April 2005

Greater Upstate Law Project, Inc.

Issue 2, 2005

Legal Services Journal

The Court Grants Summary Judgment to the Plaintiffs in *Teytelman v. Wing*

By Barbara Weiner

On February 5, 2005, Judge Diamond of the Supreme Court, New York County, ruled in favor of the plaintiffs in *Teytelman v. Wing* (Index No. 402767/02.) The *Teytelman* plaintiffs challenged various immigration related restrictions in the State's Food Assistance Program (FAP), including the requirement that, to be eligible, the applicant must have been residing in the U.S. on August 22, 1996. (See Social Services Law §95.10.) The plaintiffs are elderly immigrants and immigrant victims of domestic violence who entered the country after that date.

FAP was enacted by the New York Legislature in 1997 to provide state and locally funded food stamp benefits to the most vulnerable groups among the immigrants who had lost access to the federal food stamp program as a result of the 1996 federal welfare reform. Initially FAP was available only to elderly and disabled immigrants and to immigrant children. The program was later expanded to include immigrant victims of domestic violence who meet the definition of "qualified alien" under 8 USC §1641(c).[1] *See Endnote on page 2.* Local social services districts were not required to participate but initially many did.[1]

Over the years, two factors have operated to radically shrink program participation. First was the 1998 and 2002 restoration of federal food stamp eligibility to substantial numbers of immigrants who had been receiving benefits under FAP. Pursuant to these changes in federal law, immigrant children and disabled immigrants became eligible for federal food stamps without regard to their date of entry, as long as they have a qualifying immigration status. Other immigrants with qualifying status, including the elderly and immigrant victims of domestic violence, become eligible for the federal program after five years.

Because elderly immigrants and domestic violence victims must wait for five years before becoming eligible for federal food stamps, FAP could still serve an important purpose. So why are so few immigrants participating? This is primarily because of the requirement challenged in *Teytelman* that, to be eligible, the applicant must have resided in the

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U.S. on August 22, 1996. Most elderly immigrants and immigrant victims of domestic violence who would be eligible for FAP because they were living here in August of 1996 - which is now almost nine years ago - have been in the country long enough to be back in the federal program. However, there are many immigrants who are elderly or who have been victimized by family violence who arrived in the U.S. after August 22, 1996 and who desperately need the nutritional assistance that FAP could provide. They are barred from access to FAP because of the residence restriction.

The decision in *Teytelman* would remove that barrier to participation, by eliminating the date of residency restriction as well as several other restrictions related to immigration status and not to need. The *Teytelman* Court rested its decision squarely on the Court of Appeals decision in *Aliessa,* which held that the State's exclusion of immigrants from the state Medicaid program based only on their immigration status and date of residence violated the immigrants' rights to equal protection. *See Aliessa v. Novello*, 96 N.Y.2d 418 (2001).

Nevertheless, this good news is tempered by the very sobering prospect of the FAP program's imminent demise. FAP sunsets again in September of this year. The program has been extended twice by the Legislature, though the restrictions making the program more and more irrelevant have never been removed. Now, in an odd twist of logic, the State has been arguing to the Legislature that the lack of participants in FAP indicates that the program is no longer necessary. Ignored is the fact that the dearth of participants is directly the result of the unconstitutional restrictions on access to its benefits. Nevertheless, without the active and vocal support of advocates who work with elderly immigrants and with immigrant victims of domestic violence, FAP may well disappear before most needy immigrants can get the benefits of the *Teytelman* Court's invalidation of the program's unconstitutional eligibility restrictions.

Endnote:

It should be noted that New York's limited program stands in stark contrast to the state food stamp replacement programs enacted in several other states - including California, Maine, Minnesota, Wisconsin, Washington and Nebraska - all of which have established state programs for all, not just the most vulnerable, of the immigrants who lost their eligibility for the federal program.

The Final Stretch of the GULPILOR Merger

By Anne Erickson, Executive Director

We are rapidly approaching the final stages of the GULP-PILOR merger. Its been a long road, but the rewards are already evident. We have an amazing staff, now aligned in four major Practice Group areas. They are meeting regularly, engaging in cross-collaborations, and bringing training and support to the community. They are also developing more comprehensive legislative agendas, engaging in significant administrative advocacy, delivering a broader array of direct legal assistance, and taking the lead on major legal challenges whenever necessary.

By way of illustration, in classic GULPILOR fashion we took a "routine" call from a domestic violence shelter in Western NY where a client was harmed by SSI budgeting rules that conflicted with federal and state policies meant to protect victims of domestic violence. A woman was denied SSI because she was a part owner of the marital home she had fled to avoid domestic violence. The home (a resource), only became a disqualifying resource under SSI rules when she left it.

While trying to work through the client's needs, we also realized the problem would clearly effect other elderly or disabled victims of domestic violence and looked for a systemic solution. Our Disability Advocacy Program (DAP), domestic violence and legislative staff came together to clarify the issues, identify the regulatory problem, and draft a memo to the Social Security Administration (SSA) documenting the problem, its consequences and a proposed solution.

As a result, SSA issued a clarifying memo to all its offices across the country, attaching GULP's letter and promising full regulatory change. This change will make sure domestic violence victims nationwide do not have to choose between safety and income. It will also keep many other domestic violence attorneys from having to deal with this problem in the future – or at least arm them with a new federal directive if they do confront the issue. Now that's what its all about.

We have a great management team here as well. Working more closely with Bryan Hetherington, head of PILOR and now Chief Counsel for the combined organization, has been wonderful. He has pulled our legal work together more effectively, working with the attorneys across the Practice Groups and helping to identify emerging legal issues across the state. Kristin Brown has really stepped up as Director of Legislative Advocacy and did an incredible job marshalling a full legislative agenda, working tirelessly for state funding for civil legal services and helping to turn back the worst of the budget cuts aimed at those most in need. Kristi Hughes continues to press forward as our Director of Development, working with each Practice Group to identify and seek funding for critical new projects and services. She organized our first ever an annual campaign for general support and under her leadership we published the first of our joint annual reports, signs of professional growth for us as an organization. Becky Schroeder is now our Fiscal Manager, managing the incredible challenge of our finance systems, getting our grants management in order, and making sure everything from vouchers to audits runs smoothly.

It is such an honor to be part of this team and this transition. As Executive Director, I just celebrated five years at the helm. As a member of the GULP team, I passed the 15-year mark last October. We've been working seriously on the merger with PILOR for the last two years and its all coming to fruition.

The next big step is just around the corner: A NEW NAME!! In the next month or so, we will be re-introducing ourselves to the community under a new banner, one that re-positions us at the same time we re-dedicate ourselves to the work – to be the a full services training and technical assistance center for the legal services community; an aggressive advocacy organization for those in this state who are poor, disabled and disenfranchised; and a law firm that never shies away from tackling the legal needs of our collective clients.

We hope you will all join with us – to honor the past and celebrate the future and all its potential.

SSA Promises Better Protections for Domestic Violence Victims

By Kate Callery and Louise Tarantino

Victims of domestic violence who are forced to flee their homes frequently face complicated bureaucratic hurdles as they attempt to establish independence from their batterers. Thanks to advocacy by GULP, the Social Security Administration (SSA) will alleviate at least one such barrier.

GULP recently became aware of a case from Western New York in which a claimant had been receiving Social Security Disability Insurance (SSDI) benefits while living with her husband. She left the home that she jointly owns with her husband for the safety of a domestic violence shelter. Because she no longer had access to her husband's income, she applied for SSI. She was originally denied SSI benefits as "over-resource," allegedly because she owned a home in which she was not residing. Ultimately, she was approved for benefits, but only after she secured a statement from her husband/batterer that it would be an undue hardship on him to have to move out of the jointly owned property.

While this solution was apparently adequate in the case in question, such a resolution, which involves the cooperation of the batterer, could put other similarly situated victims in danger. Alternatively, other victims who need and would otherwise be eligible for SSI benefits may abandon their claims for fear of approaching their batterer for such a statement.

SSA's relevant regulations and POMS sections contained no clear directives to claims representatives on how to handle these difficult situations. While several of the regulations could be interpreted in a manner that would allow for a resource exemption in such cases, none are clear-cut. Consequently, GULP urged SSA to issue clear directives to guarantee that victims of domestic violence do not have to place their safety at risk when attempting to ensure their financial stability in a time of crisis.

SSA has recently agreed to seek a regulatory change so that a jointly owned home will not be counted as a resource to an individual who is forced to leave the home because of domestic abuse. Although SSA indicated that its current policies serve to prevent any undue hardship or danger to victims of domestic abuse, it agreed to issue a reminder item to its field offices stating that SSA personnel are required to assist individuals in obtaining evidence and should take into consideration the individual's circumstances in determining resource availability.

SSA will also emphasize to its field offices that since a home continues to be excluded from resources when an individual moves out but intends to return, the exclusion should continue to apply if the abused spouse intends to return home if the situation is resolved or if the batterer were not present. Finally, if necessary, SSA will issue conditional benefits for up to nine months, and waive the usual requirement of making reasonable efforts to sell the property. It will accept evidence such as a police report, restraining order or statement from the director of a shelter in lieu of evidence of making reasonable efforts to sell.

These changes should go a long way towards helping victims of domestic violence establish independence while remaining safe. Look for more information in these pages on SSA's directives. In the meantime, please let us know of any cases involving similar problems, either resolved or unresolved.

Roll Out Begins for New Medicare Drug Benefit With "Test Run" of Low-Income Subsidy Application

By Trilby de Jung

Last month, the Social Security Administration (SSA) sent the first of some 20 million applications to low-income people who might qualify for financial assistance with Medicare's new Part D prescription drug benefit. This initial mailing has been described as a test run for the application form. Mailings were limited to 42 specific zip codes in 21 states, including three in New York, two in Manhattan and one in Brooklyn (10002, 10025 and 11214). Applications for all remaining zip codes and states will be mailed in late May 2005.

SSA has also announced its intention to conduct some 3,000 outreach activities to educate recipients and their advocates about Part D and the Low-Income Subsidy. Regional offices in your area should have information about up-coming events, including trainings on the Low-Income Subsidy application process.

Low Income Subsidy Application Form No Simple Matter

The Low-Income Subsidy application form is seven pages long and includes some complex sections, including one that asks people to distinguish between the face value and the cash value of life insurance. Another question asks applicants how much money they receive from friends and relatives to help pay for food, shelter and utilities. The application form also warns people they can be punished for perjury if they knowingly submit incorrect information. In signing the form, a person declares, "I understand that anyone who knowingly gives a false or misleading statement about a material fact in this information, or causes someone else to do so, commits a crime and may be sent to prison or may face other penalties."

Although SSA officials describe the form as "simpler than that used for any other means-tested program," consumer advocates have said the form is so complex that fewer than five percent of people are expected to respond. James Firman, president of the National Council on the Aging and chairman of a coalition of community groups working with Medicare officials, said that some low-income people would be confused or intimidated by parts of the new seven-page application form. And despite calling this mailing a "test run," SSA officials have said it is too late to change the application forms. Instead, the agency will tailor its publicity to address questions raised by the first group of people who receive applications.

What Does the Low-Income Subsidy Do?

The Low-Income Subsidy will provide valuable assistance with the costs Medicare beneficiaries are expected to pay under Part D program. People with incomes up to 135% of the Federal Poverty level (FPL) are eligible for the full subsidy. The full subsidy will cover the costs of:

- Monthly premiums of about $35/month
- Annual deductible for drugs of $250
- Co-payment of 25% of annual drug costs over the $250 deductible up to $2250/year
- All drug costs in the "donut hole" for drugs between $2250 and $5100 in a year
- Above $5101, individuals will be responsible for 5% of their covered drugs or $2 for generics and $5 for covered brand-name drugs – whichever is greater.

People with incomes up to 150% of FPL are eligible for a partial subsidy. An asset test will apply to both full and partial subsidy eligibility. Details on the asset test are not yet clear.

The partial subsidy will:

- Reduce the monthly premium on a sliding scale, averaging $18/month instead of $35
- Reduce the annual deductible from $250 to $50
- Removes the donut hole, and charges a co-payment of 15% for drug costs up to $5100/year
- For costs over $5100/year, co-payment $2-$5

Nationally, about one-third of all Medicare beneficiaries, or 14 million people, are expected to be eligible for the low-income subsidies. About six million of

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Medicare Drug Benefit - continued

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those eligible for the low-income assistance are people eligible for both Medicare and Medicaid (dual eligibles), who will be automatically enrolled in the Low-Income Subsidy without completing the application. The other eight million will get financial assistance only if they successfully complete the application and are approved by either SSA or their local Medicaid office.

How Can You Maximize Automatic Enrollment in the Low-Income Subsidy?

People who will be automatically enrolled in the Low-Income Subsidy include Medicare eligible people with full Medicaid (no spend-down), and people enrolled in a Medicaid Savings Program (QMB, SLIMB, or QI-1). Make sure any of your clients who are eligible are enrolled in the Medicare Savings Program. If a client has Medicaid with a spend-down, and is not enrolled in QMB, SLIMB, or QI-1, she will have to apply for the Low-Income Subsidy for Medicare Part D.

Also, now is the time to enroll clients in Supplemental Needs Trusts if their income is over the 135% Federal Poverty levels. If they can reduce their income to below the 135% level by putting excess income into the Trust, they will be eligible for QI-1. Further reductions could qualify them for SLIMB, at 120% FPL or QMB at 100% FPL. This is important not only to save the Medicare Part B premium, which is now $78.20/month and going up, but because enrollment in QMB, SLMB or QI-1 will get them automatically enrolled in the Low Income Subsidy for the Medicare drug benefit. Visit www.wnylc.net/pb/docs/SNT_Materials for more information about Supplemental Needs Trusts and application forms.

Lower-income EPIC clients will be eligible for the Part D subsidy if their income is under 150% of the FPL and they meet the asset test. But they will have to apply for the Low-Income Subsidy (unless they are in the Medicare Savings Program). Higher income EPIC recipients will benefit substantially from enrollment in EPIC because during the "donut hole" period, costs paid by EPIC will count toward reaching the $5100 threshold for catastrophic coverage (except for EPIC co-payments, if any).

The Enrollment Process Doesn't End with the Low Income Subsidy

It's important to remember that the Low-Income Subsidy application is only the first step in the process. After enrollment in the subsidy, clients will still need to enroll in Medicare Part D in order to receive the new Medicare Drug card. Enrollment in Part D is done directly with the drug plans and will necessitate choice of a plan at the outset.

Because Medicaid drug coverage will end for dual eligibles on January 1, 2006, dual eligibles who do not choose a plan will be automatically assigned to a plan in October of 2005, with the option to choose another plan before the January 1, 2006 effective date. The Centers for Medicare and Medicaid Services (CMS) will do a series of mailings to dual eligibles as follows:

- On May 16, 2005, CMS will direct mail full benefit dual eligibles and those enrolled in Medicare Savings Plans, informing them that there is no need to apply for the Low-Income Subsidy, along with basic Part D program information.
- In June of 2005, CMS will direct mail full benefit dual eligibles, those enrolled in Medicare Savings Plans, informing them about transitioning to Part D.
- In October of 2005, CMS will direct mail full benefit dual eligibles, informing them of their auto-assigned drug plan and their option to choose another plan before January 1, 2006

As we can all imagine, problems with enrollment in Part D are likely, both for dual eligibles and other low-income Medicare recipients. No plan is likely to cover all the drugs recipients now use, or necessarily let them continue to use their neighborhood pharmacy. Advocates will need to help clients pick the best card for them and navigate the procedures. More to come on the details involved.

Many thanks to Valerie Bogart of Self Help Community Services, both for her invaluable materials on Supplemental Needs Trusts and for her posting to the Health Law ListServe about the Low-Income Subsidy, which provided a substantial portion of the information reported here.

Anything But a "Debtor's Bill of Rights": What the Federal Bankruptcy Bill Has in Store for Americans

By Kristin E. Keefe

On March 13, 2005, the Senate passed the bankruptcy bill, S.256, by a vote of 74 to 25. All 55 Republicans voted in favor of the bill, joined by a disappointing 17 Democrats. Senator Schumer remained one of the strongest opponents of the bill. Senator Clinton was not present for the vote (the vote took place on the day of her husband's surgery). As of the writing of this article, the House has not yet voted on the bill. Although it has been expected that the bill would sail through the House following passage in the Senate, massive media attention on the legislation and what it means for consumers gives some measure of hope that consumer advocates may be able to stop, or at least delay, passage of the law. (Should the House pass the bill, it is anticipated that President Bush will sign it immediately.) The bill goes into effect 180 days after signed by the President.

Although titled a "Debtor's Bill of Rights", the bill provides virtually no additional substantive protections for consumers. The bill does provide a host of protections and rights, however, for creditors to make it more difficult for consumers to discharge their debts through bankruptcy. Today's Bankruptcy Code was enacted in 1979 to provide a fresh start to Americans who have fallen into financial distress. A law school professor of mine once described it as "one of the greatest civil rights statutes" because it gives debtors a chance to return to the playing field with a clean slate. Just like Congress enacted Chapter 11 of the bankruptcy code (the chapter filed by businesses like Enron and the airlines), to encourage folks to take risks in starting businesses without the risk of losing everything, Congress enacted provisions for individuals to file for bankruptcy so that they too wouldn't fall into total financial ruin.

Much research has been done in the past few years regarding who is filing for bankruptcy. Contrary to what the credit industry has lead Congress to believe, bankruptcy filers are not generally folks who decided to spend lavishly on luxury goods and have put too many sweaters and Nintendo games on their credit cards. A study published in the journal Health Affairs, rather, found that almost half of the bankruptcies filed today are the result of medical debt, and mostly by middle class Americans who had insurance at the time of onset of the illness (75.7% had insurance). The second biggest cause behind people filing is divorce. Less than 1% of bankruptcy filings were due to credit card debt.

The changes in the law are numerous, and too many to go into in this article. One of the major changes, however, is the implementation of a means-test. Currently, a debtor filing Chapter 7 generally can be assured of discharging most of their unsecured debt (debt not secured by a security interest such as a mortgage or a lien on their car; unsecured debt includes medical, most utility and credit card debt). With the new bill, a debtor's income and expenses will be measured against pre-determined budget amounts based on the Internal Revenue Service's National Standards and Local Standards, *not* a debtor's actual expenses. Similarly, the debtor's income is based on the debtor's average prior 6 months income, rather than on their actual current income. If it is determined that the debtor *should* be able to pay their unsecured creditors, then the debtor will be forced into a payment agreement through the bankruptcy court, regardless of whether they can afford it, and will not be allowed to discharge that debt.

The bill makes filing for bankruptcy more expensive. Currently, the filing fee is around $200 for either a chapter 7 or 13 (based on local rules). Hiring an attorney for a basic filing can cost between $500 and $1,500. The means-test means that creditors will be filing more motions that need to be responded to by the debtor and will increase attorneys' costs for debtors. (It is notable here that the National Association of Consumer Bankruptcy Attorneys opposes the bill.) The means-test will only apply to debtors whose incomes fall above a median family income (based on Bureau of the Census information) and will luckily not apply to the lowest-income filers. How-

New York State's Health Care Proxy Law

Michelle Peterson

The case of Terri Schiavo has brought much attention to the subject of health care proxies. In 1991, a statute recommended by the New York State Task Force on Life, became law. The NYS Health Care Proxy provides a mechanism for a person who has become incapacitated and unable to make decisions, the ability to have their wishes are carried out. By appointing a health care agent, competent adults can authorize a family member or close friend, to make health care decisions for them, in the event they are unable to do so on their own.

The Health Care Proxy is easy to fill out and does not require an attorney. You have the ability to give your agent broad authority by saying something like "*I have discussed my wishes with my agent and they know my wishes including those about artificial nutrition and hydration.*" If you have specific instructions or want to limit your agent's authority, you must state them specifically. If an instruction is not covered by specifics written by you, then the agent will be allowed to make these decisions for you. Examples of medical treatments that you may want to give your agent special instructions are artificial respiration, nutrition and hydration, cardiopulmonary resuscitation (CPR), blood transfusions and surgical procedures to name a few.

If you are an organ donor, you may also state your wishes on this form, however, your health care agent cannot make a decision about organ donation because the agent's authority ends upon your death.

Finally, you must sign and date the Health Care Proxy. You also need two witnesses, age 18 or older, to sign the proxy. The person who is appointed as your agent or alternate agent cannot sign as a witness.

To access the form go to:
www.oag.state.ny.us/health/proxy_form.pdf

Bankruptcy Bill- continued

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ever, all debtors will be required to undergo pre-bankruptcy credit counseling as a condition of filing and post-bankruptcy education as a condition of discharge. Consumer advocates fear that this requirement will create a market for unscrupulous credit counseling agencies to emerge, subjecting debtors to deceptive practices and excessive costs. Post-filing financial management courses do not currently exists and there is no funding provided in the legislation to develop programs, yet the requirement will take effect immediately.

Other problems with the bill include a threat to child support, as other creditors will be entitled to payment by debtor's and there will be less available to go to child support judgments, the bill makes it easier for residential landlords to evict tenants in bankruptcy, makes saving homes or cars through a Chapter 13 plan more difficult and allows millionaires to continue to shelter assets in bankruptcy. It is also notable that the bill is virtually devoid of any added protections for consumers. The bill nominally regulates creditors and the information they disclose to consumers when billing, however it doesn't require full disclosure of terms such as the total amount of the debt owed, or the time it will take consumers to pay off the credit card debt should they continue to just make the minimum payment.

For more information on the bankruptcy bill and what how it will adversely affect consumers, go to the websites of the National Consumer Law Center's at www.nclc.org, Demos at www.demos-usa.org, or the National Association of Consumer Bankruptcy Attorneys at www.nacba.com.

Status of the State Budget and Funding for Civil Legal Services

By Kristin Brown

On March 31st, the Legislature passed New York State's first on-time budget since 1984. As a result, for the first time in many years, the civil legal services community will know within the first few weeks of the state fiscal year how much state funding will be available to provide services.

While technically the budget was passed on time, a few outstanding issues were set aside by the Legislature to be negotiated separately with Governor Pataki. These issues, include changes to Family Health Plus (FHPlus), Temporary Assistance for Needy Families (TANF) funding for the Disability Advocacy (DAP) and Supplemental Homelessness Intervention (SHIP) Programs, and a large TANF block grant to counties were negotiated behind closed doors over the next ten days.

Finally, on April 12th, the last day the Governor had the ability to veto portions of the budget, the Executive submitted a bill that contained most of the remaining budget items. Later that night, the Legislature amended the bill to include the other issues that had been left unresolved. This final budget bill passed both houses of the legislature and was sent to the Governor on April 13th. While the Governor does have the ability to veto all or portions of this bill, he is not expected to do so because the bill was negotiated and agreed to by the Governor, the Senate Majority Leader and the Assembly Speaker. Barring a major blow-up, the civil legal services funding abounts can be considered final and the cuts to FHPlus will remain.

Agreement on State Funding for Civil Legal Services:

- **$4.6 million** for civil legal services, including $359,000 for legal assistance to victims of domestic violence (secured)
- **$5.74** million in DAP "base" funding (secured)
- **$4 million** for SHIP (secured)
- **$1 million** for DAP TANF
- **$1 million** for DAP TANF (pending end of veto period)

Changes to FHPlus

- Drug co-pays increased to $3.00 for generics and $6.00 for brand name drugs
- New, $5.00 co-pay for dental, clinic and physician services with $25.00 annual cap on dental service co-pays.
- Preventive and routine vision services limited to once every two years
- Government employees excluded and waiting period extended from existing six months to nine month (even six month waiting period has yet to be implemented)

Reacting to an On-Time Budget Timeline

While it was somewhat difficult to adjust to the quickly paced calendar after so many years of drawn out budget negotiations, a number of legal services programs were able to come to Albany throughout the month of March to meet with their Legislators and share information about how critical the state funding is to their programs. This year, because of the sped up budget process, we were able to take the opportunity thank members for restoring the state appropriation to the budget and to give special thanks to those who have been supportive of legal services programs in other ways at both the state and the local levels.

In most instances we were also able to explain how the Governor's proposal to create a $1 billion TANF block grant to the counties would impact the provision of TANF funded legal services. Because each county would need to decide how to allocate the

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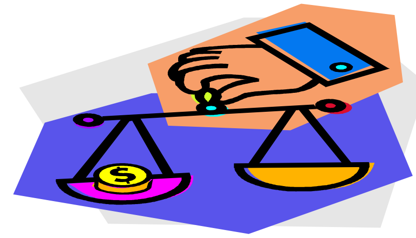
Civil Legal Services Funding-continued

funds to cover their own administrative costs and provide all TANF funded mandated and non-mandated services (including child care, child welfare, domestic violence non residential services, transportation, DAP and the Supplemental Homelessness Intervention Program (SHIP) as well as many other important welfare to work and support programs) concerns focused on whether any funding would remain after the mandated programs were provided for and how non profit organizations that provide services in multiple counties could justify the administrative time and energy spent seeking and managing contracts in each of the social services districts they serve.

Thanks to the many concerns about the block grant raised by the advocacy community and many of the counties, including New York City, the Senate and Assembly members on the Human Services and Labor Conference Committee, Chaired by Assembly member Deborah Glick and Senator Ray Meier, reached a compromise on the block grant proposal which retains a $600,000,000 block grant to the counties, but ensures that a number of critical TANF funded programs, including child care, DAP, SHIP and domestic violence non residential services remain funded separately at the state level. To view the final agreements and reports from all of the budget Conference Committees and a list of members, see http://assembly.state.ny.us/comm/WAM/20050324/ .

Civil Legal Services State Appropriation Maintained

Thanks to the un-erring support of the Assembly Majority, lead by Assembly Judiciary Committee Chair, Helene Weinstein, $4.6 million for civil legal services funding, including $359,000 in funding to provide legal assistance to victims of domestic violence was included in the Public Protection and General Government bill sent to the Governor on March 31st. This state appropriation has been restored to the budget every year since 1993 and steadily increased through 2000 where it reached a high point at $7.4 million. Unfortunately in 2001, in the aftermath of September 11th, the Assembly was forced to cut civil legal services funding by 35%. Other non profit programs and issue areas fared the same or worse. As the state continues to rebound from the budget deficits that have plagued us since 2001, we are hopeful that over the coming year resources will become available so that both the Assembly and the State as a whole will reaffirm New York's commitment to ensuring access to justice in the civil realm.



The Legal Services Assistance Fund

We have already begun to see movement toward that goal with the creation of the Legal Services Assistance Fund (LSAF) in 2003. The monies contained in the fund have continued to grow since it's creation and we are hopeful that this year the civil legal services community will begin to reap the benefits. The LSAF will be distributed through a memorandum of understanding (MOU) between the Senate, Assembly and Governor. It remains unclear whether there will be one or two MOU s, however, we do know that each house of the legislature will distribute $3 million and the Governor will get $1.8 million. LSAF funds can be used for civil and criminal legal services or for reimbursement of expenses.

The Senate clearly plans to use its portion for a loan forgiveness program for District Attorneys. GULP has been working toward getting the Senate to use a portion of their money to create a statewide program to fund the provision of civil legal services to victims of domestic violence and, while we have had some interest in this arena, it is by no means clear that this will happen.

The Assembly has intentionally kept their portion of the fund uncommitted so that they are able to use it in case the Governor vetoes current state funding.

The Governor plans to use his portion to fund prosecutorial and defense services associated with sex offender risk level determination hearings.

While it still remains unclear exactly how the civil legal services community will benefit from the LSAF we continue to push for as much as possible to go toward restoring some of the funding reductions we have seen over the past several years. GULP remains hopeful that the creation of this fund brings us one step closer to a permanent, stable funding source for the provision of civil legal services in New York State.

New HMDA Regulations Create Opportunities for Consumer Advocates

By Barbara van Kerkhove, Ph.D.

The federal Home Mortgage Disclosure Act (HMDA), passed in 1975 to help the public "determine whether depository institutions are filling their obligations to serve the housing needs of the communities and neighborhoods in which they are located,"[1] *(see page 12 for Endnotes)* requires lenders to publicly disclose information on their mortgage lending activities. Along with its implementing regulation, Regulation C[2], HMDA requires that mortgage lenders provide information on every application taken or loan purchased during the previous year and whether each application was approved or denied. HMDA reporters also are required to disclose certain information about each individual applicant - the household income, race/ethnicity, gender, the loan purpose and type, and the amount of loan; and about the property to be mortgaged - the census tract, type of property, and owner-occupancy status.

HMDA has been critical in helping consumer advocates, legislators and the public understand the extent of mortgage redlining and work to increase investment by depository institutions in low- and moderate-income and minority communities - communities that traditionally have been underserved.

Regulation C was amended in 2002 to include several new reporting requirements effective with mortgage transactions as of January 1, 2004 and reported to the federal government by March 1, 2005.

Background

Historically, it has been very difficult to determine whether or not specific mortgage lenders are violating the Fair Housing Act by charging minorities, women, or those living in minority or low-income neighborhoods inordinately higher loan rates than are charged to non-minority or male borrowers. Before the recent Regulation C amendments, HMDA data provided no information on the pricing of each individual loan originated. Legislators, consumer advocates and the general public had virtually no data on the pricing of loans by gender, race/ethnicity or census tract. Therefore, lenders that steer women and minorities into higher cost loans were shielded from the spotlight.

With the new reporting requirements under Regulation C that shield is about to be lifted.

New Opportunities

For the first time, the 2004 HMDA lending data will provide a new opportunity to analyze mortgage applications, originations and denials. The release of this new HMDA data will include, for each loan,

- the pricing of the loan and whether the loan's Annual Percentage Rate (APR) exceeds the Treasury yield threshold (3% for 1st lien mortgages, 5% for subordinate liens) and, if so, how far above the applicable Treasury yield the loan's APR is;
- better race/ethnicity data, which is now required to be asked of every applicant and observed for face-to-face applicants if applicant refuses; and
- whether or not the loan is a federal Home Owners Equity Protection Act loan.

Here is an example of the type of loan that would trigger rate spread reporting requirements using the Treasury yield threshold. A lender originates a 15-year first lien mortgage for a homeowner with an APR of 8.00%. The comparable Treasury yield for this is 4.54%. The difference (or rate spread) between the APR and Treasury yield is 3.46%.[3] Since the rate spread is above the Treasury yield trigger of 3%, the lender is required to report the rate spread of 3.46%. If this loan had an APR of 7.00%, the rate spread between the APR and the Treasury yield would only be 2.46%. Since this would be below the 3% trigger, the lender is not required to report the rate spread.

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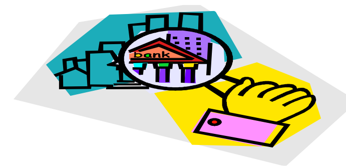

HMDA Regulations - continued

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This new information and level of detail will give consumer advocates the ability to assess whether or not minorities, women, or residents of low-moderate income or minority neighborhoods are paying higher interest rates as a result of practices that, on their face, may be gender and race neutral but in practice, result in disparate impact on protected classes that may be actionable under the Fair Housing Act.

What Lenders Are Doing

Lenders are very concerned that the new pricing data will show that minorities received a disproportionate share of the higher priced loans. An analysis by The Wall Street Journal of lending by National City Corp., the nation's ninth largest home mortgage lender in 2004, reveals just that. While 21 percent of the first-lien mortgages by National City (or its affiliates) to African-Americans exceeded the Treasury yield threshold, only 9.5 percent of the loans to whites did.[4]

In response, David Fynn, a Senior Vice President at the bank, said that "the figures released by National City don't suggest that the bank is discriminating against borrowers on the basis of race or ethnic group.[5]"

"Rather…the pricing of the loans is determined by personal credit rating or "scores," the borrower's ratio of debt to income, the size of the down payment on the home, and the type of loan sought by the customer."[6]

Other articles in the American Banker[7] reflect Fynn's view, as well as concerns by banks that consumer advocacy organizations will use the new data to substantiate charges of discrimination. Banks are clearly doing preemptive damage control. Recent actions by federal regulatory agencies indicate that they also are saying the usefulness of the new HMDA data for discrimination claims is limited.[8] The concern by banks may be a good thing for at least some communities.

Other Avenues for Advocates

Even if there are no legal violations, disparate pricing can still exist. Lenders know that a revelation of this could create a public relations disaster or problems during a merger, CRA (Community Reinvestment Act) exam or Fair Lending exam. As such, this new data provides additional tools for community-based advocacy. Organizations that advocate about lending and community reinvestment issues can work with local lenders to evaluate how they make mortgage loans. Advocates' analyses using this pricing data can provide the basis on which to offer solutions to ensure that minority, women and low-income borrowers ultimately receive prime loans.

The Greater Upstate Law Project/Public Interest Law Office of Rochester (GULPILOR) has a long history of analyzing HMDA data for the Rochester, NY area. Our analyses of HMDA and small business lending since 1992 have resulted in six home mortgage, small business and sub-prime lending reports. In addition, we have used our analyses to identify strengths and weaknesses in lending patterns, to generate ongoing discussions with area banks, and to submit comments to federal and state regulators.

GULPILOR will be analyzing the new 2004 HMDA data over the next several months. We will share our analyses with other consumer advocates and with area banks to start a better informed discussion on how to increase prime lending to traditionally underserved communities.

Endnotes:

1 12 U.S.C. §2801(b)
2 12 CFR Part 203
3 The Federal Financial institutions Examinations Council (FFIEC) has a rate spread calculator to assist HMDA reporting institutions with the new rate spread reporting requirements. It can be found at: http://www.ffiec.gov/ratespread/default.aspx
4 Hagerty, James R., March 30, 2005. "Blacks Are Found to Pay High Rates for Home Loans." The Wall Street Journal, p. D2.
5 Ibid.
6 Ibid
7 See Lively, Randy. March 4, 2005. "How new HMDA Figures Can (and Cannot) Be Used. American Banker and Paletta, Damian. February 22, 2005. "In Focus: Lenders Brace for Mortgage Data Fallout." American Banker.
8 Paletta, Damian. April 1, 2005. "Agencies Try to Head Off HMDA Storm." American Banker. See also: http://www.federalreserve.gov/boarddocs/speeches/2005/20050331/default.htm, http://www.federalreserve.gov/boarddocs/press/bcreg/2005/20050331/default.htm

Identity Theft Causes Incorrect Earnings Records

By Kate Callery and Louise Tarantino

When Social Security numbers were first issued in 1936, the federal government assured the public that use of the numbers would be limited to Social Security programs. Today, however, the Social Security number (SSN) is the most frequently used record keeping number in the United States. SSNs are used for employee files, medical records, health insurance accounts, credit and banking accounts, university ID cards, and many other purposes. In fact, the Social Security number is now required for dependents over one year of age if the parents claim the child for tax purposes.

The proliferation of the use of SSNs for multiple purposes raises some concerns among privacy rights advocates. The crime of identity theft is increasing at epidemic proportions. With the SSN accessible to so many people, it is relatively easy for someone to fraudulently use your SSN to assume your identity and gain access to your bank account, credit accounts, utilities records, and other sources of personal information. Identity thieves can also establish *new* credit and bank accounts in your name. Another one of the many ways that it can come back to haunt victims is in the Social Security realm itself. Two recent cases underscore some of the many ramifications of identity theft.

Peter Racette of the Legal Aid Society of Northeastern New York recently handled a case in which the theft of the client's identity became an issue in preparing for the hearing. Peter's client suffered from back pain and anxiety. The alleged disability onset was November 2001. When he reviewed the Social Security file, Peter noted that the earnings record showed substantial earnings (greater than $20,000 per year) in both 2002 and 2003. Peter questioned his client closely about work activity in those years. The client denied working.

Peter then reviewed the client's and his wife's joint federal income tax returns for 2002 and 2003. The tax returns showed a clear discrepancy from the Social Security earnings record. Peter contacted the local Social Security District Office to report that the client's earnings record was not correct. Peter thought there had been a bureaucratic error at SSA. His concern at the time was making certain that the discrepancy did not cause an adverse credibility determination at the hearing.

The District Office made an appointment for the client to come in and review a complete printout of earnings information. The earnings record showed five different employers from 1995-2004 by whom the client denied having been employed. All five employers were from the Southwest. The SSA Claims Representative then prepared a statement for the client to sign. In the statement, the client denied that he had worked for specified employers during specific years and requested that his earnings record be corrected. Peter submitted a copy of this statement to the Administrative Law Judge (ALJ) at the hearing, which resolved the potential adverse credibility determinations.

The SSA Claims Representative also contacted the SSA Inspector General, who opened an investigation. In January 2005, after the client was found disabled, the client called Peter to tell him the Inspector General had actually located a person in Arizona using the client's identity to work and attempted to apprehend the imposter, but the individual was apparently tipped off and fled. The client told Peter that he recalled losing his wallet in the early 1990s, an event he remembered mostly because of the inconvenience of replacing his driver's license and credit cards. The client surmised his Social Security card had likely been sold by whoever found the wallet.

Peter sent the client information on identity theft from the New York Attorney General and the Federal Trade Commission. Peter advised the client to routinely obtain free credit reports from the three major credit reporting agencies (Experian, Trans Union, and Equifax) and review the reports to ensure that no inquiries had been made to the agencies where the client

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Identity Theft - continued

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did not know the source of the inquiry. If the reports showed any suspicious activity, the client needed to contact the agency immediately.

Peter also suggested that the client specifically request a copy of his earnings record every year from SSA and, if the earnings record showed income that the client had not earned, to file a statement with SSA disputing the earnings. Peter warned the client that the imposter's earnings might trigger a Continuing Disability Review (CDR) but that the best he could do was be vigilant in making sure the imposter's earnings were removed from the earnings record.

Finally, Peter advised the client of the potential for the imposter to use the client's name and Social security number if ever arrested and the problems that could create with "fleeing felon" issues. Again, the best the client could do was to minimize the impact and inconvenience by being vigilant for signs the imposter was using his identity again. Peter counseled the client on how to respond to a notice terminating benefits because SSA believed him to be a fleeing felon. Pursuant to the Social Security Protection Act of 2004, Public Law No. 108-203, one of the mandatory good cause exceptions to application of the fleeing felon rule to both Title II and Title XVI (SSI) cases is where the individual has been the victim of identity fraud and the warrant was erroneously issued on that basis. Section 203 amends 42 U.S.C. §402(x).

Victor Torres of Brooklyn Legal Services also handled a case where identity theft came into play during the hearing. Victor represented a client who suffers from a seizure disorder. He argued that while the client did not have the requisite number of documented seizures to meet the listings, she had nonetheless experienced numerous seizures. She did not seek medical treatment after each and every seizure unless she experienced physical injuries secondary to the seizures. He submitted graphic pictures of the injuries the client sustained after having had seizures and collapsing. He also argued that his client was fearful of venturing outside of her home alone because, as had happened in the past, she could experience a seizure at any time and collapse and seriously injure herself.

Despite all this evidence, the ALJ was not all that impressed, pointing out during a lengthy pre-hearing conference that the seizure disorder could and should be controlled by medications. She was nonetheless willing to keep an open mind and hear testimony from the claimant and her witnesses. When the claimant testified, however, that she last worked in 1998, the ALJ interrupted to point out that her earnings record showed earnings from three other sources subsequent to 1998. Victor's client steadfastly denied working after losing her job in 1998. She pointed out that she had lost her Social Security card in the past, and suggested that perhaps someone else used her number. After the ALJ noted that this now raised credibility issues that cast doubt on the entire case, Victor wisely requested an adjournment.

On his way back from the hearing, Victor went directly to the Social Security office to determine whether or not his client had ever needed to replace her Social Security card because she lost it. A computer check revealed that his client had indeed had her card replaced on three separate occasions.

Armed with that information, Victor had his client produce three photos of herself, which he sent to each of the three alleged employers asking whether or not she was the same person employed by them. All three of the employers replied. One sent an employment history that included signatures from their employee that did not match Victor's client's signature. Another sent copies of payroll records. The final employer actually provided a written statement. The employer interviewed two of the claimant's former co-workers and showed them the picture that Victor had provided. They both stated that the woman in the photo was not the woman they worked with.

With this evidence, Victor went back to the Social Security office and convinced them to remove all of the post-1998 earnings from his client's record. When he received written confirmation that the earnings were removed, Victor had the hearing rescheduled. In the meantime, Victor convinced his client to seek out psychiatric treatment, which she had previously refused to

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GREATER UPSTATE LAW PROJECT

WESTERN NEW YORK LAW CENTER

Online Resource Center

In June of 2000 the Greater Upstate Law Project and the Western New York Law Center unveiled the Fair Hearing Bank (FHB). With an ever-growing number of welfare administrative hearing decisions, the FHB has become a wonderful tool allowing attorneys and advocates to access Fair Hearings by conducting and refining searches as needed.

Over time we have added other resources, changing the name to the Online Resource Center (ORC) and expanding it to include, in addition to the Fair Hearing Bank:

- **Benefits Brief Bank**: unreported and reported decisions with direct links to the reported decisions, pleadings, helpful briefs and other litigation related documents;
- **CATRAP** (Computer Assisted Tenant Representation Advocacy Program): offers attorneys preparing defenses in eviction proceedings a comprehensive selection of available defenses and direct links to relevant cases, caveats on using the defense, and other practice tips;
- **DAP Numbers**: offers materials referred to in GULP's *Disability Law News*;
- **Domestic Violence Case Law**: contains summaries of domestic violence related state and federal court decisions in New York.

Help us keep you up-to-date by making a tax-deductible donation today.

Please go to http://www.gulpny.org/ORC/ORC_Donate.htm where you can either make a secure online donation through PayPal or print out the mail in donation form.

Thank you in advance for your generos-

Identity Theft - continued

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do because she was under the mistaken impression that it would lead to the removal of her children by child protective services.

At the second hearing on January 25, 2005, Victor presented the proof that his client had not worked subsequent to 1998. He was also able to demonstrate that in addition to her seizure disorder, she was now receiving psychiatric treatment. Following the hearing, the ALJ indicated that she would issue a favorable decision.

Both Peter and Victor did great jobs for their clients - first, by believing them, and second by going to great and creative lengths to prove their credibility. Their scenarios, however, present a cautionary tale for our clients and ourselves: we should all take care to safeguard identity information. We should also take Peter's advice on checking earnings records and credit reports (our own included) to heart.

Regulatory Roundup

By Susan C. Antos

This article reports rulemaking of interest to public benefits specialists, which appeared in the New York State Register from December 22, 2004 to April 13, 2005. Three new rules have been proposed, five new rules have been adopted and one rule was promulgated on an emergency basis. All references are to 18 NYCRR, unless otherwise indicated. If you are interested in reading the text of a proposed rule or the summaries of public comment and the response regarding an adopted rule, please contact Connie Wiggins (clewis@wnylc.com) or Nancy Krupski (nkrupski@wnylc.com) at GULP.

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
3/30/05	5/07/05	369.4(c)	**Verification of School Attendance:** Currently, 18 NYCRR 369.4(c) requires that for purposes of eligibility for Family Assistance, school attendance of a minor be verified at each contact with the family. This regulation would require such verification only when the child is 18 years old. The commentary to the regulation states that districts will not be prohibited from verifying school attendance, but will not be required to do so unless the minor child is 18.
3/2/05	4/16/05	443.1 443.7	**Approval or Certification of Foster Home on an Emergency Basis:** This proposed regulation would expand the conditions under which a foster home could be certified on an emergency basis. Currently, such a certification can be made only when the child is being removed as the result of abuse or neglect. The proposed change would allow such emergency certification when there is a compelling reason to do so.
3/20/05	4/16/05	404.1(d)(2) 432.2(b)(3) 441.7 465.1 466.4 Part 428	**Uniform Case Record in Child Welfare Cases:** This proposed regulation would change the recertification period for foster care maintenance payments from 6 to 12 months and would adopt standards for the retention of foster care records.

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
3/21/05	4/6/05	351.20(c)	**Families in Transition Act:** This regulation requires districts to promptly adjust case classification and payee when the adult caretaker of a minor child dies. The regulation also advises districts that public assistance must not lapse because of the death of a caretaker and that Safety Net Assistance provided to such child during the first 45 days after filing the application for safety net assistance is regarded as being given to meet emergency circumstances. This regulation implements the Families in Transition Act (Chapter 477 of Laws of 2000), which requires that public assistance eligibility shall not lapse solely because of the death of the adult relative care taker of a minor child. (Regulation was proposed 1/12/05).
3/4/05	3/23/05	399.4(a) 352.3(c)	**Temporary Absences:** This regulation removes the requirement that the temporary absence provisions only apply to "federally aided" public assistance programs, and also permits temporary absences to occur within the social services district). Additionally this regulation deletes the 180 day cap on the payments made during temporary absences by repealing 18 NYCRR 352.3(c).
1/19/05	2/9/05	372.2(a)	**Income Standards for Emergency Assistance for Needy Families with Children:** This rule limits eligibility for Emergency Assistance to Families (EAF) to families with income under 200% of the poverty level. The statute authorizing EAF, Social Services Law §350-j, contains no income or resource limitations, but states that the applicant must be without resources to meet the immediate need. The regulatory impact statement indicates that the Federal Department of Health and Human Services would not accept New York State's TANF plan without an objective income limitation for EAF. The Regulatory Impact Statement also states that local districts are currently using a 200% of poverty standard to determine EAF eligibility.
1/10/05	1/26/05	Parts 428, 441 and 496	**Statewide Automated Child Welfare Information System:** This regulation concerns the implementation of the CONNECTIONS system, which is the data system for New York State's child welfare services system, including foster care, adoption, preventative and child protective services. The rule also requires that foster care records be retained for 30 years after discharge of a child from foster care, six years after the 18th birthday of the youngest child in a family receiving preventative services and permanently for adopted children.

Amended Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
12/28/04	1/12/05	552.8(b)(1), (2), (3), (4), (5), (6) 900.1(a)	**Operational Plans for Room and Board Facilities:** This rule was adopted on 12/16/05 to be effective 1/5/05, but was amended with several non-substantive changes. The regulation caps the calculation of the room and board rate to the amount of the statewide monthly grant based on the shelter allowance schedule without children and requires that such rate be submitted to the Office of Temporary and Disability Assistance (OTDA) for approval. Additionally, the local department of Social Services will be required to notify OTDA whenever a single entity or organization has housed 20 or more homeless families in the last 3 months and is paid at the room and board rate. After reviewing this information, OTDA may require the district to submit an operational plan pursuant to Part 900, to determine the appropriateness of the rate charged. The district may seek a waiver from this requirement. An ADM will be forthcoming providing the method and format for requesting waivers.

Emergency Rule Making

Date of Filing	Rules Expires On	Regulations Affected	Summary
3/8/05	6/5/05	11 NYCRR 362-2.5 362-2.7 362-3.2 362-4.1 362-4.2 362-4.3 362-5.1 362-5.2 362-5.3 362-5.5	**Healthy New York:** These emergency regulations make a number of changes to the Healthy New York program, including deleting co-payments for well child visits, allowing a lower cost plan option which does not include prescription drugs, defining *de minimus* contributions for purposes of determining whether small employers qualify to participate, exempting child support received as income, and deleting the requirement that supporting documents be required upon recertification.

Child Support Cooperation: New Condition of Eligibility for Child Care Assistance Raises Practical and Legal Issues

By Susan C. Antos

As a condition of eligibility for a child care subsidy, all applicants and recipients for child care assistance, whether or not they receive family assistance benefits funded under the Temporary Assistance for Needy Families (TANF) program, must now obtain a child support order with the assistance of their local child support enforcement unit, or provide proof that they are independently pursuing paternity and support. This policy is the result of the promulgation of 18 NYCRR 415.3(c), which was effective May 15, 2004. With two exceptions, which are discussed more fully below, failure to obtain a support order or to cooperate with a Child Support Enforcement Unit (CSEU) will be grounds for the discontinuance of day care services.[1] (*See Endnotes on page 23).*

The regulation states: 'The child(ren)'s caretaker must demonstrate that he or she is actively pursuing child support from the non-custodial parent(s) either through the social services district's child support enforcement program or through other legal means. A caretaker who cannot demonstrate that he or she is actively pursuing child support must show good cause for why the family should be exempted from this requirement. For the purpose of this subdivision, good cause exists if pursuing child support would adversely affect the health, safety or welfare of the child(ren) on whose behalf such payments are to be made or other persons in the child(ren)'s household. The social services district must determine whether an applicant or recipient should be exempted for good cause and must verify and document in the case file the reasons for such exemption.'

This article will present an in-depth overview of this new requirement and then review the numerous practical problems and legal issues raised by its implementation. Strong arguments can be made that there is no statutory authority for this child support requirement, that it is being implemented in a way that violates the Family Court Act §413(1)(c)(4), and the procedures which have been adopted in sub-regulatory documents, violates the New York State Administrative Procedure Act (SAPA).

Curiously, the Office of Children and Family Services (OCFS) spelled out the implementing details of this regulation nearly five years before the regulation was promulgated, in an Administrative Directive, 99 ADM-5. The direction in this ADM is not completely correct and as a result, the Office of Temporary and Disability Assistance (OTDA) and OCFS have been working on a new joint ADM, to assist Social Services Districts with the implementation of this regulation, but as of the date that this article went to print, the ADM has not been published. Perhaps as a result of this lack of guidance, as of April 15, 2005, New York City had not yet implemented this requirement.

What is Cooperation?

Child support cooperation can be shown in one of two ways. The applicant or recipient for child care services can pursue support through the Child Support Enforcement Unit (CSEU), which is also called the IV-D unit (because child support services are funded under Title IV-D of the Social Security Act), or she can proceed on her own, with or without an attorney, to obtain an order.

An applicant or recipient who proceeds through the CSEU will have to fill out two forms: an application for child support services (form DSS 2521) and another form which requests the information necessary to identify and locate the absent parent (DSS 2860).[2] These forms are attached to 99 ADM-5. A custodial parent will be deemed to have cooperated upon providing the full name and social security number of the non-custodial parent, or the full name and at least two other criteria: date of birth and address, telephone number, name and address of employer, or any equivalent information. If the parent lacks this information, she can attest under penalty of perjury that she lacks that information by filling out form LDSS-4281, which is also attached to 99 ADM-5. The applicant will also have to provide information and evidence to assist in establishing paternity and securing support, to appear as a wit-

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ness at a court or other hearing and, if necessary, to submit the child and herself to genetic testing. [3]

A parent who proceeds on her own will have to periodically verify the status of her family court case.

Treatment of the Child Care Add-On

The Family Court Act provides that support orders consist of a percentage order and an "add-on" for special expenses such as education, medical and child care. If an applicant for child care services already has a percentage order with no add-ons, she will be required to return to Family Court and pursue modification of the existing order if it does not address child care costs so that an additional amount is added to the basic order for child care.[4] Once such an order is obtained, amounts earmarked for child care expenses do not count as income to the custodial parent, but neither do they reduce the amount of the custodial parent's co-payment. Instead, the add-on reduces the district's share of the child care subsidy payment.[5]

Here is an example: *Mary Jones's child is in a day-care center that costs $150 per week and she applies for a subsidy from her social services district. The county tells her that she will have a co-payment of $75 per week. The social services district pays the balance of $75 per week. Mary has a support order already, but is sent back to court to get an add on to assist with child care. To do this she must miss three days of work - one day to go to the child support enforcement unit to fill out the modification petition, a second day to appear in Family Court for the initial return date, and a third day when she returns to court for the final order. The Court orders that the non-custodial parent pay $50.00 per week for child care. This $50.00 does not go to reduce Mary's share, but instead, reduces the county's share by that amount. The new order of support results in no improvement for Mary - she continues to pay $75 a week for her child care, the county share is reduced to $25.00, and Mary must pass on the $50 that she receives from the non-custodial parent to the child care provider to reduce the county's share. Mary has missed three days of work to obtain an order that benefits the county.*

How Will Child Care Applicants and Recipients Know About the New Rule?

The child care unit of each social services district must advise all non-temporary assistance applicants and recipients of child care services of the new child support cooperation requirements.[6] Applicants will have no action taken on their child care application until they demonstrate compliance with the support collection rules; recipients will be advised that they need to comply no later than the next case action or their recertification. At recertification, the recipient will have to proceed through the Child Support Enforcement Unit (CSEU) or may alternatively demonstrate that he or she is pursuing child support independently. Upon cooperation with the CSEU or a demonstration that support is being pursued independently, the case should be recertified for six to twelve months.[7]

What is the Good Cause Exception?

An applicant or recipient for a child care subsidy is excused from cooperation requirements if he or she can show good cause for non-compliance. Good cause is shown by demonstrating "an adverse effect on the health, safety or welfare of the child or other persons in the child's household."[8] There is no requirement of serious physical or emotional harm, as there is for temporary assistance and Medicaid cooperation. [9]

The child care services workers make determinations of good cause. The individual claiming good cause must complete a good cause request form (DSS-4279).[10] The person making the good cause claim has 20 days from the submission of that signed from to provide the worker with corroborative evidence of good cause. This time limit can be extended for good cause.[11]

A determination of good cause must be reviewed and approved by a supervisor and made in writing within 30 days of the date the good cause request form (DSS-4279) is filed unless the claimant is allowed additional time to provide verification. If addi-

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tional time is allowed, the determination must be made within ten days after the extended due date. If the determination of good cause is denied, an appeal may be made through the fair hearing process. Pending the appeal, the CSEU must suspend all paternity and support actions.[12]

It would seem to make sense to have the good cause determinations made by domestic violence liaisons who are trained to screen for domestic violence in the temporary assistance caseload. Districts may use this option, but must account for the time spent screening child care subsidy applicants and recipients and charge the time to Child Care Block Grant funding. Domestic Violence liaisons are funded with TANF dollars which may not be used to screen those who receive a child care subsidy but not cash assistance.

What Happens If An Applicant or Recipient Fails to Cooperate?

An applicant who refuses without good cause to comply with these requirements will be denied child care services. A recipient must be sent a timely and adequate notice to terminate his or her child care subsidy.[13] A recipient who fails to cooperate with the child support cooperation requirements will remain ineligible for child care services until she complies with the child support requirements. The individual must demonstrate willingness by performing an affirmative act which eliminates the basis for non-cooperation. For example, if the ineligibility was imposed for failure to show up at a genetic test, compliance will only be established when the person complies with the genetic testing requirement.[14]

There are only two exceptions to the cooperation requirement: those who successfully assert good cause and applicants and recipients of temporary assistance, who by statute must be provided with child care assistance necessary for participation in work activities even if they do not cooperate with child support requirements.[15] Recipients of Transitional Child Care must cooperate unless they demonstrate good cause.

Interestingly, the sanction against those who receive child care subsidies is harsher than it is for temporary assistance recipients who do not comply with child support cooperation requirements. Temporary assistance recipients who do not cooperate in getting a child support order have their public assistance grant reduced by 25%.[16] Child support subsidy recipients, on the other hand, are totally ineligible if they do not cooperate.[17] Even more unjust is that if a parent has children by more than one father, and cooperates to get an order from all of the fathers except one, none of the children receive a subsidy, even those children whose fathers are paying support. [18]

What Happens If the Non-Custodial Parent Stops Paying Support?

Because the add-on goes to reduce the social services district's cost of child care, the custodial parent and the child care provider are dealt a double penalty when non-custodial stops paying. The custodial parent must wait one month, and then file a violation petition before the social services district will resume payment for the absent parent's share.[19] Thus, in the event of non-payment, the non-custodial parent will not only have to pay her share but also the portion of the share for which the non-custodial was liable. In order to have the social services district resume payment of this share, the custodial parent will have to wait four weeks, and then miss work to go to court to enforce an order that only benefits the district. None of the sub-regulatory material makes clear whether or how the provider gets paid for that one month waiting period.

Legal Issues that May be Raised by Petitioners and Respondents

No statutory authority for the cooperation requirement: There is no statutory authority for the regulation that requires that recipients of child care services obtain a support order as a condition of receiving a child care subsidy. An argument can be made that the state has impermissibly added an eligibility requirement not found in Social Services Law 410-w, which defines eligibility for child care. Although there are cooperation requirements for other public assistance programs,

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these requirements exist in State law - *see SSL 158(5)(6)(Safety Net Assistance), SSL 349-b (Family Assistance), SSL 366(3)(a),(b); SSL 366(4)(h) (Medicaid), SSL 95(9) (Food stamps - this provision of the law has never been implemented).*

Sub-regulatory policies are actually rules which should have been promulgated by notice and comment rulemaking: The State Administrative Procedure Act §102(2)(a)(I) defines a "rule" as an agency statement, regulation or code of general applicability that implements or applies law. It is a fixed general practice to be applied by an administrative agency. *Schwartfigure v. Hartnett*, 83 N.Y. 2d 296, 301 (1994).

At least three of the general rules promulgated by OCFS to implement this child support requirement were issued in sub-regulatory documents. A strong argument can be made that the following policies are actually rules which should have been promulgated by notice and comment rulemaking:

- that the child care add-on defrays the subsidy paid by the social services district rather than the parental co-pay;
- that non-cooperation results in total ineligibility (as opposed to a percentage penalty);
- that non-cooperation for one child results in all children being ineligible for a subsidy, even if the parent has obtained orders for the other children.

Legal Issues that May be Raised by Respondents

The language of section 413(1)(c)(4) of the Family Court Act creates liability for expenses "incurred" by the custodial parent. The plain language of the statute would suggest that it is the cost of the custodial parent's co-payment that the non-custodial parent should be defraying. However, OCFS has directed that the child care "add-on" defray the cost of child care paid by the social services district. At least one court has determined that there is no legal basis for this, holding:

> The fact that the action of an agency has significantly reduced the cost of child care should not be to the detriment of the non-custodial parent…. Petitioner's eligibility for a government subsidy should not be to Respondent's detriment. The cost to the Petitioner is the relevant amount. *Anonymous v. Anonymous* (Chenango County Family Court, Robert Cuffney, Hearing examiner - 3/3/00 - unreported decision, on file at the Greater Upstate Law Project, Inc.) *citing Bronstein v. Bronstein*, 203 A.D. 2d 703, 610 N.Y. 2d 638 (3rd Dep't1994).

Practical Difficulties

How To Calculate the Add-On

When making a determination as to the amount of the child care add-on, section 413(1)(c)(4) of the Family Court Act requires the court to pro-rate "incurred" child care expenses and add them to the percentage child support obligation. Logically, the cost "incurred" by the parent is the amount the parent pays - the amount of the co-payment. OCFS believes that the add-on amount must be assessed against the total cost of care - the total of the parent co-payment and the county share. [20] OCFS has acknowledged that some Family Court Support Magistrates set the orders by only looking at the custodial parent's co-payment, and the agency says it will abide by those orders.[21] Whether the add-on is based on the total cost or the parent share is a matter that is likely to be resolved by the courts.

If the add-on is calculated using the total cost, courts may have a difficult time properly framing an order, because the cost of care is more variable than for those who privately pay for child care. The usual arrangement for private pay child care is that the cost of care is a fixed amount per week, whether or not the child attends every day. The parent pays even if the child is out sick or if the family goes on vacation. In contrast, although a custodial parent receiving a child care subsidy does pay a co-payment in a fixed amount based upon her income, the amount paid by the social services district to the child care provider varies from week to week depending on the hours and days of attendance (unlike most private pay arrangements).

(Continued on page 23)

Child Support Cooperation - continued

(Continued from page 22)

Social services districts require detailed attendance sheets from providers and reduce the payment proportionally for absences. Therefore, the amount that a district pays for child care can vary from week to week.

When the Child Care "Add-On" Is Set Forth As A Percentage, How Does the Non-Custodial Know How Much to Pay If the Amount Varies Every Month?

The Family Court Act requires a court to "determine reasonable child care expenses....where incurred," and to pro-rate them between the parties. Whether this suggests a fixed amount or a percentage of the cost is subject to debate. There is no doubt that courts set orders in both ways. Several practical problems arise for percentage orders when the amount is based the total cost of child care.

When the non-custodial parent's share is set forth in the order as a percentage, the custodial parent is likely to be understandably confused as to her responsibilities. In many cases the custodial parent has no way of knowing the total amount paid to the provider, because she is only advised of her co-payment, which remains the same, regardless of attendance. When she determines the amount, either by contacting her child care worker or her provider, the custodial parent will need to submit a bill to the non-custodial parent to assure that he pays the amount that is due and owing to the social services district. This results in delays in payment.

Enforcement - The Inability To Use An Income Execution:

Because of the cost of care varies, in cases where a court has set the child care add-on as a percentage, it is impossible to include these child care add-ons to an income execution. This makes it more likely that there will be non-compliance with the order.

How To Pay For IV-D Services?

A petitioner who has a child support order and who asks for IV-D legal services to get the child care add-on may be charged a fee. (For example, $105/ hour in Monroe and Tompkins Counties; $80 per hour in Chenango County). Although fairness would dictate that this fee be waived since the county is the beneficiary of the ultimate order, the fee is assessed to the custodial parent.

Endnotes

[1] 99 ADM-5, p.18
[2] 99 ADM-5, p. 18-19
[3] 99 ADM-5, p. 6-7
[4] 99 ADM-5, p. 18. Family Court Act §413(1)(c)(4) requires a court to pro-rate ***incurred*** child care expenses, and add it to the basic child support obligation. (Emphasis added).
[5] 00 INF-2, question 45.
[6] 99 ADM-5, p. 19-20
[7] 99 ADM-5, p. 20.
[8] 99 ADM-5 at 36.
[9] 18 NYCRR 369.2(b)(4)(v); 99 ADM-5 at 35.
[10] Id.
[11] 99 ADM-5 at 37.
[12] 99 ADM-5 at 39-40.
[13] 99 ADM-5 at 21-22, citing 93 INF 5.
[14] 99 ADM-5, p. 34-35.
[15] 99 ADM-5 at 19.
[16] Social Services Law §131(16).
[17] 99 ADM-5 p. 32-33.
[18] OCFS memo from Anne Ball to Suzanne Zafone Sennett and Lee Prochera, dated 11/1/99, on file at GULP.
[19] 00 INF 2, question 44.
[20] 4/7/05 telephone conversation with Lee Prochera, Office of Counsel and Anne Ball, Office of Children and Family Services.
[21] Id.

DID YOU KNOW?

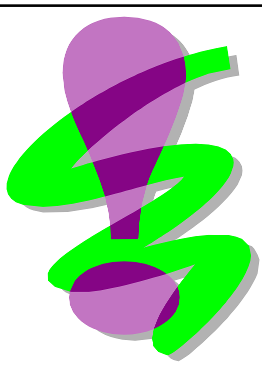
NYS Government Listings

The New York State Office for Technology (OFT) has a public phone directory for New York State Government Listings. State agencies and other entities who utilize OFT Integrated Telecommunications Systems are included in the NYS on-line telephone directory. The directory allows you to search by individuals, functions, organizations, toll fee numbers, hearing/speech impaired, NYS Congress Members, NYS Assembly and Senate Offices. If you'd like to check it out, go to:
http://www6.oft.state.ny.us/telecom/phones/.

Double Your Internet Search Functions

Have you ever wanted to search Google and Yahoo, but only have time to search one? Well, your problems are solved!
Go to ***http://yagoohoogle.com*** and take a look for yourself. While it may seem a bit silly, it's also certainly useful! Have fun searching!!

Identity Theft...Tips for Protecting Your Privacy



The State of New York Office of the Attorney General publishes an in depth, 60 page brochure titled *Tips F or Protecting Your Privacy: Don't Become a Victim of Identity Theft.* The brochure includes some valuable information on privacy and identity theft and suggests numerous ways to protect yourself and your identity. It also includes and brief explanation both Federal and New York State Law Identity Theft Statutes as well as a general details of other privacy laws affecting public agencies. The brochure can be accessed at
http://www.oag.state.ny.us/consumer/tips/identity_theft_pamphlet.pdf.

And Now For Something Completely Different…

A Lesson in Legal Services Management from the Lakotas

Circle of Courage

The Circle is a sacred symbol of life….

Individual parts within the circle connect with every other,
and what happens to one, or what one part does, affects all within the circle.

Virginia Driving Hawk Sneve

If creating an office environment in which harmony, self-worth, expertise, independence, and generosity abound has been on your wish list, it may be helpful to spend a few moments exploring Native American teachings.

The Lakota tribe has a unique way of exploring one's self-worth, depicted by a Circle of Courage. This circle, built upon a medicine wheel symbol, portrays the individual as the center surrounded by four directions[1]. These directions portray four goals of Native American education that lead to self-worth: belonging, mastery, independence and generosity.

This article briefly describes these four goals and their application to legal services offices. It also raises a series of questions on how we can incorporate these goals into our work life. Follow-up articles in the next few *Legal Services Journal* issues will address these questions.

Belonging

In Native American culture, significance was nurtured in a community that celebrated the universal need for belonging. Treating others as kin forged powerful social bonds of community that drew all into relationships of respect. In our offices we often speak of the staff as a "team" in which each individual plays a vital role in delivering services to clients. But there is also cynicism in our offices, a belief that some roles are more important than others and that not every worker is equally valued. How can we assure that our offices have a "culture if inclusion" in which every job and each staff is valued?

Mastery

Competence, in Native American culture, was ensured by guaranteed opportunity for mastery. The first lesson in traditional Native American culture was that one should always observe those with more experience to learn from them. Today's management jargon would call that "modeling." In the legal services office we try to provide training and coaching on the job that will give everyone the skills and knowledge they need to do their job well. But periodic budget crises often lead to reduction in training and travel budgets. How many offices have professional development plans for each staff member in place? In the face of shrinking budgets, how can our offices assure that every member of the staff has a "guaranteed opportunity for mastery?"

Circle of Courage - continued

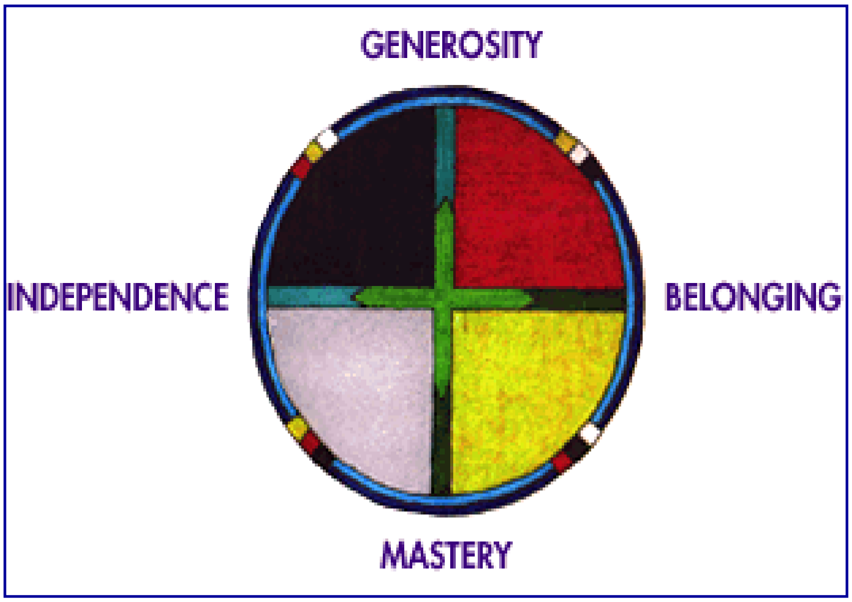
Independence

Native teaching was designed to build respect and teach inner discipline. From earliest childhood, children were encouraged to make decisions, solve problems, and show personal responsibility. Adults modeled, nurtured, taught values, and gave feedback, but children were given abundant opportunities to make choices without coercion. How can we apply these principles in our work world?

Generosity

Finally, virtue was reflected in the preeminent value of generosity in Native American culture. The central goal in Native American child-rearing is to teach the importance of being generous and unselfish. In helping others, youth create their own proof of worthiness: they have the power to make a positive contribution to another human life. What does generosity mean in the work place? How do we give beyond what's needed to our colleagues?

Future articles will address these questions and suggest the ways to incorporate these teachings into the work world. Next Issue: *Building A Culture On Inclusion.*



Editors Note: Thank you to Jerry Wein, Special Projects Coordinator, for submitting this article.

Endnote:

[1] Taken from, Brokenleg, M. (1998). A Native American Perspective: That the People May Live. In Smith, C. M., ed. Preaching Justice: Ethnic and Cultural Perspectives. Cleveland: United Church Press.

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The Legal Services Journal

The *Legal Services Journal* © is published bimonthly by the Greater Upstate Law Project, Inc. (GULP), a public interest law firm that provides legal expertise, legislative and administrative advocacy, training, and technical support to civil legal services programs and community groups working to improve the lives of New York's poor and low-income families.

 GULP's work is supported by the following:

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Westchester County Department of Health, Ryan White

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