 2007-2008 Tax Season

By Candice Lucas

The C.A.S.H. team is in the midst of preparing for the 2007-2008 tax season. C.A.S.H. - Creating Assets, Savings, and Hope - is a community coalition led by Empire Justice Center and the United Way of Greater Rochester. C.A.S.H. helps working individuals and families earning less than $40,000 annually make the most of their money and build stronger financial futures.

C.A.S.H. operates free tax preparation sites during tax season to help low-income workers:

- take advantage of the Earned Income Tax Credit
- save on exorbitant tax preparation fees
- find alternatives to predatory lending practices
- maximize financial assets through financial education, credit repair, and asset building strategies

During the 2006/2007 tax season, more than 500 volunteers, in 16 different locations, helped 12,218 Monroe County households receive $17.4 million in federal and state tax refunds, of which $9.3 million was a result of the EIC. This year, C.A.S.H.'s goal is to recruit 600 volunteers and reach more than 13,000 households.

Being a C.A.S.H. volunteer is about more than just taxes. Volunteer roles include: Front Desk Managers, C.A.S.H. Advisors and Tax Preparers. No experience is necessary. C.A.S.H. will provide all of the training and materials. Volunteers must be comfortable with computers. Sign language interpreters and bi-lingual volunteers are very welcome. To learn more about volunteer opportunities with C.A.S.H., visit http://tinyurl.com/2slo5p, email cash@empirejustice.org or call Candice Lucas at 585.295.5733.

C.A.S.H.
Creating Assets, Savings & Hope
An Empire Justice and United Way-led Coalition

Free Volunteer Legal Services Project Tax Workshop for the Deaf and Hard of Hearing

The Volunteer Legal Services Project (VLSP) will be offering an informational workshop as part of their Low Income Tax Clinic for the Deaf and Hard of Hearing. The workshop will be held on Friday, November 30, 2007 from 6:00 p.m.—7:30 p.m. at the Rochester Educational Awareness Program (R.E.A.P.) on 1564 Lyell Avenue in Rochester, New York. The event will be hosted by the Rochester Recreation Club for the Deaf. This session will be discussing general rights and responsibilities, how to complete W-4 forms, types of tax fraud and schemes along with how to protect yourself from identity theft. Space is limited so please make reservations by contacting Heather Scalzo at VLSP (585) 295-5712, or hscalzo@wnylc.com.

New Project to Assess Medicare Part D Services in New York State

By Cathy Roberts

On January 1, 2006, the Part D prescription drug component coverage of the Medicare Modernization Act of 2003 was implemented. It is now almost two years later. How has Part D implementation fared for elderly and disabled Medicare beneficiaries?

Not so well, according to an October 7th *New York Times* article entitled "Medicare Audits Show Problems in Private Plans." The *Times* reviewed 91 federal audit reports of private health insurance plans offering Part D prescription drug coverage. According to the article, the audits revealed that tens of thousands of Medicare recipients had been victimized by deceptive sales tactics and had their claims improperly denied. The audits uncovered "the improper termination of coverage for people with HIV and AIDS, huge backlogs of claims and complaints, and a failure to answer telephone calls from consumers, doctors and drugstores." Compliance problems occurred most frequently in two areas -- marketing abuses, and the handling of appeals and grievances related to the quality of care.

While the Centers for Medicaid and Medicare Services (CMS) and the health insurance plans have pledged to address these deficiencies and improve services to beneficiaries, the *Times* report highlights the need for aggressive advocacy on behalf of Medicare Part D beneficiaries.

Thanks to funding provided by the New York State legislature, through the State Office of the Aging, the Empire Justice Center is partnering with several other agencies across the state to provide an advocacy "safety net" in the Medicare Part D arena.

As part of this new project, Empire Justice is conducting a Part D needs assessment to help determine the availability of existing advocacy services, the needs of agencies who provide these services, where gaps in advocacy services exist and what types of resources are needed to address those gaps. *The survey is geared toward organizations providing advocacy services to elderly or disabled individuals.*

The assessment tool has been distributed in hard copy form to the HIICAPs (Health Insurance, Information and Counseling Assistance Programs) – the CMS-funded outreach projects who provide individual counseling and assistance to Medicare beneficiaries on the local level. We are developing an online version of the survey for other advocacy groups which should be up and running very soon.

If your organization works with elderly or disabled individuals, your input will be invaluable to us … so keep watching for news about the roll-out of the online Part D needs assessment and pass it along to any community partners who provide advocacy services to older adults and persons with disabilities.

Additionally, Empire Justice is available to provide technical assistance and support to advocates working with low-income Medicare beneficiaries.

We are working with other funded partners to develop an online resource tool to assist those working with dual eligibles (Medicare beneficiaries who have Medicaid, as well as those eligible for the Medicare Savings Programs or the Part D Low Income Subsidy). Please feel free to contact Cathy Roberts at (518) 462-6831 x 23 or croberts@empirejustice.org if you have Medicare Part D-related questions or would like more information about our Part D advocacy project.

New York Pushes Toward Universal Health Care Encounters Major Federal Resistance

Trilby de Jung

Although many of us have grown weary waiting for meaningful progress toward national health care reform, innovative state initiatives are ongoing. Governor Eliot Spitzer clearly intends to move New York into the forefront of the state movement toward universal coverage. New York State has recently responded to federal roadblocks to expansion of public insurance for children by organizing a coalition of states to take the Centers for Medicare and Medicaid Services (CMS) to court.

The Spitzer Administration's Building Block Approach to Universal Coverage

The Administration's movement toward universal coverage is based on a building block approach that seeks to expand existing programs and reform existing delivery systems. Governor Spitzer maintains a commitment to gathering public input along the way. This fall the Commissioners of Health and Insurance announced a series of public hearings across New York State, dubbed "Partnership for Coverage" hearings. The idea is to gather input from citizens on the development of proposals for universal coverage. For a copy of the hearing notice and schedule of upcoming hearings, visit: http://partnership4coverage.ny.gov/hearings/

Last year's budget included significant reforms designed to strengthen Medicaid, Family Health Plus and Child Health Plus, including enrollment simplification to help reach eligible but uninsured low-income families, expansion of Family Health Plus to allow employers to participate, and eligibility expansion of Child Health Plus to 400% of the federal poverty level. Governor Spitzer points to these legislative achievements as key building blocks in his effort to increase access to coverage and we can expect to see additional reforms in the Governor's executive budget for 2008.

However, the State Department of Health is still awaiting a response from CMS on some of the legislative reforms that require federal approval. Last month, New York received word that CMS formally disapproved the planned expansion to its Child Health Plus program.

CMS Shuts Down State Expansion of Child Health Plus

In August, CMS issued a new directive for the State Children's Health Insurance Program (SCHIP) that has the effect of barring states from covering children with family incomes above 250% of the federal poverty level (FPL), or about $42,925 a year for a family of three. Under the new directive, states cannot cover children with family incomes above 250% of FPL unless they meet enrollment participation rates for lower income children that no state has yet met (95%); make certain assurances regarding the availability of employer-based coverage; impose waiting periods of at least one year; and impose cost-sharing levels within one percentage point of that required of families under private insurance.

The new CMS policy constitutes a reversal of previous policy and interferes significantly with the authority that has long rested with the states to determine eligibility levels and to expand programs in order to reduce the number of children who lack health insurance. Yet the directive comes without any rule-making activity or other provisions for notice and comment, and it comes without any new statutory authority. The directive also comes in the midst of Congressional debate over the SCHIP program and is inconsistent with the approach taken by both the Senate and the House.

Not long after the directive was issued. Congress approved compromise legislation on SCHIP that

(Continued on page 10)

USDA Food Stamp Award $$$ Available to Local Districts

OTDA recently received a $9.8 million performance bonus award from USDA for payment accuracy improvements in the Food Stamp Program.

OTDA is passing along $7 million of the award to local districts, on the condition that they use the funds to improve food stamp access and/or maintain program accuracy. The awards are being divvied up based on caseload size, with a minimum allocation of $25,000.

Districts do not have to accept the funds, but if they do, they must tell OTDA how the plan to use the money. Districts who opt out will have their funds reallocated. 07 LCM-14 and its attachments list the allocations by district, and the 2-page plans that districts must file with OTDA. The LCM also contains suggested uses for the money, including: hiring of staff, training of staff and community partners, purchases of hardware/software which support modernization efforts, short term contracts with outreach providers, and local media/outreach expenditures. Plans are due to OTDA by November 15, 2007.

You can get the LCM at http://www.otda.state.ny.us/main/directives/2007/ by scrolling down to the Local Commissioners Memorandum section. The LCM should soon be available on the Online Resource Center, too. If you have suggestions for your local district, now is the time to let them know. We would be interested in learning how districts are planning to use the money, so it would be great if you could pass along any info you may get. Contact Cathy Roberts at croberts@empirejustice.org.

Universal Health Care—continued

(Continued from page 9)

specifically acknowledges the harsh and overreaching nature of the August directive and ameliorates its effects significantly. However, in October, President Bush vetoed the compromise legislation.

Meanwhile, New York received official notice in September that, based on the August directive, CMS had officially disapproved New York's planned expansion of its Child Health Plus program. In response, New York formed a coalition with several other states and filed a federal complaint in the Southern District of New York. New York's suit alleges that CMS violated the Administrative Procedures Act and exceeded its statutory authority by imposing the new barriers to state expansion of SCHIP that are reflected in its August guidance.

What does this mean to low-income families in New York?

Many families in New York had expected to benefit significantly from New York's expansion of Child Health Plus. According to the Children's Defense Fund, two hundred and fifty newly eligible families had completed applications with facilitated enrollers. In addition, many families currently enrolled in Child Health Plus at the full premium level would have benefited from significant reductions in their monthly bills, and in fact received bills for September reflecting the new lower premiums. These families are now being asked to repay the difference in the full premium amount and the lower levels reflected in their original bill for September. Many of the children in these families have significant health needs that continue to stress fragile family budgets.

The Empire Justice Center has been working with the Community Service Society in New York City and two national advocacy groups, the National Health Law Program and the Center for Medicare Advocacy, to put together a lawsuit on behalf of low-income families in New York that would have benefited from the planned expansion of Child Health Plus.

We plan to file a companion suit to New York State's case in the Southern District, unless Congress is able to reach a speedy and appropriate compromise that can withstand a presidential veto.

If you know families that might want to participate, or have questions about the case, contact Trilby de Jung (1-585-454-6500, X2955) or Bryan Hetherington (1-585-454-4060, X5809).

Advocacy Breakthrough: Client Information

By Alison Bates

Legal service advocates in Rochester encountered an obstacle when attempting to obtain information about their clients from caseworkers at the Monroe County Department of Human Services (DHS).

Caseworkers refused to disclose client information to the advocates unless they provided a written release. Obtaining a written release is not only difficult for clients due to obstacles of their own such as transportation and the involvement of time-sensitive issues, but it is also contrary to requirements of New York Social Service regulations.

The regulation, 18 NYCRR § 357.3(c)(2) provides an exception to the general rule that public assistance information about a particular individual is confidential. According to the regulation, confidential information may be released to a "person…or… social agency from whom the applicant or recipient has requested a particular service when it may properly be assumed that the client has requested the inquirer to act in his behalf and when such information is related to the particular service requested."

The Empire Justice Center contacted legal counsel for DHS in order to address the issue and argued that the regulation covers legal services offices representing their clients.

Counsel for DHS agreed that the regulation allows for the disclosure of information to a legal services advocate without requiring any sort of release. As a solution in Monroe County, top officials at DHS sent an email message to all caseworkers and their supervisors explaining that pursuant to § 357.3(c)(2) they are not to require a release from legal services organizations as long as the caseworker can be "reasonably sure" that the advocate is calling on behalf of the client and at the client's request.

The message explained that caseworkers can be "reasonably sure" of such information simply by looking at the caller identification information (ID) on their telephones. The message specifically identified the Empire Justice Center along with the Monroe County Legal Assistance Corporation, the Legal Aid Society, and hospitals and nursing homes as social agencies from which caseworkers are not to request a release.

The Department also explained the regulation and its implications verbally at their supervisory meeting on October 17, 2007 and had legal counsel on hand to answer any questions the supervisors had.

A formal letter from DHS legal counsel explaining the County's position on disclosure of this otherwise confidential information was provided to the Empire Justice Center in the event that a caseworker requests a release from an advocate in the future.

Federal Reemployment Rights of Returning Military Personnel

By Peter Dellinger

Over 500,000 members of the National Guard and Reserve have been called up to military service following the attacks on September 11, 2001. With the hope that many of these service members will soon be returning home from overseas missions, they will also be legally entitled to return to their old jobs. Under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §4301 *et seq.*, every employer, both public and private, must employ and reinstate members of the armed forces, regardless of the size of the company.

In addition to re-employment rights, veterans are entitled to far-reaching employee protections rarely found in the non-unionized private sector. For instance, employers are required to reinstate employees to the position, pay and benefit level that they would have had if they had not left for active duty. 42 U.S.C. §§4312 and 4316. In determining pay and benefits, each month served in military service counts as a month actively employed by the employer.

Even though the doctrine of "at will employment" allows New York employers to fire employees for virtually any reason, USERRA protects returning servicemen and women from being fired except for just cause for on year following their reinstatement. 38 U.S.C. §4316(c)(1). The statute specially

> Supersedes any State law...contract, agreement, policy, plan or practice that reduces limits, or eliminates in any manner any right or benefit provided by this chapter…38 U.S.C. §4302 (b).

As a result, during the one year reinstatement period, USERRA covered employees may be exempt from their employer's lay-offs, corporate downsizing, or other economically based job-elimination plans. In Upstate New York where jobs may be scarce, an employer may be obligated to terminate a current employee in order to comply with a returning veteran's re-employment rights under USERRA.

Employees with disabilities incurred or aggravated during military service have additional employment rights, after an employer has unsuccessfully attempted reasonable accommodation efforts. 38 U.S.C. §4313(a)(3). These employees are entitled to employment in "any other position" which is the "equivalent" or "nearest approximation", "in seniority, status, and pay, the duties of which the person is qualified to perform, or would be qualified with reasonable efforts by the employer." *Id.*

Employees are required to claim their re-employment rights by giving their employer notice of intent to return to work. Upon return, military personnel who have severed more than six months of active duty have 90 days to notify their employer that they intend to reclaim their old job.

USERRA includes comprehensive and generous enforcement rights. In addition to filing an administrative complaint with the Secretary of Veteran's Affairs, 38 U.S.C. §4322, affected employees may sue employers for USERRA violations in federal court, and are exempt from paying filing fees or court costs. 38 U.S.C. §§4323(c)(2) and (h)(1). Remedies for employer violations include lost wages; an equal amount in liquidated damages for willful violations, 38 U.S.C. §4323(d); injunctive relief, 38 U.S.C. §4323(e); attorney's fees, expert witness fees, as well as "other litigation expenses." 38 U.S.C. §4323(h)(2).

New OCFS Statewide Report on Services for Limited English Proficiency (LEP) Individuals at Social Services Offices

By Michael Mule

In September 2007, the Office of Children and Family Services (OCFS) released "The Needs of and Services for Persons with Limited English Proficiency (LEP): Findings from OCFS's LEP Survey."[1] The 77-page report on language services provided to LEP individuals is based on survey responses from 37 local departments of social services (LDSS). Language services are mechanisms used to facilitate communicate with LEP individuals. Interpreter and translation services are two distinct types of language services. The report evaluates LDSS responses, identifies effective policies and practices in other states and immediate action steps that must be taken, and proposes recommendations on improving language services to LEP individuals. This summary will highlight the main features of the larger report.

In 2004, the Office of Children and Family Services (OCFS) began developing an agency-wide plan for providing language services to limited English proficient (LEP) individuals. The plan was to ensure compliance with President Bill Clinton's 2000 Executive Order (EO) 13166, "Improving access to services for persons with limited English proficiency," regulations enforcing Title VI of the Civil Rights Acts of 1964, and the U.S. Department of Health and Human Services (HHS) LEP Guidance which describe the obligation of all agencies that receive federal funding to ensure LEP individuals are provided meaningful access to programs and services.[2]

OCFS issued Information Letter (INF) 06-OCFS-INF-05 on May 10, 2006 and asked each county program, local department of social services (LDSS), and volunteer and community programs to answer the 43 questions in the LEP survey.[3] These questions were to assess the types of language services provided to LEP individuals in programs. Since few volunteer programs responded, the OCFS report is based on the responses from 37 LDSS's.[4]

The LEP survey responses of each LDSS were evaluated and compared according to the four objectives as outlined in EO 13166:

1. The number or proportion of LEP persons in the eligible service population,
2. The frequency with which individuals with LEP come in contact with the program,
3. The importance or nature of the service provided by the program, and
4. The resources available to help meet the needs of individuals with LEP.

The number or proportion of LEP persons in the eligible service population.[5]

In the first set of questions, OCFS asked LDSS's to report on the total eligible LEP population in each services area. Most LDSS estimates of LEP individuals who attempted to access the programs matched the number of those who used or received services, suggesting the estimated number of LEP individuals that attempted to access LDSS services was not accurate. Out of 37 programs, OCFS believed only 15 provided reliable estimates of the number of LEP individuals and the total number served. Based on estimates provided by 33 programs, OCFS determined 6,753 LEP individuals use LDSS services each month.

The frequency with which individuals with LEP come in contact with the program.[6]

OCFS asked each LDSS to estimate how frequently LEP individuals are provided services and to list the six languages most commonly encountered. Of the 49 language reported by LDSS's, ninety-seven percent reported they served Spanish-speaking clients, followed by American Sign Language (ASL) or Braille (59%), and Russian (41%). Twenty-two programs identified Spanish as the most essential language, for which bilingual staff were needed. In 34 programs Spanish was

(Continued on page 14)

OCSF Report—continued

(Continued from page 13)

listed among the top six most commonly encountered languages, 16 included ASL, and 11 mentioned Russian. Spanish-speaking individuals were encountered almost daily in 11 programs, 2-9 times a month by 5 programs, and 1-12 times a year by 15 programs.

The importance or nature of the service provided by the program.[7]

This section of the survey included several questions aimed at documenting some of the programs' operating procedures. Twenty-four programs reported using signs or posters to announce the program in a language other than English, and in almost all of these programs the other language was Spanish. Half of the programs had signs or posters announcing language services in 28 of the 49 languages encountered. In 30 of the 37 programs notices of rights or benefits were available in Spanish, but only three had this information available another non-English language.

Written applications and consent materials were only available in 9 of the 49 languages in 78% of the programs reporting having these materials. Most programs (73%) reported bilingual staff, but close to half of these programs were only able to provide assistance in Spanish. About half of the programs had bilingual staff to assist with case coordination but for 46% these services were available in Spanish only. In addition, only 39% of programs that conducted activities that are mandatory for continued enrollment did so in a language other than English.

While 23 programs reported that they have renewal or recertification forms that are mandatory for continued enrollment, 21 of these programs only had these forms in one additional language, Spanish. In addition, 36 out of 37, reported they encountered Spanish-speakers, but only 29 had the application or consent forms in Spanish. OCFS also noted how it appeared there was inadequate bilingual Spanish-speaking staff to assist with case coordination, and for other languages these resources this even more limited.

The resources available to help meet the needs of individuals with LEP.[8]

The final section of the survey was designed to address existing and potential resources to assist programs in the development and implementation of a statewide plan to improve access for individuals with LEP. Less than one-third of the programs (27%) had a form that explained the rights of an LEP individual. Most of the programs (82%) reported bilingual employees, and 70% said these employees were Spanish-speaking. Despite a variety of languages spoken, nearly one-third of the programs reported that less than 1% of their employees were bilingual and able to communicate verbally or interpret orally in another language.

When communicating with LEP individuals, the most frequently reported method was using friends or relatives to communicate verbally with clients (89%). For written translations, 68% of programs rely on employees, followed by the use of friends and relatives (59%). Only two programs had a mechanism in place to track requests for services by LEP individuals. Many programs also reported challenges and concerns that were raised when they provided language services, and how professional interpreters were needed in child and family welfare cases because of the sensitive information, and the potential biases when friends and family members are used to interpret.

Successful Practices[9]

The OCFS report documented some successful practices in New York and other states. Practices at the New York City Administration of Children Services (ACS) have removed some of the language barriers. The report also noted services agency resources available for the translation of document. OCFS then looked at LEP plans from other states with comparable LEP populations. Several states (Minnesota, California, Georgia, and Texas) were advanced in responding to LEP requirements and OCFS looked at the common features of those four states. OCFS also did a cost and benefits analysis based on the 2002 Office of Management and Budget (OMB) prepared a report to Congress summarizing the total costs and benefits associated with providing language assis-

(Continued on page 15)

New York Manual for Administrative Law Judges (ALJ's) & Hearing Officers

The 2002 manual for administrative law judges (ALJ's) and hearing officers is based on a collaborative project of the 1960's and 70's by several state agencies including the Department of Civil Service. The manual describes the proper role of ALJ's and hearing officer in the process of administrative adjudication and offers suggestions for addressing many issues they will likely confront. The foreword cautions that the manual should not be used in asserting that an ALJ or hearing officer has in some way erred. A web-based and PDF version of the 483-page manual is available at: http://www.cs.state.ny.us/pio/hearingofficermanual/hearingofficer.htm

Special thanks to James T. Murphy, Legal Services of Central New York, Inc. for making sending a link to this resource.

OCSF Report—continued

(Continued from page 14)

tance services.

Needs and Recommendations[10]

The last portion of the report prioritizes the LEP needs, and makes recommendations regarding possible next steps to ensure meaningful access for LEP individuals statewide. High priority needs OCFS identified included:

1. more support to translate mandatory forms and services into Spanish,
2. more services for the blind and visually impaired and that are Deaf or hard of hearing,
3. improved translation services for LDSS programs that serve Russian and French Creole clients,
4. designating Nassau, Rockland, Suffolk, and Westchester as high priority areas and start pilot programs to bolster access for LEP individuals, an
5. a centralized language bank is needed to help support LDSS programs that frequently serve individuals with LEP with diverse or unique language needs.[11]

Lastly, OCFS described two of the three offered recommendations as immediate action steps:

1. Establish an interdepartmental work group to address EO 13166 at a state level with other state agencies
2. Establish an OCFS intra-agency work group or bureau to oversee the development, implementation, and ongoing monitoring of EO 13166
3. Develop a formal LEP plan for OCFS.[12]

Footnotes

[1] Available at, www.ocfs.state.ny.us/main/reports/LEP2007.pdf (PDF)

[2] *See* The Needs of and Services for Persons with Limited English Proficiency (LEP): Findings from OCFS's LEP Survey, (OCFS Report), pg. 3-6.

[3] Available at: http://tinyurl.com/26tfbz (PDF)

[4] *See* OCFS Report, pg. 7-15.

[5] *See* OCFS Report, pg. 16-18.

[6] *See* OCFS Report, pg. 18-22.

[7] *See* OCFS Report, pg. 22-31.

[8] *See* OCFS Report, pg. 32-37.

[9] *See* OCFS Report, pg. 38-46.

[10] *See* OCFS Report, pg. 47-53.

[11] *See* OCFS Report, pg. 47-48.

[12] *See* OCFS Report, pg. 48-53.

Doe v. Doar

Court Strikes Down Regulation that Reduced Public Assistance Benefits to Families with Disabled Household Members

By Susan Antos

On September 13, 2007, after over three years of litigation, the class action *Doe v. Doar* concluded when Monroe County Supreme Court Justice David Egan signed a judgment declaring that 18 NYCRR 352.2(b) is invalid because it violates Social Services Law §§131-a; 131-c and 209. [1] The decision will affect tens of thousands of low income families with disabled household members who were underpaid public assistance benefits and who will now collectively receive retroactive awards totaling tens of millions of dollars.

The challenged regulation, which was effective July 7, 2004, had repealed the rule that required that Supplemental Security Income (SSI) be considered invisible when calculating the eligibility and amount of public assistance due to families with children where at least one household member received SSI. The rule required that member of the household on public assistance be provided with pro-rated grants. At the time the rule was enacted, the Office of Temporary and Disability Assistance (OTDA) estimated that the regulation would reduce public assistance benefits to $30 million per year.[2]

On September 14, 2007 OTDA issued a General Information System (GIS) message (06 TA/DC011) to all social services districts advising them that pro-rated budgeting is no longer permissible. Because there are approximately 27,000 open *Doe* cases, it will take a few months for currently budgeted *Doe* cases, it will take a few months for currently budgeted *Doe* cases to be restored. However, for all newly opened cases, current cases where a household member receives SSI for the first time and all pending fair hearing decisions, the effect of the judgment in *Doe* should be immediate. Further, effective September 14, 2007, *Doe* proration may not be applied to families that applied for public assistance before that date, but who were still in application status on September 14. [3]

On October 16, 2007, OTDA issued Administrative Directive 07 ADM-06 advising districts how to rebudget open cases and provide and calculate retroactive benefits to all eligible class members. Most open *Doe* cases will be restored through mass re-budgeting (MRB), also called mass authorization (MRA). However, MRB procedures will differ between New York City and the Rest of the State (ROS). This is because New York City coded *Doe* cases in a way that makes them easily identifiable. Outside of New York City, the Welfare Management System computer can not differentiate *Doe* cases from cases which are pro-rated for other reasons. Therefore in the ROS, local districts will have to individually review all pro-rated cases.

Rest of the State

By October 13, 2007, OTDA will provide social services districts outside of New York City with a list of all active *Doe* cases that are coded as pro-rated. *Doe* cases will be a substantial sub-set of these cases. Within three weeks, the districts will be expected to have reviewed these lists, and determined whether the cases involve *Doe* pro-ration and if the case is an active *Doe* case. A case is considered active on September 14, 2007, even if the case was clocking down to close on that date or after that date. [4] If the case is an active *Doe* case, the district will remove the pro-ration at the next contact, the next recertification, but no later than 6 months after having received the lists. At the same time that the case is re-budgeted, the worker must determine and authorize the retroactive benefit. [5]

Doe class members will not receive retroactive benefits based on the actual amount that each household was underpaid. Each household's retroactive award will be based on a formula, calculated as follows: the worker will count the months since the first month of *Doe* budgeting and multiply that number by a number that equals the difference between the case properly budgeted and *Doe* budgeted at the point in time that the pro-

(Continued on page 17)

Doe v. Doar—continued

(Continued from page 16)

ration is being removed. [6] If the case was *Doe* budgeted on in July 2004, the effective date of the invalid regulation, the retroactive award will go back to that date. If there were breaks in assistance and the pro-ration was in place at the time of each closing, and the household remained in the district, and became eligible for public assistance again with the same head of household, the district will count the closed as well as the open months in calculating the underpayment. [7] The calculation will apply regardless of other changes in the case (i.e. income, household size) during the months that the retroactive award is being calculated.

By April 13, 2008, the local districts will have reviewed all the cases on the list. All active *Doe* cases will receive a notice advising them of the amount of the prospective and retroactive relief and an explanation of how retroactive relief was calculated. OTDA will review the lists which have been processed by the ROS districts no later than June, 2008 to assure that all cases have been identified, benefits issued and notices sent.

New York City

Before November 13, 2007, OTDA will run a MRB for all open *Doe* cases in New York City. This MRB will budget the household prospectively. No later than March 13, 2008, OTDA will run a second MRB to calculate retroactive benefits. This calculation will take the difference between the public assistance grant before and after pro-ration (calculated for one snapshot month) multiplied by the number of payment cycles that the person received reduced payments. As in ROS calculations, periods of ineligibility will be countable months so long as the case maintained the same head of household. Months that the household lived out of the district will be excluded. Persons will receive a written notice advising them of the amount of retroactive relieve and how such relief was calculated. The retroactive benefits will be paid within 15 days of the written notice.

How Will Class Members Get Their Retroactive Benefits?

Retroactive benefits will be issued on the recipient's Electronic Benefit (EBT) card. Many stores have limits on the amount of cash that can be distributed at one time—often no more than $200. Because many class members will be receiving thousands of dollars in retroactive benefits, they may have to go to a bank instead of a grocery store to get their cash. Class members should go to ATM case dispensing machines located at participating banks that do not charge a fee. These banks can be located by zip code at: http://www.otda.state.ny.us/main/ebt/zips/default.asp.

Fair Hearing Rights

Individuals will have a right to receive a fair hearing regarding the calculation of their retroactive benefits. However, because the methodology calculating liquidated damages by use of a formula is part of the court order, the fact that the retroactive benefits were not individually calculated by were calculated by formula will not be hearable. For example, an Appellant may properly assert that the agency did not count the correct number of months in the formula. The Appellant who asserts that the underpayment does not represent their actual underpayment will not be successful at the fair hearing.

Cases That Have Moved From One Social Services District to Another

Where *Doe* households have moved from one social services district to another, advocates will have to monitor closely to assure that their clients receive all of the retroactive benefits to which they are entitled. The ADM requires that the current district of residence must calculate the monthly underpayment amount using the formula set forth above and issue the retroactive payment for the months that the individual resided in the social services district. The current district will then notify the former district and using the monthly underpayment amount calculated by the current district, the former district will pay its share of the retroactive award based upon the number of months that the *Doe* class member resided in the district. [8]

Local districts are not allowed to apply the retroactive *Doe* underpayment against any existing overpayment. [9]

(Continued on page 18)

Doe v. Doar—continued

(Continued from page 17)

Treatment of Retroactive Awards: Effect on Food Stamps and Medicaid

The retroactive award will not be considered as income or as a resource for public assistance purposes. So long as the family remains categorically eligible for public assistance, the retroactive payment will not affect food stamps. If the family loses categorical eligibility (i.e. they are eligible on September 14, 2007, but are non longer eligible) the payment will be treated as a resource until January 1, 2008. [10] With respect to Medicaid, the payment will be excluded as income in the month received and excluded as a resource for the following month. If any of the award remains in the following month it will be counted as a resource. [11]

Aid Continuing Recoveries

Doe class members who contested *Doe* budgeting at a fair hearing and received aid continuing while their hearing was pending may be re-budgeted in one of two ways. If the district calculates the under payment from the effective date of the reduction (i.e. after the hearing was lost and aid continuing ended, then the overpayment on the books will be deleted and the class member will be reimbursed for any aid continuing overpayment recovered through recoupment. [12] If the district calculates the underpayment as of the effective date of the notice, and issues a retroactive award covering those months, the aid continuing overpayment will remain on the books. For clients that have their underpayments corrected this way, it is sure to be confusing!!

What if the Head of Household Changed?

If a grandparent caregiver has two children in her care, one of whom is on SSI and one of whom is on public assistance, the public assistance child would have been *Doe* budgeted (1/2 of a grant for two), and should be re-budgeted as a grant for one person. OTDA has taken the position that if the caretaker relative changes (for example if an aunt became a care giver), no payment will be issued to a current caretaker for a period that of a former caretaker head of household. The ADM indicates that exceptions can be made to this rule. If you have a client in such a situation, and are unable to resolve it in your client's favor, please contact Susan Antos at the Empire Justice Center.

Supplemental Security Income Awards Paid to Family Assistance Households

A person in a Family Assistance household who becomes eligible for SSI has their retroactive SSI benefits adjusted downward based on information that the local social services district provides to the Social Security Administration (SSA). The local district sends the SSA a form which reports the difference in the Family Assistance benefits payable to the household with and without the SSI recipient in the budget for each month that the person received retroactive SSI benefits. The award is reduced by this differential. Because many districts (not New York City), reported the prorated differential which resulted from *Doe* budgeting, these families received an underpayment of SSI benefits. OTDA has agreed to correct this underpayment in all *Doe* households where the household is currently eligible for public assistance. The Empire Justice Center is exploring whether there is a remedy available through the SSA for families that are not eligible for the OTDA retroactive benefit. If you have a client in such a situation, please contact Susan Antos at the Empire Justice Center.

Closed Cases

Tell your clients—DO NOT IGNORE THIS LETTER!! Persons who no longer have household members on public assistance must go through a complicated process to preserve their right to ever receive a retroactive payment. It is most important that they promptly respond to correspondence from OTDA and their local district to preserve their rights. OTDA has maintained a file of potential *Doe* class members with closed cases, and these names will be matched against other case information in WMS (i.e. food stamps, Medicaid) to get the most current address. No later than January 13, 2008, OTDA will send a letter to all persons who received reduced benefits as a result of *Doe* budgeting but who no longer have open public assistance cases. The letter will advise the class members that they have **60 days** to have their eligibility for public assistance evaluated and will ask that a form be returned in a prepaid envelope addressed

(Continued on page 19)

Doe v. Doar—continued

(Continued from page 18)

to OTDA, not the local social services district. It is most important that you advise your clients to respond to this letter, even if they are not eligible for assistance now. Persons who fail to respond within 60 days and who fail to reapply are **foreclosed from receiving a retroactive *Doe* award** in the event that they become eligible for public assistance in the future. [13]

Persons who do respond will be given an appointment. Persons may reschedule their appointment if they make a request to do so within 60 days of the date of the letter. Persons who come in for an appointment will have to reapply for benefits. They will not have to go to orientation or job activities and will not have to verify any elements that have previously been documented (social security number, date of birth, citizenship). [14] They will have to document anything that has changed (household composition, income). If the person is found eligible for ongoing public assistance the district must open the case. Once the case has been opened, ROS districts must issue retroactive benefits within 30 days if the case is a Family Assistance case and within 45 days if the case is a Safety Net Assistance case. In New York City, an MRB will be conducted for each closed case within 180 days of the date that the closed case list is provided to HRA by OTDA on or before November 13, 2007.

Retroactive Relief for Persons Not Eligible for Ongoing Public Assistance

As a general rule, persons who are not eligible for ongoing public assistance will not receive a retroactive benefit unless their cases are reopened. Class members who are not currently eligible for public assistance will receive a letter setting forth the amount of retroactive benefits that they will be entitled to receive if they become eligible for public assistance in the future. If they become eligible for public assistance in the future, they will receive retroactive benefits if they present this document to their caseworker.

Fast Track Relief

Over the course of this litigation, many class members were brought to the attention of counsel for the plaintiffs. For those identified class members who reside outside of New York City, will received retroactive benefits on or before November 13, 2007, whether or not their cases are open or closed.

Rice Budgeting Still Intact for Households Consisting Only of Adults

The decision in *Doe* only affects those households that have a disabled household member and contain a child. The pro-rated budgeting which applies to adults who live in households without children, often called *Rice* budgeting, still applies where one of the adults receives SSI and is legally responsible for the other adult in this household. [15]

The Plaintiff class in *Doe* was represented by Bryan Hetherington and Susan Antos of the Empire Justice Center, Jane Stevens of the New York Legal Assistance Group, Marc Cohan of the National Center for Law and Economic Justice and Richard Blum and Scott Rosenberg of the Legal Aid Society in New York City.

Footnotes

[1] The judgment and the remedial plan are posted in the Benefits Law Database section of the Online Resource Center at http://onlineresources.wnylc.net/welcome.asp?index=Welcome. The GIS message and the ADM are also posted to the Online Resource Center.
[2] New York State Register, January 21, 2004, p.15, available at: http://www.dos.state.ny.us/info/register/2004/jan21/pdfs/rules.pdf
[3] 07 ADM-6, p.4
[4] Id
[5] Id. *at* 8
[6] Id
[7] Id. at 9
[8] Id. at 14.
[9] Id. at 4.
[10] Id. at 16
[11] Id.
[12] Id. at 15
[13] The remedial plan provides one narrow exception to this time limit: "Such time limit for response is without prejudice to any right such class member has under any provision of law to claim good cause for failure to have timely asserted his or her right to respond to the letter timely."
[14] 07 ADM-6 11.
[15] See 94 ADM-10, available at http://onlineresources.wnylc.net/pb/docs/94_adm-10.pdf, for a description of *Rice* budgeting. For more information about the *Rice cases, visit the Benefits Law Database on the Online Resource Center at: http://onlineresources.wnylc.net/welcome.asp?index=Welcome.*

Regulatory Roundup

By Susan C. Antos

Regulatory Round Up reports on administrative rule making of interest to public benefits specialists. The rulemaking described below appeared in the New York State Register from August 15, 2007 to October 24, 2007. All references are to 18 NYCRR, unless otherwise indicated. If you are interested in reading the text of a proposed rule or the summaries of public comment and the response regarding an adopted rule, please contact Connie Wiggins (cwiggins@empirejustice.org). Any comments submitted by Empire Justice Center on proposed regulations, are available at www.empirejustice.org. From the "Issue Areas" bar, click on the "Public Benefits" section, go to "Cash Assistance" and then "Comments on Regulations."

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
10/24/07	12/08/07	415.9(j)	**Market Rates for Subsidized Child Care:** This proposed regulation, which provides updated rates for the payment of child care services received by low income families, has also been promulgated on an emergency bases. These rates vary by geographic area, age of the child, and type of care (i.e., center based, family child care). They are based on a market research survey of 4800 licensed and registered providers, and establish a payment rate at the 75th percentile of the amounts charged. The survey was conducted in both English and Spanish where needed.
10/24/07	12/08/07	423.5	**Performance and Outcome Based Provisions for Preventative Services:** These regulations have been proposed to comply with Part H of Chapter 57 of the Laws of 2007, which requires that any preventative services provided pursuant to 409-a of the Social Services Law include performance or outcome based provisions effective January 1, 2008.
10/24/07	12/08/07	415.2	**Child Care Subsidies for Employed Public Assistance Recipients:** This proposed rule conforms that state regulation governing eligibility for child care services for persons who are eligible for public assistance but who only wish to receive child care benefits, to a statutory amendment made to Social Services Law §410-w(a).

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
10/24/07	12/08/07	352.8 352.23(d) 352.29(h)(2) 387.17(d)(4) 393.4(d)(1)	**Changing Regulatory References from "Temporary Assistance" to "Public Assistance:"** Noting that there is no statutory or regulatory definition for "temporary assistance," this proposed regulation replaces the phrase "temporary assistance" with the phrase "public assistance."
10/17/07	12/01/07	347.10(a)(8)(9), (b) & (c)	**Child Support Standards Chart:** This proposed update to the child support standards chart reflects the revised poverty guidelines as reported by the federal Department of Health and Human Services, thereby increasing the self-support reserve to $13,783 (135% of poverty for a household of one).
8/22/07	10/08/07	11 NYCRR 362-2.7(d), (e), (f) and 362-2.8	**Healthy New York Program:** This proposed rule would require the Healthy New York Program to offer a high deductible health plan (at least $1,150 for individuals and $2,300 for family coverage), thereby creating an insurance product compatible with health savings accounts, which allow users to deposit pre-tax money into an account and withdraw the money tax free for medical expenses. The proposed rule would also require that Healthy New York plans offer prostate cancer screening, limited home health visits (40 per year and post hospital or surgery physical therapy visits 30 per year), benefits not covered previously.

Emergency Rule Making

Date of Filing	Rules Expire On	Regulations Affected	Summary
10/1/07	12/29/07	415.9 (j)	**Market Rates for Subsidized Child Care:** This emergency rule provides updated rates for the payment of child care services received by low income families. These rates vary by geographic area, age of the child and type of care.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
9/24/07	10/10/07	357 421 428 430 441, 443	**Home Studies for Adoptive and Foster Placement:** This rule, which was promulgated on an emergency basis on October 1, 2006, December 28, 2006, April 18, 2007, June 26, 2007, and September 24, 2007, has finally been promulgated as a proposed rule. It permits foster children who are being released into their own care to get their medical and education records at no charge. It requires child protective services information inquiries to other states when a person applying to be an adoptive or foster parent has resided out of state within 5 years of the application. It establishes time frames for the completion of home studies.
9/24/07	10/10/07	Part 421, 443	**National Criminal History Records Check:** The federal Adam Walsh Child Protection Act of 2006 amending Social Services Law §378-a(2) requires, effective January 11, 2007, national criminal history record checks through the FBI of all persons applying for certification or approval as foster or adoptive parents and all persons over the age of 18 residing in the homes of such applicants. Refusal to sign a consent for the FBI check will result in a denial of the application. The regulations also require that all such persons be fingerprinted. The emergency rule was previously filed on an emergency basis on December 28, 2006, April 18, 2007, June 26, 2007 and August 22, 2007.

HRA Agrees to Remedy Work Exemption Problems

By Kate Callery & Louise Tarantino

Many clients in New York City who have already won their Title II and/or Title XVI cases are still being called in for employability appointments before their SSI is paid. These clients may have had their Public Assistance cases closed or sanctioned for not attending a WeCARE or other employability appointment while they are waiting for their favorable SSI decision to be processed and paid. Since it often takes a few months to get a favorable SSI decision actually paid by the Social Security Administration, this problem comes up frequently.

Katie Kelleher of the Law Reform Unit of the Legal Aid Society reports that HRA has agreed to fix the problem. HRA agrees that individuals found eligible for SSA disability benefits (Title II or Title XVI) should be exempt from work activities. HRA is developing a procedure to exempt these clients, but until a policy directive is actually issued, advocates should contact the HRA Legal Department and remind them that such clients are supposed to exempt.

Katie recommends writing a letter to the HRA Legal Department to insure that these cases are resolved so that clients are exempted from work activities, are not sanctioned, or do not have their cases closed for failing to comply with work requirements.

A sample letter is available as DAP# 466. Simply add your client's details, attach a copy of the favorable SSI/SSD decision, and send to the HRA Legal Department. If you have received a favorable decision on the record but do not yet have a written decision, send the letter, noting the date of the hearing and attesting that Judge issued a favorable decision on the record. The letter should be sent to David Lock at HRA Legal: lockd@hra.nyc.gov; fax number 212 331-4465; phone number 212 331-5146. David Lock prefers email, with a copy of the favorable decision attached as a pdf file. Katie recommends also faxing a copy of the letter and decision to have proof that you sent it.

Katie reminds advocates that many sanctions and negative case actions are automatically posted by computer when the computer registers that a client has not appeared for an appointment or submitted a document. Thus, it is extremely likely that by the time HRA acts on your client's case to change your client's employability computer code to EXEMPT, there may be negative case actions looming on the case record. Therefore, any negative case actions that may have been taken against your client must also be corrected. The sample letter attached includes language asking HRA to correct any negative case actions that may have already been taken against your client.

Katie encourages advocates with questions to contact her at kkelleher@legal-aid.org, or 212-577-3307. Katie notes that these negotiations with HRA arose in the context of class action litigation brought by the Legal Aid Society and co-counsel Millbank, Tweed Hadley & McCloy against HRA on behalf of clients targeted for HRA's WeCARE employability program. The case - *Lovely H. v. Eggleston* - alleges that HRA lacks procedures necessary to provide reasonable accommodations to disabled clients needed by them to comply with the conditions of eligibility for public benefits at their local Job Centers. For background on the case along with reported decisions see http://www.legalaid.org/en/whatwedo/lawreform/civillawreformunit/activecases/disabilityrights/lovelyhveggleston.aspx

Court of Appeals Limits Oral Arguments

By Kate Callery & Louise Tarantino

Looking forward to a trip down to Foley Square in the Big Apple to show off your oral argument skills? That might not happen too often under a new rule proposed by the Court of Appeals for the Second Circuit. The Circuit is moving from a procedure under which oral argument is the default and the norm, to one where oral argument will be had only if counsel requests it, and then only if "the facts and legal arguments are [not] adequately presented in the briefs and record, and the decisional process would . . . be significantly aided by oral argument."

According to the Court, "counsel for all parties must confer (by any convenient means) and must file, within 14 days after the due date of the last brief, a joint statement indicating whether the parties - specifying which, if fewer than all - seek oral argument, or whether the parties agree to submit the case for decision on the briefs."

The Court amended Local Rule 34 of the Local Rules for the Court of Appeals for the Second Circuit on an interim basis, effective immediately. It proposes adopting it as a final rule after publication and comment. Any comments (presumably only in writing and without oral argument) are due by September 27, 2007. The publication is available at: http://www.ca2.uscourts.gov//NDocsews/localrule34final.pdf.

Advocates may want to consider seriously requesting oral argument under the new rule in Social Security appeals. Veterans of Court of Appeals arguments can attest to the number to times they have seen oral arguments actually make a difference.

Criminal Mischief—continued

(Continued from page 3)

Person, 239 A.D.2d 612. Although jurisdictions in the 2nd Department are the only courts subject to this legal interpretation, anecdotally it has been reported that many criminal justice systems (police agencies, prosecutors, judges) around the state have similarly elected to subscribe to this interpretation. See also *People v. Kheyfets*, 174 Misc.2d 516 (Supreme Court, Kings Co., 1997)

[4] See *People v. Brown*, 185 Misc.2d 326 (Criminal Court, City of New York, 2000); *People v. Kheyfets*, 174 Misc.2d 516 (Supreme Court, Kings Co., 1997); *Jackson v. United States*, 819 A.2d 963 (D.C. Ct. App., 2003); *State v. County of Maricopa*, 188 Ariz. 372 (Div. 1, Dept. E, Ct. App. 1997); *People v. Kahanic*, 196 Cal.App.3d 461 (5th Ct. App., 1987); *People v. Schneider*, 139 Ill.App.3d 222 (5th Dist. 1986); *State v. Zeien*, 505 N.W.2d 498 (1993); *Kergides v. Kergides*, 2005 WL 3739704 (N.J. Super.A.D., 2006); *Vanderburg v. State*, 843 S.W.2d 286 (1st Dist. Ct. App., 1993); *State v. Coria*, 146 Wash.2d 631 (2002); Lutz & Slye, *Where Criminal Mischief Is Not a Crime*, 10/31/97 N.Y.L.J. 1 (col.1), Lutz & Bonomolo, *My Husband Just Trashed Our Home: What Do You Mean That's Not a Crime?,* 48 S.C.LRev.641,651 (1997).

[5] Family Court Act §812(1) and Criminal Procedure Law §530.11

[6] PL §145.00 Criminal Mischief in the Fourth Degree, PL §145.05 Criminal Mischief in the Third Degree, PL §145.10 Criminal Mischief in the Second Degree, and PL §145.12 Criminal Mischief in the First Degree

[7] See Endnotes iii and iv, as well as *People v. Chatmon*, 276 A.D.2d 496 (2nd Dept. 2000)(court held that while defendant could not be convicted or criminal mischief to property jointly held with his wife, he was properly convicted of damage to the same property as his mother-in-law was also an owner of the premises, he possessed no interest in her share and damage to her share was damage to the property of another). Additionally, critics of *Person* and its general reasoning have argued that while one spouse may have the right to harm their own interest in the property, they do not have the right to simultaneously destroy the other's interest in the property and therefore such conduct is criminal mischief. *Kheyfets* at 520 [citing Lutz & Bonomolo, *My Husband Just Trashed Our Home: What Do You Mean That's Not a Crime?,* 48 S.C.LRev.641, 651 (1997)]

[8] See Endnote 5

[9] Criminal Procedure Law §530.11

[10] Criminal Procedure Law §530.12

[11] Criminal Procedure Law §140.10(4)

[12] Executive Law §214(a)

[13] Family Court Act §841(e)

DV Legislative Update—continued

(Continued from page 6)

cases), the maximum number of children a law guardian can represent, effective assistance of counsel, the complexity of the proceedings, and the nature of the court appearances required on that child's behalf. The law was effective on 8/28/07.

Vetoed by the Governor on 8/28/07:

Court Required to Review Litigant's History Prior to Issuing Custody or Visitation Orders

Bill Number: A.7329A (Weinstein) / S.4877A (DeFrancisco) Status: Passed Assembly 6/20/2007; Passed Senate 6/21/2007, Vetoed by the Governor on 8/28/07

By amending Domestic Relations Law §240(a)(1), Family Court Act §651(e), Social Services Law § 422(4)(A)(e), Executive Law § 221-a(6), and the Correction Law §168-b(2)(b) the law would have required Family and Supreme courts to conduct a complete a review of the Central Register of Child Abuse and Maltreatment, the Registry of Orders of Protection and Warrants of Arrest, and the Sex Offender Registry databases regarding the parties before them seeking custody or visitation. The court would have also been empowered to disclose the fruits of the review to all counsel, including law guardians. The court would not have been permitted to issue a temporary or final order of custody or visitation without reviewing the applicable databases and notifying counsel of its results.

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
IT Communications Manager

Cathy Roberts, Paralegal

Louise M. Tarantino, Attorney
Disability

Barbara Weiner, Attorney
Food Stamps, Immigration Benefits

Connie Wiggins, Administrative Assistant

Saima Akhtar, Law Intern
Benefits Law Database

Jessica Ansert, Law Intern
Fair Hearing Bank

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

Rebecca Case Grammatico, Attorney
Consumer

Gladys Castro
Administrative Assistant

Doris Cortes, Paralegal
Disability

Katherine Courtney, Attorney
Disability

Trilby de Jung, Attorney
Health

Peter Dellinger, Attorney
Consumer Law, Civil Rights

Rita Eygabroad, C.A.S.H

Rebecah Corcoran, Finance Assistant

Jonathan Feldman, Attorney
Education, Civil Rights

LJ Fisher, Attorney
Disability

Jane Gabriele, Attorney
Education

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

Angela Hale, Paralegal, Disability

Michael Hanley, Attorney
Housing

Tim Holler
Grants and Office Administrator

Kristi Hughes, Director
Development & Administration

Candice Lucas, C.A.S.H

Ruhi Maker, Attorney
Community Reinvestment, Consumer

Michael Mule, Attorney
Hanna Cohn Fellow

Michelle Peterson
Training & Publications Coordinator

Brandi Rauber, Paralegal
Consumer

Tania Santiago
Administrative Secretary

Becky Schroeder
Director of Finance & Human Resources

Amy Schwartz, Attorney
Domestic Violence

Barbara van Kerkhove, PhD
Community Reinvestment

Warren Wightman
Administrative Secretary

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

Robert Cisneros, Attorney

Long Island Office

Empire Justice Center at the Public Advocacy Center, Touro Law School
225 Eastview Drive, Room 222, Central Islip, NY 11722
Don Friedman (631) 650-2306 ◆ Linda Hassberg (631) 650-2305