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Governor Spitzer's First Budget Includes Funding for Civil Legal Services

By Anne Erickson

We are extremely pleased to report that for the first time, the Executive Budget includes state funding for the general delivery of civil legal services. Clearly Governor Eliot Spitzer understands the critical role that legal services plays in ensuring a level playing field and expanding access to justice for those most in need.

For the past 14 years, it has only been through the efforts of the Legislature, under the leadership and determination of Speaker Sheldon Silver and Assembly Judiciary Chair Helene Weinstein that any general fund support for core legal services has been included in the state budget.

We are very optimistic that this year will be the turning point, when the Assembly Majority finds active partners in the Senate, the Judiciary and the new Executive administration in creating a permanent stable funding stream for the delivery of civil legal services in New York State.

Recognizing that this would be a pivotal year, Empire Justice began working with the legal services community in a much more formal way this summer. While we have always organized the efforts to restore funding to the state budget, this year we envisioned a much more proactive approach. We have entered

into formal agreements with the legal services programs outside New York City and have joined with our colleagues in New York City in a new Statewide Campaign for Civil Legal Services.

The aim of all these efforts is to secure general state funding for the general delivery of legal assistance to those in need.

Background

Currently, there are three core funding streams that support the general delivery of legal services:

- ◆ The federal Legal Services Corporation (LSC)
- ◆ The Interest on Lawyers Account (IOLA)
- ◆ The State Funding - provided through the Assembly majority as line items and as part of the Legal Services Assistance Fund (LSAF)

Clearly, not all legal services programs receive funding from each of these funding streams, but together they provide the financial underpinnings for support the delivery of legal assistance.

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Funding Civil Legal Services—continued

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A Review of the Executive Budget Proposals

Governor Spitzer's first Executive Budget includes a number of extremely positive new investments. Details still need to be worked out in a number of areas, but the overall approach is to make investments in civil legal services part of the base state budget for the first time.

There is an appropriation of \$4.6 million for civil legal services currently "placed" in the IOLA fund. According to the budget language accompanying the appropriation, these funds "will not be available until a plan for their administration has been approved by the director of the budget." This plan, according to the budget, will include a competitive process.

The Executive Budget also outlines a number of proposed uses of the Legal Services Assistance Fund, including \$5 million of funding from the Legal Services Assistance Fund (LSAF) within the Judiciary budget as proposed by the Office of Court Administration (OCA). While there is little description in the budget on how these funds will be used, the accompanying narrative indicates they will be used for civil legal services.

The Executive also proposes that the criminal record search fee that supports the LSAF be increased by \$8, with \$6 of that increase targeted to the LSAF. If accepted, this would direct \$15 of each \$60 fee to the Legal Services Assistance Fund.

The Executive Budget also increases the authorization for IOLA to increase its grant making by \$4 million. This means that if interest rate activity generates that level of new income IOLA will have the needed authority to distribute those funds in its next round of grants.

Recommendations for Moving Forward

Working with the legal services community, we have made a number of recommendations, including:

Maximize and coordinate the state's investment in civil legal services. New state funding commitments to legal services should be consolidated into a single new funding stream. The \$4.6 million now "placed" in IOLA and the \$5 million proposed in the OCA budget generally for civil legal services should be consolidated into a single dedicated appropriation.

Furthermore, the \$4.6 million recommended by the Executive to support legal services cannot supplant the current commitment in the state budget. This funding needs to be in addition to – not instead of – the current funding. We urge the Senate to join with the Assembly in ensuring that the current base funding is maintained so that the funds proposed by the Executive will indeed be an expanded investment in civil legal services.

Do no harm. The organizations currently receiving state funding through the Assembly form the backbone of the legal services delivery system, delivering critical services on a daily basis. These services should not be disrupted as the state moves to a more programmatic approach to service delivery. There should be agreement to maintain stable funding while a new, transparent process for distribution of funding is developed so that these core programs can continue to serve clients during this transition process.

Create appropriate allocation and distribution mechanisms for new funding. Funding should be allocated equitably across the state and distributed to qualified legal services providers. The statewide allocation of funds should be based on a county-by-county formula driven by the federal census of poverty. This would give a formula-based allocation mechanism that ensures equitable distribution of funding across the state.

While such an allocation methodology will ensure statewide distribution of funding, the actual receipt of state funding by any organization should be based on the highest standards of quality and accountability. Local need and local planning should drive the distribution of funding to the greatest extent possible. Similar to the other core funding streams – LSC and IOLA – funding should be

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What \$36 Million?

By Anne Erickson

News reports indicate that there is “\$36 million in the state budget for civil legal services.” What they count in the \$36 million includes IOLA funding (at a hoped for \$17 million) what we think is DAP \$6.74 million, but they call it TANF; some federal Commission of Quality of Care funds and the general fund support of \$4.6 million and the new \$5 million proposed from LSAF.

Our focus is on securing the state support for the general delivery of core civil legal services.

So, yes, there’s federal funding that passes through the state budget on its way to support some legal services for some population groups. And yes there is funding to support contracts to provide legal assistance to people who have been wrongly denied federal disability benefits. And yes, funding generated by the legal profession and channeled through the state budget to be distributed by Interest on Lawyer Account (IOLA) Fund is included in the budget as a pass through. Each of these funding streams, thankfully, has been part of the state budget for years.

What has not been part of the Executive Budget and what Governor Spitzer brings to the table for the first time is a proposed \$9.6 million in state funding to support the general delivery of civil legal services.

This is a great first step for the new administration and it will hopefully build on what the Assembly Majority has been able to do over the years. We look forward to working with all involved to make sure the current proposed funding becomes real and recurring funding for these critical services.

Funding Civil Legal Services—continued

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available to meet the legal needs of each community and should not be restricted to particular services or particular populations.

Ensure an appropriate mix of services. The bulk of the funding should be directed to front-line representation and service to clients. However, there should also be a clear allowance for training, backup and technical assistance. This is especially important in New York State since neither LSC nor IOLA currently fund backup and training services which provide critical support to the community.

Create appropriate oversight and administration of the funds. The community has called for the creation of an Office of Civil Justice to be created within the executive branch in order to ensure

that there is clear executive responsibility for civil legal services. Currently, there is no one in state government with this responsibility. While we have a Division of Criminal Justice Services, there is no office, department, agency, or bureau that is charged with ensuring that **civil** legal services are included as a policy matter within the state’s infrastructure. We clearly envision a process that will ensure quality of service delivery and appropriate oversight.

Much work needs to be done between now the final adoption of the state budget, but at least the starting point this year is one of including – not eliminating – funding for civil legal services.

President's Corner:

By Anne Erickson

It's exciting, exhausting, challenging and at times frightening as we work to move the state into a new day in the delivery of civil legal services.

For the first time, the Executive Budget as submitted by our new governor, Eliot Spitzer, includes funding for the general delivery of civil legal services. While the state has run various grants and contracts over the years to fund targeted services for targeted issues or targeted populations, the Executive Budget has never included funding simply for the delivery of general legal assistance to those in need.

That's not to say the state budget as finally enacted over the years has not included funding for civil legal services. They have. Every year since 1993 thanks Assembly Majority led by Speaker Sheldon Silver and Judiciary Chair Helene Weinstein with strong support from the Assembly delegations across the state. Every year they have worked tirelessly to restore funding to the budget for civil legal services.

Indeed this annual state funding has become core and critical to many of our budgets. And it has been an intense focus of our annual advocacy efforts—to get these funds restored to the state budget by the Legislature only to see them eliminated by the Governor in the following year.

This year—finally—we start with investments in civil legal services included in the Executive Budget. There more detail in this issue of the LSJ and clearly we have a ton of work ahead of us to move this from a proposal to a reality, but with a partner finally in the Executive, with continued leadership from the Assembly, with on-going support from the Senate and the Judiciary – we are finally poised to turn the corner and join the vast majority of states that include funding for civil legal services as part of their base operations.

Governor Spitzer's Health Care Budget

A Breath of Fresh Air for Consumers

By Trilby de Jung

As promised, Governor Eliot Spitzer has proposed a dramatically redefined health care budget; one that focuses on health care consumers and puts the patients front and center. In the health care area, the Executive Budget is a breath of fresh air, both in tone and in the specific actions the Governor proposes to take.

This article will outline the Executive Budget on Health from a consumer perspective. Major topics include the Governor's exciting proposals to expand Child Health Plus eligibility and simplify Medicaid recertification, as well as steps he would take to tighten the Preferred Drug List and increase the efficiency of long term care services. We highlight an area of particular concern to advocates, the continuation of the prior administration's, rapid march toward expanding mandatory managed care to include previously exempt Medicaid recipients, those with mental illness and those receiving Supplemental Security Income (SSI). In closing, we list several issues we wish had been addressed in this year's budget – issues of particular importance to the disability community that we hope to see on the Governor's agenda in the near future.

“People on Medicaid are not the Problem”

Governor Spitzer has publicly announced that although New York's Medicaid system is in need of reform, people on Medicaid are not the problem. Consistent with that welcomed philosophy, his budget announces a shift toward a “patient-focused system of care.” Funds from large state pools, such as Indigent Care Pool and the Workforce Recruitment and Retention Pool would be continued at existing funding but restructured to target funds to those providers serving higher numbers of Medicaid beneficiaries.

And, for the first time in , the Executive Budget contains almost no cuts that would directly hit consumers by reducing program eligibility levels or eliminating services. Instead, his budget includes several specific action steps that would operate to

increase public health coverage for low-income New Yorkers, by expanding eligibility levels for Child Health Plus B (CHP B) and simplifying recertification requirements for adults.

Expanding Child Health Plus B Eligibility

Currently, subsidized coverage under Child Health Plus B is available to families with income up to 250% of the federal poverty level (FPL), provided the children are not already eligible for Child Health Plus A (Children's Medicaid). After 250%, subsidized coverage ends and premiums jump from either \$9 or \$15 per child per month to the full price for buy in to the program, \$89 to \$180 a month. The Executive Budget largely eliminates this cliff effect by continuing eligibility for subsidized coverage on a sliding scale basis up to 400% of FPL, effective September 1, 2007, based on the following guidelines:

FAMILY INCOME	PROPOSED MONTHLY PREMIUM
251-300% of	\$20 per child/\$60 max per family
301-350% of	\$30 per child/\$90 max per family
350-400% of	\$40 per child/\$120 max per family

The Executive Budget does introduce a waiting period of six months for CHP B coverage for those children with income between 251 and 400% of FPL who relinquish private insurance. For children with income below 250% of FPL, the waiting period would be triggered only if “crowd-out” rises above 8% of new enrollees, a trigger that exists under current law. The Governor's proposal retains existing exceptions to the waiting period requirement and adds several new exceptions as follows:

- No waiting period if cost of employer-based insurance is more than 5% of the family's income;;

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Spitzer's Health Care Budget—continued

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- No waiting period if the applicant is pregnant;
No waiting period if the applicant is less than two years of age.

The term crowd-out describes the dynamic which occurs when individuals enrolled in employer coverage opt to drop their insurance in order to enroll in more affordable public health insurance. Crowd-out in CHP B have ranged between two and six percent historically.

Simplifying Recertification Requirements

Long an area of concern for consumer advocates, the current re-certification process creates tremendous barriers to on-going coverage. Recognizing the importance of continuous coverage, Gov. Spitzer proposes a number of changes aimed at improving the process.

Currently, children found eligible for Medicaid and CHP B are provided with 12 months of continuous eligibility. The Governor's budget would bring much need stability and continuity to the entire family by providing 12 months of guaranteed continuous coverage for Medicaid and Family Health Plus (FHP) adults as well, unless the beneficiary moves out of state. This measure is contingent upon approval from the federal government as it would represent a departure from federal Medicaid law.

In addition, the Executive Budget would eliminate a significant portion of the documentation requirements that are current applied during recertification for Child Health Plus A, Medicaid and Family Health Plus by allowing for self-attestation of income and residency. Local districts would be required to use existing data systems such as the wage reporting system to verify eligibility without documentation.

Part D/Preferred Drug Program

Dual eligibles who are currently required to accept Part D prescription drug coverage as a condition of ongoing Medicaid coverage for other health care needs, will not find a continuation of Medicaid wraparound protection in the Executive Budget.

Medicaid coverage for prescription drugs ended for this group on January 1, 2007, after which date pharmacies can no longer bill Medicaid when a Part D plan refuses payment. Advocates will be pressing for restoration of these services to guard against any inappropriate denial of needed medication.

The Governor's Budget requires all eligible EPIC enrollees to enroll in a Medicare Part D plan during the first possible enrollment opportunity, unless such enrollment would result in a significant financial hardship of the loss of other coverage. This group will have wrap-around protection from EPIC if Part D plans deny drug coverage.

The Executive Budget amends provisions of the Preferred Drug Program and the Clinical Drug Review Program to provide that (1) costs be considered in selecting drugs that require prior authorization; (2) time frames for public notice of drug status changes be shortened, and; (3) that the Department be authorized to include anti-depressants in the preferred drug program, in consultation with the Office of Mental Health. The Budget also implements the Preferred Drug Program in EPIC, a step that is currently authorized but has not yet been implemented.

Long Term Care

Action steps in the Executive Budget relevant to long term care are largely consistent with the Governor's expressed intention to shift resources from expensive institutional care to community-based alternatives. While nursing homes are subject to the same rate freezes proposed for hospitals, home care and other community-based long-term care services are spared significant cuts in reimbursement.

Also consistent with more community long term care, the Governor increases reimbursement rates for the traumatic brain injury waiver program and allocates \$8 million for demonstration programs to develop and evaluate programs for Medicaid beneficiaries with chronic illness or complex conditions that otherwise complicate their care. Allocations for workforce recruitment and retention in long term

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Spitzer's Health Care Budget—continued

(Continued from page 6)

care are reconfigured based on each agency's hours of service to Medicaid beneficiaries, consistent with the Governor's promise to spend Medicaid dollars on Medicaid patients.

However, the long term care provisions of the budget also include proposals intended to reduce Medicaid spending on long term care services. Counties are directed to increase efforts to recover Medicaid expenses from spouses who refuse to contribute to the medical costs of Medicaid beneficiaries; second-year funding for the rural home care workforce and technology initiative is eliminated.

Elimination of Personal Care Level I Services

The Governor's initial budget submission called for the elimination of funding for Personal Care Level I services. Level I services include household and nutritional assistance that are often essential supports for elderly or disabled people living at home. According to the Department of Health, these services are provided to about 13,000 people in New York, primarily in New York City. All recipients would be assessed and either upgraded to Level II Personal Care services or evaluated for housekeeping services through Title XX funds.

Listening and responding to consumers' concerns, Gov. Spitzer amended his budget on February 21 to restore these services.

Expanding Medicaid Managed Care

Governor Spitzer's Budget continues to recognize savings from the expansion of mandatory managed care for Medicaid beneficiaries. In New York City, mandatory enrollment of SSI eligible beneficiaries began in November of 2005. Mentally ill beneficiaries (referred to as SPMI for Serious and Persistently Mentally Ill) have been exempt from mandatory enrollment, but will now be required to enroll beginning in March of 2007. While behavioral health services will be carved out of managed care for this group, all other health services must be received in their plan's network.

Upstate counties that are required to begin manda-

tory enrollment of SSI eligibles will also be required to enroll the SPMI population, but the Department has indicated that enrollment of these groups will not be likely to proceed outside of New York City until the summer or possibly the fall of 2007. Nassau, Suffolk, Westchester, Onondaga and Oswego will be among the first upstate counties required to begin enrolling these groups.

Advocates remain concerned about how well managed care plans will be able to meet the needs of disabled Medicaid recipients receiving SSI, particularly the SPMI group, which uses outpatient specialty care at twice the rate of the general population and emergency care at seven times the rate of the general population. Advocates in New York City report that clients have had problems obtaining services when plans maintain they are part of the carve out but fee for service providers are denied Medicaid payment.

To further complicate matters, two of the not-for-profit managed care plans serving NYC Medicaid recipients are poised to merge and undergo conversion to for-profit status. Governor Spitzer's Executive Budget authorizes the conversion and continues the Pataki Administration's practice of claiming 95% of the proceeds for state coffers, without providing any process for assessing how these changes will affect plan members or other Medicaid beneficiaries who are no longer exempt from mandatory managed care.

Advocates are urging the new Administration to slow the pace to conduct more outreach and education, while ensuring continuity of care to these vulnerable groups of Medicaid beneficiaries by providing navigational assistance and meaningful choices among plans. So far, the Department has shown no signs of slowing the pace.

It will be important for low-income consumer advocates across the state to monitor the impact of mandatory Medicaid managed care on their clients and help us bring problems to the attention of the new Administration. If your clients are experiencing problems with Medicaid managed care, contact Trilby de Jung at the Empire Justice Center in Rochester, 1-800-724-0490 or send an email to tdejung@empirejustice.org.

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Online Resource Center Video Trainings Now Available

By Michelle Peterson

Empire Justice Center and the Western New York Law Center (WNYLC) are pleased to announce the new on-demand Substantive Law Training Center as part of the Online Resource Center (ORC). In this new area of the ORC, we will provide access to our growing library of previously recorded training. Current video trainings that are now available to advocates cover topics such as language access rights, Medicare Part D, food stamps, emergency assistance, child support cooperation requirements and an assortment of basic area specific Social Security Disability trainings. Many thanks to IOLA for underwriting the WNYLC's web-casting and taping efforts.

For more detailed descriptions and to access these trainings, please visit the Empire Justice Center website at www.empirejustice.org – click into the

Online Resource Center where you'll find a new "Online Training" button on the left-hand menu. Registration is required to view training videos. Click on the training video you wish to see, complete the registration form and a link to the training video will be sent to you by email.

We are also excited to announce that the New York State Continuing Legal Education Board has recognized Empire Justice Center as an accredited provider of continuing legal education (CLE) in alternative (non-traditional) course formats including live web streaming, online video and DVD formats. Continuing Legal Education credits will soon be available for selected training videos on the ORC. Look for additional video trainings to be added soon!

Spitzer's Health Care Budget—continued

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For more information on mandatory managed care and ways in which some Medicaid beneficiaries can still apply for exemptions, see "New York Expands Mandatory Medicaid Managed Care to Include SSI Recipients" in the October 2006 edition of the *Legal Services Journal*, available online at www.empirejustice.org.

In Closing – Missing Initiatives.

While the Executive Budget represents a breath of fresh air for low-income consumers, there are important initiatives that should have been included and were not, particularly with regard to the disabled community. As mentioned above, the Budget does not continue Medicaid wrap-around protection for dual eligibles who have been required to receive their prescription drug coverage through Medicare's Part D program, and there is no provision to limit the copays this population will be subjected to under Medicare Part D.

The Budget also fails to provide for expansion of the EPIC program to include disabled New Yorker's under the age of 65. And nowhere in the Budget are funds set aside for the housing needs of the disabled community under the new Nursing Home Transition and Diversion Waiver. Each of these issues should have been embraced under a philosophy of expanding coverage, particularly for populations with serious medical needs. Each warrants immediate attention from the new Administration.

We appreciate the bold steps this new Administration has taken to address the health needs of low-income New Yorkers in this budget. We hope that the Governor will continue to move us forward in the direction of expanded coverage and more efficient administration of our public health programs.

New Funding Allows Legal Focus on Domestic Violence in the Gay, Lesbian, Bisexual and Transgender Communities

By Amy Schwartz

Despite a dearth of research, studies seem to indicate that a large percentage of the gay, lesbian, bisexual and transgender (GLBT) community experiences intimate partner violence at some point in their lives. As with heterosexual domestic violence, GLBT survivors experience the same patterns of power and control tactics such as coercion, manipulation, emotional abuse, physical violence, threats, isolation, sexual abuse, and economic control. While many of the tactics of abuse may be similar to those in heterosexual relationships, the larger heterosexist, homophobic, biphobic, and transphobic context presents different, additional oppressions and challenges faced by these survivors. Sadly, this domestic violence also has the potential to be lethal. In December 2006, a gay man allegedly strangled his estranged boyfriend before taking his own life with a drug overdose in a small town in Allegany County.

Many survivors in the GLBT community face enormous, complex barriers when reaching out for the support and services necessary to help leave an abuser. For example, many GLBT persons will not disclose the abuse in their relationships to friends, family, colleagues, or their faith community because of fears that this will be considered "evidence" that their relationships are "sick" or "unhealthy". If GLBT survivors are not out about their sexual orientation or gender identity to friends, family, or colleagues, they may be reluctant to make such disclosures, even where they are experiencing frightening abuse. Many social service, criminal justice, legal and medical personnel are often deficient in their ability to serve GLBT people who are the victims of intimate partner abuse. Most mainstream domestic violence or victim services programs have limited or no training or specialized services to provide for the unique needs of GLBT survivors of domestic violence. Indeed many survivors have feared or actually experienced homophobia or transphobia when they sought or considered seeking support from service providers such as law enforcement, the courts, or victim services providers. Gay males, bisexual

males, or persons with a male gender identity or gender expression have been refused residential services at domestic violence shelters with physical spaces traditionally housing women and children. Key legal protections including but not limited to civil orders of protection, divorce, spousal support, mandatory arrest and primary aggressor determinations, and access to Integrated Domestic Violence Courts are generally unavailable to most members of these communities. In their all-encompassing struggle for basic civil rights and non-discrimination, GLBT service organizations have often overlooked the challenges faced by the community of abuse survivors.

In response to growing concern about this issue, in Fall 2002 a group of domestic violence service providers, policy makers, community leaders and educators from around New York State met to attempt to identify and find ways to address these difficult issues. The result was the formation of the New York State Lesbian, Gay, Bisexual and Transgender Domestic Violence Network (The Network). Empire Justice Center was an original member of this organization and has remained active since its inception over four years ago. The Network meets as a large group annually and works throughout the year on discrete issues. However, one of the major obstacles the Network identified included funding challenges for service providers attempting to effectively outreach to serve this community.

In recognition of the importance of the issue and the funding concerns, in December 2006 members of the State Assembly dedicated a total of \$375,000 in grants to 14 Network members allowing them to focus their attention and resources on capacity-building and resource development for GLBT domestic violence-specific services and outreach. Notably, this is the first funding package of its kind. Beginning in the spring 2007, this exciting grant opportunity will allow Empire Justice Center's Domestic Violence Legal Program to provide legal technical assistance and legal trainings on the

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DAP TANF????

By

New GLBT Funding—continued

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rights and remedies of GLBT domestic violence survivors to Network members throughout the state. Trainings may be available to other organizations on a more limited basis. We will also enhance our existing website with an area devoted to addressing legal rights and remedies of GLBT survivors.

In addition to the Empire Justice Center, recipients of funding this year include: New York City Gay and Lesbian Anti-Violence Project (NYC), NYS Coalition Against Domestic Violence, Alternatives for Battered Women (Rochester), Gay Alliance of the Genesee Valley (Rochester), Men of Color Health Awareness Program (Rochester/Buffalo), The Advocacy Center (Ithaca), In Our Own Voices (Albany), LGBT DV Committee of Western NY (Buffalo), Park Slope Safe Homes Project (Brooklyn), Rockland Family Shelter (Rockland County), Safe Horizon (New York City), Vera House (Syracuse), and Victim Assistance Services (Westchester).

Thank you to all the legislators supporting this funding including: Danny O'Donnell (New York City), Speaker Sheldon Silver, James Brennan (Kings), Joan Millman (Kings), Deborah Glick (New York City), J. Gary Pretlow (Westchester), Adam Bradley (Westchester), Sandy Galef (Westchester/Putnam), Richard Brodsky (Westchester), Kenneth Zebrowski (Rockland), John McEneny (Albany), Joan Christensen (Onondaga), Barbara Lifton (Cortland/Tompkins), Susan John (Monroe), Joseph Morelle (Monroe), Crystal Peoples (Erie), and Sam Hoyt (Erie).

For more information about this new initiative, please contact Amy Schwartz at aschwartz@empirejustice.org or Dishpaul Dhuga at ddhuga@empirejustice.org.

Child Care Funding, Mired in the Flex Fund, Remains Below 2005 Levels

By Susan Antos

In describing the human services portion of his 2007-2008 budget, Governor Spitzer announced that "One New York means a state that does not just get a working parent off the welfare roll, but one that helps lift him out of poverty." Despite this promise, Governor Spitzer's budget leaves the most important support for most working parents - child care funding - in a precarious position.

In New York State, child care is funded primarily from two federal sources: block grant money specifically designated to pay for child care - the Child Care Block Grant, and money from the Temporary Assistance to Needy Families (TANF) block grant. Under federal law, up to thirty percent of TANF money can be transferred into Child Care Block Grant funded programs. In the past, although New York never came close to transferring 30% of its TANF money into child care, it transferred such significant amounts that two years ago New York had \$929 million dollars appropriated for child care.

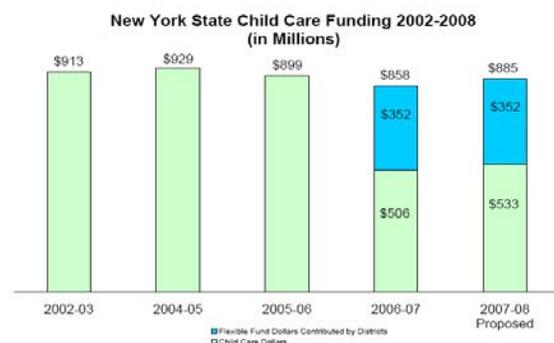
Governor Pataki created a block grant called the Flexible Fund for Family Services (hereinafter the Flex Fund) two years ago (2005-06) when it appeared that TANF surplus funds would not be sufficient to support all the TANF initiatives funded in previous years. Instead of appropriating money for each TANF funded program as had been done in previous years, the TANF money was dumped into county level block grants from which the counties could choose to fund a menu of programs: child welfare programs, including Title XX and JD PINS programs; employment demonstration programs; and drug screening and treatment programs. In that first year, child care advocates fought successfully to keep child care out of the Flex Fund, but overall, child care funding declined to \$899 million.

Last year advocates were not able to protect child care from the Flex Fund. Governor Pataki appro-

priated \$506 million for child care and directed that if local social services districts wanted to spend additional money on child care, they would have to take that money from the Flex Fund. Over one billion dollars of TANF money was put into the Flex Fund and local districts took \$352 million from the Flex fund for child care, bringing the total spent on child care to \$858 million, the lowest amount spent since 2002-03.

In this year's budget Governor Spitzer has slightly increased the child care funding base to \$533 million, but like his predecessor leaves hundreds of millions of additional child care dollars in the Flex Fund. Governor Spitzer's Flexible Fund contains just over 1 billion dollars, but contains about 28 million fewer dollars than last year's Flex Fund. Again, child care funds remain vulnerable because counties may choose to use the money in the Flex Fund for initiatives other than child care.

As the chart below illustrates, even if the local social services districts were to spend \$352 million from the Flex Fund on child care (the amount that they spent from the Flex Fund on child care last year), that amount, together with the \$533 million proposed by the Governor would total \$885 million - an increase over last year, but significantly lower than the three previous years.



Child Care Funding—continued

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Child care advocates are urging Governor Spitzer to move child care out of the Flexible Fund to ensure that the funds are directed to child care and to restore funding to at least the 2005 levels. The Flex Fund was first created in the 2005-06 budget, and child care was not included in the Flex Fund at that time. Last year for the first time, child care funding was included in the Flex Fund and overall, child care funding declined from \$899 million to \$858 million.

The Governor's tepid support for child care funding stands in stark contrast to several other initiatives that support low income children - \$99 million for pre-kindergarten expansion, \$165 million over two years to provide health care coverage for 400,000 children without insurance, and \$2.1 million for increased prenatal and postpartum home visits. The Pre-K increase brings the state's annual pre-kindergarten expenditure to \$395 million in FY 2007-8, with a commitment from the Governor to raise the annual Pre-K budget to \$645 million by FY 2010-11.

The Governor's commitment to pre-kindergarten expansion is both welcome and needed, but is not a substitute for child care funding. Indeed, pre-K and child care are complementary parts of a whole. Pre-K targets only one age group; child care is needed by children of all ages from infancy to adolescence. Pre-K covers only part of the day; child care is needed throughout the day and often into the night and over the weekends to cover the varied schedules of low wage parents. Pre-K is offered only during the school year; child care is needed throughout the year.

Unfortunately, there are already competing demands. For instance, pre-K programs are often able pay their teachers more than child care centers and thus attract qualified teachers away from child care centers which provide full day care. Because the cost of caring for younger children is higher than the cost of caring for four- year-olds, the budgets of many day care centers with the youngest children are strained when children leave centers to attend Pre-K.

By moving child care funding out of the flex fund, making sure it is clearly targeted to child care, and increasing the state's investment in these critical services, New York will be providing a tremendous support to working families across the state.

Regulatory Roundup

By Susan C. Antos

Regulatory Round Up reports on administrative rule making of interest to public benefits specialists. The rulemaking described below appeared in the New York State Register from February 7, 2007 to December 20, 2007. All references are to 18 NYCRR, unless otherwise indicated. If you are interested in reading the text of a proposed rule or the summaries of public comment and the response regarding an adopted rule, please contact Connie Wiggins (cwiggins@empirejustice.org). Any comments submitted by Empire Justice Center on proposed regulations, are available at www.empirejustice.org. From the "Issue Areas" bar, click on the "Public Benefits" section, go to "Cash Assistance" and then "Comments on Regulations."

Notice of Proposed Rule Making

Date of Filing	Last Day to Comment	Regulations Affected	Summary
1/3/07	2/17/07	360-3.2(j)	Conditions of Citizenship and Immigration Eligibility: This proposed regulation is intended to bring the Department of Health regulations into compliance with the decision of the Court of Appeals in <u>Aliessa v. Novello</u> , 96 N.Y. 2d 418 (2001), which held that Social Services Law 122 which denied Medicaid to certain immigrants who were lawfully residing in New York State, was a violation of Article 17 and the equal protection clauses of the New York State Constitution. The legislature has not amended Social Services Law 122 to comply with the <u>Aliessa</u> decision.
12/20/06	2/3/07	421.16 443.2	Medical Examinations for Prospective Adoptive and Foster Family: This proposed regulation, filed as a consensus rule, would permit medical examinations to be conducted and medical reports required for certification or approval of foster or adoptive parents to be prepared by physician assistants, nurse practitioners or other licensed and qualified health care practitioners.
12/20/06	2/3/07	426.1 427.2 428.2 431.4	Standards for Reimbursement of Foster Care Maintenance or Adoption Assistance: This proposed regulation, which is filed as a consensus rule, eliminates outdated references in the regulatory sections regarding children with special needs, the definition of family and the treatment of earnings of children in foster care.

Emergency Rule Making

Date of Filing	Rules Expires On	Regulations Affected	Summary
12/28/06	3/27/07	Part 421, 443	<p>National Criminal History Records Check: The federal Adam Walsh child Protection Act of 2006 (PL 109-248) and Chapter 668 of the Laws of 2006 amending Social Services Law §378-a(2) requires that effective January 11, 2007, national criminal history record check through the FBI of all persons applying for certification or approval as foster or adoptive parents and all persons over the age of 18 residing in the homes of such applicants. Refusal to sign a consent for the FBI check will result in a denial of the application. The regulations also require that all such persons be fingerprinted.</p>
12/28/06	3/27/06	357 421 428 430 441, 443	<p>Home Studies for Adoptive and Foster Placement: This emergency rule which was previously promulgated on an emergency basis on October 1, 2007, has not yet been promulgated as a proposed rule. It permits foster children who are being released into their own care to get their medical and education records at no charge. It requires child protective services information inquiries to other states when a person applying to be an adoptive or foster parent has resided out of state within 5 years of the application. It establishes time frames for the completion of home studies.</p>
12/8/06	3/7/07	11 NYCRR 362-2.5 362-2.7 362-3.2 362-4.1 362-4.2 362-4.3 362-5.1 362-5.3 362-5.5	<p>Healthy New York: These regulations have been repeatedly filed on an emergency basis which over the last year, 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 <i>de minimus</i> 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. These regulations were finally filed as a proposed rule on November 1, 2006.</p>

Emergency Rule Making

Date of Filing	Rules Expires On	Regulations Affected	Summary
11/29/06	2/26/07	10 NYCRR Part 402	<p>Criminal History Records Check: These emergency regulations, which have not been filed yet as proposed rules, implement Chapter 769 of the laws of 2005 and Chapter 331 of the laws of 2006 requiring that all nursing homes, certified home health agencies and long term care providers conduct criminal history records checks for certain employees. The statute and regulations allow the individual to explain in writing why his or her eligibility should not be disapproved before the Department of Health determines whether to approve the individual employment. Prospective employees must be notified of the employer's right to request criminal history information, and of his or her right to obtain review and seek correction of the information.</p> <p>The cost of each individual review is \$75.00 for the State Criminal records check, \$24.00 for the national records check and \$13.00 for fingerprints. Licensed home care agencies will be reimbursed for such costs subject to a state appropriation. The cost to nursing homes, certified home health agencies and long term home health care programs are payable under Medicaid. The regulations can be found on the Department of Health website at: www.health.state.ny.us/nysdoh/ph/forum/nyorrlo.htm.</p>

Notice of Adoption

Date of Filing	Effective Date	Regulations Affected	Summary
1/8/07	1/24/07	432.2	Child Protective Investigations: This regulation sets forth the procedures that child protective staff must take when they are denied access to a child or the home where the child resides. The regulations require an assessment done with a supervisor of whether a court order is necessary or whether any other emergency action must be taken. This assessment must be done within 24 hours after access has been refused or failed. Additionally, these regulations expand the list of collateral contacts that an agency can make as part of its child protective investigation.
1/8/07	1/24/07	441.21 443.4	Caseworker Contacts with Foster Children, Their Relatives and Caregivers: This regulation requires that local district case workers have at least monthly contact with children in foster care. The Regulatory Impact Statement notes that New York is only one of seven states that does not require monthly contacts and notes that there is a correlation between the number of case worker contacts and positive outcomes for foster children. OCFS estimates that to meet this requirement New York State will need 7 caseworkers statewide at an estimated cost of \$378,000.
12/22/06	1/10/07	347.10(a)(9) (b), (c)	Child Support Standards Chart: This regulation updates the child support standards chart which is used to calculate child support obligations for calendar year 2006. The self-support reserve for 2006 is \$13,230.
12/5/06	12/20/06	426.10 421.4 421.6 421.17 423.2	Permancy, Safety, and Well Being of Children in Foster Care: These regulations implement Chapter 3 of the Laws of 2005, which dramatically changes the proceedings governing children in foster care, particularly procedures under Article 10 of the Family Court Act, the termination of parental rights and adoption.

What is a Consensus Rule?

Two regulations filed by the Office of Children and Family Services were filed as consensus rules. When an agency proposes a regulation as a consensus rule, they must explain why they expect no one to object to such rule in the notice of proposed rulemaking (NPR), and are able to streamline the NPR to exclude a number of requirements which apply to the usual proposed rulemaking process including: the regulatory impact statement, the regulatory flexibility analysis, as well as the text of the proposed regulation.

Empire Justice Center to Open a Long Island Office

By Anne Erickson

Empire Justice will be opening a Long Island office as part of Touro Law School's newly created Long Island Public Interest Legal Center. The Center will house other not-for-profit agencies, including Nassau Suffolk Legal Services, the Health and Welfare Council of Long Island, the Puerto Rican Legal Defense Fund, the Civil Liberties Union, and others.

As part of this new Center, Empire Justice will strive to fill gaps and to supplement the work of local Long Island agencies, adding depth to their efforts by providing unrestricted legal assistance to ensure that government benefits are provided fairly and equitably, that immigrants have access to needed legal assistance, and that local government rules comply with state and federal law.

Long Island is home to over 455,000 foreign born residents (U.S. Census Bureau, 2004 American Community Survey). Over 23% of them (107,930), are considered "recent entrants" having arrived in the United States within the ten years prior to the 2000 Census. In this region, immigrants are most likely to have arrived from Latin America (47%) and Asia (25%). They face significant language barriers: 72% of foreign-born residents speak a language other than English at home with almost 60% of them reporting that they speak English "less than very well."

While their demographics may vary, the special legal needs of the immigrant population are similar in their intensity. Many of these immigrants, refugees and asylees arrive in desperation from impoverished countries leaving them extremely vulnerable – they take tougher jobs for lower pay, face discrimination, both subtle and overt, and they now confront a host of new laws governing their status in this country

We will focus our new office on helping to meet some of the legal needs of this diverse and growing population. We envision a two-person office, consisting of one senior attorney and one more junior attorney and anticipate that the attorneys will

be public benefits generalists. Their work will focus on serving the immigrant populations of Long Island. They will have considerable support from and access to Empire Justice attorneys in our Rochester, Albany and White Plains offices who specialize in immigrant rights, disability rights, consumer law, child care, HIV/AIDS, civil rights, employment, health care, domestic violence and housing. The attorneys will also benefit from interactions and collaborations that result from being housed at the Public Interest Law Clinic

In addition, as part of this unique effort, we will be able to engage Touro Law School students in this critical work. We hope to have a team of students working with our staff throughout the year.

This is an extremely exciting opportunity and we are pleased to have financial support from the Horace Hagedorn Foundation, the Long Island Community Trust, the Long Island Unitarian Universalist Fund and the New York State Interest on Lawyer Account (IOLA) Fund.

Job Announcement

Empire Justice Center is seeking to hire two attorneys to open, sustain, and grow an office at Touro Law School in Central Islip on Long Island. The office will be located within Touro Law School's new Public Interest Legal Center. It will significantly involve law students from the school in assisting with the legal work performed by the office. *It is highly desirable that at least one of the attorneys speak Spanish.*

Through the Long Island office, we will:

- Work with local agencies, particularly those housed in the Center, to identify issues broadly affecting the low-income community and vulnerable populations, specifically immigrants, on Long Island
- Develop concrete strategies for addressing those issues through a combination of:
 - local and state policy advocacy,
 - individual and class action litigation, and
 - administrative advocacy with local governmental agencies
 - Work with and provide technical assistance and support to local legal services programs
- Engage and supervise Touro Law School students in both direct legal representation of individual clients and in tracking and reporting on trends in specific issue areas, for example the extent to which immigrants seeking public assistance are provided access to needed services or the barriers imposed on those seeking child care assistance.

The **Supervising Attorney** will be responsible for:

- Identifying systems issues where our advocacy efforts could make substantial improvements for our clients
- Leading and participating in successful litigation efforts that achieve broad benefits for our clients and the broader community that we serve
- Providing and overseeing the representation of individual clients in targeted government benefit cases
- Engaging in legislative advocacy and administrative rulemaking and advocacy where needed to bring about changes for clients and groups
- Serving as the local Empire Justice Center liaison to the law school, local legal services, bar and community groups and to current and prospective funders
- Recruiting and training law students to assist productively on projects on Long Island and for legal work assigned by attorneys in our other offices
- Growing the funding of the program both by:
 - Bringing fee-generating cases where appropriate and collecting statutory attorneys fees from defendants; and
 - communicating the effectiveness and value of our work to the community and to funders regarding the significant benefits achieved for our clients and the community we will serve through the legal work of the office
 - Supervising a growing staff

Minimum Qualifications:

- Admission to practice in New York or eligibility for admission on motion from another state
- Substantial successful experience with at least five of the eight areas of responsibility listed above

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Job Announcement - continued

(Continued from page 18)

- Substantial legal experience in public benefits, housing, civil rights (including disability rights) or immigrants' rights.

The **Staff Attorney** will be responsible for

- Helping to staff and coordinate successful litigation efforts that achieve broad benefits for our clients and the broader community that we serve
- Providing individual representation to clients, primarily within the immigrant populations and primarily with a focus on public benefits
- Supervising and training law students to assist productively on projects on Long Island and on other legal work assigned by attorneys in our other offices
- Working closely with the local legal services program, community agencies and our advocacy partners to identify significant issues and design successful strategies to secure our clients' objectives
- Engaging in legislative advocacy and administrative rulemaking and advocacy where needed to bring about changes for clients and groups
- Contributing to the financial success of the office by undertaking fee-generating cases where appropriate and collecting statutory attorneys fees from defendants

Minimum Qualifications:

- Admission to practice in New York or eligibility for admission on motion from another state
- Substantial successful experience with at least three of the six areas of responsibility listed above
- Substantial legal experience in public benefits, housing, civil rights (including disability rights) or immigrants' rights.

Salary will depend on experience. Empire Justice Center has a very generous package of fringe benefits including a loan repayment assistance program (LRAP) that assists with repayment of law

school debt. Empire Justice is an Equal Opportunity Employer; all are encouraged to apply.

For either position please send:

- a letter detailing your qualifications,
- a resume,
- the names and contact information for three references and a legal writing sample to:

Becky Schroeder (bschroeder@empirejustice.org)
 Fiscal and Human Relations Manager
 Empire Justice Center
 One West Main Street; Suite 200
 Rochester, NY 14614

Class Action Challenges Fleeing Felon Rules

By Kate Callery and Louise Tarantino

On December 28, 2006, the Urban Justice Center, along with the National Senior Citizens Law Center and the law firm Proskauer Rose LLP, filed *Clark v. Barnhart*, a nation-wide class action lawsuit against the Social Security Administration (SSA) and Commissioner Jo Anne B. Barnhart in the United States District Court for the Southern District of New York. The Plaintiffs challenge the SSA's practice of suspending benefits of any recipient who has an outstanding warrant alleging a violation of probation or parole without a finding that the person is actually violating probation or parole.

As advocates will recall, the United States Court of Appeals for the Second Circuit struck down the SSA's practice of assuming that anyone with an outstanding warrant is fleeing prosecution and held that the SSA must first determine whether the person intended to flee prosecution before suspending benefits. See *Fowlkes v. Adamec*, 432 F.3d 90 (2d Cir. 2005). *Clark* challenges the SSA's implementation of the other subsection of the "fugitive felon" statute, which relates to probation and parole violators.

The named plaintiffs in *Clark*, which was filed as a nation-wide class action, come from various parts of New York State, Oregon, and Florida. All had been receiving either SSI or SSDI benefits due to their various disabilities. Their benefits were abruptly terminated by SSA based merely on allegations that they had violated conditions of their respective probations. There were no findings in

any of the cases that the plaintiffs had actually violated probation. Each plaintiff presents a very compelling story of the severity of his or her impairments and the harm suffered by losing benefits. Several of them have contemplated suicide as a result.

The Complaint alleges that SSA's policy of suspending or denying SSDI or SSI benefits solely on the basis of an outstanding warrant alleging a violation of the conditions of probation or parole without regard to whether or not there has been a finding that such individual has in fact committed such a violation is unlawful.

The complaint is posted on the Urban Justice Center's website (www.urbanjustice.org) in the Mental Health Project's litigation section.

Plaintiffs' counsel are anxious to hear of other possible plaintiffs for this lawsuit. If you have a client who lost his/her benefits because of an outstanding warrant for allegedly violating probation or parole, please contact Jennifer Parish, one of the counsel for the plaintiffs, at (646) 602-5644 or jparish@urbanjustice.org.

Are HIV Claims Being Classified as TERI?

By Kate Callery and Louise Tarantino

Readers of the HIV listserv may have been following the recent discussions concerning classification of HIV cases as TERI cases. What is a TERI case, you may ask? TERI cases are, according to SSA, "cases with an indication of terminal illness" that should be handled in an "expeditious" manner. See POMS DI 23020.045. The euphemism is used to avoid the word "terminal" on the claims file or other documents that might be reviewed by the claimant. A Form-2200 (TERI flag) is placed in the file.

The POMS describe the procedures for identifying and processing TERI cases. The claimant must have an impairment that is considered untreatable ("i.e., the impairment cannot be reversed and is expected to end in death"). SSA includes in that category:

- Chronic dependence on a cardiopulmonary life-sustaining device.
- Awaiting a heart, heart/lung, lung, liver or bone marrow transplant (excludes kidney and corneal transplants).
- Chronic pulmonary or heart failure requiring continuous home oxygen and is unable to care for personal needs.
- A malignant disease (e.g., cancer), and is home confined or institutionalized, with inability to care for personal needs and unresponsive to therapy.
- Diabetic with one or more of the following: multiple amputations due to diabetic gangrene, recurrent cardiovascular events (infarction, failure), recurrent cerebrovascular events with neurological deficit.
- Chronic liver disease; e.g., cirrhosis, hepatitis, with history of massive gastrointestinal hemorrhage.
- Comatose for 30 days or more.
- Newborn with a lethal genetic or congenital defect.

This list, however, is not intended to be all-inclusive.

Advocates are often successful in having AIDS cases classified as TERI. Various POMS sections involving determinations in HIV cases refer to possible TERI treatment. See, e.g., DI 24595.001 and DI 11055.241. Inquiries on the HIV listserv, however, raised the question of whether SSA has recently added to the requirements for proving TERI eligibility. Rumor had it that SSA had changed its criteria, as reflected in SSA Publication No. 05-10019 (Social Security for People Living with AIDS), available at <http://www.ssa.gov/pubs/10019.html>.

That publication includes a section entitled "How can I help speed up my claim?" Vital information includes:

- The names and addresses of any doctors, hospitals or clinics you have been to for treatment;
- How HIV/AIDS has affected your daily activities, such as cleaning, shopping, cooking, taking the bus, etc.; and
- The kinds of jobs you have had during the past 15 years.

Additionally, SSA will ask the treating doctor to complete a form indicating how the HIV infection has affected the claimant. See Forms SSA 4814 for adults or SSA 4815 for children.

HIV advocates have clarified, however, that nothing in this "policy" changes SSA's requirements for characterizing HIV/AIDS cases as TERI. In fact, the forms referred to in this section actually apply to "presumptive disability" determinations.

And what, you may now ask, is "presumptive disability?" According to DI 23535.001, a "claimant, including a child, applying for Supplemental Security Income (SSI) based on disability or blindness, may receive up to 6 months payments prior to the final determination of disability or blindness if he/

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HIV Claims—continued

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she is determined to be presumptively disabled or blind and meets all other eligibility requirements.” Presumptive disability (PD) determinations can be made at any point in the process by either the Field Office or the Disability Determination Service (DDS - or Division of Disability Determinations in New York State).

The Field Offices are authorized to make such determinations based on observation and/or allegations of fifteen specific categories of impairments. See POMS DI 23535.005, which includes impairments such as total blindness, total deafness, amputation, stroke, and Down Syndrome, among others. Symptomatic HIV disease must be confirmed by medical sources.

Presumptive benefits may also be awarded by the DDSs in other cases identified by SSA as impairments with “high PD potential,” including HIV disease. See POMS DI 23535.010, which also warns adjudicators of the “low PD potential” in claims involving mental impairments, respiratory disease and back pain. POMS §§ DI 23535.011 & 23535.012 set forth the responsibilities of the DDSs and field offices in PD cases involving claim-

ants alleging Human Immunodeficiency Virus (HIV) infection.

Formal determinations in PD cases are to be expedited “to avoid interruption of payments,” since payments will in fact “be interrupted” if a formal determination is not made within six months. POMS DI 23535.015. Note that payments based on PD/PB are not considered overpayments if it is later determined that the claimant is not disabled or blind unless the claim is disallowed due to ineligibility based on nondisability factors, or it is subsequently determined that the amount of payment was computed in error. POMS DI 23535.001.

So, a claimant with symptomatic HIV disease could potentially be classified as TERI and be awarded presumptive disability benefits. There do not appear to be any new policies limiting either determination. Thus, a client who is HIV symptomatic and on medications should still be able to assert TERI rights.

If you have heard otherwise, or have had problems with getting your client’s claim classified as TERI, please let us know.

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