May 23, 2014

Jeanine S. Behuniak  
NYS Office of Temporary and Disability Assistance  
40 North Pearl Street, Floor 16C  
Albany, New York 12243-0001

Re: Supplemental Security Income State Supplement Program  
Proposed 18 NYCRR Part 398; 18 NYCRR 358-5.12.

Dear Ms. Behuniak:

Thank you for the opportunity to comment on the proposed regulations regarding the State Supplement Program (SSP), part of the monthly benefit paid to most Supplemental Security Income (SSI) recipients, which will add a new Part 398 to 18 NYCRR and which also includes an amendment to 18 NYCRR 358-5.12.

The Empire Justice Center is a not-for-profit public interest law firm focusing on civil legal services for low-income individuals. In addition to litigation and policy analysis, we support legal services programs across the state with training and support and act as an informational clearinghouse. We focus on a number of issues affecting low income individuals and families: public benefits (cash assistance, child care, food stamps and child support issues), health and Medicaid, Supplemental Security Income (SSI) and Social Security Disability (SSD) benefits, consumer and foreclosure prevention, and public and subsidized housing.

The overarching theme of our comments is that there should be consistency between SSI and SSP program rules in order to reduce confusion for SSI recipients, their families, and their advocates. For decades, the state supplement has been invisible and SSI has meant one check, one process and one set of rules. SSI recipients will be best served if the rules in the two programs are consistent. In the long run, we believe this will also provide administrative efficiency for the Office of Temporary and Disability Assistance (OTDA), although at the front end it will require that staff become more deeply familiar with SSI program rules.
Eligibility for the SSP and SSPNA (State Supplemental Personal Needs Allowance) benefits are based on federal law and regulations promulgated by the Commissioner of the Social Security Administration (SSA) at Part 416 of 20 C.F.R. SSA’s regulations often fail to include sufficient detail for consistent decision-making. SSA has therefore provided the necessary detail and policy explanations via Social Security Rulings (SSRs) and the Program Operations Manual System (POMS). In addition, it is not unusual for SSA to take years to promulgate regulations to implement a law or policy change. In the interim, SSA uses sub-regulatory vehicles like SSRs, POMS and Emergency Messages (EMs) to implement the change. Failure to reference these policy instructions risks failing to follow SSA’s eligibility rules for the SSP and differing regulation interpretation and inconsistent eligibility determinations for SSI and SSP, whether on initial eligibility determination or on appeal.

Therefore, in addition to the various points discussed below where we suggest you refer to specific federal regulations, POMS, or SSRs, we suggest that you include an introductory paragraph similar to that in Massachusetts’s regulations at 106 CMR § 327.100 (Overview of State Supplement Program) reminding adjudicators that eligibility criteria is based on and should be interpreted in accordance with applicable Social Security law, regulations and relevant sub-regulatory materials, such as Social Security Rulings (SSRs), Program Operations Manual System (POMS), and Emergency Messages (EMs).

Our specific comments are as follows:

**SUBPART 398-2 DEFINITIONS**

**398-2.1(m) & (oo) Earned Income & Unearned Income**

These definitional sections define income “in accordance with federal law and regulations and with the regulations of the Office.” We are concerned that the Office’s definitions of various types of income conflict with federal laws and regulations. Also, to which “regulations of the Office” is this regulation referring? For example, the earned income provisions for temporary assistance allow a $90 disregard for earned income for all recipients and an additional 49% reduction for the remainder if children are in the household. 18 NYCRR 352.19(a); 352.20 (c); 14 ADM-01. The SSA rule regarding earned income is a $65 disregard and an additional reduction of one-half the remainder, plus any unused portion of the general $20 exclusion, as well as impairment related work expenses. 20 C.F.R. § 416.1112(c)(4); POMS SI 00820.500 et seq. We suggest that the reference to the Office’s regulations be eliminated. Rather, as noted above, we encourage you to make specific reference here and throughout the regulations to specific relevant SSI regulations and/or POMS section, as was done by the Commonwealth of Massachusetts. See, e.g., 106 CMR § 327.110.

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1Social Security Rulings (SSRs), Program Operations System Manual (POMS), and Emergency Messages (EMs) are available [https://secure.ssa.gov](https://secure.ssa.gov)
398-2.1(i) Countable Resources

The proposed regulation defines countable resources as those that are not excluded by federal law or regulation in determining eligibility for SSI. It specifies, however, that “[r]etroactive SSPNA and SSP benefits are not considered countable resources in the month of receipt and the next two succeeding months.” This definition is not in accordance with federal SSI regulation 20 C.F.R. § 416.1233, which provides that retroactive payments/underpayments are excluded from resources for nine months. We suggest the proposed language regarding retroactive payments either be eliminated or amended in accordance with the federal regulation.

398-2.1(ii) Temporary Absence

The proposed regulation defines a temporary absence as any absence that does not exceed three consecutive months. This definition could potentially conflict with SSI’s definition of temporary absence. See, for example, POMS SI 00835.042 (Temporary Absence of a Child from a Federal LA Due to School Attendance), which provides that a child is not considered absent from the federal living arrangement if away to attend school. These situations could be relevant in determining eligibility for SSP benefits under 398-4.2(a)(4), which refers to temporary absence.

SUBPART 398-3: STATE SUPPLEMENTAL PERSONAL NEEDS ALLOWANCE (SSPNA)

398-3.1 Single Application for SSPNA

We appreciate the provision in section (a) that applications for SSI will be deemed applications for SSPNA. Proposed Section 398-4.1 also provides for a single application for SSP. We question, however, why under § (b) of both regulations, the first month of eligibility is not until the month following the month in which SSI eligibility was established? SSI benefits are payable starting with the month after the SSI application is filed. 42 U.S.C. § 1382(c)(7); 20 C.F.R. §§ 416.335, 416.501. If SSP and SSPNA benefits are not paid until the month after SSI benefits are started, recipients will receive SSI benefits for one month without any supplement being paid. We do not understand the rationale for this payment lag and recommend that SSP/SSPNA benefits start when SSI benefits start.

We also suggest that you add a provision that, as in the Massachusetts regulations, a finding of eligibility for SSI is binding for SSPNA and/or SSP purposes. See 106 CMR § 120.

398-3.2(c) Eligibility requirements for SSPNA

We do not understand why someone with countable income other than SSI would not get a SSPNA. An individual may be eligible for SSI even if there is some countable income, as long as the income is below certain limits. If the individual or couple is eligible for SSI, therefore any countable income was presumably taken into account in determining the SSI eligibility.
SUBPART 398-4 STATE SUPPLEMENT PROGRAM (SSP)

398-4.2(a)(4) Eligibility Requirements for SSP Benefits

As noted above, we are concerned that your definition of temporary absence could have adverse consequences. We also note that “reside permanently in New York State” does not appear to be defined in this Part.

398-4.5 New York State Living Arrangements

We suggest that OTDA take this opportunity to clarify the definition of “living alone.” Sections 398-4.5(a)(1)(i), (iii) and (iv), each describe the concept of separate preparation of food or the eating of meals differently. We suggest that these three subparagraphs should use consistent language and should all include the important modifier in subparagraph (iv) about circumstances that “will not preclude a finding of separate preparation.” Furthermore, OTDA should change the nebulous reference regarding the “occasional preparation of meals in common” (emphasis supplied), and adopt the Supplemental Nutrition Assistance Program (SNAP) definition of a separate household: “An individual living with others, but customarily purchasing food and preparing meals for home consumption separate and apart from others” (emphasis supplied). “Customarily purchasing and preparing means for a majority of meals in a calendar month” (emphasis supplied). SNAP Source Book § 5 (at p. 48).

We also suggest that a subsection be added to reflect that an individual or couple that receives SNAP as a one or two-person household should be classified as living alone.

Section 398-4.5(vi) should be rewritten for clarity, perhaps broken into three separate subparagraphs describing the three different living arrangement described.

398-4.7 Designated Representatives

This section is confusing because of the use of the terms “representative payee,” “federally appointed representative,” and “designated representative” as interchangeable entities, which they are not. A representative payee is defined in SSA’s regulations as “either a person or an organization selected by us [SSA] to receive benefits on behalf of a beneficiary.” 20 C.F.R. §416.601(a). An appointed representative is defined in SSA’s regulations as an attorney or other person who the claimant appoints to represent him or her in dealings with SSA. 20 C.F.R. §§416.1503; 416.1505; 416.1510. In the context of the SSA, an appointed representative does not have the same duties or powers of a representative payee.

New York State Social Services regulations define “designated representative,” and “authorized representative,” as a person designated to act on behalf of an applicant for public assistance. This may be a relative, friend, or other agency or institution, with the right to make an application on a person’s behalf, provide information to the social service district, appear at an interview and sign the application when the applicant is unable to do so. See, e.g., 18 NYCRR §§350.3(a)(1),(c); 350.4 (c)(4). This section of the proposed regulations also refers to a
“designated representative payee,” which is a confusing combination of two different concepts discussed above.

We suggest that OTDA clarify its use of the terms “representative payee” and “designated representative” in this section.

SUBPART 398-6 APPLICANT/RECIPIENT REPORTING RESPONSIBILITIES

This subpart governs the reporting requirements for applicants and recipients, but does not specify how and where they must report changes in circumstances that may affect eligibility. Will recipients and applicants be required to report to OTDA and/or the Social Security Administration? If recipients report changes to SSA, will that information be forwarded to OTDA? Since local social service district offices will not be involved in this process, will recipients and applicants be allowed to respond by e-mail, mail, fax or phone? And how will the 10 days be counted in each situation, particularly if the response is by mail? Will OTDA retain envelopes for postmarks?

And how do these requirements fit with the language of proposed § 398-4.3, which provides that “the Office shall determine each individual’s and couple’s initial and ongoing eligibility for SSP benefits on the basis of the data supplied by the federal SSA through the State Data Exchange (SDX) and information available to this Office”? (Emphasis added.)

We suggest that OTDA incorporate the dictates of POMS SI 02301.200 into this section. It reminds adjudicators that SSI applicants and recipients may have difficulty reporting changes and responding to requests for information because of mental and physical conditions and difficulty communicating. The POMS section mandates that SSI recipients be offered assistance as necessary, including sufficient time to comply with requests for necessary information. These regulations should incorporate OTDA’s obligation to assist SSPNA and SSP applicants and recipients who have difficulty in providing the requested information and/or documentation consistent with 18 NYCRR §§ 351.5 & 351.6.

SUBPART 398-7 FAILURE OR REFUSAL TO COMPLY

Proposed § 398-7.1 authorizes OTDA to deny or discontinue SSPNA or SSP benefits due to “failure or refusal to comply with a requirement of this Part without good cause.” This proposed Part does not define “good cause” either directly or by reference to any other regulation, such as 18 NYCRR § 351.26. SSA’s rules at 20 C.F.R. § 416.1411 allow for a good cause finding for missing a deadline that are similar to, but more comprehensive than, those in OTDA’s regulation cited above. Social Security Ruling (SSR) 91-5p also sets forth circumstances that SSA will

2Program Operations System Manual (POMS) are available https://secure.ssa.gov/poms.nsf
recognize as good cause for missing a deadline. These standards should be incorporated into the proposed regulations.

**SUBPART 398-8 NOTICE REQUIREMENTS**

Meaningful notice to claimants and beneficiaries is crucial to the successful implementation of this program. We hope that the proposed notices will be made available for review before October. We trust that notice will be provided at each stage of the proceedings, including but not limited to the calculation of any retroactive SSP benefits.

**SUBPART 398-9 REPLACEMENT OF BENEFITS**

**398-9.3 Cash**

The proposed regulation states that OTDA will not replace cash from an additional state payment that has been lost. The regulation should be amended to state that nothing in this section will preclude a local district from replacing a lost or stolen SSP payment under the Emergency Assistance to Adults Program (EAA). Inasmuch as the state agency plans to develop an SSP Helpline, the Helpline staff should provide authority to process requests for EAA when SSP has been lost or stolen.

**SUBPART 398-10 ADMINISTRATIVE FAIR HEARINGS**

**398.10.1 Requests for Fair Hearings:**

The proposed regulations require that a request for a fair hearing be made within 60 days after OTDA’s determination, action or failure to act. The SSA’s regulations provide that a request for a reconsideration or hearing be made within 60 days of receipt of the notice of decision [see 20 C.F.R. §§ 416.1409(a); 416.1433(b)], and presumes that notice is received within five days of the date of the mailing, unless the recipient can show that it was not received within the five-day period. 20 C.F.R § 416.1401; POMS GN 03102.100.C.6 & GN 03103.010.B.3.

It will be confusing to SSI recipients to have a 65 day standard to request a hearing for SSI benefits and a 60 standard for the SSP. We recommend that either OTDA amend this section to adopt the SSA standard of 60 days from receipt, building in a five day grace period, or alternatively, that OTDA amend 18 NYCRR 358-3.5(b)(1) to provide that standard for all of its fair hearings.

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SSA’s good cause rules at 20 C.F.R. § 416.1409(b) should also be implemented as part of proposed Part § 398-10.1, to extend the time to request an appeal. This proposed part does not allow any good cause exception to the 60-day limit for requesting a Fair Hearing. SSA’s more comprehensive good cause exceptions, as discussed above, should be incorporated into this section as well. At a minimum, the good cause exceptions set forth in 18 NYCRR § 351.26 should be included in this Part. Additionally, the SSI rule which permits extending the time to request an appeal [20 C.F.R. § 416.1409(b)] should be adopted as well. “The fact that [SSI] claimants are not only poor but also aged, blind or disabled places them ‘in a profoundly inferior position in relationship to a government bureaucracy.’” *Ford v Shalala*, 87 F. Supp. 2d 163,177 (E.D.N.Y. 1999) quoting *Willis v. Lascaris*, 499 F. Supp. 749,756 (N.D.N.Y. 1980). The rules for the SSP should be flexible and accommodate the disabilities and infirmities of recipients as they negotiate the system.

**398-10.2 Right to Aid Continuing**

The proposed regulation indicates that the Office of Administrative Hearings (OAH) will determine whether and when a recipient is entitled to aid continuing. SSI regulations, however, mandate continued benefits in certain situations. See, e.g., 20 C.F.R. § 416.1336(b), which provides for continuation of payment pending an appeal if requested within ten days of a notice of an intent to discontinue, suspend, or terminate benefits. See also 20 C.F.R. § 416.996, which provides for the continuation of benefits pending an appeal of a medical cessation determination (“Continuing Disability Review” or CDR). We suggest that this section be rewritten to conform to the federal regulations. Otherwise, there may be situations where SSI benefits are suspended or terminated when SSP benefits are not, or vice versa.

**398-10.5 – Telephone hearings**

This provision states that hearings will be conducted by telephone unless an in-person hearing is requested. Given the nature of the SSP population, we suggest that requesting a hearing be made as easy as possible. First we recommend that the SSP Helpline be designated to take fair hearing requests for SSP applicants and recipients so that they do not have to endure the long wait times on the regular fair hearing line, and more importantly so that they can be screened to determine if they are *Varshavsky* class members. The *Varshavsky* order permits the disposition of administrative appeals in favor of class members by such means as conferences, redeterminations, decisions without hearings, and telephone hearings. Otherwise, if a favorable decision cannot be rendered by such means, OTDA must conduct a Fair Hearing in a class member's home. If the appeal is not aid-continuing, the home hearing must be held within 45 days of the request.

Inasmuch as many SSP applicants and recipients will likely be *Varshavsky* class members, it is important that their rights under the *Varshavsky* order be safeguarded. Additionally, we strongly recommend that given the disabled and aged nature of this population, SSP applicants and recipients who are not *Varshavsky* class members be accorded the right to request an in-person hearing if the telephone hearing results in an unfavorable determination.
Due process rights such as how the appellant will review his or her file before the hearing, and how evidence will be submitted during the course of a telephone hearing, must be developed in regulation before telephone hearings are implemented.

During our discussions at the April 30 briefing on the SSP, OTDA mentioned that it is considering a desk review process to minimize the need for hearings. If this is the case, additional regulations must be proposed that will indicate how fair hearing rights will be preserved if the desk review process fails to resolve the matter, explain the process for requesting a desk review, setting forth the time frame for desk review determination, and requiring a written determination.

**Right to review case records:** The failure in the regulations to address an SSP recipient’s right to review case records is a critical omission. Since local districts will not be maintaining SSP records, where will the records be maintained and how will claimants and their representatives obtain copies? In addition, SSP claimants and their representatives may also need to see the file prior to filing an appeal in order to decide whether to appeal or to resolve problems prior to filing an appeal. The regulations need to clearly set forth procedures for file access, including time frames for agency response.

**SUBPART 358-5.12 – Telephone hearings**

The proposed regulations at 398-10.5, discussed more fully above, propose telephone hearings for recipients of SSP benefits unless an in-person hearing is specifically requested, and references 18 NYCRR § 358-5.12. The proposed regulations also include an unexpected amendment to =, § 358-5.12, making a fundamental change applicable to all fair hearings, permitting telephone hearings in all cases governed by Part 358. This would include not only all cash public assistance hearings, but Medicaid, HEAP, child care and SNAP hearings. This would make dramatic change to the OTDA fair hearing process and should be withdrawn or limited only to SSP hearings. The broad impact of such a sweeping change would require comprehensive revision of the Part 358 regulations to protect the due process rights of the applicants for, and recipients of the other benefits affected by this revision.

**SUBPART 398-11 OVERPAYMENTS**

Given the modest level of SSP benefits, overpayments may be relatively small. But recoupment of even $7 or $8 monthly from SSP recipients could be significant.

Losing that income may mean that:

1) SSP recipients go without their medication (dual eligibles with Medicare Part D have co-pay obligations, and a pharmacy can refuse to fill their prescription if they do not have their co-pay).

2) They cannot afford basic personal items like toilet paper or soap.
3) They are short on money for other basic essentials like rent, utilities or food.

The rate of recoupment of SSI overpayments is based on the premise that it “will not deprive the individual of income required for ordinary and necessary living expenses.” 20 C.F.R. § 416.571. Recovery of SSP overpayments should follow the same principles.

398-11.1 governs OTDA’s recovery of overpayments of SSPNA and SSP benefits. Section 398-11.1(b) would require a recoupment of 10% of the grant to recover any overpayment, and unlike SSA’s regulations, does not allow for any waiver of recovery of overpayments in circumstances where the recipient was not at fault in creating the overpayment. See 20 C.F.R. §§ 416.550 et seq. While proposed § 398-11.1(f) does allow for the discontinuance of recovery of non-fraud overpayments for current SSP recipients when the cost of recovery is greater than the cost of collection, this discretionary waiver provision falls short of SSA’s regulations cited above.

398-11.1(d) allows for discontinuance of overpayment collection efforts for persons who no longer receive SSP benefits if the amount of the overpayment is less than $125.00. This provision is inconsistent with SSA’s policy of discontinuing recovery efforts against both current and past recipients of SSI if a waiver request is made and the amount of the overpayment is $1,000 or less. POMS SI 02260.030B.2.

We recommend that OTDA adopt SSA’s overpayment rules and permit the waiver of any overpayment under $1000 if the recipient is not at fault in creating the overpayment. At the very least, we urge that recipients of SSPNA and SSP at least be permitted to seek a reduction to 5% of their benefit when the reduction would cause undue hardship. This would be consistent with the current rules governing public assistance overpayments at 18 NYCRR 351.31(d)(2).

COORDINATION WITH NEW YORK STATE NUTRITION IMPROVEMENT PROJECT (NYSNIP)

NYSNIP is a joint USDA-SSA-OTDA demonstration project whereby SSI recipients classified as living alone are automatically enrolled in SNAP for a 48-month certification period without having to file a SNAP application.

Under current procedures, when a new SSI live-alone recipient begins receiving SNAP through NYSNIP, OTDA does not know whether the individual has “high” or “low” shelter costs under the NYSNIP definition unless the individual was already in receipt of SNAP prior to the NYSNIP case opening. If the individual wasn’t previously getting SNAP, OTDA opens the NYSNIP case with no shelter costs reflected in the SNAP budget and the individual receives the lowest NYSNIP payment benefit amount.4

4 To illustrate: a single SSI live-alone recipient who pays $500/month in rent is entitled to receive $189 in monthly NYSNIP/SNAP benefits. The NYSNIP case would be opened with a $69 monthly SNAP benefit (“shelter cost unknown” category).
These new NYSNIP recipients must verify their actual shelter expense before their SNAP benefit can be adjusted upward to the correct amount. OTDA includes a shelter expense questionnaire in the NYSNIP case opening notice to solicit that information; however, these individuals often do not understand that they need to complete the questionnaire and they fail to return it to their local SNAP office. As a result, many new NYSNIP recipients are losing out on a substantial amount of SNAP benefits that they should be receiving.

With New York State's takeover of administration of the SSP, OTDA should solicit this missing information from individuals who are classified as living alone at the time that the SSP payment is being determined to ensure that they receive the correct monthly amount of SNAP benefits under NYSNIP. Disability has emerged as one of the strongest known factors that affects a household’s food security. New York should take advantage of this unique opportunity to reduce hunger for disabled and elderly SSI recipients in NYSNIP.

Thank you for your time and consideration of our comments.

Very truly yours,

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