

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

By Susan Antos

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

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

## Background

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

## The Pass Through

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

Every month that child support is paid, the household should get a "mailer," which tells the family how much

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

## Excess Support

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

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

## Desk Reviews

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

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

### Local Level Review: Roadblocks Abound

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

The desk review request form is not available on line other than as an attachment to 06 ADM-16. However, the ADM does not contain the address to which the form must be mailed. OTDA says that it does not include the form in the ADM because the forms are not returned to one central address, but rather to the local district support collection units. The address to which the form is

mailed depends upon where the caller resides. There is no statewide tracking of first level desk review requests. The Empire Justice Center has obtained a list of the Support Collection Unit addresses and we have posted the request form and these addresses to the Online Resource Center, which is accessible through the websites of the Empire Justice Center <http://www.empirejustice.org/> or the Western New York Law Center at: <http://onlineresources.wnylc.net/welcome.asp?index=Welcome>. However, this posting is no substitute for adequate procedures which are easily accessible to unrepresented individuals and those who do not find their way to our web site.

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

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

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

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

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

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- contact with income maintenance staff to ascertain public assistance payment information and amounts of unreimbursed public assistance.<sup>18</sup>

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

### State Level Review

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

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

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

### Footnotes

<sup>1</sup> 42 USC 608(a)(3); Social Services Law (SSL) §§158(5); 349-b(1)(a).

<sup>2</sup> SSL §111-e(1).

<sup>3</sup> SSL §§111-c(2)(d); 131-a(8)(a)(v). Effective October 1, 2008, the federal Deficit Reduction Act of 2005 will permit

states to pass through up to \$100 per month in child support to families with one child and up to \$200 per month in child support to families that include 2 or more children.

<sup>4</sup> SSL §111-c(2)(d);131-a(8)(a)(v);

<sup>5</sup> 18 NYCRR §347.13(a).

<sup>6</sup> 18 NYCRR §347.13(b)(1).

<sup>7</sup> 18 NYCRR 352.12(b)

<sup>8</sup> 97 ADM-7, p. 7-8.

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

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

<sup>11</sup> New York State Register, December 24, 2002, p.12.

<sup>12</sup> The Administrative Directive is available in the Agency Directives section of the On Line Resource Center.

<sup>13</sup> 18 NYCRR 347.25(d)(2).

<sup>14</sup> 18 NYCRR 347.25(d)(3).

<sup>15</sup> 18 NYCRR 347.25(b).

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

<sup>17</sup> 18 NYCRR 347.25(e)(3).

<sup>18</sup> 18 NYCRR 347.25(e)(3).

<sup>19</sup> 18 NYCRR 347.25(e)(1),(f)(1).

<sup>20</sup> 18 NYCRR 347.25(f)(1).

<sup>21</sup> 18 NYCRR 347.25(f)(2).

<sup>22</sup> 18 NYCRR 347.25(g)(1).

<sup>23</sup> 18 NYCRR 347.25(g)(2).

<sup>24</sup> 18 NYCRR 347.25(g)(4).

<sup>25</sup> 18 NYCRR 347.25(g)(5).

<sup>26</sup> 18 NYCRR 347.25(g)(6).