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Legal Services Journal

Recent Settlement in *Rodriguez v. DeBuono*

New Standards for Task-Based Assessment in the Medical Personal Care Program

By Valerie J. Bogart

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The author gratefully acknowledges the contribution by Rodriguez counsel Leslie Salzman, Donna Dougherty, and Michael Scherz of pleadings and information used in this article.

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In January 2003, two settlements were finalized after six years of highly adversarial litigation in *Rodriguez v. DeBuono*, a lawsuit that challenges aspects of task-based assessment in the Medicaid personal care program. The settlements were with two of the three defendants - the New York City Human Resources Administration ("the City") and the New York State Department of Health ("the State"). Claims against the Nassau County Department of Social Services are still pending. As a result of the settlement, a statewide directive was issued that provides that ". . . a care plan must be developed that meets the patient's scheduled and unscheduled day and nighttime personal care needs." General Information System (GIS) Memorandum to all Local District Commissioners and Medicaid Directors, dated January 24, 2003 This article explains the background of the case, the details of the two settlements, and suggestions for advocacy.

Background of *Rodriguez* Litigation

Rodriguez was commenced in the Southern District of New York in February, 1997 as a proposed class action against the State alone, with no local defendants, by five elderly and disabled recipients of Medicaid personal care services in New York City and Nassau County *Juana Rodriquez et al. v. Barbara DeBuono*, 97 Civ. 0700 (S.D.N.Y) (SAS). The action challenged the legality of local task based assessment (TBA) programs, au-

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thorized by the State, that authorized personal care services in amounts equal to the sum of pre-determined maximum allowable times for each task identified as needed by the recipient.

All plaintiffs' counsel are non-profit legal services offices and a law school clinic. Lead counsel is Leslie Salzman, Clinical Professor of Law at Cardozo Law School teaching in the Bet Tzedek Legal Services Clinical Program. Co-counsel includes Donna Dougherty, Director of JASA/Queens Legal Services for the Elderly, Michael Scherz of New York Legal Assistance Group, and James Baker of Northern Manhattan Improvement Corporation.

The plaintiffs claimed that they were being denied essential personal care services because of two general flaws in TBA programs. First, local districts were failing to provide services to cognitively impaired persons that were previously authorized under the rubric of "safety monitoring." Second, home care services were not consistently provided over the "span of time" during which the needs arose. The fixed TBA task times did not take into account unscheduled needs with ambulating, toileting, and transferring. Nor did TBA assure assistance with recurring needs with feeding and medications at the times of day when that assistance was required.

Plaintiffs claimed that defendants' task based assessment policies and practices violated various provisions of the state and federal Medicaid laws, federal disability discrimination laws, due process, and were arbitrary and capricious. The action sought declaratory and injunctive relief against the State to prohibit the continued use of TBA to the extent that it failed to provide for safety monitoring, as well as to adequately provide for continuing, recurring and/or unscheduled needs. Plaintiffs sought certification of a statewide class of Medicaid home care applicants and recipients.

Intervention by Local District Defendants and Class Certification

In March 1997, the district court granted leave for intervention sought by the social services districts of New York City, Nassau County, Westchester County, and Suffolk county as defendants, with each district seeking to defend its own TBA system. In the Spring of 1997, the court certified a statewide class on the safety monitoring claim, but certified only local subclasses of Medicaid personal care recipients from New York City and Nassau county "who have received or will receive an inadequate home care authorization due to the alleged systemic failure to authorize sufficient hours of care to cover the span of time during which unscheduled and recurring needs occur." *Rodriquez v. DeBuono,* 177 F.R.D. 143 (S.D.N. Y. 1997).

Adverse Ruling on Safety Monitoring Claims and Bifurcation of Remaining "Span of Time" Claims

After an 11-day preliminary injunction hearing held in early 1997, the court issued a preliminary injunction requiring defendants to separately assess and provide personal care services for "safety monitoring" of cognitively impaired person, but denied a preliminary injunction on the span of time claims. *Id.* Upon defendants' application, the court stayed the preliminary injunction pending appeal. The Second Circuit vacated the preliminary injunction without reaching the merits of the appeal. *Rodriguez v. DeBuono*, 162 F.2d 56 (2d Cir. 1998) (per curiam), *amended by* 175 F.3d 227, 233-36 (2d Cir. 1999) (*per curiam*) (concluding that the district court must not have found "imminent" irreparable harm in light of the court's stay pending appeal). On remand, the safety monitoring claim was bifurcated from the span of time claims. The district court held that the denial of safety monitoring violated the equality principles of the Medicaid Act and

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regulations and federal laws prohibiting discrimination based on disability and entered a permanent injunction requiring defendants to provide safety monitoring and "return to their pre-TBA definition of the program." *Rodriquez v. DeBuono,* 44F. Supp. 601, 620 (S.D.N.Y. 1999). The Second Circuit reversed this decision on the merits, finding that the State's exclusion of "safety monitoring" was reasonable and lawful because "independently tasked safety monitoring" was not provided to any recipient, and requiring the State to provide "safety monitoring" would "substantially narrow" the broad discretion given to states under the Medicaid Act to determine the extent of medical assistance. *Rodriguez v. DeBuono*, 197 F.3d 611 (2d Cir. 1999), *cert den'd*, October 2, 2000.

The "Span of Time" Claims

The parties continued to litigate the span of time claims in the district court, which led to settlement negotiations that continued from January, 1999 until these settlements were reached in 2002 and then finally approved after classwide fairness hearings held in January, 2003. Since the court had not certified a statewide class on the span of time claims, there is different relief within New York City.

Terms of Settlement with New York State

As required by the State settlement, (Stipulation and Order of Settlement, dated December 19, 2002) the State disseminated a General Information System (GIS) Memorandum to all Local District Commissioners and Medicaid Directors as well as to state administrative law judges on January 24, 2003. General Information Systems (GIS) Memorandum to all Local District Commissioners and Medicaid Directors, dated January 24, 2003. The GIS can be cited by individuals statewide to advocate for adequate assistance at the local Medicaid agency level and at state administrative fair hearings.

Significantly, the GIS provides that: "The assessment process should evaluate and document when and to what degree the patient requires assistance with personal care services tasks and whether needed assistance with tasks can be scheduled or may occur at unpredictable times during the day or night." In addition, the GIS provides that **". . .** a care plan must be developed that meets the patient's scheduled and unscheduled day and nighttime personal care needs."

The GIS also clarifies that the Second Circuit decision, *supra n* 6, which allows local districts to deny aide service time for "safety monitoring." This clarification was needed because both local districts and administrative law judges were using an overbroad definition of "safety monitoring," denying home care needed for a client to perform virtually any task "safely." If, for example, a family member unknowingly characterized an applicant as needing "safety monitoring" or "supervision" because of the risk of falling, hearing decisions incorrectly used the Second Circuit decision as a pretext for denying care. Assistance to prevent falling is more properly characterized as assistance with ambulation or transfer, not as "safety monitoring," which has the narrower meaning of supervising a person who has dementia to prevent unsafe behaviors such as wandering. The GIS provides, in part:

> ". . . [D]istricts are reminded that a clear and legitimate distinction exists between 'safety monitoring' as a non-required independent stand-alone function while no Level II personal care services task is being provided, and the appropriate monitoring of the patient while providing assistance with the performance of a Level II personal care services task, such as transferring, toileting, or walking, to assure the task is being safely completed. . . "

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This language helps to limit the confusion and clarify that services should be provided to assure that recognized tasks such as meal preparation, ambulation, and toileting are safely performed, providing essential clarification about the scope of personal care services to be provided by the local Medicaid districts.

A recent amendment to state regulations codifies one holding in a different case, *Mayer v. Wing*, (18 NYCRR 505.14(b)(5)(v), effective November 1, 2001, *codifying Mayer v. Wing,* 922 F.Supp. 902 (S.D.N.Y. 1996), *modified in part,* unpublished Orders (May 20 and 21, 1996); Stipulation & Order of Discontinuance (Nov. 1, 1997); *see also* NYS Department of Health GIS Directive 01 MA/044), also protecting Medicaid recipients statewide from harmful use of TBA The *Mayer* regulation exempts from Task-Based Assessment those individuals whom a local district determines to need 24-hour care, even if some of that care is provided by family. Such persons are a "*Mayer* 3" exception and are exempt from TBA.

For plaintiffs' counsel to monitor compliance with the State settlement in *Rodriguez,* for a one-year period, State defendants must produce a sample of fair hearing affirmances of personal care services task based assessments by New York City or Nassau County social services districts. The court retains jurisdiction over the State defendants solely for purposes of enforcing the stipulation and order of settlement until 45 days after the State's final production of fair hearing decisions at the end of the one-year production period.

Terms of the Settlement with New York City

Plaintiffs and the City signed a stipulation of settlement on August 7, 2002, which was so ordered by the Court after a class-wide fairness hearing on January 9, 2003. Stipulation of Settlement and Order of Dismissal, dated January 9, 2003 ("City Settlement"). Under the settlement, the City explicitly recognizes its obligation to authorize personal care assistance with identified unscheduled and recurring needs through an appropriate plan of care. Though the stipulation is not admissible in any other proceeding, including fair hearings, the City obligations are set forth in the memorandum, amended forms and instructions annexed to the Order and described below, all of which are admissible in any and all proceedings.

A. Revised Forms and Procedures

The City has agreed to utilize modified forms, guidelines, and instructions for assessing and authorizing personal care services until at least February 7, 2005. All City personnel must be trained on these new procedures by April 9, 2003. The significant changes in the forms, guidelines, and instructions are described below.

1. Memorandum of Director

Preliminarily, the City distributed, as agreed, a Memorandum from the Director of Field Operations for the City's Medicaid Home Care Services program, informing personnel involved in assessing and authorizing personal care services of anticipated changes in relevant forms, guidelines, and instructions that require the identification of the span of time needed for assistance with unscheduled needs and underscoring the obligation to ensure a plan of care to meet the needs of clients with unscheduled toileting, ambulating and transferring needs and/or recurring needs. Memorandum from John Turley, dated August 7, 2002 and to be reissued in February 2003 (exhibit E of City Settlement)(to be posted on gulpny.org). In addition, the Director's Memorandum reiterates the prohibition against use of TBA in 24-hour cases, including those in which part of the care is provided informally by family, based on *Mayer v. Wing*. *See n* 9, *supra*.

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First Department Overturns Family Court Finding of Neglect Against Victim of Domestic Violence

By Amy E. Schwartz, Domestic Violence Legal Program Coordinator

In a decision issued on February 25, 2003, the First Department unanimously overturned a ruling by New York County Family Court Judge Susan Larabee which held that a mother, Michele G., had neglected her three children because at least one of the children was present during an isolated incident of domestic violence perpetrated by the mother's ex-boyfriend. The case, In Re H/R Children, 2003 WL 462533 (N.Y.A.D. 1 Dept.), is a notable precedent for non-offending, battered women across the state who often face the likelihood of indicated child protective services reports and, possibly, removal of their children into foster care. Michele G. is also one of the named plaintiffs in the federal civil rights class action lawsuit entitled, *Nicholson v. Williams,* 203 F. Supp.2d 153 (E.D.N.Y. 2002).

The background facts, culled from both the recent *Nicholson* decision and the Appellate opinion, are as follows: Michele G. is the mother of three children who reside with her. She had a long-term relationship with her son's father, Mr. H., that ended in January 1999. However, the parties did not reside together since 1997. Following the separation, there were several verbal disputes regarding visitation that resulted in police intervention, however there were never any reports of violence or threatened violence. On July 6, 1999, Mr. H. returned their son to her apartment following a scheduled visitation. Upon his arrival Mr. H. flew into a rage after he discovered Ms. G. visiting with a male friend. Mr. H brutally attacked Ms. G's friend with a cleaver and when she attempted to intervene, the attacker then turned on her. The injuries inflicted on her were sufficient to require one week of hospitalization. One of the children was present during the attack, but did not suffer any physical injuries.

Following her discharge from the hospital, Ms. G. filed criminal charges, assisted with the police investigation, obtained an Order of Protection, and sought alternative, safe housing for herself and her children. However, the New York City Administration for Children Services, (ACS), became involved shortly after the incident. Despite Ms. G.'s active steps to protect herself and her children, ACS filed an Article 10 petition in the New York County Family Court seeking the removal of the children. The record also indicated that ACS also based its decision to file the neglect proceeding based upon the mother's alleged refusal to cooperate with ACS.

Following a hearing, the Family Court determined that the mother had neglected her three children by failing to protect them from domestic violence. The children were removed from Ms. G's care and, surprisingly, placed with a member of Mr. H's family. It is the Family Court's dispositional order of December 7, 2000 and the same court's January 2002 denial of a motion to vacate said order from which the instant appeal lies.

As an initial matter the Court addressed the procedural challenge regarding mootness. While the dispositional order had, in fact, expired by the time the matter was heard by the Appellate Court, they declined to moot the entire case stating that the "finding of neglect upon which the Family Court decision was based remained reviewable given the potential effect of such findings in any future proceedings."

Following its review of the facts, the Court found that the record on appeal was bereft of any specific instances of domestic violence committed by Mr. H. prior to the July incident.

First Department Overturns Court Finding—continued

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Accordingly, the July 6th incident was the sole episode of domestic violence, and as such, was insufficient to support a finding of neglect. The Court noted that if the Family Court record had contained information demonstrating that the July 6th incident was one in a series of incidents of violence or threats of violence against Michele G. or the children, or if the children witnessed these events and the mother failed to take steps to protect the children from the domestic violence, they would have affirmed the trial court's determination that the mother's conduct placed the children's physical, mental, and emotional condition in imminent danger of impairment. In so holding, the Court made a clear distinction between cases where there is a history and pattern of domestic violence and ones where there is an isolated incident. The Court also noted that the mother's refusal to cooperate with ACS following the incident was also insufficient in and of itself to support a finding of neglect. In its unanimous decision, the Court reversed and vacated the findings of neglect against the mother.

As it is the first federal civil rights case in the country to challenge the constitutionality of removing children from non-offending battered mothers, *Nicholson v. Williams* is being closely monitored by domestic violence and child welfare advocates, courts, lawmakers, governmental agencies, family and matrimonial attorneys, and law guardians throughout the nation. In *Nicholson*, Michele G and the other plaintiffs sued the ACS alleging that ACS's practice of removing children solely on the grounds that the mothers were victims of domestic violence violated were unconstitutional. Following nearly two months of trial, on March 18, 2002, District Judge, Jack B. Weinstein issued his comprehensive and lengthy decision. The Court's ruling made six specific findings regarding the City's present child welfare policies and practice: (1) ACS regularly alleges and indicates neglect against battered mothers; (2) ACS rarely holds abusers accountable; (3) ACS fails to offer adequate services to mothers before prosecuting them or removing their children; (4) ACS regularly separates battered mothers and children unnecessarily; (5) ACS fails to adequately train its employees regarding domestic violence; and (6) ACS's written policies provide insufficient and inappropriate guidance to its employees.

The *Nicholson* Court also found that City's actions violated key constitutional protections against substantive and procedural due process contained within the Fourteenth Amendment, the Fourth Amendment's right to be free from unreasonable search and seizure, the Ninth Amendment's case law-determined right to integrity of the family unit, the Thirteenth Amendment's prohibition against slavery and involuntary servitude, and the Nineteenth Amendment's prohibitions regarding sex-based discrimination. At the close of trial, the Court issued a remedial preliminary injunction against the City and the State to enjoin the unconstitutional practices. The suit remains pending in the federal courts and will be heard in the coming months. Although the case has not yet been completed, *Nicholson*'s state and national impact is only now beginning to be fully realized. Doubtless, the First Department's recent ruling in In Re H/R Children also potentially offers considerable precedential opportunity throughout the state.

On February 26, 2003, citing last year's ruling in *Nicholson,* Assembly Member and Chairman of the Children and Families Committee, Roger L. Green, introduced a new bill (A.05313 Green) into the New York State Legislature seeking an amendment of the statutory definition of "neglect". Interestingly, the language used by the First Department in H/R's February 25th ruling, is virtually identical to that in the legislation which was introduced only one day later. Assemblyman Green's proposed bill seeks to amend Sections 371 of the Social Services Law and 1012 of the Family Court Act, by expanding the definition of neglect to specifically "exclude a child of a custodial parent or

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GULP Welcomes New Health Law Attorney

GULP is very pleased to announce that Trilby de Jung has joined the staff of the Rochester office as the new Health Law Attorney. Trilby steps into the role of Health Law Attorney following the departure of Ellen Yacknin, who left GULP to take the bench in January as Rochester's newest City Court Judge.

Trilby will be providing statewide support to legal services attorneys on Medicaid issues by answering service requests, offering litigation support, hosting regional meetings of the New York State Department of Health Advisory Group, and providing training and other technical assistance services.

Trilby most recently worked at New York University Law School, where she taught 1st year law students research and writing and various other "lawyering" skills, and co-taught an upper class seminar on the death penalty. Prior to teaching, she was the Deputy Director of Policy for the AIDS Institute, where she worked on a wide range of AIDS related issues. She also spent two years litigating AIDS discrimination complaints for the New York City Commission on Human Rights. She graduated from the Northwestern School of Law at Lewis and Clark College in Portland, Oregon, and began her legal career as a public defender with the Legal Aid Society in Brooklyn.

Trilby can be reached at 585-454-6500 (ext. 8) or via e-mail at tdejung@wnylc.com.

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guardian who is a victim of domestic violence, unless it is established by the court that the child was present during an incident and harmed by the domestic violence." The stated purpose of this bill is the prevention of the "unnecessary removal and placement of children into foster care when the custodial parent or legal guardian is a victim of domestic violence and there is no evidence of neglect by the battered custodian." The law would also establish a rebuttable presumption that a parent or legal guardian is a fit person able to safely raise the child. The law would further clarify that an allegation or specific fact-finding that the parent or guardian is a victim of domestic violence alone is insufficient evidence for the court to determine that the child is at imminent risk of harm warranting removal. On March 25, 2003, the bill was referred to the Codes Committee. No parallel bill has yet been introduced in the State Senate.

For copies of the decision or the legislation mentioned above, please contact Amy Schwartz at aschwartz@wnylc.com or at 1-800-724-0490.

Shelter Allowance Receives Administrative, Judicial and Gubernatorial Attention

By Susan C. Antos

In the last Legal Services Journal, we reported on the Governor's attempt to "moot" the Jiggetts case by setting the current shelter allowances, which have not been increased in over 12 years, into statute. (See *A. Erickson, "Governor Proposes to Codify Existing Shelter Allowances, " Legal Services Journal. February 2003, p.9).* This proposal is still pending, and though most of us watching the State budget process view its likelihood of passage by the Assembly as slim, it's never over until the budget is passed here in Albany. GULP will keep you posted as news develops.

Meanwhile, the question of whether families that have reached the five year Family Assistance time limit may continue to receive "Jiggetts relief," (the rent supplement provided in addition to their public assistance grant) under the Safety Net Assistance program, was decided favorably to the plaintiffs by Judge Karla Moskowitz of the New York County Supreme Court on February 27, 2003. The state had created a program called the Temporary Shelter Supplement (TSS), 18 NYCRR 307.10, which permitted rent supplements to SNA recipients with children who had reached the Family Assistance time limits, but TSS had different and more restrictive rules. For example, contributions from third parties were prohibited (sometimes people combine their Jiggetts supplement and contributions from relatives to maintain housing), rents could not exceed a certain amount ($750 for a family of three), and only a portion of the recipient's food and other grants ($100 for a family of three), could go toward rent.

The plaintiff-intervenors, both recipients with children receiving Safety Net Assistance (SNA) because they had reached the five year limit, were facing eviction. Both plaintiff-intervenors had rent exceeding the TSS maximums ($813.63 and $778.97) and were denied Jiggetts relief on the ground that SNA recipients did not fall under the protection of Social Services Law 350(a)(1), which requires adequate shelter allowances. The state argued that the language of Social Services Law 350 was limited to Family Assistance because the statute was located in the "Aid to Dependant Children:" section of the Social Services Law. The Court held that the plain reading of the statute, combined with rules of statutory construction ("a heading does not extend or restrict the language contained in the body of the statute."), did not support the State's argument and extended Jiggetts relief to households with children receiving SNA.

This case, which has not yet been officially reported, is posted on the Online Resource Center on the GULP website at www.gulpny.org.

New Revised Proposed Regulations from OTDA

A previous decision in the Jiggetts case, 261 A. D. 2d 144 (1999), had directed the State of New York to promulgate new "adequate" shelter allowances, which the Office of Temporary and Disability Assistance (OTDA) did in proposed form in July of 2002. (*See S. Antos, "State Proposes Dramatic Revisions to Public Assistance Shelter Allowances," Legal Services Journal, August, 2002, p. 1 and S. Antos, M. Hanley and B. Weiner: OTDA Proposed Shelter Allowances: No Cure for Homelessness or Sub-standard Housing," Legal Services Journal, October, 2002, p. 1)*

After assessing public comment, the OTDA has revised the shelter allowances yet again, and issued revised regulations in February which make some changes in the regulations proposed in July. Although OTDA credits the changes to an additional expert, the changes seem to be all over the map: no change at all in Monroe,

Shelter Allowance Attention—continued

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changes of over $50 per month in Albany, Nassau, New York City and Westchester, and changes in between elsewhere. Some examples are listed below: (proposed regulations abolish the distinction between rent with and without heat).

The regulations proposed in July imposed a new restriction on the use of the room and board rates, by limiting their use to commercially operated boardinghouses. Not only advocacy groups, but local social services districts opposed this change, and OTDA agreed to drop it. The room board rate is a way that some low income grandparents and other relative caregivers, who are not eligible for public assistance themselves, receive a supplement for caring for their grandchildren. Both advocates and social services districts saw the proposed change as a disincentive to low income kin who wish to care for their minor relatives. Barring additional court action, or the unlikely event that the Governor's proposal is enacted, it is expected that these regulations will be adopted in September, 2003.

	Current Regulations	August 2002 Proposal	February 2003 Proposal
Albany County Family of 3	245	315	309
Erie County Family of 3	265	302	301
Monroe County Family of 3	343	343	343
Nassau County Family of 3	384	402	445
New York City Family of 3	286	348	400
Onondaga County Family of 3	270	305	303
Westchester County Family of 3	361	368	426

Asset Development for Poor and Low Income New Yorkers: A Good Choice

By: Kristin Brown

For the past few years, the Greater Upstate Law Project has been working on several pieces of legislation that would help public assistance participants develop and maintain assets as they work their way out of poverty. Included below are three issues that we hope will be of interest. Please contact Susan Antos (santos@wnylc.com) if you have any questions or Kristin Brown (kbrown@wnylc.com) if you would like to join us in working to get these bills passed.

Modify the Lump Sum Rule to Allow Families to Achieve Self Sufficiently

Currently, families on public assistance that receive a lump sum of money are ineligible for public assistance for a period of time calculated by dividing the amount of the lump sum by the size of the public assistance grant.

Thus, a family eligible for $500 per month in public assistance that receives a lump sum of $5000 is ineligible for public assistance, regardless of their circumstances, for 10 months.

This punitive policy, which was once required by federal law, is inconsistent with the current strategy to move families from poverty to self sufficiency. As a result of this law, families that receive lump sums are actually worse off than those on public assistance because they lose their food stamp eligibility for being over the resource level, but are required to live at the public assistance standard of need, which is significantly lower than the poverty level.

Families could make important steps toward independence if they were allowed to keep lump sums. The receipt of a lump sum of income could allow a family to purchase a car, move to a safe neighborhood, start a business, begin an education or even place a down payment on a house. In fact, without a change in the lump sum bill, there is little likelihood that families would be able to take advantage of Ch. 207 of the Laws of 2001, which amended Social Services Law 131-n to allow families to save up to $4500 to purchase a car. Allowing families to use a lump sum of money to save toward a car will be an important step towards independence for many families.

The Assembly passed a bill last year that would have modified the lump sum rules and had a companion in the Senate [A.10213-A (Glick)/S.7136 (Meier)]. The Senate may have been reluctant to act since the previous year both the Senate and the Assembly passed a bill (S.4865-A/A.9020) that allowed $25,000 of a lump sum to be applied to exempt resources. The Governor vetoed that bill, indicating that he "fully supported the sponsor's goals," but found the exclusion threshold to be excessive. The bill passed by the Assembly last year lowered the threshold to $15,000 in an effort to address the Governor's concerns.

This year, the Assembly has reintroduced (A.6341, Glick) the bill that passed last year, which we anticipate will be amended. It is our hope that the Senate will introduce a companion bill once again and that the Governor will be willing to work with the Social Services Chairs to come to an agreement on the issue so that New York can join the thirty other states that have modified or repealed that punitive lump sum rule.

Protect the EITC from Tax Offset

New York has effectively utilized its tax system to distribute funds from the Temporary Assistance to Needy Families (TANF) block grant by expanding the refundable Earned Income Tax Credit (EITC). This tax benefit provides a significant boost to low income working families.

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Asset Development—continued

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Unfortunately, the earned income tax credit can disappear before it reaches the pockets of many of the state's low income families who have been on public assistance, because it is subject to seizure by the Office of Tax and Finance to recover overpayments of public assistance owed to the Office of Temporary and Disability Assistance (OTDA)[1] These overpayments are often not the fault of the recipient. With more welfare participants in the work force, earnings must be budgeted to determine family need. For families with fluctuating wages, a delay in budgeting, or worker error will result in an overpayment. Many families have overpayments because of the high cost of utilities. When they put their utilities on voucher, the agency pays the bills, but at the end of the year there is a fuel "reconciliation", a squaring of accounts—the cost of a family's utilities is measured against the highly inadequate utility allowances that are currently provided.[2] Any excess is considered an overpayment.

Over payments may be recovered by a variety of means, including the tax offset, a method by which a former welfare participant's tax refund, including the earned income tax credit, is seized to recover the debt owed to OTDA.

The Civil Practice Law and Rules §5231(b) limits the amount of any garnishee to 10% of earnings. The proposed bill would extend similar protection to the Earned Income Tax Credit by amending Tax Law §171-f which authorizes the Department of Taxation and Finance to seize tax overpayments (refunds) to recover welfare overpayments. The bill, (A.5992, Glick) (S.1823, Meier) would limit the seizure of the tax refund to 10% for any worker with wages low enough to be eligible for the EITC when it is taken to recover any overpayment owed to the OTDA, so long as that overpayment was not caused by fraud. The bill would not limit tax offsets made to recover child support arrears.

Besides New York, there are ten other states that have a refundable EITC: including Colorado, Kansas, Massachusetts, and Oklahoma. New York is more aggressive than a number of these states in collecting welfare overpayments. Neither Colorado nor Maryland intercept EITC refunds for public assistance overpayments. Minnesota does not intercept refunds to recover welfare overpayments from former welfare recipients of they are current recipients of food stamps, transitional child care, or transitional medical assistance.

Protecting the EITC would give New York's working poor a head start on the road to financial independence. Shielding the EITC would carry out the original mission of the EITC—helping families get out of poverty.

Protect the Homes of Welfare Recipients

New York is the only state in the nation that takes deeds and mortgages against the homes of welfare recipients. In this day of welfare reform where the goal is to get low income families back on their feet, it is time to repeal this policy.

Although New York treats a home as an exempt resource [18 NYCRR§352.23(b)(2)] in determining public assistance eligibility, the mortgage provision in Social Services Law (SSL) 106, permits counties to require public assistance recipients to execute a mortgage in favor of the county in the amount of public assistance received, as a condition of eligibility for public assistance.

This law is an impediment to self-sufficiency: if self-sufficiency is the goal of welfare reform, that goal is undercut in a number of ways when a social services district takes a mortgage against the home of a welfare recipient.

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Asset Development—continued

(Continued from page 12)

The Law Undercuts the Goals of Individual Development Accounts (IDAs)

New York recognizes that home ownership is an important step toward self-sufficiency. As part of welfare reform, public assistance recipients are encouraged to save for a home, by depositing earnings in special savings accounts called IDAs, which can be matched with other funds and used for certain limited purposes, including purchasing a home. For welfare recipients, it is a cruel hoax for the state to encourage the use of these accounts, because the savings which are used to buy a home, will be taken back by the local social services district in the form of a mortgage against the newly purchased home.

The Law Undercuts the Self-Sufficiency of Abandoned Spouses

A woman abandoned by a spouse who is the family's primary wage earner is often left with one asset—the house. Unfortunately, when a social services district takes a mortgage against that home, its value is gradually whittled away. Ironically, the home of the non-custodial spouse who is not on assistance but has children who are, is not subject to the imposition of a lien under this law.

The Law Undercuts the Self-Sufficiency of the Elderly

Many adults who have been on public assistance, but who have also had moderately paying jobs, have one asset when they retire—their home. They are often surprised to learn that the equity in their home is seriously compromised by the existence of the county's lien. Because the lien is open ended, "for all public assistance granted", they are often unable to obtain home equity loans of they need them for home maintenance or medical care.

Assemblymember Glick has introduced (A5991), which would repeal this archaic and counterproductive law, that undermines the current societal goals of making welfare recipients self-sufficient. It is our hope that the Senate will introduce a companion bill and that the Governor will work with the Chairs of the Social Services Committees to pass this important protection for vulnerable New Yorkers.

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[1] This tax offset system was shut down several years ago as a result of litigation in the case of *Butler v. Wing.* Although that case was recently dismissed, a subsequent lawsuit, *Watts v. Wing* (New York County Supreme), resulted in the system remaining shut down. The lawsuit does not challenge the right of social services districts to use the tax offset system, but only the lack of adequate notices and hearings in the process. Thus, when the notice and hearing issue is resolved, the tax offset process will resume. The *Watts* case could be resolved as early as the 2004 tax year.

[2] The average heating allowance for a public assistance family of three is $70 per month. 18 NYCRR§352.5(b).

Editors Note: The Legislative Agenda may be found on page 14. This agenda is effective as of March 31, 2003. For legislative updates, visit www.gulpny.org.

Helping Families Move Toward Financial Stability in an Unstable Time –A Legislative Agenda

By Kristin Brown

Note: All agenda items were as of March 31, 2003

1. **Amend the lump sum rule**

   Problem: Families that receive a lump sum of money are ineligible for public assistance for the period of time calculated by dividing the amount of the lump sum by the size of the public assistance grant. This punitive policy, which was once required by federal law, is inconsistent with the current philosophy that families should be encouraged to save for a home or higher education.

   Solution: The lump sum rule should be repealed or at least modified to exempt lump sums that are deposited in Individual Development Accounts and to allow the period of ineligibility to be calculated with a more generous divisor, such as 200% of poverty.

   Update: Assemblymember Glick, Chair of the Assembly Social Services Committee has introduced a bill (A.6341) that would exempt up to $15,000 if used within 90 days for an approved activity/expenditure. The bill has been referred to the Assembly Social Services Committee. As you may remember, in 2001 a version of this bill passed both houses and was vetoed by the Governor. We anticipate amendments to this bill in the near future that would make it more palatable to the Governor.

2. **Eliminate §106 which allows social service districts to place a lien on welfare participant's homes**

   Problem: New York State is the only state in the nation that requires applicants for public assistance to sign a mortgage to their home over to the Department of Social Services as a condition of eligibility for public assistance, undercutting many of the goals of self sufficiency that are the underpinnings of welfare reform.

   Solution: Repeal Social Services Law §106.

   Update: Assemblymember Glick, Chair of the Assembly Social Services Committee has introduced a bill (A.4304) that would repeal Social Services Law §106. The bill has been referred to the Assembly Social Services Committee. We remain hopeful that a companion bill will be introduced in the Senate.

3. **Protect EITC from recovery of public assistance overpayments**

   Problem: New York's refundable Earned Income Tax Credit, which is largely funded with TANF dollars, has rightly been called a great anti-poverty strategy. However, for many families the promise of the EITC may not be realized because it is subject to interception to recover prior overpayments of public assistance, even if those overpayments were caused by agency error or the need for utility supplements over the Standard of Need for those with high fuel costs.

   Solution: Give New York's working poor a head start on the road to financial independence. Shield the EITC from income tax interception.

   Update: Social Services Chairs Senator Meier and Assemblymember Glick have introduced companion bills (S.1823 and A.5992) that would cap the recoupment of tax refunds at 10%. In the Assembly the bill has been referred to the Ways and Means Committee and in the Senate it has been referred to the Investigations and Government Operations Committee.

(Continued on page 15)

Legislative Agenda—continued

(Continued from page 14)

4. Stop the recoupment of birthing costs

Problem: Low income fathers, even if they live with and support a child born out of wedlock, and even when they subsequently marry the mother of the child, are often sued by local social services districts to recover the costs of birthing expenses (also called confinement costs), when those costs were covered by Medicaid. This takes money away from low income families when they need it the most and when family formation is most vulnerable.

Solution: Protect low income intact families from collection of state debt, particularly costs recovered under §415 of the family court act to recover birthing expenses. Exempt low income fathers who acknowledge paternity from liability for confinement costs altogether.

Update: Assemblymember Glick, Chair of the Assembly Social Services Committee has introduced a bill (A.5992) that would exempt the father from paying for birthing expenses if he earns under 200% of poverty, or was part of an intact household and providing support at the time of the child's birth. The bill has been referred to the Assembly Judiciary Committee. As of yet, no Senate companion has been introduced. GULP will work closely with the Assembly to ensure that this bill achieves the goal of ensuring that the state is not recouping expenses to the detriment of poor children.

5. Allow families on welfare to earn their way up to poverty - remove 185% earned income cap

Problem: Working families on public assistance families have been promised that they can earn their way to the poverty level with the state's enhanced earnings disregards. However, because the law makes families with incomes over 185% of the standard of need ineligible for any assistance, many families are unable to ever earn up to the poverty level. The Standard of Need varies from county to county, but has not been increased in over 10 years. The poverty level is adjusted upward every year, and as a result, every year workers in more and more counties become ineligible at 185% of their district's standard of need before they reach the poverty level.

Solution: Remove the earnings cap from Social Services Law 131-a(10).

Update: Assemblymember Glick, Chair of the Assembly Social Services Committee has introduced a bill (A.6504) that would repeal the earnings cap provision. We are hopeful that a companion bill will be introduced in the Senate.

6. Increase the child support pass through and disregard

Problem: Once a public assistance case is closed, it often takes months for the child support that has been collected and retained by the social services district to reimburse itself for public assistance paid, to be made payable to the former recipient.

Solution: At the recipient's option, allow all child support to be passed through to the recipient, and increase the child support disregard to $100 per month.

7. Making basic education skills available to public assistance recipients

Problem: Educational activities rarely count as "work activities," although federal law permits it.

Solution: Require that literacy programs, involvement in a VESID program and the pursuit of a GED count as work activities. Expand access to post-secondary education.

(Continued on page 16)

A Legislative Agenda—continued

(Continued from page 15)

Update: Assemblymember Glick, Chair of the Assembly Social Services Committee has reintroduced the bill that the Governor vetoed last year (A.6503). We expect that the bill will be have to be amended to gain the Governor's support.

8. Support the employability of low income families by making child care more accessible

Problem: Child care subsidies make quality child care more accessible to low income families, enabling them to maintain employment. New York's current system provides local districts broad discretion in setting co-payment amounts by allowing them to choose a multiplier anywhere between 10 and 35 to the balance of a household's income after subtracting the poverty level. This makes child care subsidy co-payments uneven across the state, irregardless of actual market costs.

Solution: Follow the intent of federal child care regulations which directs that co-payments should be affordable by capping child care co-payments at 10% of household income.

Update: GULP and the Child Care that Works Campaign continue to work with both houses of the legislature to get legislation introduced that would cap child care co-payment amounts.

9. **Repeal SSL 117(3)** – This provision of the law requires that new residents to New York State receive lower public assistance benefits than other citizens of the state. In 1999 the United States Supreme Court said such laws were unconstitutional. Saenz .v Roe 526 U.S. 489; 119 S.Ct. 1195(1999). Two New York state cases have also come to the same conclusion. Aumick v. Bane, Brown v. Wing.

Update: No update available.

10. Allow 60 days to contest an employability determination for a fair hearing

Problem: The general statute of limitations for requesting a fair hearing in a public assistance case is 60 days. Welfare reform imposed a 10 day statute of limitations on disabled individuals seeking to contest findings that they are employable or work limited. There is no reason for this short period.

Solution: Amend Social Services Law 332-b(6) to allow sixty days to request a hearing, so that it is consistent with the general statute of limitations for requesting fair hearings.

11. Support funding for Civil Legal Services programs

Problem: Civil Legal Services programs provide critical and cost effective assistance to poor and low income families, children and individuals. Already drastically under funded, dramatic reductions in funding sources have forced programs to reduce services in vital matters such as domestic violence, access to benefits, employability, housing and other areas critical to poor families.

Solution: Restore $7.5 million in funding for Civil Legal Services and dedicate a portion of the Governor's proposed civil court fee increases to make a down payment on an Access to Justice Fund that would provide a permanent funding stream for civil legal aid.

Update: GULP has been working with our colleagues in New York City and civil legal services programs outside the city to bring our funding issues to the top of both houses lists of Budgetary priorities.

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GULP Joins Forces with City Colleagues to Expand "LawHelp" in Upstate New York

By Bob Carlton

What is LawHelp? LawHelp is a website that aims to provide referral information to low-income New Yorkers and to the attorneys and advocates who serve them. The site works by allowing users to simply enter a zip code and a "problem" code (such as Public Benefits) to obtain information about the programs in their region that may be able to help them with their legal needs. The website also identifies the program's areas of expertise, any restrictions they might have, hours of operation, how to contact them and any other information that might be helpful.

To complete the upstate expansion of the website, GULP has contracted with colleagues at the New York City LawHelp Consortium, which includes Legal Services for New York, the Legal Aid Society, the Association of the Bar of New York City and ProBono Net to gather the data for the website. Over the next year, GULP will be surveying all the legal services programs outside NYC, compiling information on their intake processes and services and entering this data into the LawHelp website.

If you haven't already filled out the survey and returned it, please do so as soon as possible so that we can include your program in this new on-line resource. For more information, contact Bob Carlton at (585) 462-6831.

A Legislative Agenda—continued

(Continued from page 16)

12. Support a common sense budget approach

Problem: The Governor's budget relies heavily on cuts in vital services to make up for an unprecedented budget gap in the coming fiscal year. Common sense says that a more balanced approach to stopping the gap would also seek to raise revenues during these trying times by increasing taxes and postponing tax cuts until the state's economy picks up.

Solution: Nationally respected economists have found that during difficult economic times, tax hikes are less harmful to the economy than service cuts. We support a balanced approach that focuses on raising revenues by capturing a portion of the federal windfall by increasing the personal income tax for higher income individuals and by closing corporate loopholes.

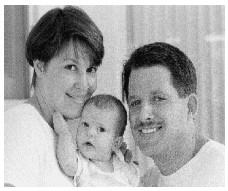
Update: GULP continues to work closely with the supporters of the Common Sense Budget Campaign. Hundreds of groups around the state have joined in supporting the campaign – and powerful public relations materials, including commercials that have the "There is a Better Choice" tagline have been developed. It remains to be seen what revenue streams will be tapped to address the budget gap in the final hours of budget negotiations, but with such broad based support, we are hopeful some of the "Common Sense" approach will be in the final mix.

For more information and GULP's memos in support, see the legislation section of our website at www.gulpny.org or contact Susan Antos, (santos@wnylc.com) or Kristin Brown (kbrown@wnylc.com)

Child Care Providers and Family and Child Health Plus

Many family day care providers who qualify for free or low cost health insurance from New York State are found ineligible because they do not know that they are eligible for special income deductions. Because they are operating a small business, Family Child Care providers **may subtract their business expenses from their income** to determine their eligibility for Family or Child Health Plus.

What are Family and Child Health Plus?



- **Family Health Plus** provides free health insurance for families
- **Child Health Plus** provides free or low cost health insurance for children under age 19. Adults are not covered under Child Health Plus.

How Much Can I Earn and Still Be Eligible?

- To qualify for Family or Child Health Plus, household income must be below certain limits depending on family size. See the chart on the next page. **Remember that it is income after business deductions that determines eligibility.**

How Can I figure Out What My Income is After Business Expenses?

1) First, determine your earnings for the last four weeks.
2) **Do Not** count payments you get from the Child and Adult Care Food Program.
3) You can then deduct **five dollars per child per day** ($25 per week per child) as a business expense. You are entitled to this deduction without receipts or any proof of specific expenses. [If your expenses are higher than $5 per child per day you can deduct more. To claim more you will have to show your tax return from last year.}

Why is $5 per day so important?

For many providers the $5 per child per day deduction will make the difference between qualifying for Family or Child Health Plus and not. A provider who care for 4 children can claim $20 per day of business expenses without proof (4 children x $5 per day). This means that if she cares for the children five days per week she can claim $100 of expenses every week ($20 per day x 5 days). If she cares for the children for 50 weeks a year she can claim $5,000 of business expenses. In addition she would not report the money she received fro the Child and Adult Care Food Program (CACFP). In all she may get to deduct nearly $10,000 for her income every year.

What should I do if I'm not allowed to claim these deductions when I apply?

Even though you are allowed to deduct business expenses every "enrollment facilitator" (the person who helps you fill out the paperwork) may not know about these rules. If they don't know about this deduction tell them it is explained on page 10 of **"01 OMM/ADM-6"** from November 2, 2001 and page 151 of the **Medicaid Reference Guide (MRG).** You should bring this fact sheet with you so you can show them where to look.

Child Care Providers and Family & Child Health Plus—continued

What if they still won't let me claim my business expenses?

If your enrollment facilitator still won't let you claim your business expenses ask them to call Susan Antos (800) 635-0355 or Trilby deJung (800) 724-0409 at the Greater Upstate Law Project (GULP). If they refuse, call GULP and we may be able to represent you or help you find representation.

Remember to ignore the CACFP and subtract $5 per day per child from your income before you check if you are eligible.

FAMILY HEALTH PLUS

Maximum Yearly Income After Expenses and Before Taxes (Effective October 2002)

Family Size:	*Single Adult*	*Couples with No Children*	*Family Size 2*	*Family Size 3*	*Family Size 4*	*Family Size 5*	*Family Size 6*
Yearly Income:	$8,860	$11,940	$17,910	$22,530	$27,150	$31,770	$36,390
Monthly Income:	$739	$995	$1,493	$1,878	$2,263	$2,648	$3,033
Weekly Income	$170	$229	$344	$433	$522	$610	$699

For each additional person after 6, add $4,620 for Yearly, $385 for Monthly, and $88 for Weekly

CHILD HEALTH PLUS

Maximum Yearly Income After Expenses and Before Taxes (Effective October 2002)
For each additional person after 6, add $7,704 for Yearly, and $642 for Monthly.

Family Size:	*Child Only Families**	*Family Size 2*	*Family Size 3*	*Family Size 4*	*Family Size 5*	*Family Size 6*
Yearly Income:	$22,152	$29,856	$37,560	$45,252	$52,956	$60,660
Monthly Income	$1,846	$2,488	$3,130	$3,771	$4,413	$5,055

**Child only families are those where the care giver is not financially responsible for the child, such as if a child lives with a grandparent who has custody or guardianship but has not adopted the child.*

Many thanks to David Ehrenberg, South Brooklyn Legal Services for creating this handout.

Second Circuit Speaks on Disability Issues

By Louise Tarantino and Catherine Callery

After a long hiatus, the United States Court of Appeals for the Second Circuit recently decided two Social Security cases. In these decisions, the Court tackled the issues of transferability of skills and what constitutes evidence.

In a decision dated November 14, 2002 in the case of *Draegert v. Barnhart*, 311 F.3d 468 (2d Cir. 2002), the Second Circuit defined transferable skills in the context of finding a claimant disabled on the basis of the Grid rules (20 C.F. R. Pt. 404, Subpt. P, App.2). For a claimant aged 55 or older, with a high school education, who previously held a skilled or semi-skilled job but now is restricted to light or sedentary work, the Grid rule compels a finding of not disabled unless the claimant possesses no skills that are transferable to other skilled or semi-skilled work. Grid rules 202.07 and 202.06. Crucial to this finding is the distinction between a skill and an aptitude.

The term 'transferable skills' is defined at 20 C.F.R. § 404.1568 (d)(4), although this section deals more with the concept of transferability rather than what constitutes skills. Social Security Ruling (SSR) 82-41 identifies skill as follows:

> A skill is knowledge of a work activity which requires the exercise of significant judgment that goes beyond the carrying out of simple job duties and is acquired through performance of an occupation which is above the unskilled level (requires more than 30 days to learn). It is practical and familiar knowledge of the principles and processes of an art, science or trade, combined with the ability to apply them in practice in a proper and approved manner. This includes activities like making precise measurements, reading blueprints, and setting up and operating complex machinery. A skill gives a person a special advantage over unskilled workers in the labor market.

Skills are not gained by doing unskilled jobs, and a person has no special advantage if he or she is skilled or semi-skilled but can qualify only for an unskilled job because his or her skills cannot be used to any significant degree in other jobs. The table rules in Appendix 2 are consistent with the provisions regarding skills because the same conclusion is directed for individuals with an unskilled work background and for those with a skilled or semi-skilled work background whose skills are not transferable. A person's acquired work skills may or may not be commensurate with his or her formal educational attainment.

In *Draegert*, the Administrative Law Judge (ALJ) identified [aided and abetted by the vocational expert (VE)] the following skills for the claimant: (1) the ability to learn and apply rules and procedures that might be hard to understand; (2) the ability to use reason and judgment in dealing with all kinds of people; (3) the ability to think clearly and react quickly in an emergency; (4) the ability to keep physically fit; and (5) the ability to make conclusions based on facts and judgment.

Mr. Draegert had been a security guard at a mental health facility, where he patrolled the grounds, arrested people, broke up fights between patients, maintained fire safety equipment and put out fires. The ALJ went on to find that these were transferable skills, even with the limitations posed by Mr. Draegert's coronary artery disease, and found that he was not disabled.

On appeal, Mr. Draegert argued that the qualities identified by SSA were not skills but were simply his own abilities. The Second Circuit agreed. Following the Ninth and the Sixth Circuits, the Court found that there was an inherent difference between vocational skills and general traits, aptitudes and abilities. *Draegert*, 311 F.3d at 474. Further, the Circuit agreed that

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Second Circuit Speaks on Disability Issues—continued

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to define ordinary qualities as learned skills would mean that almost every person had transferable skills, which would negate the presumption in the Grid rule that some older workers would not be able to transfer skills to a new job.

Using ordinary dictionary meanings for 'skill' and for 'aptitude,' the Circuit Court found that aptitudes are innate abilities and skills are learned abilities. So, qualities like intelligence, finger and manual dexterity, and good spatial sense, are innate qualities, not learned ones. Also, the ability to use independent judgment, to use tools, and to be responsible for work product, represent innate qualities, not learned ones. Under this test, the qualities identified by SSA as Mr. Draegert's transferable skills are simply his innate aptitudes.

The Second Circuit noted that for the agency to sustain its burden of showing that a worker had transferable skills, SSA would have to identify specific learned qualities and link them to the particular tasks involved in specific jobs (with those specific jobs being the ones identified by SSA as jobs the claimant can still perform). For Mr. Draegert himself, the abilities listed by the VE were not linked in any way to the jobs identified by the VE, gate guard or dispatcher. The Circuit noted that there was no indication in the record that Mr. Draegert's ability to subdue mental patients and arrest people for disorderly conduct were among the responsibilities of a gate guard or dispatcher.

The Circuit's dissatisfaction with the vocational analysis generally comes through clearly: "[A]nd while we agree that the fact that a claimant would be able to extinguish an occasional small fire could come in handy (in any job), we cannot agree that that simple ability constitutes substantial evidence that he could be a gate guard or a dispatcher." *Id*. at 477. Because this opinion is a lesson in identifying skills, the Court finds room to note that a skill that can no longer be used because of a claimant's impairment cannot be considered a skill that is transferable to a new job. ***Id.***

Finally, note that this issue is a Step 5 error, the step where SSA has the burden of proof. In line with recent cases, the Second Circuit found that SSA did not meet its burden, and remanded the case for entry of judgment for the claimant and for calculation of benefits. This case has since been cited by a district court as authority to remand for the sole purpose of calculating benefits. *Adams v. Barnhart*, 2003 US Dist LEXIS 310 (SDNY January 10, 2003)(Baer, J.)

In its December 10, 2002 decision in *Veino v. Barnhart*, 312 F.3d 578 (2d. Cir. 2002), the Second Circuit considered what constitutes evidence in Social Security cases. The case arose from a continuing disability review (CDR) in which the claimant was found no longer disabled and terminated from benefits. Mr. Veino was determined disabled in 1973 following military service in Vietnam. He suffered from post traumatic stress disorder (PTSD), anxiety and substance abuse. He was again found disabled during a CDR in 1982. In 1996, following legislation that barred eligibility based on substance abuse, another CDR was initiated and Mr. Veino was terminated from eligibility for disability benefits.

After an unsuccessful challenge to SSA's action at the District Court level, Mr. Veino appealed to the Second Circuit. On appeal, the Circuit Court noted that the current record lacked medical evidence from the earlier favorable decisions. All the appellate record contained were references to missing documents: a list of medical documents reported at the initial CDR determination; a summary of the prior medical evidence by the Disability Hearing Officer (DHO) in the reconsideration decision; and reference in the ALJ decision to medical evidence from the earlier decisions.

The Court found this record insufficient, stating: "In the absence of the early medical records, the administrative record lacks the foundation for a reasoned assessment of whether there is substantial evidence to support the

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Regulatory Roundup

by Susan C. Antos

This article reports activity in the New York State Register from January 29, 2003 to April 2, 2003. One rule has been proposed, three rules were adopted and the rule regarding temporary shelter supplements was repromulgated on an emergency basis for the fifth time. The shelter allowance regulations proposed last summer were republished and revised. All references are to 18 NYCRR, unless otherwise indicated. If you are interested in reading the text of a proposed rule or the summaries of public comment and the response regarding an adopted rule, please contact Connie Wiggins (clewis@wnylc.com) or Nancy Kripski (nkripski@wnylc.com) at GULP, Albany.

Notice of Proposed Rulemaking

Date of Filing	Last Day to Comment	Regulations Affected	Summary
3/19/03	5/3/03	383.3 (c), (d) 387.2 (y)(1)	**Replacement Fee For Lost or Stolen Identification Cards:** This regulation would establish policies for the replacement of lost, stolen or destroyed identification or electronic benefit cards. There will be no charge for the first replacement. Any subsequent replacements will result in a $3 fee to be deducted from the grantee's temporary assistance or food stamp account, If the balance in the account is less than $3, the replacement card will issued and the fee will be charged to the following month's benefits. This fee does not apply to medicaid only individuals, or to the replacement of defective cards. There are no fair hearing rights to challenge the imposition of the fee. Social Services districts may elect not to collect a fee or may submit a plan to the Office of Temporary and Disability Assistance (OTDA) electing a different method of collecting such fees. Such fees may not be implemented until the plan is approved by OTDA. The regulatory impact statement indicates that 5,000 identification cards are issued on a daily bases. Fifty-percent are Medicaid only. OTDA estimates a $335,000 savings as a result of this proposal.

Regulatory Roundup, continued

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
2/25/03	2/25/03	369.1 372.2 372.4	**Eligibility for Emergency Assistance for Families (EAF):** This regulation imposes a "non-forseeability" requirement on EAF eligibility by adding language to state regulations requiring that "the need for emergency assistance could not have been foreseen by the applicant and was not under his or her control." The regulation also removes a $500 limit on repair to client owned property.
2/25/03	3/12/03	352.23(b)(2)	**Vehicle Resource Level:** This regulation changes the language which allowed an automobile exemption for recipients working or looking for work, from an amount which was twice the food stamp vehicle exemption, to a flat figure of $9,300 (necessary because the food stamp program now exempts one vehicle completely). It also allows up to $4,650 to be set aside for vehicle purchases in an exempt savings account.
2/25/03	3/12/03	352.17(e)	**Adjustment of Public Assistance Grants**: This regulation provides additional time (current plus one additional semi-monthly payment cycle) for local Department of Social Services workers to budget timely reported new or increased.

Regulatory Roundup, continued

Emergency Rulemaking

Date of Filing	Rules Expires On	Regulations Affected	Summary
3/19/03	5/31/03	370.10	**Temporary Shelter Supplements (TSS):** This regulation, first filed as an emergency rule in November 2001, and again in February, 2002, June of 2002 and December, 2002, allows families who receive Safety Net Assistance because they have reached the 30-month time limit to receive "Jiggetts" supplements. No notice of proposed rule making has been filed with this emergency rule. Under the TSS program, arrears payments can not exceed $3,000 or six times the monthly rental obligation.
2/11/03	5/11/03	11 NYCRR 362-2.3 362-4.3	**Healthy New York**: These regulations permit a standardized application for the Healthy New York program, and clarify who is a "household member", when determining eligibility (applicant, spouse if residing in the household and any eligible children).

Notice of Revised Rule Making

Date of Filing	Last Day To Comment	Regulations Affected	Summary
2/6/03	3/26/03	Part 352, 381.3(c)	**Shelter Allowance:** These revised regulations make a number of changes to those previously proposed (see related article on page).

Michael Hanley Receives Human Rights Honors

GULP's housing program attorney, Michael Hanley, was honored by Housing Opportunities Made Equal (HOME) of Buffalo at HOME's annual dinner on April 15. This year HOME celebrated its 40th anniversary of providing fair housing services to the Buffalo area. The dinner was attended by over 300 persons. HOME presented Mike with its "Sara G. Metzger Human Rights Award" in honor of his work on the Comer v. Martinez (formerly Comer v. Kemp) public housing and Section 8 lawsuit that was filed in 1989. Consent Decrees were entered in the litigation in 1996 and 1997, but the implementation of those decrees – which resulted in new housing subsidies valued by the Department of Justice at over $130 million – is ongoing. Mike acknowledged the crucial role of GULP's co-counsel in the litigation, Neighborhood Legal Services of Buffalo and the Western New York Law Center.

HOME created the Sarah G. Metzger Human Rights Award several years ago in honor of one of its most long-standing board members who had retired after decades of service to HOME.

In addition, in November of last year, the United States Commission on Civil Rights approved the nomination of Michael Hanley as the Chair of its New York State Advisory Committee. His term will run to November of 2004.

Second Circuit Speaks on Disability Issues—continued

(Continued from page 21)

Commissioner's finding that Veino has medically improved."

The Commissioner argued that the record on appeal was adequate because the 1982 medical evidence was summarized in the DHO and ALJ decisions. "The difficulty with the Commissioner's position is that these decisions are not evidence. The ALJ did not cite or include in the record the 1982 medical evidence itself but only the DHO's summary; and without any of the 1982 medical evidence in the record before us, this Court cannot make a reasoned determination as to whether the DHO's summary is accurate or adequate."

The Commissioner also argued that the simple fact that Mr. Veino once qualified for a particular Listing and that he was found no longer to qualify for that Listing demonstrated his medical improvement. The Court disagreed. Accordingly, the matter was remanded for further proceedings.

Additionally, the Circuit Court concluded that there was substantial evidence that Mr. Veino's current condition made it difficult for him to leave his home to go to a job. The Court cited the DHO's summary of Mr. Veino's testimony and the DHO's recitation of a 1982 report that he only left home to go to his doctor appointments. A VE had testified at the current hearing that none of the jobs she cited for Mr. Veino could be performed by a person who was so uncomfortable leaving his home that he could not function away from home for more than a short period of time.

The Court concluded that in the absence of an express finding by the ALJ that Mr. Veino was emotionally able to work away from home, it was questionable whether the vocational evidence supported the conclusion that Mr. Veino was currently able to carry on substantial gainful activity (SGA). This additional issue had to be resolved on remand, according to the Court's decision.

We love the Second Circuit when they give us good decisions to work with. A common denominator on the panels that heard these two cases was Circuit Judge Amalya Kearse, who authored both opinions.

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2. Nurse's Assessment Visit Report and Instructions

The nurse's assessment is a key part of the assessment procedure under state regulations. 18 N.Y.C.R.R. §505.14(b)(2)-(b)(3). The nurse assessor's recommendation for a plan of care, which must consider the treating physician's order, (the treating physician's order is the first of several assessments used to determine eligibility for personal care and the amount of services authorized. 18 N.Y.C.R.R §505.14(b)(2)(i); 505.14(b)(3)(i). Each county develops its own physician's order form. The M11q is the form used by the City) must be considered in the final determination of hours. Since TBA began, the City's nurse's assessment forms (Form M-27r, August 7, 2002) lists pre-printed time periods that are allotted for each task the client may need. The nurse simply checked off which tasks the individual needed, and added up the pre-printed numbers of minutes to arrive at the total. For example, the form lists sixty minutes per day as the pre-printed time allotted for total assistance with mobility or toileting. While in the past, nurses could override these times, there was nothing on the form to prompt them to do so, or to require them to consider whether the client's need for mobility or toileting assistance was met.

The nurse's assessment form and its accompanying instructions have been changed in two significant ways. First, on page four of the assessment form, on which the nurse indicates whether there is a need for partial or total assistance with the three key activities of ambulating, transferring or toileting, the "comments" section now includes an explicit directive that if the nurse identifies a need for assistance with any of these three key activities, she must "indicate the span of time over which the assistance of a home attendant is required" in the space provided, or explain why assistance is not needed over a span of time. The separate instructions further clarify that the nurse should specifically explain the type of assistance needed with these tasks, and, *if the need for assistance is unscheduled*, to identify the span of time on the form and in the form's "comments" section.

The second change in the nurse's assessment is on page one, where the nurse is now asked for his or her final "recommendation for authorization of services (in hours)." Before, the more limited request was for a "recommendation for authorization of total weekly time to complete tasks." The separate instructions now clarify that the nurse's recommendation will no longer be a simple tally of hours, but must be sufficient to cover the required span of time over which the client needs the attendant's assistance with unscheduled tasks.

Other changes in the separate instructions for the nurse's assessment form clarify that in cases where the client has 24-hour needs, the weekly tally of task time does not need to be completed, based on the *Mayer* ruling which prohibits use of TBA in 24-hour cases. Also, the instructions provide that the nurse identify any recurring needs in the comments section of the assessment form. Recurring needs include assistance with feeding and medication, and the client's need for nighttime assistance, even if the nighttime assistance is provided by informal caregivers. These instructions that require consideration of nighttime needs ensure that 24-hour care is authorized where necessary.

3. "Medical Review Team" Form and Guidelines

In New York City, a "Medical Review Team" ("MRT") makes the final determination of the amount of personal care services hours that will be authorized, based on the series of assessments required by the regulations. The *MRT Plan of Care* form now groups together the unscheduled needs of ambulating, toileting, and transferring, and adds a new line on the task chart to add time for "unscheduled needs" re-

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quiring assistance over a span of time, when such needs are identified by the medical review team.

Several significant changes have been made to the instructions for completing the MRT assessment form.

- Care Plans: The revised guidelines add a "task-based span of time plan" and a "Mayer 3" task-based service exemption to the list of available care plans. In addition, the revised list of care plans clarifies that sleep-in and split shift plans are "traditional," rather than "task-based" plans of care. The MRT guidelines remind the MRT that clients requiring 24-hour assistance (including "Mayer 3" cases in which some care is provided by informal supports), should not receive a task-based plan of care, but should receive a traditional care plan for the hours that informal supports are not available.

- The guidelines instruct the MRT to review the nurse's assessment to ensure that the nurse's service recommendation is sufficient to meet the client's identified needs, including the client's unscheduled needs.

- Both the MRT guidelines and instructions for the nurse's assessment remind the assessors that clients requiring 24-hour assistance should receive traditional care plans sufficient to assist during all hours that informal supports are not available.

- The MRT guidelines explain the new method for completing the Task Sheet-MRT plan of care when an individual has unscheduled needs for assistance. First, if the client needs assistance with ambulating, transferring and/or toileting, the reviewer must either identify the span of time in the comments section or explain why a span of time is not needed. Next, the reviewer must add all the task times identified on the task sheet. If the times are not sufficient to cover the needed span, the reviewer must add additional time to the "unscheduled needs" line of the task sheet so that the total tally of task times is adequate to cover the necessary span. For example, if the task times add up to 35 hours per week, but the span of time for assistance with toileting is twelve hours per day, the MRT reviewer must add 37 hours to the "unscheduled needs" line to total the 72 hours necessary to cover the span.

- The guidelines also require that the MRT reviewer determine whether the client needs assistance with recurring late afternoon and/or evening tasks ("e.g., bed preparation, feeding, assistance with evening medication, etc.") such that a multi-visit plan is appropriate. If a multi-visit plan is appropriate, the reviewer must indicate the need for the multi-visit plan in the comments section of the MRT plan of care. If the individual requires assistance with "feeding," the MRT plan of care must provide for a multi-visit plan or explain why a multi-visit is not needed.

B. Other Terms of Settlement with City

While the settlement with the City contains no formal monitoring provisions, the stipulation establishes a process for plaintiffs' counsel to bring to the attention of a designated City lawyer cases which plaintiffs believe raise questions or concerns regarding the appropriate use of the revised TBA documents for an individual with unscheduled and/or recurring needs. Under this procedure, the designated Legal Department employee must provide plaintiffs' counsel with written notification about what action, if any, the City intends to take with regard to the case presented by plaintiffs' counsel.

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Also, plaintiffs' counsel will be able to review the City's compliance with this agreement by reviewing a sample of fair hearing files that will be supplied by the State for a one-year period. The sample will be drawn from hearings that affirmed task based assessments by New York City or Nassau County. The City has also agreed to notify the State agency responsible for Medicaid fair hearings that it has revised its forms and to provide the agency with copies of the revised forms.

On around February 7, 2005, the court's jurisdiction over City defendants will cease for all purposes. The court's jurisdiction ceases earlier, after about two years, for all purposes except enforcement of the stipulation or for an application attorney's fees. To protect future personal care recipients, the stipulation also modifies the class definition to close the class as of the date that the City defendant files its affidavit of compliance attesting to completion of the required training and implementation of the new forms, guidelines and instructions, on around April 9, 2003.

4. Status of Claims for Nassau County Sub-Class

Settlement negotiations are still continuing with the Nassau County department of social services. While Nassau County is bound to follow the State GIS and settlement, outlined above, Nassau has not agreed to any additional relief such as that agreed to by New York City. Discovery is under way to assess whether Nassau's claims that its procedures have improved are true. The court has tentatively scheduled the case for trial for either July or August 2003.

5. Points for Advocacy

The key to advocacy is good documentation of the client's needs, principally by the treating physician in the mandated physician's order. All other assessments mandated by the regulations, *see n* 12, including the newly revised New York City forms, must consider the treating physician's form. Advocates must educate treating physicians on the importance of describing the client's needs in detail, addressing the factors explicitly required in the new *Rodriguez* GIS and, for New York City residents, in the City settlement.

- For the basic activities of toileting, ambulation, and transfer, the physician must describe the *type* of assistance needed (hands-on care or verbal cueing and prompting), and whether assistance with these tasks can be *scheduled*, or may occur at *unpredictable* times during the day or night.

- In New York City, the physician should specify the "span of time" during which these needs arise.

- Physicians should address any *recurring* needs that arise at particular times, such as assisting with feeding (may be frequent with diabetics) or with administering medication.

- The physician should address the medical reason for all needs (i.e. frequent urination because of diuretics, or need for verbal cuing to remind client to use walker – cuing needed because of dementia and walker needed because of high risk of falling and injury due to gait disorder and osteoporosis).

- The physician should explain why alternatives are not adequate, such as why the client cannot safely or appropriately use a commode or bedpan by herself at night.

- For anyone who needs 24-hour assistance, even where some of that care is provided informally by a family member such as a working daughter, the 24-hour needs should be specifically explained, to invoke the

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Mayer III exception that prohibits the use of task-based assessment for people with 24-hour needs.

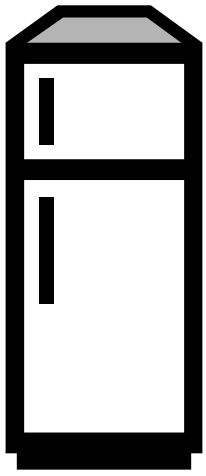
The physician forms used in most local districts, including New York City, do not specifically elicit this information from the physician, so it is imperative that advocates elicit this information and ensure its inclusion on the physician forms.

Besides the physician forms, advocates can present detailed information about the client's needs to the local district in other ways. They can request that they or family members be present when the other mandatory assessments are conducted by district employees or contractors - a nurse, case worker, and in some cases, a physician. At these sessions, the client's specific needs with respect to the criteria in the GIS directive and New York City settlement can be pointed out. Also, there is no bar to the submission of other evidence to support an application -- an independent evaluation by a nurse, social worker, physical therapist, or simply an affidavit by a family member, friend, or private home care aide who is familiar with the client's needs.

Finally, care must be taken to avoid the "safety monitoring" trap. The State GIS now clarifies that assistance to ensure safe performance of recognized activities, such as to prevent falling, is not "safety monitoring" within the meaning of the Second Circuit decision, and must be provided. Advocates must educate physicians and witnesses who testify at hearings that such assistance is more properly characterized as assistance with ambulation or transfer, not as "safety monitoring," which has the narrower meaning of supervising a person who has dementia to prevent unsafe behaviors such as wandering. Clients who have dementia and exhibit such behaviors can obtain care if the needed assistance is not mischaracterized as a stand-alone task of safety monitoring, but as a form of verbal or physical assistance with the recognized task of ambulation. A client who wanders may often need assistance with ambulation for other reasons -- poor balance, gait disorders, arthritis, and other mobility impairments. These needs should always be cited as well to establish the need for assistance at unpredictable times and to justify the appropriate span of time.

Predatory Sales and Rent to Own

February's issue of the Legal Services Journal featured an article titled *Predatory Sales: Rent to Own Stores in New York State*, written by Peter Dellinger. Peter Dellinger is an attorney with the Public Interest Law Office of Rochester and is very interested in rent-to-own consumer issues. If you should have any questions concerning rent-to-own predatory loan practices, or clients who have bought or are attempting to buy merchandise from rent-to-own companies, please contact him at (585) 454-4060 or by e-mail: pdellinger@wnylc.com.



To learn more on predatory sales and rent to own stores in New York State, you can find this article on-line at www.gulpny.org.

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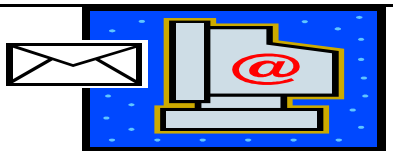

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