

ACTION ALERT

To: NYS Advocates Who Work with People in Waivers -
○ Traumatic Brain Injury (TBI),
○ Nursing Home Transition & Diversion Waiver (NHTDW), and
○ Lombardi waiver programs
Disability Advocates. Regional Resource Development Centers (RRDC)

From: Trilby de Jung, Empire Justice Center
Julie Morse, Legal Services of Central New York
Valerie Bogart, Selfhelp Community Services

Date: October 8, 2008, revised Nov. 26, 2008

Re: Please tell us about people who are or will be affected by the elimination of spousal/family impoverishment protections in NHTDW & TBI waivers, or *threat* of elimination of these protections in the Lombardi waiver.

1. **TBI AND NHTDW advocates and RRDC Specialists --** Please keep your eyes out for potential *applicants for the NHTDW and TBI waiver* who are married and who would have benefited from the spousal income protections (couples in which the waiver participant has income higher than \$745/month, and his/her spouse has less than \$2610/month -- see examples in the explanation pages that follow). Please return the attached response form for every such applicant you find. If in doubt, just call or e-mail us.

Encourage people who would benefit from the waiver to apply for services, though they will be denied the spousal impoverishment protections. We can then challenge the denial. If they don't apply, and get denied, no one can challenge it.

2. **TBI WAIVER ADVOCATES/ RRDC Specialists – PLEASE** review your caseloads for **married TBI waiver participants who received services before September 1, 2008** – these folks will lose spousal protections at their next recertification. **And look for the rare single person whose dependents may be receiving a Family Member Allowance.** Please return the Response forms below. If in doubt, just call or e-mail us.
3. **Many people mistakenly believe that “spousal refusal” will no longer exist. This is not true.** Do NOT refer us cases where the “community spouse” has substantial income -- his or her income will NOT be counted by Medicaid. Only refer cases where the WAIVER PARTICIPANT/APPLICANT has income higher than \$745/month, and his/her spouse has income less than \$2610, or his/her other dependents have income less than \$584 each.
4. **LOMBARDI WAIVER** – See next page.

The Lombardi waiver still has spousal impoverishment protections.

- The waiver was supposed to “expire” on December 31, 2008, unless renewed by the federal CMS. CMS had refused to renew it unless the State eliminated the spousal impoverishment protections that have existed for 20 years – but last week CMS gave a verbal extension of the existing waiver through Jan. 29, 2009.
- CMS apparently understands that New York State law *requires* spousal impoverishment protections in this waiver, and has to be amended in order to eliminate them. The law can only be amended in the budget process – so CMS is allowing time for that to happen.
- Of course, advocates as well the State will urge the “new” CMS in the new Administration to reverse this policy and allow New York to keep these vital protections. Stay tuned for how you can help make this happen.
- In the meantime, married couples in Lombardi programs keep these protections, and new married individuals applying for Lombardi should be admitted into the programs.
- **PLEASE LET US KNOW ABOUT:**
 - **MARRIED INDIVIDUALS BEING DISCOURAGED FROM APPLYING FOR LOMBARDI, .**
 - **CURRENT LOMBARDI PARTICIPANTS WHO DEPEND ON THE SPOUSAL IMPOVERISHMENT ALLOWANCES**, who would face hardship if they lose them. (We don’t want to alarm these people but.. it will be helpful to have real life examples of people who will be affected).

YOU CAN USE THE ATTACHED REFERRAL FORM, or call or e-mail:

	E-mail	Fax	Tel
Trilby de Jung	tdejung@empirejustice.org	585-454-4019	585-454-6500 x 8
Julie Morse	jmorse@wnylc.com	315-475-2706	866-475-9967
Valerie Bogart	vbogart@selfhelp.net	212-947-8737	212-971-7693

EXPLANATION OF ACTION ALERT

TWO WAIVER PROGRAMS (TBI, NHTDW) LOSING “SPOUSAL” and FAMILY IMPOVERISHMENT PROTECTIONS – and 3RD PROGRAM (LOMBARDI) THREATENED --- YOUR HELP NEEDED

The State Department of Health (DOH) has announced that, because of a change in a 20-year-old policy by the Center for Medicare & Medicaid Services (CMS- the federal Medicaid agency), people in two “waiver” programs will not be able to use part of their income to support a dependent spouse or other family member.¹ The programs now affected are the NURSING HOME TRANSITION & DIVERSION WAIVER (NHTDW) and TRAUMATIC BRAIN INJURY (TBI) Waiver. The Lombardi waiver program continues to have “spousal” and family impoverishment protections. However, these protections are at risk when the waiver is renewed by the federal Medicaid agency soon.

1. WHAT ARE THE CHANGES?

- **People applying for the TBI waiver after Sept. 1, 2008, and all applicants for the new NURSING HOME TRANSITION & DIVERSION WAIVER (NHTDW)** are not allowed to use part of their income to support a spouse or other dependent relative.
 - **Married applicants** may not use part of their income to support their spouse whose own income is less than \$2610/month
 - **All TBI waiver participants may not** use part of their income to support their dependent child, parent, or sibling who don't have \$584 in income of his or her own.
 - **All of the waiver participant's income exceeding \$745/month**, after deducting any health insurance premiums, must be paid toward the cost of care under the waiver as a “spend down.”²
- **Married persons and singles with dependents who were already receiving TBI waiver services before Sept. 1, 2008 will be re-budgeted at their next annual recertification.** If part of the waiver participant's income had been allocated to support the dependent spouse, child, parent, or sibling, this will no longer be allowed. All of the participant's income exceeding \$745/month must be paid as a “spend down.” See footnote 2. Making matters worse, a federal judge ruled last week that waiver participants may not shelter their income into a pooled trust or an individual Supplemental Needs Trust to eliminate the spend-down.³ Only people in regular community-based Medicaid programs, not waivers, may shelter their income.

¹ This change was announced in two directives. For the TBI program, see NYS DOH Directive 08-MA-024, 8/26/08, http://www.health.state.ny.us/health_care/medicaid/publications/docs/gis/08ma024.pdf. For the NHTDW program, see NYS DOH Directive 08-OLTC-ADM-1, 4/28/08 http://www.health.state.ny.us/health_care/medicaid/publications/docs/adm/08oltcadm-1.pdf pp. 5-6

² If the TBI waiver participant is working, s/he may keep more than \$745/month under special rules that encourage people with disabilities to work. Contact us for more info.

³ *Wong v. Daines*, 2008 WL 4450262 (S.D.N.Y. Sep. 29, 2008)

2. WHICH TBI or NHTDW PARTICIPANTS ARE AFFECTED BY THE NEW RULES?

- *Married* couples where the:
 - *Spouse* in the waiver has significant income of his or her own, and
 - The spouse who is not participating in the waiver (called the “community spouse”) has significantly less income than \$2610, OR
 - There is a minor child, dependent child, sibling, or parent of either spouse living with the couple, and over 50% of that family member’s maintenance needs are met by either or both spouses. Before 9/1/08, \$584 of the waiver participant’s income could be allocated to these dependents as a family member allowance (maximum \$1750/mo for all dependents)
- *Single* TBI or NHTDW waiver participants who live with a minor child, a dependent child of any age, or a dependent parent or dependent sibling, and over 50% of that family member’s maintenance needs are met by the TBI or NHTDW waiver participant Before 9/1/08, \$584 of the waiver participant’s income could be allocated to these dependents as a family member allowance (maximum \$1750/mo for all dependents)

3. EXAMPLES OF WHO IS AFFECTED:

A. COUPLE EXAMPLE –

Before Bill suffered from a TBI injury, he worked for many years. He receives Social Security Disability of \$1500/month and a pension of \$1500/month. His wife Sally is age 62 and receives Social Security Retirement benefits of \$1000/month. They have no minor or dependent children, and no dependent parent or dependent sibling lives with them. He does not pay for any Medigap or other health insurance premium.

FORMER RULE – If Bill was in the TBI waiver before 9/1/08, his wife has received an allowance from him of \$1610, which brings her total income up to the minimum monthly maintenance needs allowance (MMMNA) of \$2610. His “spend-down is \$1048” – the amount he is supposed to contribute toward the cost his waiver. This will more than double under the “new rule” below when Bill is “recertified.”

\$ 3000 – Bill’s total income
- 1610 – Spousal allowance, brings his wife’s income up to \$2610
- 342 - Bill’s personal needs allowance

\$ 1048 - Bill’s spend-down or “Net Available Monthly Income” NAMI

NEW RULE – After Bill is recertified, or if Bill was now first applying for the TBI or NHTDW waiver -- He spend-down more than doubles to \$2255, as follows:

\$3000 – Bill’s total income
- 745 – Bill’s allowance

\$2255 - Bill’s spend-down or “Net Available Monthly Income” NAMI

B. EXAMPLE WITH MINOR CHILD or OTHER DEPENDENT FAMILY MEMBER –

In same scenario, Sally’s 15-year old daughter (any child under age 18) from her first marriage lives with them. Or Bill’s or Sally’s parent, sibling, or child of any age lives with them and over 50% of that family member’s maintenance needs are met by either or both spouses.

FORMER RULE -

- \$ 3000 – Bill’s total income
- 1610 – Spousal allowance, brings her income up to \$2610
- 584 – Family member allowance
- 342 - Bill’s personal needs allowance
- \$ **464** Bill’s spend-down or “Net Available Monthly Income” NAMI

AFTER SPOUSAL/FAMILY PROTECTIONS REMOVED--

- \$3000 – Bill’s total income
 - 745 – Bill’s allowance
 - \$**2255** - Bill’s spend-down or “Net Available Monthly Income” NAMI -
- NO ALLOWANCE MADE FOR SPOUSE, CHILD, or OTHER DEPENDENT FAMILY*

4. WHAT WILL NOT CHANGE?

- **Spousal refusal** -- Before, if the “community spouse” not receiving waiver services had a high income, s/he did a “spousal refusal” so that his/her income would not be counted. Now, the income of the spouse of the waiver participant will not be counted at all. A community spouse with substantial income of her own does not have to sign a “spousal refusal” because his/her income simply is not counted. These couples will not be affected.
- **SPOUSAL ASSET PROTECTIONS** – The waiver participant may keep his/her own resource allowance of \$13,050, and the spouse may have assets up to \$74,820, and sometimes as much as \$104,400. This is a “Community Spouse Resource Allowance” (CSRA). This allowance is not changing.
 - If the spouse has assets above the CSRA, s/he may do a “**spousal refusal**” to contribute the assets above the allowance. The right of spousal refusal regarding assets is not changed by the new rules. However, local Medicaid districts still have the right to sue the “refusing spouse” for support.

TBI/NHTDW/Lombardi WAIVER RESPONSE FORM

Spousal/Family Impoverishment

Your name _____ Program _____

Your Address _____
Street city zip

E-mail _____ Phone _____

You do not need to give us the name of the client(s) now, but we may ask you for it later. If you don't give name, please use initials or first name so that you will know which client this is for follow-up. You of course need your client to sign a release in order to give their name to us.

1. Name of person in or applying for waiver: _____ Age _____

- TBI waiver participant since _____
- New applicant for TBI waiver since 9/1/08
- Applicant for NHTDW
- Participant in Lombardi program
- New applicant for Lombardi program

2. Waiver applicant/participant's INCOME (monthly):

Social Security Disability _____

Pension _____

Earnings (GROSS AMOUNT on paycheck _____ and indicate
how often paid - weekly bi-weekly monthly

Other (specify type and amount) _____

3. Spouse not in waiver -- Age _____

INCOME (monthly): Social Security _____

Pension _____

Earnings (GROSS AMOUNT on paycheck _____ and indicate
how often paid - weekly bi-weekly monthly

Other (specify type and amount) _____

4. Does waiver participant/applicant pay a health insurance premium – such as Medigap or retiree insurance? If so, cost \$_____ per month quarter _____ (other)

5. Do any other relatives live with waiver participant?
- **Child** of either spouse under age 18? YES NO
 - **Child** older than age 18 who depends on either spouse for more than half of his support? YES NO
 - **Parent** who depends on either spouse for more than half of his support?
 YES NO
 - **Sibling** who depends on either spouse for more than half of his support?
 YES NO

If any of the above relatives are checked YES, please write here the **age** and **relationship** of these relative(s)

-
- For each relative, indicate whether s/he receives a Family Member Allowance through the TBI waiver budget YES NO Don't know
 - For each relative, indicate the family member's own income, if known e.g. a child under age 18 might receive Social Security based on the disability of parent
\$ _____ Source _____

6. **Do you have or can you get a copy of the Medicaid waiver budget** showing the support allowances? If so, please fax it. If you do not have a privacy release, please redact the individuals' names, social security numbers, Medicaid numbers, and addresses.

7. **Please give any information you have about how elimination of the spousal/family allowance will cause a financial hardship.** How high is their rent/mortgage? What are their other significant expenses?

8. **What are individual's/ couple's savings?**

Participant - Cash/stocks/CDs \$ _____ **IRA/retirement** \$ _____
Spouse -Cash/stocks/CDs \$ _____ **IRA/retirement** \$ _____

9. **When was the last renewal** of the waiver participant's Medicaid budget (month and year)? _____

PLEASE RETURN FORM OR SEND QUESTIONS TO:

	E-mail	Fax	Tel
Trilby de Jung	tdejung@empirejustice.org	585-454-4019	585-454-6500 x 8
Julie Morse	jmorse@wnylc.com	315-475-2706	866-475-9967
Valerie Bogart	vbogart@selfhelp.net	212-947-8737	212-971-7693