


# The Final Regulations to Change the Disability Claims Process: Do They Help or Hurt Claimants?


Region I Representatives Meeting:  
How to Deal with DSI  
July 10, 2006



## Sources: Disability Service Improvement Process (DSI)

- o Final regulations: 71 Fed. Reg. 16424 (Mar. 31, 2006)
  - o Creates new 20 C.F.R., Part 405
    - Effective: August 1, 2006 (in Region I)
  - o Available at: [www.nosscr.org](http://www.nosscr.org); Federal Register home page: [www.gpoaccess.gov/fr](http://www.gpoaccess.gov/fr)
  - o SSA web site: [www.ssa.gov/disability-new-approach](http://www.ssa.gov/disability-new-approach)


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## The DSI Process

<p><b>CURRENT:</b></p> <ul style="list-style-type: none"> <li>o Initial decision</li> <li>o Reconsideration</li> <li>o ALJ</li> <li>o Appeals Council</li> <li>o Federal court</li> </ul>	<p><b>DSI:</b></p> <ul style="list-style-type: none"> <li>o Initial decision           <ul style="list-style-type: none"> <li>• QDD</li> </ul> </li> <li>o Federal Reviewing Official</li> <li>o ALJ</li> <li>o Decision Review Board (no claimant appeal except dismissals)</li> <li>o Federal court</li> </ul>
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## Major Changes from NPRM

- o 75-day notice of ALJ hearing
- o 30 days to object to time/place of hearing
- o Rules for submitting evidence relaxed (but stricter than current rules)
  - Evidence due 5 business days before hearing
  - Or: Within 5 days, if exceptions met
  - Evidence after hearing, before decision
  - Evidence after ALJ decision or for DRB
- o No requirement to submit adverse evidence
- o Right to file DRB statement in every case
- o Reopening rules intact, but only pre-ALJ decision
- o Initial denial notice includes right to representation

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## ● ● ● | DSI Implementation

- Effective August 1, 2006
- Applies only to cases processed through DSI
- Current process applies to cases that are not initial disability claims (including in Region I)
- Gradual, region-by-region rollout
- First DSI region: REGION I (Boston):
  - CT, ME, MA, NH, RI, VT
  - For at least one year
- Note: If claimant moves, original process at time of application will apply

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## ● ● ● | Impact of eDIB

- Disability folders are electronic
- Adjudicator can be located anywhere
  - Federal Reviewing Officials
  - With video hearings, ALJs
  - Decision Review Board
- Medical/vocational experts can be anywhere
- Representatives get CD with all evidence – early access to record to determine what additional evidence needed

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## ● ● ● | Initial Determinations

### Quick Disability Determinations (QDDs)

- Predictive model – “high potential” of disability
  - Factors: medical history; treatment; medical findings; not necessarily specific conditions
- Evidence easily and quickly obtained
- Cases referred to DDS QDD Unit
- Decision in 20 days
  - If not, goes to regular DDS initial claims process; same place in queue
- SSI presumptive disability and TERI still apply

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## ● ● ● | Medical and Vocational Expert System (MVES)

- MVES will provide medical, psychological, vocational expertise to all adjudicators
  - Includes VEs earlier in process
- MVES has two components:
  - Medical and Vocational Expert Unit (MVEU)
  - National network of medical and psychological experts
- MVEU will:
  - Oversee national network who advise on complex medical issues
  - Arrange for experts requested by ROs and ALJs
  - Advise adjudicators on nature of expertise they may need and arrange for it

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## ● ● ● | MVES (cont'd)

- ROs and ALJs must request MEs and VEs through MVEU
- SSA sets qualifications & standards for all experts
  - Including DDS doctors and psychologists
  - Eventually for VEs
- Fees/rates set by SSA
- ALJ must consider treating MD op., even if not in MVEU
- Consultative examinations
  - Can be done by treating MD
  - SSA to develop training and certification requirements
- Note: MVEU was the “Federal Expert Unit” in the NPRM

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## ● ● ● | Federal Reviewing Official (RO)

- Reconsideration eliminated
- Federal RO review
  - “Centrally managed” – Per SSA: “linchpin” of DSI
  - May be located anywhere because of eDIB and no face-to-face meeting
  - ROs will be attorneys
- RO job announcement: “Many vacancies” and all in Falls Church, VA (ODAR HQ)
- Procedures before RO: § 405.215
  - RO will develop evidence:
    - Can be submitted at any time before decision
    - RO may obtain from other sources or obtain CE
  - RO has subpoena authority. § 405.217

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## ● ● ● | Reviewing Official (cont'd)

- RO Decision: § 405.220
  - If new evidence submitted and/or RO disagrees with DDS, i.e., wants to allow, RO “will” consult with MVES
  - But, RO has final authority to make decision
    - No time limit
    - Decision template
- Initial denial notice:
  - Explains basis for denial;
  - Informs of right to RO appeal; AND
  - Right to representation at RO

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## ● ● ● | Administrative Law Judge

- Retains *de novo* hearing
- Sets goal of getting hearing date within 90 days of appeal
  - But no time limit for decision
- Hearing Notice: 75 days (unless agree to less)
  - Current: 20 days
  - NPRM: 45 days
- C can submit new evidence -- time limits relaxed from NPRM

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## ALJ Time Limits

- Object to time or place of hearing
  - Current: earliest possible opportunity; NPRM: 10 days after Notice
  - FINAL: 30 days after Notice
- Object to issues in hearing notice
  - Current: earliest possible opportunity; NPRM: 10 days after Notice
  - FINAL: 5 business days before hearing
- Request ALJ to vacate dismissal
  - Current: 60 days to ask ALJ or appeal to Appeals Council; NPRM: must first ask ALJ within 10 days
  - FINAL: must first ask ALJ within 30 days of order; then 60 days to appeal to DRB

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## Submitting new evidence to ALJ: Rule depends on when submitted

- Before hearing
  - Current: "at the hearing"
  - NPRM: 20 days before hearing unless good cause
  - FINAL: At least 5 business days; within 5 days if exception met
- After hearing, before decision
  - Current: can submit to ALJ or Appeals Council
  - NPRM: no provision
  - FINAL: (1) If record kept open; or (2) exception met
- After decision (no DRB review)
  - Current: Submit to Appeals Council
  - NPRM: 10 days after hearing decision, no good cause
  - FINAL: Request within 30 days AND meet exception

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## Submitting evidence before ALJ hearing

### CURRENT:

- 42 USC § 405(b): Right to hearing with decision based on "evidence adduced at the hearing"
- Case law re ALJ "duty to develop" in every circuit
- Regulations allow submission at hearing

### NPRM:

- C must submit all new evidence (both favorable and unfavorable) 20 days before hearing UNLESS:
- (1) Good cause; or (2) material change in condition before hearing

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## Final Rule: Submission of evidence before hearing

- 5 business days before hearing: Evidence must be submitted. § 405.331(a).
- Within 5 days: ALJ will accept new evidence, per § 405.331(b), if C shows that:
  - (1) SSA's action misled C;
  - (2) C has a physical, educational or linguistic limitation that prevented timely submission; OR
  - (3) Some other "unusual, unexpected, or unavoidable circumstance beyond the claimant's control" prevented earlier filing
    - SSA says this applies when evidence requested but not received

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## Submission of evidence before hearing (cont'd)

- Exceptions are the same as “good cause” to extend time limits: § 405.20(a)
- Examples that “if documented, may establish good cause include”:
  - “You were trying very hard to find necessary information to support your claim but did not find the information within the stated time period.” § 405.20(b)(4)
- Within 5 day period, no requirement to show “possibility” or “probability” of changed outcome

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## Submission of evidence after hearing

### CURRENT:

- Can submit after hearing if record open
- Can submit to Appeals Council within limits

### Under NPRM:

- Not considered at all unless: “Request permission” within 10 days of ALJ decision (no good cause); **AND**
- C required to show:
  - “Unforeseen and material change” in condition between hearing and decision; or
  - At hearing, asked ALJ to keep record open, ALJ agreed, and show good cause for missing deadline

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## Final Rule: New evidence between hearing and decision

20 CFR § 405.331(c): ALJ will accept and consider if:

- (1) One of these exceptions is met:
  - SSA’s action misled C;
  - C has a physical, educational or linguistic limitation that prevented timely submission; or
  - Some other “unusual, unexpected, or unavoidable circumstance beyond the claimant’s control” prevented earlier filing; **AND**
- (2) There is a reasonable possibility that new evidence, alone or with other evidence, would affect the outcome of the claim.

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## Final Rule: New evidence between hearing and decision: ALJ keeps record open

- In addition, ALJ has discretion to hold record open for additional evidence
- According to preamble:
  - If C requests additional time, ALJ may keep record open
  - C should inform ALJ at hearing if: (1) aware of other evidence unable to obtain before hearing or (2) scheduled to undergo additional medical evaluation

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## Final Rule: New evidence after the hearing decision

20 CFR § 405.373: ALJ will consider if:

- (1) One of these exceptions is met:
  - SSA's action misled C;
  - C has a physical, educational or linguistic limitation that prevented timely submission; **or**
  - "Unusual, unexpected, or unavoidable circumstance beyond the claimant's control" prevented earlier filing; **AND**
- (2) There is a reasonable probability that new evidence, alone or with other evidence, would change the outcome of the claim; **AND**
- (3) Request filed within **30 days** of receiving the ALJ decision

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## Reality Check: Concerns re limits on evidence submission

- Consistent with 42 USC § 405(b)?
  - Right to hearing with decision based on evidence adduced at the hearing
- Consistent with ALJ duty to develop?
- Consistent with realities of obtaining representation?
  - Representation often obtained just before the ALJ hearing or even after the hearing
  - What happens if claimant comes in after hearing or after hearing decision?

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## Reality Check: Concerns re limits on evidence submission (cont'd)

- Consistent with realities of obtaining medical records (before or after hearing)?
- Consistent with DSI goal: Ensure that adjudicators have complete record?
- Consistent with realities of claimants' changing medical conditions?
- Will ALJs have too much discretion to refuse evidence?
  - Will DRB detect problems or will Cs be forced into federal court?

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## FINAL RULE: No duty to submit adverse evidence

- FINAL RULE: No duty to submit adverse evidence.
  - Provide evidence, without redaction, showing how impairments affect functioning. 20 CFR §§ 404.1512(c) and 416.912(c).
  - Effective nationwide: August 1, 2006
- Final rule similar to CURRENT rules:
  - Claimant must submit evidence to support claim
  - Statutory and regulatory requirements and penalties re disclosure of "material" facts
- Under NPRM:
  - Claimant must submit all "available" evidence, including unfavorable evidence

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## Existing statutory/regulatory requirements to disclose

- Imposition of civil monetary penalties
  - 42 U.S.C. § 1320a-8
  - 20 C.F.R. § 498.100, *et seq.*
  - Final rule: 71 Fed. Reg. 28574 (May 17, 2006). Effective: June 16, 2006
- Applies when any individual who:
  - Makes false or misleading statement or representation of a material fact re benefits eligibility
  - Omits from a statement or representation a material fact re benefits eligibility and omission is misleading or false
  - Otherwise withholds disclosure of a material fact
    - Applies to “changed circumstances”
    - Per SSPA, not effective until “centralized computer system” for earnings in place
- What is a “material fact”? A fact which may be considered by SSA in evaluating eligibility

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## The ALJ decision

- Explain in detail why agrees or disagrees with RO findings and rationale. § 405.370(a)
  - RO decision not considered “evidence”
  - ALJ decision templates
- Does this requirement:
  - Undermine de novo nature of hearing?
  - Compromise ALJ’s decisional independence?
  - Add unnecessary burden to ALJ’s decision-making process?

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## Other ALJ level issues

- C “should” (but not required) to list issues with request for hearing. § 405.310(a).
- 30 days to object to issues in hearing notice (NPRM: 10 days). § 405.317.
- Pre-hearing statements: You “may” submit or ALJ “may” request. § 405.334.
- Video hearings. § 405.315(c)
  - Reaffirms right to object and appear in person
  - Query: Does C have 30 days after notice to object to VTC?

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## Other ALJ level issues (cont’d)

- R/H “may” be dismissed for failure to appear at pre-hearing conference. § 405.330.
  - Only if neither C nor representative appears and no good cause
- R/H cannot be dismissed for failure to appear at post-hearing conference. § 405.336(b).
- Documents other than evidence – 12 pt font. § 405.333
- Subpoenas – request 10 days before hearing. § 405.332

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## ALJ dismissals

- Must first ask ALJ to vacate. §§ 405.381, 405.382, 405.427
  - Must request 30 days after dismissal notice
- If ALJ denies, 60 days to file request to vacate with DRB. § 405.427(a)
- May submit dismissal-relevant evidence to DRB. § 405.427(b)
- May submit written statement (2000 words) but only at time request to vacate is filed. § 405.427(c)

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## Decision Review Board

- CURRENT:
  - C can file appeal to Appeals Council
  - C can submit new evidence within limits
  - Over 25% of claimants receive relief
- FINAL RULE:
  - Eliminates Appeals Council
  - Eliminates C's right to administrative appeal
    - Only claimant appeal: ALJ dismissals (but must first ask ALJ to vacate)
  - Replace with review by DRB

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## What is the DRB?

- Members: ALJs and AAJs; rotational basis
- Selection of cases:
  - Review both favorable and unfavorable
  - Every ALJ decision screened by "computer-based predictive screening tools"
  - Based on: "Increased likelihood of error" or new policies
- Promote accurate, consistent, and fair decisions
- Purpose: Review and correct ALJ decisions
- ID issues "that may impede consistent adjudication at all levels ... and recommend ways to improve ..."

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## How will the DRB work?

- ALJ decisions reviewed before effectuation
  - Cs will not receive ALJ decision until DRB screening
  - Goal: 10 days to screen
- If no DRB review:
  - ALJ decision sent
  - ALJ decision is SSA's "final decision"
  - 60 days to appeal to court
- If DRB review:
  - ALJ decision sent with DRB Notice of Review
  - DRB has 90 days to complete action. § 405.415
    - 90 days starts with date DRB Notice is received
  - If not completed in 90 days, ALJ decision is "final" and C has 60 days (after 90<sup>th</sup> day) to file in court

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## How will DRB work? (cont'd)

- o DRB review (cont'd)
  - Beyond 90 days: DRB can issue decision, only if “fully favorable”
    - If already in court, will request remand
  - Decision will be sent to ALJ if DRB disagrees

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## How will DRB work? (cont'd)

- o Other DRB procedures
  - 10 days after notice to submit written statement (2000 words). § 405.425(b)
  - Can submit new evidence after DRB Review Notice. § 405.373(b) and (d)
    - Same as ALJ post-decision rule. § 405.373
      - Does that mean 30 days after DRB Review Notice?
    - “Reasonable probability” of outcome change AND meet one of three exceptions (SSA misled; limitation; or circumstance beyond C’s control)

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## What action can DRB take?

- o Standard of review. § 405.440(a)
  - Findings of fact: substantial evidence
  - Application of law: *de novo*
- o Actions by DRB. § 405.440(b)
  - Affirm if: (1) ALJ findings of fact supported by S/E; and/or (2) No “significant” error of law
  - If error of law: Issue own decision affirming, reversing, or modifying ALJ decision
  - Remand if factual findings not supported by S/E and further development needed

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## DRB Procedures re Court

- o Appeal to federal court: § 405.501
  - Within 60 days after DRB’s decision (if unfavorable)
    - No appeal from DRB remand. § 405.450(c)
  - Within 60 days after 90-day DRB time limit expires
    - ALJ decision then becomes “final” SSA decision. § 405.450(b)
    - How will Cs know when 90 days has passed? 90 days begins date DRB review notice is received. § 405.420(a)(2). But will Cs be confused?
- o Can request extension of time to file in court. § 405.505. Use good cause standard in § 405.20
- o DRB will handle court remands. § 405.510

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## How will the DRB be implemented?

- Very gradually in one “small” region: Boston
- AC review eliminated only where application filed under DSI process (Region I as of 8/1/06)
- AC review retained in all other cases, including non-DSI cases in Region I
- Review all or “almost all” ALJ decisions

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## Concerns about the DRB

- Eliminates effective claimant-initiated appeal
  - FY 04: 27% received reversal or remand
  - JCUS: Urges keeping claimant’s right to appeal
  - Simple procedure vs. filing in court
  - Why else important to claimants?
    - Can submit new evidence
    - Can request review of ALJ dismissals and reopening denials
    - Can raise denial of right to full and fair hearing
    - Can also review nondisability issues

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## DRB Concerns (cont’d)

- Impact on federal courts
  - Avalanche of cases? Are we headed to a Social Security Court?
  - Final rule says gradual implementation in one small region with few court filings. But if filings increase, will SSA change final regulation?
  - Will there be more sentence 6 remand court filings if ALJs reject new and material evidence?

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## DRB Concerns: Impact on courts

- In FY 2004, there were 92,540 appeals from the ALJ stage to the Appeals Council. Meanwhile, there were only 14,944 actions filed in federal court.
- *“This amount ... is a relatively modest percentage of the 92,540 requests for review presented to the Appeals Council....the existence of a right to seek administrative appellate review appears to result in a large majority of claimants not seeking judicial review following receipt of the Appeals Council final decision.”* Congressional testimony, Judge Howard D. McKibben, 9/27/05

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## ● ● ● | DRB concerns (cont'd)

- Composition
  - Will review be neutral?
    - Other ALJs review other ALJs
    - How panels selected?
    - Every decision subject to screening as error prone?
- Selection of cases
  - Will ALJs learn which cases likely to trigger DRB review?
  - Targeting groups of Cs: by impairment? Credibility? RFC?
  - Is disclosure of selection criteria required by the APA?

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## ● ● ● | DRB concerns (cont'd)

- Submitting new evidence to DRB
  - Permitted under regulations [§ 405.373(d)]
  - What is the time frame? 30 days after Notice received? [See § 405.373(a)]
  - How does this time limit work if:
    - C seeks representation after the ALJ hearing?
    - Need more time to obtain records?
    - Need time to obtain and review hearing recording and exhibits?
    - Need an extension of time to submit written statement and/or records?

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## ● ● ● | DRB concerns: Can DRB provide effective review of unfavorable ALJ decisions?

- What is considered an “error”?
- Will DRB screening find:
  - The broad range of issues used to deny claims?
  - All errors in an ALJ decision?
  - More subtle errors, e.g., bias/unfair hearing?
- What if case has both legal and factual errors?
  - Remand is only remedy for factual error

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## ● ● ● | DRB concerns (cont'd)

- Limited DRB authority to remedy errors
  - Error of law:
    - Affirm, reverse, or modify, but NO remand
  - Findings of fact:
    - If not supported by substantial evidence: remand
  - What if case has both legal and factual errors?

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## ● ● ● | Reopening: § 405.601

- FINAL RULE: Retains current rules but only for pre-ALJ-level decisions
- CURRENT: 20 CFR §§ 404.988 and 416.1488
  - Within one year of initial determination for any reason
  - For good cause within 2 yrs (SSI) or 4 yrs (TII) of initial determination
    - Good cause includes “new and material evidence”
- NPRM:
  - Eliminated reopening within 1 yr for any reason
  - Eliminated new and material evidence as good cause for reopening
  - Reopening allowed only within 6 months of “final action”

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## ● ● ● | Reopening (cont'd)

- Current procedures apply prior to “final decision”
  - Ex: ALJ can reopen RO decision for new and material evidence within 2/4 year time periods
- The “final decision” of the Commissioner (ALJ or DRB decision) can be reopened ONLY within six months AND
  - “New and material evidence” is not basis for good cause per §§ 404.989 or 416.1489
  - In only two situations:
    - Clerical error in computation of benefits; OR
    - Clear error on face of the evidence

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## ● ● ● | Good cause for extending deadlines: § 405.20

- To extend deadline, C must show:
  - SSA action misled C
  - Physical, mental educational, or linguistic limitation prevented timely filing
  - Other “unusual, unexpected, or unavoidable circumstance beyond your control” prevented timely filing
- Nonexhaustive list of examples: § 405.20(b)
  - (b)(4): “Trying very hard to find necessary information”
    - Per SSA, applies to efforts to obtain medical records

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## ● ● ● | Discrimination complaints: § 405.30

- First time process established for: “race, color, national origin, sex, religion, or impairment”
- 180 days to file after became aware (60 days in NPRM)
- List of grounds does not include “general bias”
  - “We have procedures in place to deal with allegations of [ALJ] bias and complaints of discrimination.... [W]e did not believe it was necessary to include those procedures....” (p. 16440)
- But how adequate are these procedures?
  - See *Pronti v. Barnhart*, 339 F.Supp.2d 480 (W.D.N.Y. 2004)

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## ● ● ● | DSI Resources

- Join the DSI listserve
  - Contact Barbara Siegel at [bsiegel@dlc-ma.org](mailto:bsiegel@dlc-ma.org)
- Check out these websites:
  - [www.nosscr.org](http://www.nosscr.org)
  - [www.masslegalservices.org/cat/3221](http://www.masslegalservices.org/cat/3221)
- Final regulations: 71 Fed. Reg. 16424 (Mar. 31, 2006)
- House Social Security Subcommittee hearing on June 15, 2006
  - Written statements and transcript available at:
    - <http://waysandmeans.house.gov>

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## ● ● ● | What's next?

- August 1, 2006: Implementation starts in Region I
  - Remember: Changes apply only to those cases that start out in the new process from the beginning, even if C moves
  - Region I states: CT, ME, MA, NH, RI, VT
- Monitor Region I implementation – provide feedback to SSA
- Check the NOSSCR and DLC websites for updates and further information

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