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February 13, 2012

Daniel J. Curley
Commissioner, DTA
600 Washington Street
Boston, MA 02111

Re: Comments: Proposed Regulations Implementing State Administration of the SSI State Supplement

Dear Commissioner Curley,

The undersigned write to provide comment on proposed regulation 106 C.M.R. 343.330 and 106 C.M.R. 327.000 *et seq.* Our purpose in commenting is to help ensure clarity and consistent decision-making, and to reduce confusion for SSI recipients, their advocates and others who work with them. Since the early 1970s in Massachusetts, SSI has meant both the SSI federal benefit rate (FBR) and the SSI state supplement (SSP), one check, and one appeal process. It's safe to say that most recipients have been unaware that there have been two separate parts to the SSI benefit. When the Commonwealth assumes state administration of the state supplement, SSI will mean only the FBR and there will be a new acronym (SSP) to learn. In addition to the new lingo, recipients, as well as advocates and state agencies, will need to become accustomed to new processes, split decision makers, and separate appeal processes. In addition, DTA appeal officers will be unfamiliar with the complex SSI/SSP eligibility rules. It is therefore critical that the regulations implementing state administration of the SSP are correct, clear, and follow federal policy.

The Disability Law Center (DLC) is the Protection and Advocacy agency for Massachusetts. DLC is a private nonprofit entity that provides free legal assistance to individuals with disabilities throughout Massachusetts. A key mission of the DLC is to help ensure that people with disabilities are able to fairly access the benefits, items, and services they may need to live and work in the community. Since 1983, the Disability

The Protection and Advocacy System for Massachusetts



Benefits Project (DBP) at the Disability Law Center has provided statewide technical back up and support to legal services advocates and private attorneys who represent individuals before the Social Security Administration (SSA).

Greater Boston Legal Services (GBLS) is a non-profit corporation that provides civil legal services to eligible low income clients in 33 cities and towns in eastern Massachusetts. The help it offers ranges from legal advice to full case representation, depending on client need. As part of its mission, GBLS, through its' Disability Benefits Project, and Children's Disability Project, represents individuals with disabilities of all types who are seeking to receive or preserve benefits under Titles II or XVI of the Social Security Act. GBLS also represents individuals who are in nursing homes and receive SSI at rate designated for Federal Living Arrangement D.

Our comments on specific sections are below.

I. Fair Hearing Rules

106 C.M.R. 343.330 Right to Examine Case File and Documents

This regulation indicates that one must make an appointment to examine the case file but does not state where. Where will the SSP case file be maintained and where will SSP claimants and their helpers and advocates be able to obtain a copy? Must they go to UMass in Shrewsbury or to a DTA local office? Or, will the UMass office mail or fax a copy upon request?

In addition to the need to have timely access to the case file when an appeal has been filed, SSP claimants, their advocates and helpers may also need to see the case file to decide whether to appeal or to resolve questions prior to filing appeal. Keeping unnecessary appeals out of the hearing office queue is a goal we all share. We urge you to make file access readily available to SSP claimants and their advocates and helpers, whether before or after having filed an appeal. We also urge you to ensure that claimants and their advocates have access to decision-makers to try to resolve problems prior to appeal, whether or not an appeal has been filed.

Finally, timely access requires clarity on the type of release necessary for advocates and helpers to obtain file copies. What constitutes timely access may depend on the circumstances, but we would suggest the appellant be supplied a copy of the case file no less than 10 days prior to a scheduled hearing.

II. SSP Rules 106 C.M.R. 327.000 *et seq.*

1. 106 C.M.R. 327.110 Definitions

This section of the proposed regulations does not include a reference to the SSI countable resources rules at 20 C.F.R. 416.1200 *et seq.* This definition should be added.

The Commonwealth must follow the rules of the Social Security Administration (SSA) to determine eligibility for the SSP. 20 C.F.R. 416.2015(c). However, 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). For example, it is only in the POMS (*e.g.*, POMS SI 00835.160¹) where one will find definitions of the household expenses SSA uses to determine whether one is in a Full Cost or Shared living arrangement or whether in-kind support and maintenance applies. 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. For example, it is only in the POMS where one will find SSA's current rules on trust countability or non-citizen eligibility. 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.

2. 106 C.M.R. 327.120 Eligibility for SSP

The first paragraph of this proposed regulation indicates that an application for SSI is an application for the SSP, as does 106 C.M.R. 327.340, Date Benefits Begin. To avoid confusion, the regulations should make clear that there is no separate application for the SSP and that an application for SSP starts with an application for SSI at the Social Security Administration.

3. 106 C.M.R. 327 150 Verifications; cooperation in all, except if good cause exists.

DTA should ensure that adequate good cause reasons are incorporated in this standard. The general good cause reasons and verifications for TAFDC and EAEDC are at 106 C.M.R. 701.380, <http://www.mass.gov/eohhs/docs/dta/g-reg-701.pdf> and the assumption is that these apply in this situation.

4. 106 C.M.R. 327.210 Eligibility Categories

Subparts (B) & (C) reference SSA's disability and blindness standard regulations at 20 C.F.R. 416, Subpart I. However, just as noted in #II.1. above, SSA has provided significant guidance to its disability adjudicators in Social Security Rulings (SSRs). For example, SSRs 85-15² and 85-16³ provide instruction on the mental health functional

¹ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0500835160>

² http://ssa.gov/OP_Home/rulings/di/02/SSR85-15-di-02.html

³ http://ssa.gov/OP_Home/rulings/di/01/SSR85-16-di-01.html

requirements of work, SSRs 96-8p⁴ and 96-9p⁵ show the rules for evaluating the ability to engage in work activities on a sustained basis, SSR 11-2p⁶ discusses the evaluation of disability in young adults, and SSRs 09-1p – 09-2p⁷ provide guidance on the evaluation of childhood disability. Failure to reference and follow the SSRs on disability determinations risks failure to follow SSA's disability determination rules for the SSP and inconsistent eligibility determinations for SSI and the SSP.

5. 106 C.M.R. 327.220 State Living Arrangements

You should define the term “public income maintenance payments” where relevant to the living arrangement determination, *e.g.*, subparts (A)(1)(c) & (d), and (A)(3). See SSA's definition of public income maintenance payments at POMS SI 01415.044(G)⁸. See #II.1. above for the necessary source of the rules for determining when one is paying at least two-thirds of the household's expenses.

6. 106 C.M.R. 327.310 Income and 327.320 Resources

These regulations cite only to the SSI regulations to determine countability. The state must generally follow SSA's regulations in Parts A through Q of 20 CFR 416.2015(c). But, SSA also provides policy explanations via Social Security Rulings and POMS to its decision makers and adjudicators. In addition, SSA issues instructions in POMS and EMs prior to issuing regulations on law changes. It's not unusual for SSA to take years to promulgate regulations on a law or policy change, making subregulatory instructions the only place to view SSA's implementation of the change. *E.g.*, SSA's policies on trusts and noncitizen eligibility. Failure to reference and these policy instructions risks differing regulation interpretation and inconsistent eligibility determinations for SSI and SSP.

7. 106 C.M.R. 327.350 Timing and method of SSP payments

This proposed regulation states that the Department shall determine the method of payment. We expect this means that you will use the same method that the claimant has elected for receiving the SSI benefit. Nevertheless, claimants should be able to choose their preferred method of payment for the SSP, even if it is different from the method of payment selected for the SSI benefit.

8. 106 C.M.R. 327.370 Designated Payees and Representative Payees.

There does not appear to be any good reason to introduce the concept of a designated payee in the SSP. Current DTA regulations, 106 C.M.R. 701.370, provide for an

⁴ http://ssa.gov/OP_Home/rulings/di/01/SSR96-08-di-01.html

⁵ http://ssa.gov/OP_Home/rulings/di/01/SSR96-09-di-01.html

⁶ http://ssa.gov/OP_Home/rulings/di/01/SSR2011-02-di-01.html

⁷ http://ssa.gov/OP_Home/rulings/ssi/02/SSR2009-01-ssi-02.html;

http://ssa.gov/OP_Home/rulings/ssi/02/SSR2009-02-ssi-02.html

⁸ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501415044>

"authorized representative" to be "designated" as "payee", but these terms are not defined in the cash assistance definitions section, 106 C.M.R.701.600. We suggest that you adopt the representative payee provisions of SSA. This system of representative payee designation and monitoring is in SSA's regulations (20 C.F.R. 416.601 *et seq.*) and in the POMS (GN 00500.000 *et seq.*⁹, GN 00600.000 *et seq.*¹⁰). If an individual is deemed to be unable to handle this/her own benefits by an ALJ or a competent medical authority, and if the benefit is for someone under the age of 18, then a payee must be appointed. SSA also has standards and procedures for determining when others need a payee to use their benefits in their own best interests and procedures for determining when a payee is misusing benefits and for terminating or changing a representative payee. The proposed regulations give no guidance as to how these situations will be handled or by whom. Will these issues be handled by a DTA caseworker? By the contractor call center? You must spell out how these determinations will be made and by whom and what standards will be used.

9. 106 C.M.R. 327.380 Determination of Continuing Eligibility

This regulation should spell out the periodicity for redeterminations of non-disability factors (e.g., living arrangements) and for disability redeterminations. SSA redetermines non-disability eligibility criteria about yearly. Since you will be receiving the SDX information on these redeterminations, you should also follow SSA's periodicity.

SSA's disability redetermination periodicity depends on whether the SSI recipient has been deemed expected to improve or not. For consistency, we recommend that you also use SSA's periodicity for disability redeterminations. You must also use SSA's Continuing Disability Review Standards (e.g., 20 C.F.R. 416.994).


10. SSP Recipient Responsibilities

We urge you to define recipient reporting responsibilities for clarity.

Thank you for this opportunity to comment.

Respectfully submitted,


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Disability Law Center


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⁹ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200500000>

¹⁰ <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200600000>