

ATTACHMENT B

To February 24, 2011 Letter to Astrue

Submitted by: Legal Services NYC (LS-NYC), Disability Rights Education and Defense Fund (DREDF), the Law Foundation of Silicon Valley, the National Senior Citizens Law Center and the National Center for Law and Economic Justice

RECOMMENDATIONS FOR POLICY MODIFICATIONS PURSUANT TO SSA'S CURRENT SECTION 504 SELF-EVALUATION

Below we have provided examples of the problems identified in our February 24, 2011 letter to Commissioner Astrue, along with some recommended modifications. The examples provided are not intended to be exhaustive. In conducting its self-evaluation, SSA should conduct an exhaustive review of its policies to identify additional instances of the problems identified and make the same types of changes that we are recommending to the examples provided below.

1. Examples of SSA policies that provide for some assistance or flexibility with regard to disability, including some contradictory policies. Where indicated, policy modifications should be made to ensure non-discriminatory methods of administration. Each policy should also cross reference to a *new comprehensive SSA Section 504 policy*.

- a. Applying for benefits

- i. SSA Regulations

- (1) 20 C.F.R. § 416.345 (The SSA “will use the date of an oral inquiry about SSI benefits as the filing date of an application for benefits only if the use of that date will result in your eligibility for additional benefits [and certain conditions are met].”)

Recommended Policy modification: SSA will inquire whether a claimant needs assistance to make an application for SSI and will offer to use the date of an oral inquiry about SSI benefits as filing date if claimant states that he or she is unable due to disability to submit a written application.

- ii. POMS

- (1) GN 00204.003 (Proper Applicant) (“B.1.a. An adult claimant (age 18 or older in the first month of eligibility) is always a proper applicant regardless of: The type of benefits being claimed; or His/her physical or mental capability.”)

- (2) GN 00204.003 (“B.1.c. An adult claimant need not sign the application if he/she is: Adjudged legally incompetent ... Unable to understand what filing for benefits means ...; [or] Physically unable (see GN 00204.003B.4.) or is not available to sign (e.g., out of town due to sickness or death of a family member) and a loss of benefits would result; Note: A court appointed representative or a person who is responsible for the care of the claimant, including a relative, may sign the application when it is not necessary for an adult claimant to sign.”)
- (3) DI 11005.023 (Completing the Disability Report Adult Form SSA-3368) (includes requirement to “Use the claimant's allegations, and obtain the claimant's own perception of when he or she became unable to work because of his or her physical or mental condition(s)”; includes notations about the claimant’s “Ability to read and understand English”, “Ability to write more than his or her name in English”, “details about any special education classes the claimant attended”, etc.)
- (4) SI 00601.060 (Supplemental Security Income (SSI) Interviewing) (“C.2. Sensitivity[.] Be sensitive to the needs, circumstances and limitations of individuals who contact SSA about SSI”)
- (5) SI 00601.060 (“C.3. Barriers[.] Be aware of barriers that may inhibit the smooth progress of the interview, such as: ... problems in communicating due to language difficulties, limited education, cultural factors, or the effects of the individual's disability ..., lack of mobility, and anxiety due to misconceptions about eligibility requirements. Make any reasonable accommodations necessary to deal with these factors before and during the interview.”) (emphasis added)

Recommended Policy modification: Define reasonable accommodations, such as: Reasonable accommodations are rights that claimants, beneficiaries and recipients may have based on disability. These rights apply whenever necessary to ensure “meaningful access” to SSA’s programs, and include but are not limited to, sign language interpreters, documents in alternate formats, and other ways of making information accessible to provide effective communication, such as using simple language and repeating information, providing additional time to

complete interviews, and excusing untimely responses for good cause. To offer and provide reasonable accommodations we may need to change how we normally do things, such as offering to hold appointments at a person's home or by telephone, helping complete forms, and helping gather information required by SSA.

- (6) SI 00601.100 (Information/Evidence—General) (“B.1. SSA must offer assistance to claimants/recipients and interested third parties in obtaining information/evidence needed to determine the claimant's eligibility and/or payment amount. The offer should be made during the initial contact with the individual and all subsequent contacts that involve requests for additional information/evidence.”)
- (7) SI 00601.110 (Closeout - Failure to Cooperate (N18) – Initial Claims) (“B.2. If the individual ... fails to provide the requested information/evidence by the expiration of the 30-day closeout period, attempt to contact the individual by telephone to determine if additional time is needed and offer assistance. Make several attempts to call at different times on different days. If you do not reach the individual or he/she is uncooperative: Review the claims file, for names of relatives, friends or medical treating sources such as doctors/clinics who may be able to provide assistance[; and] Pursue any known sources of assistance including contacts with community organizations established through outreach activities.”)

iii. Social Security Handbook

- (1) § 104 (Who is Responsible for Proving a Claim?) (“You are responsible for submitting the necessary evidence to support a claim. We assist you by explaining the evidence that is required to establish your claim. If you are unable to collect the evidence, we offer special assistance to ensure the proper outcome of your claim. In addition, we maintain cooperative relationships with many groups and organizations that provide assistance with the application process.”)

Recommended Policy modification: Add language clarifying rights under Section 504, such as: You may have a right to a reasonable accommodation if you have a physical or mental condition that limits what you can do.

Some reasonable accommodations are sign language interpreters, documents in other formats like Braille, audio CD and large print, and other ways of making information accessible. We can also change how we do things, and hold appointments at your home, help you with forms, and help you get papers you need to apply. If you think you need an accommodation, contact your local Social Security office or call 1-800-772-1213.

- (2) § 110.3 (Are there other places you can meet Social Security office staff other than the local offices?) (“....If necessary, a representative from our office will make a personal visit to your home if you are unable to visit the office or contact station because of illness or infirmity.”)

Recommended Policy modification: Add language clarifying rights under Section 504, such as: You may have a right to a reasonable accommodation if you have a physical or mental condition that limits what you can do. Some reasonable accommodations are sign language interpreters, documents in documents in other formats like Braille, audio CD and large print, and other ways of making information accessible. We can also change how we do things, and hold appointments at your home, help you with forms, and help you get papers you need to apply. If you think you need an accommodation, contact your local Social Security office or call 1-800-772-1213.

- (3) § 1512 (How can Social Security help you complete your application?) (“.... If you cannot go to the Social Security office personally because of poor health, or if there is no Social Security office nearby, call the toll-free number at 1-800-772-1213, or write the nearest Social Security office to: 1. Get full information and application forms; 2. Make an appointment for a telephone interview; or 3. Request that someone from the Social Security office go to your home.”)

Recommended Policy modification: Add language clarifying rights under Section 504, such as: You may have a right to a reasonable accommodation if you have a physical or mental condition that limits what you can do. Some reasonable accommodations are sign language interpreters, documents in documents in other formats like Braille, audio CD and large print, and other ways of making information accessible. We can also change how

we do things, and hold appointments at your home, help you with forms, and help you get papers you need to apply. If you think you need an accommodation, contact your local Social Security office or call 1-800-772-1213.

b. Interviewing

i. POMS

- (1) GN 00203.009 (Difficult Interviewing Situations) (“A. [...] Some interviews may involve [problems such as] communication difficulties, language barriers, personality conflicts, claimant dissatisfaction or conflict of interest. People who are emotionally upset or under stress may show outward signs of a problem (e.g., they may grimace, be antagonistic, or withdrawn). Special interviewing techniques and skills are required because the claimant's difficulties may be due to a physical or emotional state (e.g., terminal illness, etc.).”

Recommended Policy modification: Add disabling conditions.

- (2) GN 00203.010 (Conducting Interviews under Difficult Circumstances) (provides procedures for interviewing blind or visually impaired, terminally ill people and people with contagious diseases)

Recommended Policy modification: Add more disabling conditions.

- (3) DI 11005.070 (Interviewing Blind or Visually Impaired Persons)

- (4) GN 00203.012 (Special Interviewing Situations (Deaf and Hard-of-Hearing Individuals)) (“As mandated by Section 504 of the Rehabilitation Act of 1973 (P.L. 93-112), SSA will attempt to ensure maximum accessibility of all SSA programs and proceedings to deaf and hard-of-hearing persons. This policy provides for the purchase of sign language interpreter services whenever necessary to ensure accurate communication.”)

- (5) GN 00203.013 (Special Interviewing Situations (Hostile/Abusive)) (reviewing the procedures for interviewing “persons with behavioral irregularities”)

c. Attaining third-party documentation

i. SSA Regulations

- (1) 20 C.F.R. § 416.203(a) (“We will help you get any documents you need but do not have.”)
- (2) 20 C.F.R. § 416.912(d) (Our Responsibility) (“Before we make a determination that you are not disabled, we will develop your complete medical history for at least the 12 months preceding the month in which you file your application unless there is a reason to believe that development of an earlier period is necessary or unless you say that your disability began less than 12 months before you filed your application. We will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports.”)

ii. POMS

- (1) SI 00601.080 (Adjudicating Supplemental Security Income (SSI) Claims--General) (“B.2.b. Contact third parties, including outside sources, directly when: ...the claimant is unable to provide the information/evidence”)
- (2) SI 00601.100 (Information/Evidence--General) (“C. Assist the claimant or recipient in obtaining necessary information/evidence from third parties, if the individual is having difficulty (e.g., homeless individuals). Consider developing for a representative payee if you believe this difficulty indicates the claimant/recipient cannot manage funds or direct the management of funds.”)
- (3) DI 11010.520 (Following Up on Requests for Medical Reports) (“In cases where the claimant is unable to proceed with the request (e.g., bedridden, illiterate, or mentally ill), try to obtain the name and address of a friend or relative who can be of assistance. Whenever necessary, enlist the support of this third party and take any other required action (e.g., develop for a representative payee).”)
- (4) DI 11010.525 (Assisting Claimants Who are Unable to Furnish Medical Evidence) (“A. There will be a number of situations, however, where the claimant will be unable to

furnish medical evidence because of circumstances beyond his/her control. [] In these situations, do not arrange for the claimant to be examined by a public agency. Instead, annotate in the "Remarks" section of the SSA-3368-BK and RPOC, the following remarks: 'No medical evidence available for reasons beyond the claimant's control'")

- (5) DI 22510.016 (Arranging the Consultative Examination (CE) Appointment Special Scheduling Procedures) ("F. If the claimant refuses to travel due to a health reason or health risk, or the claimant's TS does not agree that it would be reasonable for the claimant to travel to the CE appointment, determine if a CE at the claimant's residence would be adequate for providing the necessary evidence. Consider the need for, and availability of, special equipment or facilities").

Recommended Policy modification: Add disabling conditions.

- (6) GN 00301.180 (Identifying Claimants Who Need Assistance) ("A.2. [noting that a claimant might need assistance if he or she] (e). [h]as a mental or physical condition which seriously hampers his/her ability to do things for himself/herself; or (f). [h]as advanced senility or is severely emotionally disturbed.")

d. Failure to comply

i. SSA Regulations

- (1) 20 C.F.R. § 416.918 ((b)(1) [including "illness" as an example of a good reason for failure to appear for a consultative examination]; "(a) We will consider your physical, mental, educational, and linguistic limitations (including any lack of facility with the English language) when determining if you have a good reason")

ii. POMS

- (1) DI 22510.016 (Arranging the Consultative Examination (CE) Appointment Special Scheduling Procedures) ("H. If you reach the claimant, ask the claimant if he or she will attend the CE appointment. Inform the claimant that if he or she does not attend the CE appointment, we may make a determination based on the evidence in file.

Explain that this means we may find that he or she is not disabled.”)

Recommended Policy modification: Add language, such as: If the claimant states he or she will not attend or if the claimant seems to lack understanding about the purpose of your call, take special care to explain in simple terms why you are calling and offer assistance to obtain necessary information. Take special care in scheduling an examination for a non-hospitalized mentally or emotionally ill claimant because the claimant may: 1. Be emotionally unprepared for an examination; 2. Have never been examined or treated for these disorders; 3. Have difficulty understanding the purpose of the examination or pursuing the claim adequately; 4. Fail to reply to the correspondence about the need for the examination.

- (2) DI 23007.010 (Failure to Attend a Consultative Examination (CE) Appointment) (“E. [good reasons to excuse a failure to appear for a CE].”)

Recommended Policy modification: Add language, such as: If [t]he claimant alleges a mental impairment (or a mental and physical impairment) or the available evidence suggests a mental impairment that interfered with claimant’s ability to attend a CE.

- (3) SI 02301.235 (Failure to Provide Information) (“B. We do not suspend SSI using N20 when: [...] the recipient may need a representative payee ([GN 00502.020](#)) or change in payee ([GN 00504.100](#)). [...] I. **Exhaust efforts** to locate and contact recipients and obtain needed information. Contact any source you believe may have contact with the recipient or who could provide the information such as a financial institution, employer, benefit source, medical treatment source or a homeless shelter. **Develop capability** if it appears that a recipient may not be managing benefits and meeting needs. GN 00502.020.”)

Recommended Policy modification: Eliminate arbitrary deadlines when person unable to comply due to disability. Discuss need to offer and provide accommodations and modifications as part of “developing capability.”

- (4) GN 00502.020 (Determining Capability – Adult Beneficiaries) (“A.1. If you suspect that the beneficiary has a mental or physical condition that prevents him/her from managing or directing someone else to manage benefits, you must make a capability determination.”)

Recommended Policy modification: Discuss obligation to consider whether provision of accommodations and/or modifications may meet individual need for assistance to be capable of managing own benefits, in lieu of establishing representative payment.

- (5) ALL Good Cause Policies, e.g., GN 03101.020 (Good Cause for Extending Time Limit) (“A.1. When individuals contact the FO or TSC and question or disagree with a determination after the 10-day or 60-day time limits have expired, assist them if they want to appeal and develop good cause for extending the time limits for appeal and benefit continuation. [...] A.4. Examples of circumstances where good cause **may** exist include, but are not limited to, the following situations: [...] the claimant did not understand the requirement to file timely or was not able (mentally or physically) to file timely. [...] B. Obtain a written statement from the claimant explaining the reason for filing the appeal late.”) (emphasis added)

NOTE: This policy contradicts POMS SI 02301.235 (Failure to Provide Information), above, as follows:

- no automatic do not suspend if person lacks “capacity”
- no affirmative duty to determine whether person lacks “capacity”
- onus on individual to contact agency, request relief, and put it in writing – although this POMS tells staff to assist to put in writing when necessary, how is that enforced and how do people know that this assistance should be provided?

Recommended Policy modification: Conform to POMS SI 02301.235, including policy modification recommendations made above. Affirmatively offer to determine if failure to comply is due to disability. Good cause **will be granted** when the claimant did not understand the requirement to file timely or was not able to file timely, due to disability. When such conditions apply, remove all requirements that place onus on claimant or beneficiary to prove good cause.

iii. Social Security Handbook

- (1) § 1833.2 (What are examples of good cause?) (“.... A. Your serious illness, or death or serious illness in your immediate family; ... I. You had a physical, mental, educational or linguistic limitation (including any lack of familiarity with the English language) that kept you from understanding the reporting responsibilities. Therefore, you did not file a timely report.”)

e. Appeals

i. POMS

- (1) GN 03102.150 (Good Cause for Extending Time Limit) (“A.3. [noting that examples of good cause for failing to appeal within 60 days include]: “the claimant was seriously ill and was prevented from contacting SSA by phone, in person, in writing, or through a friend, relative, or other person” and “the claimant did not understand the requirement to file timely or was not able (mentally or physically) to file timely.”)
- (2) GN 03910.030 (Advising Claimants Regarding Right to Representation) (“A.1. The Social Security Act and regulations require that SSA notify any claimant who is not represented by an attorney, and who receives an adverse determination, about the options for obtaining attorney representation and the availability, to qualifying claimants, of legal services organizations that provide legal services free of charge (e.g., legal aid groups).”)
- (3) SI 04010.020 (SSI Appeals Considerations) (“A.2. A party to any initial determination who can show in writing that his/her benefit rights may be adversely affected by the initial determination may appeal it. An appointed representative, representative payee, or someone who would be considered a proper applicant per SI 00601.012 can make the request for appeal on behalf of the claimant. Also, when someone writes on behalf of the claimant requesting appeal but the request clearly originated with the claimant, we treat the request as a writing from the claimant.”)

Recommended Policy modification: Eliminate requirement to “show in writing” when not possible due to disabling condition.

ii. SSRs

- (1) SSR 91-5p: (Policy Interpretation Ruling Titles II and XVI: Mental Incapacity and Good Cause for Missing the Deadline to Request Review) (“The purpose of this interpretative ruling is to clarify our policy on establishing good cause for missing the deadline to request review. It is being issued to avoid the improper application of res judicata or administrative finality when the evidence establishes that a claimant lacked the mental capacity to understand the procedures for requesting review.”)

f. Hearings

i. HALLEX

- (1) I-2-3-10(A) (“Do not require a claimant to travel a significant distance to the hearing office (HO) or another hearing site if a closer hearing site exists...”) & (“Do not require a claimant to appear at the HO or another hearing site if personal circumstances prevent the claimant from doing so.”)

g. Compliance

i. POMS

- (1) GN 00903.400 (“Complaints of Discrimination Against SSA and/or SSA Employees by Members of the Public”) (“A. The Commissioner has delegated to SSA's Office of the General Counsel (OGC) the authority to accept, investigate and resolve such complaints. [...] C. SSA personnel may assist a person in filing a written complaint of discrimination. If a person makes an oral complaint (either in person or by phone), SSA personnel shall reduce the complaint to writing. [...] D. A complete complaint must be filed no later than 180 days from the date of the last act of alleged discrimination. Although the time limit for filing a complaint may be extended by the General Counsel for good cause, members of the public must be advised that they should not delay in filing a complaint.”)

Recommended Policy modification: As with policies related to failures to comply with program rules, this policy should be modified to ensure that staff affirmatively inform individuals of the right to make a complaint, the bases for making such a complaint, and offer to assist those who wish to make a complaint but are unable to do so due to disability. Time limits should be required to be waived accordingly.

ii. HALLEX

- (1) I-2-3-10(D) (“A claimant may object to the time or place of a hearing by notifying the ALJ, at the earliest possible opportunity before the time set for the hearing, of the reasons for the objection, and the time and place he or she would prefer the hearing to be held.”);
- (2) I-2-3-10(E)(1) (“The ALJ must find good cause for changing the time or place of a scheduled hearing, and change the time or place of the hearing, if: 1. the claimant or the claimant's representative is unable to attend or travel to the scheduled hearing because of a serious physical or mental condition, incapacitating injury”);
- (3) I-2-6-20(B) (“Affidavits or depositions may be used when an essential person cannot be present at the time and place of the hearing”);
- (4) I-5-1-16 (setting forth the procedures for video conferencing);
- (5) I-5-1-16(III)(B) (giving ALJs discretion not to schedule a video teleconferencing appearance if “[t]he claimant or the claimant's representative has a visual or auditory impairment of a type that could adversely affect his or her ability to appear and participate in the hearing through VTC, with respect to interacting with either the ALJ or a witness.”)