STATE OF NEW YORK

5613

2021-2022 Regular Sessions

IN ASSEMBLY

February 22, 2021

Introduced by M. of A. GOTTFRIED -- read once and referred to the Committee on Social Services

AN ACT to amend the social services law and the civil practice law and rules, in relation to recovery of overpayment of certain assistance

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 104 of the social services law, subdivision 1 as amended by chapter 573 of the laws of 1964, subdivision 2 as amended by chapter 909 of the laws of 1974, subdivision 3 as added by chapter 433 of the laws of 1993 and subdivision 4 as added by chapter 340 of the laws of 2003, is amended to read as follows:

§ 104. Recovery from a person discovered to have property. 1. **For purposes of this section:**

(a) "Overpayment" shall include erroneous payments made to an eligible person in excess of the recipient's needs as defined in this chapter and erroneous payments made to ineligible persons, including but not limited to, payments made to such persons pending a fair hearing decision.

(b) "Recipient" shall mean any individual who is currently receiving or at one time received assistance or care as pursuant to the provisions of this title.

2. A public welfare official may bring **an** action or proceeding **in a court of competent jurisdiction** against a [~~person~~] **recipient who is** discovered to have real or personal property, **which resulted in an overpayment to the recipient,** or against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, [~~if such person, or any one for whose support he is or was liable, received assistance and care during the preceding ten years, and~~] **and there has been an overpayment to the recipient. The public welfare official** shall be entitled to recover up to the value of such property **which cause the assistance or care to constitute an overpayment to the recipient or** the cost of such assistance or care**, which-**

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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ever is lower. Any public assistance or care received by such person shall constitute an implied contract. [~~No claim of a public welfare official against the estate or the executors, administrators and successors in interest of a person who dies leaving real or personal property, shall be barred or defeated, in whole or in part, by any lack of sufficiency of ability on the part of such person during the period assistance and care were received.~~

~~Nor shall the claim asserted by a public welfare official against any person under this section be impaired, impeded, barred or defeated, in whole or in part, on the grounds that another person or persons may also have been liable to contribute.~~]

In all claims of the public welfare official made under this section the public welfare official shall be deemed a preferred creditor.

[~~2. No~~] 3. The public welfare official shall not bring an action or proceeding under this section if excess payments or payments made to the person were made due to agency or contractor error, including but not limited to an error made by a facilitated enroller.

4. In an action or proceeding under this section, the complaint shall be accompanied by a certificate, signed by the attorney for the public welfare official, declaring the following:

(a) the attorney has reviewed the facts of the case and has concluded that there is a reasonable basis for the action or proceeding;

(b) certification that the continuous coverage protections under paragraph (c) of subdivision four of section three hundred sixty-six of this chapter do not apply to the recipient;

(c) the specific eligibility criteria under which the recipient was allegedly ineligible for benefits; the budgeting methodology that was applied in making the determination that the recipient was ineligible for benefits, including the applicable resource or income limit for the recipient's household composition during the claim period, and the recipient's applicable resources and income during the claim period; the time period during which the recipient was allegedly ineligible; the value of the real or personal property which resulted in an overpayment; and the amount of recovery sought; and

(d) the action or proceeding is supported by exhibits including an accounting of the recovery sought and all expenditures of assistance or care made on behalf of the recipient during the period of alleged inelgibility.

5. There shall be no right of action [~~shall accrue against~~] to recover an alleged overpayment for assistance or care received by a person under twenty-one years of age [~~by reason of the assistance or care granted to him unless at the time it was granted the person was possessed of money and property in excess of his reasonable requirements, taking into account his maintenance, education, medical care and any other factors applicable to his condition~~].

[~~3.~~] 6. To the extent described in section 7-1.12 of the estates, powers and trusts law, the trustee of a supplemental needs trust which conforms to the provisions of such section 7-1.12 shall not be deemed to be holding assets for the benefit of a beneficiary who may otherwise be the subject of a claim under this section and no action or proceeding may be brought against either the trust or the trustee to recover the cost of assistance or care provided to such person, or anyone for whose support such person is or was liable.

[~~4.~~] 7. Any inconsistent provision of this chapter or of any other law notwithstanding, a social services official may not assert any claim under any provision of this chapter to recover payments of public

assistance if such payments were reimbursed by child support collections.

8. There shall be no right of action against a recipient who loses medical assistance eligibility by reason of excess resources or income because the recipient's medical assistance eligibility group, as determined under section three hundred sixty-six of this chapter, changed from MAGI, as defined in section three hundred sixty-six of this chapter, to non-MAGI, for the two years subsequent to their eligibility change. A right of action against such a recipient begins to accrue only if the recipient remains ineligible for medical assistance after the two-year grace period.

9. The public welfare official shall not use confession of judgment to recover an overpayment.

10. Any action or proceeding to recover an overpayment under this section shall be waived in cases of undue hardship in which a recipient's adjusted gross income for the applicable household size is two hundred fifty percent of the federal poverty line or lower and in cases of other extenuating circumstances as determined by the public welfare official.

11. Any action or proceeding under this section shall be commenced within two years from payment for assistance or care. No determination of a debt or award of debt shall be based upon payment for assistance or care that occurred more than two years before the action or proceeding is commenced.

12. The rate of interest for a judgment obtained pursuant to this section shall be calculated at the one-year United States treasury bill rate. For the purpose of this section, the "one-year United States treasury bill rate" means the weekly average one-year constant maturity treasury yield, as published by the board of governors of the federal reserve system, for the calendar week preceding the date of the entry of the judgment awarding damages.

13. There shall be no right of action against a recipient whose medical assistance eligibility was granted or extended during the period of the COVID-19 public health emergency, defined for the purposes of this section as March eighteenth, two thousand twenty through the end of the quarter when such public health emergency ends.

14. All settlement and payment agreements under this section in which the recipient has paid fifty percent or more of the debt by the end of the COVID-19 public health emergency ends are hereby considered paid in full.

15. If a recipient subject to a settlement or payment agreement under this section has not paid fifty percent or more of the debt by the end of the COVID-19 public health emergency ends, the recipient may submit evidence of undue hardship and receive waiver of the remaining debt under subdivision ten of this section or an appropriate reduction of debt based on hardship. Notice regarding the opportunity for the waiver shall be provided by the public welfare official.

§ 2. The civil practice law and rules is amended by adding a new section 3012-c to read as follows:

§ 3012-c. Certificate of merit in certain overpayment of assistance actions. In any action or proceeding for recovery of an overpayment of assistance or care, as defined in section one hundred four of the social services law, the complaint shall be accompanied by a certificate, signed by the attorney for the public welfare official, meeting all the requirements of section one hundred four of the social services law.

§ 3. The civil practice law and rules is amended by adding a new section 3202 to read as follows:

§ 3202. Confession of judgment for recovery of overpayment of certain assistance invalid. Notwithstanding the provisions of section thirty-two hundred eighteen of this article, no judgment by confession shall be entered to recover an overpayment, as defined in section one hundred four of the social services law. Any judgment entered in violation of this section is void and unenforceable.

§ 4. The civil practice law and rules is amended by adding a new section 213-e to read as follows:

§ 213-e. Actions to be commenced within two years; actions to recover certain overpayments. An action or proceeding on an overpayment by a public welfare official under section one hundred four of the social services law shall be commenced within two years from payment for assistance or care, and no determination of a debt or award of debt shall be based upon payment for assistance or care that occurred more than two years before the action or proceeding is commenced.

§ 5. Section 106-b of the social services law, as amended by chapter 81 of the laws of 1995, is amended to read as follows:

§ 106-b. Adjustment for incorrect payments. **1. For purposes of this section:**

(a) "Overpayment" shall include erroneous payments made to an eligible person in excess of the recipient's needs as defined in this chapter and erroneous payments made to ineligible persons, including but not limited to, payments made to those persons pending a fair hearing decision.

(b) "Recipient" shall mean any individual who is currently receiving or at one time received assistance or care under this title.

2. Any inconsistent provision of law notwithstanding, a social services official shall, in accordance with the regulations of the department and consistent with federal law and regulations, take all necessary steps to correct any overpayment or underpayment to a public assistance recipient[~~; provided, however,~~]**. However:**

(a) A social services official shall not bring an action or proceeding under this section:

(i) if excess payments or payments made to an ineligible person were made due to agency or contractor error, including but not limited to an error made by a facilitated enroller; or

(ii) to recover an overpayment under this section for assistance or care received by a person under twenty-one years of age.

(b) [~~that a~~] **A** social services official [~~may~~] **shall** waive recovery of a past overpayment, in the case of an individual who is not currently a recipient of public assistance, where the cost of recovery is greater than the cost of collections as determined in accordance with department regulations consistent with federal law and regulations. [~~For purposes of this section, overpayment shall include payments made to an eligible person in excess of his needs as defined in this chapter and payments made to ineligible persons (including payments made to such persons pending a fair hearings decision). The commissioner shall promulgate regulations to implement procedures for correcting overpayments and underpayments. The~~]

(c) In any action or proceeding to recover an overpayment under this section, the social services official shall be entitled to recover no more than the value of the property which resulted in an overpayment to the recipient or the cost of the assistance or care, whichever is lower.

(d) Any action or proceeding to recover an overpayment under this section shall be waived in cases of undue hardship in which a recipi-

ent's adjusted gross income for the applicable household size is two hundred fifty percent of the federal poverty line or lower and in cases of other extenuating circumstances as determined by the social services official.

3. The procedures for correcting overpayments shall be designed to and shall minimize adverse impact on the recipient, and to the extent possible avoid undue hardship. [~~Notwithstanding any other provision of law to the contrary, no underpayment shall be corrected with respect to a person who is currently not eligible for or in receipt of home relief or aid to dependent children, except that corrective payments may be made with respect to persons formerly eligible for or in receipt of aid to dependent children to the extent that federal law and regulations require.~~]

4. A social services official shall follow the following procedures when correcting any overpayment or underpayment to a public assistance recipient under this section:

(a) When determining whether a recipient may be liable for an overpayment, the most favorable budgeting under the applicable law and rules shall be used to determine eligibility for assistance or care.

(b) After identification and verification of an overpayment, and prior to meeting with the recipient under investigation, a written notice containing the following information shall be mailed to the recipient:

(i) a statement of the specific eligibility criteria under which the recipient was allegedly ineligible for benefits;

(ii) the budgeting methodology, under the applicable law and rules, applied in making the decision to pursue recovery of an alleged overpayment;

(iii) the time period during which the recipient was allegedly ineligible;

(iv) the value of the real or personal property that resulted in an overpayment;

(v) the amount of recovery sought, including an accounting of the recovery sought and all expenditures of assistance or care made on behalf of the recipient during the period of ineligibility;

(vi) an explanation of the recipient's rights to bring counsel or any other person to any meeting with social services officials and to leave any meeting with social services officials at any time; and

(vii) an explanation of the recipient's right to challenge liability for an overpayment by establishing eligibility for assistance or care using the most favorable budgeting under the applicable law and rules.

(c) No documents may be requested from recipients during an investigation of an alleged overpayment unless it is directly relevant to the eligibility factors and time periods for which the social services official has a good faith basis to believe the recipient was ineligible. The recipient shall be given a reasonable amount of time to respond to document requests and meeting requests, taking into account time periods necessary for third parties to provide documents.

(d) In the case of an alleged medical assistance overpayment, districts shall contact recipient's managed care plans to ascertain whether the recipient accessed services during the time period when recovery is being contemplated.

5. No settlement agreement or payment plan to recover an overpayment shall be effective unless a social services official with personal knowledge of the claims produces an affidavit attesting to the validity of the claims against the recipient, including but not limited to an attestation that the social services official has determined that the contin-

uous coverage protections pursuant to paragraph (c) of subdivision four of section three hundred sixty-six of this chapter do not apply to the recipient. The attestation must also state the specific eligibility criteria under to which the recipient was allegedly ineligible for benefits; the budgeting methodology under the applicable laws and rules that was applied in making the determination that the recipient was ineligible for benefits, including the applicable resource or income limits for the recipient's household composition during the claim period, and the recipient's applicable resources and income during the claim period; the time period during which the recipient was allegedly ineligible; the value of the real or personal property which resulted in an overpayment; and the amount of recovery sought. The affidavit shall be supported by exhibits including an accounting of the recovery sought and all expenditures of assistance or care made on behalf of the recipient during the period of ineligibility.

6. The social services official shall not use a confession of judgment to recover an overpayment.

7. There shall be no action or proceeding to recover an overpayment under this section for medical assistance benefits against a recipient whose medical assistance eligibility was granted or extended during the period of the COVID-19 public health emergency, to be defined as March eighteenth, two thousand twenty through the end of the quarter when such public health emergency ends.

8. All settlement agreements and payment plans obtained under this section in which the recipient has paid fifty percent or more of the debt by the end of the COVID-19 public health emergency are hereby considered paid in full.

9. If a recipient subject to a settlement agreement or payment plan under this section has not paid fifty percent or more of the debt by the end of the COVID-19 public health emergency, the recipient shall be allowed to submit evidence of undue hardship for waiver of the remaining debt under paragraph (e) of subdivision two of this section or an appropriate reduction of debt based on hardship. Notice regarding the opportunity for such a waiver shall be provided by the social services official.

§ 6. This act shall take effect on the one hundred eightieth day after it shall have become a law and shall apply to any claim, matter, or administrative or legal action or proceeding pending at or after that time. The commissioner of health, the commissioner of the office of temporary and disability assistance, and local social services officials shall make regulations and take other actions reasonably necessary to implement this act on that date.